Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine

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The Supreme Court has recently signaled its interest in developing a new nondelegation test, one that would have courts more aggressively police Congress's delegations of power to agencies. This could represent a death knell for significant climate action. The technical and scientific complexity of climate change mean that it is a problem uniquely suited to redress by expert agencies. If Congress is not permitted to delegate authority to agencies to address climate change, then it will be difficult for meaningful action against climate change to be taken at the federal level.

With this threat in mind, this Article evaluates the emerging basis for the Court's new nondelegation test: Chevron. *The Court has hinted that it will look to two rules developed under* Chevron *to guide its revived nondelegation doctrine: the major questions doctrine and the jurisdictional exception that Chief Justice Roberts laid out in* City of Arlington. *By grounding the long-extinct nondelegation doctrine in the robust body of* Chevron *jurisprudence, the Court could give the nondelegation doctrine a legitimacy and specificity that a freeform version would lack.*

This Article argues, however, that transplanting the rules of Chevron *to the nondelegation context would be doctrinally and logically incoherent. The Article first explains how the Court's* Chevron *jurisprudence is based on a particular legal fiction about congressional delegation of authority to agencies. The Court has used this legal fiction to derive limiting principles for the application of* Chevron *deference, such as the major question doctrine and the* City of Arlington *jurisdictional exception. Importantly,*

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Chevron's *limiting principles and the legal fiction underlying them are based on a principle of legislative supremacy, i.e., the understanding that Congress is supreme in the realm of policymaking, and thus courts' role in interpreting statutes is to be agents of Congress. By contrast, the nondelegation doctrine as it is envisioned by the current Court relies on a notion of judicial supremacy: It imagines that courts have the final say as to what is acceptable policymaking, regardless of Congress's intentions. Transferring* Chevron *to the nondelegation context would therefore amount to a categorical error. As a result, the Article concludes that, given the incompatible institutional framework underlying* Chevron's *rules, the Court must look elsewhere for inspiration and support for its new nondelegation test.*

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INTRODUCTION

One of the biggest challenges facing federal action on climate change today is the courts. The Biden Administration has already proclaimed that it wants to make climate change a top priority.[1] All of the resources of the federal government are being marshalled to confront the climate crisis, including agencies who have not been traditionally involved in environmental policy.[2] And the prospects of legislative action on climate policy, while still precarious, look more promising than they have in years.[3] But looming on the horizon are the legal challenges these policies will face in the courts. And perhaps more so than any other time in recent history, there is a serious risk that these actions will not survive judicial review, particularly by the Supreme Court.

That risk is the result of a confluence of two phenomena at the Supreme Court. First, a majority of Supreme Court Justices have signaled that they are ready to develop a new test for the nondelegation doctrine.[4] That doctrine, usually attributed to Article I of the Constitution,[5] says that Congress cannot delegate its legislative powers

[1] *See, e.g.*, Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021) (addressing the climate crisis at home and abroad).

[2] *Id.* at 7622 ("It is the policy of my Administration to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a Government-wide approach that reduces climate pollution in every sector of the economy . . . ."); *see also id.* at 7623 (creating a National Climate Task Force comprised of all of the Cabinet members as well as the Administrator of General Services, the Director of the Office of Science and Technology Policy, and the Director of the Office of Management and Budget, among others).

[3] *See, e.g.*, Nick Sobczyk & Scott Waldman, *White House Escalates Push for Clean Electricity Standard*, E&E NEWS (June 30, 2021, 1:39 PM EDT), https://www.eenews.net/greenwire/stories/1063736203 [https://perma.cc/3AFS-BVAU] (discussing a White House memorandum laying out the case for Congress to pass a clean electricity standard to reduce greenhouse gas emissions from electricity generation); Kelsey Tamborrino, *Granholm: Reconciliation Possible for Clean Energy Standard, but No Decisions Made*, POLITICO (Apr. 14, 2021, 3:33 PM EDT), https://www.politico.com/news/2021/04/14/jennifer-granholm-clean-energy-reconciliation-481545 [https://perma.cc/E2C2-U3FH] (highlighting potential to pass clean energy legislation through Senate reconciliation).

[4] *See* Paul v. United States, 140 S. Ct. 342 (2019) (mem.) (Kavanaugh, J., statement respecting the denial of certiorari); Gundy v. United States, 139 S. Ct. 2116, 2131-48 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J. and Thomas, J.); *id.* at 2130-31 (Alito, J., concurring).

[5] U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

to another entity.[6] While historically the Supreme Court has interpreted this doctrine to permit most congressional policymaking,[7] the Court's new majority appears ready to adopt a nondelegation test that would have courts more aggressively restrict Congress's ability to effect policy through agencies. That would pose uniquely serious problems for major federal action on climate change. Climate change is a technically and scientifically complex issue. Almost every action the Biden Administration has proposed to address climate change — including both new legislation as well as new rulemakings from federal agencies like the Environmental Protection Agency ("EPA") — envisions significant reliance on agency involvement and expertise.[8] If Congress is not permitted to delegate authority to agencies to exercise such discretion, then meaningful federal action on climate change may be impossible.

Second, some of those same Justices have indicated that they may pull from the Court's *Chevron* jurisprudence to craft that new nondelegation test. Specifically, the Court is likely to draw from limiting principles that it has developed to restrict *Chevron* deference to build its new nondelegation test, most notably the major questions doctrine.[9] The major questions doctrine has already been a barrier to the federal government's attempts to regulate greenhouse gas emissions. In 2014, for instance, the Supreme Court struck down EPA's effort to regulate greenhouse gas emissions from major emitting facilities under the Clean Air Act, in part on the grounds that EPA's action violated the major questions doctrine.[10] Meanwhile, in January of 2021, Judge Walker of the D.C. Circuit wrote a lengthy partial concurrence and partial dissent in a case involving the Trump Administration's repeal of the Clean Power Plan that suggested that almost any agency attempt to regulate

[6] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers . . . .").

[7] *See Gundy*, 139 S. Ct. at 2123 (plurality opinion).

[8] *See, e.g.*, Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021) (directing the EPA to take certain actions consistent with tackling the climate crisis); Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021) (directing the Administrator of the EPA to "strengthen enforcement of environmental violations"); Lesley Clark, Mike Lee, Mike Soraghan, Heather Richards, David Iaconangelo & Miranda Willson, *Biden's First 100 Days: What's Coming on Energy*, E&E NEWS (Jan. 21, 2021, 7:14 AM EST), eenews.net/stories/1063723117 [https://perma.cc/3J8N-RAF5] (describing Biden's proposed actions on climate change).

[9] *See, e.g.*, Paul v. United States, 140 S. Ct. 342, 342 (Kavanaugh, J., statement respecting the denial of certiorari) (suggesting that "congressional delegations to agencies of authority to decide major policy questions" should not be permitted).

[10] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 333-34 (2014).

greenhouse gases would violate the major questions doctrine.[11] The Supreme Court recently granted certiorari in this case to decide whether Congress "constitutionally authorize[d]" EPA to issue "significant rules" to regulate greenhouse gas emissions from power plants under the Clean Air Act.[12] There is thus a serious threat that the Supreme Court will use the major questions doctrine as its new nondelegation test in order to strike down EPA's ability to regulate greenhouse gas emissions from the power sector, making it doubly difficult for the federal government to take action to limit greenhouse gas emissions.[13]

With this threat in mind, this Article takes the Supreme Court's nondelegation signals seriously. The Article confronts the Supreme Court's signals on their own terms, and asks whether the transplantation of *Chevron* rules into the nondelegation context would be logically coherent. The Article concludes that it would not be.

The problem is that the Court's *Chevron* doctrine and the new nondelegation doctrine are based on conflicting notions of institutional supremacy. The rules of *Chevron* deference, including its limiting principles like the major questions doctrine, are all grounded in a theory of legislative supremacy. The Court's *Chevron* jurisprudence recognizes that Congress is the supreme policymaker, and when interpreting statutes administered by agencies, courts must be faithful to Congress's design. By contrast, the nondelegation doctrine, at least as envisioned by the current Court majority, is a doctrine of judicial supremacy. It places courts in a position of power over Congress to dictate the

[11] Am. Lung Ass'n v. EPA, 985 F.3d 914, 996-1003 (D.C. Cir. 2021) (Walker, J., concurring in part, concurring in judgment in part, and dissenting in part); *see infra* Part II.B.3.

[12] *See* W. Va. v. EPA, No. 20-1530, 2021 WL 5024616 (D.C. Cir. Oct. 29, 2021) (mem.); Petition for a Writ of Certiorari at I, W. Va. v. EPA, No. 20-1530, 2021 WL 5024616 (D.C. Cir. Apr. 29, 2021); *see also infra* Part II.B.3. Notably, the Supreme Court granted certiorari in this case despite the fact there is currently no EPA rule in place regulating greenhouse gas emissions from power plants. Brief for the Federal Respondents in Opposition at 18-21, W. Va. v. EPA, No. 20-1530, 2021 WL 5024616. The Court's intervention before the agency has even interpreted the statutory provision at issue lends further support to the argument made in this Article that the Court's current approach to major questions and nondelegation issues is based on a theory of judicial supremacy. *See infra* Part IV.B.

[13] *See* Ann Carlson, Amelia Keyes, Benjamin Harris & Dallas Burtraw, *Climate Policymaking in the Shadow of the Supreme Court*, RESOURCES (Oct. 27, 2020), https://www.resources.org/common-resources/climate-policymaking-shadow-supreme-court/ [https://perma.cc/29BW-LWL2] (recognizing the threat that the nondelegation doctrine and the major questions doctrine pose to federal climate policy, and discussing strategies policymakers can take to try to avoid legal challenges based on those doctrines).

boundaries of policymaking. Converting the rules of *Chevron* into a test for the nondelegation doctrine would thus be twisting a doctrine meant to promote legislative supremacy into a tool used to strike down Congress's most significant policies.

This conclusion is important because it removes a potential crutch the Court may rely on for its revival of the nondelegation doctrine. There is much debate in the current academic literature about what the nondelegation doctrine is and whether it is actually grounded in the Constitution or in the nation's history.[14] The Court will be searching for a way to lend its revived doctrine legitimacy and specificity. But in doing so, it will find itself stuck between a rock and a hard place. On the one hand, formalist supporters of nondelegation champion a new nondelegation test that would draw a sharp line between legislative and executive power, one that could dramatically disrupt the current administrative state.[15] On the other hand, less aggressive proponents of nondelegation are searching for a new, narrower test, one that would be judicially administrable, selectively deployable, and yet still justifiable under the formalist rubric of the nondelegation doctrine.[16]

Taking these concerns into account, the Court's *Chevron* jurisprudence looks attractive to the proponents of a less aggressive

[14] *See, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (arguing that there is no historical evidence that a nondelegation doctrine existed at the Founding); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 131 YALE L.J. 1288 (2021) (amassing evidence of congressional delegation of discretionary rulemaking authority to federal boards of tax commissioners in 1798); Ilan Wurman, *Nondelegation at the Founding*, 131 YALE L.J. 1490 (2021) (arguing that historical evidence points to the Founders' support of the nondelegation doctrine); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, GA. L. REV. (forthcoming 2021) (analyzing the role of delegation in the First Congress of the United States); *see also* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1735-36 (2002).

[15] *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.R.s, 575 U.S. 43, 66-87 (2015) (Thomas, J., concurring) (describing a framework that clearly separates legislative from administrative power); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 1 (2014) (claiming that administrative law is "unrecognized by the Constitution"); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335-55, 358 (2002) (arguing for a sharp distinction to be drawn in the exercise of legislative and the exercise of executive power).

[16] *See, e.g.*, Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975 (2018) (refashioning the facial nondelegation doctrine to a less powerful "as-applied" doctrine); Wurman, *supra* note 14, at 1533-55 (arguing that a narrower version of the nondelegation doctrine can be crafted based on the notion of nonexclusive and exclusive powers).

nondelegation doctrine. *Chevron*'s limiting principles would theoretically provide a body of precedent from which the Court could draw to argue that its new nondelegation test is not unprecedented and is administrable. But if *Chevron*'s case law does not support the idea of a judicially enforceable nondelegation doctrine, as this Article argues, then the Court will not be able to rely on the *Chevron* crutch. It will have to be honest about its nondelegation choices: It can either choose a formalist test that threatens extreme consequences, or it can craft a narrower one that is less dramatic but whose limits are created from wholecloth.

The Article proceeds in three parts. Part I explains the theoretical underpinning of the Court's *Chevron* jurisprudence and its limiting principles. The Court has relied on a legal fiction to justify *Chevron* deference: when a statute administered by an agency is ambiguous, Congress intended to delegate authority to the agency (rather than a court) to interpret that ambiguity. *Chevron*'s limiting principles, including the major questions doctrine and Chief Justice Roberts' jurisdictional exception in *City of Arlington v. FCC*,[17] build off of that legal fiction to carve out circumstances in which Congress does *not* intend to delegate interpretive authority to an agency. This Section teases out the institutional dynamics at play in *Chevron*'s legal fiction, emphasizing that the Court's *Chevron* jurisprudence reflects tension over whether courts or agencies are better suited to resolve statutory ambiguities.

Part II presents the evidence for why two of *Chevron*'s limiting principles, the major questions doctrine and Chief Justice Roberts' jurisdictional exception, are likely to form the basis of a new nondelegation test.

Part III explains how transferring *Chevron*'s limiting principles into the nondelegation context would fundamentally distort them because the two fields are based on conflicting understandings of institutional supremacy. While *Chevron*'s legal fiction reflects tension over whether courts or agencies ought to resolve questions of statutory ambiguity, it is grounded in the understanding that, whatever the proper role of courts and agencies may be, Congress is the supreme policymaker. And fights within the Court's *Chevron* jurisprudence over how to prioritize courts or agencies reflect differing understandings of how best to effectuate Congress's design based on differing theories of statutory interpretation. A judicially enforceable nondelegation doctrine, by contrast, would not recognize Congress as the supreme policymaker. It

[17] City of Arlington v. FCC, 569 U.S. 290, 312-28 (2013) (Roberts, C.J., dissenting).

would place courts in the position of dictating Congress's acceptable policy choices. The Section discusses this tension in the real-world example of the regulation of the telecommunications industry, which was the subject of the Court's first major questions case in the 1990s. Given this conflict, the Article concludes that the Court must look elsewhere for inspiration, and support, for its new nondelegation test.

I. *CHEVRON*'S LEGAL FICTIONS AND LIMITING PRINCIPLES

Before turning to the Court's new nondelegation test, it is important to understand the foundation created by *Chevron* and two important limiting principles: the major questions doctrine and Chief Justice Roberts' jurisdictional exception in *City of Arlington*. This Section gives an overview of *Chevron* deference and the legal fiction that exists at the heart of it: that Congress intends to delegate interpretive authority to agencies through the use of statutory ambiguity. The Section then traces the evolution of *Chevron*'s legal fiction about congressional intent through the two limiting principles developed to restrict the application of *Chevron* deference. Both are likely bases for the Court's new nondelegation test.

A. Chevron's *Legal Fictions*

The Court's *Chevron* jurisprudence is based on a widely-acknowledged legal fiction.[18] This fiction started with the *Chevron* opinion itself. The Court in *Chevron* set forth a straightforward rule to govern judicial review of agency interpretations: courts must defer to reasonable agency interpretations of ambiguous statutory provisions that the agency is tasked with administering.[19] But the simplicity of the Court's rule papered over a clutter of different justifications for it.[20]

[18] *See, e.g.*, Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2009-11 (2010) (discussing the legal fiction at the heart of *Chevron* deference and collating other sources that do the same); John F. Manning, Chevron *and the Reasonable Legislator*, 128 HARV. L. REV. 457, 458-59 (2014) (explaining that "[e]very framework used by the Court for determining the availability of deference," including *Chevron* deference, "has rested on a legal fiction about presumed legislative intent") [hereinafter Chevron *and the Reasonable Legislator*]; John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1932 (2015) (explaining that the Court's *Chevron* deference regime rests on a fictional congressional intent) [hereinafter *Inside Congress's Mind*].

[19] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

[20] *See id.* at 865-66 (intimating a political accountability or separation of powers rationale); *id.* at 865 (intimating a technical expertise rationale); *id.* at 842-44

Ultimately, the Court and scholars alike settled on a common rationale: that statutory ambiguity indicates congressional intent to delegate interpretive authority to administrative agencies, and therefore deference is simply the courts' way to respect Congress's intent.[21]

The consensus around the congressional-intent rationale for *Chevron* deference owes much to Justices Breyer and Scalia, both of whom advocated for this particular justification for *Chevron* in the late 1980s.[22] They did so despite explicitly acknowledging that any presumption of congressional intent was a legal fiction.[23] For his part, then-Judge Breyer believed that grounding *Chevron* in a legal fiction of congressional intent allowed courts to build some flexibility into the otherwise harsh two-step rule of *Chevron*. If *Chevron* deference was based on an assumption about congressional intent, then courts could examine other indicia of congressional intent — like statutory language, legislative history, agency practice, and other contextual clues — to either buttress or overcome this assumption, and tailor deference to the

(intimating a rationale based on the congressional delegation of interpretive authority to the agency).

