THE MAJOR QUESTIONS DOCTRINE AND THE ADMINISTRATIVE STATE: A PUBLIC CHOICE APPROACH

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INTRODUCTION

Recent high-profile decisions by the United States Supreme Court, for instance, *West Virginia v. Environmental Protection Agency*[1] and *Alabama Association of Realtors v. Department of Health and Human Services,*[2] have brought renewed attention to the major questions doctrine. The major questions doctrine is an effort by the Court to impose a limit on administrative agencies' power to enact regulations that impose costs much greater than the legislature intended with statutes that authorized regulations. Congressional legislation, generally made by majority votes in the House of Representatives and subject to the filibuster supermajority rule in the Senate, render questions of major importance to the nation's economy subject to an accountability that is not present where decisions are made by bureaucratic agencies.

The principle of judicial deference to agency interpretations of statutes developed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,[3] fails to impose real limits on the power of agencies to interpret federal statutes in a way that allows them to expand their own power, because the courts will defer to the agency unless Congress has imposed a clear limitation on the agency's authority to regulate.[4] But the major questions doctrine provides that there is some threshold beyond which the executive branch cannot impose its will and that the legislature should have passed upon the subject matter of the regulation.

Chevron itself has been a way for administrative agencies to avoid judicial scrutiny and for political activists and organized interests to obtain desired results through the administrative process that they could not achieve through the political process. Its rise and apparent wane reflect political conflict in the judiciary, with both judicial conservatives and liberals finding the executive branch an appealing way to obtain desired policy results.[5]

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[1] 597 U.S. 697 (2022).

[2] 594 U.S. 758 (2021).

[3] 467 U.S. 837, 863-64, 866 (1984).

[4] *See* THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 198-99 (2022).

[5] JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 289-95 (2017).

The major questions doctrine is a patchwork effort to impose constraints on the administrative state. It is a patchwork effort because its contours and scope are not subject to a meaningful definition, as is illustrated by the decisions that compose its admittedly limited history. It is best understood as a kind of clear statement rule that is related to, though distinct from, the nondelegation doctrine. A rejuvenated nondelegation doctrine and a proper application of Administrative Procedure Act requirement that a reviewing court "hold unlawful and set aside agency action . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"[6] would be a better approach to constraining the administrative state and preserving the separation of powers and the republican values that constitutional principle represents in administrative law.

I. *CHEVRON* AND THE ADMINISTRATIVE STATE

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. addresses an important tension in the administrative state: the extent to which Congress intends for agencies to have discretion in applying statutes in regulatory actions.[7] In *Chevron*, the Court was presented with a question under the Clean Air Act (CAA): whether the EPA's application of a "bubble concept" to define "stationary source" as that term is used in the CAA was a permissible interpretation of the CAA.[8] With the "bubble concept," the EPA would consider the plant-wide emissions from a source in determining whether the plant had to seek a permit for a change to an element of its production process.[9] The Court held that the "bubble concept" was a reasonable interpretation of the CAA by the EPA.[10]

Under *Chevron*, a court reviewing a challenge to an administrative rule on the ground that the rule exceeds the agency's statutory authority asks first (at step one) whether the Congress, by means of the statute, has foreclosed the agency's

[6] 5 U.S.C. § 706(2)(C).
[7] *See* 467 U.S. 837, 863-64, 866 (1984).
[8] *Id.* at 860-61 (citing 40 C.F.R. §§ 51.165(j)(1)(i)–(ii) (1983)).
[9] *Id.* at 837.
[10] *Id.* at 861, 866.

discretion.[11] If the answer to that question is affirmative, that is the end of the inquiry. However, if Congress in the statute has not prevented the agency from adopting the regulation in question, then the court inquires (at step two) whether the regulation is a reasonable interpretation of the statute. If the regulation is a reasonable interpretation of the statute, the court defers to the agency's interpretation of the law, and the regulation stands.[12] In subsequent decisions, the Court refined the *Chevron* doctrine, holding that *Chevron* deference does not apply to informal interpretations of statutory authority,[13] and that the doctrine does not apply in instances of unambiguous statutory language.[14]

The chief rationale for *Chevron* deference is that the agency has expertise in the area of policymaking, and courts should defer to that expertise where there is no prohibition from Congress for the agency adopting the challenged regulation.[15] *Chevron* thus represents the apotheosis of the administrative state in the American political system in that agencies have broad discretion to do that which is in some general way reasonably determined by the agency to have been authorized by Congress. This is so, not because Congress specifically granted the agency the authority, but because Congress has not denied the authority to the agency. Provided it is not denied to the agency, the courts should defer to the agency's reasonable interpretation of the authority Congress granted it.

Thomas Merrill offers an engaging account of how the *Chevron* doctrine came to be. The *Chevron* opinion itself was not a great departure from traditional administrative law on the scope of

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[11] *Chevron*, 467 U.S. at 844.

[12] *Id.* at 844-45.

[13] Christensen v. Harris County, 529 U.S. 576, 587 (2000). *See* Barnhart v. Walton, 535 U.S. 212, 217, 221 (2002) (holding that the Social Security Agency's definition of "disability," which required that the individual had been unable to work for a year, was not due to *Chevron's* deference, as it had been established "through means less formal than 'notice and comment' rulemaking"). *See also* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (determining whether "Congress delegated authority to the agency generally to make rules carrying the force of law, and [whether] the agency interpretation claiming deference was promulgated in the exercise of that authority"); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 221-22 (2006) (In this "Step Zero" analysis, the agency is assumed to be exercising delegated rulemaking authority when it is authorized to employ notice-and-comment rulemaking.).

[14] Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 446-48 (1987).

[15] *Chevron*, 467 U.S. at 866.

agency discretion established in the 1930s in, for example, *Skidmore v. Swift & Co.*[16] In *Skidmore*, the Court considered an interpretive bulletin issued by the Department of Labor on the Fair Labor Standards Act.[17] The Court reversed the trial court's decision relying on the interpretive bulletin.[18] The principle of *Swift* is that the courts should decide on a case-by-case basis whether to defer to agency interpretations of law depending upon how persuasive those interpretations are.

In determining how persuasive an agency's interpretation of law is, a court should consider the quality of the agency's reasoning, the depth of its investigation of the background, and the historic consistency of the agency's interpretation of the statute in question.[19] Merrill argues that the Supreme Court's decision in *Chevron* itself did not depart from this traditional approach, but that subsequent decisions of the District of Columbia Court of Appeals applied the two-step approach in part of Justice Stevens' opinion in a rigorous way that offered the sense of a clear rule in such issues.[20]

Merrill suggests that *Chevron* went wrong in assuming there could be implicit delegations of authority, which undermines the separation of powers.[21] In fact, as Merrill notes, there is a tension between *Chevron*'s ready willingness to find implicit delegations of power from Congress to agencies and the clear statement rule as a canon of statutory construction in American law.[22] A clear statement rule provides that courts should not interpret a statute in a way that the legislature did not intend, which in turn is based

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[16] 323 U.S. 134 (1944). *See* MERRILL, *supra* note 4, at 42-45 (2022).

