

Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine

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ABSTRACT. On the final day of Justice Breyer’s tenure on the U.S. Supreme Court, the Court formally recognized the major questions doctrine, which requires an agency to point to “clear congressional authorization” before it exercises a novel power with economic and political significance. Though its origins are disputed, our account traces the doctrine to *MCI Telecommunications Corp. v. AT&T*—a decision announced just months before Breyer joined the Court—and from there to an article Breyer penned while a judge on the U.S. Court of Appeals for the First Circuit. The doctrine therefore provides a vantage point from which to survey Breyer’s administrative-law jurisprudence in panorama. That is this Essay’s aim.

We begin by examining the major questions doctrine, the details of which remain hazy, in large part because the Court is of many minds about what Congress does when it gives discretion to agencies. Justice Breyer had one answer, to which the Essay turns next: Congress legislates in broad strokes but leaves it to agency experts to fill in the details. Courts police these experts at the boundaries. Breyer’s answer led him to follow the logic of the major questions doctrine in some cases but not others. The key, for him, was flexibility. Over the course of his tenure, Breyer’s case-by-case approach guided the Court to treat questions of deference with nuance. But an increased appreciation for the degree of policy-making authority agencies wield has more recently led the Court to utilize the major questions doctrine in a manner at odds with Breyer’s judicial philosophy. The Essay traces this evolution and concludes by predicting an uncertain future for a doctrine with such unstable foundations.

INTRODUCTION

As Justice Stephen Breyer retires, he leaves behind a body of administrative law that owes much of its shape to his work both on and off the bench. He treated Congress’s delegation of authority to the modern administrative state as a pragmatic and flexible solution to the challenges of governing an increasingly complex society. He displayed sympathy and patience toward Congress and administrative agencies as they confronted these challenges. Throughout his more than forty-year judicial career, he diligently took up what he believed to be the courts’

responsibility: to endeavor to understand Congress’s intent with respect to a given regulatory scheme and to resolve disputes with an eye toward achieving Congress’s purpose. His sensibilities reflect his broader commitment to “active liberty” – giving democratic majorities room to address societal problems.¹ Many aspects of today’s administrative law bear the mark of these sensibilities.

On the final day of Justice Breyer’s final term, the Supreme Court issued an important administrative-law decision: *West Virginia v. Environmental Protection Agency (EPA)*.² That decision invoked for the first time the term that lower courts and commentators had been using to identify a “body of law that ha[d] developed over” the course of Breyer’s tenure: the “major questions doctrine.”³ This Essay considers how the major questions doctrine fits into Breyer’s administrative-law legacy and how the doctrine may evolve after his retirement.

The major questions doctrine instructs courts to presume that Congress does not delegate policy decisions of great economic and political magnitude to agencies. It has come to be seen as a tool for paring back agencies’ authority, so one would expect Justice Breyer – a proponent of the modern administrative state – to oppose it. And indeed, he has often, but not always, found himself on the other side of Supreme Court opinions that have wielded the doctrine. Most famously, he dissented from the Court’s decision in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, which contains the seminal statement of the major questions principle.⁴

And yet, the major questions doctrine takes its name from Breyer’s own writing. When he was a judge on the U.S. Court of Appeals for the First Circuit, he wrote an article in which he advocated softening *Chevron*’s command that courts defer to agencies.⁵ Then-Judge Breyer argued that, before deferring to an agency’s statutory interpretation, courts should “ask whether the legal question is an important one.”⁶ As he explained, “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.”⁷ The Supreme

1. STEPHEN BREYER, *ACTIVE LIBERTY* (2005); see Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387 (2006) (reviewing BREYER, *supra*).

2. 142 S. Ct. 2587 (2022).

3. *Id.* at 2609.

4. 529 U.S. 120, 133 (2000) (citing *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994)) (“[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”).

5. Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

6. *Id.* at 370.

7. *Id.* (emphasis added).

Court agreed and cited his article in *Brown & Williamson* to support its decision not to defer to the Food and Drug Administration's (FDA's) judgment that the Food, Drug & Cosmetics Act allowed it to regulate tobacco.⁸

Part I of this Essay provides an overview of the major questions doctrine. The term describes not a unitary doctrine, but rather a collection of related principles concerning congressional intent and the separation of powers. Part II describes Justice Breyer's administrative-law jurisprudence. Like his approach to other areas of law, Breyer's administrative-law jurisprudence is pragmatic and optimistic. He shuns rules in favor of multifactor analyses designed to exploit the institutional competencies of the different actors that formulate, enforce, and interpret regulatory policy. His *Chevron* jurisprudence reflects some of the principles that make up the major questions doctrine, while rejecting others. Part III concludes by tracing the trajectory of the major questions doctrine and identifying the forces that will influence its future direction. The doctrine is on a path to become a clear-statement rule that requires agencies to cite unambiguous statutory support for regulatory initiatives with great economic and political significance. But, as with any judge-made rule, the doctrine could easily change direction.

I. THE MAJOR QUESTIONS DOCTRINE

In 1994, the Supreme Court handed down its decision in *MCI Telecommunications Corp. v. AT&T*.⁹ That case presented the question whether the Federal Communication Commission's (FCC's) authority to "modify any requirement" imposed by the Communications Act included the ability to relieve long-distance carriers of the obligation to file their rates. In an opinion by Justice Scalia, the Court held that the Commission enjoyed no such authority. The Court reasoned, "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."¹⁰

These words marked a departure from the deference courts usually give to agencies' interpretations of the statutes they administer. The *Chevron* doctrine instructs courts to treat statutory silence or ambiguity as an implicit delegation of authority from Congress to the agency.¹¹ The doctrine "presum[es] that Congress, when it [has] left ambiguity in a statute meant for implementation by an

8. *Brown & Williamson*, 529 U.S. at 159.

9. 512 U.S. 218.

10. *Id.* at 231.

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

agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”¹² Courts must therefore respect any “permissible” or “reasonable” construction of ambiguity or silence in a statute when that statute is administered by the construing agency.¹³

The Supreme Court “most often describe[s] Congress’ supposed choice to leave matters to agency discretion as an allocation of interpretive authority.”¹⁴ But the Court also “sometimes treat[s] [an agency’s] discretion as though it were a form of legislative power.”¹⁵ *Chevron* itself acknowledges that agencies are not selecting the soundest textual interpretation of the statute but are instead “formulat[ing] policy.”¹⁶ Accordingly, agencies’ decisions have the force of law even if “Congress did not actually have an intent’ as to a particular result.”¹⁷

MCI Telecommunications laid the groundwork for what has become known as the major questions doctrine. The doctrine, in contrast to the *Chevron* doctrine, commands courts to cast a jaundiced eye on an agency’s claim that Congress delegated to it a decision of significant “economic and political magnitude.”¹⁸ Under either conception of *Chevron* described above, the agency is performing functions conventionally performed by the judiciary or the legislature: saying what

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

13. *Chevron*, 467 U.S. at 843-44.

14. *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)); see also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 192 (2006) (“[C]ourts should increase their willingness to use the *Chevron* framework whenever the agency has authoritatively answered a question about the meaning of a statute that it has been asked to implement.”).

15. *Michigan*, 576 U.S. at 761 (Thomas, J., concurring); see also *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) (“An agency’s interpretive authority, entitling the agency to judicial deference, acquires its legitimacy from a delegation of lawmaking power from Congress to the Executive.”).

16. *Chevron*, 467 U.S. at 843.

17. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (quoting *Chevron*, 467 U.S. at 845); see also THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE* 4 (2022) (“The *Chevron* doctrine downplays the role of Congress’s faithful agent, the courts, and elevates the roles of executive agencies, which are not so faithful because they are subject to oversight by the President, who often has different views about policy than did the enacting legislature.”). According to this theory, the court is still deciding “all relevant questions of law,” as the Administrative Procedure Act directs, “but the answer to the relevant questions will depend on the [agency’s] interpretation, because . . . the law is what the [agency] says it is.” Sunstein, *supra* note 14, at 196; see also *City of Arlington*, 569 U.S. at 317 (Roberts, C.J., dissenting) (“We give binding deference to permissible agency interpretations of statutory ambiguities because Congress has delegated to the agency the authority to interpret those ambiguities ‘with the force of law.’” (quoting *Mead*, 533 U.S. at 229)).

18. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

the law is or what it shall be.¹⁹ Reversing that delegation by means of the major questions doctrine, then, restores power to the courts, Congress, or state legislatures.²⁰ A court that cites the major questions doctrine to substitute its statutory interpretation for that of an agency is reclaiming authority *Chevron* would otherwise vest in the agency. A court that cites the major questions doctrine to deny the agency policy-making authority²¹ reserves the policy choice for the federal or state legislatures.

The justifications offered for the major questions doctrine will depend on how it operates in a given case. For example, each branch's institutional competencies point in different directions, depending on what function or functions they are passing back and forth.²² If one is concerned about political accountability, then restoring power to Congress promotes that institutional value, while restoring power to the courts does not.²³ If one is concerned about expertise, then one might favor restoring *interpretive* authority to the courts, but not overriding *policy* judgments by the agencies. And if one believes that an agency is selecting from a range of policy options instead of from a range of interpretations of fixed statutory language, one might place greater emphasis on flexibility.²⁴

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19. See *Michigan*, 576 U.S. at 760-64 (Thomas, J., concurring); MERRILL, *supra* note 17, at 195; see also E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENV'T L.J. 1, 14 (2005) (describing *Chevron* as "a major shift of power to the Executive Branch and away from congressional staff and lower federal courts").
 20. Compare *Nat'l Fed'n of Indep. Bus. (NFIB) v. OSHA*, 142 S. Ct. 661, 676-77 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (arguing that the Court arrogated power to itself by invoking the major questions doctrine), with *id.* at 669-70 (Gorsuch, J., concurring) (arguing that the Court restored power to Congress). See also Sunstein, *supra* note 14, at 245 (arguing that the major questions doctrine "requires Congress, rather than agencies, to decide critical questions of policy").
 21. In this Essay, we use "policy-making authority" to refer to the authority to *create*—as opposed to merely interpret—rules of law. We use "policy-making authority" instead of either "rule-making authority" or "legislative power" because "rule making" is a term of art in administrative law, 5 U.S.C. § 551(5) (2018), and not all rule creation requires an exercise of the legislative power, see, e.g., *DOT v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 82 (2015) (Thomas, J., concurring in the judgment).
 22. See, e.g., Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (or why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593, 612-13 (2008).
 23. The *Chevron* Court focused on accountability as a primary justification for allowing agencies instead of courts to fill statutory gaps. *Chevron*, 467 U.S. at 865-66 (1984); see also Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENV'T L. & ADMIN. L. 479, 500 (2016) ("Invoking the doctrine where significant policy questions are at issue thereby shifts power from the executive branch to the judiciary to 'make policy.'").
 24. See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517-19.

Uncertainty about the nature of the function the *Chevron* doctrine allows agencies to perform (interpretation or policy making) perhaps arises from the fact that it is a judge-made doctrine with a doubtful rationale.²⁵ That foundational uncertainty, in turn, may have prevented the bundle of principles associated with the major questions doctrine from coalescing into a single, coherent rule for the past thirty-odd years. Although the Court decided *MCI Telecommunications* in 1994, it did not name the doctrine that decision launched until this past term, in *West Virginia v. EPA*. The still-sparse caselaw leaves unanswered at least three key questions about the major questions doctrine.