[21] *See, e.g.*, *City of Arlington*, 569 U.S. at 317 (2013) (Roberts, C.J., dissenting) ("We give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities . . . ."); Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 836 (2001) ("The Supreme Court in recent years has endorsed the notion that *Chevron* rests on implied congressional intent. . . . [W]e agree."); Cass Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 192 (2006) ("[*Chevron* is rooted in] a theory of implicit congressional delegation of law-interpreting power to administrative agencies."); *cf.* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 6 (1983) (arguing that the "court's interpretational task" in a case of judicial review of administrative action is "to determine the boundaries of delegated authority").

[22] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 369-71 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516-19; *see, e.g.*, David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 213-14 ("[T]he statutory theory of *Chevron* [became] dominant, largely . . . at the hands of Justice Scalia."); Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753, 761-62 (2014) ("Justice Scalia, in a law review article (written shortly after he joined the Court) had opined that Chevron rests on a 'fiction[]' of congressional intent to delegate interpretational authority to agencies to fill in the gaps created by unclear statutes."); Sunstein, *supra* note 21, at 192, 195-205 (discussing the role that Justices Breyer and Scalia played in shaping the reasoning behind *Chevron* deference).

[23] Breyer, *supra* note 22, at 370 ("For the most part courts have used 'legislative intent to delegate the law-interpreting function' as a kind of legal fiction."); Scalia, *supra* note 22, at 517 ("[A]ny rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.").

particular circumstances of any given case.[24] By contrast, Justice Scalia favored an underlying fiction of congressional intent because he believed that it created a simple and administrable rule. If courts presumed that, through the use of statutory ambiguity, Congress intended to delegate interpretive authority to agencies, then courts could adopt the general policy of deferring to agency interpretations, subject always to Congress's ability to legislate against that backdrop.[25]

The story of *Chevron*'s theoretical underpinnings set the stage for the development of the Court's *Chevron* jurisprudence later on. Over the years, *Chevron*'s seemingly unbounded rule of deference threatened to invade every corner of administrative law. In response, critics (and even supporters) of *Chevron* sought to limit the doctrine's reach.[26] The Court similarly tried to constrain *Chevron* deference by building off of *Chevron*'s original legal fiction.

For instance, in *United States v. Mead Corp.*, the Court held that statutory ambiguity alone is not enough to trigger application of the *Chevron* framework.[27] Instead, courts must engage in a "step zero" inquiry to determine whether Congress intended to delegate interpretive authority to an agency before *Chevron*'s two-step is applied.[28] According to this step zero test, an agency's interpretation of a statute qualifies for *Chevron* deference when (1) "Congress delegated authority to the agency generally to make rules carrying the force of law," and (2) "the agency interpretation claiming deference was promulgated in the exercise of that authority."[29]

The Court arrived at this rule by following the thread of *Chevron*'s legal fiction. First, the Court reiterated that *Chevron* deference is premised on the idea that Congress intended to delegate interpretive authority to the agency.[30] Second, the Court reasoned that sometimes statutory ambiguity alone may not be enough to indicate Congress's intent. Rather, "the agency's generally conferred authority and other statutory circumstances" may indicate that "Congress would expect the

[24] Breyer, *supra* note 22, at 370.

[25] Scalia, *supra* note 22, at 516-19.

[26] *See* Merrill & Hickman, *supra* note 21, at 833-34 ("Scholars and judges alike have debated the wisdom of the *Chevron* transformation; have considered what real-world effect the doctrine has had on the distribution of power in the administrative state; and have explored different interpretations of *Chevon*'s famous 'two-step' procedure . . . ."); Sunstein, *supra* note 21, at 193.

[27] United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

[28] *See id.*

[29] *Id.*

[30] *Id.* at 229.

agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law."[31] Third, the Court determined that congressional authorization for the agency "to engage in the process of rulemaking or adjudication" is a good indicator Congress intended the agency to act with the force of law.[32] The Court thus linked congressional delegation of interpretive authority to an agency to congressional delegation of rulemaking or adjudicatory authority to an agency.

Notably, the *Mead* Court did not attempt to justify its assumption that Congress intends to delegate interpretive authority to an agency when it delegates rulemaking or adjudicatory authority to that agency. Others have subsequently argued that there may be reasons to doubt the Court's assumption,[33] although an empirical study by Professors Gluck and Bressman suggests that, at least in the abstract, the Court's assumption about congressional intent in *Mead* may indeed more accurately reflect legislative drafting than the theory of congressional intent used to justify the *Chevron* decision.[34]

But in either case, the accuracy of the Court's approximation of true congressional intent is immaterial. As Professor Manning points out, the Court has never been concerned about *genuine* congressional intent, as shown by the Court's own methodology in these cases.[35] In *Mead*, the Court nowhere premised its holding on a data-driven inquiry into how Congress actually indicates its desire for a court to defer to an agency's interpretation. Nor have any of the Court's subsequent opinions followed such an empirical approach. Rather, the Court's stated assumptions about congressional intent serve as a cover under which the Court can make normative pronouncements about institutional

[31] *Id.*

[32] *Id.*

[33] *See, e.g.*, Barron & Kagan, *supra* note 22, at 218 ("[The] equation — of delegations to make binding substantive law through rulemakings or adjudications with delegations to make controlling interpretations of statutory terms — has little to support it."); Sunstein, *supra* note 21, at 221-28 (critiquing the assumptions underlying *Mead*).

[34] Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 995-99 (2013) (surveying congressional staff, and concluding that a majority of respondents indicated that statutory ambiguity does not necessarily indicate an intent to delegate interpretive authority to the agency, but that *Mead*'s test of whether the agency has the authority to engage in notice-and-comment rulemaking is a good indicator of drafters' intent to give the agency interpretive authority).

[35] Manning, *Inside Congress's Mind*, *supra* note 18, at 1916, 1919, 1924, 1932.

preference.[36] Specifically, the fiction allows the Court to answer the question: acknowledging that Congress is the supreme policymaker, when faced with an ambiguous statutory provision, are courts or agencies better positioned to resolve that ambiguity? Members of the Court have not always agreed on that answer. Justice Breyer wanted to give courts the ability to grant or deny deference based on a holistic understanding of Congress's purpose; Justice Scalia, on the other hand, wanted to give agencies the default presumption of deference, subject to Congress's ability to override that presumption. But both came to their conclusions in an attempt to best effectuate Congress's role as policymaker.

Since its original decision in *Chevron*, the Court has spun an increasingly elaborate story of congressional intent in order to avoid granting *Chevron* deference to agencies. It has done so most clearly in the context of two rules crafted to limit the application of *Chevron*: the major questions doctrine, and Chief Justice Roberts' exception for agency interpretations of the scope of their own jurisdiction. Understanding these exceptions is important because, as discussed later, both are likely candidates for the Court's new nondelegation test.

B. Limiting Principle #1: The Major Questions Doctrine

Broadly speaking, the Court's major questions doctrine has been described as the general principle that Congress does not grant agencies the authority to alter the fundamental details of a statutory scheme, or resolve questions of economic and political significance, through vague or ancillary statutory provisions.[37] But the Court's major questions

[36] Manning, Chevron *and the Reasonable Legislator*, *supra* note 18, at 464 ("In the absence of a clear signal from an organic act about whether Congress meant to delegate such discretion to the agency or the court, the Court under each approach has imputed a fictive intent to Congress based on the Court's judgment about which approach makes the greatest sense from an institutional perspective."); John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2400 (2017) ("In the hard cases that judges and law professors worry about . . . , legislative intent is a fiction, something judges invoke to elide the fact that they are constructing rather than identifying a legislative decision."); *cf.* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 927 (2003) (positing that the debate around judicial deference to agencies is best resolved by reference to institutional arguments).

[37] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (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."); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) (observing that Congress does not "intend[] to delegate" decisions of "economic and political significance" to agencies in a "cryptic . . . fashion").

doctrine is a mess. Scholars have struggled to discern any coherent principle behind the doctrine.[38] Those who have attempted to define the doctrine have come to different conclusions about what the major questions doctrine is,[39] and even which cases fall within its domain in the first place.[40]

[38] 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, 607 (2008) ("[T]he existing literature has almost unanimously concluded that the *Brown & Williamson* rule lacks a coherent justification."); *see* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 45 (2010) ("[T]he Court applies the elephants-in-mouseholes doctrine seemingly haphazardly; those in the majority one day are in the dissent the next, and vice versa."); Sunstein, *supra* note 21, at 232-47 (discussing the confusion as to the application of and reasoning behind the Court's major questions cases); Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2192 (2016) (describing the major questions cases as "disorderly" and "episodes of vaguely equitable intervention" as opposed to principled decisions).

[39] *See, e.g.*, Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 73 (describing the major questions doctrine as an interpretive canon that says that "statutes should not be construed to give agencies authority over questions of great 'economic and political' significance unless Congress has spoken clearly"). Freeman and Vermeule suggest that the doctrine may be best understood as a "nondelegation canon." *Id.* at 76; Gluck & Bressman, *supra* note 34, at 1003 (describing the major questions doctrine as a "presumption of nondelegation in the face of statutory ambiguity over major policy questions or questions of major political or economic significance on the theory, as Justice Scalia has memorably described it, that Congress 'does not . . . hide elephants in mouseholes'"). Gluck and Bressman give "three formulations" of the major questions doctrine, based on whether the question involves a "major policy question[]," a "question[] of major economic significance," or a "question[] of major political significance." *Id.* at 1003; *see also* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1937-38 (2017) (defining the tests applied in *Utility Air Regulatory Group v. EPA* and *King v. Burwell* as separate but related canons constituting "clear-statement principles" that "require clear congressional language to enable an ambitious regulatory agenda but not to disable one"); Loshin & Nielson, *supra* note 38, at 20-23 (defining the major questions doctrine as a nondelegation canon that "requires a clear statement in an obvious place for a significant expansion of regulatory authority," without which "the Court not only does not defer to the agency's interpretation of the statute, but it per se forbids the agency action"); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 462-65 (2016) (summarizing four different theories about what the major questions doctrine is); Moncrieff, *supra* note 38, at 596 (discussing three different justifications for the major questions doctrine and ultimately arguing that the doctrine is best understood "as a doctrine of noninterference," which "the Court uses to prevent intermeddling among governmental institutions"); Sunstein, *supra* note 21, at 247 (concluding that the Court's major questions cases "are best read as [*Chevron*] Step One decisions" expounding upon when a statute's language is unambiguous).

[40] *See, e.g.*, Heinzerling, *supra* note 39, at 1950-51, 1960-61 (describing *UARG* and *King* as deploying a "mutant strain" of ideas developed in earlier cases like *Brown & Williamson*, *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994), *Whitman*, and

One way to lend clarity to the doctrine is to focus on the particular form of congressional intent that is at issue. The Court's major questions cases are a jumble, and they all cite to each other for similar but not identical propositions. But look closely and you'll see that that these cases are concerned with three distinct forms of congressional intent: (1) whether Congress intended a specific meaning for a given statutory provision; (2) whether Congress intended to delegate to the agency the authority to adopt the specific interpretation that it has; and (3) whether Congress intended to delegate interpretive authority to an agency *at all*.

Disentangling these three strands helps explain why the Court's major questions cases have seemed so disjointed. The last two forms of congressional intent have to do with Congress's intent to delegate interpretive authority to agencies — i.e., *Chevron* deference. As a result, underneath the surface of some of the Court's major questions cases is an ongoing battle about the reach of *Chevron*. And the Court's inconsistent application of the major questions doctrine reflects disagreement over whether or not to preserve the *Chevron* framework writ large. Tracing the last two categories of major questions cases reveals how the Court has built out its legal fiction about congressional intent to craft a limiting principle for *Chevron* deference. It is the precise contours of this legal fiction that are now influencing the Court's nondelegation doctrine.

Below, I discuss the three strands of congressional intent underlying the Court's major questions cases, the relationship of two of those strands to the Court's *Chevron* jurisprudence, and the Court's recent embrace of a theory of fictional congressional intent that would both limit the application of *Chevron* writ large and may form the basis of the Court's new nondelegation test.

Gonzales v. Oregon, 546 U.S. 218 (1994), which Heinzerling places in a different interpretive category); Loshin & Nielson, *supra* note 38, at 27-44 (listing *MCI*, *Brown & Williamson*, *Whitman*, *Gonzales*, *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831 (2008), *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009), and *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009), as elephants-in-mouseholes cases); Monast, *supra* note 39, at 449-62 (identifying *King*, *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607 (1980), *MCI*, *Brown & Williamson*, *Whitman*, *Gonzales*, and *Util. Air Regul. Grp. v. EPA*, 134 S. Ct. 2427 (2014), as major questions cases); Moncrieff, *supra* note 38, at 597-98 (describing *MCI* and *Brown & Williamson* as major questions cases); Sunstein, *supra* note 21, at 193 n.30, 236-42 (identifying *Brown & Williamson*, *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687 (1995), and *MCI* as comprising "the 'Major Question' trilogy"); Note, *supra* note 38, at 2197-2202 (listing *Brown & Williamson*, *UARG*, and *King* as major questions cases, although observing that "[t]he 'major question' category is somewhat fluid, and other cases could be included here").

1. The Major Questions Doctrine as Principle of Statutory Interpretation

Some of the Court's major questions cases are concerned with the form of congressional intent that is the basis for most statutory interpretation questions — whether Congress intended a specific meaning for a given statutory provision. This is the "major questions doctrine as principle of statutory interpretation." It stands for the idea that, as Justice Scalia put it, Congress "*does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes*."[41] In other words, the doctrine adopts an assumption about congressional intent — one based predominantly on common sense about how Congress drafts statutes — to hold that courts should not read minor statutory provisions to do major work to alter the statutory scheme.

A recent example of this type of analysis appeared in the Court's opinion in *Cyan, Inc. v. Beaver County Employees Retirement Fund*,[42] in which the Court held that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") did not strip state courts of jurisdiction over class actions alleging violations of only the Securities Act of 1933. The Court so concluded in part because the argument that SLUSA *did* strip state courts of such jurisdiction relied on the idea that Congress had intended this result through the use of a "conforming amendment" to the 1933 Act.[43] As the Court explained, it would be unreasonable to think that Congress intended to implement such a dramatic change in the balance of federal-state court jurisdiction through the vehicle of a conforming amendment:

> [Petitioner's] take on the except clause reads too much into a mere 'conforming amendment.' . . . The change [Petitioner] claims that clause made to state-court jurisdiction is the very opposite of a minor tweak. When Congress passed SLUSA, state courts had for 65 years adjudicated all manner of 1933 Act cases, including class actions. . . . To think [Petitioner] right, we would have to believe that Congress upended that entrenched practice not by any direct means, but instead by way

[41] *Whitman*, 531 U.S. at 468 (emphasis added). Notably, although this language from *Whitman* is most frequently cited by the Court for this version of the major questions doctrine, *Whitman* itself arguably fits into the second category of major questions cases. *See infra* Part II.B.2.

[42] 138 S. Ct. 1061 (2018).

[43] *Id.* at 1071.

> of a conforming amendment . . . . But . . . . Congress does not 'hide elephants in mouseholes.'[44]

Importantly, this principle of statutory interpretation does not depend on any notion of agency deference. It applies equally to a statute administered by an agency and to statutes that are not subject to agency oversight. As such, the Court has deployed the doctrine in cases, like *Cyan, Inc.*, where no agency action was at issue.[45] The Court has also deployed the doctrine in cases, like *Epic Systems Corp. v. Lewis*, where an agency action was at issue, but the Court determined the agency was not entitled to deference for other reasons.[46]

Because, in this context, the Court's assumptions about congressional intent have nothing to do with agency deference, this version of the major questions doctrine does not intersect with the Court's *Chevron* jurisprudence. And so, the stakes of the Court's deployment of this principle of statutory interpretation are lower than in the other two sets of major questions cases. Justices can use this principle regardless of their *Chevron* jurisprudential commitments. The lack of connection between this version of the major questions doctrine and *Chevron* also means that it has little role to play in the new nondelegation doctrine.

2. The Major Questions Doctrine as Status Quo Ante Principle

The other two strands of congressional intent present in the Court's major questions cases are directly tied to the application of *Chevron* deference. The first of these strands asks whether Congress intended to delegate to the agency the authority to adopt the specific interpretation that it has. In this category of cases, the Court agrees that the *Chevron* framework applies, reviews the agency's interpretation of the statute, and asks whether Congress intended to delegate to the agency the authority to adopt that particular interpretation. In other words, the Court does not quibble with the application of the *Chevron* framework,

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[44] *Id.* at 1071-72 (quoting *Whitman*, 531 U.S. at 468).

