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The Major Questions Doctrine: Right Diagnosis, Wrong Remedy

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The Supreme Court term that ended in the summer of 2022 will be remembered for, among other things, the Court's endorsement of something called the "major questions" doctrine. The doctrine emerged in four decisions, three arising out of regulatory actions of the Biden administration in response to the COVID-19 pandemic (collectively referred to below as the "three COVID-19 cases"), and the fourth out of a controversy over the scope of the Environmental Protection Agency's (EPA) authority to regulate greenhouse gases emitted by existing fossil-fuel power plants.[1] The Court either stayed or disapproved of the agency action in three cases, but in the fourth allowed a regulation by the Department of Health and Human Services (HHS) to stand, requiring that all health care personnel in federally funded facilities be vaccinated against the COVID-19 virus.[2] A rough statement of the new doctrine is that courts will not uphold novel agency efforts to regulate questions of "economic and political significance" unless the agency can point to clear congressional authorization for such action.[3] But the future import of the doctrine is uncertain.

The primary response of the legal academy to the major questions doctrine has been very negative. Perhaps the most widespread view is that the doctrine is a covert attempt to revive the nondelegation doctrine, thought to have been put to rest by multiple decisions of the Supreme Court since 1935 upholding congressional delegations of highly discretionary power to administrative agencies.[4] Others have argued that it is a partisan device that allows the Court effectively to veto administrative initiatives it does not like.[5] In other words, the doctrine is a power grab by the newly empowered conservative majority of justices.

A better explanation for the emergence of the doctrine, I argue, is dissatisfaction with the framework for judicial review of agency legal interpretations that dominated administrative law for more than thirty years—the so-called *Chevron* doctrine, named for *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*.[6] To be sure, *Chevron* was not mentioned in any of the controlling opinions in the four major questions decisions. But this does not distinguish these decisions from other administrative law cases decided by the Court in recent years. By some unspoken agreement, the justices have stopped applying the *Chevron* doctrine.[7]

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The most plausible explanation is that the justices in the conservative majority all agree that changes need to be made to the *Chevron* regime, but they have not reached a consensus about what form those revisions should take. Outright overruling, although occasionally advocated by Justices Thomas and Gorsuch, would be difficult to explain given that *Chevron* is the most cited decision in all public law and was applied by the Court itself in over 100 cases.[8] From this perspective, the major questions doctrine should be seen as a carve-out from the *Chevron* doctrine, one that all six justices in the conservative majority could agree on as a partial corrective to some of the most frequently cited failings of the *Chevron* regime.

In what follows, I argue that the *Chevron* carve-out provides a better fit with the features of the newly minted major questions doctrine than does the explanation that it represents a covert revival of the nondelegation doctrine.[9] I also argue that the failings of the *Chevron* regime that motivated the carve-out are legitimate concerns warranting adjustments in the *Chevron* doctrine. In that sense, the major questions doctrine can be said to rest on a correct diagnosis of some of *Chevron*'s failings. I also argue, however, that the major questions doctrine, as formulated in the four decisions of the 2021 term, is the wrong remedy for these failings, most centrally because it posits a role for the courts that is inconsistent with the comparative advantage of an independent judiciary. This points to another advantage of the carve-out thesis: it suggests a way of integrating the major questions doctrine with long-standing conceptions about the proper role of the courts in a liberal constitutional order.

1. WHAT IS A MAJOR QUESTION?

The major questions doctrine did not come out of nowhere. The Court had episodically expressed skepticism about agency assertions of "broad and unusual authority through an implicit delegation."[10] For example, the Court held in 2000 that the Food and Drug Administration (FDA), after consistently disclaiming such authority, could not regulate tobacco products as ordinarily marketed based on its general authority to regulate drugs and devices.[11] And in 2014, the Court held that the EPA could not subject stationary sources of air pollution to certain stringent regulations based on the quantity of greenhouse gases emitted, since this would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[12]

Until 2022, however, such expressions of skepticism about novel and expansive agency interpretations had been offered in the course of exercises in ordinary statutory interpretation, nearly always as part of "step one" or "step two" of the *Chevron* doctrine. The Court's statements had the status of sayings or maxims, such as the oft-quoted quip that Congress does not hide "elephants in mouseholes."[13] In contrast, in the recent decisions, most prominently *West Virginia v. EPA*, the Court elevated these observations to the status of a distinct "doctrine." The Court acknowledged that calling the collection of "common threads" among previous decisions a "doctrine" was new.[14] But it offered no guidance as to the significance of labeling something a doctrine, as opposed to, say, a generalization from precedent or even a canon of statutory interpretation. This, in effect, is the critical question presented by the recent decisions: What is the significance of announcing that something is a "doctrine"?[15]

The obvious and generally dispositive question is, What constitutes a "major question"? Chief Justice Roberts's opinion for the Court in *West Virginia*, as is often his style, sought to ground the idea of major questions in precedent, and in so doing offered up quotations from a number of the Court's previous decisions. Thus, we read that a major question exists when an agency offers a "novel reading" of a statute that would result in the "wholesale restructuring" of an industry; when it advances a claim of "sweeping and consequential authority" based on a "cryptic" statutory provision; when it entails "unheralded" regulatory power over "a significant portion of the American economy;" when it invokes "oblique or elliptical language" to make a "radical or fundamental change" in a regulatory scheme; when it cites an "ancillary provision" to "adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself[,]" and so forth.[16]

It is hazardous to attempt to distill a more precise formulation of what constitutes a major question based on this collection of quotations. The root idea, as I read the Court's opinion in *West Virginia*, together with its three per curiam opinions arising out of the COVID-19 pandemic, is that a major question is one characterized by three features: first, the agency decision under review is a deviation from its settled sphere of action ("novel," "unprecedented," "unheralded"); second, the agency decision has the effect of significantly changing the scope of the agency's authority ("transformative," "radical change," "wholesale restructuring"); and third, the agency action is a big deal ("sweeping and consequential," "vast economic and political significance"). Admittedly, there are other themes as well, such as the idea that the agency action constitutes an end run around congressional authority ("a regulatory program that Congress had conspicuously and repeatedly declined to enact itself").

Justice Gorsuch, in a concurring opinion in *West Virginia* joined by Justice Alito, sought to provide a crisper formulation of the meaning of a "major question." He discerned three inquiries that provide "a good deal of guidance."[17] First, does the agency claim the power to resolve a matter of great "political significance," such as one in which Congress has considered and rejected "bills authorizing something akin to the agency's proposed course of action"?[18] Second, does the agency seek to regulate "a significant portion of the American economy" or does its action implicate "billions of dollars in spending" by private persons or entities?[19] Third, does the agency seek to intrude into an area "that is the particular domain of state law," thus implicating considerations of federalism?[20] The first two inquiries are compounds of two separate factors (e.g., political controversy and prior rejection by Congress), so arguably Gorsuch has posited five factors rather than three. Without regard to how one totes up the factors, the determination of whether something is a major question entails the weighing of variables that cannot be reduced to a common metric. And the justice added that his list of "triggers may not be exclusive."[21]

The Gorsuch concurrence further muddies things up by offering an exegesis about what qualifies as clear congressional authorization. Here, as expected, we read that "oblique or elliptical language," "gap filler" provisions, and "broad and unusual authority" do not count.[22] But we also read that novel agency interpretations of old statutes, agency interpretations that are not contemporaneous with the enactment of a statute or of long-standing duration, and interpretations that reflect a "mismatch between an agency's challenged action and its congressionally assigned mission and expertise" may not count.[23] These latter circumstances suggest

a concern about the novelty or lack of precedent for the agency interpretation (very much a theme of the majority opinions). As such, these latter factors seem to go to the nature of the agency decision, not to whether Congress has supplied the requisite clear authorization. So maybe the concurrence posits eight factors, rather than three or five.

There are some intriguing differences between, on the one hand, the description of the major questions doctrine in Chief Justice Roberts's opinion for the Court in *West Virginia* and the three per curiam opinions in the COVID-19 cases, and, on the other hand, Justice Gorsuch's concurring opinions in *West Virginia* and *NFIB* (the Occupational Safety and Health Administration (OSHA) vaccine mandate case).

First, the chief justice's opinion for the Court in *West Virginia* and the three COVID-19 cases do not reference the nondelegation doctrine. This is especially notable in *West Virginia*, where the opinion for the Court by the chief justice is pure administrative common law. The quotations he musters were taken exclusively from decisions applying the *Chevron* doctrine, which is itself a form of administrative common law.[24] Other than one unelaborated reference to "separation of powers principles," there is no reference to the Constitution in any of these opinions.[25] To top it off, the chief justice concludes his opinion in *West Virginia* with the observation that "[c]apping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible 'solution to the crisis of the day.' . . . [But a] decision of such magnitude and consequence rests with Congress itself, *or an agency acting pursuant to a clear delegation from that representative body*."[26] So the problem was not that the issue could not be delegated; it was that the issue had not been delegated with sufficient clarity.