First, what makes a question “major”? The Supreme Court has answered this question in both absolute and relative terms. The first possibility is that courts should measure a question’s significance by some *absolute* standard external to the statute: perhaps the court’s own assessment of the question’s importance or the degree of attention Congress has given to the subject.²⁶ *Brown & Williamson* relies on these measures, emphasizing tobacco’s cultural and economic significance in American life, as well as the number of tobacco-specific legislative initiatives Congress had considered in the preceding decades.²⁷ Justice Gorsuch also advocates an absolute standard in his *West Virginia* concurrence, where he provides a nonexhaustive list of political, economic, and structural considerations.²⁸

Another possibility is that courts should measure a question’s *relative* significance by its place in the statutory or regulatory scheme—that is, by the size of the “eyebrow-raise” the agency’s answer provokes.²⁹ Does this question more closely resemble questions that Congress resolved explicitly, or the sorts of interstitial questions that Congress left to the agency? How much does the answer to the question at issue change the shape of the broader legislative initiative? Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in

25. See Sunstein, *supra* note 14, at 198; Scalia, *supra* note 24, at 516; see generally Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017) (examining the doctrinal basis of *Chevron* deference).

26. See Moncrieff, *supra* note 22, at 611-13.

27. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143-61 (2000); see also *Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006) (“The importance of physician-assisted suicide, which has been the subject of an ‘earnest and profound debate’ across the country, makes the oblique form of the claimed delegation all the more suspect.” (citation omitted)); *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (noting that the agency’s eviction moratorium affects “[a]t least 80% of the country, including between 6 and 17 million tenants at risk of eviction”).

28. *West Virginia v. EPA*, 142 S. Ct. 2587, 2620-22 (2022) (Gorsuch, J., concurring).

29. *Id.* at 2636 (Kagan, J., dissenting).

mouseholes.”³⁰ To decide whether a question qualifies as an “elephant,” one must know the size of the “mousehole.”³¹ *King v. Burwell* exemplifies this approach: the Court’s determination that the question whether health insurance policies qualify for tax credits was a major one turned on the question’s centrality to the statutory scheme.³² So, too, the *West Virginia* dissent uses a relative measure when it accounts for the major questions line of cases as those in which “the agency had strayed out of its lane, to an area where it had neither expertise nor experience.”³³

Of course, courts often invoke both absolute and relative measures of significance when applying the major questions doctrine, and it is possible that either form of significance should trigger a less deferential form of judicial review.³⁴ But it is not clear that the justification for independent review remains the same whether one is talking about a vast expansion of agency power (as in *Brown & Williamson*) or a fundamental alteration in the regulatory scheme (as in *King*). Indeed, some have described the rule that neither courts nor agencies should interpret indefinite statutory provisions to fundamentally alter the statutory scheme as a doctrine that is distinct from, though related to, the major questions doctrine.³⁵ Similarly, the Court’s “major questions” analysis sometimes sidles up to other, substantive canons that have their own independent rationales.³⁶

How one measures significance relates to the more fundamental question discussed above: whether *Chevron* allocates interpretive or policy-making

30. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

31. *Cf. MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 229 (1994) (“For the body of a law, as for the body of a person, whether a change is minor or major depends to some extent upon the importance of the item changed to the whole.”).

32. *See King v. Burwell*, 576 U.S. 473, 484-86 (2015); *see also, e.g., MCI Telecomms.*, 512 U.S. at 231 (noting that FCC’s rule amounted to a “fundamental revision of the statute”); *Gonzales*, 546 U.S. at 290 (Scalia, J., dissenting) (arguing that deference was proper because “[t]he Attorney General’s power to issue regulations against questionable uses of controlled substances in no way alters ‘the fundamental details’ of the CSA”); MERRILL, *supra* note 17, at 202-03 (questioning *King*’s classification as a “major questions” case because the decision turned more on the question’s impact on “Congress’s plan” than on some inchoate concept of significance). *But see* Mila Sohoni, *King’s Domain*, 93 NOTRE DAME L. REV. 1419, 1422, 1425-26 (2018) (interpreting *King* to define as “major” only questions whose answers “would create federal spending without clear congressional authorization”).

33. *West Virginia*, 142 S. Ct. at 2636 (Kagan, J., dissenting).

34. *See, e.g., id.* at 2610-14 (majority opinion); *King*, 135 S. Ct. at 2488-89; *see also West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (understanding *King* to endorse an absolute measure of significance).

35. *See, e.g., Biden v. Missouri*, 142 S. Ct. 647, 656, 658 (2022) (Thomas, J., dissenting); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 61 (2010).

36. *See, e.g., Alabama Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021); *Missouri*, 142 S. Ct. at 658 (Thomas, J., dissenting); *West Virginia*, 142 S. Ct. at 2621-22 (Gorsuch, J., concurring).

authority. An impulse to preserve legislative control over decisions that will have a substantial impact on Americans' lives may make courts more reluctant to give agencies the final word on *policy decisions* that are "major" in an *absolute* sense. By contrast, a desire to preserve the judicial prerogative to "say what the law is" may lead courts to refuse to give agencies the final word on *the interpretation of statutory provisions* that are "major" in the *relative* sense.

Second, how does the doctrine interact with *Chevron*? In the absence of the major questions doctrine, courts usually formulate *Chevron* as a two-step test.³⁷ At Step One, a court asks whether the statute is ambiguous. If it is not, then the court applies the statute's unambiguous meaning.³⁸ If the statute is ambiguous, then the court proceeds to Step Two, where it asks whether the agency's interpretation is reasonable.³⁹ Some commentators have also argued that there is an unspoken "Step Zero"—a threshold determination of whether the *Chevron* framework applies to begin with.⁴⁰ Where does the major questions doctrine fit into this analysis?⁴¹

In some cases, courts treat the major questions doctrine as one that reverses *Chevron*'s presumption about who gets to interpret the statute.⁴² In these cases, the doctrine operates at *Chevron* Step Zero because it redirects the court away from the *Chevron* framework.⁴³ The court is under no obligation to defer to the agency's interpretation of the statute, even if the statute is ambiguous, and even if the agency's interpretation is reasonable.⁴⁴ The court may, however, adopt the

37. See, e.g., *King*, 576 U.S. at 484; see also *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (the Court's original formulation of these two steps).

38. *Chevron*, 467 U.S. at 843.

39. *King*, 576 U.S. at 485 (citing *Chevron*, 837 U.S. at 842-43).

40. See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001); Sunstein, *supra* note 14.

41. Leske, *supra* note 23.

42. See Cass Sunstein, *There Are Two 'Major Questions' Doctrines*, 73 ADMIN. L. REV. 475, 482 (2021).

43. Sunstein, *supra* note 14, at 236-44; MERRILL, *supra* note 17, at 2021.

44. See, e.g., *King*, 576 U.S. at 485-86. *Brown & Williamson* is most often classified as a "Step One" case; however, the Court arguably invoked the major questions doctrine as a Step-Zero principle. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (acknowledging "the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps," but explaining that "[i]n extraordinary cases," "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation"); see also Merrill & Hickman, *supra* note 40, at 845 (outlining this as one potential interpretation of *Brown & Williamson*). But see Sohoni, *supra* note 32, at 1421 n.8 (arguing that *King* is the only decision "in which the major questions exception alone drove a Step-Zero determination not to defer to the agency").

agency's preferred construction of its own accord.⁴⁵ So understood, the major questions doctrine reclaims interpretive power for the courts but does not necessarily return policy-making authority to Congress.

In other cases, courts rely on the doctrine to inform their answer to the underlying statutory-interpretation question. In these cases, the major questions doctrine may be an input at Step One or Step Two⁴⁶ or operate entirely apart from the *Chevron* framework.⁴⁷ The court reads the statute not to give the agency a substantive regulatory power because the statute is at best ambiguous as to whether the agency possesses that power, and the doctrine assumes that Congress does not delegate such significant decisions ambiguously.⁴⁸ So understood, the major questions doctrine guards against excessive delegations of policy-making authority from Congress to administrative agencies.⁴⁹

The distinction between these two approaches may explain why the Court resolved one of the most significant regulatory questions to come before it this century without relying on or even confronting the major questions doctrine. In *Massachusetts v. EPA*, the Court considered whether the Clean Air Act's definition of "air pollutant" includes greenhouse gases believed to contribute to global warming.⁵⁰ EPA argued,⁵¹ and the Court later held in another case,⁵² that this was a "major question" because defining "air pollutant" to include greenhouse gases would massively expand EPA's authority and have a significant impact on the American economy. In *Massachusetts*, however, neither the majority nor the

45. See, e.g., *King*, 576 U.S. at 497-98; see also Sohoni, *supra* note 32, at 1420 (discussing the Court's agreement with the agency interpretation at issue in *King*).

46. Leske, *supra* note 23, at 488; MERRILL, *supra* note 17, at 203-13; Sunstein, *supra* note 14, at 243; see also Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (per curiam) ("Even if the text were ambiguous, the sheer scope of CDC's claimed authority under § 361(a) would counsel against the Government's interpretation."). It is not clear that the choice between Step One and Step Two is doctrinally significant for purposes of the major questions analysis, as the Court is engaged in the exercise of statutory interpretation at either step. See generally Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009) (arguing there is no meaningful distinction between Steps One and Two).

47. See *infra* Section III.A.

48. Sunstein, *supra* note 14, at 244. This is also the version of the doctrine that EPA invoked in *Massachusetts v. EPA* and certain stages of the *West Virginia v. EPA* litigation. See Brief for the Federal Respondent at 21-22, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120), 2006 WL 3043970, at *21-22; *West Virginia*, 142 S. Ct. at 2594.

49. See Sunstein, *supra* note 14, at 244; Sunstein, *supra* note 42, at 477.

50. 549 U.S. 497 (2007).

51. See *supra* note 48.

52. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014).

dissent addressed the major questions doctrine.⁵³ The majority simply held that the plain meaning of the term “air pollutant” encompassed greenhouse gases,⁵⁴ a conclusion that is consistent with an understanding of the doctrine as a *Chevron* Step-Zero rule. Because the Court found the statute to be unambiguous, it had no cause to determine whether the *Chevron* framework applied at all.⁵⁵ By contrast, Justice Scalia’s dissenting opinion is more consistent with treating the major questions doctrine as a substantive input in statutory interpretation. EPA had disclaimed the power to regulate greenhouse gases, so the dissent could rely on the argument that EPA’s interpretation was *at least* a reasonable interpretation entitled to deference without using the major questions doctrine to establish that it was the *only* reasonable interpretation.⁵⁶

Finally, does the doctrine’s presumption reflect the way Congress *does* act or the way Congress *should* act? The *Chevron* doctrine purports to describe congressional intent to delegate a decision to an agency. The major questions doctrine began as a refinement of *Chevron*’s approximation of congressional intent: it assumed that Congress is less likely to delegate consequential decisions to agencies.⁵⁷

The major questions doctrine has, however, taken on a normative cast as an expression of the nondelegation doctrine. By some accounts, then, the major questions doctrine presumes that Congress does not vest significant policy-making authority in agencies because Congress *should not* do so.⁵⁸ The Constitution vests legislative power in Congress,⁵⁹ and—in theory—Congress may not delegate that power to administrative agencies.⁶⁰ Courts have long believed that their ability to enforce the nondelegation doctrine is limited because “[a] certain degree of discretion, and thus of lawmaking, inheres in most executive . . . action,”

53. The Court recited EPA’s “major questions” argument based on *Brown & Williamson*, but it distinguished *Brown & Williamson* on the narrow ground that the legislative history in the two cases differed, *Massachusetts*, 549 U.S. at 530-31.