[45] *See, e.g.*, Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1903 (2019) (rejecting interpretation of statute based on no-elephants-in-mouseholes principle); Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 984 (2017) (same); Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1947 (2016) (same); Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 116 (2008) (same). *But see, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (2020) (finding no-elephants-in-mouseholes principle inapplicable where statutory provision was an elephant); Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1354-55 (2020) (same).

[46] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1626-27, 1629-30 (2018) (finding no-elephants-in-mouseholes provision applicable to section 7 of the NLRA and rejecting *Chevron* deference for the NLRB's interpretation on unrelated grounds).

but doubts whether the agency's interpretation is permissible under *Chevron* step one or step two. In this context, the Court has applied a principle similar to the statutory interpretation principle articulated above to hold that *Congress does not intend to delegate to agencies the ability to alter the fundamental details of a statutory scheme, or to decide questions of great economic and political significance, through the use of vague or ancillary statutory provisions*. This is the "major questions doctrine as status quo ante principle," and it describes many of the Court's most prominent major questions cases, including *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.* ("*MCI*"),[47] *FDA v. Brown & Williamson Tobacco Corp.* ("*Brown & Williamson*"),[48] and *Utility Air Regulatory Group v. EPA* ("*UARG*").[49]

At the outset, there are several important things to recognize with respect to this category of major questions cases. First, while these cases raise the question of the intended scope of Congress's delegation of authority to an agency, they do so with respect to the specific interpretation offered by the agency only, and not the agency's interpretive authority writ large. In other words, the major questions doctrine in these cases functions as a kind of clear-statement rule at *Chevron* step one or two: Faced with an unambiguous statutory provision, courts should not presume that congressional silence with respect to a fundamental detail of the statutory scheme, or a question of major economic and political significance, creates the ambiguity that

[47] MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218 (1994).

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

[49] 573 U.S. 302 (2014). The Court's opinions in *Whitman* and *Massachusetts v. EPA*, 549 U.S. 497 (2007), arguably also fit into this category of cases, although they differ in certain respects. In *Whitman*, EPA disclaimed the ability to consider costs under section 109 of the Clean Air Act. *Whitman*, 531 U.S. at 463-64. The Court agreed with this interpretation, concluding that to hold otherwise would amount to reading the Clean Air Act in contravention of the major questions doctrine. *Id.* at 468. Thus, *Whitman* differs from the above only in that the agency was not the one seeking the statutory interpretation the Court held was foreclosed. In *Massachusetts*, EPA similarly disclaimed the authority to regulate greenhouse gases under the Clean Air Act, this time explicitly relying on one of the Court's major questions cases, *Brown & Williamson*, 549 U.S. at 511-13. But unlike in *Whitman*, the *Massachusetts* Court rejected this argument, finding that the statute clearly required EPA to regulate greenhouse gases if the agency determined that they contribute to climate change. *Id.* at 528, 530-31. The *Massachusetts* Court thus found the major questions doctrine inapplicable in that case. The D.C. Circuit's majority opinion in *American Lung Association v. EPA*, 985 F.3d 914 (D.C. Cir. 2021), reflects a similar approach. *Am. Lung Ass'n*, 985 F.3d at 957-61 (rejecting EPA's argument that it did not have the authority to regulate greenhouse gas emissions from existing power plants through the mechanism of generation shifting because EPA erroneously believed that such a regulation would implicate the major questions doctrine).

would indicate a delegation of authority to the agency to resolve that particular question. As such, though the cases narrow the range of agency interpretations that a court would uphold, they pose no existential threat to the Court's *Chevron* jurisprudence.

Second, and not coincidentally, in all but one of these cases, Justice Scalia — an avid supporter of *Chevron* deference — authored the majority opinion. By locating this version of the major questions doctrine under *Chevron* step one or two, Justice Scalia allowed the Court to apply his common sense, "elephants-in-mouseholes" principle of statutory interpretation within the specific context of *Chevron*, without threatening to disrupt the balance of power struck between courts and agencies in *Chevron*. Notably, the one case in this category where Justice Scalia did *not* author the majority opinion, *Brown & Williamson*, took the same approach as the other cases in this category, but used language that was much more expansive, calling into question Congress's intent to delegate interpretive authority to the agency at all.[50] (By this measure, *Brown & Williamson* is rhetorically closer to the third category of major questions cases discussed in Part I.B.3.) Justice Scalia's policing of the major questions doctrine within the context of *Chevron* cases thus explains some of the doctrine's inconsistencies: When Justice Scalia held the pen, the doctrine remained comfortably deployed under *Chevron* step one or two. The same could not be said for other members of the Court.

Third, as the label "major questions doctrine as status quo ante principle" suggests, and as others have observed,[51] these cases all involve Court rejections of agency attempts at regulatory innovation. The clear-statement rule prevents the agency from attempting an innovative use of its regulatory authority, even if the statutory text itself does not prohibit or could even sustain such a reading.

Finally, each of these cases relies on an assumption about congressional intent drawn from the Court's *Chevron* jurisprudence. More specifically, the cases build upon *Chevron*'s premise of congressional intent to delegate interpretive authority in order to craft a limiting principle for the application of *Chevron* deference. And, like

[50] *See infra* Part II.B.2.

[51] *See, e.g.*, Heinzerling, *supra* note 39, at 1937-38 (describing *UARG* and other cases as "requir[ing] clear congressional language to enable an ambitious regulatory agenda but not to disable one"); Lisa Heinzerling, *The Rule of Five Guys*, 119 MICH. L. REV. 1137, 1147 (2021) ("[The Court's] interpretive approach to 'major questions' [is] nothing other than a political preference for inaction over action."); Sunstein, *supra* note 21, at 243-45 (describing *MCI* and *Brown & Williamson* as "discretion-denying decisions" that announce "that ambiguities will be construed so as to reduce the authority of regulatory agencies").

Chevron itself, the theory of congressional intent underlying these major questions cases relies on a legal fiction that the court uses to disguise its normative preference for which institution ought to decide the question at hand — agencies, or courts.

1. Take the Court's opinion in *MCI*. The case dealt with the question of whether the FCC's statutory authority to "modify any requirement made by or under" section 203(b)(2) of the Communications Act of 1934 allowed the FCC to waive the requirement that long-distance telephone carriers file their rates with the FCC.[52] The Court, in an opinion written by Justice Scalia, concluded that it did not, applying the *Chevron* framework and using traditional tools of statutory interpretation to determine that the term "modify" unambiguously meant moderate or minor changes, and not basic or fundamental changes to the statutory scheme, as the majority determined the FCC's interpretation would have required.[53]

Much of the opinion reads like a standard *Chevron* case, except for one notable difference. In deciding that the statute unambiguously foreclosed the FCC's interpretation, Justice Scalia found that the FCC's policy would have wrought a fundamental change to the statutory structure, and observed that "[i]t is highly unlikely that Congress 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."[54] Justice Scalia used this supposition about the "likelihood" of congressional intent as an independent reason to reject the agency's reading of the statute.[55]

But Justice Scalia failed to provide any evidence to support his presumption that it was "unlikely" that Congress intended to delegate authority to the FCC to decide whether to exempt companies from rate-filing requirements.[56] That assertion, without more, is particularly notable given the facts of *MCI*. As Justice Stevens pointed out in his dissent in the case, there was plenty of evidence that Congress had intended to give the FCC exactly the kind of regulatory discretion that Justice Scalia assumed was absent.[57] Justice Stevens observed that the Communications Act of 1934 gave the FCC "unusually broad discretion to meet new and unanticipated problems" in the monopolistic

[52] *MCI*, 512 U.S. at 220-25.

[53] *Id.* at 225-32.

[54] *Id.* at 231.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 235-45 (Stevens, J., dissenting).

communications industry.[58] The statute specifically prohibited carriers from providing telecommunications services without filing a tariff *unless* the FCC provided otherwise "under authority of this Act" — indicating that Congress had contemplated the ability of the FCC to discontinue rate-filing requirements at its discretion.[59] And, while the statute explicitly limited the FCC's ability to *stiffen* a regulated entity's rate-filing requirements, it included no such limit on the agency's authority to *relax* those requirements.[60] Finally, Justice Stevens observed, the FCC's action to remove certain rate-filing requirements was the product of a series of incremental steps that the FCC had taken over the previous decades successfully to increase competition in the telecommunications industry.[61]

2. The Court relied on a similarly debatable assumption about congressional intent to reject the FDA's authority to decide whether to regulate tobacco products in *Brown & Williamson*. In that case, the Court, in an opinion written by Justice O'Connor, addressed the FDA's attempt to regulate nicotine and cigarettes as "drugs" and "devices," respectively, under the Food, Drug, and Cosmetic Act ("FDCA").[62] The Court applied the *Chevron* framework and, looking at the statutory text, context, and other congressional action on the subject, found that the statute unambiguously excluded tobacco products from the FDA's jurisdiction.[63]

But, as in *MCI*, the Court did not stop there. It engaged in a separate inquiry under *Chevron* step one to determine whether Congress intended to delegate to the FDA the authority to resolve the particular question.[64] Justice O'Connor explained that when courts are deciding whether a statutory provision is ambiguous at step one, they should use not just the traditional tools of statutory interpretation, but also "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."[65] Then, in language that seems to go further than the rule announced in *MCI*, as discussed *infra*, Justice O'Connor stated that "[d]eference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's

[58] *Id.* at 235.
[59] *Id.* at 240 (quoting 47 U.S.C. § 203(c) (2018)).
[60] *Id.* (citing 47 U.S.C. § 203(b)(2) (2018)).
[61] *Id.* at 237-39.
[62] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 127 (2000).
[63] *Id.* at 131-59.
[64] *See id.* at 133, 159-61.
[65] *Id.* at 133.

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."[66] Ultimately, the Court concluded that the FDA's discretion to regulate tobacco products constituted just such an extraordinary case,[67] in part because the Court was "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."[68]

The *Brown & Williamson* Court applied the major questions doctrine at *Chevron* step one, although it used language suggesting that the Court doubted whether a congressional delegation of interpretive authority — the fictional prerequisite for the application of *Chevron* — had occurred at all.[69] And the Court's doubt was founded not on evidence of actual congressional intent, but rather the Court's own intuitions about how Congress delegates interpretive authority.[70] Nowhere did the Court explain or attempt to justify why its standard assumptions about congressional delegation should be inverted for "extraordinary cases." The only support the Court provided for its assumption was a citation to its previous decision in *MCI*, and a law review article written by then-Judge Breyer in 1986 (discussed in more detail *infra*[71]).

Moreover, much as in *MCI*, the Court's "common sense" approach to Congress's intent ignored a more complicated picture. As Justice Breyer observed in his dissent in that case, there was evidence that Congress had intended to delegate discretion to the FDA to resolve the issue.[72] Congress had intentionally drafted the FDCA using broad language; in fact, Congress had amended the FDCA specifically to expand the scope of products subject to the FDA's jurisdiction, and to permit the FDA to exercise broad discretion in selecting which "drugs" and "devices" to regulate.[73] And Justice Breyer pointed out that it was just as sensible to believe that Congress had intended the FDA, a politically accountable institution whose actions are just as much subject to public scrutiny as

66 *Id.* at 159.
67 *See id.* at 159-60.
68 *Id.* at 160.
69 *See id.* at 159-60.
70 *See id.*
71 *See infra* Part II.B.3.
72 *See Brown & Williamson*, 529 U.S. at 161-92 (Breyer, J., dissenting).
73 *Id.* at 164-65.

Congress's, to decide whether to regulate tobacco products as it was to assume that Congress wanted to answer that question for itself.[74]

3. Finally, in *UARG*, the Court once again applied an assumption about congressional intent — this time at *Chevron* step two — to deny an agency deference for its interpretation. In *UARG*, the Court, in an opinion written by Justice Scalia, held that EPA's interpretation that it could regulate greenhouse gas emissions from all major emitting facilities permitted under two Clean Air Act programs was foreclosed by the statute.[75] The Court applied the *Chevron* framework and determined that the relevant statutory provision was ambiguous at *Chevron* step one.[76] It then used the traditional tools of statutory interpretation to determine that including greenhouse gas emissions under the programs' general permitting provisions would "be inconsistent with — in fact, would overthrow — the Act's structure and design."[77]

Then, akin to its approach in *MCI* and *Brown & Williamson*, the Court engaged in a separate major questions analysis. The Court explained that the "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."[78] Citing to *Brown & Williamson*, the Court explained that "[w]hen 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."[79] "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[80]

UARG is unusual because it locates its major questions analysis in step two of *Chevron*. As a result, the analysis is almost entirely disconnected from the question of whether Congress intended to delegate authority to the agency to resolve the issue. In *UARG*, the Court concluded that Congress *did* delegate interpretive authority to the agency, but that the interpretation the agency adopted was unreasonable because the Court assumed that Congress would have specifically authorized the agency to regulate greenhouse gas emissions from major emitting facilities had it intended that result. In this sense,

[74] *Id.* at 190-91.
[75] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 321-23 (2014).
[76] *Id.* at 315-21.
[77] *Id.* at 321.
[78] *Id.* at 324.
[79] *Id.* (quoting *Brown & Williamson*, 529 U.S. at 159).
[80] *Id.* (quoting *Brown & Williamson*, 529 U.S. at 160).

the major questions analysis in *UARG* looks more like the "major questions doctrine as principle of statutory interpretation." Yet Justice Scalia explicitly framed the major questions analysis as a *Chevron*-style inquiry about delegation — a question of whether Congress had intended "to assign to an agency decisions of vast 'economic and political significance.'"[81] By squirreling the major questions doctrine away in *Chevron* step two, Justice Scalia ensured that it was compatible with *Chevron*, and yet could still be used to reject the interpretation offered by the agency.

Moreover, as with *MCI* and *Brown & Williamson*, Justice Scalia's cavalier assumption about Congress's intent glossed over the strange circumstances of *UARG*. Only seven years prior, in *Massachusetts v. EPA*, the Court had held not only that Congress intended for EPA to regulate greenhouse gases under the Clean Air Act, but that EPA could not *decline* to regulate greenhouse gases if it determined that they contribute to climate change.[82] It is difficult to square the Court's decision in *Massachusetts v. EPA* with the sweeping generalizations invoked by Justice Scalia in *UARG* — asserting that EPA was claiming an unheralded power to regulate a significant portion of the American economy, when it was actually the Court that had expressly directed EPA to exercise that power. Again, the Court's invocation of Congress's intent in its major questions analysis functioned more as a rhetorical device than a real-world variable subject to the Court's inquiry.

* * *

At bottom, in each of these cases, the Court asserted a claim about congressional intent to delegate interpretive authority without any attempt to justify that claim. In *MCI*, *Brown & Williamson*, and *UARG*, the Court spent plenty of time marshalling evidence as to why its interpretation of the statutory interpretation at issue was the unambiguously correct one under *Chevron* step one, or the reasonable one under *Chevron* step two. But, as the dissents in those cases demonstrate, it spent no time attempting to determine whether Congress wanted the agency, as opposed to the Court, to answer the question presented. The Court's invocation of congressional intent was a legal fiction. And it was a legal fiction that built upon the *Chevron* framework: a fiction that, contrary to the default presumption under *Chevron*, congressional silence with respect to questions of great economic and political significance, or the fundamental details of a

[81] *Id.* (quoting *Brown & Williamson*, 529 U.S. at 160).

[82] Massachusetts v. EPA, 549 U.S. 497, 528-35 (2007).

statutory scheme, does not indicate congressional intent to leave those issues up to the agency's discretion. Further, this legal fiction allowed the Court to deny *Chevron* deference to the agency's interpretation *without* large-scale undermining of the balance of power between courts and agencies struck by the *Chevron* framework.

3. The Major Questions Doctrine as *Chevron* Step Zero Test

In the third set of major questions cases, the Court has given up on protecting *Chevron* deference, and instead adopts an all-out assault on it. This category, indifferent to the reasonableness of the agency's interpretation, asks whether Congress intended to delegate interpretive authority to an agency *at all*. In other words, here, a similar presumption about congressional intent is being applied as that in *MCI*, *Brown & Williamson*, and *UARG*. The Court assumes that, *in extraordinary cases involving questions of great economic and political significance, or questions central to the statutory scheme, Congress does not intend to delegate interpretive authority to an agency unless it expressly says so*. But in this version, the major questions doctrine acts as a threshold inquiry akin to *Mead* to determine whether the *Chevron* framework even applies. This is the "major questions doctrine as a *Chevron* step zero test." The Court has arguably applied this version of the major questions doctrine only once, in *King v. Burwell*.[83] But its roots took hold much earlier, in a 1986 law review article written by then-Judge Breyer and, as hinted above, in the Court's opinion in *Brown & Williamson*.[84]

[83] 576 U.S. 473 (2015).