[17] *Swift*, 323 U.S. at 135.

[18] *Id.* at 140.

[19] *Id. See also* Gonzales v. Oregon, 546 U.S. 243, 249-51, 274-75 (2006) (The Court refused to offer *Chevron* deference and followed *Skidmore* instead to reject the Attorney General's interpretation of the Controlled Substances Act that it authorized him to disallow the use of certain drugs for assisted suicide under an Oregon law, on the ground that this was a decision left for the Secretary of Health and Human Services and not the Department of Justice. Although the Act gave the Attorney General the authority to place drugs on schedules of controlled substances, it was not for the Department of Justice to regulate physicians or deregister them for certain drugs because of the physicians' controversial use of prescriptions for them.).

[20] MERRILL, *supra* note 4, at 43, 81, 85.

[21] *Id.* at 94-95.

[22] *Id.* at 260.

on the idea that if the legislature intends for a statute to be applied in a certain way, the text of the statute will so provide.[23]

Chevron, of course, does the opposite. As a tool of statutory construction, the *Chevron* doctrine establishes that an agency's interpretation of a congressional statute is one the court should defer to if the statute does not deny the agency the purported authority and if the agency's interpretation of the law is reasonable.[24] If anything in the law has helped to establish the self-growing administrative state, in which agencies have a great deal of institutional autonomy facing outward from the executive branch, it is this.

Under *Chevron*, Congress must limit the power of executive branch agencies through a clear statement. For this reason, "the *Chevron* doctrine may countenance one of the largest transfers of political power in our history, from Congress to the executive. One might think this would require a constitutional amendment, not a decision of the Supreme Court."[25] Nevertheless, after 2016, the Court seems to have stopped following *Chevron*, though it has not overruled it.[26]

II. DEVELOPMENT OF THE MAJOR QUESTIONS DOCTRINE

This section discusses the principal cases applying major questions in chronological order to show the reasoning and development of the doctrine.

A. MCI Telecomm. Corp. v. AT&T Co.

The Court first invoked the major questions doctrine in *MCI Telecommunications Corporation v. Atlantic Telephone & Telegraph Co.*[27] *MCI* addressed a practice developed by the Federal Communications Commission ("FCC"), charged with enforcing the Communications Act of 1934.[28] The Act required telephone companies to send tariffs to the FCC and then pass the costs on to

[23] *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

[24] *Chevron*, 467 U.S. at 844-45.

[25] MERRILL, *supra* note 4, at 4.

[26] *See id.* at 7.

[27] 512 U.S. 218 (1994).

[28] *Id.* at 224.

their customers.[29] The statute authorized the FCC to modify the tariff requirement "in its discretion and for good cause shown."[30] The dispute in the case arose because the FCC stopped requiring all long-distance carriers, except AT&T, to submit the tariffs.[31]

The question presented to the Court was whether the agency's statutory authority to "modify" the tariff authorized the agency to do what it had done here, to eliminate the tariff for all but one carrier.[32] The Court held that it was not, reasoning that "the Commission's permissive detariffing policy can be justified only if it makes a less than radical or fundamental change in the Act's tariff-filing requirement."[33] In this case, the agency regarded an "essential characteristic" of the statute as a matter of its discretion.[34]

B. *FDA v. Brown & Williamson*

The major questions doctrine reappeared in *Food & Drug Administration v. Brown & Williamson Tobacco Corporation*,[35] where the Court considered whether the Food and Drug Administration ("FDA") had the authority to regulate tobacco products as a drug under the Food, Drug, and Cosmetic Act.[36] The Court determined that the *Chevron* doctrine was applicable because the FDA administered the statute in question.[37] However, the Court determined that *Chevron* deference was not warranted.[38]

This is because the regulation was not filling in a gap in the statute using the agency's expertise, but instead, had the agency giving itself authority over "a significant portion of the American economy."[39] Since Congress would not grant the agency such authority without some clear indication, Congress had "directly

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[29] *MCI Telecomm. Co.*, 512 U.S. at 224.
[30] *Id.* at 224 (quoting 47 U.S.C. § 203(b)(2) (1988 & Supp. IV)).
[31] *See id.* at 222.
[32] *Id.*
[33] *Id.* at 229.
[34] *Id.* at 231.
[35] 529 U.S. 120 (2000).
[36] *Id.*
[37] *Id.* at 159.
[38] *Id.*
[39] *Id.*

spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products," foreclosing *Chevron* deference.[40]

In both *MCI* and *Brown & Williamson*, the Court determined that Congress directly spoke to the issues addressed by the regulations in question and that, at its inception, 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."[41]

C. Utility Air Regulatory Group v. EPA

The Environmental Protection Agency ("EPA") regulated greenhouse gas emissions from motor vehicles under the Clean Air Act ("CAA"), specifically, air pollutant emissions from new motor vehicles.[42] That section requires the EPA expressly to regulate emissions from new motor vehicles. But when the EPA sought to regulate greenhouse gas emissions in the air from power plants in 2012, the Supreme Court rejected its statutory authority to do so under the Prevention of Significant Deterioration ("PSD") program and Title V of the CAA.[43]

In *Utility Air Regulatory Group v. EPA*, the agency sought to impose permitting requirements on emitters of greenhouse gases under the PSD program.[44] The case involved the twin questions of whether the EPA could regulate stationary sources based upon their potential to emit greenhouse gases and whether a stationary source already being regulated for emissions of other air pollutants

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[40] *Food & Drug Admin.*, 529 U.S. at 133.

[41] Kevin O. Leske, *Major Questions about the "Major Questions" Doctrine*, 5 MICH. J. ENV'T. & ADMIN. L. 479, 488 (2016).

[42] *See* Massachusetts v. EPA, 549 U.S. 497, 528 (2007); *see also* 42 U.S.C. § 7521(a)(1) ("[EPA] 'shall by regualtion prescribe…standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public heath or welfare.'").

[43] *See* 42 U.S.C. § 7471; 42 U.S.C. § 7475. The program requires permitting for new or modified sources of air pollutants in areas that are either in attainment or cannot be classified under the NAAQS program. *See* 42 U.S.C. § 7470. The PSD program requires the Best Available Control Technology to prevent significant deterioration of air quality in the area where the new or modified source is located. *See* 42 U.S.C. § 7479.

