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### Administrative Law's Extraordinary Cases

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# ADMINISTRATIVE LAW'S EXTRAORDINARY CASES

JONATHAN SKINNER-THOMPSON\*

Ordinarily, courts apply the familiar *Chevron* two-step when analyzing an agency's interpretation of a statute.<sup>1</sup> But what of "extraordinary cases"—those involving "a question of deep economic and political significance"?<sup>2</sup> Scholars have struggled over the years to place this "major questions" doctrine into the *Chevron* framework.<sup>3</sup> One warns that this uncertainty could lead to a "chilling effect" on agency action.<sup>4</sup> Another views the doctrine as potentially more nefarious—an unjustified power grab by the Supreme Court.<sup>5</sup> And yet, it might also be an "important and necessary concession," a "safety valve for *Chevron*."<sup>6</sup> While the doctrine seems to have reemerged in recent years, we are now even more befuddled by its application. Indeed, it has an "air of judicial improvisation."<sup>7</sup>

This Essay recognizes that at least one Justice, newly appointed Justice Kavanaugh, may be inclined to take the doctrine in still another direction.<sup>8</sup> So although this Essay attempts to reground the major

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1. *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015) (citing *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)). "Under that framework, [courts] ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable." *Id.*

2. *Id.* at 2488–89.

3. See, e.g., Kevin O. Leske, *Major Questions About the 'Major Questions' Doctrine*, 5 MICH. J. OF ENVTL. & ADMIN. L. 479 (2016) (discussing emergence and challenges of major questions doctrine); Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) (discussing problems with the major questions doctrine).

4. See Jonas Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 476–80 (2016) (discussing the "chilling effect" on agency action).

5. See generally Lisa Heizerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933 (2017) (describing the new canons as "power canons").

6. Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent 'Major Questions' Doctrine*, 49 CONN. L. REV. 355, 359 (2016).

7. Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2202 (2016).

8. See *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (suggesting that "major national policy positions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive

questions doctrine in its original step, *Chevron* step one, it also tries to anticipate potential twists in light of Justice Kavanaugh’s prior opinions<sup>9</sup> and recent statements.<sup>10</sup>

Finally, this Essay explores ramifications of the major questions doctrine, including its twists and turns, in view of an issue of utmost economic and political significance: climate change.

Because the following sections discuss administrative law’s extraordinary cases in the *Chevron* framework, it merits a brief refresher. In applying *Chevron*, courts first—and always—examine “whether Congress has directly spoken to the precise question at issue.”<sup>11</sup> If the answer is clear, courts (and the agency) “must give effect to the unambiguously expressed intent of Congress.”<sup>12</sup> If the statute is silent or ambiguous, in contrast, courts must determine whether the agency’s interpretation “is based on a permissible construction of the statute.”<sup>13</sup> This framework is commonly referred to as the *Chevron* two-step.

The *Chevron* two-step is not without its critics.<sup>14</sup> The chief critique is that *Chevron*’s second step denies the judiciary its constitutional obligation to “say what the law is.”<sup>15</sup> Because of this concern, courts may be reluctant to cede interpretive authority to executive agencies (especially out of a belief that those agencies are not politically accountable). On the other hand, *Chevron*’s defenders have argued that concluding “that a statute delegates power to an executive agency is still an interpretation.”<sup>16</sup> Thus, an implicit statutory delegation is not

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branch.”). Justice Gorsuch might agree that the major questions doctrine stands for the “constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.” *Gundy v. U.S.*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

9. See *U.S. Telecom Assoc. v. FCC*, 855 F.3d 381, 417–26 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (discussing why the case should be heard on en banc).

10. See *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari) (suggesting that “major national policy positions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive branch”).

11. *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984).

12. *Id.* at 843.

13. *Id.*

14. See, e.g., Amanda Frost, *Academic highlight: Hamburger and Siegel on the constitutionality of Chevron deference*, SCOTUSBLOG (May 17, 2018), <https://www.scotusblog.com/2018/05/academic-highlight-hamburger-and-siegel-on-the-constitutionality-of-chevron-deference/> (discussing various views of justices and academics on the *Chevron* two-step).

15. *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

16. Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 942 (2018).

“the power to interpret the statute, but the power to make a policy choice within the limits . . . of the statute.”<sup>17</sup> And, *Chevron* explains it is in this policy space, which the judiciary must avoid venturing: “the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views . . . are not judicial ones.” Instead, the “Constitution vests such responsibilities in the political branches.”<sup>18</sup> While this Essay does not contend with the larger constitutional debate over *Chevron*, the debate underscores growing judicial discomfort in these extraordinary cases that may inform the future of the major questions doctrine.

### I. STEP ONE ORIGINS: *MCI* AND *BROWN & WILLIAMSON*

The origins of the major questions doctrine can be traced to two core cases: *MCI Telecommunications Corp. v. American Telephone & Telegraph*<sup>19</sup> and *FDA v. Brown & Williamson Tobacco*.<sup>20</sup> There may be others to consider—for example, Cass Sunstein identifies a major questions trilogy, adding *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,<sup>21</sup> whereas Jonas Monast considers *Industrial Union v. American Petroleum Institute*<sup>22</sup> the doctrine’s foundation.<sup>23</sup> But these two opinions embody the genesis (*MCI*) and common refrain (*Brown & Williamson*) that lead to the doctrinal incantation: “We expect Congress to speak clearly if it wishes to assign an agency decisions of vast ‘economic and political significance.’”<sup>24</sup>

#### A. *MCI Telecommunications v. AT&T*

*MCI*, as the first major questions case, addressed the Federal Communications Commission’s (FCC’s) attempt to exempt certain common carriers from having to file tariffs with the Commission.<sup>25</sup>

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17. *Id.* at 937.

18. *Chevron*, 467 U.S. at 866.

19. 512 U.S. 218 (1994).

20. 529 U.S. 120 (2000).

21. 515 U.S. 687 (1995); *see* Sunstein, *supra* note 3, at 219 (citing *Babbitt* in reference to the “Step One trilogy”).

22. 448 U.S. 607 (1980).

23. Monast, *supra* note 4, at 453. Blake Emerson would also consider the *Industrial Union* case as “the clearest precedent for the major questions doctrine.” Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2044 (2018). However, the article does not include the case because it predates *Chevron*. *Id.* at 2044 n.132.

24. *Util. Air Regulatory Grp. v. EPA (UARG)*, 573 U.S. 302, 324 (2014).

25. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 220 (1994).

AT&T, the sole dominant carrier, objected.<sup>26</sup>

The central dispute concerned the meaning of the phrase “modify any requirement” in section 203(b)(2) of the Communications Act of 1934.<sup>27</sup> After surveying several dictionaries, the Court found that the word *modify*, “ha[ving] a connotation of increment or limitation,” means “to change moderately or in minor fashion.”<sup>28</sup> Accordingly, the Commission’s policy could be justified only “if it makes a less than radical or fundamental change in the Act’s tariff-filing requirement.”<sup>29</sup> But it did not. Rate filings, the Court explained, are “the essential characteristic of a rate-regulated industry.”<sup>30</sup> The Commission’s policy, however, fundamentally revised the statute.<sup>31</sup> It is “highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”<sup>32</sup> Accordingly, the Commission’s interpretation was not entitled to deference because it went beyond the meaning that the statute can bear.<sup>33</sup>

The case did not expressly identify a clear statement principle for answering “major questions,” nor was it an “extraordinary” case. It would come to be recognized, however, as a guiding principle for the Court in pronouncing a new doctrine.

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

Nearly six years after *MCI*, the Court issued the seminal opinion establishing the major questions doctrine. In *Brown & Williamson*, the Food and Drug Administration (FDA) had asserted jurisdiction over tobacco products by concluding that nicotine is a “drug” within the meaning of the Food, Drug, and Cosmetic Act, and finding that cigarettes and smokeless tobacco constituted “combination products” that deliver nicotine to the body.<sup>34</sup> But “once the FDA fulfilled its statutory obligation to classify tobacco products, it could not allow

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26. *Id.* at 222.

27. *Id.* at 225.

28. *Id.*

29. *Id.* at 229.

30. *Id.* at 231.

31. *Id.*

32. *Id.*

33. *Id.* at 218–19.

34. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).

them to be marketed.”<sup>35</sup> In other words, “the Act would require the agency to ban them.”<sup>36</sup>

Because the case involved the FDA’s interpretation of a statute that it administered, the Court first asked “whether Congress has directly spoken to the precise question at issue.”<sup>37</sup> If so, the Court’s inquiry would reach an end—the Court “must give effect to the unambiguously expressed intent of Congress.”<sup>38</sup> But the Court explained that this inquiry “is shaped, at least in some measure, by the nature of the question presented.”<sup>39</sup> Major questions—and indeed, extraordinary cases—may provide reason to hesitate before concluding that Congress had intended an implicit delegation of authority through statutory ambiguity.<sup>40</sup> In the case at hand, the FDA’s assertion of jurisdiction over a significant and unique industry plainly contradicted “Congress’ consistent judgment to deny the FDA this power.”<sup>41</sup> Guided by *MCI*, the Court concluded that “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”<sup>42</sup>

In both *MCI* and *Brown & Williamson*, the Court focused its inquiries on Congress’ unambiguous intent.<sup>43</sup> This suggests that both cases were decided at *Chevron* step one. In fact, Justice Scalia later objected to the Court’s citation to *Brown & Williamson* in a case interpreting the Controlled Substances Act (CSA) by explaining that *Brown & Williamson* “relied on the first step of the *Chevron* analysis to determine that Congress had spoken to the precise issue in question, impliedly repealing the grant of jurisdiction on which the [FDA]

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35. *Id.* at 136.

36. *Id.* at 137.

37. *Id.* at 132 (quoting *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984)).

38. *Id.* (quoting *Chevron*, 467 U.S. at 843).

39. *Id.* at 159.

40. *Id.* To support this new pronouncement, the Court quoted then-Judge Stephen Breyer’s 1986 essay, *Judicial Review of Questions of Law & Policy*, 38 ADMIN. L. REV. 363, 370 (1986). Justice Breyer, incidentally, dissented from the majority’s opinion. *Brown & Williamson*, 529 U.S. at 161–92 (Breyer, J., dissenting); see also Sunstein, *supra* note 3, at 241 (discussing Justice Breyer’s dissent and describing it as a “power rebuttal to his own argument from 1986”).

41. *Brown & Williamson*, 529 U.S. at 160.

42. *Id.*

43. See *id.* at 161 (“Reading the FDCA as a whole, as well as in conjunction with Congress’ subsequent tobacco-specific legislation, it is *plain* that Congress has not given the FDA the authority that it seeks to exercise here.”); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) (“It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”).

relied.”<sup>44</sup> Accordingly, he explained, *Brown & Williamson* is “obviously inapt” where Congress has not “‘spoken directly’ to the subject in any way beyond the text of the CSA.”<sup>45</sup> In another case, Justice Scalia explained that “*Chevron* establishes a presumption that ambiguities are to be resolved (within the bounds of reasonable interpretation) by the administering agency.”<sup>46</sup> Thus, at least as originally articulated, the major questions doctrine was envisioned as an application of *Chevron*. “The implausibility of Congress’ leaving a highly significant issue unaddressed,” according to Justice Scalia, “is assuredly one of the factors to be considered in determining *whether there is ambiguity*, but once ambiguity is established the consequences of *Chevron* attach.”<sup>47</sup>

## II. STEP ZERO SIDE-STEP: GONZALEZ V. OREGON AND KING V. BURWELL

Growing discomfort with *Chevron* among the Justices,<sup>48</sup> however, may be steering the major questions doctrine away from its doctrinal origin. Rather than applying the doctrine at *Chevron* step one, the Court is using it to deny deference at *Chevron* step zero (discussed below) but also at *Chevron* step two (discussed in Section III).

First, what is step zero? The term, crafted by Thomas Merrill and Kristin Hickman, describes the step taken by courts before moving on to *Chevron* step one,<sup>49</sup> that is, the “inquiry into whether the *Chevron* framework applies at all.”<sup>50</sup> Like Justice Scalia, Cass Sunstein regards *MCI* and *Brown & Williamson* as step one cases, not as step zero cases.<sup>51</sup> “The reason,” Sunstein said, “is that there is no justification for the conclusion that major questions should be resolved by courts rather than agencies.”<sup>52</sup> That there may be some distinction between big questions and little ones seems to come from then-Judge Breyer’s essay

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44. *Gonzales v. Oregon*, 546 U.S. 243, 291 n.6 (2006) (Scalia, J., dissenting) (citing *Brown & Williamson*, 529 U.S. at 160–61).