[84] The Court's opinion in *Gonzales v. Oregon*, 546 U.S. 243 (2006), could also potentially qualify as a *Chevron* step zero application of the major questions doctrine. In that case, the Court held that the Attorney General's Interpretive Rule prohibiting physicians from prescribing controlled substances to assist suicide was not entitled to *Chevron* deference. *Gonzales*, 546 U.S. at 258. The Court concluded that Congress had not delegated the Attorney General the authority to issue such a rule, in part based on the idea that Congress does not delegate discretion over questions of such economic and political significance in cryptic statutory provisions. *Id.* at 267 (citing *Whitman* and *Brown & Williamson*). But the Court's finding that the Attorney General had not been delegated such authority was also based on other reasons: the Court observed that the Attorney General was given limited authority to make rules carrying the force of law under the Controlled Substances Act, *id.* at 258-59; that the Attorney General's rulemaking authority was subject to carefully circumscribed procedural requirements, which the Attorney General had not followed, *see id.* at 260-61; that to read the Attorney General's specific grants of authority as authorizing more general authority to criminalize certain conduct by physicians would be "anomalous," *id.* at 262; that the Attorney General did not have sole delegated authority under the Act, but rather had to implement it in concert with other agencies, *see id.* at 265-66; and that the Attorney

A few things to note at the outset of this discussion, as well. First, observe that Justice Scalia, despite his prominence in the other categories of major questions cases, is nowhere to be found in this version of the major questions doctrine. That is no coincidence. Here, the major questions doctrine is directly antagonistic to the *Chevron* framework. Second, as in the "major questions doctrine as status quo ante principle," this version of the major questions doctrine uses a similar twisting of the legal fiction underlying *Chevron* deference to justify denial of deference to an agency. But in this case, the legal fiction functions to reject application of the *Chevron* framework entirely. That is, the balance of power struck between the courts and agencies in *Chevron* is explicitly *rejected* in this category in favor of aggrandizement of power to the courts. It is this version of the legal fiction — that, irrespective of statutory ambiguity, there has been no delegation of interpretive authority *at all* to an agency — that is influencing the Court's new nondelegation test.

1. Many have traced the origins of this version of the major questions doctrine — including its name — to a law review article written by then-Judge Breyer in 1986.[85] It was in this article that then-Judge Breyer advocated for the legal fiction of congressional intent underlying *Chevron* deference that later became the doctrine's norm. In that same article, however, then-Judge Breyer observed that in some circumstances, statutory ambiguity alone may not indicate congressional intent to delegate interpretive authority.[86] As an example, then-Judge Breyer hypothesized that it may be less reasonable for courts to presume that Congress intended to delegate interpretive authority to agencies to resolve "important" legal questions.[87] Then-Judge Breyer stated, without further elaboration, 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

General did not possess particular expertise over medical practice, *see id.* at 265-67. Given the multitude of other factors motivating the Court's decision in *Gonzales*, it is difficult to say just how important the major questions doctrine was to the outcome of the case.

[85] *See, e.g.*, U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting) ("Justice Breyer appears to have been the first to describe a dichotomy between ordinary and major rules and to articulate the major rules doctrine as a distinct principle of statutory interpretation."); Sunstein, *supra* note 21, at 200 (describing Justice Breyer's reasoning in advocating for judicial deference to legislative agencies).

[86] *See* Breyer, *supra* note 22, at 370.

[87] *Id.*

daily administration."[88] In other words, a reverse-presumption of congressional intent to delegate authority to an agency applies in the context of "major questions."

Then-Judge Breyer's supposition was both vague and unsupported. Nowhere did he define what constitutes a "major question" as opposed to an "interstitial matter."[89] Nor did he give any evidence for his assertion that Congress is less likely to delegate authority to agencies to answer "major questions" than minor ones. Others have subsequently argued that it would be just as reasonable to think that Congress *would* want to delegate the resolution of "major questions" to agency discretion,[90] although at least one empirical study suggests that legislative drafters may prefer *not* to leave "major questions" up to agency resolution.[91] The accuracy of the claim, however, is largely immaterial. Then-Judge Breyer's supposition did not rely on any real-world assessment of how Congress legislates. Rather, it was based on what a "hypothetically 'reasonable' legislator would have wanted (given the statute's objective) as an interpretive method of understanding a statutory term surrounded by silence."[92] In other words, it was a legal fiction, the purpose of which was to allow a court to decline to defer to an agency, even in circumstances that would normally demand deference under *Chevron*.

The rejection of the assumption of congressional intent to delegate interpretive authority even in situations of statutory ambiguity is what distinguishes this version of the major questions doctrine from the "major questions doctrine as status quo ante principle." While both rely on a similar intuition about congressional drafting, it is only under this version of the major questions doctrine that the balance of power

[88] *Id.*

[89] *Cf.* Moncrieff, *supra* note 38, at 611-12 (explaining the difficulty in drawing that line); Sunstein, *supra* note 21, at 233-46.

[90] *See, e.g.*, Heinzerling, *supra* note 39, at 1991 ("[T]he basic purpose of broad statutory language is to allow . . . the fresh assertion of regulatory authority as information develops showing that regulatory intervention is warranted"); Loshin & Nielson, *supra* note 38, at 63 (discussing the complications of the legislative process and raising the question of whether it is "the Court's place to upend Congress's bargain . . ."); Moncrieff, *supra* note 38, at 612 ("[A]gencies are better equipped than judges to answer *major* political questions just as they are better equipped to answer *minor* ones[]."); Sunstein, *supra* note 21, at 232-33 (stating that there is no reason to believe that Congress would seek a judicial rather than administrative judgment when it comes to major questions).

[91] Gluck & Bressman, *supra* note 34, at 1003 (finding that more than sixty percent of congressional drafter surveyed believed that Congress, not agencies, should resolve "major questions").

[92] Breyer, *supra* note 29, at 370.

between agencies and courts is reallocated. This version returns interpretive power to the courts, not just by removing from the agency's domain a subset of "major questions," but also by leaving it to the courts to decide what is a "major question" in the first place. By contrast, because the "major questions doctrine as status quo ante principle" uses its legal fiction about congressional intent to define the boundaries of an unambiguous statutory provision, or an unreasonable agency interpretation, that version leaves in place the preferred institutional balance set out in *Chevron*. It is an important normative shift, one that then-Judge Breyer took very little space to justify.

2. The Court's opinion in *Brown & Williamson* hinted at what this new normative approach might look like, even though the Court technically applied the "major questions doctrine as status quo ante principle" version of the doctrine. As mentioned above, in that case, the Court observed that "[d]eference 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," but that, in "extraordinary cases," there may be "reason to hesitate before concluding that Congress has intended such an implicit delegation."[93] As its sole support for this statement, the Court included a "cf." cite to then-Judge Breyer's 1986 article.[94] The Court concluded that the FDA's attempted regulation of tobacco products constituted just such an extraordinary case.[95] And as much as the Court may have insisted that the statute was unambiguous on this account, it is hard not to read the *Brown & Williamson* decision as wresting interpretive authority from the agency irrespective of the statute's clarity.

3. But it was not until the Court's opinion in *King v. Burwell* that the Court wholeheartedly applied this version of the major questions doctrine.[96] *King* involved the question of whether the Affordable Care Act's tax credits to make health insurance more affordable applied equally in states that had a state-run "[e]xchange" (i.e., a healthcare marketplace) as in states that had a federal exchange.[97] The IRS had interpreted the statute to make the tax credits equally available in either

[93] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

[94] *Id.*

[95] *See id.* at 159-61.

[96] *See* King v. Burwell, 576 U.S. 473 (2015).

[97] *Id.* at 479.

form of exchange.[98] Both the Fourth Circuit and the D.C. Circuit below had applied the *Chevron* framework to resolve the issue.[99]

But Chief Justice Roberts' majority opinion declined to apply *Chevron* at all. First, Chief Justice Roberts explained that "[w]hen analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*."[100] Then, quoting *Brown & Williamson*, he observed that 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."[101] But, as *Brown & Williamson* recognized, in "extraordinary cases" that presumption may not apply.[102] Chief Justice Roberts concluded that the tax credit issue was just such an "extraordinary case": the tax credits were "among the Act's key reforms," and the question of whether those credits were available on the federal exchanges was one of "deep 'economic and political significance'" that was "central to the statutory scheme."[103] Finally, Chief Justice Roberts observed that "had Congress wished to assign that question to an agency, it surely would have done so expressly."[104] Finding no such express assignment, Chief Justice Roberts declined to apply the *Chevron* framework at all.[105]

Tellingly, Chief Justice Roberts' deployment of this version of the major questions doctrine occurs at the very beginning of the opinion. It appears before any lengthy discussion of the statutory text, context, or structure.[106] This placement is the opposite of the major questions doctrine's appearance in *MCI*, *Brown & Williamson*, and *UARG*.

The reverse ordering in *King* is in keeping with Chief Justice Roberts' understanding of the major questions doctrine as a *Chevron* step zero test. The inquiry is a threshold one, rather than another tool of statutory interpretation to be deployed at *Chevron* step one or two. And because the analysis comes before any meaty statutory discussion, the "majorness" of the question at issue is abstracted from the nitty gritty details of the statute itself. Having explained in broad strokes how the Affordable Care Act works in the factual background section of the

98 *Id.* at 483.

99 *See id.* at 484.

100 *Id.* at 485.

101 *Id.* (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

102 *Id.*

103 *Id.* at 485-86 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

104 *Id.* at 486.

105 *Id.*

106 *Id.* at 486-98.

opinion,[107] Chief Justice Roberts can persuasively say that the issue of whether the Act's tax credits would be equally available in federally-run exchanges as in state-run exchanges is a question of great significance to the statute's success — a "major" question.

But the birds-eye view of the question is more straightforward than its on-the-ground reality. As Professor Gluck has recounted, the litigation in *King* involved what amounted to a minor drafting error in the Affordable Care Act.[108] The Act specified only that the tax subsidies for individuals would be calculated based on "the monthly premiums for such month . . . the taxpayer [was] enrolled in through an Exchange *established by the State* under [section] 1311."[109] Because the provision did not explicitly mention *federally*-run exchanges, the dispute in the case turned on whether the provision afforded subsidies for individuals participating in both state-run and federally-run exchanges.[110] But the provision did not mention the federal exchanges because the provision was a compilation of different versions of the Act assembled during the Conference Committee process, each of which used different terminology for the exchanges.[111] Examining those versions revealed that Congress had intended to provide subsidies to individuals regardless of the type of exchange.[112] Opponents of the Act originally acknowledged that the statutory provision at issue was simply a "glitch" or drafting error.[113] They nonetheless viewed it as ripe for exploitation to force the Court to overturn the entire statute.[114]

If there is any situation in which it would be reasonable for a court to assume that Congress intended to delegate to the agency the authority to resolve an interpretive issue, *King* was it. The question presented in *King* wasn't meant to be a "major" question; it wasn't meant to be a question at all. Surely it is reasonable to think that Congress intended for the agency charged with administering a statute to be able to interpret any drafting errors that arise during the statute's implementation. That would seem to be the lowest bar of a deference regime.

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[107] *Id.* at 479-83.

[108] Abbe R. Gluck, Comment, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 69-79 (2015).

[109] *Id.* at 71 (quoting 26 U.S.C. § 36B(b)(2)(A) (2018)) (emphasis added).

[110] *Id.*

[111] *See id.* at 77-79.

[112] *See id.*

[113] *Id.* at 72.

[114] *Id.* at 69-79.

But because Chief Justice Roberts addressed the "majorness" of the question before he engaged in any deep statutory analysis, he did not have to grapple with the statutory context. He did not have to confront the question of whether Congress would have wanted an agency, rather than a court, to resolve ambiguities resulting from drafting errors. He could instead frame the analysis as a simple question of whether the tax credit issue was a "major" one. And while Chief Justice Roberts ultimately acknowledged that the Affordable Care Act "contains more than a few examples of inartful drafting,"[115] he did so a dozen paragraphs after he had already jettisoned *Chevron*. Chief Justice Roberts' majority opinion in *King* was thus not concerned with discerning Congress's intent as to which institution ought to resolve the statutory ambiguity at issue. The Court simply wanted to claim interpretive supremacy for itself — as evidenced by the fact that the Court ultimately arrived at the same interpretation of the statute as the IRS did.[116]

4. Finally, the Supreme Court recently granted certiorari to review the D.C. Circuit's opinion in *American Lung Association v. EPA*.[117] In that case, Judge Walker on the D.C. Circuit wrote a partial concurrence and partial dissent that represents a quintessential use of the "major questions doctrine as *Chevron* step zero test."[118] A majority of the panel of the D.C. Circuit rejected Judge Walker's deployment of the major questions doctrine.[119] But the grant of certiorari suggests that the Supreme Court may adopt Judge Walker's reading of the major questions doctrine — particularly because the Supreme Court granted review on the question of whether "Congress constitutionally authorize[d] the Environmental Protection Agency to issue significant rules" to regulate greenhouse gas emissions from power plants under the Clean Air Act.[120] Given this, it is instructive to review Judge Walker's deployment of the major questions doctrine. At bottom, Judge Walker's partial concurrence represents the extreme version of what happens when the doctrine is

115 King v. Burwell, 576 U.S. 473, 491 (2015).

116 *See id.* at 483, 486.

117 W. Va. v. EPA, No. 20-1530, 2021 WL 5024616 (D.C. Cir. Oct. 29, 2021) (mem.).

118 Am. Lung Ass'n v. EPA, 985 F.3d 914, 995 (D.C. Cir. 2021) (Walker, J., concurring in part, concurring in judgment in part, and dissenting in part), *certiorari granted sub nom.* W. Va. v. EPA, No. 20-1530, 2021 WL 5024616 (D.C. Cir. Oct. 29, 2021) (mem.).

119 *Id.* at 958-68.

120 Petition for a Writ of Certiorari at I, W. Va. v. EPA, No. 20-1530, 2021 WL 5024616 (D.C. Cir. Apr. 29, 2021).

understood as an abstract threshold inquiry rather than an interpretive principle grounded in the statutory text.

American Lung Association involves a challenge to the EPA's repeal of the Clean Power Plan rule regulating greenhouse gas emissions from existing power plants, and its replacement of that rule with the Affordable Clean Energy Rule.[121] In the Clean Power Plan, the Obama Administration's EPA had attempted the first significant regulation of greenhouse gas pollution from existing power plants by incentivizing "generation shifting."[122] Generation shifting describes the shift from high-polluting energy sources on the grid — like coal plants — to lower-polluting sources — like gas-fired turbines, renewable energy sources, and energy efficiency technologies.[123] Generation shifting has been occurring on the grid for some time now, as the cost of lower-polluting technologies has become increasingly competitive, pushing more expensive (often higher-polluting) resources off the grid.[124] In the Clean Power Plan, the Obama Administration's EPA sought to encourage accelerated generation shifting in order to reduce greenhouse gas emissions from the power sector.[125]

But the Clean Power Plan was never implemented. And when the Trump Administration came into power, the new EPA Administrator repealed the Clean Power Plan.[126] The EPA concluded that it was "compelled" to do so because the Clean Power Plan was unlawful.[127] It reasoned that the "plain meaning" of section 111 of the Clean Air Act — which authorizes the EPA to regulate air pollutants from existing power plants "through the application of the best system of emission reduction" — "unambiguously" precluded the EPA from encouraging generation shifting.[128] The EPA based its conclusion on the statute's text, which the agency read to permit only pollution-control technologies that can be put into operation at a specific "building, structure, facility, or installation."[129] But the agency also said that its

121 *Am. Lung Ass'n*, 985 F.3d at 929-30.

122 *Id.* at 936-37.

123 *Id.*

124 *Id.* State-level laws like renewable portfolio standards and clean energy mandates have played an important role in making these new technologies cost-competitive.

125 *Id.*

126 *See id.* at 937-38.

127 *See id.* at 938.

128 *See id.* at 930-31, 938 (quoting 42 U.S.C. § 7411(a)(1) (2018)).

129 *Id.* at 938 (quoting Repeal of the Clean Power Plan, 84 Fed. Reg. 32,520, 32,523-24 (July 8, 2019)).

conclusion was "confirm[ed]" by the major questions doctrine.[130] The EPA said that the decision of whether to use generation shifting was one of "vast economic and political significance," and therefore required explicit authorization from Congress.[131]

In *American Lung Association*, a majority of the D.C. Circuit held that the EPA was wrong on both accounts.[132] The Court first exhaustively analyzed the statutory text, structure, history, and purpose to conclude that section 111's "best system of emission reduction" requirement did *not* unambiguously preclude the EPA from encouraging mechanisms like generation shifting.[133] The Court then determined that generation shifting did not amount to an unusual exercise of EPA's authority implicating the major questions doctrine. In making this determination, the Court took into account Supreme Court case law recognizing the EPA's authority to regulate greenhouse gases from existing power plants; the unique statutory design of section 111; the extent of the problem at issue; and the technical reality of the electricity grid and the sources on it.[134]

Reviewing just the EPA's arguments and the majority's rejection of them, *American Lung Association* looks like a classic case of "the major questions doctrine as status quo ante principle," although with the court and the agency in reversed positions.[135] The EPA believed that the statutory text limited its regulatory authority so as to preclude the use of generation shifting, while a majority of the D.C. Circuit did not; and, to some degree, the major questions doctrine was only the last in a series of standard tools of statutory interpretation that both used to come to their respective conclusions.