54. *Massachusetts*, 549 U.S. at 528-29.

55. *Cf.* U.S. Telecomm. Ass’n v. FCC, 855 F.3d 381, 421 n.2 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (“[E]ven though such a rule would presumably be a major rule, the statute clearly authorized it, according to the Court.”); Loshin & Nielson, *supra* note 35, at 22 (“[W]hile no one can reasonably argue that regulating greenhouse gases is not an elephant, the language of the statute was quite broad and so was not a mousehole.”).

56. *Massachusetts*, 549 U.S. at 557-58 (Scalia, J., dissenting).

57. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 149 (2000); Merrill & Hickman, *supra* note 40, at 836, 872-73.

58. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2619-20 (2022) (Gorsuch, J., concurring).

59. U.S. CONST. art. I, § 1.

60. See *DOT v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 67-68 (2015) (citing *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472 (2001) (legislative power); and *Stern v. Marshall*, 564 U.S. 462, 482-83 (2011) (judicial power)).

and it has proven difficult to craft a judicially administrable rule to distinguish permissible executive policy making from genuine exercises of legislative power.⁶¹ The major questions doctrine is a way to narrow the field in which the nondelegation doctrine remains underenforced because it, in effect, requires Congress to speak clearly if it wishes to delegate decisions of great political or economic significance to an administrative agency.⁶² Under this view, it would not matter that Congress intended to delegate the authority in question if Congress did not clear this judicially erected hurdle by expressing its intent clearly.

In theory, the divide between the descriptive and normative views is not as large as it might seem. Courts have long treated congressional intent as a “legal fiction” drawn less from empirical observations about the mental state of the legislators who enacted the law, and more from a series of assumptions about how a “reasonable legislator” would have acted.⁶³ A reasonable legislator *would* act the way a reasonable legislator *should* act, or so the theory goes.⁶⁴ That said, the distinction between the two attitudes toward major questions has proven consequential, as we will discuss below.

This final puzzle relates closely to the first two. Where the question is merely “major” within the statutory scheme, the doctrine may operate more as an assessment of congressional intent. Where the question is “major” in an absolute sense, however, a court may be more inclined to resort to the nondelegation principle to explain its lack of deference. Moreover, someone looking to cut back on delegations of legislative power may well favor the canon variant of the doctrine – which denies the agency policy-making authority in the absence of an explicit delegation – over the *Chevron*-exception variant – which merely denies the agency interpretive power.

61. *Whitman*, 531 U.S. at 475 (citing *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)).

62. Moncrieff, *supra* note 22, at 616-20; Loshin & Nielson, *supra* note 35, at 60-61.

63. Breyer, *supra* note 5, at 370; see also Scalia, *supra* note 24, at 517 (“[A]ny rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.”). Although the intent both *Chevron* and the major questions doctrine seek to discern is a “legal fiction,” the Supreme Court has sometimes resorted to evidence of Congress’s actual intent, such as failed legislative initiatives. See, e.g., *West Virginia*, 142 S. Ct. at 2614 (citing cases). See generally Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1004, 1008 (2013) (describing the doctrine as a “presumption of nondelegation” and concluding that it accords with congressional practice).

64. See, e.g., Moncrieff, *supra* note 22, at 608-09; cf. Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL’Y 463, 466 (2021) (noting the “subtle” distinction between the theory of the major questions doctrine – identifying congressional intent – and its practice – “tell[ing] Congress *how* it may delegate authority”).

* * *

The Court published its decision in *MCI Telecommunications* one month after President Clinton announced that he was nominating then-Judge Breyer to fill Justice Blackmun's seat.⁶⁵ The Court published its decision in *West Virginia* two hours before Justice Breyer's retirement took effect.⁶⁶ The foregoing puzzles reveal that the doctrine born and christened at the edges of Breyer's term is not (or at least, not yet) a unitary one, but rather a collection of related principles that operate to reduce agencies' powers—whether interpretive or regulatory—over questions that are by some measure significant. One would expect someone with Breyer's friendly attitude toward the administrative state to disfavor such a doctrine. The reality is more complicated.

II. JUSTICE BREYER AND THE MAJOR QUESTIONS DOCTRINE

When Justice Breyer took his oath as an Associate Justice of the U.S. Supreme Court, he had already dedicated decades of his career to problems of administrative law and regulatory policy. As a professor at Harvard Law School, he had specialized in administrative law.⁶⁷ As special and then chief counsel to the Senate Judiciary Committee, he had worked on a number of regulatory projects, including the Airline Deregulation Act.⁶⁸ And as a judge on the First Circuit, he had not only decided appeals involving administrative law, but synthesized his ideas in books and articles.⁶⁹

65. Paul Richter, *Clinton Picks Moderate Judge Breyer for Supreme Court Spot*, L.A. TIMES (May 14, 1994, 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-1994-05-14-mn-57615-story.html> [<https://perma.cc/F84K-GK76>].

66. See Letter from Justice Stephen Breyer to President Joseph Biden (Jun. 29, 2022), https://www.supremecourt.gov/publicinfo/press/2022-06-29_SGB_Letter.pdf [<https://perma.cc/MDE6-DNE3>] (announcing that Justice Breyer's retirement would take effect at noon on June 30, 2022).

67. *Pragmatic Justice*, HARV. L. TODAY (Jan. 27, 2022), <https://today.law.harvard.edu/pragmatic-justice> [<https://perma.cc/5AUV-EMN9>]; Thomas O. Sargentich, *Justice Breyer's Contribution to Administrative Law*, 8 ADMIN. L.J. AM. U. 713, 713 n.1 (1995).

68. Ernest Gellhorn, *Justice Breyer on Statutory Review and Interpretation*, 8 ADMIN. L.J. AM. U. 755, 755 & n.1 (1995).

69. See, e.g., *United States v. Ottati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990) (Breyer, J.); *Mayburg v. Sec'y of HHS*, 740 F.2d 100 (1st Cir. 1984) (Breyer, J.); STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); Breyer, *supra* note 5.

Justice Breyer's writings on the administrative state reflect his faith in agencies' will and capacity to regulate for the public good.⁷⁰ In his view, courts should decide cases in ways that help agencies further their public-good mission. As a judge, he approached that task pragmatically, using congressional intent as his lodestar and making case-by-case adjustments to account for a range of practical considerations and real-world observations. In ascertaining what Congress intended (or should have intended), he considered the characteristics and competencies of the branches of government involved in a given statutory scheme.⁷¹ Subject-matter expertise, flexibility, and accountability were chief among the institutional characteristics that informed Breyer's understanding of congressional intent.⁷²

Justice Breyer famously deployed flexible standards to resolve cases, meaning that his decisions depended heavily on the facts and practical implications of a given dispute.⁷³ He rejected any rule that limited judges' ability to dispose of a case in a way that "ma[d]e law work for people."⁷⁴ These features of Breyer's jurisprudence combined to script a modest role for courts reviewing agency action: according to Breyer, courts should leave Congress and agencies free to allocate authority, structure decision-making, and formulate policy in a way that best promotes the public good, while courts police the boundaries of rational action through fact-intensive, case-by-case correction.

Justice Breyer arrived on the Court as one of the leading critics of the *Chevron* doctrine, which he found too rigid to accommodate the case-by-case approach to judicial review that he favored. Breyer believed that "there are too many different types of circumstances . . . to allow 'proper' judicial attitudes about questions of law to be reduced to any single simple verbal formula."⁷⁵ Moreover, he "consider[ed] that broadly requiring deference in situations of statutory silence or ambiguity is to risk mandating an overly restrictive judicial approach in the very area in which courts are most qualified."⁷⁶ His attitude was such that, when

70. See, e.g., BREYER, *supra* note 1, at 11.

71. See, e.g., Breyer, *supra* note 5, at 364; see also Richard J. Pierce, Jr., *Justice Breyer: Intentionalist, Pragmatist, and Empiricist*, 8 ADMIN. L.J. AM. U. 747, 749 (1995) ("He respects the roles of Congress, the President, agencies, and courts, but he has an understanding of, and empathy for, the inherent limitations of each of those institutions.").

72. See, e.g., *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 342 (2014) (Breyer, J., concurring in part and dissenting in part); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 547 (2009) (Breyer, J., dissenting); Breyer, *supra* note 5, at 371.

73. Pierce, *supra* note 71, at 750.

74. *Id.* at 749; see, e.g., Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 790 (1984).

75. Breyer, *supra* note 5, at 373.

76. Sargentich, *supra* note 67, at 719; see Breyer, *supra* note 5, at 365.

he first took the bench, the “prediction that Breyer’s influence may well increase the proportion of cases in which the Court upholds an agency’s construction of its authorizing statute” was labeled “counter-intuitive.”⁷⁷

To soften *Chevron*’s rigidity, Justice Breyer believed that courts should “work out a unified set of principles . . . that [would] allow a court to formulate a ‘proper’ judicial attitude in individual cases.”⁷⁸ He favored an approach to deference that would account for “the comparative institutional competence of a court or agency to answer the specific question, the information available to the courts and agency to decide the question on review, and the need for flexibility to accommodate policy requirements.”⁷⁹ Among other things, courts should “ask whether the legal question is an important one”⁸⁰ because “Congress is more likely to have focused upon, and answered, *major questions*.”⁸¹ As already noted, the major questions doctrine takes its name from this formulation.⁸² Breyer has nevertheless regularly found himself on the other side of opinions invoking the major questions doctrine to reject agency constructions of statutes.⁸³ Why is this?

77. Sargentich, *supra* note 67, at 718.

78. Breyer, *supra* note 5, at 381; *see also* *City of Arlington v. FCC*, 569 U.S. 290, 308-10 (2013) (Breyer, J. concurring) (describing a “workable,” if “complex,” approach to deference). *See generally* Sunstein, *supra* note 14, at 198-202 (discussing Justice Breyer’s “plea for complexity” in applying *Chevron*).

79. Gellhorn, *supra* note 68, at 764.

80. Breyer, *supra* note 5, at 370.

81. *Id.* (emphasis added); *see also id.* at 366 (“Why should one expect a legal system to provide one consistent method for deciding legal questions of such varying importance?”).

82. *See supra* notes 5-8 and accompanying text; *see also* Sunstein, *supra* note 14, at 240-41 (noting that the Court’s opinion in *Brown & Williamson* “resorted to only one source: Judge Breyer’s 1986 essay” for the argument that “there is a difference between ‘major questions,’ on which ‘Congress is more likely to have focused,’ and ‘interstitial matters’” (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000))).