The Gorsuch concurrences, in contrast, are written on a much broader canvas, aligning the major questions doctrine with various substantive canons of interpretation applied by the Marshall Court and explicitly linking it to the nondelegation doctrine, something Gorsuch has urged the Court to revive.[27] Even so, it is not clear that Gorsuch regards the major questions doctrine as a device for enforcing the nondelegation principle. He writes in *NFIB* that OSHA's regulation violates the major questions doctrine because it was not clearly authorized by the agency's statute. He then adds: "[I]f the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority."[28] This too indicates that the major questions doctrine is aimed at the clarity of the delegation, not its permissibility *vel non*.

Also, although this may prove to be a small point, Justice Gorsuch in his separate opinions repeatedly characterizes the major questions doctrine as a "clear statement rule." Chief Justice Roberts never uses the expression in the portions of his opinion in *West Virginia* setting forth his understanding of the doctrine, nor does the expression appear in the per curiam opinions of the Court in the three COVID-19 cases. Instead, the opinions for the Court speak of the requirement of "clear authorization" by Congress. *Clear statement* connotes a demand for express authorization in the text of a statute. *Clear authorization* is less precise. It might include, for example, implicit ratification of the agency position by subsequent legislative action or (heaven forbid!) authorization found in persuasive legislative history.

Beyond these differences in the content of the majority opinions and the Gorsuch concurrences, it is also instructive to compare the outcomes reached in the four decisions and the rationale given for these outcomes. The theme of agency consistency or inconsistency over time plays a key role in all four decisions. In each of the three decisions disapproving the agency action, the Court portrays the agency as having departed from previously settled understandings. The Centers for Disease Control and Prevention (CDC) eviction moratorium was based on a statute that had "rarely been invoked—and never before to justify an eviction moratorium."[29] The OSHA vaccination rule was a broad mandate "never before imposed" by the agency in the fifty years of its existence.[30] The Clean Power Plan adopted by the Obama administration to regulate existing power plants rested on a generation-shifting strategy never before used in setting an emissions standard under the relevant statute. In contrast, the one agency action upheld in the four major questions cases—the interim rule requiring that all employees in Medicare- and Medicaid-funded facilities get vaccinated—was upheld on the ground that HHS had a "longstanding practice" of issuing rules imposing "a host of conditions that address the safe and effective provision of healthcare."[31] The majority in that case (which included the chief justice and Justice Kavanaugh) was unmoved by the dissent's argument that HHS could point to no grant of rulemaking authority that clearly authorized such regulations.[32] Perceived consistency with past regulatory practice carried the day.

Also, it is instructive to compare the four decisions in terms of whether the controlling opinion concluded the agency action had major economic and political significance. An important theme in each case was whether the controlling opinion perceived the agency as having "strayed out of its lane."[33] The CDC's moratorium on evictions intruded "into an area that is the particular domain of state law: the landlord-tenant relationship."[34] OSHA was charged with workplace safety, not with promoting "general public health."[35] The EPA was created to deal with air pollution, not to balance "the many vital considerations of national policy implicated in deciding how Americans will get their energy."[36] In contrast, HHS was acting squarely within its wheelhouse in adopting a regulation designed to promote the health and safety of hospital and nursing home workers.[37]

A final point: it makes no sense as a conceptual matter to enforce the nondelegation doctrine with a requirement of clear congressional authorization. The nondelegation doctrine rests on the proposition that the Constitution gives Congress the exclusive power to legislate, and therefore Congress cannot transfer this authority to another branch of government.[38] Over the years, the Court has implicitly defined "to legislate" (in the nondelegation context at least) to mean to transfer great discretionary power to act with the force of law to another branch of government.[39] Hence the proposition that if Congress cabins the transfer of power with an "intelligible principle" (or limits it to "filling up the details"), there has been no violation of the Constitution, because there has been no transfer of great discretionary power. But if Congress has exclusive authority to legislate, and cannot transfer this to another branch of government by giving it great discretionary power, it makes no sense to say Congress can transfer great discretionary authority by clearly authorizing the transfer.[40]

Putting this together, the case for characterizing the major questions doctrine as an effort to revive the nondelegation doctrine in the guise of a "clear statement rule" is weak. There

seems to be a tendency to take the Gorsuch concurrences as the true expression of the Court's reasons for adopting the major questions doctrine.[41] To be sure, Gorsuch writes with more self-assurance and grounds his arguments in jurisprudential ideas wrapped in a quasi-originalist gloss. But the majority opinion in *West Virginia* and the three per curiam opinions are opinions for the Court and carry the full force of precedent. Justice Gorsuch's concurring opinions garnered no more than three votes, and thus have no binding authority.[42] The fact that the nondelegation doctrine is not mentioned in any of the majority opinions would seem to belie the claim that a revival of that doctrine is the real objective of the Court.

On the other hand, the fact that the precedents relied upon by the Court are nearly all taken from previous *Chevron* decisions, more specifically, from decisions declining to defer to agency legal interpretations under *Chevron*, supports the contention that the doctrine is a carve-out from *Chevron*. And as I argue in the next section, both the rhetoric of the majority opinions and the outcomes reached in the four cases correspond to major criticisms of the *Chevron* doctrine offered by the justices in the run-up to the major questions decisions.

2. THE RIGHT DIAGNOSIS

The major questions doctrine is grounded in a correct diagnosis of some significant problems that have emerged in recent years in calibrating the correct role of courts in reviewing agency interpretations of the statutes they implement. Judicial review of agency interpretations has been dominated for nearly thirty-five years by the two-step approach associated with the *Chevron* decision.[43] Under this approach, courts first ask whether the statute in question provides a "clear" or "unambiguous" answer to the question presented. If so, then that answer must be enforced. But if the court concludes that the statute does not clearly or unambiguously answer the question, then, second, the court asks whether the agency's interpretation is "reasonable," meaning one that a reasonable interpreter could permissibly adopt, even if the court thinks it is not the best reading. If the agency interpretation is reasonable, then the court must accept it.[44]

Chevron justified this two-step conception of the division of authority between agencies and courts by framing the inquiry in terms of a delegation of authority by Congress. The Court noted that prior decisions held that Congress could make explicit delegations to agencies to interpret a statutory term. The Court added, without elaboration, that such a delegation can be implicit as well as explicit.[45] The Court also noted that interpretations of unclear statutes often require the reconciliation of conflicting policies. Agencies are better than courts at making such policy decisions, the Court observed, both because of their greater expertise and also because they are accountable to the elected president. Courts, by contrast, are insulated from the political process and should stick to enforcing the law rather than wading into policy disputes, unless this cannot be avoided.[46]

This streamlined two-step doctrine proved to be popular with overburdened lower courts. Eventually, the Court extended the two-step doctrine to multiple agencies, establishing it as a universal metric for assessing agency interpretations of the statutes they administer. I cover much of the history in a recent book.[47] Yet the streamlined approach to judicial review

associated with *Chevron* also remained controversial. Two problems, in particular, appear to have weighed on the Court, or at least many of the justices, in recent years: legal instability and (in)ability to assure that agencies confine themselves to the authority delegated to them by Congress.

2.1 LEGAL INSTABILITY

One problem is that the *Chevron* formula, by allowing successive administrations to adopt different but "reasonable" interpretations of regulatory statutes, appears to generate instability in the law. At different times, a pattern emerged. First, one administration would interpret the statute to mean x, then the next administration would interpret it to mean not-x, then the following administration would revert to x, and so forth.[48] When this happened, regulated entities could fairly claim that they were being whipsawed by ever-changing legal requirements, which injected great uncertainty into the nature of their legal obligations and made long-term planning difficult. The proper interpretation of the Clean Air Act, insofar as it applies to climate change, provides a prime illustration. The Bush II administration interpreted the act narrowly, the Obama administration broadly, the Trump administration reverted to narrow interpretation, and the Biden administration wants to go broad again. This was effectively the source of the dispute in *West Virginia*.

In the era before *Chevron*, this kind of regulatory flip-flopping would have been met with judicial skepticism. As Aditya Bamzai has documented, the courts pre-*Chevron* frequently said that they would give "weight" (sometimes "great weight") to agency interpretations that were consistently maintained over a significant period of time.[49] Agency interpretations inconsistent with past readings, in contrast, were viewed skeptically and given little or no "weight."[50] This privileging of agency consistency created an incentive for agencies to adhere to settled understandings, which thereby promoted the ability of regulated entities to rely on agency interpretations laid down in the past.