But Judge Walker, in his partial concurrence, took a different approach. Judge Walker's analysis began not with the statutory text, but with a first-principles description of how laws are passed under the Constitution.[136] He then recounted the various failed attempts to pass legislation regulating greenhouse gases.[137] He noted that the Clean Power Plan was promulgated after these legislative failures.[138] And he

130 *Id.* (quoting Repeal of the Clean Power Plan, 84 Fed. Reg. at 32,529).

131 Repeal of the Clean Power Plan, 84 Fed. Reg. at 32,529 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

132 *See Am. Lung Ass'n*, 985 F.3d at 943-44, 958-59.

133 *See id.* at 941-57.

134 *See id.* at 958-68.

135 *See supra* note 49 and accompanying text.

136 *Am. Lung Ass'n*, 985 F.3d at 996-97 (Walker, J., concurring in part).

137 *Id.* at 997-98.

138 *Id.* at 998-99.

observed that the legal fight that ensued involved opposing "political faction[s]" who had appeared on opposite sides in the failed legislative proceedings.[139]

Having summarized the state of play, Judge Walker then said that he "doubt[ed]" that Section 111 of the Clean Air Act authorized "arguably one of the most consequential rules ever proposed by an administrative agency."[140] He listed the various descriptors that politicians, advocates, and pundits used to characterize the Clean Power Plan.[141] And he observed that the costs of the rule ranged in the billions.[142] He then concluded that regulation of greenhouse gas emissions constitutes a "major" question:

> Minor questions do not forestall consequences comparable to "the extinction event that wiped out the dinosaurs 65 million years ago." Minor questions are not analogous to "Thermopylae, Agincourt, Trafalgar, Lexington and Concord, Dunkirk, Pearl Harbor, the Battle of the Bulge, Midway and Sept. 11.". . . [T]he question of how to make this "the moment when the rise of the oceans began to slow and our planet began to heal" — and who should pay for it — requires a "decision[] of vast economic and political significance."[143]

Notably, nowhere within Judge Walker's major questions analysis did he ever cite to the Clean Air Act. Nor did he discuss the phrase "best system of emission reduction" — the statutory language around which both the majority and the EPA had centered their textual analysis. Judge Walker did, however, manage to work in references to *Lawrence of Arabia*,[144] *An Inconvenient Truth*,[145] press releases by the major environmental NGOs,[146] and an opinion editorial in the *New York Times* by Al Gore.[147] While those references may seem far afield from the majority's and the EPA's approach, they don't seem quite so absurd for the threshold-inquiry version of the major questions doctrine. After all, if the doctrine is simply an abstract inquiry about whether something is

[139] *Id.* at 999.
[140] *Id.* at 999-1000.
[141] *Id.* at 1000-01.
[142] *Id.* at 1000.
[143] *Id.* at 1001-02.
[144] *Id.* at 1002 n.55.
[145] *Id.* at 1001 n.45.
[146] *Id.* at 1000 nn.34–36.
[147] *Id.* at 1001 n.46.

a "major" issue or not, then an op-ed by Al Gore could be just as relevant as the words of the statute itself.

Moreover, Judge Walker's approach to the major questions doctrine would make it difficult, if not impossible, for any federal agency to take significant action to regulate greenhouse gases. In Judge Walker's eyes, any effort to regulate greenhouse gases would amount to a major question, irrespective of the scope of the agency's regulatory authority. If a majority of the Supreme Court takes the same view, it will be an uphill battle for federal agencies under the Biden Administration to take significant action to address climate change.

* * *

It is this final articulation of the major questions doctrine — that Congress does not intend to delegate interpretive authority to agencies to resolve "major questions" through the use of statutory ambiguity — that may form the basis of the Court's new nondelegation test. In that light, there is an important point that the "major questions doctrine as *Chevron* step zero test" establishes. As the Court's opinion in *King* most clearly demonstrates, the legal fiction of congressional intent is a cover the Court uses to reclaim power for itself from the administrative agency. The real question is not what Congress intended with respect to a particular statutory provision, but rather whether the issue before the Court constitutes a "major question." If the Court answers that question affirmatively, then it can apply its fiction about congressional intent to decline to apply *Chevron* at all. Indeed, the very premise of the doctrine — the existence of a "major question" — is something that can be discovered only through the judicial process, when a statute is applied to different factual circumstances and different, often unanticipated questions arise. Congressional intent at this point is both nonexistent and irrelevant.

Nonetheless, even this version of the doctrine preserves space for Congress to change the power dynamic between agencies and courts. If Congress expressly states that it wants agencies to resolve "major questions," then courts will follow that instruction. At bottom, the power struggle here is between courts and agencies, not courts and Congress.

C. Limiting Principle #2: Chief Justice Roberts' Jurisdictional Exception

Chief Justice Roberts' (failed) attempt to limit *Chevron* deference in the case of agency interpretations of their own jurisdiction is another example of an area of the Court's *Chevron* jurisprudence where the doctrine's underlying legal fiction was built out in order to craft a

limiting principle for *Chevron*. As in the major questions doctrine example, this limiting principle also carves out a space where Congress is assumed *not* to intend to delegate interpretive authority to agencies. But in this context, the exception is targeted at agency interpretations of the scope of their own jurisdiction, rather than "major questions."

Chief Justice Roberts' jurisdictional exception resurfaced following the Court's decision in *Mead*, although the issue predated that case. *Mead* brought to the fore a question that had dogged the Court's *Chevron* jurisprudence for several years: whether agencies can receive *Chevron* deference for their interpretations of the scope of their own jurisdiction.[148] The Court had touched upon this topic fairly early on, in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*.[149] At issue in that case was whether the Federal Energy Regulatory Commission's ("FERC") determination that a nuclear power plant's wholesale electricity rates were just and reasonable preempted the state public utility commission's parallel inquiry that retail rates passed onto consumers were prudently incurred.[150] The Court held that the state's inquiry was preempted.[151]

Justice Scalia, writing in concurrence, observed that the case turned on FERC's conclusion that the electricity sales at issue qualified as wholesale sales of electricity, and therefore fell under FERC's jurisdiction, which the Court had already held allowed FERC to preempt certain state ratemaking proceedings.[152] Justice Scalia stated that, under *Chevron*, the Court was obligated to defer to FERC's conclusion, so long as it was reasonable.[153] Further, Justice Scalia maintained that the Court was required to defer even though the question involved "an agency's interpretation of its own statutory authority or jurisdiction."[154] According to Justice Scalia, "there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority."[155] "Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe

[148] *See, e.g.*, Merrill & Hickman, *supra* note 21, at 844 & n.54 (noting open question of whether there is a "scope of jurisdiction" exception to *Chevron* deference and citing conflicting case law).

[149] Miss. Power & Light Co. v. Mississippi, 487 U.S. 354, 387 (1988).

[150] *Id.* at 356-67.

[151] *Id.* at 372.

[152] *Id.* at 377-79 (Scalia, J., concurring).

[153] *Id.* at 380.

[154] *Id.* at 381.

[155] *Id.*

'authority.'"[156] As such, *Chevron* deference applies equally in both scenarios. Indeed, Justice Scalia said, invoking the theory of fictional congressional intent underlying *Chevron*, "Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction."[157]

But Justice Scalia's theory of *Chevron* was not adopted by the Court (in fact, Justice Brennan vehemently disagreed with Justice Scalia's position[158]), and the issue remained an open question in the decades following *Chevron*. It was not until after the Court issued its opinion in *Mead* that the question gained new urgency. When the *Mead* Court directly linked Congress's grant of rulemaking authority to an agency to Congress's grant of interpretive authority to an agency,[159] it collapsed any distinction that could previously have been made between the extent of an agency's ability to act with the force of law (i.e., its jurisdiction) and the agency's ability to receive deference for its interpretations.

The problem becomes clear once you understand the general grants of rulemaking authority upon which the *Mead* Court conditioned *Chevron* deference. Such grants are common and broad. For instance, agencies are often given the authority "to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title," or "to make such rules and regulations . . . as may be necessary in the administration of this Act."[160] These delegations often occur in the parts of the statute devoted to general administration. But the exact same statute may also contain more precise rulemaking language in its substantive subsections.[161] The presence of both broad and specific grants of rulemaking authority within the same statute itself

156 *Id.*

157 *Id.* at 381-82.

158 *See id.* at 386-87 (Brennan, J., dissenting).

159 United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

160 Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 471 (2002) (quoting first the Securities Act of 1933, 15 U.S.C. § 77s(a) (2018)), then the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 939(a) (2018)); *see also id.* at 471 nn.8–9.

161 For instance, the Clean Air Act gives the EPA Administration the authority to "prescribe such regulations as are necessary to carry out his functions under this chapter" under its general provisions. 42 U.S.C. § 7601(a)(1) (2018). But the Clean Air Act also authorizes the EPA Administrator to promulgate specific rules in its substantive subchapters. *See, e.g.*, *id.* § 7409(a)(1)(A) (authorizing the EPA Administrator to "publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard"); *id.* § 7411(b)(1)(B) (authorizing the EPA Administrator to "publish proposed regulations, establishing Federal standards of performance for new [stationary] sources").

creates ambiguity. Through the broad grant of rulemaking authority, Congress may have intended to give the agency the ability to issue rules as necessary to effectuate the provisions of the statute — including categories of rules that Congress may not have anticipated. Alternatively, through the specific grants of rulemaking authority, Congress may have intended to authorize the agency to act with the force of law with respect to those areas that Congress identified as eligible for regulation only. If *Chevron* deference is conditioned solely upon the grant of a broad rulemaking authority, as *Mead* says, then it follows that agencies, rather than courts, get to resolve *all* statutory ambiguities, including the scope of their own rulemaking authority, so long as they can show a general grant of rulemaking authority. In other words, agencies get *Chevron* deference for interpretations of their own jurisdiction.

The Court ultimately adopted the position that logically flows from *Mead* in *City of Arlington v. FCC*.[162] That case concerned the question of whether *Chevron* deference applied to the FCC's determination that the Communications Act of 1934's broad grant of regulatory authority to the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out [the Act's] provisions" empowered the FCC to issue a declaratory ruling interpreting a subsection of the Act governing state and local governments' wireless siting procedures.[163] Challengers to the FCC's declaratory ruling argued that the FCC was not entitled to *Chevron* deference for its interpretation because the question centered on the FCC's scope of its own statutory authority — i.e., its jurisdiction.[164]

Justice Scalia, writing the opinion for the majority in an explicit rebuke to those who sought to diminish *Chevron*'s extent,[165] explained that the FCC was entitled to *Chevron* deference for its interpretation, and that the distinction between "jurisdictional" and "nonjurisdictional" questions is a "mirage."[166] Expanding upon his concurrence in *Mississippi Power & Light Co.*, Justice Scalia said:

> The argument against deference rests on the premise that there exist two distinct classes of agency interpretations: Some interpretations — the big, important ones, presumably — define the agency's "jurisdiction." Others — humdrum, run-of-

[162] 569 U.S. 290 (2013).

[163] *Id.* at 292-96.

[164] *Id.* at 294-95.

[165] *Id.* at 304 ("Make no mistake — the ultimate target here is *Chevron* itself.").

[166] *Id.* at 297.

> the-mill stuff — are simply applications of jurisdiction the agency plainly has. That premise is false . . . . No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*.[167]

Justice Scalia acknowledged that *Mead* held that "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted."[168] But under *Mead* a "general conferral of rulemaking authority or adjudicative authority" is *all* that an agency must show in order to establish the requisite congressional authority; it needs nothing more to claim eligibility for deference for its interpretation of its own jurisdiction.[169]

Chief Justice Roberts dissented in *City of Arlington* over what he labeled a "fundamental" disagreement with the majority's approach to *Chevron*.[170] Chief Justice Roberts maintained that because an agency's ability to claim deference under *Chevron* is premised on the idea that the agency has been delegated interpretive authority by Congress, which in turn depends on a delegation of rulemaking or adjudicatory authority by Congress, an agency cannot claim *Chevron* deference for its interpretation of its own rulemaking authority without making the entire deference regime circular.[171] At bottom, Chief Justice Roberts' view was clearly motivated by a desire to restrain *Chevron*. He stated outright that the "danger posed by the growing power of the administrative state" as a direct result of *Chevron* deference "cannot be dismissed."[172] And he expressed concern over "today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities."[173] In order to restrain that power, Chief Justice Roberts advocated for a limiting principle for the application of *Chevron* in the case of questions involving the agency's interpretation of its own jurisdiction. And, as in *Mead* and the last two categories of major questions doctrine cases

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[167] *Id.*

[168] *Id.* at 306.

[169] *Id.*

[170] *Id.* at 312 (Roberts, C.J., dissenting).

[171] *See id.*

[172] *Id.* at 315.

[173] *Id.* at 313 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010)).

discussed *supra*, that limiting principle is built upon the theory of fictional congressional intent that underlies *Chevron*.

Chief Justice Roberts' dissent in *City of Arlington* tunneled deeper into the hole that the Court dug for itself by linking *Chevron* deference to a congressional intent to delegate interpretive authority to an agency, and that intent in turn to a general grant of rulemaking or adjudicatory authority. Chief Justice Roberts began by emphasizing that *Chevron*'s rule of deference is conditioned upon whether Congress has "answered the *specific question* at issue."[174] If it has not, then, Chief Justice Roberts said, both embracing and recharacterizing the theory of fictional congressional intent, courts must determine "whether Congress ha[s] 'delegat[ed] authority to the agency to elucidate a *specific provision* of the statute by regulation."[175] Chief Justice Roberts acknowledged that, in *Mead*, the Court held that such a delegation occurs "when it appears that Congress delegated authority to the agency *generally* to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in exercise of that authority."[176] But he argued that "[a] congressional grant of authority over *some portion* of a statute does not necessarily mean that Congress granted the agency interpretive authority over *all* its provisions."[177] Eliding the distinction between *Chevron*'s "specific" language and *Mead*'s "general" language, Chief Justice Roberts said that "[i]f a congressional delegation of interpretive authority is to support *Chevron* deference, however, that delegation must extend to the specific statutory ambiguity at issue."[178] Thus, he would have courts engage in a more particularized inquiry into Congress's general grant of rulemaking authority to satisfy themselves that a specific grant of interpretive authority has been made.[179]

In other words, because Chief Justice Roberts had a different normative take on the proper allocation of power between courts and agencies with respect to interpretation of questions involving the scope of the agency's own jurisdiction, he advocated for making the inquiry into the legal fiction of congressional intent more "specific." *Chevron* deference must be tied to whether Congress had an intent with respect to the "specific" question at issue. If it did not, then courts must determine whether Congress intended to delegate interpretive authority

174 *Id.* at 318 (emphasis added).

175 *Id.* (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984)).

176 *Id.* at 320 (internal quotation marks and citation omitted) (emphasis added).

177 *Id.* at 323 (emphasis added).

178 *Id.* at 322.

179 *See id.* at 323-24.

to the agency with respect to that "specific" question. To do so, courts must ask whether Congress gave a "specific" grant of rulemaking authority to the agency with respect to that precise issue. All this is fine in the abstract, but it's turtles all the way down. Congress's intent to delegate interpretive authority is a legal fiction, so it can never be "specific." The connection between the grant of rulemaking or adjudicatory authority and congressional intent to grant of interpretive authority is also a legal fiction, so it can also never be "specific." Courts will be sent on a wild goose chase looking for specific evidence of a congressional action that has never been taken.

At the end of the day, then, like the "major questions doctrine as *Chevron* step zero test," Chief Justice Roberts' rule for agency interpretations of their own jurisdiction would ultimately be disconnected from any real exploration of Congress's actual intent, and would instead be a means of reallocating the balance of power between courts and agencies. And because in many instances the specificity that the rule demands would be lacking, the rule would likely function primarily as a method for courts to decline to apply the *Chevron* framework to agency actions. It would, as Justice Scalia predicted in the majority opinion for *City of Arlington*, act as a means for judges, perhaps "tempted by the prospect of making public policy," to "prescribe[e] the meaning of ambiguous statutory commands."[180] When applied in the context of *Chevron*, the rule preserves the possibility for Congress to avoid this shift in power by expressly delegating interpretive authority to the agency. But the significance of the temptation to make public policy grows exponentially once the doctrine is transplanted to a dispute between courts and Congress itself.

