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INTRODUCTION

Since 1984, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* has held a prominent place in administrative law.[1] This "quasi-constitutional text"[2] provides the foundation for reasonable agency deference in the face of statutory ambiguity. While *Chevron* remains the law today, and this deference to executive agencies remains theoretically intact, the landscape of administrative law has changed since 1984. Over time, both scholars and judges have raised serious doubts about the rationale behind *Chevron* and its consequences. One well-known critic, Justice Neil Gorsuch, has gone as far as to accuse *Chevron* of being an "abdication of the judicial duty"[3] and question whether

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1. *See, e.g.*, Michael Herz, Chevron *is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1872 (2015) (noting that *Chevron* is "the Supreme Court's most important decision regarding judicial deference to agency views of statutory meaning").

2. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 188 (2006).

3. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016)

the time has come to reconsider it altogether.

This Article takes a particular look at Justice Gorsuch's constitutional critique of the current administrative state, which arguably is being manifested most predominantly as the major questions doctrine in Supreme Court jurisprudence. Justice Gorsuch, among others, argues that the current administrative state—specifically post-*Chevron*—violates the separation of powers as the Framers intended. Under his view, the Constitution vests *the legislature* with the power to make the law, but, under *Chevron*, Congress is unconstitutionally delegating too much of that power to the executive in the form of regulatory agencies.

While this "nondelegation" argument is one legitimate, constitutional argument, there also exists an opposing constitutional argument in defense of *Chevron*. The opposing argument, which is also grounded in the separation of powers, embodies the "intelligible principle" doctrine, which states that if Congress delegates quasi-legislative powers to another body, it must provide a "general provision" by which "those who . . . act" can "fill up the details."[4] In other words, Congress cannot give an agency unlimited freedom to craft laws, but it can authorize the agency to clarify the meaning of a law that Congress has already enacted.

Thus, because two equivalent constitutional interpretations of *Chevron* exist, this Article claims that resolution of this interpretive dispute does not rest on some neutral place of constitutional bedrock, but instead proceeds on the basis of the proper role of the current administrative state. Justice Gorsuch is not engaging simply in a formalistic interpretation of the Constitution in advocating for the overturn of *Chevron*. His argument has its own policy orientation and goals—it serves to reject the growth of the administrative state.

(Gorsuch, J., concurring).

4. Wayman v. Southard, 23 U.S. 1, 43 (1825).

The principal way that the nondelegation argument is currently manifesting in Supreme Court jurisprudence is through the major questions doctrine. The major questions doctrine arises when the Court rejects *Chevron* deference by arguing that Congress would not have delegated a question of this significance to the agency. But under both nondelegation and the major questions doctrine, the Court claims to restrict the power of an administrative agency and relocate lawmaking power, as required under separation of powers, to the legislative branch. This Article demonstrates, though, that by invoking the major questions doctrine, the Court is, in fact, enhancing its own interpretive power.

The purpose of this Article is twofold: (1) to demonstrate that because a dispute in the constitutional interpretation of *Chevron* exists over the proper separation of powers, it is insufficient for Justice Gorsuch to claim to rely solely on a nondelegation argument to refute *Chevron* deference and (2) to demonstrate that the major questions doctrine acts more as a facade for the Court's separation of power effort to diminish administrative power. Neither of these critiques of *Chevron* actually fixes the alleged problem of unconstitutional delegations because their "remedy" is for the Court to be the body that assumes interpretive authority. But, under this remedy, the separation of powers is not being restored to what the Constitution intended; the delegation is not being restored to the legislature. Thus, the argument is really about a policy disagreement over the role of the administrative state, which remains in dispute. While other scholarly articles note that the enhancement of the Court's own interpretive powers is one of the major questions doctrine's ramifications,[5] this Article is distinct in the depth

5. *See, e.g.*, Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2050 (2018) ("The major questions cases are therefore best understood as a way to reassert the primacy of courts over agencies as the interpretive agents of Congress."); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1937 (2017) (questioning whether the major questions doctrine was intended to serve as a "power canon" for the Court to "seiz[e] power aligned with its basic

in which it addresses this issue and in its argument against nondelegation as both a critique of *Chevron* and a rationale of the major questions doctrine.[6]

Part I of this Article will provide background on *Chevron*, its rationales, and the competing separation of powers arguments both in favor of and against *Chevron* deference. Part II will summarize Justice Gorsuch's argument against *Chevron*—found mainly in his Tenth Circuit *Gutierrez-Brizuela v. Lynch* concurrence, which, while not mentioning the major questions doctrine by name, can be interpreted as fuel for its revitalization. Part II will also outline the emergence of the major questions doctrine in Supreme Court jurisprudence, arguing that this doctrine is a manifestation of the nondelegation argument and criticism of *Chevron* generally. Lastly, Part III of this Article illustrates the pitfall of Justice Gorsuch's nondelegation argument: that by stopping the delegation (whether improper or not), the Court is in fact rerouting the delegation to itself, which results in the Court doing the work of the legislator by deciding legislative meaning as it deems proper. Part III also argues that the major questions doctrine acts as a facade for the Court's nondelegation effort to diminish administrative power, by adopting the same remedy as Justice Gorsuch's

distrust of an active administrative state"); Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 499 (2016) (stating in the conclusion that, "when the Court applies the doctrine, it diminishes the deference that an agency normally receives, thereby shifting interpretive authority to the courts"); *Major Question Objections*, 129 HARV. L. REV. 2191, 2202 (2016) ("[T]he [major questions] exception has sought to route especially 'big' or consequential questions away from agencies and to courts . . . .").

6. *But see* Emerson, *supra* note 5, at 2044–45 ("Since the primary purpose of the major questions doctrine is to reinforce the nondelegation doctrine [via the Court's use of substantive canons], the justification for the major questions doctrine must be sought out in the nondelegation doctrine itself."); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 52–53 (2010) (same); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance,* 2000 SUP. CT. REV. 223, 242 (2000) (offering the under-enforced constitutional principle of nondelegation as a rationale for the major questions doctrine).

argument. Therefore, what underlies these nondelegation arguments is a policy effort to reduce the status of the current administrative state.

I. *CHEVRON* BACKGROUND

A. *The Supreme Court Case:* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.

The Supreme Court's 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* has been termed a "counter-*Marbury* for the administrative state," which stated that "in the face of ambiguity, it is emphatically the province and duty of the *administrative* department to say what the law is."[7] *Chevron* did this by creating a two-step inquiry for courts to follow in reviewing agency interpretations of law.[8] Under Step One, the Court asks whether Congress has "directly spoken to the precise question at issue."[9] If it has, and Congress's intent is consequently clear, then this ends the Court's inquiry as the Court "must give effect to the unambiguously expressed intent of Congress."[10] The Court proceeds to Step Two only if it determines that Congress has not directly addressed the question at issue—meaning the statute is silent—or if the statute is ambiguous with regard to the specific issue.[11] Under Step Two, rather than imposing its own construction of the statute— as the Court would normally do in the absence of administrative interpretation—the Court asks whether the agency's interpretation is a "permissible" or reasonable construction of the statute.[12] If the agency's

7. Sunstein, *supra* note 2, at 189 (emphasis original).

8. See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

9. *Id.* at 842.

10. *Id.* at 843.

11. *Id.*

12. *Id.*

interpretation is reasonable, then the agency's interpretation is controlling.[13] Note that "reasonable" does not mean whether, in the Court's view, the interpretation is how the Court would have answered the question had it been given the task, but rather whether the agency's interpretation is a permissible reading of the statute, regardless of whether the Court agrees with it.[14]

While *Chevron* framed the deference inquiry in two steps, a third step—Step Zero—was subsequently developed that asks whether *Chevron's* two-step framework should apply to begin with. According to Cass Sunstein, this step was developed through a trilogy of cases,[15] suggesting that "when agencies have not exercised delegated power to act with the force of law, a case-by-case analysis of several factors ought to be used to determine whether *Chevron* provides the governing framework."[16] *Chevron* Step Zero is also commonly derived from *United States v. Mead Corporation*, which held that *Chevron* only applies if Congress delegated interpretive authority to the agency with respect to the provision in question and the agency has made an appropriate formal ruling.[17] In short, Step Zero reasons that if *Chevron* is based on a theory of implied delegation, then it is reasonable to assume that there are some questions of interpretation that Congress would not have wanted to delegate to the agencies.

B. *The Rationales Behind the Case*

In promulgating *Chevron's* two-step test, the Court did

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13. *Id.* at 844.

14. *Id.* at 843 n.11.

15. *See* Barnhart v. Walton, 535 U.S. 212 (2002); United States v. Mead Corp., 533 U.S. 218 (2001); Christensen v. Harris Cty., 529 U.S. 576 (2000).

16. Sunstein, *supra* note 2, at 193. Step Zero is more complex than this, but for the purposes of this Article, the above explanation suffices. *See id.* at 211–31 for a discussion on the cases that provide the foundation for *Chevron* Step Zero and the resulting applicability of the *Chevron* framework.

17. *Mead*, 533 U.S. at 226–27.

not provide a clear rationale behind its approach. One of the reasons the Court gave for why agencies should be permitted to interpret statutory ambiguities, with reasonableness as their only limitation, was implied delegation:

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[18]

However, this justification does not explain why a court should find an implicit delegation to the agency, either on the basis of the Administrative Procedure Act ("APA") or the Clear Air Act, which provided the governing statutory provisions in *Chevron*.[19] The APA, on the contrary, states that the "reviewing court shall decide all relevant questions of law, [and] interpret . . . statutory provisions,"[20] suggesting that ambiguities must be resolved by the court. This has led many Supreme Court Justices and scholars to draw the conclusion that implied delegation is merely a legal fiction.[21]

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18. *Chevron*, 467 U.S at 843–44 (citations omitted) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

19. Sunstein, *supra* note 2, at 196.

20. 5 U.S.C. § 706 (2012).

21. *See e.g.*, Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 91 (2000) ("Insofar as *Chevron* instructs lower courts to treat a statutory ambiguity as an implicit delegation of interpretive authority, it is widely understood to rest on a fiction."); David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 224 (citing Breyer's observation on the fiction of Chevron); Kurt Eggert, *Deference and Fiction: Reforming* Chevron's *Legal Fictions After* King v. Burwell, 95 NEB. L. REV. 702, 719 (2017) ("The *Chevron* opinion, however, rests on the legal fiction that Congress, by leaving a gap or ambiguity in a statute, evinces an intent to delegate to the administering agency the power to fill in that gap."); Herz, *supra* note 1, at 1876 ("But it is hard to find anyone who does not consider congressional delegation a fiction."); John F.

Indeed, both Justice Stephen Breyer and Justice Antonin Scalia wrote separate law review articles in the 1980s discussing this implication of delegation as an important legal fiction newly created by the Supreme Court in *Chevron*.[22]

The Court in *Chevron* also provided two additional policy reasons to justify deference: agency expertise and political accountability. The Court noted that "[j]udges are not experts in the field"[23] and "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."[24]

The debate about how to understand *Chevron's* rationale continues to this day, with scholars both returning to the original justifications such as implied delegation, agency expertise, and political accountability, and also appraising new ones like uniformity.[25] Jonathan Adler makes a

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Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1932 (2015) ("Yet whatever the background legislative understanding about deference and delegation may once have been, it would be facetious for judges today to treat the availability of deference as a question of *genuine* legislative intent.").

22. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986). *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

23. *Chevron*, 467 U.S. at 865.

24. *Id.* at 865–66.