45. *Id.*

46. *Christensen v. Harris County*, 529 U.S. 576, 589 n.\* (2000) (Scalia, J., concurring).

47. *Id.* (emphasis added) (citations omitted).

48. *See, e.g., Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (“Given the concerns raised by some Members of this Court . . . , it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.” (citations omitted)).

49. Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 90 GEO. L.J. 833, 836 (2001).

50. Sunstein, *supra* note 3, at 191.

51. *Id.* at 243.

52. *Id.*

on *Judicial Review of Questions of Law and Policy*.<sup>53</sup> In his article, which was cited by the Court in *Brown & Williamson*,<sup>54</sup> then-Judge Breyer argued that “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”<sup>55</sup> To that end, questions that raise important and delicate legal questions may not have been delegated to executive agencies to answer.<sup>56</sup> On its face, this distinction may seem sensible, but Cass Sunstein retorts “as with the distinction between jurisdictional and non-jurisdictional questions, the difference between interstitial and major questions is extremely difficult to administer.”<sup>57</sup> The analogy was perhaps prophetic.

In 2013, the Court decided *City of Arlington v. FCC*,<sup>58</sup> holding that an agency’s interpretation of statutory ambiguity concerning the scope of its regulatory authority (i.e., its jurisdiction) is entitled to deference under *Chevron*.<sup>59</sup> “[T]he distinction,” Justice Scalia wrote for the majority, “between ‘jurisdictional’ and ‘nonjurisdictional’ interpretations is a mirage.”<sup>60</sup> And applying *Chevron* to “big, important” matters as well as “humdrum, run-of-the-mill stuff” does no disservice to *Chevron*.<sup>61</sup> Indeed, the Court—citing to both *MCI* and *Brown & Williamson*—“ha[s] applied *Chevron* where concerns about agency self-aggrandizement are at their apogee: in cases where an agency’s expansive construction of the extent of its own power would have wrought a fundamental change in the regulatory scheme.”<sup>62</sup> Though not a major questions case itself, *City of Arlington* confirms not only that *MCI* and *Brown & Williamson* are step one cases, but also that major questions can be addressed through *Chevron*.<sup>63</sup>

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53. See Breyer, *supra* note 40 and accompanying text.

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

55. Breyer, *supra* note 40, at 370.

56. *Id.* at 371.

57. Sunstein, *supra* note 3, at 243.

58. *City of Arlington v. FCC*, 569 U.S. 290 (2013).

59. *Id.* at 290.

60. *Id.* at 297.

61. *Id.*

62. *Id.* at 303–04 (referring to both *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) and *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994)).

63. See *id.* at 303–04 (discussing *Brown & Williamson*, 529 U.S. at 133 and noting that “the threshold question was the ‘appropriate framework for analyzing’ the FDA’s assertion of ‘jurisdiction to regulate tobacco products,’—a question of vast ‘economic and political magnitude[.]’ ‘Because this case involves an administrative agency’s construction of a statute that it administers,’ we held, *Chevron* applied.” (quoting *Brown & Williamson*, 529 U.S. at 126, 132, 133)).



In dissent, Chief Justice Roberts expressed his fundamental disagreement with *City of Arlington*. He believed that administrative agencies enjoyed “a significant degree of independence”<sup>64</sup> and “wield[ed] vast power” over “every aspect of daily life.”<sup>65</sup> Whether Congress has conferred a power to act, therefore, “is the ‘relevant question[] of law’ that must be answered before affording *Chevron* deference.”<sup>66</sup> To support his position, Chief Justice Roberts highlighted the first major questions case to follow *Brown & Williamson—Gonzales v. Oregon*, 546 U.S. 243 (2006).<sup>67</sup>

#### A. *Gonzales v. Oregon*

*Gonzales* is not always considered a major questions case; Cass Sunstein, for example, does not describe it as one in *Chevron Step Zero*.<sup>68</sup> Blake Emerson, however, identifies *Gonzales* as a “somewhat different[]” application of the major questions doctrine.<sup>69</sup> The question in the case was whether the Controlled Substances Act authorized the U.S. Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, even when a state law permitted the procedure.<sup>70</sup> The Court declined to recognize an implicit delegation of rulemaking authority to the Attorney General.<sup>71</sup> The Court, citing *Brown & Williamson*, reasoned that the interpretive rule construing the Controlled Substances Act to prohibit the prescription of certain drugs used in physician-assisted suicide “did not fall under the *Chevron* framework, because Congress would not have delegated authority over an issue of such political significance through the statute’s registration provisions.”<sup>72</sup> The Attorney General, unlike the expert agencies in *MCI* and *Brown & Williamson*, held no special

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64. *Id.* at 313. (Roberts, J., dissenting).

65. *Id.* (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010)).

66. *Id.* at 317.

67. *See id.* at 321 (“*Adams Fruit*, *Mead*, and *Gonzales* thus confirm that *Chevron* deference is based on, and finds legitimacy as, a congressional delegation of interpretive authority.”).

68. *See* Sunstein, *supra* note 3, at 191 n.19 (characterizing the inquiry in *Gonzales* as being decided at step zero).

69. Emerson, *supra* note 23, at 2037.

70. *Gonzales v. Oregon*, 546 U.S. 243, 248–49 (2006).

71. *See id.* at 245 (“The specific respects in which the Attorney General is authorized to make rules under the CSA show that he is not authorized to make a rule declaring illegitimate a medical standard for patient care and treatment specifically authorized under state law.”).

72. Emerson, *supra* note 23, at 2037; *see Gonzales*, 546 U.S. at 267 (“The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA’s registration provision is not sustainable.”).

expertise in carrying out the interpretative power allegedly invested in him by Congress.<sup>73</sup> As a result, the Court owed no deference under *Chevron* to the Attorney General.<sup>74</sup> But, as noted above, Justice Scalia's dissent in *Gonzales* called out the majority's citation to *Brown & Williamson* as a basis to side-step application of *Chevron*.<sup>75</sup>

### *B. King v. Burwell*

Several years after *Gonzales*, the Court again invoked a major questions principle to deny *Chevron* deference to a federal agency, this time, Justice Roberts writing for the majority.<sup>76</sup> In *King v. Burwell*, the Internal Revenue Service issued a rule implementing a tax credit provision of the Patient Protection and Affordable Care Act.<sup>77</sup> The provision, according to the Court, is central to the statutory scheme and the question of whether tax credits are available on Federal Exchanges was “a question of deep ‘economic and political significance.’”<sup>78</sup> And, as in *Gonzales*, the administrative actor had no expertise in the particular area of regulation.<sup>79</sup> Accordingly, the Court declined to apply *Chevron* and determined that “it must itself

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73. See *Gonzales*, 546 U.S. at 269 (“The deference here is tempered by the Attorney General’s lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment.”).