In *Chevron*, the respondents argued that the EPA's interpretation of "stationary source" was entitled to no weight because the agency had changed its mind about whether this referred to an entire plant or to any emission source within the plant.[51] The Court rejected this argument, commenting that "[a]n agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."[52] This was read by later courts (perhaps wrongly) to mean that adherence to settled interpretations by agencies no longer matters.[53]

Chevron's two-step standard of review also seemed to devalue any concern about agency constancy in matters of interpretation. The first step, in which the court was to ask if the statute has a clear or unambiguous meaning, appeared to contemplate an exercise in de novo review by the reviewing court, abstracting away from the agency interpretation. The second step, in which the court was to ask if the agency interpretation was reasonable, appeared to contemplate an assessment of the agency's interpretation against judicial norms of sound interpretation.[54] This too seemed to preclude giving any consideration to the value of stability in the law over time.

Toward the end of *Chevron*'s reign, the Court appeared to be increasingly concerned about sudden shifts in administrative interpretation and the lack of "fair warning" that such shifts could entail. In an opinion written by Justice Alito, the Court declined to give strong deference to an agency interpretation of its own regulations that presented the danger of "unfair surprise" because it conflicted with long-standing industry practice to which the agency had acquiesced.[55] In another opinion for the Court, Justice Kennedy held that an interpretation by an agency "inconsistent" with its "longstanding earlier position" was not eligible for *Chevron* deference.[56]

Justice Gorsuch, both before and after he joined the Court, generalized this concern. As he wrote in one separate opinion:

> [T]hese days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations. How, in all this, can ordinary citizens be expected to keep up—required not only to conform their conduct to the fairest reading of the law they might expect from a neutral judge, but forced to guess whether the statute will be declared ambiguous; to guess again whether the agency's initial interpretation of the law will be declared "reasonable"; and to guess *again* whether a later and opposing agency interpretation will *also* be held reasonable? And why should courts, charged with the independent and neutral interpretation of the laws Congress has enacted, defer to such bureaucratic pirouetting?[57]

Gorsuch recently reiterated this critique in a separate opinion in a case that would have to be characterized as presenting a "minor question" (except by those directly affected).[58] So this aspect of the movement to curtail *Chevron* promises to persist after the Court's announcement of the major questions exception.

2.2 THE SCOPE OF AGENCY AUTHORITY

A second concern that emerged over time is whether *Chevron*-style deference is capable of preserving long-standing principles of separation of powers. The Constitution, on any fair reading of the document, makes Congress the lawmaking institution of the federal government. Collectively, the Constitution's expansive provisions dealing with the powers of Congress, especially in contrast to the minimal powers of the president, have always been understood to establish the principle of *legislative supremacy*. What this means is that duly enacted legislation has a higher form of legal authority than any executive order issued by the president or any regulation or order issued by an administrative agency. This is a settled understanding about the American legal system. All agree that if there is a direct and unambiguous conflict between what a statute says and what the president does by executive order or what an agency does by regulation or order, the statute prevails.[59]

Over time, two doctrines have emerged designed to preserve the principle of legislative supremacy. One is the nondelegation doctrine. This says, in effect, that Congress may not delegate too much discretionary authority to either the president or an administrative department or agency.[60] The rationale for the nondelegation doctrine is often expressed in terms of democratic theory: Congress is the branch of government where conflicting views about

public policy are thrashed out and critical compromises are reached.[61] So important issues of policy should be resolved by Congress, not handed off to some other branch of government.

The remedy for a violation of the nondelegation principle is invalidation of the offending statute. Other than two 1935 decisions involving provisions of the National Industrial Recovery Act, this has not occurred.[62] The standard formula for determining whether Congress has conferred too much discretion on the executive is to ask whether the legislation includes an "intelligible principle" for guiding the actions of the executive actor, which the Court has always discovered.[63] More recently, several justices, led by Justice Gorsuch, have argued that the intelligible principle formula is too lax. They have urged that the nondelegation doctrine be reformulated to limit permissible delegations to those that require an agency to "fill up the details" in a statutory scheme, or other limited circumstances.[64] This proposition has attracted at least tentative support from a majority of the justices on the current Court, but no holdings.[65]

The *Chevron* decision was dismissive of the nondelegation doctrine. In a remarkable passage near the end of the opinion, the Court said it is perfectly acceptable for contesting factions in Congress, when they cannot agree about what to do, to reach a tacit agreement "to take their chances with the scheme devised by the agency."[66] In other words, delegation is permissible even if it is the product of Congress not being able to agree on major questions of public policy.

A second doctrine designed to preserve the principle of legislative supremacy posits that administrative agencies "possess only the authority that Congress has provided."[67] This can be called the "exclusive delegation" or the "anti-inherency" principle.[68] It differs from the nondelegation doctrine in that the concern is not with Congress giving *too much discretion* to agencies, but rather that agencies act *within the bounds* of whatever discretion Congress has given them. The rationale for this second doctrine can also be expressed in terms of democratic theory. In addition, however, this second doctrine serves a critical coordinating function. Only Congress has the kind of authority to create agencies and define their functions—as well as to determine whether particular issues should be addressed by the federal government, the states, or private action. In other words, Congress is the only plausible institution to decide who decides.[69]

This second principle is enforced not by declaring a statute unconstitutional, but through ordinary statutory interpretation by reviewing courts. Without regard to how much discretion an agency is given, agency action that exceeds the bounds of its delegated authority is *ultra vires* and its action will be set aside. This principle is clearly reflected in the Administrative Procedure Act of 1946, which instructs courts to set aside agency action "in excess of statutory jurisdiction."[70]

The critical point for present purposes is that the *Chevron* doctrine provides no obvious way for courts to enforce this second principle of legislative supremacy. Taken literally, the doctrine seems to say that if Congress lacks the foresight to delineate the powers of an agency in clear and unambiguous language, the agency can exploit any gap, silence, or ambiguity to expand or contract its powers in any way that passes muster as a permissible interpretation.

On several prominent occasions, the Court has declined to take *Chevron* literally in this context, as in the precursors of the major questions doctrine relied upon by the Court in *West Virginia*. But in a fateful decision in 2013, the Court cemented the essential weakness of *Chevron* in this regard.

The question presented in *City of Arlington v. FCC* was whether the *Chevron* standard of review should apply to questions about agency "jurisdiction."[71] In an opinion for five justices, including three of the four liberals then on the Court, Justice Scalia held that the answer was yes. His basic point was that every limit on agency authority is jurisdictional, in the sense that an agency decision that violates such a limit is *ultra vires* and cannot be enforced. There is thus no subset of decisions that are "jurisdictional" as opposed to "nonjurisdictional."[72] Since the ordinary standard of review for agency interpretations of statutory ambiguities is *Chevron*, Scalia reasoned, *Chevron* must also apply to questions about the scope of agency jurisdiction.[73]

Justice Scalia of course did not think that agencies should be free to disregard limits on the scope of their authority. But the remedy for wayward agency action, he insisted, was for Congress to enact clearer statutes confining agency authority. As he put it, "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion."[74]

Chief Justice Roberts, joined by Justices Kennedy and Alito, wrote an emphatic dissent. He framed the issue this way:

> My disagreement with the Court is fundamental. It is also easily expressed: A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference. Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.[75]

The chief justice went on to observe that these propositions are rooted in separation of powers precepts, particularly the principle of legislative supremacy.[76]

City of Arlington is critical in understanding how the Court came to perceive the need for something like the major questions doctrine. Standing alone, the *Chevron* doctrine provides no basis for enforcing limits on the nature and scope of agency authority when those limits are not set forth in clear and unambiguous terms. In effect, the justices in *City of Arlington* were divided on which was more important: preserving the *Chevron* doctrine for all cases of agency statutory interpretation or preserving the ability of courts to exercise independent judgment in enforcing the principle of legislative supremacy. Justice Scalia and his supporters decided that it was more important to preserve *Chevron*. With the death of Justice Scalia, the erstwhile champion of *Chevron*, and appointments to the Court of new justices skeptical of *Chevron*, the balance of forces has shifted in favor of legislative supremacy.

The immediate problem with giving effect to this shift in priorities is *stare decisis*. The Court itself has applied the two-step standard of review associated with *Chevron* in over 100 cases.[77] Many of the justices in the conservative majority, including the chief justice, have authored some of these decisions. Outright repudiation of *Chevron* would be impossible to square with this history. Overruling *City of Arlington* might seem more doable. But overruling one of the last major decisions by Justice Scalia would also be awkward, given his iconic status among conservative jurists. And a close reading of the opinions in *City of Arlington* suggests that no one disagreed with Justice Scalia about the difficulty of maintaining a distinction between "jurisdictional" and "nonjurisdictional" questions in the administrative context. So there would be no appetite for overruling *City of Arlington* in order to embrace that particular distinction.