25. *See* Jonathan Adler, *Restoring* Chevron's *Domain*, 81 MO. L. REV. 983, 987–89 (2016) ("Empowering agencies to offer authoritative interpretations of ambiguous federal laws also serves the goal of uniformity within the federal system. If federal law is federal law, it should apply uniformly throughout the nation. Leaving the interpretation of ambiguous or unclear statutes to the courts can result in different interpretations applying in different places (at least until the Supreme Court resolves such questions, should it choose to do so). A federal agency interpretation to which courts are obliged to defer, on the other hand, provides for a single nationwide interpretation of the relevant statute.").

distinction between these types of rationales. He points out that agency expertise, political accountability, and uniformity are all policy reasons for deferring to agencies over judges.[26] But *Chevron* needed a legal basis as well, especially when one considers the fact that the Administrative Procedure Act essentially states the opposite rule: that it is *courts* that are to "decide all relevant questions of law," which includes the meaning of "statutory provisions."[27] Despite the lack of a statutory provision that instructs the courts to defer to agency interpretations in cases of ambiguous statutory texts, the Supreme Court, on numerous occasions, has noted that *Chevron* is premised on a delegation of interpretive power from Congress to executive agencies.[28] This is what is meant by implied delegation.

Implied delegation is, in fact, rooted in the Constitution. It is a function of the exclusive allocation of legislative authority to Congress in Article I.[29] However, because few statutes explicitly provide for this delegation, the rationale that Congress intends each ambiguity as a delegation of authority is considered by most to be a "legal fiction."[30] But if it is a legal fiction, it is a widely accepted one, and one that

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26. *Id.* at 989.

27. 5 U.S.C. § 706 (2012).

28. King v. Burwell, 135 S. Ct. 2480, 2488 (2015) (*Chevron* "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (same); United States v. Mead Corp. 533 U.S. 218, 226–27, 229 (2001) (recognizing that the delegation of authority may be implicit); *see also* Adler, *supra* note 25, at 990–91.

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

30. Adler, *supra* note 25, at 990–91; *see also* Lisa Schulz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2009 (2011) (noting *Chevron* "rests on a legal fiction"); Herz, *supra* note 1, at 1876 ("[I]t is hard to find anyone who does not consider congressional delegation a fiction."); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 749 (2002) ("*Chevron* deference revolves around the fiction of a congressional delegation . . . .").

provides the basis for *Chevron's* legal foundation. As Justice Scalia remarked in a 1989 article:

> *Chevron* . . . replaced [a] statute-by-statute evaluation . . . with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant . . . . Surely, [this] is a more rational presumption today than it would have been thirty years ago—which explains the change in the law. Broad delegation to the Executive is the hallmark of the modern administrative state; agency rulemaking powers are the rule rather than, as they once were, the exception; and as the sheer number of modern departments and agencies suggests, we are awash in agency "expertise." . . . In the vast majority of cases I expect that Congress . . . didn't think about the matter at all . . . [which means] any 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.[31]

C. *The Competing Constitutional Interpretations of* Chevron

There exist two competing constitutional interpretations of *Chevron*. Both concern the proper separation of powers and arise out of the historical development of the nondelegation doctrine. What this Article terms the "nondelegation argument" more closely aligns with the traditional nondelegation doctrine, which represents the reluctance in the 1930s to expand the powers of the federal government. Advocates for a reduction of *Chevron* deference and the administrative state in general use this nondelegation argument. On the contrary, those who advocate for maintaining the current administrative state use the "intelligible principle argument," which represents a willingness after the 1930s to accommodate legislative delegations given the increasing difficulties of governing a

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31. Scalia, *supra* note 22, at 516–17. Justice Scalia goes on to state that "[i]f that is the principal function to be served, *Chevron* is unquestionably better than what preceded it" because (1) "Congress now knows that the ambiguity it creates . . . will be resolved within the bounds of permissible interpretation . . . by a particular agency, whose policy biases will ordinarily be known"; and (2) *Chevron* "permit[s] needed flexibility, and appropriate political participation, in the administrative process." *Id.* at 517.

growing nation.[32] This gave way to a modification of the traditional nondelegation doctrine, equating constitutionality with the presence of an "intelligible principle" from Congress.

Those favoring a reduction in the current administrative state use the nondelegation argument. The traditional nondelegation doctrine states: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[33] This is because Article I of the Constitution vests all legislative power in Congress. According to the nondelegation argument's advocates, Justice Gorsuch among them, the nondelegation doctrine has an essential connection to separation of powers and individual liberty.[34] This position emphasizes more the "separation" in the separation of powers. It is a more literal understanding of the structure of the Constitution and of the APA (which requires that courts "decide all relevant questions of law" and "interpret constitutional and statutory provisions"),[35] as well as *Marbury v. Madison's* enunciation of judicial duty.[36]

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32. For a discussion on the judicial history of the nondelegation doctrine, see Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the* Chevron *and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 928–933 (2006).

33. Field v. Clark, 143 U.S. 649, 692 (1892); *see also* Mistretta v. United States, 488 U.S. 361, 371–72 (1989) ("Congress generally cannot delegate its legislative power to another [b]ranch.").

34. DOT v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1237, 1241 (2015) ("The principle that Congress cannot delegate away its vested powers exists to protect liberty.") (Alito, J., concurring) ("At issue in this case is the proper division between legislative and executive powers. An examination of the history of those powers reveals how far our modern separation-of-powers jurisprudence has departed from the original meaning of the Constitution.") (Thomas, J., concurring).

35. 5 U.S.C. § 706 (2012) (outlining the standards by which a court should determine the validity of an agency action in reviewing its proceedings).

36. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

As applied here, the nondelegation argument is that Congress's delegation of authority to executive agencies under *Chevron* is unconstitutional because Congress is delegating too much of its constitutional power to the executive. The major questions doctrine, then, is one way for the Court to remedy these unconstitutional delegations, as it stops them in cases of significant questions.

On the other hand, those in favor of maintaining the current administrative state use the intelligible principle argument: that as long as Congress has supplied something like an "intelligible principle" to guide and limit executive discretion, delegations of power are constitutional.[37] Notably, what is considered a permissible intelligible principle can be very broad and vague. For example, in *Whitman v. American Trucking Associations, Inc.*, the Court held that the language "requisite to protect the public health" contained a sufficient intelligible principle to guide the Environmental Protection Agency ("EPA") in setting air quality standards.[38] This finding follows a long line of precedent in which broad and vague terms are still held as containing an intelligible principle.[39]

So while the nondelegation argument emphasizes more the separation in the separation of powers, the intelligible

37. The intelligible principle doctrine can be originally attributed to *J. W. Hampton, Jr. & Co. v. United States*, a 1928 case, where the Court upheld Congress's delegation to the President to set tariff rates that would equalize production costs in the United States and competing countries. *See* J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). There, the Court emphasized the importance of seeking the cooperation of another branch of government, and in doing so, Congress was only restrained by the "common sense and the inherent necessities" of the situation. *Id.* at 406. The Court stated it would uphold delegations as long as Congress provided an "intelligible principle" to which the President or an agency must comply. *Id.* at 409 ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

38. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475–76 (2001).

39. *See, e.g.*, Indus. Union Dep't v. Am. Petroleum Inst. (Benzene), 448 U.S. 607, 612 (1980); Mistretta v. United States, 488 U.S. 361, 372 (1989).

principle argument emphasizes instead the principle that the separation of powers also works to permit coordination of powers, in order to allow government to function effectively. For instance, *Buckley v. Valeo* embodies this principle when it cites prior precedent on the subject of the three branches of government as "co-ordinate parts of one government," stating that one branch may seek assistance from another "according to common sense and the inherent necessities of the government co-ordination."[40] The separation of powers contemplates "that practice will integrate the dispersed powers into a workable government."[41] Chief Justice Roberts also emphasizes this principle in *Burwell* by discussing the Court's role in ensuring government workability rather than insisting on more literal understandings that defeat the government design.[42] Those in favor of the intelligible principle argument would argue that the nondelegation argument, and its literal interpretation of the separation of powers, makes government unworkable, but making government unworkable is precisely its goal.

Thus, the intelligible principle argument, in contrast to the nondelegation argument, is grounded more in something akin to constitutional realism rather than legal formalism,

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40. Buckley v. Valeo, 424 U.S. 1, 122 (1976) (quoting Hampton & Co. v. United States, 276 U.S. 394, 406 (1928)).

41. *Id.* (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)).

42. King v. Burwell, 135 S. Ct. 2480, 2496 (2015).

> In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—"to say what the law is." Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan. Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.

Id. (Roberts, J., writing for the majority).

recognizing the realities of the traditional nondelegation doctrine. Even though scholars and judges continue to use the nondelegation argument to make a case against *Chevron*, there have only been two decisions invalidating an agency action as unconstitutional on nondelegation grounds.[43] Both decisions were in 1935, one of which "provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'"[44] Many scholars attribute the reason for the lack of the nondelegation doctrine's enforcement, despite the many opportunities for the Court to do so, to its impossibility of being judicially administered in a principled way.[45] Justice Scalia stated in *Whitman* that "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"[46]

As Professor John Manning has summarized: "[E]nforcement of the nondelegation doctrine necessarily reduces to the question whether a statute confers too much discretion. Without a reliable metric (other than an I-know-it-when-I-see-it test), the Court has long doubted its capacity to make principled judgments about such questions of

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43. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

44. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) (citing *Panama Refining Co.*, 293 U.S. at 388; *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 495).

45. *See e.g.*, Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 321 (2000) ("[J]udicial enforcement of the nondelegation doctrine would raise serious problems of judicial competence and would greatly magnify the role of the judiciary in overseeing the operation of modern government. Because the relevant questions are ones of degree, the nondelegation doctrine could not be administered in anything like a rule-bound way, and hence the nondelegation doctrine is likely, in practice, to violate its own aspirations to discretion-free law."); Loshin & Nielson, *supra* note 6, at 57.

46. *Whitman*, 531 U.S. at 474–75 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

degree."[47] The traditional nondelegation doctrine largely failed as a constitutional matter. Nonetheless, the nondelegation argument appears to have been resurrected as a doctrine of statutory interpretation.

This Article will primarily focus on the nondelegation argument because this is the argument used by critics of *Chevron*, particularly Justice Gorsuch. The nondelegation argument often provides the justification that Justice Gorsuch and proponents of the major questions doctrine use to argue that *Chevron* deference should be scaled back. Nevertheless, it is essential to appreciate that both the nondelegation argument and the intelligible principle are viable separation of powers arguments that concern the proper constitutional interpretation of *Chevron*. Deciding which of these constitutional visions one aligns with usually depends upon one's policy preference on the status of the current administrative state.

II. *CHEVRON* CRITICISM

Chevron has drawn much criticism. Many judges and scholars reject the intelligible principle argument and the "legal fiction" of implied delegation. They believe that an ambiguity in a statute does *not* reflect a congressional intent for agencies to fill in the gaps,[48] and such delegations are a violation of the separation of powers. Indeed, under these views, it is the Court's function to resolve legislative meanings. This Part focuses on Justice Gorsuch's nondelegation argument against *Chevron* deference and the major questions doctrine as a manifestation of that criticism against *Chevron*.

A. *Justice Gorsuch's Argument*

One of the more well-known critics of the *Chevron*

47. Manning, *supra* note 6, at 241–42.

48. *See* Garry, *supra* note 32, at 945–46.

doctrine is now-Justice Gorsuch. As previously mentioned, one of his main arguments is that *Chevron* is contrary to the separation of powers as the Framers intended. He penned this critique when he was still sitting on the Tenth Circuit in an opinion titled *Gutierrez-Brizuela v. Lynch*.[49] The majority opinion, which he also wrote, is important as it addresses the interplay between judicial and agency interpretations under both *Chevron* and *Brand X*.[50] However, Justice Gorsuch's separate concurrence is even more vital for the purposes of this Article because it is there that Justice Gorsuch focuses on the nondelegation argument, all but calling for the Supreme Court to overturn *Chevron*.