74. See *id.* at 268 (“Since the Interpretive Rule was not promulgated pursuant to the Attorney General’s authority, its interpretation of ‘legitimate medical purpose’ does not receive *Chevron* deference.”).

75. See *id.* at 291 n.6 (Scalia, J., dissenting) (“The other case cited by the Court, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291, 146 L.Ed.2d 121 (2000), is even more obviously inapt. There we relied on the first step of the *Chevron* analysis to determine that Congress had spoken to the precise issue in question, impliedly repealing the grant of jurisdiction on which the Food and Drug Administration relied. 529 U.S., at 160–161, 120 S. Ct. 1291. Here, Congress has not expressly or impliedly authorized the practice of assisted suicide, or indeed ‘spoken directly’ to the subject in any way beyond the text of the CSA.”).

76. See *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (finding that this was an “extraordinary case[]” where “there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); Emerson, *supra* note 23, at 2022 (summarizing the holding of *King v. Burwell*, 135 S. Ct. 2480 (2015)).

77. *King*, 135 S. Ct. at 2487; Emerson, *supra* note 23, at 2038; see also Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012) (codified at 26 C.F.R. pts. 1 & 602) (explaining the final regulations relating to the health insurance premium tax credit enacted by the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010).

78. *King*, 135 S. Ct. at 2489 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

79. See *King*, 135 S. Ct. at 2489 (“It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.”).

‘determine the correct reading’ of the tax credit provision.”<sup>80</sup>

Perhaps *Gonzales* and *King* are not appropriate *Chevron* cases, and, therefore, not truly major questions cases. In *Chevron*, the Court addressed an “agency’s construction of the statute *which it administers*,”<sup>81</sup> which “necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”<sup>82</sup> Both *MCI* and *Brown & Williamson* addressed interpretations proffered by the designated executive agencies. But in *Gonzales* and *King*, the executive agencies were acting outside their substantive fields. In such cases, absent clear Congressional intent, the Court found it would not be appropriate to defer, because the interpretations were advanced by non-expert agencies.<sup>83</sup> The cases are, perhaps, appropriately viewed as outside the *Chevron* framework and not truly applications of *MCI* and *Brown & Williamson*. To that end, there may be parallel major questions doctrines: 1) Congress is unlikely to delegate authority to answer major questions implicitly to a non-expert agency (*Gonzales* and *King*); and 2) Even expert agencies must have clear authorization to adopt transformative interpretations of statutes they administer (*MCI* and *Brown & Williamson*).

### III. STEP TWO CONFUSION: *UTILITY AIR REGULATORY GROUP V. EPA (UARG)*

Against a backdrop of growing scientific consensus on the implications of unregulated greenhouse gas emissions, a group of States, local governments, and private organizations petitioned the Court to review whether the Environmental Protection Agency (EPA) “has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether [EPA’s] stated reasons for refusing to do so are consistent with the [Clean Air Act (CAA)].”<sup>84</sup> This case, *Massachusetts v. EPA*,<sup>85</sup> arose after EPA denied a rulemaking petition, explaining, in part, “that it was ‘urged on in this view’ by [the] Court’s decision in *Brown & Williamson*.”<sup>86</sup> The Court took a different view.

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80. Leske, *supra* note 3, at 497 (citing *King*, 135 S. Ct. at 2489).

81. *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984) (emphasis added).

82. *Id.* at 843.

83. *See King*, 135 S. Ct. at 2489 (“It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.” (citing *Gonzales v. Oregon*, 546 U. S. 243, 266–67 (2006))).

84. *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

85. *Id.* at 505.

86. *Id.* at 512 (citations omitted).

In a 5-4 decision, the Court “found critical at least two considerations” that distinguished *Brown & Williamson* from the case at hand—and, for this reason, *Massachusetts* is not a major questions case.<sup>87</sup> First, the Court explained that the statutory scheme of the Food, Drug, and Cosmetic Act would have required tobacco to be immediately banned from the marketplace once the FDA asserted regulatory authority over tobacco products, which was clearly contrary to congressional intent.<sup>88</sup> Second, the FDA repeatedly disclaimed authority to regulate tobacco in congressional hearings, in light of which Congress enacted tobacco-specific legislation that “effectively ratified the FDA’s previous position that it lacks jurisdiction to regulate tobacco.”<sup>89</sup>

The Court found no counterpart in EPA’s regulation of greenhouse gases. Recognizing that Congress “might not have appreciated the possibility that burning fossil fuels could lead to global warming,” the Court believed that Congress “did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the [CAA] obsolete.”<sup>90</sup> Thus, Congress’ decision to use “broad language . . . reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.”<sup>91</sup> Accordingly, the Court held that EPA has statutory authority to regulate greenhouse gas emissions under Title II of the CAA.<sup>92</sup>

*Massachusetts* seemed to settle the major questions debate when it comes to climate change and the CAA. In fact, the Court thereafter confirmed that Congress designated EPA “as best suited to serve as primary regulator of greenhouse gas emissions.”<sup>93</sup> In *American Electric Power Co. v. Connecticut (AEP)*, eight states, New York City, and three land trusts brought a federal common law nuisance claim against five major electric power companies, requesting injunctive relief to cap and reduce carbon dioxide emissions from these companies over a period of years.<sup>94</sup> The Court held that the CAA, however, had displaced federal common law since “Congress *delegated to EPA* the

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87. *Id.* at 531.

88. *Id.*

89. *See id.* (referring to *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000)).

90. *Id.* at 532.

91. *Id.*

92. *Id.*

93. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011).