What was needed was a work-around that would correct the abdication of judicial authority to police agency violations of the scope of their delegated authority without overruling *City of Arlington*. To achieve such a work-around, Chief Justice Roberts, a master at slicing and dicing precedents and quotations in precedents, settled on the major questions doctrine. Shortly after he found himself on the losing end in *City of Arlington*, the chief justice wrote for the Court in a case presenting the question whether a health insurance exchange "established by a state" includes one established by the federal government.[78] If the objective was to rule for the government and assure that a future administration could not undo the decision, this could easily be accomplished within the framework of the *Chevron* doctrine: the Court could simply say that the statute was "clear," once the meaning of "established by a state" was considered in the context of the structure of the act, that is, consistent with "Congress's plan."[79] Instead, the chief justice declined to apply *Chevron*, on the ground that the case presented a "question of deep economic and political significance that is central to this statutory scheme."[80] This laid the groundwork for emergence of the major questions doctrine in the recent quartet. At least when the issue is "major," the Court will decide for itself, in the exercise of independent judgment, whether the agency interpretation is consistent with the scope of its delegated authority. *City of Arlington* was not overruled but was reduced to a proposition about the proper judicial posture when the matter is "minor."

The twin failings of the *Chevron* regime emphasized here are of course closely related. They are the product of the rise of presidential administration as the dominant mode of contemporary government.[81] Presidential administration, in turn, has unquestionably been driven by a succession of perceived crises, such as international terrorism, financial instability, the COVID pandemic, and climate change.[82] Presidential administration employs administrative agencies as instruments of power, in part because they are perceived as having the capacity to respond quickly to crises. But in a world of close political division, where control by one political party succeeds another, agency-made law is inherently unstable. And agency initiatives are often concocted out of dubious interpretations of outmoded statutes. The Court's dissatisfaction with *Chevron* may reflect a deeper dissatisfaction with this contemporary political reality.

If this is the new reality, it is not clear that the Court has the capacity to change it. But be that as it may, there are better and worse ways to repair a legal doctrine seen as abetting the rise of inadequately constrained administrative power. The major questions doctrine is effectively a reverse-*Chevron* doctrine for whatever qualifies as a major question. *Chevron* says courts

must accept plausible agency interpretations of the statute they administer if the statute is unclear; the major questions doctrine says courts must *reject* agency interpretations if the statute is unclear. Assuming *Chevron* still applies in some fashion, the Court has now created two diametrically opposed doctrines, which turn on whether or not the question at issue is "major" and whether the statute is "clear." The question is whether this work-around, designed to mitigate the perceived deficiencies of the *Chevron* doctrine, is wise or, well, workable.

3. WHAT'S WRONG WITH MAJOR QUESTIONS

The major questions doctrine is problematic for a number of reasons. I will briefly consider four grounds for concern: it substitutes political punditry for legal interpretation; it relies on too many variables to be predictable; it will generate unmanageable conflicts in the lower courts; and it does nothing to correct the problems associated with "minor" questions.

3.1 THE FLIGHT FROM LEGAL INTERPRETATION

Dissenting in *West Virginia*, Justice Kagan objected to the major questions doctrine on the ground that in each of the precedents cited in support of the new doctrine, the Court had engaged in a close analysis of statutory language and context. The statements in these decisions that Congress was unlikely to have authorized agency action on an issue of economic and political significance, she argued, were advanced as a kind of supporting observation confirming an exercise in conventional statutory interpretation. As she put it, "the relevant decisions do normal statutory interpretation: in them, the Court simply insisted that the text of a broad delegation, like any other statute, should be read in context, and with a modicum of common sense."[83] Justice Kagan was correct in her depiction of the provenance of the major questions ideas. But she failed to identify the most problematic aspect of the new "doctrine."

The major questions doctrine, if it requires a preliminary finding of "major question" before a court will consider the agency's interpretation, effectively requires courts to engage in an exercise in political science. In determining whether something is a major question, the factors mentioned by the chief justice, and by Justice Gorsuch in his concurring opinions, include such variables as whether the matter is politically controversial, whether large numbers of dollars are involved, whether large numbers of people are affected, whether Congress has sought and failed to legislate on the matter. The only element that implicates the traditional interpretive role of the courts is whether the agency action is unprecedented or departs from settled agency practice. Courts have a comparative advantage in matters of legal interpretation.[84] But they have no obvious advantage in determining whether an issue is too "controversial," or affects too many people, or too many dollars, to be decided by an agency as opposed to Congress. Courts should stick to their knitting—deciding disputes between adverse parties, and when necessary resolving contested issues of law in order to resolve such disputes—and leave political punditry to the pundits.

Both the Gorsuch concurrence and the Kagan dissent spoke about problems of a "mismatch" between agency initiatives and congressional authorizations.[85] But the biggest mismatch in

West Virginia would seem to be between the majority's characterization of the role of the federal judiciary under the major questions doctrine and conventional understandings about the judiciary's proper function relative to politically accountable institutions. Judges are thought to have a comparative advantage in determining the facts in disputes between adverse parties in a fair and impartial manner and in interpreting the statutes that Congress has enacted in an "independent and neutral" manner, to borrow the expression of Justice Gorsuch quoted earlier.[86]

By declaring the judiciary the arbiter of major questions of political and economic significance, the Court has not only nominated judges for a role they are unsuited to play, it has ignored the most important insight of the *Chevron* decision. Justice Stevens pointed out in *Chevron* that when statutory interpretation ultimately turns on a policy dispute, courts have two big disadvantages relative to agencies: courts are not directly accountable to elected officials and thus indirectly to the people, and they have more limited experience with the statute in question and the problems it is designed to solve.[87] The major questions doctrine portends a world in which the most consequential questions—the most controversial and those implicating the most significant conflicting interests—will be made by courts having neither accountability nor expertise. This is a deeply misguided division of authority over regulatory policy.

3.2 INDETERMINACY

Another and rather obvious problem with the major questions doctrine is the extreme indeterminacy of the inquiry—something that is endemic to any legal doctrine that posits a large number of variables of no specified weight. Chief Justice Roberts's opinion for the Court in *West Virginia* suggests factors that go to the surprising nature of the agency decision (unprecedented, novel, unheralded, etc.), its large consequences (millions of persons affected, major economic significance, restructuring of an industry), and its controversial nature (Congress has "conspicuously and repeatedly declined to enact"). Justice Gorsuch's exposition suggests three factors, or perhaps five, or perhaps eight.[88]

Justice Scalia argued persuasively that "too much discretion" (the operative concept under the nondelegation doctrine) is unworkable because discretion is a matter of degree.[89] The concept of "major question" is worse than a matter of degree. It is an extreme form of a multifactorial inquiry with no assigned weights or priorities among the factors. The net effect is a kind of all-things-considered test that confers enormous discretion on a court to decide whether the agency does or does not have authority over the relevant issue.[90]

The problem is compounded by the slipperiness of the concept of clear authorization. Justice Kavanaugh penned a persuasive critique of the use of the concept of "clarity" in the *Chevron* doctrine in an article written while he was a judge on the D.C. Circuit.[91] He noted that clarity is a matter of degree, which makes it difficult for judges to make decisions "in a settled, principled, or evenhanded way."[92] Coupling a finding that an issue is "major" with a finding that authorization is not "clear" is an open invitation to judicial willfulness and unpredictability.

Considering the regulatory landscape, all sorts of disputes are likely to break out over what is and is not a "major question." If the Biden administration sets emissions standards for new vehicles designed to force everyone to buy an electric car, is this a major question? Emissions standards have been moved up and down for years, but does setting the standards in such a way as to require an all-electric motor vehicle fleet constitute an effort to transform an entire industry, making it a major question not backed by clear legislative authorization? What about adoption by the Securities and Exchange Commission of a rule requiring firms to disclose their efforts to comply with environmental, social, and corporate governance (ESG) principles? Is the Deferred Action for Childhood Arrivals (DACA) program, now embodied in a regulation adopted using notice-and-comment procedures, a major question? Does the Federal Trade Commission have authority to issue legislative rules requiring internet service providers or social media firms to share their data or platforms with potential competitors?[93] The list goes on and the answers are mostly uncertain.