[44] 573 U.S. 302, 302 (2014).

could also be required to add devices to reduce greenhouse gas emissions.[45] As to the former, the Court held that the EPA was not required by the CAA to impose permit requirements of stationary sources solely because they had the potential to emit greenhouse gases.[46]

As to the second issue, the Court invoked the major questions doctrine to reject the EPA's construction of the statute, which would have authorized it to impose permit requirements on stationary sources already being regulated for their emissions of other air pollutants.[47] The Court reasoned that applying the EPA's construction of the statute to authorize permitting requirements for small emitters of greenhouse gases already being regulated for emissions of other air pollutants would be disruptive to the nation's economy, paralyzing construction and other industries.[48]

After the Court held that greenhouse gases were subject to regulation as air pollutants under the CAA, the EPA promulgated regulations for greenhouse gas emissions from motor vehicles under the CAA § 7475 and under the PSD program for stationary sources of greenhouse gas emissions that required them to obtain a permit for construction and operation.[49] The question for the Court was whether the statute that required regulation of motor vehicle emissions thereby also required as a result permitting requirements for greenhouse gas emissions from stationary sources.[50] The Court held in an opinion authored by Justice Scalia that though *Massachusetts v. EPA* determined that greenhouse gases were air pollutants under the CAA, this did not require the regulation of greenhouse gases universally in every application of the statutory term.[51]

D. King v. Burwell

In *King v. Burwell*, an opinion authored by Chief Justice Roberts, the Court applied the major questions doctrine to reject

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[45] *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 314-15 (2014).
[46] *See id.* at 321.
[47] *See Util. Air Regul. Grp.*, 573 U.S. at 324.
[48] *See id.*
[49] *Id.* at 310-13.
[50] *Id.* at 331.
[51] *Id.* at 333.

the IRS's interpretation of the Affordable Care Act.[52] The statute required state governments to establish exchanges in which individuals could purchase health insurance policies,[53] but stipulated that the citizens of states that did not establish such exchanges could purchase health insurance policies on exchanges established by the federal government.[54] The statute allowed tax credits for persons who purchased qualifying health insurance policies "through an Exchange established by the State under section 1311 [§18031] of the Patient Protection and Affordable Care Act[.]"[55] The IRS interpreted the statutory language to allow for tax credits whether the person purchased health insurance through an exchange established by a state government or one established by the federal government.[56]

In *King*, the Court fashioned a "Step Zero" to *Chevron* deference, determining that in some cases, a court should ask whether Congress intended to delegate to an agency the authority to interpret a statute.[57] The Court concluded that the IRS was not an agency to which Congress intended to delegate the authority to make decisions regarding the purchase of health insurance by individuals.[58]

E. Alabama Association of Realtors v. HHS

The Court invoked the major questions doctrine in a per curiam opinion, holding that the Centers for Disease Control ("CDC") and Prevention of the United States Department of Health and Human Services exceeded its authority to reinstate a moratorium on evictions from rental properties due to the COVID-19 pandemic after the congressional authorization for the moratorium expired.[59] The CDC claimed its authority under a section of the Public Health Service Act and an allied regulation that authorized the HHS and CDC to make regulations "to prevent

[52] 576 U.S. 473 (2015).
[53] 42 U.S.C. § 18031(b)(1)(A).
[54] 42 U.S.C. § 18041(c)(1).
[55] 26 U.S.C. § 36B(c)(2)(A)(i); *see* 26 U.S.C. §§ 36B(b)-(c).
[56] 45 C.F.R. § 155.20 (2023).
[57] *King*, 576 U.S. at 485.
[58] *See id.*
[59] *See* Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485 (2021).

the introduction, transmission, or spread of communicable diseases" from foreign countries or other states within the United States.[60]

The Court's per curiam decision emphasized the magnitude of the CDC's moratorium, which covered about 17 million tenants and $50 billion in rental income, and the fact that "it is a stretch" to maintain that the CDC has the authority to interfere with the landlord-tenant relationship, traditionally a matter of state law.[61] A dissent authored by Justice Breyer and joined by Justices Sotomayor and Kagan emphasized the dangers of COVID-19 and the idea that evictions would promote the spread of the disease.[62]

F. NFIB v. OSHA

National Federation of Independent Business v. Occupational Health and Safety Administration[63] arose from OSHA's proposed rule requiring all employers of more than one hundred employees to impose COVID-19 vaccine mandates.[64] In a per curiam opinion, the Court ordered a stay of the agency's rule.[65] Recognizing that the proposed action was "a significant encroachment into the lives—and health—of a vast number of employees[,]" the Court looked for a clear statement in legislation authorizing such action and found none.[66]

Instead, the Occupational Safety and Health Act, on which the agency relied, authorized the agency "to set *workplace* safety standards, not broad public health measures."[67] The agency's construction of the statute, the Court concluded, "would significantly expand OSHA's regulatory authority without clear congressional authorization."[68] Justice Gorsuch's dissenting opinion connects the major questions doctrine with the

[60] *See id.*; *see also* 42 U.S.C. § 264(a); 42 C.F.R. § 70.2 (2020).
[61] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488-89.
[62] *Id.* at 2490-94 (Breyer, J., dissenting).
[63] 142 S. Ct. 661 (2022).
[64] *Id.* at 662-67.
[65] *Id.* at 661.
[66] *Id.* at 665.
[67] *Id.* (citing 29 U.S.C. §§ 655(b)-(c)(1)).
[68] *Id.*

nondelegation doctrine in that each promotes governmental accountability to the public.[69]

G. West Virginia v. EPA

In its most recent application of the major questions doctrine, the Court considered a regulation that would seek, over time, to eliminate coal-fired power plants in the United States.[70] Acting under § 111(d) of the Clean Air Act, the Environmental Protection Agency promulgated the Clean Power Plan in 2015, which required coal-fired power plants to begin replacing their generation of power with natural gas, solar, or other non-coal sources of energy.[71] Section 111 of the Clean Air Act established the New Source Performance Standards program.[72]

Under that program, the EPA is to determine stationary sources of "air pollution which may reasonably be anticipated to endanger public health or welfare."[73] Under Section 111(b), the EPA must then promulgate for each category "[f]ederal standards of performance for new sources."[74] A "standard of performance" is one that "reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated."[75]

Section 111, by its terms, regulates new stationary sources of air pollution. The language of Section 111(b) makes clear that it regulates only new sources and not existing sources of air pollution.[76] For new stationary sources of air pollution, the EPA is empowered to impose limits on the emissions of air pollutants by new stationary systems in light of the emissions that would be

[69] *Nat'l Fed'n of Indep. Bus.,* 595 U.S. at 688 (Gorsuch, J., dissenting). *See* Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting).

[70] *See* West Virginia. v. EPA, 142 S. Ct. 2587 (2022).