83. *See, e.g., Brown & Williamson*, 529 U.S. at 161 (Breyer, J., dissenting); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 334 (2014) (Breyer, J., concurring in part and dissenting in part); *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (Breyer, J., dissenting); *NFIB v. OSHA*, 142 S. Ct. 661, 670 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting); *West Virginia v. EPA*, 142 S. Ct. 2587, 2626 (2022) (Kagan, J., joined by Breyer & Sotomayor, JJ., dissenting); *see also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 230 (2009) (Breyer, J., concurring in part and dissenting in part) (joining the majority’s reasoning rather than a dissent which argued that the majority’s interpretation altered “fundamental details of a regulatory scheme” and thus depended upon finding an elephant in a mousehole, *Entergy Corp.*, 556 U.S. at 239 (Stevens, J., dissenting)); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 291 (Breyer, J., concurring) (2009) (same); *Biden v. Missouri*, 142 S. Ct. 647, 650 (2022) (per curiam) (same). *But see Gonzales v. Oregon*, 546 U.S. 243, 248 (2006) (Kennedy, J., joined by Stevens, O’Connor, Souter, Ginsburg & Breyer, JJ.) (joining the Court’s majority opinion which invoked major-questions-style reasoning to reject an agency interpretation).

The simple answer is that the major questions doctrine – in Justice Breyer’s eyes – suffers from the very defect that afflicts the *Chevron* doctrine: rigidity. Just as he disfavored treating *Chevron* as a switch that flips deference on whenever a statute is ambiguous, so too did he disfavor treating the major questions doctrine as a switch that flips it off whenever the legal question is significant. In his view, ambiguity and significance are merely factors to be placed on one side of the scale or the other. In some cases, other factors – like the need for flexibility – weigh more heavily in favor of deference than the significance of the question weighs against it. And sometimes, the significance of the question *favors* deference when it is combined with the other factors, especially institutional competence.⁸⁴ Breyer’s answers to the questions we posed above further illuminate his approach to the major questions doctrine.

First, what makes a question major? Justice Breyer’s statement of his major questions principle suggests that he measured the significance of a question by its relative position in the statutory or regulatory scheme, as opposed to by an absolute, external standard.⁸⁵ He distinguished major questions from “interstitial” ones: those that occupy the gaps in a statute’s design.⁸⁶ By contrast, as discussed further below, Breyer was more likely to defer on questions that were “major” in the absolute sense.

Justice Breyer’s reliance on a relative measure of significance makes sense when one considers his position on the respective competencies of courts and agencies. Courts are more competent at interpreting legal texts, and thus at answering a question whose resolution has a significant impact on the meaning of the statute.⁸⁷ By contrast, agencies are more competent at formulating policy, and thus at answering a question whose resolution has a significant impact on matters of economic and political concern.⁸⁸ Even so, Breyer still deferred on some questions that were “major” in the relative sense. According to Breyer, a question could be “interstitial” yet “important to the administration of the

84. See Sunstein, *supra* note 14, at 232 (observing that major questions may call for the expertise that *Chevron* assumes agencies possess).

85. See, e.g., *West Virginia*, 142 S. Ct. at 2636 (Kagan, J., joined by Breyer & Sotomayor, JJ., dissenting).

86. See Breyer, *supra* note 5, at 370; *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (Breyer, J.); see also *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 90 (2007) (Breyer, J.) (“[T]he calculation method for determining whether a state aid program ‘equalizes expenditures’ – is the kind of highly technical, specialized interstitial matter that Congress often does not decide itself, but delegates to specialized agencies to decide.”).

87. See Breyer, *supra* note 5, at 364–65.

88. See *NFIB*, 142 S. Ct. at 672 (Breyer, Sotomayor & Kagan, JJ., dissenting); *Ala. Ass’n of Realtors*, 141 S. Ct. at 2492 (Breyer, J., dissenting).

statute” and trigger deference in part because its administrative significance called for the agency’s expertise.⁸⁹

Second, how does the doctrine interact with *Chevron*? Although he proposed it as a threshold consideration, Justice Breyer’s major questions principle does not convincingly argue for dispensing with the *Chevron* framework altogether once a court has determined that an interpretive question is a major one. Recall, he reasoned that “Congress is more likely to have focused upon and answered, major questions.”⁹⁰ “If Congress has, in fact, focused upon, and answered, major questions, agencies” and courts “must accept those answers under *Chevron* Step One.”⁹¹ There is no need to throw out the *Chevron* framework to effect congressional intent; the court simply needs to implement Congress’s answer, as it always does at Step One when Congress has answered the question. Breyer has nevertheless joined at least one opinion holding that the major questions doctrine creates an exception to *Chevron*.⁹² Under the logic of that opinion, the doctrine allows courts to decide de novo whether an *ambiguous* statute authorizes administrative action – a scenario to which Breyer’s major questions rationale does not appear to extend.

In any event, Justice Breyer has, with one notable exception,⁹³ dissented from opinions that use the major questions doctrine as a canon of construction to limit agencies’ substantive regulatory powers.⁹⁴ He disfavored any canon that made it more difficult for Congress to empower agencies to act on matters of absolute economic and political significance. In fact, Breyer was inclined to find broad substantive delegations precisely where the stakes were high, on the ground that high-stakes problems demand flexibility. Thus, in *Brown & Williamson*, he argued that the Court “should interpret the [Food, Drug, and Cosmetic Act] in light of Congress’ overall desire to protect health.”⁹⁵ According to Breyer, “[t]hat purpose require[d] a flexible interpretation” – namely, one that

89. *Barnhart*, 535 U.S. at 222.

90. Breyer, *supra* note 5, at 370.

91. Sunstein, *supra* note 14, at 232.

92. See *King v. Burwell*, 576 U.S. 473, 485–86 (2015) (Roberts, C.J., joined by Kennedy, Ginsburg, Breyer, Sotomayor & Kagan, JJ.).

93. See *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006) (Kennedy, J., joined by Stevens, O’Connor, Souter, Ginsburg & Breyer, JJ.).

94. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (Breyer, J., dissenting); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 334 (2014) (Breyer, J., concurring in part and dissenting in part); *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (Breyer, J., dissenting).

95. 529 U.S. at 181 (Breyer, J., dissenting).

allowed FDA to rely on ever-advancing scientific knowledge to select which substances to regulate and how.⁹⁶

Justice Breyer's conviction that Congress should—and therefore does—give agencies flexibility to meet the unexpected was so firm that, in many cases in which he opposed the major questions doctrine, he did so not on *Chevron* grounds, but instead on the ground that Congress unambiguously delegated regulatory authority on matters of immense economic and political significance.⁹⁷ In *Massachusetts v. EPA*,⁹⁸ for example, he joined a majority that declined the agency's invitation to apply the major questions doctrine⁹⁹ because he believed that the statute *unambiguously* required EPA to regulate greenhouse-gas emissions if it believed they were a threat to public health. Despite the widely acknowledged significance of the questions at issue—whether and how to regulate greenhouse gases—the majority opinion in *Massachusetts v. EPA* did not look to the Clean Air Act for a clear statement that EPA must regulate greenhouse gases; indeed, the Court acknowledged that “the Congresses that drafted [the statutory provision at issue] might not have appreciated the possibility that burning fossil fuels could lead to global warming.”¹⁰⁰ The Court nevertheless discerned in the broad language of the act “an intentional effort to confer the flexibility necessary to forestall [the] obsolescence” that would befall the Clean Air Act if EPA could not respond to “changing circumstances and scientific developments.”¹⁰¹ The same, pragmatic rationale recurs in Breyer's own opinions on major questions.¹⁰²

Finally, does the doctrine's presumption reflect the way Congress *does* act or the way Congress *should* act? Justice Breyer endorsed a major questions principle as a refinement of the “legal fiction” through which courts seek to give effect to Congress's intent.¹⁰³ In Breyer's view, this presumption that Congress does not leave major questions to agencies may be rebutted by other indications—

96. *Id.*

97. See *Ala. Ass'n of Realtors*, 141 S. Ct. at 2491 (Breyer, J., dissenting); *NFIB v. OSHA*, 142 S. Ct. 661, 673 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

98. 549 U.S. 497 (2007).

99. See sources cited *supra* note 48.

100. *Massachusetts*, 549 U.S. at 532.

101. *Id.*

102. See, e.g., *NFIB*, 142 S. Ct. at 674 (Breyer, Sotomayor & Kagan, JJ., dissenting); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 166-67 (2000) (Breyer, J., dissenting).

103. See *Mayburg v. Sec'y of HHS*, 740 F.2d 100, 106 (1st Cir. 1984) (Breyer, J.); Breyer, *supra* note 5, at 370. By arguing that courts must “defer to agency interpretations of law when, and because, Congress has told them to do so”—as determined by the legal fiction of congressional intent—Justice Breyer discerned the justification for *Chevron* that has come to dominate our understanding of the doctrine. Sunstein, *supra* note 14, at 198 (emphasis omitted).

such as broad language—that Congress *did* intend to delegate a major decision to an agency. According to Breyer, “the ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency’s rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of ‘gap-filling’ authority.”¹⁰⁴

By contrast, Justice Breyer was usually unmoved by the separation-of-powers principles that undergird the nondelegation variant of the major questions doctrine. For example, while opponents of delegation have argued that major questions of policy ought to be resolved by democratically elected members of Congress,¹⁰⁵ Breyer has rejoined that major questions are the ones on which agency administrators are most likely to be held democratically accountable through the President.¹⁰⁶ Breyer has also questioned whether courts employing the major questions doctrine truly return authority to Congress, arguing that they instead arrogate these choices to the least accountable branch: the judiciary.¹⁰⁷

This is not to say that Justice Breyer’s version of the major questions doctrine is devoid of normative content. As noted, he treated *Chevron* as a legal fiction crafted by courts seeking to “imagine what a hypothetically ‘reasonable’ legislator would have wanted.”¹⁰⁸ In Breyer’s view, that exercise required courts to “decide whether [delegation] ‘makes sense,’ in terms of the need for fair and efficient administration of that statute in light of its substantive purpose.”¹⁰⁹ This, in turn, means “allocat[ing] the law-interpreting function between court and agency in a way likely to work best within any particular statutory scheme.”¹¹⁰ As the foregoing discussion shows, Breyer’s answer turned less on constitutional concerns and more on a judgment about an agency’s expertise and flexibility to respond to the problem Congress wished to solve.

104. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007) (Breyer, J.).

105. See, e.g., *NFIB*, 142 S. Ct. at 666 (per curiam).

106. *Brown & Williamson*, 529 U.S. at 190–91 (Breyer, J., dissenting).

107. See, e.g., *NFIB*, 142 S. Ct. at 676 (Breyer, Sotomayor & Kagan, JJ., dissenting).

108. Breyer, *supra* note 5, at 370; see also *SAS Inst. v. Iancu*, 138 S. Ct. 1348, 1364 (2018) (Breyer, J., dissenting) (“I recognize that Congress does not always consider such matters, but if not, courts can often implement a more general, virtually omnipresent congressional purpose . . . by using a canon-like, judicially created construct, the hypothetical reasonable legislator.”); *Mayburg*, 740 F.2d at 106 (Breyer, J.) (advocating “asking what a *sensible* legislator would have expected given the statutory circumstances” (emphasis added)).

109. Breyer, *supra* note 5, at 370.

110. *Id.* at 371; see also *SAS Inst.*, 138 S. Ct. at 1364 (Breyer, J., dissenting) (arguing that courts should implement the congressional purpose of creating “a well-functioning statutory scheme”).