1. *Gutierrez-Brizuela v. Lynch* Majority Opinion

The intricate question before the Tenth Circuit in *Gutierrez-Brizuela* was: "[A]ccepting that an agency may overrule a court, may it do so not only prospectively but also retroactively, applying its new rule to completed conduct that transpired at a time when the contrary judicial precedent appeared to control?"[51] Writing for the majority, Justice Gorsuch held that an agency's interpretation is not "legally effective" until a court, in deference to the agency, overrules itself.[52]

Gutierrez-Brizuela dealt with two seemingly contradictory provisions of U.S. immigration law. The first statute "grants the Attorney General discretion to 'adjust the status' of those who have entered the country illegally and afford them lawful residency."[53] The second statute "provides that certain persons who have entered this country illegally

49. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

50. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

51. *Gutierrez-Brizuela,* 834 F.3d at 1143.

52. *Id.* at 1145.

53. 8 U.S.C. § 1255(i)(2) (2012); *Gutierrez-Brizuela,* 834 F.3d at 1144 (citing De Niz Robles v. Lynch, 803 F.3d 1165, 1167 (10th Cir. 2015)).

more than once are categorically prohibited from winning lawful residency . . . unless they first serve a ten-year waiting period outside our borders."[54] In 2005, the Tenth Circuit determined that the first statute should control.[55] *Padilla-Caldera v. Gonzales* (*Padilla-Caldera I*) held that the Attorney General's discretion to afford relief without insisting on a decade-long waiting period remained intact.[56]

However, in 2007, the Board of Immigration Appeals ("BIA") issued *In re Briones*.[57] In *Briones,* the BIA decided that as a matter of policy discretion the statutory tension should be resolved *against* affording the Attorney General any discretion to consider applications for adjustment of status when the second statute applies.[58] The BIA sought to apply this new rule—holding that the second statute controls—in *Padilla-Caldera II*.[59] There, the Tenth Circuit held that "the Supreme Court's extension of *Chevron* in *Brand X* further required this court to defer to the agency's policy choice and overrule our own governing statutory interpretation in *Padilla-Caldera I*."[60]

Unfortunately, that was not the end of the court's recitation of relevant procedural history. The BIA tried to make its *In re Briones* ruling retroactive in a case titled *De*

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54. 8 U.S.C § 1182(a)(9)(C)(i)(I); *Gutierrez-Brizuela,* 834 F.3d at 1144 (citing *De Niz Robles*, 803 F.3d at 1167)).

55. *Gutierrez-Brizuela,* 834 F.3d at 1144 (citing Padilla-Caldera v. Gonzales (*Padilla-Caldera I*), 426 F.3d 1294, 1299–1301 (10th Cir. 2005), *amended and superseded on reh'g by* 453 F.3d 1237, 1242–44 (10th Cir. 2006)).

56. *Id.*

57. *Id.* (citing *In re Briones*, 24 I. & N. Dec. 355 (BIA 2007)).

58. *Id.* (citing *In re Briones*, 24 I. & N. Dec. 355 (BIA 2007)).

59. *Id.*

60. *Id.* (citing Padilla-Caldera v. Holder (*Padilla-Caldera II*), 637 F.3d 1140, 1148–52 (10th Cir. 2011)). The Tenth Circuit engaged in a *Chevron* analysis, finding that the "two statutory directives were ambiguous [and] that 'step two' of *Chevron* required this court to assume that Congress had delegated legislative authority to the BIA to make a 'reasonable' policy choice in the face of this statutory ambiguity." *Id.* (citing *Padilla–Caldera II*, 637 F.3d at 1148–52).

Niz Robles,[61] and the Tenth Circuit quite simply said "no." Both bodies agreed that after *Padilla-Caldera II* all future petitioners must satisfy the ten-year waiting period and not seek discretionary relief from the Attorney General.[62] But *De Niz Robles* applied to a petitioner who applied for discretionary relief in express reliance on *Padilla-Caldera I*, *before* the BIA's announcement of its contrary interpretation in *Briones*.[63] The Tenth Circuit held that "because the agency's promulgation of a new rule of general applicability under *Chevron* step two and *Brand X* is an exercise of delegated legislative policymaking authority, it is subject to the presumption of prospectivity that attends true exercises of legislative authority."[64]

Finally arriving to the case before it in 2016—*Gutierrez-Brizuela*—the BIA tried again to bring a similar claim. Mr. Gutierrez-Brizuela, like Mr. De Niz Robles, applied for adjustment of status in reliance on the court's decision in *Padilla-Caldera I*.[65] The difference is that Mr. Gutierrez-Brizuela applied for relief during the period *after* the BIA's announcement of its contrary interpretation in *Briones* but *before Padilla-Caldera II* declared *Briones* controlling and *Padilla-Caldera I* overruled.[66] The BIA argued that this distinction made "all the legal difference."[67] But the Tenth Circuit disagreed.[68]

Justice Gorsuch wrote that Mr. Gutierrez-Brizuela was eligible for adjusted status because *Padilla-Caldera I*—and not *Briones* or *Padilla-Caldera II*—controlled his 2009

61. De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2015).

62. *Gutierrez-Brizuela,* 834 F.3d at 1144.

63. *Id.*

64. *Id.* (citing *De Niz Robles*, 803 F.3d at 1172–74).

65. *Id.*

66. *Id.* at 1144–45.

67. *Id.* at 1145.

68. *Id.*

application for adjusted status.[69] This was because of both the rule and the reasoning in *De Niz Robles v. Lynch*.[70]

The court first discussed the rule in *De Niz Robles*, which was*:* "An agency in the *Chevron* step two/*Brand X* scenario may enforce its new policy judgment only with judicial approval."[71] The BIA depended on *Padilla-Caldera II* (a Tenth Circuit Court opinion) to render *Briones* (a BIA opinion) effective. Why? Because the court had to "discharge its obligation under *Chevron* step two and *Brand X* to determine that the statutory provisions at issue were indeed ambiguous [and] that the BIA's interpretation of them was indeed reasonable."[72]

Then, the court turned to *De Niz Robles*' reasoning: "[T]o the extent the executive is permitted to exercise delegated legislative authority to overrule judicial decisions, logic suggests it should be bound by the same presumption of prospectivity that attends true legislative enactments."[73] If Congress, for example, wanted to amend the law to dismiss a judicial decision such as *Padilla-Caldera I*, its actions would have controlled conduct arising only *after* the legislation went into effect. In this case, we know that *Briones* only went into effect when the Tenth Circuit handed down *Padilla-Caldera II*.[74] Thus, individuals were free to rely on *Padilla-Caldera I*.[75]

In sum, focusing on a court's obligation to find whether the relevant statutory provision is ambiguous and, if it is, whether the agency's interpretation is reasonable, *Guiterrez-Brizuela v. Lynch* held that an agency's interpretation must

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69. *Id.* at 1144–45.

70. Id. at 1145; De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2015).

71. *Gutierrez-Brizuela,* 834 F.3d at 1145 (quoting *De Niz Robles*, 803 F.3d at 1174).

72. *Id.*

73. *Id.* (citing *De Niz Robles*, 803 F.3d at 1172).

74. *Id.*

75. *Id.*

wait for a court's approval. In other words, an agency's interpretation is not "legally effective" until a court, in deference to the agency, overrules itself.

2. *Gutierrez-Brizuela v. Lynch* Concurrence

Clearly believing that *Gutierrez-Brizuela v. Lynch* demonstrated fundamental problems with the *Chevron* doctrine, Justice Gorsuch took the opportunity to write a separate concurring opinion. His opening remarks set the overall tone of the concurrence: "[T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth."[76]

For the purposes of this Article, I will break down Justice Gorsuch's relevant concerns regarding *Chevron* into two categories, both of which relate to the separation of powers. Justice Gorsuch argues that *Chevron* and *Brand X* are contrary to the separation of powers intended by the framers of the Constitution both by (1) depriving the judiciary of its proper role (the "abdication of judicial duty argument") and (2) relinquishing excessive legislative authority to the executive (the "nondelegation argument").[77] It is the second

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76. *Id.* at 1149 (Gorsuch, J., concurring).

77. *Id.* at 1154 (Gorsuch, J., concurring). Justice Gorsuch has a third, related argument that *Chevron* makes it considerably more difficult for "the people" to discern what the law is:

> Under *Chevron* the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess whether the statute will be declared "ambiguous" (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed "reasonable." Who can even attempt all that, at least without an army of perfumed lawyers and lobbyists? And, of course, that's not the end of it. Even if the people somehow manage to make it through this far unscathed, they must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely

argument that is the focus of this Article.

First, as to the abdication of judicial duty argument, Justice Gorsuch states that *Chevron* and *Brand X* prevent courts from fulfilling their constitutional and statutory duty, under the APA, to say what the law is. Justice Gorsuch starts by discussing *Brand X's* tension with the separation of powers: "By *Brand X*'s own telling . . . a judicial declaration of the law's meaning in a case or controversy before it is not 'authoritative,' but is instead subject to revision by a politically accountable branch of government."[78] This is, after all, precisely what had happened to Justice Gorsuch in the case of Mr. Padilla-Caldera. After the Tenth Circuit had declared the immigration statutes' meaning and issued its holding, "an executive agency was permitted to (and did) tell us to reverse our decision like some sort of super court of appeals."[79] Justice Gorsuch stated that "[i]f that doesn't qualify as an unconstitutional revision of a judicial declaration of the law by a political branch, I confess I begin to wonder whether we've forgotten what might."[80]

Justice Gorsuch continued with what he believed the proper solution should have been. Instead of the agency being able to change the law: "When the political branches disagree with a judicial interpretation of existing law, the Constitution prescribes the appropriate remedial process. It's called legislation. Admittedly, the legislative process can be an arduous one. But that's no bug in the constitutional

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> on the shift of political winds and *still* prevail. Neither, too, will agencies always deign to announce their views in advance; often enough they seek to impose their "reasonable" new interpretations only retroactively in administrative adjudications.

Id. at 1152.

78. *Id.* at 1150 (Gorsuch, J., concurring) (internal citations omitted).

79. *Id.* (Gorsuch, J., concurring) (citing Padilla-Caldera v. Gonzales (*Padilla-Caldera I*), 426 F.3d 1294 (10th Cir. 2005), *amended and superseded on reh'g* by 453 F.3d 1237 (10th Cir. 2006)).

80. *Id.* (Gorsuch, J., concurring).

design: it is the very point of the design."[81] Then, Justice Gorsuch came to the heart of the issue. "Of course, *Brand X* asserts that its rule about judicial deference to executive revisions follows logically 'from *Chevron* itself' . . . . But acknowledging this much only brings the colossus now fully into view."[82] Justice Gorsuch's problem is ultimately not with *Brand X*, but with *Chevron* deference itself.

Justice Gorsuch's concurrence also cited to the APA to further his critique of the abdication of judicial duty argument. Section 706 of the APA outlines the standards by which a court should determine the validity of an agency action in reviewing its proceedings.[83] Section 706 requires that courts "decide all relevant questions of law" and "interpret constitutional and statutory provisions."[84] Yet, according to Justice Gorsuch, the APA is not being followed: "[R]ather than completing the task expressly assigned to us, rather than 'interpret[ing] . . . statutory provisions,' declaring what the law is, and overturning inconsistent agency action, *Chevron* step two tells us we must allow an executive agency to resolve the meaning of any ambiguous statutory provision. In this way, *Chevron seems no less than a judge-made doctrine for the abdication of the judicial duty*."[85]

Justice Gorsuch's reliance on the APA is an example of another formalist argument—as opposed to acknowledging the legal realism of the courts adjusting to the complexities of the existing administrative state. However, once again, this argument is not simply formalistic; it serves to reject the growth of the administrative state.

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81. *Id.* at 1151 (Gorsuch, J., concurring).

82. *Id.* (Gorsuch, J., concurring).

83. 5 U.S.C. § 706 (2012).

84. *Id.*; *Gutierrez-Brizuela*, 834 F.3d at 1151 (Gorsuch, J., concurring) (citing 5 U.S.C. § 706 (2012)).

85. *Gutierrez-Brizuela*, 834 F.3d at 1151–52 (Gorsuch, J., concurring) (emphasis added).