[71] *West Virginia*, 142 S. Ct. at 2599.

[72] 42 U.S.C. § 7411.

[73] 42 U.S.C. § 7411(b)(1)(A).

[74] 42 U.S.C. § 7411(b)(1)(B).

[75] *West Virginia*, 142 S. Ct. at 2601 (alterations in original) (citing 42 U.S.C. § 7411(a)(1) (2013)).

[76] *See* 42 U.S.C. § 7411(b).

generated by the best available system for reducing emissions.[77] The title of Section 111 indicates that the new sources it authorizes regulating also include "modified" sources.[78]

Section 111(d) authorizes the EPA to regulate existing sources of air pollutants if those specific pollutants are not already regulated under one of two other programs established by the Clean Air Act (CAA): the National Ambient Air Quality Standards ("NAAQS") program or the Hazardous Air Pollutants (HAP) program.[79] Section 111(d) requires states to submit plans to establish standards of performance for existing sources as if they were new sources, unless the category of source or the pollutants that the source emits are regulated under another section of the CAA.[80]

Under the NAAQS program, the EPA identifies pollutants to be regulated and sets emissions limitations for each, but the EPA requires the states to establish the means by which these emissions limitations are to be met.[81] This is pursuant to Section 110 of the CAA.[82] The HAP program regulates pollutants that have hazardous health impacts that are not regulated under NAAQS.[83] Under Section 111(d), the EPA can regulate existing stationary sources of air pollutants if those pollutants are not already regulated under the NAAQS or HAP programs.[84] Since most air pollutants were regulated by NAAQS or HAP programs, Section 111(d) has not been used often. For this reason, the Court described Section 111(d) as a "gap filler" in the CAA that "had rarely been used in the preceding decades."[85]

While this litigation was pending, the Trump Administration took office, and the new Administration's EPA repealed and replaced the Clean Power Plan with the Affordable Clean Energy rule, which was an approach that sought to reduce emissions of greenhouse gases from power plants through reductions

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[77] *See* § 7411(b).
[78] *Id.*
[79] *Id.*
[80] 42 U.S.C. § 7411(d).
[81] *See id.*
[82] *See* 42 U.S.C. § 74110.
[83] *Id.*
[84] *Id.*
[85] West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

technologies rather than through generation shifting to renewable sources of energy.[86] This too provoked litigation, and the Court of Appeals for the District of Columbia, at the end of the Trump Administration's term in office, held that the EPA had violated the Administrative Procedure Act in adopting Affordable Clean Energy rule.[87] The effect of this decision reinstated the Clean Power Plan, though the Biden Administration did not pursue its implementation.[88] The government argued to the Court that the case was moot, because the Biden administration did not intend to implement the Clean Power Act.[89] The Court rejected that argument and held that the voluntary cessation of seeking to implement the Clean Power Act by the government did not moot the issue.[90]

The Court held that Congress had not in the Clean Air Act authorized the EPA to establish a cap on the emissions of greenhouse gasses by means of the generation shifting approach reflected in the Clean Power Plan.[91] The Court, quoting *FDA v. Brown and Williamson*, referred to the major questions doctrine as covering those "extraordinary cases" in which the "'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[92] The major questions doctrine requires an agency to identify "clear congressional authorization" for its actions and is supported ultimately by the separation of powers.[93]

Before the Obama Administration's Clean Power Act, Section 111 had been used to reduce emissions through technologies designed to reduce emissions from existing sources of operation rather than requiring entirely new technologies to replace those being used currently.[94] For that reason, the Court required "clear

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[86] *West Virginia*, 142 S. Ct. at 2594.
[87] *Id.* at 2604.
[88] *Id.*
[89] *Id.* at 2606-07.
[90] *Id.*
[91] West Virginia v. EPA, 142 S. Ct. 2587, 2626 (2022) (Gorsuch, J. concurring).
[92] *Id.* at 2608.
[93] *Id.* at 2621 (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).
[94] *Id.* (citing 41 Fed. Reg. 48706 (Nov. 4, 1976) and 80 Fed. Reg. 64726 (Nov. 4, 1976)).

congressional authorization" to mandate the generation-shifting approach and regulate in that manner.[95] The EPA's invocation of the statutory language— "the application of the best system of emission reduction . . . adequately demonstrated"—[96] did not convince the Court. Specifically, the Court rejected the EPA's argument that the word "system" could refer to the cap-and-trade system contemplated under the Clean Power Plan.[97]

The Biden Administration and Congress responded to the Court's decision in *West Virginia v. EPA* by including in its Inflation Reduction Act tax credits to encourage investment in "clean" electricity production.[98] The Inflation Reduction Act was part of a budget bill adopted through the reconciliation process,[99] which is not subject to a Senate filibuster and passed by a perfect party line vote in both chambers.[100] It would not likely have been politically feasible to substantively amend the Clean Air Act in a way that would empower the EPA to compel electric power plants to transition to generation shifting technologies such as wind and solar power.

Section 111(d) presented a remarkable opportunity to the EPA, and to environmental organizations seeking to greatly reduce or altogether eliminate fossil fuels in electricity production. That was, and remains, the goal of many environmental activists who, for example, also developed plans to use Section 111(d) to go after the petroleum refining industry using a model like that of the Clean Power Plan.[101] Section 111(d) had not been often used because most air pollutants are subject to regulation under NAAQS or HAP plans, but, due to Congress' and the Bush Administration's reluctance, in the wake of the *Massachusetts v. EPA decision*, to

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[95] *West Virginia*, 142 S. Ct. at 2621 (citing Util. Air Regul. Grp. v. EPA., 573 U.S. 302, 324 (2014)).

[96] 42 U.S.C. § 7411(a)(1).

[97] *West Virginia*, 142 S. Ct. at 2610.

[98] Inflation Reduction Act of 2022, Pub. L. No. 117-169, §§ 13701-13704 (Aug. 16, 2022).

[99] S. Con. Res. 14, 117th Cong., 136 Stat. 1818 (2022).

[100] *See* H.R. 5376, Roll Call 420, Aug. 12, 2022, 117th Cong., 2d sess.; H.R. 5376, Roll Call 325, Aug. 7, 2022, 117th Cong., 2d sess.

[101] *See*, *e.g*, *EPA Regulation of Greenhouse Gas Emissions from New Power Plants*, CTR. CLIMATE & ENERGY SOLS., https://www.c2es.org/document/epa-regulation-of-greenhouse-gas-emissions-from-new-power-plants/ [https://perma.cc/P3SB-6WCJ] (Last visited Jan. 11, 2024).

take dramatic action to reduce carbon emissions by seeking to replace coal and natural gas, Section 111(d) appeared to offer a regulatory path to requiring that fossil fuel-fired electric plants shift their energy production away from fossil fuels and toward such technologies as solar and wind power.