More far-reaching questions could loom as well. Does the major questions doctrine apply only to agencies, or does it also apply to courts? I regard the Court's decision in *Massachusetts v. EPA*, declaring the term "air pollutant" in the Clean Air Act to include greenhouse gases like carbon dioxide, to be a major question.[94] But note that this was a decision by the Supreme Court that *reversed* an EPA interpretation rejecting such a reading of the act, based on the misfit between the statute's regulatory strategies and a ubiquitous and global substance like carbon dioxide. Should *Massachusetts* now be overruled? For that matter, what about constitutional decisions by the Court effecting various social transformations without any clear authorization in the text of the Constitution? Is the *Dobbs* decision just a constitutional version of the major questions doctrine?[95]

A doctrine that raises so many questions, without any obvious answers, seems dubious at best.

3.3 SUPERVISING THE LOWER COURTS

Another problem is how lower courts will respond to the major questions doctrine. Most courts will probably react cautiously at first, waiting to see how the Supreme Court follows up. When the Court announced another clear statement rule to the effect that general federal statutes should not be applied to traditional state functions absent a clear statement,[96] there was not much follow-up by the Court. Perhaps as a result, the rule has not been extensively invoked by lower courts.

That said, even if most lower court judges exercise caution, litigants eager to press any advantage will not be shy. Those who would like to derail particular forms of administrative action, in particular, will undoubtedly claim that their case presents a major question, and since there will rarely be anything that can be characterized as a "clear authorization," the agency action must be invalidated. Faced with these claims, some judges will inevitably be moved to adopt the major questions characterization. This may be backed up with an injunction prohibiting the agency from enforcing its regulatory action, wherever it might apply. This will then set off the usual scramble to obtain a stay in the court of appeals or, failing that, in the Supreme

Court. Many have bemoaned the emergence of the Supreme Court's "shadow docket," composed in significant part of rulings in response to these stay applications.[97] The Court's creation of the major questions will only aggravate the phenomenon.

Whether or not litigation over the major questions doctrine generates more nationwide injunctions, the potential for conflicts in the circuits is high. Given the extreme indeterminacy of the doctrine, disagreement among the lower courts must be regarded as real concern. Some lower courts will find particular agency initiatives barred by the major questions doctrine; others will disagree. The new doctrine therefore raises the prospect of all sorts of confusion and conflicts in the circuits breaking out, which the Supreme Court does not have the decisional capacity to sort out on a conflict-by-conflict basis.

3.4 WHAT ABOUT "MINOR" QUESTIONS?

A final concern involves the very considerable segment of the legal universe that cannot plausibly be characterized as presenting a "major question." The *Chevron* doctrine, with its flaws, applies to all interpretations of agency statutes, big deals and little deals alike. Not all are questions of major "economic and political significance," but they nearly all affect real people in ways that matter to them. The Supreme Court, from its Olympian heights, may not regard these questions as worthy of its attention. But such questions arise with some frequency in the lower courts.[98] If some lower courts employ a version of the *Chevron* doctrine that says the agency nearly always wins, then some people may be the victims of agency action that departs from settled law or that ignores important limits on agency action imposed by Congress. Justice Kennedy, shortly before he retired, perceived that many lower courts were applying *Chevron* to give "reflexive deference" to agency interpretations based on "cursory analysis."[99] The major questions doctrine does nothing to fix this.

The *Buffington* case that recently attracted the attention of Justice Gorsuch is a good illustration.[100] The case involved a veteran entitled to partial disability benefits. He lost the benefits when he was called up for active duty, but the benefits were not reactivated as required by statute when he left active duty, because he was not notified about a Veterans Administration regulation that required him to submit a new application in these circumstances. Whether the regulation was justifiable in light of the statutory entitlement is debatable. The Court of Appeals for Veterans Claims and the Federal Circuit did not consider the matter in any detail; they simply upheld the VA regulation as permissible under the *Chevron* doctrine. A legal doctrine that allows busy courts to dismiss the claims of little people with a superficial gesture deserves to be corrected. But the major questions doctrine offers no help on this score.

4. BETTER SOLUTIONS TO *CHEVRON*'S FAILINGS

The largest question posed by both *Chevron* and the major questions doctrine concerns how to strike the right balance between stability and change in a liberal constitutional order. Clearly, the best way to strike such a balance is by enacting legislation. Federal legislation sits near the top of the legal hierarchy (just below constitutional limitations) and is capable

of effecting significant change by superseding everything below it in the hierarchy (interpretations of previous statutes, agency rules, executive orders, state law, common law). But because new legislation is difficult to secure, given the multiple actors who have to sign off and the limited capacity of Congress to enact laws,[101] legislation also enjoys a high degree of stability once it is on the books. Given the incessant demands for change, and the inability of legislatures to satisfy these demands, pressure has built on presidents to become agents of change. This has translated into new ventures in administrative lawmaking and a surge of legal actions by those opposed to these changes seeking to have them overturned by the courts.

Both the *Chevron* doctrine and the major questions doctrine rest on ideas about the delegation of interpretive authority from Congress to administrative agencies. In other words, both invoke the authority of Congress. This is a testament to the understanding that legislation is the right way to achieve a balance between stability and change. *Chevron* introduced the idea of implicit delegations by Congress, and the doctrine it spawned eventually held that any ambiguity in an agency statute is an implicit delegation by Congress to the agency to make changes within the limits of the ambiguity.[102] The major questions doctrine is effectively an unacknowledged carve-out from *Chevron*. The doctrine posits that when a "major question" is involved, a proper delegation from Congress must take the form of clear authorization; according to the Gorsuch concurrences, only an express delegation or something close to it will do.

Both the maximalist version of *Chevron* and the major questions doctrine are too extreme for a second-best world desperately trying to strike the right balance between stability and change without the benefit of a steady stream of legislation addressing salient social problems. The idea that any ambiguity in a statute is an implicit delegation transfers too much power to administrative actors. The view that only express delegations will do for questions that reviewing courts regard as "major" concentrates too much power in the courts.

Is it possible to do better? Perhaps not. But here are at least two relatively modest correctives that might strike a better balance between stability and change than either *Chevron* in its "maximalist" form or the major questions doctrine.

4.1 REDUCING LEGAL INSTABILITY

We have seen that the Court in the twilight of the *Chevron* era has become concerned that the doctrine was promoting legal instability. The Court cut back on deference in cases where the agency interpretation failed to provide "fair notice" to parties who had relied on earlier agency interpretations. Each of the recent major questions decisions emphasizes the dangers of dramatic agency changes in the law. Justice Gorsuch, in his anti-*Chevron* opinions both before and after he joined the Court, has consistently sounded the theme that *Chevron* unsettles the law. As he wrote recently:

> [*Chevron*] encourages executive officials to write ever more ambitious rules on the strength of ever thinner statutory terms, all in the hope that some later court will find their work to be

> at least marginally reasonable. When one administration departs and the next arrives, a broad reading of *Chevron* frees new officials to undo the ambitious work of their predecessors and proceed in the opposite direction with equal zeal. In the process, we encourage executive agents not to aspire to fidelity to the statute Congress has adopted, but to do what they might while they can.[103]

Great rhetoric. But what is the solution? According to Justice Gorsuch, the solution is for the courts to abandon all deference, at least maximal deference of the sort associated with *Chevron*, and engage in "independent judgment of the law's meaning in the cases that come before the Nation's courts."[104]

This is not crazy as a solution. In terms of how they rank on the spectrum from stability to change, courts fall near the far end of the stability pole. Progressive critics of the Court, who rail about judicial power grabs and the like, completely miss the point.[105] Courts have no power to do anything, unless nearly everyone, and most importantly the executive, agrees to abide by their interpretations of the law. In order to keep nearly everyone complying with their views of the law, courts must adhere to the precedents they have laid down in the past. Simply put, if courts do not follow their precedents, no one else will either.[106] So all courts, including the supposedly imperial Supreme Court, are strongly inclined toward stability in terms of their views of the law. Extensions and qualifications are permissible, but they must be justified. Overrulings must be kept to a minimum, and when they occur they require a special justification. The result is that judicial interpretations are very sticky. (Case in point: the thirty-five-year reign of the *Chevron* doctrine.)

There are many objections that can be made to the idea that courts should assume the exclusive power of legal interpretation in the interest of restoring greater legal stability.[107] Perhaps the primary objection is that we do not simply want legal stability, we want an acceptable balance between stability and change. But if change is inevitable, and if it is not going to come from Congress (at least not often enough), we do not want it coming from the courts, for all the reasons cited in *Chevron* and the legions of decisions following it.