Turning to Justice Gorsuch's second argument against *Chevron*, the "nondelegation argument," Justice Gorsuch argues that the amount of interpretive authority that *Chevron* vests in agencies violates the *traditional* nondelegation doctrine. Recall that the traditional nondelegation doctrine has as its opposite the intelligible principle argument, and that the intelligible principle argument assumes that Congress delegated enough of an intelligible principle in order to make *Chevron* deference constitutional in the majority of cases. Justice Gorsuch seeks to respond to the intelligible principle argument and the implied delegation rationale for *Chevron* by writing: "*Chevron* says that we should infer from any statutory ambiguity Congress's 'intent' to 'delegate' its 'legislative authority' to the executive to make 'reasonable' policy choices,"[86] but this delegation to the executive branch is merely *implied*,[87] while, by contrast, an express delegation to the courts exists. Citing to the APA again, Justice Gorsuch writes that "Congress expressly vested the courts with the responsibility to 'interpret . . . statutory provisions' and overturn agency action inconsistent with those interpretations."[88] Couple this with the fact that "not a word can be found here about delegating legislative authority to agencies," and "how can anyone fairly say that Congress 'intended' for courts to abdicate their statutory duty under § 706 and instead 'intended' to delegate away its legislative power to executive agencies?"[89]

Justice Gorsuch invokes the nondelegation argument

86. *Id.* at 1153 (Gorsuch, J., concurring) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984)).

87. *Id.* (Gorsuch, J., concurring) ("But where exactly has Congress expressed this intent?").

88. *Id.* (Gorsuch, J., concurring) (citing 5 U.S.C. § 706).

89. *Id.* (Gorsuch, J., concurring). Justice Gorsuch then admits that "*Chevron*'s claim about legislative intentions is no more than a fiction." *Id.* Many judges and legal scholars agree that this claim is a legal fiction, but accept it nonetheless because, among other advantages, it provides the background rule of law against which Congress can legislate. *See supra* notes 30–31 and accompanying text.

when he takes his argument a step further. Justice Gorsuch writes that, assuming for the sake of argument that Congress *did* delegate its legislative authority to executive agencies under *Chevron,* the question then becomes "*can* Congress really delegate its legislative authority—its power to write new rules of general applicability—to executive agencies?"[90]

Justice Gorsuch's gut reaction is to answer no, Congress cannot delegate its legislative authority to executive agencies, even though *Chevron's* essential purpose is to "delegate legislative power to the executive branch."[91] Importantly, he concedes that the law in "recent times" involves the rule of the "intelligible principle," which, in his words, means that the Court has "suggested" that "Congress may allow the executive to make new rules of general applicability that look a great deal like legislation, so long as the controlling legislation contains an 'intelligible principle' that 'clearly delineates the general policy' the agency is to apply and 'the boundaries of [its] delegated authority.'"[92] "This means Congress must at least 'provide substantial guidance on setting . . . standards that affect the entire national economy.'"[93]

Yet, nondelegation remains a problem for Justice Gorsuch: "But even taking the forgiving intelligible principle test as a given, it's no small question whether *Chevron* can

90. *Gutierrez-Brizuela,* 834 F.3d at 1153 (Gorsuch, J., concurring) (reminding the readers of *Field v. Clark*, 143 U.S. 649, 692 (1892), for the proposition that "[t]he Supreme Court has long recognized that under the Constitution 'Congress cannot delegate legislative power to the president' and that this 'principle [is] universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.'").

91. *Id.* at 1154 (Gorsuch, J., concurring).

92. *Id.* (Gorsuch, J., concurring) (citing Mistretta v. United States, 488 U.S. 361, 372–73 (1989) (internal quotation marks omitted)).

93. *Id.* (Gorsuch, J., concurring) (citing Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 475 (2001)).

clear it."[94] Justice Gorsuch does not believe that the requisite substantial guidance exists when an agency has the power to "enact a new rule of general applicability affecting huge swaths of the national economy one day and reverse itself the next."[95] Citing to the 1935 *Schechter* decision, Justice Gorsuch writes that "[t]he Supreme Court once unanimously declared that a statute affording the executive the power to write an industrial code of competition for the poultry industry violated the separation of powers. And if that's the case, you might ask how is it that *Chevron*—a rule that invests agencies with pretty unfettered power to regulate a lot more than chicken—can evade the chopping block."[96]

Justice Gorsuch's main concern seems to be that an administrative agency's ability under *Chevron* and *Brand X* to "set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive)" has created an administrative state that can supersede any branch of the government.[97] At the end of his concurrence, Justice Gorsuch asks, "what would happen in a world without *Chevron*?"[98] In practice, his answer is not much, but in principle, a return to pre-*Chevron* administrative law would restore the proper constitutional arrangement and the rule-of-law protections it was meant to secure.[99] Justice Gorsuch's resolution would be to overturn *Chevron* or, in the very least, afford less deference to agencies under *Chevron*.[100]

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94. *Id.* (Gorsuch, J., concurring).

95. *Id.* (Gorsuch, J., concurring).

96. *Id.* at 1155 (Gorsuch, J., concurring) (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–42 (1935)).

97. *Id.* (Gorsuch, J., concurring).

98. *Id.* at 1158 (Gorsuch, J., concurring).

99. *See id.* (Gorsuch, J., concurring).

100. Scholar Eric Citron raises the interesting argument that "Gorsuch's two best-known decisions on administrative law—*Gutierrez-Brizuela* and *De Niz Robles v. Lynch*—both involve one of the weakest possible contexts in which to defend *Chevron* doctrine." By this Citron means that because the administrative

While Justice Gorsuch raises a good separation of powers point in criticizing the ability, post-*Brand X*, for agencies to effectively overrule a court, this is distinguishable from his objections to *Chevron* generally and from the major questions doctrine. The major questions doctrine has been invoked to remove agency deference in situations not when there has been an executive revision of a court's rule, but in cases of first impression for both the court and the agency. For example, in *Brown & Williamson*, which will be discussed in more detail later, the Court invoked the major questions doctrine so that the Food and Drug Administration ("FDA") was not the entity that interpreted whether or not tobacco was a drug within the meaning of the Federal Food, Drug, and Cosmetic Act ("FDCA").[101] Similarly, in *King v. Burwell*, the Court invoked the major questions doctrine so that the Internal Revenue Service ("IRS") was not the entity that interpreted whether tax credits were available on State Exchanges.[102] In the same vein, Justice Gorsuch's

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agency at issue in both cases was the Board of Immigration Appeals—"the primary function of which is just to decide the host of quasi-judicial immigration cases that must be adjudicated throughout the nation"—"no real issue of technical judgment or agency expertise" was involved. "Gorsuch's next best-known administrative law decision shares this feature." *United States v. Nichols*, 784 F.3d 666, (10th Cir. 2015), similarly involved "the power of a non-technical administrator (the attorney general) to create retroactive effects on individuals," this time, involving the interpretation of a criminal statute. Citron argues that this exposure is different than the agencies commonplace in D.C. that were the reason behind *Chevron*:

> The core case for *Chevron* thus comes from big policy statutes that broadly create or empower federal agencies with technical expertise—statutes like the Clean Air Act and Clean Water Act (EPA); the Federal Communications Act (Federal Communications Commission); the Federal Power Act and Natural Gas Act (Federal Energy Regulatory Commission); the Food, Drug, and Cosmetic Act (Food and Drug Administration); or the Occupational Safety and Health Act (Occupational Safety and Health Administration).

Eric Citron, *The roots and limits of Gorsuch's views on* Chevron *deference*, SCOTUSBLOG (Mar. 17, 2017, 11:26 AM), http://www.scotusblog.com/2017/03/roots-limits-gorsuchs-views-chevron-deference/.

101. *See infra* notes 131–43 and accompanying text.

102. *See infra* notes 169–206 and accompanying text.

underlying concern with and real objection to *Chevron*—that he believes the Court should be the entity to answer the question to begin with—is not quite the same as believing that an agency should not be able to overrule a court.

This Article returns and responds to Justice Gorsuch's nondelegation argument in Part III. But first, it is important to examine the major questions doctrine because, despite not explicitly mentioning the major questions doctrine, Justice Gorsuch's concurrence could easily be considered fuel for its use in Supreme Court jurisprudence.[103] The major questions doctrine is often phrased as an "exception" to *Chevron* deference. Scholars have argued that the major questions doctrine is a new way for the Court to handle what it perceives as unconstitutional delegations by Congress.[104] While, at the moment, the doctrine seems to be reserved for only the most "extraordinary"[105] of cases, its resurgence, fueled by critics of *Chevron* who are now sitting on the bench, may signal a more prevalent place for its use.

B. *Major Questions Doctrine as a Manifestation of* Chevron *Criticism*

In addition to *Chevron* being a continuous subject of debate among judges and scholars, the Court itself has reshaped the doctrine over the years since its inception.

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103. Justice Gorsuch's concurrence was published in 2015, as was the decision in *King v. Burwell*, 135 S. Ct. 2480 (2015).

104. *See, e.g.*, William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking,* 45 VAND. L. REV. 593, 630–31 (1992) (arguing that many of the substantive canons, such as nondelegation, are judicial efforts to give vitality to under-enforced constitutional norms); Loshin & Nielson, *supra* note 6, at 20–21, 53 ("Although the Court has effectively given up policing the nondelegation doctrine directly, the Court is still concerned about agencies making important policy choices. So the Court has attempted to craft a new canon of statutory construction to minimize what it perceives to be excessive delegation. . . . Accordingly, while not striking down statutes under the nondelegation doctrine, the Court has nonetheless wielded the elephants-in-mouseholes doctrine to limit delegations of authority.").

105. *Burwell*, 135 S. Ct. at 2488–89.

Among the additions to the original *Chevron* doctrine[106] is the exception for a class of cases for which *Chevron* deference does not apply at all. First established in the 1990s, this is the major questions doctrine. The major questions doctrine has manifested in the Court for the same reasons that Justice Gorsuch has criticized *Chevron*. Both criticize the rule of deference to administrative decision making.

In an effort to rein in *Chevron* deference in certain cases and re-establish judicial authority, the major questions doctrine arises when an agency acts based on its interpretation of the statute in question, and the reviewing court rejects deference to the agency's interpretation that would otherwise be available under *Chevron* by pointing to the significance of the question involved. The most recent, well-known occurrence of the major questions doctrine is in *King v. Burwell*, in which the Court upheld an Affordable Care Act regulation promulgated by the IRS—not by granting the IRS deference, but by stating that *Chevron* was wholly inapplicable and interpreting the statutory ambiguity for itself.[107] The Court stated it was able to do this because the question was one of "deep 'economic and political significance'"[108] and "[h]ad Congress wished to assign that question to an agency, it surely would have done so expressly."[109]

The most simple iteration of the major questions doctrine is that in questions involving "deep 'economic and political significance'" the Court will not defer to an agency's

106. One example is adding Step Zero in *Mead*. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001). Another, arguably, is *Chevron* Step One-And-A-Half. *See* Daniel J. Hemel and Aaron L. Nielson, Chevron *Step One-And-A-Half,* 84 U. CHI. L. REV. 757, 757 (2017) (arguing that an intermediate step between Chevron Steps One and Two exists, which asks: "Did the agency recognize that the statutory provision is ambiguous?").

107. *Burwell*, 135 S. Ct. at 2488–89.

108. *Id.* at 2489 (quoting Util. Air Regulatory Grp. v. EPA (*UARG*), 573 U.S. 302, 324 (2014)).

109. *Id.* (quoting *UARG*, 573 U.S. at 324).

interpretation unless Congress has explicitly stated so.[110] The 1990 and early 2000s cases where the doctrine first appeared are *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,[111] *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*,[112] and *Utility Air Regulatory Group v. Environmental Protection Agency*.[113] Shortly after this line of cases, however, the major questions doctrine became dormant, causing scholars to question whether the doctrine was dead.[114] But its resurgence in 2014 and 2015—most notably in *King v. Burwell*[115]—proved this was far from the case.