94. *Id.* at 415.

decision whether and how to regulate carbon-dioxide emissions from power plants.”<sup>95</sup>

### A. *UARG*

After *Massachusetts* (and as acknowledged in *AEP*), EPA began considering whether greenhouse gas emissions should be regulated under Title II of the CAA.<sup>96</sup> In doing so, EPA believed that:

[O]nce greenhouse gas emissions became regulated under any part of the [CAA], the PSD and Title V permitting requirements would apply to all stationary sources with the potential to emit greenhouse gasses in excess of the statutory thresholds: 100 tons per year under Title V, and 100 or 250 tons per year under the PSD program depending on the type of source.<sup>97</sup>

EPA hesitated. A plain reading of its Title V and Prevention of Significant Deterioration (PSD) programs “would constitute an ‘unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land,’ yet still be ‘relatively ineffective at reducing greenhouse gas concentrations.’”<sup>98</sup> Recognizing these complications, EPA announced steps to “tailor” the PSD and Title V programs to greenhouse gases—referred to as the Tailoring Rule.<sup>99</sup> For sources that otherwise triggered PSD requirements, so called “anyway” sources, EPA would require compliance with “best available control technology” (BACT) emission standards for greenhouse gases. The Court, in a split opinion, rejected the Tailoring Rule but upheld the applicability of greenhouse gas BACT requirements to “anyway” sources.<sup>100</sup>

#### 1. The Court Rejects the Tailoring Rule

The Tailoring Rule was rejected by the Court in a 5-4 decision.<sup>101</sup> Justice Scalia, writing for the majority, structured this aspect of the

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95. *Id.* at 426 (emphasis added).

96. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 310 (2014); *see also Am. Elec. Power*, 564 U.S. at 417–18 (discussing EPA’s actions following the *Massachusetts* decision).

97. *Util. Air Regulatory Grp.*, 573 U.S. at 310. For the sake of brevity, the PSD program concerns pre-construction permits and Title V concerns operating permits.

98. *Id.* at 310–11 (quoting *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354, 44,355 (July 30, 2008)).

99. *See generally* *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010) (discussing the mechanics of the Tailoring Rule).

100. *Util. Air Regulatory Grp.*, 573 U.S. at 332.

101. *Id.* at 302.

Court's ruling into three parts. First, the Court determined that EPA was not compelled to regulate greenhouse gases under the PSD and Title V programs.<sup>102</sup> Second, the Court rejected EPA's rationale that the agency could exercise discretion when including greenhouse gases under the PSD and Title V programs.<sup>103</sup> And third, the Court concluded that EPA had no power to tailor its regulation of greenhouse gases in the face of unambiguous statutory terms.<sup>104</sup>

Under the second part, Justice Scalia articulated two independent reasons for rejecting EPA's rationale in this case. To start, *Chevron's* deferential framework requires that agencies "operate 'within the bounds of reasonable interpretation.'"<sup>105</sup> And in line with this instruction, "an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole,' does not merit deference."<sup>106</sup> Here, a plain reading of the statute would require several million new permits and would "place plainly excessive demands on limited governmental resources."<sup>107</sup> Accordingly, the majority reasoned that Congress could not have intended for the PSD and Title V programs to ordinarily apply to greenhouse gas emissions.

But the Court did not end there. Justice Scalia said that "EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."<sup>108</sup> Justice Scalia wrote:

When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."<sup>109</sup>

In citing *Brown & Williamson*, the Court rejected EPA's position that

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102. *See id.* at 320 ("In sum, there is no insuperable textual barrier to EPA's interpreting 'any air pollutant' in the permitting triggers of PSD and Title V . . . to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written.").

103. *Id.* at 321.

104. *Id.* at 327.

105. *Id.* at 337 (quoting *City of Arlington v. FCC*, 569 U.S. 290, 298 (2013)).

106. *Id.* (quoting *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 339 (2013)).

107. *Id.* at 323–24 (stated after an overview of the PSD and Title V programs).

108. *Id.* at 324.

109. *Id.* (quoting *Brown v. Williamson*, 529 U.S. 120, 159, 160 (2000)) (citing *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) and *Indus. Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 645–46 (1980) (plurality opinion)).

it was entitled to deference under *Chevron* step two.<sup>110</sup>

In part three, Justice Scalia concluded that “[a]n agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.”<sup>111</sup> In the end, EPA never seemed to contest that the statutory text would have required an “unprecedented expansion” of its regulatory authority; indeed, that concern was the basis for EPA’s argument that the agency was justified in reinterpreting the plain language to avoid a clearly unreasonable outcome.<sup>112</sup>

## 2. The Court Upholds BACT Emission Standards for Greenhouse Gases

In a fractured opinion, the Court upheld BACT emission standards for greenhouse gases.<sup>113</sup> This time, Justice Scalia organized a two-part ruling. First, the Court addressed concerns that BACT is fundamentally unsuited to greenhouse gas regulation by turning to EPA’s guidance on BACT limitations (decided 5-4); and second, the Court deferred to EPA’s decision to require BACT for non-*de minimis* amounts of greenhouse gas emissions from anyway sources (decided 7-2).<sup>114</sup>

Despite invoking *Brown & Williamson* with respect to the Tailoring Rule, Justice Scalia refrained from applying the case to interpreting BACT<sup>115</sup> —defined as “an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation” that is “achievable . . . through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques.”<sup>116</sup> Industry petitioners argued to the Court that BACT “has traditionally been about end-of-stack controls”—e.g., pollution

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110. *Id.* at 302.

111. *Id.* at 325.

112. *Id.* at 310–11.

113. *See id.* at 334 (“EPA may, however, continue to treat greenhouse gases as a ‘pollutant subject to regulation under this chapter’ for purposes of requiring BACT for ‘anyway’ sources.”).

114. *Id.* at 332.

115. *See id.* at 331–32 (“Whereas the dubious breadth of ‘any air pollutant’ in the permitting triggers suggests a role for agency judgment in identifying the subset of pollutants covered by the particular regulatory program at issue, the more specific phrasing of the BACT provision suggests that the necessary judgment has already been made by Congress. . . . Even if the text were not clear, applying BACT to greenhouse gases is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority, as to convince us that EPA’s interpretation is unreasonable.”).