Section 111(d) offered this path because greenhouse gas emissions were not being regulated under other sections, and because, once new stationary sources of greenhouse gas emissions were being regulated under Section 111(b), existing stationary sources could then be regulated under Section 111(d). In a nutshell, Section 111(d) offered the EPA and environmental activists a means to defeat the coal industry. This is relevant to the analysis of the Clean Power Plan under the major questions doctrine.

Justice Gorsuch wrote a concurring opinion, which emphasized the separation of powers and federalism and their requiring of a broad base of support for major policy initiatives.[102] Requiring compromise among competing and diverse interests is inherent in the Madisonian design reflected in the national government's structure.[103] In addition, Justice Gorsuch refers to the nondelegation doctrine in both the federal and state systems as a way to promote democratic accountability in government.[104] He regards the major questions doctrine as a clear statement rule, which he connected with Article 1.[105] He noted that as early as 1897, the Court had used this doctrine to reject an agency interpretation of the Interstate Commerce Act, dealing with railroad rates.[106] The Court in *Interstate Commerce Commission v. Cincinnati*[107] emphasized the magnitude of the power assumed by the Interstate Commerce Commission to set future rates for railroad freight transport and stated:

> [t]hat Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and

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[102] West Virginia v. EPA, 142 S. Ct. 2587, 2619-25 (2022).

[103] THE FEDERALIST NO. 10, at 254 (Madison) (Jacob E. Cooke ed. 1961).

[104] *West Virginia*, 142 S. Ct. at 2618.

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

[106] Interstate Com. Comm'n v. Cincinnati, New Orleans & Tex. Pac. Ry Co., 167 U.S. 479, 499 (1897).

[107] *Id.*

> phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct.[108]

The major questions doctrine, Justice Gorsuch reasoned, is analogous to other clear statement rules and has the same rationale, which is to preserve the separation of powers.[109] "At stake is not just a question of retroactive liability or sovereign immunity, but basic questions about self-government, equality, fair notice, federalism, and the separation of powers."[110] Gorsuch continued that the Court's precedents show that the major questions doctrine applies when it appears that the agency is seeking a workaround to avoid the political process, its decision will have a major impact on the nation's economy, or it upsets the balance between state and federal authority.[111] For this reason, he argues that we should look for a clear basis for believing that elected representatives chose the policy in question.[112]

As to how to identify a clear statement, Gorsuch reasons that the claimed power should be clear from the "statutory scheme," i.e., not from a "gap filler" provision such as Section 111(d), and that an agency using an old statute to discover a new and unprecedented power under the statute is cause for suspicion.[113] Further, "an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority."[114] We should consider too the agency's historic understanding of the statute, and "skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise."[115] In response to Justice Kagan's dissenting

[108] *Interstate Com. Comm'n*, 167 U.S. at 505.
[109] *See West Virginia*, 142 S. Ct. at 2620.
[110] *Id.*
[111] *See id.* at 2621 (citing EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule 3–27, 3–30, 3–33, 6–25 (Oct. 23, 2015)).
[112] *See id.*
[113] *See id.* at 2624.
[114] *Id.* at 2623.
[115] *Id.* at 2622-23.

opinion, Justice Gorsuch suggests that perhaps the difference among the justices rests on whether the statute does in fact give clear authorization to the EPA to adopt the rule, for, he argues, the dissenters do not appear to argue against clear statement rules in administrative law.[116]

Justice Kagan's dissent emphasizes the importance of climate change and the need for the EPA to be able to combat this environmental threat.[117] The dissent reasoned that the phrase "best system of emission reduction" in § 7411(a)(1) means that Congress authorized the EPA to employ the generation shifting mandated for existing systems by the Clean Power Plan: "The 'best system' full stop—no ifs, ands, or buts of any kind relevant here."[118] Thus, there is no limit on the EPA's authority to mandate the best system of emission reduction, in spite of the statute's limiting language requiring the EPA to take "into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements."[119]

The dissent reasons that Congress gave the EPA extremely broad discretion in § 7411 to enable the agency to address new and unanticipated problems.[120] The dissent downplays the limiting language about the cost of regulatory impacts: After quoting Section 111(d), the dissent states, "[t]o take that language apart a bit, the provision instructs the EPA to decide upon the 'best system of emission reduction which . . . has been adequately demonstrated.'"[121] The dissent took the language apart by replacing the language about cost with ellipses. Nevertheless, the dissent ultimately acknowledges that the statute includes cost as a factor, albeit one the dissent regards as subsidiary.[122]

Thus, an important difference between the majority and dissent lies in their view of the significance of cost. The majority does not rely on the statutory language regarding cost, but instead on the major questions doctrine. The dissent diminishes the importance of cost in the statutory language and reasons that the

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116 *See West Virginia*, 142 S. Ct. at 2624.
117 *See id.* at 2627 (Kagan, J., dissenting).
118 *Id.* at 2628.
119 *See* § 7411(a)(1).
120 *Id.*
121 *Id.* at 2629.
122 *See id.* at 2630.

statute gives such broad authority to the EPA that the major questions doctrine is not applicable to the Clean Power Act.

Noting that § 7411(d) applies to pollutants that are not regulated under NAAQS or HAP programs, the dissent concludes from this that, as "the Senate Report explained, Section 111(d) guarantees that 'there should be no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare.'"[123] In spite of this feature of § 7411(d), the dissent rejects the majority's characterization of this as a "gap filler" section.[124] Justice Kagan's dissent regards § 111 not as a gap filler but as a "backstop": "Section 111(d) tells EPA that when a pollutant—like carbon dioxide—is not regulated through other programs, EPA must undertake a further regulatory effort to control that substance's emission from existing stationary sources. In that way, Section 111(d) operates to ensure that the Act achieves comprehensive pollution control."[125]

Of course, this invites the response that the function of § 7411(d) is precisely to fill any gaps in the pollutants regulated by NAAQS or HAP programs. Thus, it appears that the section is in fact a gap-filler. Indeed, the EPA's brief referred to the section as a gap filler.[126] The dissent rejects the major questions doctrine. In place of that doctrine, the dissent insists that the cases on which the majority relies employed ordinary statutory interpretation to reject agency actions for two reasons:

> First, an agency was operating far outside its traditional lane, so that it had no viable claim of expertise or experience. And second, the action, if allowed, would have conflicted with, or even wreaked havoc on, Congress's broader design. In short, the assertion of delegated power was a misfit for both the agency and the statutory scheme.[127]

[123] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2629 (2022) (quoting S. Rep. No. 91–1196, p. 20 (1970)).

[124] *Id.*

[125] *Id.*

[126] *See* Brief for the Fed. Respondents in Opposition at 27-28, 30, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (No. 20-1530).