As will be explicated in Part III, the major questions doctrine cases often illustrate a judicial policy choice to not defer to agencies. The Court could have let the agency answer the question, but it believed the issue was of such

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110. *See id.*

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

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

113. Util. Air Regulatory Grp. v. EPA (*UARG*), 573 U.S. 302 (2014). *Whitman v. American Trucking Association, Inc.* is arguably another major questions doctrine case. 531 U.S. 457 (2001). In *Whitman*, respondents, private parties and several states, challenged the Environmental Protection Agency's ("EPA") revised air quality standards under the Clean Air Act ("CAA") on several grounds. *Id.* at 462–63. The Court first held that the CAA's delegation of authority to the EPA to set air quality standards at a level "requisite to protect the public health" was not unconstitutional delegation of legislative power. *Id.* at 465. But the Court also held that, contrary to respondents' argument that the CAA requires the EPA to consider costs in setting air quality standards, "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Id.* at 468 (citing to *MCI,* 512 U.S. at 231; *Brown & Williamson*, 529 U.S. at 159–60).

114. *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 (2008). Moncrieff states that *Massachusetts v. EPA* signaled the death of the major questions doctrine. *Id.* at 594, 598.

115. *See Burwell*, 135 S. Ct. at 2488–89. The other recent case in which the major questions doctrine has been invoked is *Utility Air Regulatory Group v. EPA* in 2014. 573 U.S. 302 (2014).

significance that it should be the entity that has the authority to decide the issue instead. The major questions doctrine is not only a manifestation of *Chevron* criticism generally, but more specifically, it is arguably a manifestation of the nondelegation argument, because the Court is concluding that Congress would not have delegated a question of such "deep economic and political significance" to the agency. For example, in *Burwell*, the Court ultimately reached the same conclusion as the agency in interpreting the Affordable Care Act, but by taking away agency deference, it eliminated the opportunity for a future agency to reverse the decision.

Critics of the major questions doctrine point out that its invocation seems to be arbitrary or inconsistent,[116] not only in the decision of which cases to invoke the doctrine,[117] but also in the way it is applied in the cases where that decision is made. For example, as will be discussed, in both *MCI* and *Brown & Williamson*, the major questions doctrine was invoked during the Court's analysis of *Chevron* Step One.[118] In *UARG*, the major questions doctrine was invoked at *Chevron* Step Two. And in *Burwell*, it was invoked at *Chevron* Step Zero. These inconsistencies could signal that the major questions doctrine is merely a smokescreen for

116. *See, e.g.*, Leske, *supra* note 5, at 488.

117. Determining which questions are of "deep economic and political significance" is a vague standard. *See, e.g.*, David Gammage, *Foreword*—King v. Burwell *Symposium: Comments on the Commentaries (and on Some Elephants in the Room)*, 43 PEPP. L. REV. 1, 3, 5 (2015); Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 43 PEPP. L. REV. 56, 57 (2015).

118. *See, e.g.*, Leske, *supra* note 5, at 488 ("In both *MCI* and *Brown & Williamson*, the Court applied the doctrine within *Chevron's* Step One analysis. . . . Thus, in its *original* form, the major questions doctrine constituted a narrow expansion of the *Chevron* framework whereby the Court, in its *Chevron* Step One analysis, measured the degree to which the issue at hand was 'major' to help determine whether the statutory language was plain and unambiguous."); Christopher J. Walker, *Toward A Context-Specific* Chevron *Deference*, 81 MO. L. REV. 1095, 1101 (2016) ("Similarly, *Brown & Williamson*, on which both *UARG* and *King* relied, applied the major questions doctrine within the two-step framework at Step One.").

policy judgments by the Court, which necessarily results in an enhancement of the Court's own interpretive power.

1. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*

MCI Telecommunications Corp. v. American Telephone & Telegraph Co. (*MCI*) was the first case in which the Supreme Court invoked the major questions doctrine.[119] This case involved the proper interpretation of the term "modify" under § 203(b) of the Communications Act of 1934. The Communications Act of 1934 stated that communications common carriers—such as AT&T—were required to file tariffs with the Federal Communications Commission ("FCC") and then charge customers pursuant to those tariff rates.[120] But the Act also authorized the FCC to "modify" this requirement "in its discretion and for good cause shown."[121] The FCC argued that because of this discretion to modify, it could make this requirement voluntary.[122] The factual occurrence that led to the filing of the *MCI* case was that in the 1980s, the FCC relieved non-dominant long-distance carriers from filing tariffs, which left only AT&T subject to this filing requirement.[123]

The question before the Court was whether the FCC's authority allowed it to interpret the word "modify" to excuse the other carriers from filing tariffs.[124] With Justice Scalia writing the majority opinion, the Court cited *Chevron* briefly in its opinion, but stated that contextual indications were also important, "which in the present cases . . . contradict

119. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994*); see also* Leske, *supra* note 5, at 485; Sunstein, *supra* note 2, at 236.

120. *MCI*, 512 U.S. at 220.

121. *Id.* at 224 (quoting 47 U.S.C. § 203(b)(2) (1988 & Supp. IV)).

122. *Id.* at 225–26.

123. *Id.* at 221–22.

124. *Id.* at 220.

petitioners' position."[125] The Court noted that "[r]ate filings are . . . the essential characteristic of a rate-regulated industry."[126] Because the filing requirement "was Congress's chosen means of preventing unreasonableness and discrimination in charges,"[127] the Court rejected the FCC's construction, which it deemed a "fundamental revision of the statute."[128]

Characterizing its holding as falling under *Chevron* Step One, the Court found "not the slightest doubt" that Congress had directly spoken on this issue.[129] Invoking the major questions doctrine, the Court concluded: "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."[130]

2. *FDA v. Brown & Williamson Tobacco Corp.*

Brown & Williamson was decided six years after *MCI*.[131] The simple issue before the Court was whether the FDA had the authority to regulate tobacco products.[132] The FDA previously concluded that tobacco came within the scope of the term "drug" as defined by the FDCA which included "articles (other than food) intended to affect the structure or any function of the body."[133] This, in turn, meant that the

125. *Id.* at 226.

126. *Id.* at 231.

127. *Id.* at 230.

128. *Id.* at 231–32.

129. *Id.* at 228. The Court does not, however, explicitly cite to *Chevron*, here. Nonetheless, whether Congress has spoken on the issue in question is a Step One inquiry.

130. *Id.* at 231.

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

132. *Id.* at 125.

133. *Id.* at 126 (quoting 21 U.S.C § 321(g)(1)(C) (1994 & Supp. III)).

FDA could regulate tobacco products' promotion, labeling, and accessibility to children and adolescents.[134] Brown & Williamson Tobacco Corporation filed suit challenging the FDA's regulations.

In holding that Congress had not given the FDA the authority to regulate tobacco products, the Supreme Court turned to a *Chevron* analysis: "A threshold issue is the appropriate framework for analyzing the FDA's assertion of authority to regulate tobacco products."[135] "Because this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by *Chevron* . . . ."[136]

Notably, however, that was not the end of the Court's analysis. The Court also stated other principles that were pertinent to the case before it. Towards the end of the opinion, the Court wrote that its Step One analysis—"our inquiry into whether Congress has directly spoken to the precise question at issue"—was "shaped . . . by the nature of the question presented."[137] Referencing and then narrowing *Chevron's* implied delegation rationale, the Court stated: "Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[138] "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such

134. *Id.* at 125.

135. *Id.* at 132.

136. *Id.* "Under *Chevron*, a reviewing court must first ask 'whether Congress has directly spoken to the precise question at issue.' If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.' But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible." *Id.* (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)) (internal citations omitted).

137. *Id.* at 159.

138. *Id.* (citing *Chevron,* 467 U.S. at 844).

an implicit delegation."[139]

In the Court's view, *Brown & Williamson* was an extraordinary case.[140] Tobacco had a "unique place in American history and society," which led "Congress, for better or for worse . . . to preclude any agency from exercising significant policymaking authority in the area."[141] In its reasoning, the Court found *MCI* to be instructive: "As in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[142] The Court thus concluded that Congress had directly spoken to the issue and precluded the FDA from regulating tobacco products.[143]

3. *Utility Air Regulatory Group v. Environmental Protection Agency*

Utility Air Regulatory Group v. Environmental Protection (*UARG*) was decided in 2014 and marked the first time the Court applied the major questions doctrine since 2001.[144] This was also the first time the Court applied the doctrine outside of its *Chevron* Step One analysis. The invocation of the major questions doctrine came in the Court's *Chevron* Step Two analysis in *UARG*.[145]

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139. *Id.* (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. 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")).

140. *Id.* ("This is hardly an ordinary case.").

141. *Id.* at 159–60.

142. *Id.* at 160. The Court stressed, no matter how serious the issue, "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Id.* at 123.

143. *Id.* at 160–61.

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

145. *See, e.g.*, Leske, *supra* note 5, at 494 ("Thus, the Court twice addressed the major questions doctrine in its *Chevron* Step Two analysis, but with different results."); Walker, *supra* note 118, at 1101 ("Justice Scalia's invocation of the

After the Supreme Court's decision in *Massachusetts v. EPA*,[146] which held that air pollution was subject to Environmental Protection Agency ("EPA") regulation under the Clean Air Act ("CAA"), the Court granted certiorari to hear challenges to these regulations. The specific question in *UARG* was whether the EPA's promulgation of greenhouse gas ("GHG") emission standards for new motor vehicles *compelled* the agency to regulate certain "stationary sources" of GHG emissions, such as power plants or industrial facilities.[147] Alternatively, even if the EPA was not compelled to regulate these stationary sources, the Court also considered whether the EPA was *permitted* to do so under the CAA.[148]

The Court broke down its analysis even further, resulting in a fairly complex decision,[149] but, for the purposes of this Article, what is significant is that the majority opinion stated that its review of the EPA's interpretations of the CAA was governed by *Chevron*[150] and that the major questions doctrine was invoked not during the Court's Step One analysis, but under Step Two.

Under *Chevron* Step One, the Court concluded that the

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major questions doctrine took place . . . as part of the Step Two inquiry in *UARG*.").

146. Massachusetts v. EPA, 549 U.S. 497 (2007). Many scholars note that the Court had the chance to invoke the major questions doctrine in this case but chose not to, which led some to believe the doctrine was dead or dormant. *See, e.g.*, Moncrieff, *supra* note 114, at 607.

147. *UARG,* 573 U.S. at 314.

148. *Id.* at 321.

149. *See id.* at 314–15 ("This litigation presents two distinct challenges to EPA's stance on greenhouse-gas permitting for stationary sources. First, we must decide whether EPA permissibly determined that a source may be subject to the PSD and Title V permitting requirements on the sole basis of the source's potential to emit greenhouse gases. Second, we must decide whether EPA permissibly determined that a source already subject to the PSD program because of its emission of conventional pollutants (an 'anyway' source) may be required to limit its greenhouse-gas emissions by employing the 'best available control technology' for greenhouse gases.").

150. *Id.* at 315.

CAA was ambiguous, thus rejecting the EPA's argument that under the plain language of the CAA, a source not otherwise regulated because of its emissions of conventional pollutants must be subject to applicable permitting requirements based solely on its potential to emit greenhouse gases.[151] Disagreeing, the Court found that there was "no insuperable textual barrier to EPA's interpreting 'any air pollutant' in the permitting triggers [of the CAA] to encompass only pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds, and to exclude [GHGs] that are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written."[152]

Then, after rejecting the EPA's plain language argument, the Court turned to *Chevron* Step Two to determine whether the EPA's interpretation was reasonable.[153] The Court noted that "reasonable statutory interpretation" must consider both "the specific context in which . . . language is used" and "the broader context of the statute as a whole."[154] Clarifying further, "a statutory 'provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'"[155] And "an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole' does not merit deference."[156]

Applying these principles, the Court found that the

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151. *Id.* at 313–16.