In sum, Justice Breyer preferred a flexible approach to deference that would leave agencies free to make policy within their zones of expertise, with courts policing their choices on a fact-intensive, case-by-case basis. Breyer's influence is evident in the major question doctrine's evolution over the course of his tenure.¹¹¹

III. THE TRAJECTORY OF THE DOCTRINE

The Supreme Court has often reviewed agencies' answers to questions that would seem to qualify as major – whether in an absolute or relative sense – without ever invoking the major questions doctrine or explaining why it does not apply.¹¹² Like a piece of yarn woven through a dramatic tapestry, the major questions doctrine makes occasional appearances in the fabric of the *Chevron* doctrine. But its place in the tableau has become more pronounced as *Chevron*'s fortunes have fallen.

A. Past, Present . . .

MCI notwithstanding, *Chevron* was still in its heyday when Justice Breyer arrived on the Court.¹¹³ Justice Scalia famously defended it as an imperfect but laudably administrable “estimation of modern congressional intent.”¹¹⁴ Scalia's view remained “triumph[ant],” if contested, throughout the 1990s.¹¹⁵ One of Breyer's first *Chevron* majority opinions applied the rule in the straightforward manner Scalia championed.¹¹⁶

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111. See generally Chad Squitieri, *Major Problems with Major Questions*, LAW & LIBERTY (Sept. 6, 2022), <https://lawliberty.org/major-problems-with-major-questions> [https://perma.cc/TQ29-EPTS] (arguing that “[t]he major questions doctrine is a product of legal pragmatism – a theory of statutory interpretation advanced by Justice Breyer”).
112. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (absolute sense); *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 696 (1995) (relative sense).
113. See Sunstein, *supra* note 14, at 189, 208 (describing *Chevron*'s growth and uncritical application in the eighties and nineties).
114. Scalia, *supra* note 24, at 517; see also Sunstein, *supra* note 14, at 202-05 (describing Justice Scalia's “plea” for an “across-the-board presumption” of deference).
115. See Sunstein, *supra* note 14, at 193.
116. See *Nat'l Fed'n of Fed. Emps. Loc. 1309 v. Dep't of the Interior*, 526 U.S. 86, 92-99 (1999) (Breyer, J.); see also *Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 387-91 (1998) (Scalia, J., for a unanimous Court) (applying *Chevron*); *Medtronic v. Lohr*, 518 U.S. 470, 506 (1996) (Breyer, J., concurring) (citing *Chevron* for the proposition that “in the absence of a clear congressional command as to pre-emption, courts may infer that the relevant administrative agency possesses a degree of leeway”); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89-90 (1995) (Breyer, J.) (similar).

But as already noted, Justice Breyer favored a more nuanced approach to deference.¹¹⁷ The “triumph” of Breyer’s case-by-case approach, including his major questions principle, came in the early 2000s as *Chevron* began to fall out of favor.¹¹⁸ Two terms after *Brown & Williamson* consolidated the major questions reasoning from *MCI*, Breyer wrote for a nearly unanimous Court in *Barnhart v. Walton*.¹¹⁹ Although the *Barnhart* opinion nominally invoked *Chevron*, it justified its deference to the agency’s interpretation not just based on statutory ambiguity, but based on a range of factors, many of which were foreign to conventional *Chevron* analysis.¹²⁰ The concluding paragraph captures in a nutshell Breyer’s multifaceted approach to agency deference, invoking “*the interstitial nature of the legal question*, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time.”¹²¹

Since *Barnhart*, the Court has become increasingly troubled by the delegation of legislative power to administrative agencies and increasingly wary of *Chevron* as one channel through which that delegation occurs.¹²² This suspicion has invigorated the nondelegation features of the major questions doctrine and left Justice Breyer defending the *Chevron* doctrine.

117. See MERRILL, *supra* note 17, at 128-29 (comparing Justices Scalia’s and Breyer’s positions on *Chevron*); Sunstein, *supra* note 14, at 198-205 (same).

118. Sunstein, *supra* note 14, at 216-19.

119. 535 U.S. 212 (2002). *Barnhart* is the third in a “trilogy” of cases that narrowed the range of agency interpretations entitled to deference. In the preceding two years, the Court had worked an “avulsive change in” the *Chevron* doctrine, *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting), by holding that courts need not defer to agency interpretations of the statutes they administer unless “it appears that Congress delegated authority to the agency generally to make rules carrying the force of law” and “the agency interpretation claiming deference was promulgated in the exercise of that authority,” *id.* at 226-27 (majority opinion); see also *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (initiating the trilogy of cases that narrowed *Chevron* deference to exclude interpretations made in instruments lacking the force of law); Sunstein, *supra* note 14, at 211-19 (describing the trilogy). *Barnhart* did not create a rule-based exception to *Chevron* in the way that its predecessors appeared to do, but it diminished *Chevron*’s rigidity by enumerating factors that would inform a court’s decision whether to defer.

120. *Barnhart*, 535 U.S. at 219-22; see *id.* at 226 (Scalia, J., concurring in part and concurring in the judgment) (criticizing the opinion on this ground).

121. *Id.* at 222 (emphasis added).

122. See, e.g., *Michigan v. EPA*, 576 U.S. 743, 760-61 (2015) (Thomas, J., concurring); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2446 n.114 (2018) (Gorsuch, J., concurring in the judgment). This concern was exacerbated by the death in 2013 of a separate major-questions-like limitation on *Chevron*: the rule that agencies receive no deference on their interpretation of statutory provisions “concern[ing] the scope of [their] regulatory authority.” *City of Arlington v. FCC*, 569 U.S. 290, 293 (2013); see *id.* at 312-16, 327 (Roberts, C.J., dissenting) (expressing concerns).

In 2014, the Supreme Court revisited the meaning of “air pollutant” in *Utility Air Regulatory Group v. EPA*.¹²³ Recall that seven years before, in *Massachusetts v. EPA*, the Court had ruled that the Clean Air Act’s act-wide definition of “air pollutant” unambiguously encompassed greenhouse gases – without invoking the major questions doctrine.¹²⁴ In *Utility Air Regulatory Group*, the Court relied on the major questions doctrine to hold that the term “air pollutant,” as used in two separate provisions of the same Act, *excluded* greenhouse gases.¹²⁵ Justice Breyer dissented, but not on the grounds one might expect. Everyone – majority, dissent, and agency – agreed that applying the statute as written would lead to “untenable” results if “air pollutant” included greenhouse gases.¹²⁶ And everyone also agreed that the agency enjoyed a degree of discretion to interpret the statute to avoid that absurdity.¹²⁷ But the majority perceived more constraints on the agency’s discretion than did Breyer.¹²⁸ Among the principles of statutory interpretation the majority used to constrain the agency’s authority were both the major questions doctrine¹²⁹ and separation-of-powers concerns about the agency’s exercise of legislative power.¹³⁰ But the Court still treated them as distinct considerations.

Dissenting in part, Justice Breyer advocated focusing on practicalities rather than on text and structure. In response to the separation-of-powers concerns articulated by the majority, Breyer observed that EPA should be given the “flexibility” to deploy its superior “technical expertise and administrative experience.”¹³¹ He also invoked his major questions principle, arguing that the precise content of “air pollutant” was an “interstitial” question of the sort “Congress typically leaves to the agencies.”¹³² Unlike the majority, he expressly connected his major questions principle to the normative (institutional) principles that underpinned it.¹³³

123. 573 U.S. 302 (2014).

124. *Id.* at 316 (citing *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007)).

125. *Id.* at 328-29.

126. *Id.* at 316; *id.* at 338 (Breyer, J., concurring in part and dissenting in part); *id.* at 343-44 (Alito, J., concurring in part and dissenting in part).

127. *Id.* at 318-19 (majority opinion); *id.* at 340 (Breyer, J., concurring in part and dissenting in part).

128. Compare *id.* at 321-28 (majority opinion), with *id.* at 338-43 (Breyer, J., concurring in part and dissenting in part).

129. *Id.* at 324 (majority opinion).

130. *Id.* at 327.

131. *Id.* at 341-42 (Breyer, J., concurring in part and dissenting in part).

132. *Id.* at 342.

133. *Id.*

Meanwhile, the Court's retreat from *Chevron* continued. Justice Breyer, writing for the Court in 2016, invoked *Chevron* to defer to the Patent Office's gap-filling regulation concerning inter partes review.¹³⁴ The decision tells us little about the Court's disposition toward *Chevron*, however, because—as Justice Thomas noted in his concurrence—it did “not rest on *Chevron*'s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law.”¹³⁵ Rather, Congress had expressly authorized rulemaking to fill out the details of inter partes review.¹³⁶ Since that decision, the Court has consistently declined to defer to agencies under *Chevron*.¹³⁷

In 2018, the Court considered overturning *Chevron*¹³⁸ but ultimately left the question for another day.¹³⁹ Writing for two other Justices in dissent, Justice Breyer pleaded for *Chevron*'s life by describing it as a mere “rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have.”¹⁴⁰ Arguing that the “rule of thumb” favored deference in the case before the Court, he again invoked his version of the major questions principle, observing that the statutory provision before the court “constitutes a minor procedural part of a larger administrative scheme.”¹⁴¹ Two terms later, Justices Breyer and Kagan alone advocated giving *Chevron* deference to an agency's interpretation of a statutory provision whose meaning was hotly contested.¹⁴²

134. *Cuozzo Speed Techs. v. Lee*, 579 U.S. 261, 275–83 (2016).

135. *Id.* at 286 (Thomas, J., concurring).

136. *Id.* at 275 (majority opinion).

137. See, e.g., *Biden v. Missouri*, 142 S. Ct. 647 (2022); *Pereira v. Sessions*, 138 S. Ct. 2105 (2018); see also *Pereira*, 138 S. Ct. at 2121, 2129 (Alito, J., dissenting) (“I can only conclude that the Court, for whatever reason, is ignoring *Chevron*. . . . [U]nless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law.”). Scholars have also noted the Court's tendency to avoid *Chevron*. See MERRILL, *supra* note 17, at 7; Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931, 934 (2021).

138. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018).

139. *Id.*

140. *Id.* at 1364 (Breyer, J., dissenting).

141. *Id.* at 1360.

142. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2397 (2020) (Kagan, J., joined by Breyer, J., concurring in the judgment). This case provides a good example of Justice Breyer's willingness to compromise. He joined Justice Kagan's concurrence despite the fact that her opinion described *Chevron* in more absolute terms than Breyer was disposed to use. Compare *id.* (“*Chevron* instructs that a court facing statutory ambiguity should accede to a reasonable interpretation by the implementing agency.”), with *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488 (2012) (Breyer, J.) (“*Chevron* and later cases . . . find in ambiguous language at least a presumptive indication that Congress did delegate that gap-filling authority [to an agency].”).