Here is one suggestion, pulled from the legal toolkit: restore the idea that agency interpretations get "weight" if contemporaneous with enactment of the statute or if maintained in a consistent and long-standing fashion, but get no weight if they represent a departure or swerve from prior administrative understandings, at least if the departure is not accompanied by a persuasive explanation. This is a very old doctrine, applications of which can be found in the early decades of our Republic.[108] Partisans of a maximalist version of *Chevron*, most prominently Justice Scalia, thought the doctrine had been abolished by *Chevron*. But scholars have shown that the idea never went away, and kept popping up, even during the high-water mark of the *Chevron* era.[109] The current Court, given the disparaging remarks in the major questions cases about "novel," "unheralded," and "unprecedented" agency action, would appear to be receptive to a reaffirmation of these venerable canons.

The contemporaneous and long-standing canons put a thumb on the scale in favor of settled expectations and preserving reliance interests. In so doing, they tilt the playing field in the

direction of greater legal stability. They are not absolute. If an agency that perceives the need for a course correction can muster the data and arguments in support of a change, the reviewing court should give the agency's position respectful consideration. But if the court perceives that the agency is simply flip-flopping from one administration's political platform to another, the appropriate response should be for the court to announce its own best interpretation of the statute, putting an end to the gyrations. This will require the contesting factions to direct their energies to Congress, which always retains the authority to amend the statute to achieve a different outcome if it can muster the votes. In the meantime, a measure of stability in the law will have been restored, whether or not observers regard the settlement as optimal.[110]

4.2 ENFORCING CONGRESS'S ASSIGNMENT OF ROLES

What then should courts do about preserving the allocation of regulatory authority as established by Congress? A preliminary question, of course, is whether the congressional assignment of responsibilities is worth preserving. The structure of the Constitution tells us that this is an aspect of legislative supremacy. And the Court has never wavered from the position that only Congress can create an agency and that agencies, once created, can exercise only the powers given by Congress.[111] Conceivably, this is a bit of fusty thinking left over from an era when one emergency did not follow another, and Congress could stay on top of what was happening in the federal establishment.[112] Conceivably, it is time to throw in the towel, and give the president, under some fiction about the meaning of the "executive power," free rein to run the federal government. I think not. It is not realistic for federal courts to attempt to require Congress to make any and all "important" federal policy decisions, i.e., revive (or impose anew) the nondelegation doctrine. The federal judiciary is too puny an institution, and too internally divided, to enforce any such a proposition against the far-flung administrative state implementing a massively complex US Code. The Court may fiddle with the formula for identifying a violation of the nondelegation doctrine. But it is not going to reverse the reality that highly consequential policy decisions often and inevitably come from administrative agencies like the EPA, the Federal Reserve, the Federal Communications Commission (FCC), or the CDC.

It is not too late, however, to enforce the principle that administrative bodies have no authority to act unless and until they can trace that authority to a delegation from Congress. This version of legislative supremacy is critical in checking the power of the executive. And it performs a vital function of coordination. As long as Congress controls the purse strings, only Congress can decide who gets to do what, and with what resources.[113]

The problem with restoring a meaningful role for the courts in enforcing the limits of agency authority is *City of Arlington*. The Court, for better or worse, is committed to respecting decisions like *City of Arlington* as a matter of *stare decisis*. Overruling *City of Arlington*, for the reasons previously discussed, is probably not possible. The major questions doctrine is best understood as an end-run around *City of Arlington*, but it is a seriously flawed one. Is there a better way to restore judicial authority to enforce limits on agency authority without concocting a misguided work-around like the major questions doctrine?

Here is one idea: The Court in some future case should distinguish between the scope of agency authority *to regulate*, and the scope of agency authority *to interpret*.[114] Courts must always exercise independent judgment in determining whether an agency is acting within the scope of its authority to regulate as delegated by Congress. Agencies should be given respectful consideration in determining the correct answer to this question. But courts should not accept any plausible agency view about the scope of its authority to regulate whenever a question arises about that. Once the court determines that the agency is acting within the scope of its regulatory authority, it should defer to the agency about the proper resolution of interpretive questions that arise *within the scope of that authority*, presumably under the *Chevron* doctrine or whatever emerges to follow it. In effect, courts should determine independently the "space" in which an agency has been authorized to regulate, but once that space has been delineated, the agency should be given significant leeway to determine how best to interpret statutory ambiguities that arise within that space.[115]

In light of this distinction, *City of Arlington* can be distinguished as a decision that rejected, as an abstract proposition, the idea that there is a general exception to *Chevron* for any question of interpretation that can be characterized as "jurisdictional." The exception was framed so broadly by the petitioners that it would encompass any ambiguity that arises about an agency's authority—including its authority to decide interpretive questions that fall comfortably within its delegated authority to regulate. This, as the Court observed, would effectively eviscerate *Chevron*.[116] In this respect, it is helpful that the Court in *Arlington* assumed, without deciding, that the FCC was acting within the scope of its regulatory authority in interpreting the phrase "within a reasonable period of time" as it applies to the siting of wireless transmission towers.[117] In other words, the Court did not apply *Chevron* to determine whether the agency was acting within the scope of its authority to regulate. It merely rejected the proposition that there is a generalized exception under *Chevron* to any question that can be characterized as "jurisdictional."[118]

In searching for authority to support the distinction, one need look no further than the *Chevron* decision itself. The Court in *Chevron* determined that Congress had delegated regulatory authority to the EPA to establish emissions limitations on major stationary sources in nonattainment areas. Once it concluded that the agency was acting within the scope of its regulatory authority, the Court concluded that the definition of "source" was ambiguous, because it could mean either an entire plant or any smokestack within the plant. On this interpretive question, which fell easily within the scope of the agency's regulatory authority, the Court deferred to the agency's preferred interpretation. Similar decisions abound. In *MCI v. AT&T*, for example, the Court concluded that the FCC had no regulatory authority to deregulate the long-distance telephone market, and could not achieve such an objective by interpreting a statute authorizing it to "modify" tariff filing requirements.[119] In *Cuomo v. Clearing House Assn.*, the Court held that the Comptroller General had no regulatory authority to preempt general state laws applicable to the conduct of banking, notwithstanding an ambiguous provision giving the office exclusive power to engage in "visitorial" oversight of national banks.[120] Several of the precursors of the major questions doctrine can be interpreted the same way.[121]

Beyond precedent, there are a number of overlapping justifications for requiring independent judicial judgment about the scope of an agency's authority to regulate. One is that this is the traditional understanding, certainly before *Chevron* was decided.[122] Another is that this is the starting point required by the APA, on any fair reading of Section 706, including the specific directive that courts are to hold unlawful and set aside agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[123] A third is that this is more realistically what Congress wants, given that Congress undoubtedly perceives the independent judiciary as a more plausible faithful agent of its designs than executive branch agencies. Courts by tradition see their role as enforcing the instructions of the legislature. Agencies, which are subject to much greater control by the political appointees in the executive branch, are more likely to interpret statutes to further the transitory political objectives of the incumbent president. Finally, independent judicial judgment is the default most likely to preserve the principle of separation of powers and the role of Congress in providing a check on the executive.

Admittedly, the distinction between authority to regulate and authority to interpret will not always be clear. But it is far clearer than the distinction between major and minor questions. Moreover, courts can draw upon contextual signals in determining whether a question concerns the authority of an agency to regulate. Perhaps most generally, agency exercises of authority that depart from settled expectations should be given closer scrutiny. This principle is more in the nature of a red flag rather than a fixed rule. When agencies seek to regulate in ways that are inconsistent with the prior understanding of the scope of their regulatory mandate, this should alert courts to the possibility that they are wandering off the ranch. It may be that the court will ultimately conclude that the agency is properly exercising its delegated authority. Consequently, this principle merely directs the attention of the court to the need to engage in a more searching analysis of whether Congress intended to delegate regulatory authority to the agency with respect to the matter in question.

Another contextual signal, which is also in the nature of a red flag rather than a fixed rule, is that agency initiatives that have an important impact on the scope of the agency's regulatory authority should be closely scrutinized. Often this principle will overlap with or be subsumed under the previous consideration of agency initiatives that conflict with settled expectations. But it is possible to imagine situations where there are no settled expectations about an issue one way or another, and an agency embarks on a program that has major implications for the scope of its authority. The fact that the resolution of the question will have an important impact on the scope of agency authority warrants close judicial examination as to whether the agency is proposing to exceed the bounds of its delegated authority.

The appropriate use of these red flags brings us back to the major questions doctrine. Decisions such as *Brown & Williamson*, *MCI v. AT&T*, and *Utility Air* were precedents heavily relied upon by Chief Justice Roberts in support of recognizing a major questions doctrine. The crucial difference, however, is that in these previous decisions, observations about the "economic and political significance" of the agency interpretation, or its potential for "radical or fundamental change," were offered in the course of the Court's exercise of traditional statutory interpretation to determine the scope of the agency's regulatory authority. The

provenance of the major questions idea gives rise to hope that the doctrine can be assimilated to the complex of norms about statutory interpretation—which is to say, to the world of conventional interpretation, as displayed in the precedents upon which the major questions doctrine draws.