II. NEW NONDELEGATION TESTS

The legal fictions underlying the major questions doctrine (specifically, the "major questions doctrine as *Chevron* step zero test") and Chief Justice Roberts' jurisdictional exception are poised to become the Court's new nondelegation tests. In this context, instead of demarcating exceptions where Congress does *not* intend to delegate interpretive authority to agencies, these limiting principles could be used to demarcate areas where Congress *cannot* delegate authority to agencies. This Section sets forth the evidence that these two limiting principles may form the foundation of a new nondelegation test.

[180] *Id.* at 304.

A. The Major Questions Doctrine as Nondelegation Test

Members of the Court in favor of reinvigorating the nondelegation doctrine have already signaled that they may use the major questions doctrine (specifically, the "major questions doctrine as *Chevron* step zero test") as the basis for their new nondelegation test. First, Justice Gorsuch in his dissent in *Gundy* proposed a nondelegation test based on a distinction between important policy decisions and mundane decisions that fill up the statutory details that echoes the major questions doctrine.[181] Second, Justice Kavanaugh in his statement respecting the denial of certiorari in *Paul v. United States* explicitly said that he would use the major questions doctrine as the basis of his nondelegation test.[182] With at least two votes on board, the major questions doctrine is a serious candidate for the new nondelegation test.

Justice Gorsuch's dissent in *Gundy* laid out three possible versions of the new nondelegation test (likely mutually inclusive): a delegation is unconstitutional if it (1) requires the agency, instead of Congress, to make the policy decisions regulating private conduct, and does not consist of the agency simply "fill[ing] up the details";[183] (2) does not specify when the congressionally-prescribed rule is applicable, although Congress can make the application of the rule "depend on executive fact-finding";[184] and (3) delegates nondelegable legislative powers, although Congress can delegate certain "non-legislative responsibilities," like delegating courts the ability to regulate their own practice.[185]

Justice Gorsuch's first rule sounds a lot like the "major questions doctrine as *Chevron* step zero test." Like that version of the major questions doctrine, Justice Gorsuch's first rule makes a distinction between "policy decisions," which are presumably "major questions," and agency actions that simply "fill up the details," which are presumably those minor or "interstitial" matters to which the major questions doctrine grants interpretive deference.[186] (Notably, *Chevron* itself uses similar language about "fill[ing]" in the "gaps" to describe the kind of fictional delegations that are eligible for *Chevron* deference.)[187]

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[181] Gundy v. United States, 139 S. Ct. 2116, 2141-42 (2019) (Gorsuch, J., dissenting).

[182] Paul v. United States, 140 S. Ct. 342, 342 (2019).

[183] *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

[184] *Id.*

[185] *Id.* at 2137.

[186] *Id.* at 2136.

[187] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

Further, in his dissent, Justice Gorsuch reads some of the Court's prior nondelegation case law to stand for the principle that "important subjects" must be "entirely regulated by the legislature itself," whereas "those of less interest" may be delegated to the executive to "fill up the details."[188] And he even says explicitly that the Court's major questions doctrine is simply another mechanism that the Court uses to "polic[e] improper legislative delegations."[189] Justice Gorsuch claims that the major questions doctrine is "nominally a canon of statutory construction" that is used "in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[190]

But Justice Gorsuch's rule would take the major questions doctrine one step further than the Court's current iteration of the doctrine in *King*: Instead of assuming that Congress does not intend to delegate interpretive authority to agencies to resolve "major questions," Justice Gorsuch's rule would hold that Congress is *constitutionally prohibited* from making such a delegation. In other words, Article I of the Constitution — where Justice Gorsuch locates the nondelegation doctrine — prohibits Congress from delegating to agencies the authority to resolve "major questions."

Justice Kavanaugh made this extension of the "major questions doctrine as *Chevron* step zero test" into the constitutional domain explicit in his statement respecting the denial of certiorari in *Paul v. United States*. There, Justice Kavanaugh observed that the nondelegation doctrine could be said to hold that "major national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch."[191] He noted that although "the Court has not adopted a nondelegation principle for major questions," it has "applied a closely related statutory interpretation doctrine":

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[188] *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (quoting Wayman v. Southard, 23 U.S. 1, 43 (1825)); *see also id.* at 2137 (explaining that the statute at issue in *A.L.A. Schechter Poultry Corp. v. United States* violated the nondelegation doctrine in part because it failed to provide "meaningful guidance" on the "policy questions" at issue); *id.* at 2138 (explaining that the statute at issue in *Panama Refining Co. v. Ryan* violated the nondelegation doctrine because it did not "ask the executive to 'fill up the details' 'within the framework of the policy which the legislature has sufficiently defined'" (quoting Pan. Refin. Co. v. Ryan, 293 U.S. 388, 426, 429)).

[189] *Id.* at 2141.

[190] *Id.* at 2142.

[191] Paul v. United States, 140 S. Ct. 342, 342 (2019).

> In order for an executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce.[192]

Justice Kavanaugh concluded that, under Justice Gorsuch's view of the nondelegation doctrine, the "second category" of "congressional delegations to agencies of authority to decide major policy questions" would not be permitted "even if Congress expressly and specifically delegates that authority."[193] It is this interpretation of the nondelegation doctrine that Justice Kavanaugh indicates "may warrant further consideration in future cases."[194]

The members of the Court who are leading the revived nondelegation charge have thus explicitly said that the "major questions doctrine as *Chevron* step zero test" could form the basis of their new nondelegation test. Indeed, Justice Kavanaugh's embrace of the major questions doctrine in the context of nondelegation may be particularly important if Justice Kavanaugh becomes the swing vote on the new six-Justice-conservative-majority Court.

B. Chief Justice Roberts' Jurisdictional Exception as Nondelegation Test

Less obvious, but perhaps even more likely, is the prospect that Chief Justice Roberts' jurisdictional exception for *Chevron* deference could become a new nondelegation test. There are at least three reasons why this could be the case. First, the motivations underlying Chief Justice Roberts' dissent in *City of Arlington* bespeak a deep concern with the growing power of administrative agencies writ large, not just their interpretive authority under *Chevron*, which could be redressed through a more aggressive use of the nondelegation doctrine. Second, the Court has already signaled that it may be ready to review a nondelegation challenge in a case where the agency's scope of its own authority is at issue. And third, because Chief Justice Roberts' jurisdictional exception in *City of Arlington* shares some similarities with the major questions

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192 *Id.*

193 *Id.*

194 *Id.* Judge Walker indicated his support for this reading of the major questions doctrine in his partial concurrence in Am. Lung Ass'n v. EPA, 985 F.3d 914, 1002-03 (D.C. Cir. 2021) (Walker, J., concurring in part).

doctrine, but offers a more tailored approach, Chief Justice Roberts' rule could be a compromise for those in favor of articulating a new nondelegation test but skeptical about the workability of adapting the major questions doctrine.

1. The rhetoric of Chief Justice Roberts' dissent in *City of Arlington* reflects a fundamental concern with the growth of administrative agencies, which may be more successfully redressed through aggressive use of the nondelegation doctrine rather than alterations to the *Chevron* regime. The dissent begins by observing that, as a "practical matter," administrative agencies "exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules."[195] It maintains that administrative agencies enjoy "a significant degree of independence" with respect to how they wield these authorities, noting that President Truman once said, "I thought I was the president, but when it comes to these bureaucrats, I can't do a damn thing."[196] It cites manuals from the United States government to demonstrate that "the federal bureaucracy continues to grow," with more than fifty new agencies created in the last fifteen years and more "on the way."[197] And it posits that the extent of the modern administrative bureaucracy "could hardly have [been] envisioned" by the Founders.[198] If these are the kinds of problems that underlie Chief Justice Roberts' thinking in *City of Arlington*, then it would be incongruent to read his jurisdictional carve-out as narrowly targeted to restore interpretive supremacy to the courts for a subset of *Chevron* cases. Rather, it makes more sense to understand Chief Justice Roberts' *City of Arlington* dissent as a broader attack on agencies' rulemaking authority founded in separation-of-powers concerns.

In fact, Chief Justice Roberts' dissent bears remarkable resemblance to his separation-of-powers opinions in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[199] and *Seila Law LLC v. Consumer Financial Protection Bureau*.[200] In both of those cases, the Supreme Court, with Chief Justice Roberts writing for the majority, rejected congressional restrictions of the President's removal power over officers

195 City of Arlington v. FCC, 569 U.S. 290, 312-13 (2013) (Roberts, C.J., dissenting).

196 *Id.* at 313-14 (quoting R. NATHAN, THE ADMINISTRATIVE PRESIDENCY 2 (1983)).

197 *Id.* at 313.

198 *Id.*

199 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

200 Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

of administrative agencies on separation-of-powers grounds.[201] First, in *Free Enterprise Fund*, the Court held that the structure of the five-member Public Company Accounting Oversight Board was unconstitutional because it was subject to two layers of removal restrictions: members of the Board were removable by the Securities and Exchange Commission only "for good cause shown," and the Commissioners in turn were subject to removal by the President only in cases of "inefficiency, neglect of duty, or malfeasance in office."[202] Then, in *Seila Law LLC*, the Court held that the structure of the Consumer Financial Protection Bureau ("CFPB") was unconstitutional because it was led by a single Director subject to for-cause removal who wielded significant executive power and who operated outside of both the standard congressional appropriation process and the President's four-year term of office.[203]

In both *Free Enterprise Fund* and *Seila Law LLC*, as in *City of Arlington*, Chief Justice Roberts was clearly motivated by what he saw as Congress's unrestrained creation of independent agencies run by unelected bureaucrats who are not politically accountable and are not represented in the Constitution. For instance, in *Free Enterprise Fund*, Chief Justice Roberts wrote that, had the removal restrictions in that case been allowed to stand, they would have provided "a blueprint for extensive expansion of the legislative power,"[204] wherein Congress could create a vast bureaucracy of inferior officers, "safely encased within a Matryoshka doll of tenure protections," who were "immune from Presidential oversight, even as they exercised power in the people's name."[205] He even trotted out the tried-and-true example of poor President Truman, who had to "'persuad[e]' his unelected subordinates 'to do what they ought to do without persuasion.'"[206]

Similarly, in *Seila Law LLC*, Chief Justice Roberts recited a parade of horribles that he believed attached to Congress's design of the CFPB. He observed that the CFPB's single-director structure "vest[ed] significant governmental power in the hands of a single individual accountable to no one."[207] The director was "neither elected by the people nor meaningfully controlled (through the threat of removal) by

[201] *See Free Enter. Fund*, 561 U.S. at 484; *Seila Law LLC*, 140 S. Ct. at 2192.

[202] *Free Enter. Fund*, 561 U.S. at 486-87 (quoting first 15 U.S.C. § 7211(e)(6) (2018), then Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935)).

[203] *Seila Law LLC*, 140 S. Ct. at 2202-04.

[204] *Free Enter. Fund*, 561 U.S. at 500.

[205] *Id.* at 497.

[206] *Id.* at 501-02.

[207] *Seila Law LLC*, 140 S. Ct. at 2203-04.

someone who is."[208] Yet the director could "issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties."[209] "With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans."[210]

The problem that preoccupied Chief Justice Roberts in *Free Enterprise Fund* and *Seila Law LLC* is the same as that underlying his *City of Arlington* dissent: the expansion of an unelected, independent, and powerful bureaucracy. In *Free Enterprise Fund* and *Seila Law LLC*, his solution to this problem was to make the bureaucracy more directly accountable to the President through an unrestricted removal power. His rule in *City of Arlington* could be seen as the other side of the same coin: restrain agencies by denying them rulemaking authority. And while that tactic may have failed to garner sufficient votes in the context of *Chevron*, it could be successfully revived in the context of the nondelegation doctrine.

2. Further, the Court has already signaled that it may be ready to review a nondelegation challenge in a case where the agency's interpretation of the scope of its own authority is at issue. In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*,[211] the Court addressed whether the Departments of Health and Human Services, Labor, and the Treasury had the authority to promulgate rules authorizing private employers with religious and conscientious objections to obtain exemptions from the Affordable Care Act's contraceptive mandate.[212] The dispute centered around the scope of the agencies' authority under the Act.[213] Ultimately, the Court concluded,

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208 *Id.*

209 *Id.* at 2187.

210 *Id.* at 2204.

211 140 S. Ct. 2367 (2020) .

212 *See id.* at 2372-74.

213 *See id.* at 2397 (Kagan, J., concurring) ("Sometimes when I squint, I read the law as giving HRSA discretion over all coverage issues: The agency gets to decide who needs to provide what services to women. At other times, I see the statute as putting the agency in charge of only the 'what' question, and not the 'who.'"). *Compare id.* at 2380 (concluding that the statutory provision at issue "grants sweeping authority to HRSA to craft a set of standards defining the preventive care that applicable health plans must cover, . . . including the ability to identify and create exemptions from its own Guidelines"), *with id.* at 2405 (Ginsburg, J., dissenting) (agreeing that the agencies have "broad discretion to determine *what* preventive services insurers should provide for women" but not whether certain employers could be exempted from those requirements).

in a majority opinion written by Justice Thomas (and joined by Chief Justice Roberts and Justices Alito, Gorsuch, and Kavanaugh), that the Act's "capacious grant of authority" to implementing agencies permitted the agencies not only to enumerate the types of preventing care that all health insurance plans must cover, but also to exempt employers from those coverage requirements on religious grounds.[214] Justice Kagan, joined by Justice Breyer, concurred in the judgment of the Court, recognizing that because the Act was ambiguous with regard to the extent of the agencies' authority, the Court was obligated to defer to the agencies' reasonable interpretation of the scope of their own authority under *Chevron* and *City of Arlington*.[215]

But, the majority specifically observed that "[n]o party has pressed a constitutional challenge to the breadth of the delegation involved here," and therefore the only question facing the Court was whether the statutory language permitted the agencies to exercise the interpretive discretion that they did.[216] The Court's unprompted aside suggests that it may be amenable to revisiting its nondelegation jurisprudence in a case that involves a *City of Arlington*-style jurisdictional question.

3. Finally, because Chief Justice Roberts' jurisdictional exception in *City of Arlington* shares some similarities with the major questions doctrine, but offers a more tailored approach, Chief Justice Roberts' rule could be a compromise for those in favor of articulating a new nondelegation test but skeptical about the workability of adapting the major questions doctrine. As an initial matter, there is some conceptual overlap between the jurisdictional dispute at issue in *City of Arlington* and the major questions doctrine.[217] The language the majority opinion uses in *City of Arlington* reflects that: Justice Scalia defines "jurisdictional" questions as the "big, important ones," i.e., major questions, whereas "nonjurisdictional" questions are questions involving "humdrum, run-of-the-mill stuff," i.e., minor or interstitial questions.[218] In fact, the questions at issue in *MCI*, *Brown & Williamson*, and *UARG* could all be described as "jurisdictional" questions. They all involved instances of agencies attempting to interpret statutory provisions to expand their regulatory jurisdiction beyond its prior scope. In *MCI*, the dispute was over rate-based regulation;[219] in *Brown*

[214] *Id.* at 2379-82.

[215] *Id.* at 2397 (Kagan, J., concurring).

[216] *Id.* at 2382 (citing Gundy v. United States, 139 S. Ct. 2116 (2019)).

[217] *See* Heinzerling, *supra* note 39, at 1949, 1984 (noting the similarity between the rule rejected in *City of Arlington* and the rule deployed in *UARG* and *King*).

[218] City of Arlington v. FCC, 569 U.S. 290, 297 (2013).

[219] MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 220 (1994).

& Williamson, tobacco products;[220] and in *UARG*, greenhouse gases.[221] Justice Scalia in *City of Arlington* even describes *Brown & Williamson* and *MCI* as cases where the Court "appli[ed] . . . *Chevron* to agencies' constructions of the scope of their own jurisdiction."[222] In other words, there is a sense in which the terms "jurisdictional questions" and "major questions" are interchangeable.

But the conceptual overlap between "jurisdictional" and "major" questions may be troubling for those who support the major questions doctrine, precisely because of what happened in *City of Arlington*. There, the Court rejected the idea that there is a jurisdictional exception for *Chevron* deference because the Court found that the distinction between "jurisdictional" and "nonjurisdictional" questions is a "mirage."[223] Almost any question could become a "jurisdictional" question through the act of reframing. The major questions doctrine is vulnerable to the same critique. As a five-judge concurrence in an en banc decision of the Fifth Circuit recently said, discussing the "major questions doctrine as principle of statutory interpretation" (and using Justice Scalia's "elephants-in-mouseholes" nomenclature):

> . . . . [P]achyderms and rodents are in the eye of the beholder, leading the Court to apply the maxim 'seemingly haphazardly.' What some Justices see as 'big game,' others see as 'just a regular rodent.' Reasonable judicial minds can, and do, differ. Perhaps what lurks in the mousehole is, actually, 'a rather plump mouse.' Or perhaps what some take for a mousehole is, actually, 'a rather cramped circus tent.' The 'elephants in mouseholes' doctrine, while pithy, is best with unpredictability: '[T]hose in the majority one day are in the dissent the next, and vice versa.'[224]

If, as in the example of jurisdictional questions, there is no such thing as a "major" question or a "minor" question, and the whole exercise is really one of perspective, then the major questions doctrine, whatever limited purchase it has been able to secure in the context of *Chevron*, is ultimately just as illusory as its jurisdictional counterpart. In fact, critics of the major questions doctrine have seized upon precisely this line-

[220] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000).