With the COVID-19 pandemic have come decisions that have strengthened the connection between the major questions doctrine and the nondelegation doctrine.¹⁴³ Most notable is the Court’s decision staying the Occupational Safety and Health Administration’s (OSHA’s) so-called vaccine mandate.¹⁴⁴ This decision is significant because it was the first in which the Supreme Court expressly treated the major questions doctrine as a rule of statutory interpretation that stands independently from the *Chevron* framework.¹⁴⁵ Citing (indirectly) *Brown & Williamson* instead of *Chevron*, the Court framed the question *not* as whether Congress had spoken directly to the issue before the Court, but instead as “whether the Act plainly authorizes the Secretary’s mandate.”¹⁴⁶ In other words, the Court required the agency to point to a provision placing the policy choice in the agency’s hands, instead of requiring the challenger to point to a provision taking the choice away from the agency, as the *Chevron* doctrine arguably does. In a concurrence, Justice Gorsuch (joined by Justices Thomas and Alito) described this requirement of plain authorization as “closely related to . . . the non-delegation doctrine.”¹⁴⁷ He then finalized the major question doctrine’s divorce from the *Chevron* doctrine by tracing the major questions doctrine, and its non-delegation ancestry, to a pre-*Chevron* decision.¹⁴⁸

A central theme of the vaccine-mandate opinions is, “Who decides?”¹⁴⁹ The COVID-19 pandemic has required our government to make difficult trade-offs between public health and individual liberty. The per curiam opinion in *NFIB v. OSHA* argued that “[i]n our system of government, [weighing tradeoffs] is the responsibility of those chosen by the people through democratic processes.”¹⁵⁰ Justice Gorsuch agreed and asserted that the major questions doctrine was an important tool for restoring the decision to the proper decision maker: the doctrine is “designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.”¹⁵¹

143. See, e.g., *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485 (2021); cf. *Biden v. Missouri*, 142 S. Ct. 647, 656, 658 (2022) (Thomas, J., dissenting) (invoking the major questions doctrine in connection with federalism concerns).

144. *NFIB v. OSHA*, 142 S. Ct. 661, 662 (2022) (per curiam).

145. *Id.* at 665.

146. *Id.*

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

148. *Id.* (citing *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980)).

149. *Id.* at 667.

150. *Id.* at 666 (majority opinion) (per curiam).

151. *Id.* at 668-69 (Gorsuch, J., concurring).

Justice Breyer and his fellow dissenters saw the matter differently. In their view, OSHA had made the tradeoffs the people’s representatives charged it with making, and, by staying the mandate, the Court “displace[d]” OSHA’s democratically endowed judgment.¹⁵² One could view this departure as a simple disagreement over whether Congress gave OSHA the authority it claimed. But that disagreement traces back farther, to the opinions’ respective starting points: the dissent flipped the majority’s presumption, asking not whether Congress had clearly conferred this authority, but instead whether Congress had clearly denied it.¹⁵³ Although Breyer and his fellow dissenters did not rely on *Chevron*, their reasoning allocated the burden in much the same way that *Chevron* does.¹⁵⁴ For the dissenters, the political and economic significance of the question did not change the locus of the burden but instead compounded the Court’s sin in displacing OSHA’s judgment.¹⁵⁵

Finally, in *West Virginia v. EPA* – the penultimate decision of Justice Breyer’s term and another Clean Air Act decision – the Court officially recognized the “major questions doctrine.”¹⁵⁶ The Court described *Brown & Williamson* and its progeny as “extraordinary cases” in which “the ‘history and the breadth of the authority that [the agency] ha[d] asserted,’ and the ‘economic and political significance’ of that assertion” led the Court to require the agency to “point to ‘clear congressional authorization’ for the power it claim[ed].”¹⁵⁷ The Chief Justice’s majority opinion was characteristically incremental: it acknowledged this burden-shifting practice and dubbed it the “major questions doctrine” but left largely unanswered the questions we have outlined above. The majority was ambivalent about whether courts should measure a question’s significance by an absolute or relative standard.¹⁵⁸ It also justified the rule as an approximation of

152. *Id.* at 676–77 (Breyer, Sotomayor & Kagan JJ., dissenting).

153. *Id.* at 673.

154. See MERRILL, *supra* note 17, at 4, 198; Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2151 (2016) (book review) (“*Chevron* invites . . . agencies [to] think they can take a particular action unless it is *clearly forbidden*.”).

155. *NFIB*, 142 S. Ct. at 675–77 (Breyer, Sotomayor & Kagan J.J., dissenting).

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

157. *Id.* at 2608–09 (first quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000); and then quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

158. *Id.* at 2609 (explaining that the major question doctrine has been triggered by “extraordinary grants of regulatory authority” or those that “make a ‘radical or fundamental change’ to a statutory scheme”); see also Kristin E. Hickman, *Thoughts on West Virginia v. EPA*, YALE J. ON REGUL.: NOTICE & COMMENT (July 5, 2022), <https://www.yalejreg.com/nc/thoughts-on-west-virginia-v-epa> [<https://perma.cc/NGB6-3NZ5>] (identifying the features that make a question “major” according to the majority opinion).

congressional intent but stopped just short of expressly endorsing it as a tool for enforcing the nondelegation doctrine.¹⁵⁹ There was no mention of *Chevron*.

Justice Gorsuch sought to put flesh on the doctrine in his concurrence.¹⁶⁰ He described it as a clear-statement rule designed to enforce Article I's Vesting Clause, as well as other important structural and procedural values in the Constitution.¹⁶¹ He further articulated principles that could guide a court's determinations as to whether a question is "major" and whether Congress has spoken clearly enough in authorizing an agency to answer that question.¹⁶² Confirming that the contours of the doctrine remain unsettled, only Justice Alito joined Gorsuch's opinion.¹⁶³

Justice Breyer joined Justice Kagan's dissent.¹⁶⁴ The opinion is a tribute to Breyer's administrative-law jurisprudence. It emphasized the practical consequences of the Court's decision.¹⁶⁵ It welcomed purpose into the textualist fold.¹⁶⁶ And it pointed to Breyer's opinion for the Court in *Barnhart* to exemplify a "common sense" approach to the question whether Congress has delegated a decision to an agency—an approach that encompasses a range of evidence but is ultimately centered on the agency's expertise.¹⁶⁷ In applying that "common sense" approach to the Clean Air Act, the dissent echoes *Massachusetts*¹⁶⁸ and Breyer's major questions opinions¹⁶⁹ by finding in the statute's words breadth rather than ambiguity.¹⁷⁰ The dissent also joined issue on the nondelegation rationale for the major questions doctrine for the first time, arguing that the Constitution does not support a heightened clarity requirement for congressional delegations of major policy-making authority.¹⁷¹ It made no plea, however, for

159. *West Virginia*, 142 S. Ct. at 2609. For this reason, it remains unclear how easily courts should yield their hesitation to evidence that Congress intended to delegate the asserted power. An unambiguous clear-statement rule would preference nondelegation over contrary evidence of congressional intent up to a definite point, but the majority eschews the words "clear statement" in favor of *Brown & Williamson's* "clear congressional authorization," which it describes as something "more than a merely plausible textual basis." *Id.*; *see id.* at 2614.

160. *Id.* at 2616 (Gorsuch, J., concurring).

161. *Id.* at 2616-20.

162. *Id.* at 2620-24.

163. *Id.* at 2616 (Gorsuch, J., joined by Alito, J., concurring).

164. *Id.* at 2626 (Kagan, J., joined by Breyer & Sotomayor, JJ., dissenting).

165. *Id.* at 2643-44.

166. *Id.* at 2634.

167. *Id.* at 2633.

168. *See supra* notes 98-101 and accompanying text.

169. *See supra* notes 95-97, 102 and accompanying text.

170. *West Virginia*, 142 S. Ct. at 2628, 2630, 2632-33, 2642-43 (Kagan, J., dissenting).

171. *Id.* at 2641-42.

Chevron deference to the agency's statutory interpretation.¹⁷² New battle lines have been drawn, and *Chevron* appears to have left the field.

B. . . . and Future

As the Court has grown increasingly suspicious of the powers exercised by administrative agencies, the major questions doctrine has taken shape as a rule of statutory construction that denies agencies substantive regulatory authority over questions of great political and economic significance. Justice Breyer has resisted this movement. Will his retirement allow it to accelerate?

The logical person to look to for an answer is Justice Breyer's successor. As a lower-court judge, Ketanji Brown Jackson hewed to doctrine on questions of statutory interpretation and deference to agencies. Her descriptions of the *Chevron* framework acknowledge that it is not absolute but do not stray beyond Supreme Court precedent.¹⁷³ She has not applied the major questions doctrine in any form, and her lone nondelegation opinion follows the modern pattern of rejecting the constitutional challenge.¹⁷⁴ Although some have predicted that she will be a pragmatist in Breyer's mold,¹⁷⁵ Justice Jackson's prior decisions contain few hints about whether she will follow in his footsteps by advocating for a more case-by-case approach to agency deference.

Justice Breyer, like Justice Scalia before him, arrived at the Court as an acknowledged expert in administrative law, and he has remained a leader in that field.¹⁷⁶ Moreover, his case-by-case approach to the law has enabled him to concur more often and thus to exert a moderating influence on the Court's

172. Justice Kagan wrote—and her fellow dissenters joined—the plurality opinion in *Gundy v. United States*, in which she adopted an atextual reading of the Sex Offender Registration and Notification Act to avoid a nondelegation problem. See Aditya Bamzai, *Delegation and Interpretative Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 171-74 (2019). One difference between *Gundy*, on the one hand, and *NFIB* and *West Virginia*, on the other, is that the government advocated the narrower construction in the former case but not in the latter two, suggesting that deference to the Executive continues to play a role in the Justices' approach. See *supra* note 154 and accompanying text.

173. See, e.g., *Otay Mesa Property, L.P. v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 355, 364 (D.D.C. 2018); see also *Otsuka Pharm. Co. v. Burwell*, 302 F. Supp. 3d 375, 389 (D.D.C. 2016) (quotations omitted) (applying a straightforward *Chevron* analysis).

174. *Rothe Dev., Inc. v. DOD*, 107 F. Supp. 3d 183, 211 (D.D.C. 2015).

175. See, e.g., *Durbin: Judge Jackson Will Be a Supreme Court Justice in the Mold of Justice Breyer*, U.S. SENATE, COMM. ON THE JUDICIARY (Mar. 1, 2022), <https://www.judiciary.senate.gov/press/dem/releases/durbin-judge-jackson-will-be-a-supreme-court-justice-in-the-mold-of-justice-breyer> [<https://perma.cc/FHT9-KNNN>].

176. Sargentich, *supra* note 67, at 713; Sunstein, *supra* note 14, at 192; MERRILL, *supra* note 17, at 129.

pronouncements about administrative law. Although he may not agree with all the exceptions that have been carved out of it, the erosion of the *Chevron* “rule” is a testament to his influence. As the Court sets out to shape the newly recognized major questions doctrine, it is Justice Kavanaugh who seems most poised to exert an influence over its formation similar to that Breyer exerted over *Chevron*’s development.¹⁷⁷

As Justice Breyer was for Justice Scalia, Justice Kavanaugh is Breyer’s foil on many issues of statutory interpretation. *Chevron* is one such issue.¹⁷⁸ Breyer favors introducing complexity into judicial review of agencies’ interpretations of statutes; Kavanaugh favors simplifying it. Specifically, he would eliminate statutory ambiguity as a trigger for *Chevron* deference.¹⁷⁹ He has criticized the ambiguity standard for, well, its ambiguity: how much ambiguity is enough to trigger *Chevron*, and how do we measure it?¹⁸⁰ In Kavanaugh’s view, the traditional rules of statutory interpretation almost always yield a *best* reading of the statute, and that is the meaning a court should employ in resolving the dispute before it.¹⁸¹ Courts should defer to agencies only when the statute is best read to direct them to do so, such as when it includes discretion-conferring words like “reasonable.”¹⁸² This means that courts will never *presume* a delegation of interpretive authority to administrative agencies on questions major or minor.