152. *Id.* at 320.

153. *Id.* at 321 ("[W]e next consider the [EPA's] alternative position that its interpretation was justified as an exercise of its 'discretion' to adopt 'a reasonable construction of the statute.'").

154. *Id.* (internal citations omitted).

155. *Id.* (internal citations omitted).

156. *Id.* (internal citations omitted).

EPA's interpretation was incompatible with the regulatory scheme as this would "overthrow" the Act's "structure and design."[157] Additionally, this interpretation was contrary to Congress's intent as applied to smaller stationary sources.[158]

It was at this point in the Court's opinion that the Court applied the major questions doctrine. Rather than stop at Step Two, the Court went on to say that the conclusion that the EPA's interpretation was unreasonable was also compelled by the major questions doctrine.[159]

"EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[160] The Court cited both *MCI* and *Brown & Williamson* for the premise that in circumstances where an agency's interpretation impacts "a significant portion of the American economy," courts ought to be hesitant in adopting such an interpretation without clear direction by Congress.[161] The Court was uncomfortable

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157. *Id.* The Court first pointed to practical reasons: The EPA's interpretation would cause an extreme rise in permit applications, cause administrative costs to swell, and decade-long delays that would cause construction projects to grind to a halt nationwide.

158. *Id.* at 322–23. According to the Court's reading of Congress's intention in designing the permitting programs, both the PSD program and Title V of the CAA were not meant to apply to smaller stationary sources. *Id.* at 323 ("Not surprisingly, EPA acknowledges that PSD review is a 'complicated, resource-intensive, time-consuming, and sometimes contentious process' suitable for 'hundreds of larger sources,' not 'tens of thousands of smaller sources.'") ("As EPA wrote, Title V is 'finely crafted for thousands,' not millions, of sources.").

159. *Id.* at 323–24 ("The fact that EPA's greenhouse-gas-inclusive interpretation of the PSD and Title V triggers would place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it; but that is not the only reason.").

160. *Id.* at 324.

161. *Id.* ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy' . . . we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" (citing *Brown & Williamson,* 529 U.S. at 159–60; *MCI*, 512 U.S. at 231)).

with "an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute 'unrecognizable to the Congress that designed' it."[162] Thus, the Court concluded, as part of a major questions doctrine analysis, that the EPA's interpretation was unreasonable.[163]

The next question before the Court in *UARG* provides an example of the Court applying the major questions doctrine, but still allowing the agency's regulation to stand. At this point in the case, the Court still had to determine whether the EPA permissibly determined that an "anyway source" (a source already subject to the CAA permitting program because of its emission of conventional pollutants) "may be required to limit its [GHG] emissions" by having to install best available control technology ("BACT").[164] Similar to the previous analysis, the Court found that under Step One of *Chevron*, the BACT provision was unambiguous and did indeed apply to GHG emissions from "anyway sources."[165]

Again, the Court's analysis could have ended there, this time at Step One. But instead, the Court went on to say that even if the plain text of the BACT provision "were not clear," the EPA's interpretation was not unreasonable under *Chevron* Step Two.[166] This was *not* a "major question" because "applying BACT to greenhouse gases is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority."[167]

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162. *Id.*

163. *Id.* ("Since, as we hold above, the statute does not compel EPA's interpretation, it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.").

164. *Id.* at 315–16.

165. *Id.* at 330–32.

166. *Id.*

167. *Id.* at 332.

In sum, the Court struck down an EPA interpretation of the CAA because the issue was one of "vast 'economic and political significance'" and the EPA's interpretation "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[168]

4. *King v. Burwell*

The most recent case to invoke the major questions doctrine was *King v. Burwell* in 2015.[169] *Burwell* upheld a regulation promulgated by the Internal Revenue Service ("IRS") that interpreted a key provision of the Patient Protection and Affordable Care Act ("ACA").[170] Before reviewing the Court's analysis, some background is necessary to understand the contours of the case and to suggest why the Court believed the major questions doctrine was relevant.

The ACA was enacted to increase the number of Americans covered by health insurance and to decrease the cost of health care. In order to accomplish these goals, the ACA adopted three "interlocking" reforms that applied to all states: (1) insurance market regulations; (2) a coverage mandate; and (3) tax credits.[171]

The first reform, the insurance market regulations, "bars insurers from denying coverage to any person because of his health"[172] and "bars insurers from charging a person higher premiums for the same reason."[173] The second reform, the coverage mandate, requires that individuals maintain health

168. *Id.* at 324 (quoting *Brown & Williamson,* 529 U.S. at 160).

169. King v. Burwell, 135 S. Ct. 2480 (2015).

170. *Id.*

171. *Id.* at 2482.

172. *Id.* This is known as the "guaranteed issue" requirement. 42 U.S.C. § 300gg–1(a).

173. *Id.* This is known as the "community rating" requirement. 42 U.S.C. § 300gg.

insurance coverage or pay a penalty to the IRS.[174] The second reform was enacted as an incentive to avoid the problem of individuals waiting to purchase health insurance until they were sick.[175] This coverage mandate "minimize[d] this adverse selection and broaden[ed] the health insurance risk pool to include healthy individuals, which [would] lower health insurance premiums."[176] Congress also provided an exemption from the coverage requirement for anyone who has to spend more than eight percent of his or her income on health insurance.[177]

The third reform, the tax credits, sought to make insurance more affordable to low income individuals. Individuals with household incomes between 100 and 400 percent of the federal poverty line were able to purchase insurance with tax credits, which were provided directly to the insurer.[178] The Court noted the importance of how closely intertwined these three reforms were: "Congress found that the guaranteed issue and community rating requirements would not work without the coverage requirement. And the coverage requirement would not work without the tax credits."[179]

Lastly, in addition to the three reforms, the ACA required the creation of an "Exchange" in each state. An Exchange acted as a marketplace where people could compare and purchase insurance plans.[180] "The Act gives each State the opportunity to establish its own Exchange,

174. *Id.* at 2486 (citing 26 U.S.C. § 5000A).

175. *Id.*

176. *Id.* (quoting 42 U.S.C. § 18091(2)(I)).

177. *Id.* at 2486–87 (citing 26 U.S.C. §§ 5000A(e)(1)(A), (e)(1)(B)(ii)).

178. *Id.* at 2487 (citing 42 U.S.C. §§ 18081, 18082).

179. *Id.* (internal citation omitted). The reason all three reforms had to be in place to work was because "without the tax credits, the cost of buying insurance would exceed eight percent of income for a large number of individuals, which would exempt them from the coverage requirement." *Id.*

180. *Id.*

but provides that the Federal Government will establish the Exchange if the State does not."[181]

The issue before the Court in *Burwell* was "whether the Act's tax credits are available in States that have a Federal Exchange," so that "the Act's interlocking reforms apply equally in each State no matter who establishes the State's Exchange."[182]

The ACA initially states that tax credits "shall be allowed" for any "applicable taxpayer."[183] Subsequently, in what seems like a contradiction, the ACA provides that the "amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through 'an Exchange *established by the State* under section 1311 of the Patient Protection and Affordable Care Act.'"[184]

The IRS issued a regulation that made tax credits available on both State *and* Federal Exchanges.[185] Specifically, the IRS interpreted the provision to determine tax credit eligibility based on enrollment in an insurance plan through "an Exchange," which it defined as "an Exchange serving the individual market . . . regardless of whether the Exchange is established and operated by a State . . . or by HHS."[186]

Petitioners challenging the IRS interpretation were individuals living in a state that had a Federal Exchange who did not wish to purchase health insurance.[187] Their

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181. *Id.* at 2485.

182. *Id.*

183. *Id.* at 2487 (citing 26 U.S.C. § 36B(a)).

184. *Id.* (citing 26 U.S.C. §§ 36B(b)–(c)) (emphasis in original).

185. *Id.* (citing 77 Fed. Reg. 30378 (2012)).

186. *Id.* (quoting 26 CFR § 1.36B-2 (2013) and 45 CFR § 155.20 (2014)).

187. *Id.* If Virginia's Exchange did not qualify as "an Exchange established by the State under [42 U.S.C. § 18031]," Petitioners would not receive any tax credits. If they did not receive the tax credits, the cost of buying insurance would be "more than eight percent of their income, which would exempt them from the Act's coverage requirement." *Id.* (citing 26 U.S.C. § 5000A(e)(1)).

argument was that the tax credits were not available for individuals who enrolled in insurance plans through a Federal Exchange because, based on the ACA, a Federal Exchange is not "an Exchange established by the State under [42 U.S.C. § 18031]."[188]

The Supreme Court noted a circuit split that resulted in differing applicability of the tax credits. In this case, the Fourth Circuit viewed the Act as "ambiguous and subject to at least two different interpretations," ultimately deferring to the IRS's interpretation under *Chevron.*[189] On the same day that the Fourth Circuit issued its decision, the D.C. Circuit struck down the IRS Rule, holding under *Chevron* Step One that the ACA "unambiguously restricts" the tax credits to state Exchanges.[190]

Rather than side with one of the two circuits and conduct its analysis under *Chevron*, though, the Supreme Court found for the first time that the application of the major questions doctrine rendered *Chevron* wholly inapplicable.[191] Quoting *Brown & Williamson,* the Court wrote that applicability of *Chevron* is "premised on the theory that the statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps," and "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[192]

According to the Court, this was such a case.[193] The Court stated that the tax credits were among the ACA's "key reforms," which involved "billions of dollars in spending each year and affecting the price of health insurance for millions

188. *Id.*

189. *Id.* at 2488.

190. *Id.* (citing Halbig v. Burwell, 758 F.3d 390, 394 (2014)).

191. *Id.* at 2488–89.

192. *Id.*

193. *Id.* at 2489.

of people."[194] Quoting *UARG,* the question of whether the tax credits were available on Federal Exchanges was thus "a question of deep 'economic and political significance' that is central to this statutory scheme."[195] "[H]ad Congress wished to assign that question to an agency, it surely would have done so expressly."[196] The Court considered it even more unlikely that Congress would have delegated this decision to the IRS, "which has no expertise in crafting health insurance policy of this sort."[197] The Court concluded: "This is not a case for the IRS."[198]

In concluding, the Court necessarily gave the power to interpret the ACA to the Court itself.[199] Reverting to traditional principles of statutory interpretation such as enforcing the plain language of the statute and reading the words in context "with a view to their place in the overall statutory scheme,"[200] the Court ultimately concluded that the ACA "allows tax credits for insurance purchased on any Exchange created under the Act."[201]

Burwell is different from the previous cases that invoked the major questions doctrine because of both how and when the doctrine was invoked. *MCI* and *Brown & Williamson* invoked the major questions doctrine as part of the Step One inquiry.[202] *UARG* invoked the major questions doctrine as

194. *Id.*

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

196. *Id.* (citing *UARG*, 573 U.S. at 324).

197. *Id.*

198. *Id.*

199. *Id.* ("It is instead *our* task to determine the correct reading of Section 36B.") (emphasis added).

200. *Id.* ("Our duty, after all, is 'to construe statutes, not isolated provisions.'").

201. *Id.* at 2496.

202. In *Brown & Williamson*, the Court went back and characterized its holding in *MCI* as falling within the Step One inquiry: "We rejected the FCC's construction, finding 'not the slightest doubt' that Congress had directly spoken to the question." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160

part of the Step Two inquiry.[203] However, despite being invoked at different steps within the *Chevron* analysis, the major questions doctrine was still invoked as *a step within the* Chevron *analysis* in those cases. In other words, the Court still defaulted to *Chevron* and held that *Chevron* applied. *Burwell,* however, invoked the major questions doctrine as a threshold, Step Zero inquiry,[204] finding instead that *Chevron* does not apply.