To be more specific, it would be desirable for the Court, in some future encounter with a question about the scope of agency authority to regulate, to proceed as if *West Virginia* did not establish a hard-edged clear statement rule requiring a preliminary determination (based on multiple factors of uncertain weight) whether the question is "major" and, if so, then demanding a clear statement from Congress authorizing the agency to address the issue. It would be better to treat *West Virginia* as requiring, in every case, that the agency possess actual delegated authority over a question before the court will defer to it. And the circumstances that led the Supreme Court to deem the question in *West Virginia* "major" should be cited as ones that *alert* the reviewing court to the need for a particularly careful examination of the agency's claim of authority.

CONCLUSION

At the end of the day, there is no substitute for judges rolling up their sleeves when faced with a legal challenge to an interpretation of agency law. They must dig into the history of the agency's previous interpretations, in order to determine whether the agency's current view reflects settled expectations or a new direction. Preservation of settled expectation should be entitled to a thumb on the scales; departures should require a persuasive explanation. The court must also determine whether Congress actually delegated authority to the agency to regulate the particular question at issue, if the matter is contested. Actual delegation preserves the principle of legislative supremacy. Careful judicial inquiry into whether there has been an actual delegation keeps agencies from overstepping the bounds of the authority they have been given. To be sure, these forms of careful review require more work by judges. No presumptions, no clear statement shortcuts. But a central reason why we have federal courts, and give them life tenure, is to answer such difficult questions.

We live in a perilous world in which the rule of law is vulnerable to being crushed in a contest of universal political "hardball." The *Chevron* doctrine was a notable attempt to distinguish the realm of "law" from that of "policy," and to define the role of the courts as being the realm of law, with agencies given primacy in the realm of policy. Over time, the *Chevron* doctrine proved to have a number of shortcomings. But the Court, in its efforts to define something better, needs to tread cautiously, lest it make the ideal of the rule of law, and the courts' role in enforcing it, more difficult to attain than ever before.

NOTES

1. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam) (granting stay of CDC rule imposing moratorium on evictions from rental housing); Biden v. Missouri, 142 S. Ct. 647 (2022) (per curiam) (granting a stay of injunctions of HHS rule requiring employees of Medicare and Medicaid facilities to get vaccinated); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022)

(per curiam) (granting stay of OSHA rule requiring employees of large companies to get vaccinated); West Virginia v. EPA, 142 S. Ct. 2587 (2022) (reversing D.C. Circuit decision authorizing generation shifting approach to setting emissions level for existing fossil fuel power plants).

2. *See* Biden v. Missouri, 142 S. Ct. 647 (2022).

3. *See* West Virginia v. EPA, 142 S. Ct. at 2608.

4. *See, e.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 265 (2022); Alison Gocke, Chevron's *Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955 (2021); Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENVTL. L. J. 379 (2021).

5. *See, e.g.*, Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023), https://ssrn.co./abstract=4165724 [https://perma.cc/76ET-XCLX]; Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174 (2022).

6. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

7. *See, e.g.*, Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) (remarking "that the Court, for whatever reasons, is simply ignoring *Chevron* . . . an important, frequently invoked, once celebrated, and now increasingly maligned precedent").

8. *See* Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L. J. 931, 986 (2021) (listing 107 Supreme Court decisions applying the *Chevron* doctrine between 1984 and 2019).

9. For an insightful article, written before the four decisions of the 2021 term, that recognizes the major questions doctrine can be conceptualized either as a clear statement doctrine grounded in the nondelegation doctrine or as a carve-out from the *Chevron* regime, see Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021).

10. Gonzales v. Oregon, 546 U.S. 243, 267 (2006).

11. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

12. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

13. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

14. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

15. The most relevant analogue would be the *Chevron* doctrine, which emerged slowly, gradually became more powerful, was eventually labeled a "doctrine" by commentators and occasionally by the Court, and then became a matter of controversy among the justices. *See generally* THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE (2022). The fact that the *Chevron* doctrine has effectively disappeared from the Court's decisions provides a cautionary note about the significance of labeling something a "doctrine."

16. West Virginia v. EPA, 142 S. Ct. 2605, 2608, 2609, 2610 (citations omitted).

17. *Id*. at 2620 (Gorsuch, J., concurring).

18. *Id*. at 2620–21 (citation omitted).

19. *Id*. at 2621 (citations omitted).

20. *Id*. (citation omitted).

21. *Id*.

22. *Id*. at 2622–23 (Gorsuch, J., concurring) (citations omitted).

23. *Id*. at 2623.

24. *See* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1300–04 (2012); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189 (1998).

25. The chief justice made one brief reference in *West Virginia* to "separation of powers principles" without spelling out what they were. 142 S. Ct. at 2609. This was paired in the same sentence with "a practical understanding of legislative intent." *Id*.

26. *Id*. at 2616 (emphasis added).

27. *Compare* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (reaffirming the traditional test permitting the delegation of discretionary authority if constrained by an "intelligible principle") *with id*. at 2135–37 (Gorsuch, J., dissenting) (insisting that delegations should be limited to filling the details in statutes with major questions resolved by Congress).

28. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

29. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2487 (2021).

30. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. at 662, 666.

31. Biden v. Missouri, 142 S. Ct. 647, 652 (2022).

32. *See id*. at 655–58 (Thomas, J., dissenting) (noting that HHS relied on a provision authorizing regulations required for the "efficient administration" of the Act and could point to no specific authority for imposing health and safety measures on federal grant recipients) (citation omitted).

33. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2636 (2022) (Kagan, J., dissenting).

34. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

35. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. at 666.

36. West Virginia v. EPA, 142 S. Ct. at 2612.

37. Biden v. Missouri, 142 S. Ct. at 652.

38. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001).

39. *See* Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2122–27 (2004) (contrasting different conceptions of what it means to exercise "legislative power").

40. This was made clear in *Whitman v. American Trucking Associations*, where the Court rejected the proposition that a nondelegation violation could be cured by having an agency articulate an intelligible principle limiting its discretion. The Court wrote: "The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory." 521 U.S. at 473. Similarly, the idea that Congress could cure an unconstitutionally standardless delegation by making clear that it was delegating standardless discretion makes no sense.

41. This includes Justice Kagan in her dissenting opinion in *West Virginia v. EPA*. She includes multiple pages rebutting the idea that the Framers of the Constitution were concerned about excessively broad delegations of authority to the executive, citing recent scholarship in support. *See* West Virginia v. EPA, 142 S. Ct. at 2641–44 (Kagan, J., dissenting).

42. Justice Gorsuch did not write a dissent in the HHS vaccine mandate case, but joined dissents written by Justice Thomas and Justice Alito. *See* Biden v. Missouri, 142 S. Ct. 647 (2022). Neither of those dissents made reference to the nondelegation doctrine.

43. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

44. *Id*. at 842–43.

45. *Id*. at 843–44.

46. *Id*. at 865–66.

47. MERRILL, *supra* note 15.

48. Some examples: (1) the regular flip-flopping between Republican and Democratic administrations as to whether family planning clinics can provide the names of abortion providers to pregnant women; (2) the expansion and contraction in the scope of wetlands subject to federal permitting requirements as part of the "waters of the United States"; (3) the rejection, adoption, rejection, and adoption of the so-called net neutrality requirement for internet service providers, depending on the party affiliation of the chair of the Federal Communications Commission; and (4) the oscillation between skepticism and conviction about the need for urgent action to reduce the risk of climate change associated with the accumulation in the atmosphere of greenhouse gases. The examples are discussed in MERRILL, *supra* note 15, at 171–75, 209–14, 317 n. 28.

49. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L. J. 908, 942 (2017).

50. *See, e.g.*, Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976) ("We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency.").

51. Brief for Respondents at *72, *Chevron*, 467 U.S. 837 (Nos. 82-1005, 82-1247, 82-1591), 1983 U.S. S. Ct. Briefs LEXIS 921.

52. *Chevron*, 467 U.S. at 863–64.

53. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 186 (1991). Empirical studies indicate that it continues to matter to judges. *See* Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823 (2015). I argue in MERRILL, *supra* note 15, at 66–67, that Justice Stevens rejected the argument from inconsistency in *Chevron* because the agency's oscillating interpretations had been dictated by the D.C. Circuit, not because the agency could not make up its mind about the best definition of source.

54. The Supreme Court has provided no guidance about what sort of analysis is contemplated at step two, and the lower courts have been badly divided on the question. *See* Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1444, 1469–70 (2018).

55. Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 158–59 (2012). This was reaffirmed in Kisor v. Wilkie, 139 S. Ct. 2400, 2417–18 (2019).

56. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2127 (2016).

57. Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 790–91 (2020) (statement of Gorsuch, J., regarding denial of certiorari). Justice Gorsuch's principal critique of *Chevron* before he joined the Court also emphasized legal instability. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

58. Buffington v. McDonough, No. 21-972 (Nov. 7, 2022) (Gorsuch, J., dissenting from the denial of certiorari).

59. *See* MERRILL, *supra* note 15, at 12–13 (noting that American law is characterized by a "securely settled" understanding about the hierarchy of legal authority to the effect that "[t]he Constitution trumps statutes, and statutes trump agency regulations and orders and executive orders of the president (and conflicting state statute and regulations)").

60. Merrill, *supra* note 39, at 2100.

61. *See* Gundy v. United States, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) ("Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current president. And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice.").

62. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 288 (1935).

63. J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). To be sure, it is plausible to read more recent decisions as invoking nondelegation concerns as a kind of canon of constitutional avoidance. *See, e.g.*, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607 (1980) (plurality opinion). *See generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000). Some of the precursors of the major questions doctrine can be read this way. For example, in *MCI Telecommunications Corp. v. American Telegraph & Telephone Co.*, 512 U.S. 218 (1994), the Court interpreted the FCC's authority to "modify" tariff filing requirements to preclude a regulation completely abolishing such requirements for nondominant telephone companies, on the ground that this would effectively confer discretionary authority on the agency to deregulate the industry.

64. Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (citation omitted). The other permissible delegations, according to the dissent, are for fact finding or the performance of "nonlegislative" functions. *Id*. at 2136–37.

65. See *id*. at 2131–42 (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *id*. at 2131 (Alito, J., concurring in the judgment) (expressing willingness to reconsider the approach to nondelegation "taken for the past 84 years" if there is majority support to do so); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of certiorari) (stating that "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in a future case").

66. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

67. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022). *See also* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (agencies "have only those powers given to them by Congress"); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it"); Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.").

68. *See* Merrill, *supra* note 15, at 20 ("anti-inherency"); Merrill, *supra* note 39, at 2109-2114 ("exclusive delegation").

69. *See* Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 Colum L. Rev. 452, 469–75 (2010) (providing a functional justification for Congress exercising the authority to coordinate "the exercise of policymaking authority in society").

70. 5 U.S.C. § 706(2)(c).

71. City of Arlington v. FCC, 569 U.S. 290, 293 (2013).

72. *Id*. at 297.

73. The conclusion does not follow. If every limitation on agency authority is "jurisdictional," then one can equally argue that every limitation should be interpreted and enforced by courts in the exercise of independent judgment.

74. City of Arlington v. FCC, 569 U.S. at 296.

75. *Id*. at 312 (Roberts, C.J., dissenting).

76. *Id*. at 327.

77. *See* Hickman & Nielson, *supra* note 8, at 986.

78. King v. Burwell, 576 U.S. 473, 483 (2015).

79. *Id*. at 498.

80. *Id*. at 486 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

81. *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2281–19 (2001) (broadly characterizing presidential administration as a form of governance in which the president uses regulatory oversight, directives, and public statements to deploy administrative agencies as instruments of the president's political agenda).

82. *See, e.g.*, Eric A. Posner & Adrian Vermeule, The Executive Unbound (2011) (positing the inevitable growth of executive power in response to perceived crises).

83. West Virginia v. EPA, 142 S. Ct. 2587, 2633 (2022) (Kagan, J., dissenting).

84. Merrill, *supra* note 15, at 10–24.

85. West Virginia v. EPA, 142 S. Ct. at 2623 (Gorsuch, J., concurring); *id*. at 2633 (Kagan, J., dissenting) (using the term "misfit" but evidently meaning the same thing as "mismatch").

86. See *supra* note 57 and accompanying text.

87. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984).

88. *See* West Virginia v. EPA, 142 S. Ct. at 2620–23 (Gorsuch, J., concurring).

89. *See* United States v. Mistretta, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting); *see also* Whitman v. American Trucking Ass'ns, 531 U.S. 457, 472–76 (2001) (Scalia, J.) (emphasizing the history of broad deference to Congress in determining how much to constrain the discretion of administrative actors).

90. *See* U.S. Telecom. Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing *en banc*) (acknowledging that the major questions canon has a "know it when you see it" quality).

91. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

92. *Id*. at 2118.

93. *See* Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, 75 ADMIN. L. REV. (forthcoming 2023), https://ssrn.com/abstract=4344807 [https://perma.cc/SE24-D32Y].

94. *See* Massachusetts v. EPA, 549 U.S. 497 (2007).

95. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973)).

96. Gregory v. Ashcroft, 501 U.S. 452, 469–70 (1991).

97. *See, e.g.*, William Baude, *The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1, 3–5 (2015). For the problematic nature of nationwide injunctions of agencies, *see, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Howard M. Wasserman, *"Nationwide" Injunctions are Really Universal Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 3335 (2018).

98. *See* Aaron L. Nielson, *The Minor Questions Doctrine*, 169 U. PA. L. REV. 1181, 1183–84 (2021) ("Minor questions—i.e., relatively noncontroversial, often bipartisan policies that help the public but that are not particularly salient—are ubiquitous.").

99. Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

100. Buffington v. McDonough, No. 21-972 (Nov. 7, 2022) (Gorsuch, J., dissenting from denial of certiorari).

101. Other than laws directing the spending of money, it would seem.

102. Smiley v. Citibank, N.A. (S.D.), N.A., 517 U.S. 735, 740–41 (1996), was the first decision expressly to endorse this proposition. This interpretation was initially advanced in Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 516.

103. Buffington v. McDonough, No. 21-972 at 11–12 (Nov. 7, 2022).

104. *Id*. at 16.

105. *See, e.g.*, Mark A. Lemley, Essay, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 114–15 (2022) (portraying the Court as engaged in a massive "power grab" by undercutting the authority of all other institutions). Perhaps this kind of claim should be called the "*Dobbs* derangement syndrome."

106. *See, e.g.*, MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 3–4 (2008) (referring to "a golden rule of precedent — justices must be prepared to treat others' precedents as they would like their own to be treated or risk their preferred precedents being treated with the same kind of disdain they show others'").

107. Here are a few: (i) Not every dispute over the meaning of legislation can be translated into a judicial proceeding; (ii) Courts often disagree when they interpret statutes, and the Supreme Court does not have the institutional capacity to resolve all the disagreements; (iii) If only courts can say what the law means, those clamoring for change will urge the courts to effectuate changes, perhaps though manipulative interpretations or revisions of previously settled precedents, and this runs the risk of degrading the dispute resolution function of courts.

108. *See* Bamzai, *supra* note 49.

109. *See, e.g.*, Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823 (2015).

110. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

111. *See* authorities cited *supra* note 67.

112. *See* Adrian Vermeule, Law's Abnegation (2016).

113. *Cf.* Merrill, *supra* note 69, at 454.

114. I thank John Harrison for suggesting this distinction.

115. *Cf.* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "Skidmore Weight,"* 112 Colum. L. Rev. 1143 (2012) (contrasting the "space" in which an agency has been given authority to act—a legal question ultimately for a reviewing court to decide—and the weight a court should give to the agency's resolution of interpretational issues that fall within the scope of its delegated space).

116. City of Arlington v. FCC, 569 U.S. 290, 304 (2013) ("Make no mistake—the ultimate target here is *Chevron* itself.").

117. The Court granted review only to decide whether there is an exception to *Chevron* for jurisdictional questions. It did not decide whether the FCC had been delegated authority to regulate the siting of wireless towers. *City of Arlington*, 569 U.S. at 305 ("We granted certiorari . . . limited to the first question presented: 'Whether . . . a court should apply *Chevron* to . . . an agency's determination of its own jurisdiction.'" Pet. for Cert. in No. 11-1545, p. i.).

118. Indeed, it is not at all clear that Justice Scalia would have rejected the proposition that courts must always determine whether an agency is acting within the scope of its delegated authority to regulate. As he wrote in *City of Arlington*: "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*." 569 U.S. at 297.

119. MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994).

120. Cuomo v. Clearing House Ass'n, 557 U.S. 519 (2009).

121. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014); Gonzales v. Oregon, 546 U.S. 243 (2006).

122. Soc. Sec. Bd. v. Nierotko, 327 U.S. 358, 369 (1946) ("An agency may not finally decide the limits of its statutory power. That is a judicial function.").

123. 5 U.S.C. § 706(2)(C).

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