[127] *Interstate Com. Comm'n.*, 167 U.S at 2633.

As to the first question, the dissent suggests that when the Court examines whether a regulatory scheme is appropriate to the agency, the Court should consider "the nature of the regulation, the nature of the agency, and the relationship of the two to each other."[128] In other decisions that the majority regarded as "major questions doctrine" cases, the dissent insists that all of them are ordinary statutory construction cases in which the Court refused to apply *Chevron* deference to the agency's action.[129]

In those cases, the dissent insists, the statute had foreclosed the agency's action. "But nowhere does the majority provide evidence from within the statute itself that the Clean Power Plan conflicts with or undermines Congress's design. That fact alone makes this case different from all the cases described above."[130] Further, the dissent continues, in those other cases the majority relies upon, the agency had no expertise in the area, whereas here, the majority reasons that the agency has no experience making judgements of national policy of this breadth.[131]

Justice Kagan's dissent concludes that changing by regulation a means of generating power is coterminous with regulating emissions from power plants.[132] Specifically, the dissent states, "the "how" of generation shifting creates no mismatch with the EPA's expertise."[133] The dissent suggests that because the EPA regulates emissions, "everything [the] EPA does is 'generation shifting.'"[134] Regulating emissions would indeed be part of the EPA's expertise, but the crux of the majority's opinion is that methods of generating power are not part of the EPA's expertise. The dissent thus fails to respond to the principal thrust of the majority opinion.

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[128] *Interstate Com. Comm'n.*, 167 U.S at 2633.

[129] *See* Gonzalez v. Oregon, 543 U.S. 246 (2009) (holding that the Attorney General lacked authority to rescind physicians' registrations for assisted suicide); Util. Regul. Air Grp. v. EPA, 573 U.S. 302 (2014) (holding that the EPA lacked authority to regulate greenhouse emissions from stationary sources under the PDS and Title V of Clean Air Act); Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485 (2021) (holding that the CDC lacked authority to impose eviction moratorium during Covid-19 pandemic).

[130] *West Virginia*, 142 S. Ct. at 2636 (Kagan, J., dissenting).

[131] *Id.*

[132] *Id.*

[133] *Id.* at 2637.

[134] *Id.*

Justice Kagan's dissent regards the delegation in this case as unremarkable, stating that it is rooted in the founding era view of delegation, which was not concerned with delegating power to the executive branch: "The records of the Constitutional Convention, the ratification debates, the Federalist—none of them suggests any significant limit on Congress's capacity to delegate policymaking authority to the Executive Branch. And neither does any early practice."[135] In fact, "[f]rom 1789 to 1828, Congress largely refrained from delegating its legislative powers to administrative officers, and did so because of its commitment to the constitutional principle of nondelegation."[136] Congressional Federalists and Jeffersonians/Democrats in the early republican period insisted on legislation constraining executive power to act with independent discretion, and this reflects, in turn, the Madisonian idea that checks and balances preserve the separation of powers.[137]

Does *West Virginia v. EPA* conflict with the Court's prior decision in *Massachusetts v. EPA*, which held that the EPA could regard greenhouse gases as an air pollutant subject to regulation under the Clean Air Act?[138] The Court does not reject this conclusion in *West Virginia v. EPA*.[139] Instead, the Court in *West Virginia* held that the EPA was not entitled to interpret § 111 of the Clean Air Act to empower the EPA to force the electric power industry nationwide to stop using coal to operate electric power plants and to force electric power plants to use natural gas, solar, and wind to power them.[140]

The Court does not say that greenhouse gases cannot be regulated under the Clean Air Act. Instead, it was simply the means to be employed that the Court held the EPA was not entitled to use. In fact, in *Massachusetts v. EPA*, the Court distinguished *Brown & Williamson v. FDA*, a major questions case, on the ground that if the FDA had the authority to regulate tobacco as a drug as

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[135] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2642 (2022) (Kagan, J., dissenting).

[136] POSTELL, *supra* note 5, at 78.

[137] *See id.* at 73-78.

[138] *See* Massachusetts v. EPA, 549 U.S. 497 (2007). *See also* Frances Williamson, *Implicit Rejection of Massachusetts v. EPA: The Prominence of the Major Questions Doctrine in Checks on EPA Power*, 2022 HARV. J.L. & PUB. POL'Y PER CURIAM 1, 1-2 (2022).

[139] *See generally* West Virgina v. EPA, 142 S.Ct. 2587, 2610 (2022).

[140] *See id.*

it sought to do, it could in principle ban drugs. In *Massachusetts v. EPA*, by contrast, the EPA was being called upon to regulate emissions of greenhouse gases, which did not call for any power that could result in banning technologies.[141] In *West Virginia v. EPA*, by contrast, the generation-shifting approach was, in fact, an effort by the EPA to ban coal-fired power plants over a period of time.

H. The Major Questions Doctrine Today

As the foregoing review indicates, major questions doctrine cases have invalidated agency action where the agency's action effected a "radical or fundamental change" in a statute's provision.[142] The same has happened where the agency's interpretation of a statute gave it authority over "a significant portion of the American economy" without clear statutory indication from Congress.[143] The Court has applied the major questions doctrine to reject an agency's construction of a statute that would disrupt the nation's economy.[144]

The Court also rejected an agency's construction of a statute where the agency lacks expertise in the subject matter of the regulation.[145] An agency's construction of a statute, leading to great control over an area of law traditionally under state control has also been rejected under the major question's doctrine.[146] Further, the Court also rejected an agency's construction of a statute that "would significantly expand [the agency's] regulatory authority without clear congressional authorization."[147] In its most recent application of the major questions doctrine, the Court required the agency to identify "clear congressional authorization" for its actions.[148] A "gap filler" section of a statute is unlikely to be a source of such authorization.[149]

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[141] *See* Massachusetts v. EPA, 549 U.S. 497, 531 (2007).
[142] MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229 (1994).
[143] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000).
[144] *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).
[145] *See* King v. Burwell, 576 U.S. 473, 486 (2015).
[146] *See* Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021).
[147] Nat'l Fed'n of Bus. v. Dep't of Lab., 595 U.S. 109, 118 (2022).
[148] West Virginia v. EPA, 142 S. Ct. 2587, 2621 (2022).
[149] *Id.*

III. WHAT IS "MAJOR"?

While there have been a number of criticisms lodged against the major questions doctrine,[150] perhaps the most important one is the inherent vagueness of the concept of what is "major."[151] The major questions doctrine does not impose a meaningful constraint on the *Chevron* doctrine because it is not well-defined and the Court does not consistently use it.[152] The Court's decisions have taken different approaches to defining a question as "major." In some, the Court has deemed a regulatory question major by reference to features of the statute involved – i.e., how big the action seems in relation to the specific statutory scheme – but in other cases, the Court has deemed a regulatory action major by reference to its impact on the economy or social life generally.[153]

One way to address the Court's approach in *West Virginia v. EPA* is from a perspective of cost-benefit analysis. The Court emphasized the costs that would be incurred as a result of the EPA's decision. Tens-of-thousands of jobs would be lost in the coal and related industries, and consumers would pay more for energy services as a result of the EPA's decision to require energy producers to change technologies to non-coal sources. The Court in *West Virginia* stressed the costs associated with the policy promulgated by the EPA.[154] Accordingly, it is fair to ask whether the Court is sufficiently impressed by the costs associated with the policy to place it in the category of the major questions doctrine.