In *Burwell*, the Court concluded that the statute was ambiguous and that the agency's interpretation was reasonable. That could have been done through a standard *Chevron* Step One and Step Two analysis. Or, the Court could have engaged in a *Chevron* Step Zero analysis.[205] But that is not what the Court chose to do. The Court arrived at its conclusion by deciding that it—the Court, rather than the agency—was the entity with the power to interpret the statutory ambiguity.[206] And it did so by invoking the major questions doctrine. It is of some significance that the Court

(2000) (quoting MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 228 (1994)). Then, the Court concluded the same for the case before it as well, holding that "Congress has directly spoken to the precise question at issue." *Id.* at 159. *Whitman v. American Trucking Ass'n* also invoked the major questions doctrine as part of the Step One inquiry. 531 U.S. 457, 471 (2001) ("The text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the [Clean Air Act] as a whole, unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA.").

203. *UARG*, 573 U.S. at 324 ("EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.").

204. Without attempting to explain why the Court applies the major questions doctrine at different points of its *Chevron* analysis, as that is beyond the scope of this Article, two scholars interestingly observed the impact this decision could make. *See* Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 PEPP. L. REV. 33, 40 (noting that the application of the major questions doctrine at Step Zero or Step One—as opposed to Step Two—has the additional benefit of "foreclos[ing] a subsequent presidential administration from reinterpreting the statute via regulation to prohibit tax subsidies in exchanges established by the Federal Government").

205. *See* Part III.B.2.

206. *Burwell,* 135 S. Ct. at 2489.

invoked the major questions doctrine to take away agency deference only to come to the same conclusion as the agency. One possible reason for this move in *Burwell* is that by taking away agency discretion, the Court eliminated the possibility of agency reversal in interpretation of the Affordable Care Act in a new presidential administration.

III. POLICY JUDGMENTS THAT SERVE TO ENHANCE THE COURT'S POWER

Justice Gorsuch's remedy for unconstitutional delegations under *Chevron*[207] is essentially the same remedy that the major questions doctrine has been effectuating in the Court: have the Court be the entity that answers the question at hand, rather than the agency. However, this does not solve the problem of unconstitutional delegations. According to Justice Gorsuch, *Chevron* violates the separation of powers because it allows Congress to unconstitutionally delegate too much of its power to executive agencies. However, if the remedy is not a judicial invalidation of the delegation on constitutional grounds—which, it is not under both Justice Gorsuch's view and the major questions doctrine—then this Article argues that what really underlies the arguments over *Chevron's* existence are policy disagreements over the proper role of the current administrative state.

A. *"Re-Routing Delegation to the Courts," Not Congress*

Justice Gorsuch's second argument against *Chevron* from his *Gutierrez-Brizuela* concurrence was that the amount of interpretive authority *Chevron* vests in agencies violates the nondelegation doctrine.[208] This Article claims that Justice Gorsuch's argument fails because, assuming there was an unconstitutional delegation by Congress to

207. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

208. *See id.*

begin with,[209] re-routing the authority to answer the question from the executive agency to the Court does not make the delegation constitutional.

Asher Steinberg also acknowledges that, in responding to *Chevron's* premise (that statutory ambiguities delegate interstitial lawmaking authority to the executive), Justice Gorsuch "suggests the delegations *Chevron* presupposes are unconstitutional under even the current instantiation of the nondelegation doctrine, to which no statute has fallen victim in eighty years."[210] Again, assuming for the sake of argument that Justice Gorsuch is correct about the unconstitutionality of the delegations that Congress gives to agencies, Justice Gorsuch's remedy is misguided. The proper remedy would be to send the question back to Congress, but Justice Gorsuch is clear that he believes the Court should be the one to answer it. As Steinberg surmises:

> The remedy for an unconstitutional delegation is to invalidate the delegation and suggest that Congress write a clearer law. Judge Gorsuch seems to think an equally good remedy is to pretend the delegation isn't there. Holding that courts get to decide the meaning of an indeterminate term like "stationary source" or "sexual abuse of a minor" wouldn't make the delegations embedded in those indeterminacies go away; it would just re-route the delegations to courts, a result that (besides not being what Congress wanted or making any practical sense) isn't any more constitutional than letting agencies keep them. Courts, to be sure, would claim they were finding what "sexual abuse of a minor" and the like "really" meant, but who besides Judge Gorsuch would believe them?[211]

Steinberg borrows a quote from Justice Gorsuch's predecessor to further demonstrate his point. In *Industrial Union Department v. American Petroleum Institute* (the

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209. The intelligible principle argument would conclude otherwise in most cases.

210. Asher Steinberg, *Judge Gorsuch and* Chevron *Doctrine Part III: The* Gutierrez-Brizuela *Concurring Opinion*, NOTICE & COMMENT (Mar. 29, 2017), http://yalejreg.com/ nc/judge-gorsuch-and-chevron-doctrine-part-ii-the-gutierrez-brizuela-concurring-opinion-by-asher-steinberg/. *See id.* for a response to all "three" arguments in Justice Gorsuch's concurrence.

211. *Id.*

Benzene Case), the Supreme Court avoided a nondelegation problem by giving content to a vague statute. Justice Scalia later commented on the decision, stating that the Court should have struck the statute down or let the agency's interpretation stand.[212] Justice Scalia wrote: "In giving content to a law which in fact says no more than that OSHA should ensure 'safe places of employment' (whatever that means) and should maximize protection against toxic materials 'to the extent feasible' (whatever that means), it was the plurality of the Court, rather than OSHA, that ended up doing legislator's work."[213] Justice Scalia understood that "absent the enforcement of a nondelegation doctrine that he came to recognize was unenforceable, denying deference to agencies would result in courts doing legislator's work."[214]

The *Benzene Case* was not the only time Justice Scalia defended *Chevron* against the nondelegation doctrine. Justice Scalia authored the majority opinion in *Whitman v. American Trucking Ass'ns, Inc.*,[215] a case that many hoped would reestablish the nondelegation doctrine. In *Whitman*, the Court upheld the EPA's revision of air quality standards against a nondelegation challenge.[216] The Court held that the CAA's delegation of authority to the EPA to set the air quality standards at a level "requisite . . . to protect the public health" was not an unconstitutional delegation of legislative power.[217] The scope of discretion allowed by the relevant section of the CAA was held to be "well within the outer limits of [our] nondelegation precedents."[218] The Court

212. *Id.* (quoting Antonin Scalia, *A note on the* Benzene *case*, AEI J. ON GOV'T & SOC'Y (Aug. 6, 1980, 7:36 p.m.)).

213. *Id.* (quoting Antonin Scalia, *A note on the* Benzene *case*, AEI J. ON GOV'T & SOC'Y (Aug. 6, 1980, 7:36 p.m.)).

214. *Id.*

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

216. *See id.*

217. *Id.* at 475–76.

218. *Id.* at 474.

also noted that it has only ever found an "intelligible principle" lacking and therefore was required to strike down the corresponding statute on nondelegation doctrine grounds twice in its history.[219]

Justice Scalia defended *Chevron* against its detractors both left and right, seeing it as a useful constraint on activist courts. Justice Scalia was opposed to having the Court do the legislature's work. In a 1989 article, Justice Scalia defended *Chevron* by writing that "[b]road delegation to the Executive is the hallmark of the modern administrative state," and *Chevron* provides a "background rule of law against which Congress can legislate."[220] Justice Scalia assumed the legal fiction of implied delegation—that Congress intends for agencies to exercise their discretion:

> Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known. The legislative process becomes less of a sporting event when those supporting and opposing a particular disposition do not have to gamble upon whether, if they say nothing about it in the statute, the ultimate answer will be provided by the courts or rather by the Department of Labor.[221]

Justice Scalia also considered the fact that agencies can change the resolution of these statutory ambiguities as their knowledge and the political desires of their constituents changes to be a good thing, permitting the "needed flexibility" and "appropriate political participation" in the administrative process.[222]

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219. *Id.*

220. Scalia, *supra* note 22, at 516–17.

221. *Id.* at 517.

222. *Id.*

> One of the major disadvantages of having the courts resolve ambiguities is that they resolve them for ever and ever; only statutory amendment can produce a change. If the word "stationary source" in the Clean Air Act did not permit the "bubble concept" today, it would not permit the "bubble concept" four years from now either, no matter how much the

Justice Gorsuch, on the other hand, advocates for the overturn of *Chevron*, arguing that it is better for the Court to do the legislator's work than the agencies. Justice Gorsuch views *Chevron* as a potential threat to the fundamental obligation of the judiciary to interpret statutes and "say what the law is."[223]

Justice Gorsuch and others critique *Chevron*, and many use the major questions doctrine to do so, claiming as a matter of separation of powers to be returning power to Congress when, in reality, they are giving power to the courts. However, there is a valid argument that courts should not make policy choices. The judiciary is an unelected branch, while agencies have political accountability under the President. "[W]hen congressional instructions are either vague or absent, judges should assume that Congress delegated resolution of those statutory ambiguities to the Executive. In most such cases, of course, Congress did not speak to the question of interpretive authority, either explicitly or implicitly, so the delegation is purely fictional—a judicial presumption."[224] But this "fiction" that *Chevron* deference rests on Congress's choice to delegate law-interpreting power to administrative agencies is justified by the argument that "a reasonable legislator in the modern administrative state would rather give law-interpreting

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> perception of whether that concept impairs or furthers the objectives of the Act may change. Under *Chevron*, however, "stationary source" can mean a range of things, and it is up to the agency, in light of its advancing knowledge (and also, to be realistic about it, in light of the changing political pressures that it feels from Congress and from its various constituencies) to specify the correct meaning. If Congress is to delegate broadly, as modern times are thought to demand, it seems to me desirable that the delegee be able to suit its actions to the times, and that continuing political accountability be assured, through direct political pressures upon the Executive and through the indirect political pressure of congressional oversight.

Id. at 517-18.

223. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

224. Moncrieff, *supra* note 114, at 608.

power to agencies than to courts."[225] The *Chevron* opinion itself included the greater political accountability of agencies and the executive branch as a specific policy reason for the courts to defer to agencies.[226]

Whether the critique of *Chevron* is through the nondelegation argument that Justice Gorsuch makes in his Tenth Circuit *Gutierrez-Brizuela* concurrence, or whether it is through the increasingly common invocation of the major questions doctrine in Supreme Court jurisprudence,[227] denying deference to agencies is resulting in courts doing the legislator's work—and often under the guise of preventing unconstitutional delegations and restoring the proper separation of powers.

B. *How the Court Would Resolve the Issue Absent Invocation of the MQD*

As is clear from *MCI*, *Brown & Williamson*, *UARG*, and *Burwell*, one of the larger ramifications of the major questions doctrine is the diminution of agency deference and the enhancement of the courts' interpretive role.[228] The

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225. *Id.*

226. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .").

227. The major questions doctrine is also sometimes rationalized by the nondelegation argument. *See infra* note 6; *see also infra* note 104 and accompanying text.

228. With the recent appointments of both Justice Gorsuch and Justice Kavanaugh to the bench, both of whom have criticized *Chevron* deference, *see Gutierrez-Brizuela*, 834 F.3d at 1149–58 (Gorsuch, J., concurring) and Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150–54 (2016) (raising concerns about *Chevron* and suggesting limitations to the doctrine) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)), there is a legitimate threat that the major questions doctrine will be used to further scale back *Chevron's* domain. See also Justice Gorsuch's dissent in *Gundy v. United States*, 588 U.S. ___ (2019) (holding that 34 U.S.C. § 20913(d), part of the Sex Offender Registration and Notification Act, does not violate the nondelegation doctrine) and his concurrence in *Kisor v. Wilkie*, 588 U.S. ___ (2019) (upholding *Auer* deference) (where he was joined by Justice Kavanaugh) for recent examples

Court has never provided an explanation for why it invokes the doctrine at different points in its *Chevron* analysis.[229] Nor has the Court explained when it will consider a case to be of deep economic and political significance. *MCI*, *Brown & Williamson*, *UARG*, and *Burwell* all demonstrate this. Rather, the invocation of the doctrine seems only to be comprised of "episodes of vaguely equitable intervention, where the Court's 'olfactory sense detects the odor of administrative waywardness.'"[230] The major question doctrine's arbitrary and inconsistent application may suggest certain implications behind its invocation.