[221] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 307 (2014).

[222] *City of Arlington*, 569 U.S. at 291.

[223] *Id.* at 297.

[224] Thomas v. Reeves, 961 F.3d 800, 825 (5th Cir. 2020) (en banc) (Willett, J., concurring) (footnotes omitted) (internal citations omitted).

drawing problem as a reason to reject it.[225] If the Court were to embrace the doctrine as the basis for its new nondelegation test, it would have to grapple with its fundamentally shapeshifting nature.

But Chief Justice Roberts' dissent in *City of Arlington* could offer a more concrete alternative. First, Chief Justice Roberts did not disagree with Justice Scalia in that case that there is no real distinction between "big, important" questions of statutory interpretation and "humdrum" ones.[226] He disputed instead Justice Scalia's definition of "jurisdictional" questions.[227] Chief Justice Roberts defined a "jurisdictional" question to be one that determines "whether Congress has granted the agency interpretive authority over the statutory ambiguity at issue."[228] Because of the way in which the Court's *Chevron* jurisprudence has developed over the years, this question can be stated more particularly as: whether Congress has granted the agency the authority "generally to make rules carrying the force of law."[229] In addition, Chief Justice Roberts would amend that inquiry to ask whether Congress has granted the agency the authority to make rules carrying the force of law with respect to the specific question at issue.[230] As a result, Chief Justice Roberts would define a jurisdictional question to be one that asks whether Congress has granted the agency rulemaking or adjudicatory authority to answer the specific question at issue.

If this test is translated into a nondelegation test, it seems to be a more manageable rule than the major questions doctrine. That is, rephrased as a nondelegation test, Chief Justice Roberts' jurisdictional exception would say that it is unconstitutional for Congress to delegate to an agency the authority to decide whether it has rulemaking or adjudicatory authority over a particular issue. In other words, Congress would have to delineate clearly the bounds of the agency's ability to act with the force of law; Congress could not leave it up to the agency to decide what to regulate. This approach would not necessarily eliminate line-drawing problems. As Justice Scalia observed in the majority opinion in *City of Arlington*, directing an agency to regulate "outside

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[225] *See, e.g.*, Heinzerling, *supra* note 39, at 1983-84, 1986-90 (discussing how *UARG* and *King* exacerbate the uncertainty of the major questions doctrine by adding new untested factors); Moncrieff, *supra* note 38, at 611-12 (describing issues of administrability with the major questions exception); Sunstein, *supra* note 21, at 233 (discussing issues related to the expansion of administrative authority under "major questions").

[226] *City of Arlington*, 569 U.S. at 316 (Roberts, C.J., dissenting).

[227] *Id.*

[228] *Id.*

[229] United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

[230] *City of Arlington*, 569 U.S. at 322 (Roberts, C.J., dissenting).

salesm[e]n," "pole attachment[s]," or the "waters of the United States" is not so different from directing an agency to define its own jurisdiction.[231] Nonetheless, Chief Justice Roberts' jurisdictional rule is arguably better defined, or at least more judicially administrable, than the squishy "major questions."

III. CONFLICTS OF SUPREMACY IN *CHEVRON*'S LIMITING PRINCIPLES AND THE NONDELEGATION DOCTRINE

The Court is likely to use one of *Chevron*'s limiting principles as the basis for its new nondelegation test. And while, at first glance, there does seem to be some symmetry between these two doctrines, digging deeper reveals that there is a clear problem with appropriating *Chevron*'s rules for the nondelegation context: the two doctrines are founded on different notions of institutional supremacy. *Chevron* and its limiting principles are based on a background principle of legislative supremacy — they were crafted with the understanding that Congress is supreme in the realm of policymaking, and thus courts' role in interpreting statutes is to implement Congress's design.[232] By contrast, the nondelegation doctrine as it is envisioned by the current Court relies on the notion of judicial supremacy — it imagines that courts have the final say as to what is acceptable policymaking. This Section discusses the superficial overlap between the two as well as their fundamental conflict.

A. The Superficial Overlap: Delegations and the Nondelegation Canon

At first glance, there is a kind of superficial harmony to the Court's use of *Chevron*'s limiting principles to define its new nondelegation test. Going from a principle that interprets Congress's delegation narrowly to a principle that strikes down that delegation entirely does not seem like that much of a doctrinal leap. But that connection falls apart once one remembers that the delegation at issue in the context of *Chevron* is entirely fictional. The Court does not really believe that Congress has delegated interpretive authority to the agency through the use of statutory ambiguity, nor does it frankly care. Congress's intent here is irrelevant. Rather, the fiction of congressional delegation serves as a cover under which the Court can decide which institution is better positioned to resolve statutory ambiguities: courts, or agencies. As such, there is something sinister about the idea of the Court using a fictional

[231] *Id.* at 300 (majority opinion) (internal citations omitted).

[232] *See supra* Part II.A.

congressional delegation that it imputes to Congress to strike down Congress's actual legislation.

A more charitable reading of the link between *Chevron*'s limiting principles and the nondelegation doctrine would rely not on their linguistic similarities, but rather the underlying motivation for the limiting principles themselves. Some scholars have argued that the Court's limits on *Chevron*, particularly the major questions doctrine, come from a desire to avoid nondelegation concerns. In other words, the major questions doctrine and rules like it function as a "nondelegation canon." As Professor Sunstein has explained, such canons "hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so," so that courts may avoid "invalidating federal legislation as excessively open-ended."[233] According to this reading, the major questions doctrine is best understood as the Court's attempt to avoid declaring congressional delegations to agencies to resolve "major questions" unconstitutional by applying a clear-statement rule at the various steps of *Chevron*. Thus, the major questions doctrine is a way for the Court to "address nondelegation concerns indirectly without actually having to decide whether Congress has delegated too much authority to an agency."[234]

There are a few problems with this reading of the major questions doctrine. First, as others have pointed out, the nondelegation doctrine itself, or at least its boundary in relation to the major questions doctrine, is murky and not clearly rooted in the Constitution.[235] As Professor

[233] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000); *see also* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223 ("Rather than overturning administrative statutes on [nondelegation] ground[s], however, the Court has long enforced the nondelegation doctrine by narrowly construing administrative statutes that otherwise risk conferring unconstitutionally excessive agency discretion.").

[234] Loshin & Nielson, *supra* note 38, at 22-23; *see also* Manning, *supra* note 233, at 237 ("[A]lthough the Court never explicitly invoked the canon of avoidance, *Brown & Williamson*'s reasoning fits neatly within the Court's practice of aggressively narrowing administrative statutes to avoid serious nondelegation concerns."); Moncrieff, *supra* note 38, at 616-17 ("[T]he intuition driving *Brown & Williamson* may be that the FDCA, if understood to authorize FDA's regulations, would represent an unconstitutionally broad delegation of policymaking authority."); Sunstein, *supra* note 21, at 244-45 (hypothesizing that *MCI* and *Brown & Williamson* may qualify as nondelegation canon cases).

[235] *See, e.g.*, Heinzerling, *supra* note 39, at 1975-77 (questioning the nondelegation doctrine's constitutional basis for the shift of interpretation authority from agencies to courts); Sunstein, *supra* note 21, at 245 ("As a matter of text and history, the [nondelegation] doctrine does not have a clear constitutional pedigree, and it is

Heinzerling has observed, in none of the major questions cases or in *City of Arlington* did the Justices attempt to "explicitly connect[]" their limiting principle for *Chevron* deference "to a constitutional theory."[236] Justice Scalia perhaps came closest in *UARG*, in which he cited to a nondelegation case as support for the "major questions doctrine as status quo ante principle."[237] But he did not "explicitly assert a constitutional claim or even suggest that avoiding such a claim through a narrowing interpretation would be appropriate."[238] Similarly, Chief Justice Roberts in his dissent in *City of Arlington* hinted that his problems with the administrative state and *Chevron* lay in the constitutional realm, but he did not "come out and say that the entire structure, or even a large part of it, is unconstitutional, or even name the constitutional source of his anxiety."[239] And indeed, it is difficult to see how Congress's instruction to the FDA to regulate "drugs" and "devices," or its instruction to the EPA to regulate "air pollution" from major emitting facilities, or even its instruction that insurance purchased on health-care exchanges "established by the State[s]" be eligible for tax credits, constitute unconstitutional delegations.[240] Constitutional avoidance canons are controversial enough without

controversial, to say the least, to base a principle of statutory construction on a doctrine that cannot easily be rooted in the Constitution."). *See generally* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2019-20 (2011) (raising doubts about whether the distinction the nondelegation doctrine draws between executive and legislative power actually exists); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2097-2102 (2004) (arguing that the best reading of the textual, historical, and judicial evidence does not support the existence of the nondelegation doctrine); Posner & Vermeule, *supra* note 14, at 1722 ("[There is] no constitutional nondelegation rule, nor has there ever been.").

[236] *See* Heinzerling, *supra* note 45, at 1974.

[237] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (citing Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 645-46 (1980) (plurality opinion)); *see also* Heinzerling, *supra* note 39, at 1974-75.

[238] Heinzerling, *supra* note 39, at 1975.

[239] *Id.* at 1971-72.

[240] *See id.* at 1975 ("Characterizing the interpretive principle embraced in *King* as one designed to avoid a nondelegation problem would be especially strange. What unconstitutional result, exactly, would the Court have been avoiding in declining to defer to the IRS? The IRS reached the same result the Court eventually reached, albeit through a less circuitous route. Once the Court was finished with its analysis of the Affordable Care Act, it was plain that there was only one reasonable answer to the question of whether federal subsidies were available on federal exchanges, and that answer was yes. It is very hard to imagine a nondelegation problem created by a statute that, altogether, made just one interpretive result reasonable.").

reading them into decisions where no constitutional problem came close to being identified.

Second, the major questions doctrine is notoriously difficult to administer and dependent upon the eye of the beholder — potentially dangerous characteristics to describe a rule intended to enforce constitutional boundaries.[241] As discussed above, and as Loshin and Nielson detail, scholars and courts alike have struggled to find a principled way to explain and apply the major questions doctrine.[242] Many of the attempted explanations to identify what constitutes a "major" question rely on some combination of institutional choice, moral or political decision-making, statutory and legislative history and context, and the desire for public debate.[243] But courts are not particularly well-suited to address these kinds of factors: "Courts are not equipped to play political prognosticator, evaluating just how seriously the public is debating an issue or what Congress's likely views are on the subject. How would a court even begin to articulate a doctrinal rule that could encompass these factors? How much public discussion and 'consensus' is necessary, and how intense and widespread must that public discussion be before the Court" determines that a question is a "major" one?[244] The slipperiness of the rule, particularly in the hands of judges, makes it a difficult and unsuitable test for obliquely enforcing any discernible constitutional principle.[245]

Third, as Professor Manning has most prominently argued, using the major questions doctrine as a nondelegation canon would "undermine[], rather than further[], the constitutional aims of th[e nondelegation] doctrine," because it authorizes a court to rewrite duly-enacted legislation in order to protect the process of duly enacting legislation.[246] That is, according to some, the nondelegation doctrine "seeks to protect the constitutional values embodied in Article I —

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[241] *See* Loshin & Nielson, *supra* note 38, at 23 ("[W]e argue that though the elephants-in-mouseholes doctrine emerges from principled nondelegation apprehension, the doctrine is not a workable reincarnation of the nondelegation doctrine because it is not amenable to consistent application."); Sunstein, *supra* note 21, at 245.

[242] *See* Loshin & Nielson, *supra* note 38, at 60-68; *supra* notes 44–46 and accompanying citations.

[243] *See* Loshin & Nielson, *supra* note 38, at 63-68.

[244] *Id.* at 67.

[245] *Cf.* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 143-52 (1893) (explaining why courts should strike down Acts of Congress as unconstitutional only when their unconstitutionality is "very clear" and not subject to reasonable dispute).

[246] Manning, *supra* note 233, at 228.

specifically, that Congress sets legislative policy and that such policy passes through the filter of bicameralism and presentment prescribed by Article I, Section 7."[247] But, "if the Court alters the meaning of an open-ended statute in order to avoid nondelegation concerns, it apparently disturbs whatever choice or compromise has emerged from that process."[248] "This creates the perverse result of attempting to safeguard the legislative process by explicitly disregarding the results of that process."[249] Moreover, the erroneous process which the use of a nondelegation canon of avoidance attempts to shut down — i.e., the unconstitutional exercise of legislative power by an agency operating outside the bounds of Article I — is not halted but merely transferred to the judiciary.[250] The problem is one that plagues simplistic associations between nondelegation and *Chevron* deference more broadly: "[i]f the executive is denied interpretive authority, that authority is given to the judiciary instead, and that step would hardly reduce the nondelegation concern; it would merely grant courts the power to make judgments of policy and principle."[251]

Nonetheless, there are those who would be untroubled by these critiques — and we could most likely place a majority of the current Supreme Court in that category. For them, transplanting the major questions doctrine, and relatedly Chief Justice Roberts' jurisdictional exception, into the nondelegation doctrine may simply be a natural extension of these limiting principles. And in fact, the very act of converting the major questions doctrine from a *Chevron* limiting principle to a nondelegation test may cure some of these deficiencies.[252]

B. The Fundamental Conflict: Institutional Supremacy in Chevron*'s Limiting Principles and the Nondelegation Doctrine*

But even if these problems are ignored or resolved, there still remains a fundamental error in carrying over the rules of *Chevron* to the nondelegation world. That is because *Chevron* and the nondelegation doctrine, at least as it is envisioned by the current Court, are premised on two different notions of institutional supremacy. *Chevron* is, at

[247] *Id.* at 256.

[248] *Id.*

[249] *Id.*

[250] *See id.* at 257.

[251] Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2608 (2006).

[252] For instance, Manning's critique of nondelegation canons would no longer seem to apply if the rule is being used to strike down legislation rather than rewrite it.

bottom, concerned with formulating rules that recognize the legislative supremacy of Congress, whereas the nondelegation doctrine is built on a notion of judicial supremacy. Converting the rules of *Chevron* into a test for the nondelegation doctrine would thus be twisting doctrines meant to promote legislative supremacy into tools used to strike down Congress's statutes.

In the field of statutory interpretation, legislative supremacy involves the recognition that "judges are subordinate to legislatures in the making of public policy."[253] While that may seem straightforward, the notion of legislative supremacy is notoriously capacious.[254] It could encompass the belief that courts may act only as "faithful" or "honest" agents of Congress, "carrying out the commands of the legislature" and "adher[ing] closely to the directives provided to them by the statute's text."[255] Or it could permit a looser conception of the court-legislature relationship, where courts "hav[e] a creative, discretionary function in adapting constitutional and statutory language — which is frequently vague, and even more frequently reflects imperfect foresight — to novel circumstances."[256] "On this view, judges remain agents, but, absent contrary evidence, they assume their principals invested them with bounded authority to interpret legal mandates in light of considerations of fairness, policy, and prudence."[257] In either case, however, Congress remains the supreme policymaker. "Congress's language and policy aims (as reconstructed by the judiciary) establish the outer limit of the judicial function," and "[t]he judicial role is to interpret and implement the language that Congress has adopted, not to formulate a policy agenda."[258]

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[253] Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 281 (1989).

[254] *See* William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 343 (1989).

[255] *Id.* at 320; *see also* Richard H. Fallon, Jr., & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2033 (2007) (describing the "Agency Model" of statutory interpretation in which "courts should regard themselves as the agents of those who enacted, or ratified, pertinent statutory or constitutional provisions; they should assume that those provisions were framed to be as determinate as possible; and they should minimize judicial creativity").

[256] Fallon & Meltzer, *supra* note 255, at 2033; *see also* Eskridge, *supra* note 254, at 326, 343-50 (describing this as a form of "dynamic statutory interpretation" that falls under the umbrella of a legislative supremacy model).

[257] Fallon & Meltzer, *supra* note 255, at 2033.

[258] Richard H. Fallon, Jr., *On Viewing the Courts as Junior Partners of Congress in Statutory Interpretation Cases: An Essay Celebrating the Scholarship of Daniel J. Meltzer*, 91 NOTRE DAME L. REV. 1743, 1746 (2016).

Most modern methods of statutory interpretation adopt some baseline presumption of legislative supremacy.[259] That includes *Chevron* deference, which is itself a method of statutory interpretation. The rules of *Chevron* have been crafted with the understanding that courts are subordinate to Congress in the realm of policymaking. This phenomenon is clearly reflected in the legal fiction of congressional intent that the Court uses to justify *Chevron*; in the Court's repeated admonitions that it will follow Congress's express intent with respect to delegation; and in the Court's and various Justices' use of a legal fiction — congressional intent — to further their own understanding of *Chevron* deference consistent with their own understanding of legislative supremacy.