Even when he favored the *Chevron* doctrine, Justice Scalia foresaw the possible ascendancy of Justice Kavanaugh’s “best reading” approach.¹⁸³ He believed textualists would arrive less often at *Chevron* Step Two because they would find

177. See generally Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum*, 95 IND. L.J. 923 (2020) (predicting that Justice Kavanaugh will exert significant influence on the nondelegation and *Chevron* doctrines).

178. See, e.g., Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1911-13 (2017) (explaining then-Judge Kavanaugh’s preferred approach to the *Chevron* doctrine); Kavanaugh, *supra* note 154, at 2150-54 (same).

179. Kavanaugh, *supra* note 178, at 1912-13.

180. *Id.* at 1910. Though their responses to its theoretical flaws differ, Justice Breyer shares Justice Kavanaugh’s skepticism about the ambiguity standard. Breyer, *supra* note 5, at 397.

181. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448 (2018) (Kavanaugh, J., concurring); Kavanaugh, *supra* note 178, at 1912. Justice Kavanaugh’s opinion for the Court in *American Hospital Ass’n v. Becerra*, 142 S. Ct. 1896 (2022), exemplifies this approach. See Jonathan H. Adler, *Supreme Court Decides Major Chevron Case Without Citing Chevron*, VOLOKH CONSPIRACY (June 15, 2022, 2:34 PM), <https://reason.com/volokh/2022/06/15/supreme-court-decides-major-chevron-case-without-citing-chevron> [<https://perma.cc/3YCF-GYP8>].

182. *Kisor*, 139 S. Ct. at 2448-49; Kavanaugh, *supra* note 178, at 1912-13; Kavanaugh, *supra* note 154, at 2152.

183. Scalia, *supra* note 24, at 520-21.

ambiguity in the statute less often.¹⁸⁴ Those who do not give controlling weight to the text, by contrast, would more frequently find conflicting signals that required them to give way to an agency's judgment.¹⁸⁵ In this sense, Scalia perhaps believed *Chevron* reinforced the separation of powers: so long as courts behaved like courts, they would have the final word, but if they strayed into "picking out [their] friends," they would have to give way to the experts.¹⁸⁶

Justice Kavanaugh's experience in the executive branch has led him to take a less sanguine view of *Chevron*'s incentives. He believes that "[t]he *Chevron* doctrine encourages agency aggressiveness on a large scale."¹⁸⁷ "Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes."¹⁸⁸ And stretch they will, because it is easier than sponsoring new legislation.¹⁸⁹ Moreover, because courts do not have a standard for assessing statutory ambiguity, they are ill equipped to counter enterprising agencies.¹⁹⁰

Whereas Justice Kavanaugh's pre-judicial public service occurred in Article II, Justice Breyer's occurred primarily in Article I.¹⁹¹ Breyer drew heavily on his experience in the legislative branch when interpreting statutes.¹⁹² His major questions principle was born of his observation that institutional limitations lead Congress to paint in broad strokes and leave interstitial issues to administrators.

184. *Id.* at 521; *See, e.g.*, MERRILL, *supra* note 17, at 204; Merrill & Hickman, *supra* note 40, at 860, 911.

185. Scalia, *supra* note 24, at 521.

186. Kavanaugh, *supra* note 178, at 1911 (paraphrasing Justice Scalia's criticism of legislative history).

187. *Id.*; *see* Kavanaugh, *supra* note 154, at 2150-51. Even some proponents of *Chevron* acknowledge this effect. *See, e.g.*, Elliott, *supra* note 19, at 3, 16-18.

188. Kavanaugh, *supra* note 178, at 1911.

189. *See id.*; Kavanaugh, *supra* note 154, at 2151.

190. *See, e.g.*, Kavanaugh, *supra* note 154, at 2152.

191. Justice Breyer's experience in Article II was limited to brief periods of service in the Department of Justice. *See* Nina Totenberg, *Justice Breyer, An Influential Liberal on the Supreme Court, to Retire*, NPR (Jan. 26, 2022, 3:48 ET), <https://www.npr.org/2022/01/26/1075781724/justice-stephen-breyer-supreme-court-retires> [<https://perma.cc/Z5MR-ERJ8>]. Another point of contrast between their biographies: whereas Breyer taught administrative law, Justice Kavanaugh taught a course on the separation of powers. *See Trump Announces Brett Kavanaugh as Supreme Court Nominee: Full Video and Transcript*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/politics/trump-supreme-court-announcement-transcript.html> [<https://perma.cc/AB22-D7WY>].

192. Pierce, *supra* note 71, at 753; Jordan S. Rubin, *Breyer's Time in U.S. Senate 'Foundational' for Tenure on Bench*, BLOOMBERG L. (Jan. 26, 2022), <https://news.bloomberglaw.com/us-law-week/breyers-time-in-u-s-senate-foundational-for-tenure-on-bench> [<https://perma.cc/LN7A-XGHR>].

Observations about executive overreach, by contrast, exerted little influence in his jurisprudence.

This leads to another point of contrast between Justice Breyer and Justice Kavanaugh: their positions on the separation of powers. Kavanaugh believes that the separation of powers is a critical safeguard of our liberties and democratic institutions.¹⁹³ He has criticized the *Chevron* doctrine as a “judicially orchestrated shift of power from Congress to the Executive Branch”¹⁹⁴ and has taken up the major questions doctrine (which he calls the “major rules doctrine”) as an important tool to return power to Congress.¹⁹⁵ Kavanaugh wrote an opinion similar to Justice Gorsuch’s *NFIB* and *West Virginia* concurrences when he was a judge on the D.C. Circuit. In it, he argued that the major questions doctrine is an offshoot of the nondelegation doctrine and that, accordingly, *neither* an executive agency nor the judiciary should be able to conclude that Congress has given the agency authority to decide a major policy question without a clear authorization from Congress.¹⁹⁶ Moreover, after joining the Court, Kavanaugh issued a statement in which he questioned whether Congress should be able to delegate such authority *even with* a clear statement.¹⁹⁷

Unsurprisingly, Justice Kavanaugh’s answers to the questions we posed above are diametrically opposed to Justice Breyer’s.

First, what makes a question “major”? Justice Kavanaugh’s choice of terminology – “major rules” instead of “major questions” – provides the answer. In his view, the doctrine comes into play only when agencies issue “rules of great economic and political significance.”¹⁹⁸ In other words, Kavanaugh uses an absolute, external measure of significance. He has identified a set of factors that make a *rule* major: “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.”¹⁹⁹ *Questions* whose

193. *U.S. Telecomm. Ass’n v. FCC*, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

194. Kavanaugh, *supra* note 154, at 2150.

195. *U.S. Telecomm. Ass’n*, 855 F.3d at 417 (Kavanaugh, J., dissenting from denial of rehearing en banc).

196. *Id.* at 419.

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

198. *U.S. Telecomm. Ass’n*, 855 F.3d at 419 (Kavanaugh, J., dissenting from denial of rehearing en banc); *see also Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari) (indicating that the doctrine is invoked when considering “major national policy decisions”).

199. *U.S. Telecomm. Ass’n*, 855 F.3d at 422-23 (Kavanaugh, J., dissenting from denial of rehearing en banc).

significance depends on their role within the statutory scheme require no special approach: Kavanaugh’s version of *Chevron* will almost never give agencies the upper hand on questions of statutory interpretation in any event.²⁰⁰

Second, how does the doctrine interact with *Chevron*? Justice Kavanaugh describes the “major rules doctrine” as a simple inversion of *Chevron*: “while the *Chevron* doctrine *allows* an agency to rely on statutory ambiguity to issue *ordinary* rules, the major rules doctrine *prevents* an agency from relying on statutory ambiguity to issue *major* rules.”²⁰¹ But this does not mean that Kavanaugh’s “major rules doctrine” operates at *Chevron* Step Zero.²⁰² Because Kavanaugh would never *presume* that Congress intended an agency to determine the meaning of a statute, he does not need a doctrine to help him assess whether such a presumption should apply.²⁰³ Instead, he applies his “major rules doctrine” as a rule of statutory interpretation at *Chevron* Step One, where he almost always lands on a single “best reading” of the statute that precludes agency discretion. As a rule of statutory interpretation, the doctrine limits agencies’ ability to issue “binding legal rules” on matters of political and economic significance by constraining them to rely on a clear congressional delegation of authority to issue the rules.²⁰⁴

Finally, does the doctrine’s presumption reflect the way Congress *does* act or the way Congress *should* act? Although Justice Kavanaugh has stated that the major questions doctrine describes the way Congress is presumed to act, he also emphasizes its normative underpinnings.²⁰⁵ The “key reason” for requiring a clear authorization from Congress is to ensure that the people’s democratic representatives retain control over the formulation of “binding legal rules,” especially on matters of great economic and political significance.²⁰⁶

* * *

In recent decisions, the Court has taken the major questions doctrine in Justice Kavanaugh’s favored direction, treating it as a rule of statutory interpretation

200. *Id.* at 419.

201. *Id.*

202. *Id.* at 426 n.7.

203. For this reason, Justice Kavanaugh distinguishes *King*—the quintessential “Step Zero” decision—“from the prototypical major rules cases.” *U.S. Telecom Ass’n*, 855 F.3d at 421 n.2. He believes it stands “for the distinct proposition that *Chevron* deference may not apply when an agency interprets a major government benefits or appropriations provision of a statute.” *Id.*

204. *Id.* at 419, 421.

205. *Id.* at 419.

206. *Id.* at 419, 422 (quoting WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 289 (2016)).

that requires Congress to speak clearly if it wishes to delegate significant regulatory powers to agencies.²⁰⁷ But as the opinions in *West Virginia* and *NFIB* reveal, there are still many open paths the doctrine could take, and we know from history that doctrinal paths can wind in unexpected ways. At the dawn of Justice Breyer's tenure on the Court, Justice Scalia was *Chevron's* greatest champion, and Breyer, its greatest critic. Yet today, the Justice who casts himself in Scalia's mold on questions of statutory interpretation has called for an end to *Chevron* as we know it, and Breyer has defended it.

There is good reason to believe that the Court's approach to interpreting regulatory statutes will continue to be unpredictable. At least four other Justices have expressed reservations about *Chevron* and delegations of legislative and judicial power.²⁰⁸ But this potential majority does not speak with one voice.

Justice Kavanaugh's proposed method—sidelining *Chevron* by refusing to find statutory ambiguity—represents a comparatively moderate approach. At least two of Kavanaugh's colleagues (Justices Thomas and Gorsuch) have advocated repudiating *Chevron* altogether,²⁰⁹ an approach with which Kavanaugh has signaled his sympathy.²¹⁰ Without the *Chevron* doctrine, the major questions doctrine would never aid courts in deciding whether to defer to agencies. As courts independently interpret statutes, however, they might continue to employ the major questions doctrine as a rule of construction that disfavors reading statutes to give agencies significant policy-making authority. In practice, this

207. See *supra* Section III.A.

208. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2446 n.114 (2018) (Gorsuch, J., concurring); *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring); see also *Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring) (noting that the Court's decision reaffirming *Auer* deference does not "touch upon" the "distinct" issues "raised in connection with judicial deference to agency interpretations of statutes enacted by Congress"); *id.* at 2449 (Kavanaugh, J., concurring) (same). Though Justice Barrett has said less about these issues, she has endorsed the view that "the power of judicial review carries with it a subsidiary power to push—though not force—statutory language in directions that better accommodate constitutional values." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U.L. REV. 109, 112 (2010). She has not joined Justice Gorsuch's call for a clear-statement rule, but she was part of the *NFIB* per curiam and *West Virginia* majority opinions that applied a rule of interpretation designed to reinforce the separation-of-powers principles thought to be jeopardized by *Chevron* and congressional delegations. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (Roberts, C.J., joined by Thomas, Alito, Gorsuch, Kavanaugh & Barrett, JJ.); *NFIB v. OSHA*, 142 S. Ct. 661 (2022) (per curiam).