Taking a closer analysis of *Brown & Williamson* and *Burwell*, this Section will argue that these cases could have been resolved within the *Chevron* framework and without invocation of the major questions doctrine. By reevaluating the cases to determine how the Court would resolve the issue absent invocation of the major questions doctrine, this Section will demonstrate that a possible reason for the arbitrariness is because the major questions doctrine is acting as a super-strong clear statement rule[231] that permits

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of arguments in favor of greater judicial control over the administrative state.

229. *See, e.g.*, Leske, *supra* note 5, at 488–89 ("[I]n key cases such as *MCI* and *Brown & Williamson* . . . the Court did not engage in a discussion or elaboration of [the major question doctrine's] contours. Nor was there any mention of how the major questions doctrine fit within the *Chevron* analysis or whether it should be applied exclusively at *Chevron* Step One."); *Major Question Objections*, *supra* note 5, at 2197 ("[T]he [major questions] exception has never been justified by any coherent rationale.").

230. *Major Question Objections*, *supra* note 5, at 2192 (quoting Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 598 (1985)).

231. As termed by William Eskridge, a "super-strong clear statement rule" requires "very specifically targeted 'clear statements' on the face of the statute to rebut a policy presumption the Court has created." Eskridge and Frickey, *supra* note 104, at 595 n.4. Contrast this with regular "clear statement rules," which "require a 'clear statement' on the face of the statute to rebut a policy presumption the Court has created" and "presumptions," which "are general policies the Court will 'presume' Congress intends to incorporate into statutes . . . [and] can be rebutted by persuasive arguments that the statutory text, legislative history, or purpose is inconsistent with the presumptions." *Id.*

an escape from conclusions that could otherwise be drawn using agency power. The clear statement rule is a guideline for statutory construction that instructs courts not to interpret a statute in a way that will bring about a particular result unless the statute makes unmistakably clear its intent to achieve that result. Applied in this context, it would be read to say that deference will not be given to agencies absent unmistakably clear statutory language. Under this argument, then, the major questions doctrine acts more as a facade for the Court's separation of power effort to diminish administrative power.[232]

1. *Brown & Williamson* Revisited

In *Brown & Williamson*, the issue again was whether the FDA had the authority to regulate tobacco products. The FDA's position was that it had such authority because the FDCA defined drug as including "articles (other than food) intended to affect the structure or any function of the body."[233] The Court concluded otherwise, though, by invoking the major questions doctrine during its application of *Chevron* Step One.[234] Because of tobacco's "unique place in

232. Justice Gorsuch is not the first person on the bench to question the growth of executive agencies' power. Chief Justice Roberts' dissent in *City of Arlington v. FCC* is well-known for his critique of the administrative state. 569 U.S. 290, 313 (2013) (Roberts, J., dissenting). As surmised by Chief Justice Roberts, agencies today "exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *Id.* at 312–13 (Roberts, J., dissenting). Add that with the improbability that a President has the time or the desire to "supervise so broad a swath of regulatory activity," then "the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 313, 315 (Roberts, J., dissenting) (internal citations omitted). Justice Thomas also questioned the *Chevron* doctrine in his *Michigan v. EPA* concurrence: "These cases bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference." 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring).

233. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000) (quoting 21 U.S.C. § 321(g)(1)(C) (1994 & Supp. III)).

234. *Chevron* Step One seeks to ascertain whether the meaning from the statute is clear, and if so, then that meaning controls. Chevron U.S.A. Inc. v. Nat.

American history and society," and the lack of an explicit delegation from Congress combined with several pieces of legislation on tobacco that suggested a congressional intent to retain jurisdiction, the Court held that Congress had directly spoken to the issue.[235] *Brown & Williamson* was a clear statement case because the major questions doctrine gave the Court an escape from the conclusion that would otherwise be drawn using agency power. The Court stated that it could not interpret the FDCA in a way that would bring about a result it believed was not intended by Congress, especially when that particular result was not unmistakably clear from the text of the statute itself.

Arguably, though, the Court could have decided the issue without invoking the major questions doctrine, and instead could have relied solely on contextual evidence to inform the meaning of the statute under *Chevron* Step One. In *Brown & Williamson*, there was considerable contextual evidence the majority could draw upon of separate statutory pronouncements on tobacco regulation that might lead the Court to judge that the language in the FDCA permitting the FDA to regulate drugs did not include tobacco. This contextual evidence included the fact that the FDA consistently stated before 1995 that it lacked jurisdiction over tobacco,[236] that Congress had enacted several tobacco-specific statutes fully cognizant of the FDA's position,[237] and

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Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

235. *Brown & Williamson*, 529 U.S. at 160–61.

236. *Id.* at 144 (pointing to the "FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco absent claims of therapeutic benefit by the manufacturer").

237. *Id.* at 143–44.

> Congress has enacted six separate pieces of legislation since 1965 addressing the problem of tobacco use and human health. . . . Those statutes, among other things, require that health warnings appear on all packaging and in all print and outdoor advertisements, see 15 U.S.C. §§ 1331, 1333, 4402; prohibit the advertisement of tobacco products through "any medium of electronic communication" subject to regulation by the Federal Communications Commission (FCC), see §§ 1335, 4402(f); require the Secretary of Health and Human Services (HHS) to report

that Congress had considered and rejected many bills that would have given the agency such authority.[238] Thus, the Court wrote, "[u]nder these circumstances, it is evident that Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products. Congress has created a distinct regulatory scheme to address the problem of tobacco and health, and that scheme, as presently constructed, precludes any role for the FDA."[239]

The above could have been enough to find that the seemingly clear language in the FDCA permitting the FDA to regulate drugs did not include tobacco, ending its inquiry at *Chevron* Step One. Nevertheless, rather than cabining its discussion to the plain meaning of the statute—informed by these separate statutory pronouncements—the Court went beyond *Chevron* Step One to include a consideration of how likely it was that Congress delegated "a policy decision of such economic and political magnitude to an administrative agency."[240] By invoking the major questions doctrine here, the Court limited the role of *Chevron* and of agency determinations more generally.

2. *Burwell* Revisited

Similarly, in *King v. Burwell*, the Court could have reached its conclusion without invocation of the major

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every three years to Congress on research findings concerning "the addictive property of tobacco," 42 U.S.C. § 290aa—2(b)(2); and make States' receipt of certain federal block grants contingent on their making it unlawful "for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18," § 300x—26(a)(1).

Id.

238. *Id.* at 144 ("[O]n several occasions . . . and after the health consequences of tobacco use and nicotine's pharmacological effects had become well known, Congress considered and rejected bills that would have granted the FDA such jurisdiction.").

239. *Id.* For the full recitation of the context of the regulatory scheme surrounding tobacco, see the Court's discussion on pages 143–159.

240. *Id.* at 133.

questions doctrine. The issue in *Burwell* was whether the ACA's tax credits were available in states that had a Federal Exchange.[241] Prior to *Burwell*, the IRS issued a regulation that made tax credits available on both State and Federal Exchanges.[242] Invoking the major questions doctrine, the Court held that *Chevron* was wholly inapplicable, as it was extremely unlikely that Congress had delegated such "a question of deep 'economic and political significance' that is central to this statutory scheme."[243]

However, a straightforward *Chevron* Step Zero analysis could have viably led to the conclusion that the IRS did not have jurisdiction to address health care issues, and thus no deference was warranted. *Chevron* Step Zero asks whether the agency has the authority to issue binding legal rules.[244] If the answer is no, *Chevron* does not apply.[245] In *Burwell*, the Court could have analyzed whether the IRS had the authority to interpret the Section in question, 36B, which was codified in Title 26 of the United States Code, the Internal Revenue Code ("IRC"). What was necessary to resolve the issue in *Burwell* was not simply a straightforward interpretation of Section 36B, but the interpretation of Section 36B *in relation to* the remainder of the ACA, many of which parts lay outside of the IRC. To illustrate: "Section 36B allows an individual to receive tax credits only if the individual enrolls in an insurance plan through 'an Exchange established by the State under [42 U.S.C. § 18031].'"[246] In addition, the Court also reviewed 42

241. King v. Burwell, 135 S. Ct. 2480, 2485 (2015).

242. *Id.* at 2487 (citing 77 Fed. Reg. 30378 (2012)).

243. *Id.* at 2489 (quoting Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014)).

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

245. *Id*. Though the agency may still receive *Skidmore* deference—an agency's statutory arguments are entitled to respectful consideration, given an agency's expertise about the statute it administers and the practical and technical issues involved in implementing the law.

246. *Burwell*, 135 S. Ct. at 2489.

U.S.C. § 18041 to inform the meaning of Section 36B.[247] These two provisions are codified in Title 42 of the United States Code, which is the United States Code dealing with public health, social welfare, and civil rights.

Thus, the Court could have concluded, under *Chevron* Step Zero, that the IRS did not have the authority to interpret Section 36B. The Court even recognized in its analysis that the IRS "has no expertise in crafting health insurance policy of this sort."[248] But instead, the Court refrained from engaging in a *Chevron* analysis, finding that the major questions doctrine rendered *Chevron* inapplicable.

The argument can be made that the Court is now substituting one doctrine (the major questions doctrine) for another (traditional nondelegation doctrine) to deal with what it believes are excessive delegations by Congress. In doing so, the Court is increasing its own interpretive authority at the cost of agency deference. This is especially true when the Court could have restricted its analysis within the existing *Chevron* framework, but chose not to. The major questions doctrine acts more as a facade for the Court's separation of power effort to diminish administrative power. This new approach centers around whether the Court believes agency deference should exist as it currently does, and can result in judicial decisions that are arbitrarily based on the Court's own policy judgments.[249]

CONCLUSION

One could take the view of the nondelegation argument that *Chevron* violates the separation of powers as the

247. *Id.* at 2489 ("Although phrased as a requirement, the Act gives the States 'flexibility' by allowing them to 'elect' whether they want to establish an Exchange. § 18041(b). If the State chooses not to do so, Section 18041 provides that the Secretary 'shall . . . establish and operate *such Exchange* within the State.' § 18041(c)(1) (emphasis added).").

248. *Id.*

249. Heather Steiner, *Food & (and) Drug Administration v. Brown & Williamson Tobacco Corp.*, 28 ECOLOGY L. Q. 355, 356 (2001).

Framers intended, because it allows Congress to unconstitutionally delegate too much of its power to executive agencies. Or, one could take the view of the intelligible principle argument set out in *Mistretta* that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[250] Both views invoke a vision of the Constitution. No matter which view one agrees with, however, statutory ambiguity is unavoidable,[251] and a decision must be made as to what entity resolves that ambiguity.

Both Justice Gorsuch and advocates of the major questions doctrine believe that the Court should be the entity to resolve the ambiguity—at the very least in cases that present significant questions. But in setting out the constitutional critique of *Chevron*, both Justice Gorsuch and the major questions doctrine, as a manifestation of the same criticism, offer a remedy that does not solve the problem of which their critique complains. It appears that the Court is now substituting the major questions doctrine for the traditional nondelegation doctrine to deal with what it believes are unconstitutional delegations by Congress. But the delegation is not being restored to the legislature. The result is a diminution of agency deference and an enhancement of the Court's interpretive role. This development, coupled with the fact that a legitimate dispute in the constitutional interpretation of *Chevron* exists, demonstrates that what really underlies the arguments over *Chevron's* existence are policy disagreements over the proper role of the current administrative state.

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250. Mistretta v. United States, 488 U.S. 361, 372 (1989).

251. *See* Nicholas R. Bednar & Kristin E. Hickman, Chevron's *Inevitability*, 85 GEO. WASH. L. REV. 1392, 1448 (2017) (using as examples "what constitute[s] a 'safe' drug, a 'reasonable hazard,' . . . [or] a 'crashworthy automobile.'").