116. 40 U.S.C. § 7479(3) (1955).

controls that can be added to a smokestack—and applying BACT to greenhouse gases would “make it more about regulating energy use, which will enable regulators to control ‘every aspect of a facility’s operation and design,’ right down to the ‘light bulbs in the factory cafeteria.’”<sup>117</sup> While EPA recognized that “compulsory improvements in energy efficiency will be the ‘foundation’ of greenhouse-gas BACT,” EPA “has long interpreted BACT as required only for pollutants that the source itself emits.”<sup>118</sup> With this in mind, Justice Scalia (writing for a 5-4 majority) was not convinced that the same fears raised under the Tailoring Rule were necessarily implicated by applying BACT to greenhouse gases.<sup>119</sup> The Court expressed no opinion on whether “BACT may be used to force some improvements in energy efficiency” or whether EPA could use other statutory mechanisms to obtain “reductions in a facility’s demand for energy from the electric grid.”<sup>120</sup>

Finally, in a 7-2 decision, the Court concluded that EPA reasonably decided to require BACT for greenhouse gases emitted by sources otherwise subject to PSD review.<sup>121</sup> Here, Justice Scalia reasoned that “[e]ven if the text [of the BACT provision] were not clear, applying BACT to greenhouse gases is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority, as to convince us that EPA’s interpretation is unreasonable.”<sup>122</sup>

In *MCI* and *Brown & Williamson*, the Court focused its inquiries on Congress’ unambiguous intent.<sup>123</sup> In *Gonzales* and *King*, the Court denied *Chevron* deference to agencies that were acting outside of their expert capacities. In *UARG*, however, Justice Scalia seems to invoke *Brown & Williamson* while assessing the reasonableness of EPA’s interpretation. Although he omits any reference to *Chevron* step two, Justice Scalia proceeds to consider whether EPA’s interpretation is “permissible,” which ordinarily provides EPA with judicial

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117. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 330 (2014).

118. *Id.* at 330–31.

119. *Id.* at 331–33.

120. *Id.* at 330–31.

121. *Id.* at 331.

122. *Id.* at 332.

123. “Reading the FDCA as a whole, as well as in conjunction with Congress’ subsequent tobacco-specific legislation, it is *plain* that Congress has not given the FDA the authority that it seeks to exercise here.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (emphasis added); *see also MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) (“It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion . . .”).



deference.<sup>124</sup> In fact, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>125</sup> But here Justice Scalia dismisses that provision by presuming judicial skepticism when agency decisions may have “vast ‘economic and political significance.’”<sup>126</sup>

How then does one reconcile *UARG* with the step one analyses in *MCI* and *Brown & Williamson*? If we recall, Justice Scalia also said that “once ambiguity is established the consequences of *Chevron* attach.”<sup>127</sup> Perhaps, he might have responded that *UARG* stands for the proposition that courts must still “tak[e] seriously, and apply[] rigorously, in all cases, statutory limits on agencies’ authority.”<sup>128</sup> Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, “the agency can go no further than the ambiguity will fairly allow.”<sup>129</sup> In *UARG*, it may be difficult to imagine a term “less ambiguous than the precise numerical thresholds” established by Congress.<sup>130</sup> So replacing those numbers with figures an order of magnitude greater may have clearly gone beyond the bounds of statutory authority.<sup>131</sup>

#### IV. JUSTICE KAVANAUGH: MAJOR RULES AND NONDELEGATION

Though *MCI*, *Brown & Williamson*, and *UARG* all clearly applied *Chevron* to extraordinary cases of administrative law, then-Judge Kavanaugh added a new twist on the major questions doctrine: “while the *Chevron* doctrine *allows* an agency to rely on statutory ambiguity to issue *ordinary* rules, the major rules doctrine *prevents* an agency

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124. To the extent that this part relates to *Chevron* step one, however, Justice Scalia seems to require that Congressional intent not only be clear but that it be *really* clear when an agency’s decision may have “vast ‘economic and political significance.’” *Util. Air Regulatory Grp.*, 573 U.S. at 324 (citing *Brown & Williamson*, 529 U.S. at 160). Such a requirement would seem to be an insurmountable hurdle to *Chevron* step two: either the statute is clear or it is not. The Court could have concluded that *Chevron* step two was never implicated, however, because the statutory thresholds for Title V and PSD are clear. Citing *Brown & Williamson* in this context would have been appropriate.

125. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984).

126. *Util. Air Regulatory Grp.*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 160).

127. *Christensen v. Harris Cty.*, 529 U.S. 576, 589 n.\* (2000) (Scalia, J., concurring) (citations omitted).

128. *City of Arlington, v. FCC*, 569 U.S. 290, 307 (2013).

129. *Id.*

130. *Util. Air Regulatory Grp.*, 573 U.S. at 326.

131. *Id.*

from relying on statutory ambiguity to issue *major* rules.”<sup>132</sup> “Major rules,” in other words, must be authorized by clear congressional authorization—not *Chevron* step two.<sup>133</sup>

So, what is a major rule? Judge Kavanaugh’s dissent in *United States Telecom Association v. FCC* provides some insight on the factors he found relevant (though he concedes the task “has a bit of a ‘know it when you see it’ quality”),<sup>134</sup> including: “the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue.”<sup>135</sup> And “when an agency relies on a long-extant statute to support the agency’s bold new assertion of regulatory authority,” the Court’s concern is likely to be heightened.<sup>136</sup>

This twist on the major questions doctrine is not subtle. Under the former doctrine, the question must have vast economic and political significance: can the FDA ban tobacco products? Can EPA regulate greenhouse gases under Title II of the CAA? What about under Title I (concerning National Ambient Air Quality Standards and certain stationary source regulations) and Title VI (concerning stratospheric ozone protection)? Judge Kavanaugh expands the inquiry past *whether* an agency can regulate and looks at *how*—that is, did Congress authorize this specific rule, because it has economic and political significance? But what of rules that involve a mix of statutory terms, some clear and others ambiguous? Does every aspect of the rule require clear authorization? If not, what components are “ordinary” versus “major”?

Perhaps it may not matter. Just last year, Justice Kavanaugh suggested a new direction for exceptional cases, inspired by Justice Rehnquist’s concurrence in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*<sup>137</sup> and Justice Gorsuch’s dissent in *Gundy v. United States*.<sup>138</sup> In *Industrial Union*, Justice Rehnquist believed “that

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132. U.S. Telecom Ass’n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

133. There are some who believe that Justice Kavanaugh’s “major rules” doctrine can bridge the gap between *Chevron* and a resurgent interest in the nondelegation doctrine. See generally Michael Sebring, Note, *The Major Rules Doctrine: Host Justice Brett Kavanaugh’s Novel Doctrine Can Bridge the Gap Between the Chevron and Nondelegation Doctrines*, 12 N.Y.U. J.L. & LIBERTY 189 (2018). Nathan Richardson might agree, warning “*Chevron*’s virtues in ordinary cases . . . are not worth risking.” Richardson, *supra* note 6, at 355.

134. U.S. Telecom Ass’n, 855 F.3d at 423.

135. *Id.* at 422–23.

136. *Id.* at 423.

137. 448 U.S. 607, 671–88 (1980) (Rehnquist, J., concurring).