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[150] These include the idea that "agencies are best situated to resolve complex matters and are more politically accountable than judges," and the major questions doctrine's purported "anti-regulatory bent." Joshua S. Sellers, *"Major Questions" Moderation*, 87 GEO. WASH. L. REV. 930, 946-47 (2019). Furthermore, the major questions cases often rely on different rationales, so that the major questions doctrine does not seem to be a single coherent principle. *See generally* Leske, *supra* note 41.

[151] Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 406 (2016).

[152] *See* Andrew Howayeck, Comment, *The Major Questions Doctrine: How the Supreme Court's Efforts to Rein in the Effects of Chevron Have Failed to Meet Expectations*, 25 ROGER WILLIAMS U.L. REV. 173, 184 (2020).

[153] *See* Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. FORUM 693, 699 (2022); *but see* Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got it Wrong)*, 60 ADMIN. L. REV. 593, 612-13 (2008).

[154] *See generally* West Virginia v. EPA, 142 S. Ct. 2587, 2621 (2022).

This question is important because, if the Court regards a question as major due to its anticipated costs, this changes the question from one of quality to one of quantity. That is, it makes the major questions doctrine about the magnitude of the effect a policy is likely to have on the nation's economy rather than about the kind of question it presents. This would make the major questions doctrine more about the economic impact of a policy than about the kind of policy it is. In a word, it makes the major questions doctrine more about consequences than about a category of action by the executive branch. If this is so, there can be no bright-line rule about what constitutes a major question, because it must be in each case a matter of the magnitude of a policy's economic impact rather than the kind of policy the regulatory agency makes.

If it is simply the magnitude of potential impact that led the Court to invoke the major questions doctrine, there was in fact a large potential impact at stake. As the Court in *West Virginia* articulated, the EPA conceded in its own analysis of the proposed rule that it "would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors."[155] The Court also noted that the Department of Energy's Energy Information Administration predicted that "the rule would cause retail electricity prices to remain persistently 10% higher in many States, and would reduce GDP by at least a trillion 2009 dollars by 2040."[156]

But the Court is not performing a cost-benefit analysis. Instead, the Court is concluding that, from the EPA's own analysis, the economic costs of the policy choice it proposes will be very great. Since these costs will be very great, the elected representatives in Congress, who are politically accountable to the voters, should decide whether these costs should be incurred by the public to whom they are accountable, rather than having that decided by bureaucrats who are not directly accountable to anyone but their agency leadership. Furthermore, the Court is not assessing the

[155] West Virginia v. EPA, 142 S. Ct. 2587, 2604 (2022) (citing ENV'T PROT. AGENCY, Regulatory Impact Analysis for the Clean Power Plan Final Rule 3-22, 3-30, 3-33, 6-24, 6-25 (2015)).

[156] *Id.* (citing DEP'T of Energy, Analysis of the Impacts of the Clean Power Plan 21, 63-64 (May 2015)).

benefits of the proposed policy, so the Court cannot weigh the prospective benefits of the proposed policy against its costs.

Is a "major question" a matter of magnitude or category? This is an important consideration, perhaps the most basic and central question, in defining the scope of the major questions doctrine. There are good reasons for treating it as a question of category rather than of magnitude. If it is a question of magnitude simply, it may not be possible to determine what a major question is, because this would require putting a price tag on a policy that makes it "major" in nature. It should be easy to see why this is a bad approach. To begin with, any price tag a court puts on a "major question" is inherently a value judgment made by the court itself and seems to be beyond the judiciary's proper role. Indeed, part of the *Chevron* doctrine is the assumption that the political branches are better equipped to make value-based judgements about public policy than the judiciary. Even the bureaucracy is at least accountable to political appointees and the president, who is ultimately accountable to the public.

There is an interesting philosophical problem that attends what is "major," which is known as the sorities problem in philosophy.[157] The sorities problem is one that is a product of the ambiguity of language.[158] When we speak of something as major, we have to define what major is. This may seem like a non-issue in the law, but it is a logical problem that attends law as well as other conceptual issues.

The problem is simple and easy to follow.[159] Take a grain of sand. Add another to it, and another, and another. At some point, the grains of sand become a heap of sand. But at what point may we say that the grains of sand become a "heap" of sand? Of course, there is no obvious answer to this question. At some point, the grains become a heap, but we cannot identify the number of grains at which the grains become a heap. And this is why the problem of identifying the question of what makes a policy a "major question" cannot be a problem of magnitude only. There is no point, measured in objective terms, at which the impact of a public policy becomes

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[157] ROY SORENSEN, VAGUENESS AND CONTRADICTION 112-18 (Oxford Univ. Press 2004).

[158] *See id.*

[159] *See id.*

"major." There is no dollar amount, or a number of lost jobs, at which a policy can be deemed "major" in any objective sense. If there were, the job of the courts would be easy in that the court could simply identify the dollar value of a policy and determine that this dollar value makes the regulation into one that is a "major question" that should be decided by the legislature rather than by the agency. Alas, there is no such dollar amount. So, what should the courts do to decide whether a policy constitutes a "major question" that should be decided by the legislature rather than by the bureaucracy? The major questions doctrine does not offer an answer.

The major questions doctrine has not proved to be a principle that can function effectively and predictably as an exception to *Chevron*. The Court's decisions applying the principle do not identify its scope sufficiently to enable lower courts to know when to apply the principle. Nor can agencies know when a regulatory program is likely to constitute a major question that would trigger the doctrine's application. In the *Utility Air Regulatory Group* litigation, initial legal research conducted by the EPA's General Counsel's office did not include the major questions doctrine; they did so only after receiving comments from interested parties during the notice-and-comment period.[160] Thus, the major questions doctrine appears unlikely to take shape as a meaningful principle that imposes limits on deference to agencies.