The Court's use of the legal fiction of congressional intent is one of the most straightforward examples of the doctrine's concern with legislative supremacy. That is, in the most superficial sense, the Court's *Chevron* cases reflect a principle of legislative supremacy because the Court *says that they do*. In the wake of *Chevron*, and in the Court's subsequent cases like *Mead*, the major questions cases, and *City of Arlington*, the Court repeatedly framed its rule of deference around what Congress intended.[260] Thus, the Court justified its *Chevron* opinion on the grounds that Congress intended to delegate interpretive authority to agencies through the use of ambiguous statutory provisions. It justified its limitation of that assumption in *Mead* on the grounds that Congress's grant of authority to an agency to act with the force of law indicates Congress's intent to delegate interpretive authority to that agency. It justified its decisions not to defer in the major questions cases on the grounds that Congress does *not* intend to delegate authority to agencies to resolve major questions through the use of ancillary or vague statutory provisions. And both Justice Scalia and Chief Justice Roberts in *City of Arlington* framed their understanding of *Chevron* deference as it applies to jurisdictional questions around congressional intent.

Even more directly, the Court said in these cases that it would follow Congress's instruction with respect to delegation if Congress is clear. Thus in *Chevron* the Court said that "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must

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[259] *But see* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 655-56 (7th ed. 2015) (describing "common law theories of statutory interpretation" that reject "the assumption that federal judges must act as Congress' faithful agents").

[260] *See supra* Part II.C.

give effect to the unambiguously expressed intent of Congress."[261] Likewise, the Court's major questions cases and Chief Justice Robert's *City of Arlington* dissent are all built around the idea that Congress was *not* explicit. Had Congress explicitly delegated authority to the agency, the Court says it would have followed Congress's clear command.

Most importantly, the Court's repeated invocations of congressional intent are not mere lip service that the Court pays to a superficial idea of legislative supremacy. True, the intent that the Court invokes in all of these scenarios is a legal fiction. But that does not mean the Court is not actually attempting to advance legislative supremacy in its *Chevron* cases. The Court and individual Justices use the legal fiction of congressional intent to further their understanding of the best method of statutory interpretation.[262] And because those methods of statutory interpretation all revolve around differing conceptions of legislative supremacy, the Court's and individual Justices' debates around congressional intent in the context of *Chevron* are actually debates about how to best advance their own theory of legislative supremacy.[263]

Take, for instance, Justice Breyer's approach to *Chevron*. Justice Breyer is a Legal Process thinker.[264] According to Legal Process theory, Congress is the supreme policymaking body whose primary role is to enact policy that attempts to solve specific problems.[265] To support that role, courts interpreting Congress's statutes should seek to discover the problem that the statute is meant to solve, i.e., the statute's purpose.[266] Once courts know the purpose of a statute, they can interpret any statutory ambiguities in light of that purpose. And so long as courts are interpreting statutes in accordance with the statute's purpose, courts will be acting as agents of Congress.[267] Under this framing, Justice Breyer's case-by-case rule of *Chevron* deference, in which a court engages in a particularized inquiry for congressional intent based on the

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[261] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

[262] *See* Manning, *Inside Congress's Mind*, *supra* note 24, at 1913.

[263] *See id.* at 1914-15.

[264] *See, e.g.*, William N. Eskridge, Jr., & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 27 (1994) (observing that Justice Breyer's appointment to the United States Supreme Court gave the legal process school "a majority on the Court"); John F. Manning, Chevron *and the Reasonable Legislator*, *supra* note 18, at 457 ("Justice Breyer is a quintessential Legal Process judge.").

[265] *See, e.g.*, Manning, *Without the Pretense of Legislative Intent*, *supra* note 36, at 2419 (describing the two men who are mostly credited with the ideas behind the Legal Process School — Hart and Sacks — as "good old-fashioned legislative supremacists" who believed that "Congress legislates to solve problems").

[266] *See id.*; Manning, Chevron *and the Reasonable Legislator*, *supra* note 18, at 457.

[267] *See* Manning, *Without the Pretense of Legislative Intent*, *supra* note 36, at 2418-21.

statutory text, purpose, and legislative history furthers his overall belief in legislative supremacy. Justice Breyer advocated for this rule not because he thought it would be any more accurate at assessing Congress's true intent in any given statute, but rather because he thought it would (1) allow courts to engage in a more holistic inquiry into the statute's overall purpose, (2) tailor deference to that purpose, and (3) thereby ensure that courts are faithfully following Congress's policymaking.[268]

Or take Justice Scalia's approach to *Chevron*. Justice Scalia was a textualist. Textualists also believe that Congress is supreme to courts when it comes to policymaking.[269] But for textualists, the underlying purpose of a statute is not always clear. To textualists, the legislative process is chaotic, and the aims of a statute, much less Congress as a uniform body, are difficult to glean.[270] Thus, under the textualist approach to statutory interpretation, courts can be agents of Congress only by following the plain meaning of the text that Congress has actually passed through bicameralism and presentment.[271] According to this approach, taking Congress's enacted words seriously, and giving them no more and no less meaning beyond what they clearly say, ensures that Congress's legislative choices remain supreme.[272] Moreover, if courts abide by straightforward rules of statutory interpretation, then Congress has a clear backdrop against which it can legislate.[273] In this light, Justice Scalia's approach to *Chevron* deference is that of a textualist attempting to advance legislative supremacy. Justice Scalia embraced a categorical rule of deference not because he thought that rule better captured Congress's intent, but because he believed that establishing a clear background presumption against which Congress can legislate allows the courts to more easily abide by Congress's instructions.[274] Moreover, this framing also explains Justice Scalia's approach to the major questions cases: his allegiance to both the "major questions doctrine as principle of statutory interpretation" and "major questions doctrine as status quo ante principle" is the approach of a textualist who, reading Congress's words strictly, declines to give

[268] *See* Manning, *Inside Congress's Mind*, *supra* note 24, at 1933-34.

[269] *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91-92 (2006) (describing how both textualism and purposivism rely on "the constitutional ideal of legislative supremacy").

[270] *See* Manning, *Without Pretense of Legislative Intent*, *supra* note 36, at 2422-43.

[271] *See id.* at 2422.

[272] *See id.* at 2424.

[273] *Id.* at 2421-25; Fallon, *supra* note 255, at 1747.

[274] Manning, *Inside Congress's Mind*, *supra* note 18, at 1932-33.

ancillary statutory provisions more meaning than they plainly hold so as to avoid overstepping the bounds of the text passed under Article I.

Even Chief Justice Roberts' approach in the *Chevron* cases reflects some underlying theory of statutory interpretation in which Congress is supreme over the courts. Chief Justice Roberts seems to embrace a method of statutory interpretation somewhere in between purposivism and textualism. That is, he favors default categorical rules like the jurisdictional exception to *Chevron* deference, but also seems willing to engage in a more holistic, contextual approach like Justice Breyer's major questions test. It remains to be seen what school of statutory interpretation with which Chief Justice Roberts may associate, but his combination of close textual reading with a more context-sensitive perspective nonetheless reflects an interpreter attempting to be faithful to Congress's design.[275]

It is important to recognize the debates about institutional preference that are at play in the Court's *Chevron* cases. Those debates involve crucial normative questions about which institution ought to resolve questions of statutory ambiguity: courts or agencies. Justice Scalia generally favored agencies; Justice Breyer generally favored courts; and the Court's major questions cases and *City of Arlington* reflect an ongoing tension about what courts ought to do in cases involving questions of great economic and political significance, or fundamental details of the statutory scheme, or the scope of the agency's jurisdiction. Nonetheless, in each of these cases, the institutional role of Congress *itself* was not in dispute. Everyone agreed that, at the end of the day, Congress is supreme to both agencies and courts. And they crafted their rules of deference to further their understanding of the best way to ensure Congress's supremacy even in the face of ambiguity about Congress's preferences.

That is decidedly *not* the framework of the nondelegation doctrine, at least as it is being understood by members of the current Court. In its idealized version, the nondelegation doctrine arguably could be understood as an attempt to ensure Congress's supremacy by requiring

[275] *See Transcript: Day Three of the Roberts Confirmation Hearings*, WASH. POST (Sept. 14, 2005, 1:45 PM) https://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091401451.html?itid=lk_inline_manual_3 [https://perma.cc/5EJD-WP2P] ("[W]hen you're dealing with interpreting a statute, the most important part is the text. . . . [I]f the text is clear, that is what you follow and that's binding. And you don't look beyond it to say, well, if you look here, though, maybe this clear word should be interpreted in a different way. On the other hand, we confront situations where the text is not clear and the legislative history can be helpful in resolving that ambiguity. . . . You have to, I think, have some degree of sensitivity in understanding exactly what you're looking at . . . . [Your job] is to figure out what Congress intended.").

Congress to be the ultimate crafter of policy.[276] But that legislative-supremacy orientation disappears the moment the nondelegation doctrine becomes a *judicially-enforceable* principle. The nondelegation doctrine relies on the idea that there is some core of policy decision-making that must be made by Congress. But if it is the courts' job to decide what that core is, scour Congress's statutes for its presence, and reject statutes that are unsatisfactory in the courts' eyes, then it is not Congress who is ultimately in charge of the policy decision-making — it is the courts.

In fact, Justice Scalia recognized this very point more than three decades ago in his dissent in *Mistretta v. United States*.[277] There, Justice Scalia explained that because "no statute can be entirely precise," the nondelegation doctrine inevitably becomes a question of what degree of policymaking detail is constitutionally necessary.[278] That question involves an understanding of "the necessities of government," and the "factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political."[279] Because, in a democracy, the legislature is better-positioned to determine "the permissible degree of policy judgment that can be left to those executing or applying the law," the nondelegation doctrine "is not an element readily enforceable by the courts."[280]

Because a judicially enforceable nondelegation doctrine would amount to a tool of judicial supremacy, using the rules of *Chevron* to enforce that doctrine would fundamentally distort them. Perhaps the best way to see this is through the real-world example of the Court's first major questions case: *MCI*. As discussed above, *MCI* involved an effort by the FCC to waive certain rate-filing requirements for long-distance telephone carriers under the Communications Act of 1934.[281]

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[276] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131-34 (1980) (describing the nondelegation doctrine as a means of forcing Congress to make controversial policy decisions, rather than offloading those decisions onto administrative agencies, thereby ensuring that legislators can be held accountable for their decisions).

[277] 488 U.S. 361 (1989).

[278] *Id.* at 415 (Scalia, J., dissenting).

[279] *Id.* at 416.

[280] *Id.* at 415-16; *see also* Wayman v. Southard, 23 U.S. 1, 46 (1825) (Marshall, J.) ("The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.").

[281] *See supra* Part II.B.2.

The FCC's rulemaking was part of a decades-long effort by the agency to respond to a dramatically transformed industry, one that was incompatible with the FCC's traditional regulatory model.[282] Telecommunications had originated as a natural monopoly, which the FCC regulated through a standard rate-based public utility model.[283] But the industry began to change in the 1980s, when the combination of the federal government's antitrust case against AT&T and technological innovation made it possible to introduce greater competition to certain components of the industry.[284] For those parts of the industry that became competitive, the FCC's traditional model of rate regulation threatened to do more harm than good: rate-filing requirements and other regulatory measures intended to check monopolistic practices were barriers to entry for new competitors.[285] At the same time, significant parts of the industry remained uncompetitive, and removing regulatory oversight from those areas would have put consumers at the mercy of monopolies.[286] So the FCC settled on a compromise: it would selectively exempt certain companies from its rate-filing and other regulatory requirements depending on whether those companies possessed market power sufficient to classify them as monopolistic.[287]

It was this compromise that the Court ultimately struck down in *MCI* as not clearly authorized by the statutory text.[288] The decision left the FCC significantly crippled in its ability to address serious threats to consumers in its industry.[289] Congress recognized this, and acted with surprising speed: in 1996, Congress passed the Telecommunications Act, a comprehensive piece of legislation that sought to bring the telecommunications industry into the modern era and, among other things, restored the regulatory authority to the FCC that the Court found lacking in *MCI*.[290] In fact, in the Telecommunications Act, the

[282] *See generally* Scott M. Schoenwald, *Regulating Competition in the Interexchange Telecommunications Market: The Dominant/Nondominant Carrier Approach and the Evolution of Forbearance*, 49 FED. COMMS. L.J. 367 (1997) (discussing evolution of FCC regulations on the telecommunications industry).

[283] *Id.* at 369-70, 374-75.

[284] *Id.* at 369-70.

[285] *Id.* at 370.

[286] *Id.* at 375-77.

[287] *Id.* at 374-409.

[288] *Id.* at 417-18, 423-30.

[289] *Id.* at 436-37.

[290] *Id.* at 449-52.

FCC was given the explicit authority to decide whether or not to apply its regulations to certain companies based on their competitiveness.[291]

The story of *MCI* thus represents the ideal version of the major questions doctrine as a principle of legislative supremacy. Faced with a vague, ancillary statutory provision that did not clearly authorize a dramatic reconfiguration of an agency's regulatory authority, the Supreme Court rejected the agency's regulatory innovation based on its understanding that Congress had not authorized the innovation, with the backstop that Congress could always indicate otherwise. Congress reviewed the issue, decided it *did* want the agency to be able to exercise the innovative authority, and restored to the agency the discretion that the Court had removed. And that was that. The Court had limited the set of tools in the agency's toolbox, but it did nothing to constrain Congress's ultimate ability to dictate the agency's tools.

But if the major questions doctrine is instead wielded as a nondelegation test, then it suddenly becomes a weapon of judicial supremacy. Assume that all the same events happened in the story of *MCI* as described above, except that the Court determined that the major questions inquiry was a nondelegation problem and not simply a statutory interpretation one. In that case, Congress's subsequent action in the Telecommunications Act of 1996 would not have been the final word. Congress's explicit instruction to the agency that it had the *discretion* to decide whether to selectively exempt certain companies from its rate regulations would have amounted to explicit authorization to an agency to resolve a major question — a delegation that runs afoul of the major-questions-doctrine-as-nondelegation test. Congress would have had to, on its own, determine which companies in the telecommunications industry would be subject to rate regulation, and which companies would be free from such regulation — a difficult (if not impossible) thing to do, given that the relative competitiveness of companies was constantly changing as the industry transitioned.[292] In fact, Congress may have been forced to keep the entire industry subjected to rate regulation, given its inability to oversee either a partial or full transition to a competitive market. In this scenario, the Court is controlling which tools Congress can put in the agency's toolbox. The Court is dictating the boundaries of policymaking.

In other words, in the major-questions-doctrine-as-nondelegation test, a rule that was crafted to empower Congress is instead used to empower courts. In the true story of *MCI*, the Court's use of the major

[291] *Id.* at 450-51; *see also* 47 U.S.C. § 160(a) (2018).

[292] *See* Schoenwald, *supra* note 282, at 453.

questions doctrine encouraged Congress to step in, reconsider an industry that had been dramatically transformed since it had last been evaluated by the legislature, and express anew its understanding of the best way to regulate the industry. In the twisted version of *MCI*, the Court's use of the major questions doctrine would have stymied agency action and cut down the range of policy actions Congress could take to address a thorny problem.

This realization should make Justice Kavanaugh's subtle maneuver in *Paul v. United States* particularly troubling. There, Justice Kavanaugh transforms the major questions doctrine from a "statutory interpretation doctrine" to a "nondelegation principle" by manipulating a linguistic similarity, leaping across a chasm of theoretical underpinnings that separates the two.[293] Under the "major questions doctrine as statutory interpretation doctrine," if Congress expressly delegates to an agency the authority to resolve a "major question," the Court must defer to that express instruction. Under the "major questions doctrine as nondelegation principle," the Court does not. And that makes all the difference.

CONCLUSION

The Supreme Court cannot make the rules of *Chevron* the foundation of its new nondelegation test without fundamentally distorting them. Similarly, the Court cannot use its *Chevron* jurisprudence as precedent for its new nondelegation test, as the reasoning behind the *Chevron* cases and a judicially-enforceable nondelegation doctrine are at odds with each other. If the *Chevron* fig leaf is taken away, as it must be, then the Court has to be honest about its nondelegation project. Any test the Court chooses to enforce its new judicially-enforceable nondelegation doctrine will be unprecedented. The Court can attempt to assemble a formalist test that would draw a sharp line between executive and legislative power — and potentially doom the administrative state. Or the Court can invent a more narrow test that lets some delegations by — but it must be frank that such a test would be drawn from wholecloth, is not supported by the Court's *Chevron* case law, and has no record of judicial administrability. And whatever test the Court selects, if it ultimately deploys that test, it will be a judicial power grab. The Court will be seizing power for itself under the guise of protecting Congress.

[293] *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).