209. See *Michigan v. EPA*, 576 U.S. 743, 761-62 (2015) (Thomas, J. concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring). Before Justice Scalia's untimely death and Justice Kennedy's retirement, both men seemed poised to endorse this move. See *Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109-10 (2015) (Scalia, J., concurring).

210. See *Kisor*, 139 S. Ct. at 2446, n.114 (Gorsuch, J., joined by Thomas & Kavanaugh, JJ., concurring in the judgment).

approach would only depart modestly from Kavanaugh's, as, again, he would defer to agencies relatively infrequently.

Should *Chevron* stagger on, however, a separate trend could increase the frequency with which the major questions doctrine determines whether the Court defers to an agency's interpretation.²¹¹ Justice Gorsuch has allied with Justice Kagan to promote a more literalist variant of textualism that runs counter to Justice Kavanaugh's efforts to eliminate statutory indeterminacy.²¹² In his dissent in *Bostock v. Clayton County*, Kavanaugh criticized the majority opinion's literalist approach on the ground that it displaces the ordinary meaning of phrases with the sum of individual words' dictionary definitions, which in turn undermines efforts to "make sense" of the statute through traditional tools of statutory interpretation.²¹³ As Justice Breyer himself acknowledged, these tools can make the difference in whether one finds a statute to be clear or ambiguous.²¹⁴ And although they may not concur with Kavanaugh's characterization of their approach, Kagan and Gorsuch have readily acknowledged that their literal textualism will likely lead to consequences that were not anticipated by the enacting Congress.²¹⁵ The consequent loss of statutory coherence seems likely to result in greater ambiguity.²¹⁶ That ambiguity, in turn, could give the canon variant of the major questions doctrine a role even larger than the one Kavanaugh envisions. That is, it could increase the frequency with which the Court finds several "plausible" interpretations that would grant an agency policy-making power but then selects a narrowing construction on major questions grounds.²¹⁷

211. If nothing else, so long as the Court continues its current practice of marginalizing without overruling *Chevron*, lower courts will continue to apply it. Kristin Hickman & Aaron Nielson, *The Future of Chevron Deference*, 70 DUKE L.J. 1016, 1017 (2021).

212. See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Gorsuch, J., joined by Roberts, C.J., Ginsburg, Breyer, Sotomayor & Kagan, JJ.). For examples of Justice Kagan's recent invocations of a more literal variant of textualism—though not joined by Justice Gorsuch—see *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2361-66 (2021) (Kagan, J., dissenting); and *West Virginia v. EPA*, 142 S. Ct. 2587, 2629 (2022) (Kagan, J., dissenting). The Chief Justice joined Justice Gorsuch's opinion in *Bostock*, but there are good reasons to doubt that he endorses its hyperliteralist approach to textualism. To the contrary, the Chief Justice has championed a form of contextualism that is on the other end of the textualist spectrum. See *King v. Burwell*, 135 S. Ct. 2480 (2015).

213. See *Bostock*, 140 S. Ct. at 1766-67 (Kavanaugh, J., dissenting) (quoting John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79-80 (2006)).

214. See *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488 (2012).

215. *Bostock*, 140 S. Ct. at 1737; *Brnovich*, 141 S. Ct. at 2364 n.9 (Kagan, J., dissenting).

216. Cf. MERRILL, *supra* note 17, at 215 ("[T]he plain-meaning version of textualism, as deployed by Justice Breyer in dissent in *Brown & Williamson* and by Justice Stevens in *Massachusetts*, reveals that textualism can be used just as easily to blow up limits on agency authority as to enforce them.").

217. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

Nor is Justice Kavanaugh’s “major rules” approach to the nondelegation doctrine (i.e., reinvigorating the nondelegation doctrine through the use of the major questions doctrine) guaranteed to prevail. While there are at least five votes to strengthen the nondelegation doctrine,²¹⁸ there is no single answer about how to do so.²¹⁹ In an opinion joined by Chief Justice Roberts and Justice Thomas, Justice Gorsuch identified three “important guiding principles” that should inform the Court’s approach to that doctrine.²²⁰ One principle traces its roots to Chief Justice Marshall’s opinion in *Wayman v. Southard*: “[A]s long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to ‘fill up the details.’”²²¹ Is this a major questions principle?²²²

Justice Thomas has suggested otherwise, arguing that *Wayman* is consistent with an understanding of Article I that requires Congress to create *all* “rules of private conduct,” large or small.²²³ If Thomas’s view prevails, then the major questions doctrine will become much less important as a rule of statutory interpretation. The major questions doctrine is able to coexist with the present nondelegation doctrine – which allows Congress to delegate policy-making authority to agencies so long as it provides an “intelligible principle” to guide the agency’s exercise of that authority – but the rules-of-private-conduct version of nondelegation gives the major questions doctrine much less scope. That is because *any* “rule of private conduct” of *any* degree of economic or political significance will have to come from the people’s

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218. See *DOT v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 86 (2015) (Thomas, J., concurring in the judgment); *Gundy v. United States*, 139 S. Ct. 2116, 2135-37 (2019) (Gorsuch, J., joined by Roberts, C.J., Thomas, J., dissenting); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (“Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.”). Justice Alito has also expressed his willingness to strengthen the nondelegation doctrine. *Id.* at 2130-31 (Alito, J., concurring in the judgment).
219. See, e.g., *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari) (outlining two potential approaches).
220. *Gundy*, 139 S. Ct. at 2136-37 (Gorsuch, J., dissenting).
221. *Id.* (citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).
222. See *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari) (understanding Justice Gorsuch’s *Gundy* opinion to derive a major questions principle from *Wayman*); see also *U.S. Telecomm. Ass’n v. FCC*, 855 F.3d 381, 402 (D.C. Cir. 2017) (Brown, J., dissenting from denial of en banc review) (citing *Wayman* as the source of the major questions doctrine).
223. *Ass’n of Am. R.Rs.*, 575 U.S. at 82 (Thomas, J., concurring in the judgment). *Chevron* has arguably created a unique set of problems by allowing Congress to hand small questions off to agencies. See generally Aaron L. Nielson, *The Minor Questions Doctrine*, 169 U. PA. L. REV. 1181 (2021) (arguing that such minor questions create a collective-action problem that may prevent both Congress and the executive branch from acting on them).

representatives, regardless of how clearly Congress expresses its desire for an agency to make the rule instead.

Where do the proponents of the nondelegation doctrine stand on this divide? Notably, although they joined Justice Gorsuch's dissent in *Gundy*, both the Chief Justice and Justice Thomas stopped short of identifying the major questions doctrine as an offshoot of the nondelegation doctrine in *West Virginia*.²²⁴ Justice Kavanaugh's major questions writings notwithstanding, it is not at all clear that he disagrees with Thomas that the nondelegation doctrine, whatever it requires, applies equally to questions large and small.²²⁵ As a proponent of legal rules that confine the branches to their constitutionally defined lanes, Kavanaugh may well grow suspicious of the major questions doctrine as a judge-made rule that empowers courts to decide what is major and what is not—or to reshape statutes in a way that may be at odds with congressional intent.²²⁶ Perhaps it was this concern that led him to refrain from joining Gorsuch's *West Virginia* and *NFIB* concurrences, despite having endorsed many of the principles articulated in those opinions. Or perhaps he simply favors a more cautious approach—one that says no more than is necessary to decide the case before the Court. Only time will tell.

CONCLUSION

As Justice Breyer resumes his role as a professor of administrative law at Harvard Law School,²²⁷ he will continue to shape our understanding of the relationship between Congress, the courts, and the administrative state. Optimism has always been an important ingredient of Breyer's approach to administrative law. His approach exhibits a progressive faith in technical expertise and the perfectibility of our institutions,²²⁸ which makes him less concerned than many of his former colleagues about preserving the structures the Founders erected to control man's inherently imperfect nature.²²⁹ We respect Breyer's

224. See *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting); *supra* note 159 and accompanying text.

225. See, e.g., Kavanaugh, *supra* note 154, at 2152.

226. See Squitieri, *supra* note 64, at 495-513; see also Loshin & Nielson, *supra* note 35, at 23 (arguing that the “elephants-in-mouseholes doctrine” is “not amenable to consistent application” because “[o]ne judge's mouse is another judge's elephant, and it ever will be so”).

227. *Justice Stephen Breyer Returns to Harvard Law School*, HARV. L. TODAY (July 15, 2022), <https://today.law.harvard.edu/justice-stephen-breyer-returns-to-harvard-law-school> [<https://perma.cc/K2S5-WYMC>].

228. Justice Breyer saw the same progressive faith reflected back in major legislative initiatives. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 165-66 (2000) (Breyer, J., dissenting).

229. See THE FEDERALIST NO. 51 (James Madison).

starting presumption of good faith. It is a critical—and eroding—virtue in our constitutional democracy.²³⁰ We look forward to his continued contributions in that vein. But we also agree with Justice Kavanaugh that we should not dispose of the structural protections that guard against bad faith or misguided good faith, even if doing so seems likely to lead to the best outcome in a given case. Is the major questions doctrine one of those structural protections?

Justice Breyer developed his major questions principle as a way for courts to help Congress achieve its desired ends. To the extent that Breyer dispensed (or dispensed with) that principle to form a presumptive congressional intent, he assumed Congress had the ultimate goal of regulating for the public good—as revealed to the court in the facts of a given case. In Breyer’s eyes, the facts usually reveal that Congress and the courts best serve the public good when they allow the “experts” at agencies to make policy, even—and perhaps especially—on questions of great economic and political significance.

Justice Breyer’s major questions principle has developed into a doctrine that may shape congressional intent in a very different way, one that makes it more difficult for Congress to empower agencies to answer questions of great economic and political significance. How heavy a thumb the doctrine will place on the scale may well depend on Justice Kavanaugh. He has positioned himself between the two emerging approaches to the doctrine: the Chief Justice’s cautious search for “clear authorization” in “extraordinary cases,” and Justice Gorsuch’s more robust “clear statement rule” that applies to a wide range of “major” questions.

For now, Justice Kavanaugh has cast his vote with the Chief Justice, and we see the wisdom in his caution. The *Chevron* doctrine was once hailed as a cure for the ailments within our system of government caused by an overly muscular judiciary. Those jealous of the separation of powers came to rue its side effects. The major questions doctrine may remedy those side effects and other delegation-related maladies besides. Or it may create another unintended imbalance.

What was true when Chief Justice Marshall penned *Wayman* remains true today:

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and

230. See Thomas B. Griffith, *The Degradation of Civic Charity*, 134 HARV. L. REV. F. 119, 127-28 (2020); Thomas B. Griffith, *Civic Charity and the Constitution*, 41 HARV. J.L. & PUB. POL’Y 633, 634-35 (2020).

power given to those who are to act under such general provisions to fill up the details.²³¹

The line-drawing pen is in the hands of an ever-shifting majority and, for that reason, the future of the major questions doctrine remains very much up for grabs.

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²³¹. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).