138. 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting).

delegations of legislative authority must be judged according to common sense.”<sup>139</sup> In *Gundy*, Justice Gorsuch warned that the “intelligible principle” test threatens the separation of powers and “accelerate[s] the flight of power from the legislative to the executive branch.”<sup>140</sup> Those opinions, Justice Kavanaugh explains, would not allow congressional delegations to agencies of authority to decide major policy questions—“even if Congress expressly and specifically delegates that authority.”<sup>141</sup> The consequences of this nondelegation approach to extraordinary cases are even less clear.<sup>142</sup>

Consider again *Massachusetts v. EPA*.<sup>143</sup> There the Court explained that Congress’ use of broad language was an intentional delegation of authority to EPA to address changing circumstances and scientific developments.<sup>144</sup> But if Congress cannot delegate major policy questions to an agency (even to resolve a matter for which the agency is a recognized expert), will *Massachusetts* and *AEP* be overturned by implication? And what about applying BACT to anyway sources? Who decides what is a major policy question anyhow? While we might agree that climate change regulation fits comfortably within the major questions doctrine, Cass Sunstein warned that “the difference between interstitial and major questions is extremely difficult to administer.”<sup>145</sup> What about considering climate change when conducting an environmental impact statement as required by the National Environmental Policy Act? Does that cross an unconstitutional line? Under a nondelegation theory of the major questions doctrine, Congress might be prohibited from delegating those questions to the executive branch altogether.

## V. ON CLIMATE CHANGE

This section addresses a hypothetical regulation under the CAA.

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139. *Indus. Union.*, 448 U.S. at 675.

140. *Gundy*, 139 S. Ct. at 2142.

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

142. Or perhaps they are clear. See Ann Carlson, *Greenhouse Gas Regulations Under the Clean Air Act Are Doomed*, <https://legal-planet.org/2019/11/27/greenhouse-gas-regulations-under-the-clean-air-act-are-doomed/> (last visited May 20, 2020) (“The only question now is whether [Justice Kavanaugh] will use what is known as the ‘major questions’ doctrine, the ‘non-delegation’ doctrine, or some combination of the two to strike [EPA regulations of greenhouse gases] down.”).

143. 549 U.S. 497 (2007).

144. *Id.* at 532.

145. Sunstein, *supra* note 3, at 243.

Section 111(b) of the CAA authorizes the Administrator to issue nationally applicable standards limiting air pollution from “new sources” in source categories that cause or significantly contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.<sup>146</sup> When EPA issues such a standard, section 111(d) authorizes EPA to require—under certain circumstances—states to regulate existing sources in the same category.<sup>147</sup>

In 2013, President Barack Obama issued a memorandum directing EPA to issue standards under section 111(d) to address carbon pollution from existing power plants.<sup>148</sup> To that end, in 2015, EPA issued the Clean Power Plan (CPP), which established section 111(d) guidelines for states to follow in limiting CO<sub>2</sub> emissions from existing fossil fuel-fired power plants.<sup>149</sup> The guidelines were based on EPA’s determination of the “best system of emission reduction,” an undefined statutory term.<sup>150</sup> The CPP’s best system of emission reduction was based on the combination of three “building blocks.”<sup>151</sup> They were, 1) efficiency improvements for coal-fired power plants<sup>152</sup>; 2) substitution of existing gas-fired generation in place of existing coal-fired generation<sup>153</sup>; and 3) substitution of new zero-emitting renewable generation for both existing coal- and gas-fired generation.<sup>154</sup> The CPP faced significant opposition, and on February 9, 2016, the Supreme Court issued an unprecedented stay of the rule.<sup>155</sup>

The crux of the challenge was that EPA’s second and third building blocks represented an unprecedented expansion of statutory authority. Opponents, citing to the major questions doctrine, requested that the court apply a different standard of review for an issue of such great economic and political significance.<sup>156</sup> EPA countered that the correct course is to apply *Chevron*, reasoning that the major question

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146. 42 U.S.C. § 7411(b)(1)(A) (2012).

147. 42 U.S.C. § 7411(d) (2012).

148. Power Sector Carbon Pollution Standards, Memorandum for the Administrator of the Environmental Protection Agency (June 25, 2013), *in* 78 Fed. Reg. 39,535, 39,535–36 (July 1, 2013).

149. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,663 (Oct. 23, 2015).

150. *Id.* at 64,762.

151. *Id.* at 64,667.

152. *Id.* at 64,787.

153. *Id.* at 64,795.

154. *Id.* at 64,803.

155. *West Virginia v. EPA*, 136 S. Ct. 1000 (2016).

156. Opening Brief of Petitioner on Core Legal Issues at 32–36, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Feb. 19, 2016), Doc. 1610010.

of *whether* to regulate carbon emissions from power plants had already been answered in *AEP*—in fact, the Court specifically identified section 111 as the appropriate regulatory scheme<sup>157</sup>—and the more technical question of *how* to regulate was a matter for *Chevron*.<sup>158</sup>

On March 28, 2017, President Donald Trump signed Executive Order 13783, which specifically called for a review of the CPP and a proposal to “suspend[], revis[e], or rescind[]” it.<sup>159</sup> On July 8, 2019, EPA published its final repeal of the CPP and a replacement, called the Affordable Clean Energy Rule.<sup>160</sup> That rule identified a best system of emission reduction based on “candidate technologies” that EPA believed would lead to efficiency improvements at existing coal-fired power plants.<sup>161</sup> That rule also faces significant opposition.<sup>162</sup>

Consider now a hypothetical alternative regulation: a best system of emission reduction based on the combination of carbon capture technologies and a cap-and-trade allowance system. Such an approach would be modeled on the George W. Bush Administration’s Clean Air Mercury Rule (CAMR), which was also promulgated under section 111(d).<sup>163</sup>

Suppose first that everyone agrees that carbon capture technology is clearly a “system of emission reduction” that can be applied to

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157. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,778.

158. See Respondent EPA’s Initial Brief at 40–46, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Mar 28, 2016), Doc. 1609995 (explaining why the *Chevron* two-step is the proper standard of review and under this standard the EPA’s interpretation is entitled to deference).

159. Exec. Order No. 13,783 § 4, 82 Fed. Reg. 16,093, 16,095 (Mar. 31, 2017).

160. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019).

161. *Id.* at 32,536.

162. See *id.* at 32,521 (noting that the repeal received over 1.5 million comments during the notice and comment period).

163. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005). The regulatory history of mercury emissions from power plants may be informative for other reasons. CAMR was ultimately vacated on grounds unrelated to EPA’s interpretation of section 111. *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008). The Obama Administration responded with the Mercury and Air Toxics Standards issued under section 112, which the Administration successfully defended in the D.C. Circuit. *White Stallion Energy*, 748 F.3d 1222, 1229 (D.C. Cir. 2014). In a Petition for Writ of Certiorari, however, industry claimed that Congress “did not assign authority to EPA to act without consideration of costs.” Petition for Writ of Certiorari at 35, *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014) (No. 14-47), 2014 WL 3530750, at \*35. And “[e]ven if one assumes for purposes of argument . . . that ‘appropriate and necessary’ is ambiguous, that would still mean that, under *Brown & Williamson*, EPA’s cost-blind interpretation is unreasonable and therefore unlawful.” *Id.* While the Court ultimately granted cert, its opinion failed to mention the major questions doctrine. See *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014).

individual power plants. The next step in EPA's evaluation then is to account for costs (financial as well as environmental) in determining whether this system is indeed the "best" one for reducing emissions.

As many powerplants age, retrofitting them with costly new controls may not be financially sound.<sup>164</sup> But some owners may decide it is appropriate or economically viable. By assessing the technology in light of a cap-and-trade program, the technology might be not only more broadly applicable, but also economically feasible. That is, if an emission standard is set such that installation of carbon capture technologies could generate emission credits, those owners could 1) subsidize the installation of costly controls; and 2) allow other plants to operate without capturing their emissions (by making up the difference through the acquisition of emission credits).

The question then is whether this would be an exceptional case in administrative law. The following tries to answer this question applying each manifestation of the major questions doctrine.

First, EPA has previously interpreted "system of emission reduction" to include the combination of a cap-and-trade program and control technology.<sup>165</sup> EPA might argue, as it did in defense of the Clean Power Plan, that the question of whether the agency can regulate carbon emissions from existing power plants has already been addressed by the Court in *AEP*,<sup>166</sup> and the question of how to regulate, therefore, is assessed under *Chevron*. Further, the combined cap-and-trade/technology system does not bring about a transformative expansion of agency authority. Thus, the major questions doctrine would not be triggered at *Chevron* steps zero, one, or two.

Now consider the same scenario under a "major rules" analysis.

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164. See, e.g., Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. at 32,547 (discussing commenters that noted "that it can be much costlier and more technically challenging to retrofit" existing power plants as compared to newly constructed ones); see also *id.* at 32,548 ("[T]he costs of retrofitting pollution controls on an existing facility generally are greater than the costs of installing pollution controls on a new facility.").

165. *Id.* at 32,526 n.65 (quoting CAMR). Although environmental groups challenged this prior interpretation, see Final Opening Brief of Environmental Petitioners at 25–28, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097), 2007 WL 2155491, it was generally supported by power companies, see Brief of Petitioner Utility Air Regulatory Group at 7–9, *New Jersey v. EPA*, (D.C. Cir. 2008) (No. 05-1097), 2007 WL 3231253, at \*7–9 (arguing instead that EPA could not allow states to avoid implementing EPA's best system for reducing mercury emissions from existing coal-fired power plants).

166. See *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) ("It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions.").

Assuming there is significant political and public interest in the regulation, which would be consistent with interest in the Clean Power Plan and the Affordable Clean Energy Rule, judges could conclude that the regulation is a “major rule.” As before, the CAA does not define the phrase “system of emission reduction,” so EPA would rely on its interpretive authority to conclude that the phrase encompasses a cap-and-trade program (just like in CAMR). But as a major rule, EPA would need to identify clear congressional authority to do so. We have, potentially, two different standards of review based on the degree of public interest: whereas CAMR might have been a reasonable interpretation of an ambiguous statutory provision, EPA’s carbon rule might fail because it lacks clear congressional authorization.

Finally, consider the situation should the Court conclude that Congress has no power to delegate *any* major policy decisions to the executive branch. Climate change policy is unquestionably a major issue facing the legislative branch. While *Massachusetts v. EPA* recognized that Congress may deliberately use capacious terms to allow EPA to address unforeseeable or new environmental challenges,<sup>167</sup> and while *AEP* acknowledged that EPA was designated the expert agency to address carbon emissions from existing power plants,<sup>168</sup> a nondelegation theory of the major questions doctrine would thwart EPA’s authority to address climate change at all. In other words, even a clearly authorized regulation under section 111—e.g., carbon capture control technology—would be prohibited because the larger policy question of whether we should regulate carbon dioxide cannot be delegated to the executive branch and must, instead, be answered by Congress.

## VI. CONCLUSION

*Chevron* recognized that challenges to agency interpretations often “really center[] on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress.”<sup>169</sup> Accordingly, the Court explained, “federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”<sup>170</sup> But there are increasing calls to reconsider this

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167. 549 U.S. 497, 532 (2007) (“Because greenhouse gases fit well within the Clean Air Act’s capacious definition of “air pollutant,” we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.”).

168. *Am. Elec. Power Co.*, 564 U.S. at 428.

169. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 866 (1984).

170. *Id.*

premise.<sup>171</sup> Justice Roberts warns that while “the Constitution empowers the President to keep federal officers accountable, administrative agencies enjoy in practice a significant degree of independence.”<sup>172</sup> And this independence, he claims, counsels for increased oversight of the “headless fourth branch of government.”<sup>173</sup> In practice, however, addressing major questions may be an exception. Though Presidents cannot or do not wish to “supervise so broad a swatch of regulatory activity,”<sup>174</sup> the promulgation, repeal, and replacement of the Clean Power Plan suggests that promulgating major rules *are* supervised by the President (and thus *are* democratically accountable decisions).

The constitutional debate over *Chevron* may one day face a reckoning. But until that day, administrative law's extraordinary cases should be assessed at *Chevron* step one. As Justice Scalia once explained—the implausibility of Congress' leaving a highly significant issue unaddressed should be considered in determining *whether there is ambiguity*, but once ambiguity is established the consequences of *Chevron* should attach. This ensures that judges “respect legitimate policy choices,” *especially* major policy choices, without injecting personal preferences into that judgment.<sup>175</sup>

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171. *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring).

172. *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, J., dissenting).

173. *Id.* at 314.

174. *Id.* at 313.

175. *Chevron*, 467 U.S. at 865–66.