There are additional good reasons to question whether the major questions doctrine imposes a meaningful limitation on *Chevron* deference. For one thing, the champion of the major questions doctrine must show that there is indeed a major question in the sense the Court has given it, and the nature of a major question itself suggests that, as Justice O'Connor put it in *Brown & Williamson*, this doctrine applies where there is an extraordinary and exceptional case.[161] Most cases will be neither extraordinary nor exceptional. Additionally, it is difficult to specify when a question is "major," and this is in the nature of the doctrine too, because, just as it is difficult to identify with any precision when

[160] Daniel Hornung, Note, *Agency Lawyers' Answers to the Major Questions Doctrine*, 37 YALE J. ON REG. 759, 776 (2020).

[161] *See* Food & Drug Admin. v. Brown & Williamson Tobaco Corp., 529 U.S. 120, 123 (2000).

something goes from not-large to large, it is likewise difficult (or probably impossible) to state with any precision when something goes from being not-major to major. That is, the boundaries of what constitutes a major question are necessarily imprecise and subject to reasonable disagreement.

It is arguable that more recent major questions decisions by the Court differ from older ones. Specifically, in the older decisions (before *Utility Air Regulatory Group v. EPA*) the Court interpreted the statute de novo if it found the agency's interpretation of the statute unreasonable and denied *Chevron* deference, but in the decisions beginning with *Utility Air Regulatory Group*, the Court invalidated the challenged regulation if it did not find a clear statement authorizing it.[162]

IV. THE MAJOR QUESTIONS AND NONDELEGATION DOCTRINES

It is notoriously difficult to pin down the meaning and scope of the major questions doctrine. This principle has been invoked rarely, and observers disagree about the basis for the principle or its rationale. It is arguable that there is no clear principle at all or rationale for its application. On this view, the major questions principle is not a rule, but rather an equitable principle that the Court has applied when an agency decision just seems to be somehow wrong and in need of correction.[163] The major questions doctrine has been interpreted as a nondelegation doctrine, especially after *King v. Burwell*, but one that needs to have the power of *Schechter* and *Panama Refining*, not the "intelligible principle" concept of *J.W. Hampton, Jr. & Co. v. United States*, which was transformed into a test that has less impact on delegations of legislative authority to agencies.[164]

The nondelegation doctrine, however, is different from the major questions doctrine. The former is applied to statutes adopted

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[162] *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 483 (2021); *see also* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 271-74 (2022).

[163] *See* Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2203 (2016).

[164] *See* Clinton T. Summers, Comment, *Nondelegation of Major Questions*, 74 ARK. L. REV. 83, 89 (2021). *See also* King v. Burwell, 576 U.S. 473 (2015); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

by the legislature, which may be found unconstitutional if they fail to give sufficient guidance to administrative agencies. A statute must leave policy making to Congress and may leave interstitial decisions and factfinding to the executive branch.[165] The major questions doctrine, on the other hand, is applied to regulations adopted by agencies when they overreach the authority that has been delegated to them. Nevertheless, while these doctrines are distinct, they are related to each other.

Furthermore, it is not obvious that the "intelligible principle" phrase in *J.W. Hampton, Jr. & Co. v. United States* conveys a less rigorous standard than those of *Panama Refining*[166] and *Schechter Poultry*.[167] In *J.W. Hampton*, a federal statute authorized the Tariff Commission to determine the difference in cost between production in a foreign country plus transportation to the United States, and the cost of production in the United States, for purposes of levying a tariff in an amount that would equalize the competition between foreign and United States producers.[168] The Court found the statute's meaning and purpose to be "perfectly clear and perfectly intelligible."[169]

The Court cited the principle *delegata postestas non potest delegari*, noting that, while it was drawn from the law of agency and the common law, it also applies to state and federal constitutional law in the United States.[170] This principle, which maintains that an agent may not further delegate powers delegated to the agent, draws from the Lockean political principle, reflected in Anglo-American law, that legislators are the agents of the governed and may not delegate their legislative authority given by the consent of the governed to other institutions or persons.[171] In *J.W. Hampton*, Congress gave a formula to the Tariff Commission, and a formula is both clear and intelligible guidance. The

[165] *See* Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

[166] *See* Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935).

[167] *Compare* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 403 (128), *with* Panama Refining Co. v. Ryan, 293 U.S. 388, 403 (1935), *and* Ala. Schechter Poultry Co. v. United States, 295 U.S. 495, 541 (1935).

[168] *Hampton*, 276 U.S. at 403 (1928).

[169] *Id*. at 404.

[170] *Id.*

[171] *See* Horst P. Ehmke, *"Delegata Potestas Non Potest Delegari," A Maxim of American Constitutional Law*, 47 CORNELL L. REV. 50, 51-52 (1961).

interpretation of *J.W. Hampton* as a loose definition of nondelegation that sets a low bar for Congress is not convincing.[172]

While it is true that the nondelegation principle has not been wielded to nullify an act of Congress in many decades, no development in administrative law overrides the principle of the separation of powers. The way administrative law has developed has given greater autonomy to agencies and freedom from the constraints of legislation. As a practical matter, this has freed Congress from the necessity of addressing politically difficult issues and producing the kinds of compromise legislation that could succeed through the legislative process and be signed into law.

Under *Chevron*, the Court examines whether there has been an implicit delegation of authority to the agency to regulate.[173] But there is more than a tension here. The nondelegation doctrine calls upon Congress to establish guidelines for an administrative agency in promulgating regulations to implement a statute. This is a constitutional principle involving the separation of powers, so it is a matter of prime importance in determining what executive branch agencies are authorized to do.

How is it that the Congress is required to offer guidance to an agency to regulate under the nondelegation doctrine, but also that agencies may regulate under the idea that the agency has an implicit authority to regulate because Congress was silent on the matter? When the courts, under the major questions doctrine, are asking whether an area of regulation is in some way too great in scope for an agency to regulate, based upon an implicit authority to regulate, it must be the case that the court is asking whether the statute that purportedly authorizes the regulation lacks clear guidance to the agency to regulate.

Does the major questions doctrine interfere with the executive branch's Article II responsibility to take care that the laws are faithfully executed?[174] On this view, the major questions doctrine actually erodes the separation of powers by limiting agency autonomy from Congress. This argument suggests that by limiting

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[172] Justice Gorsuch seems amenable to this argument. *See* Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting).

[173] Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 844 (1984).

[174] *See* Timothy A. Roth, Note, *Major Questions Doctrine: Implications for Separation of Powers and the Clean Power Plan*, 29 GEO. ENV'T. L. REV. 555, 565 (2017).

the executive branch agencies to reasonable interpretations of statutory authority to regulate granted by the Congress where broad and far-reaching policy initiatives are the subject of agency action, the major questions doctrine obstructs agencies from carrying out their constitutional obligations. On the contrary, by limiting agency discretion to reasonable interpretations of laws adopted by the Congress where agency actions with far-reaching implications are involved, the major questions doctrine is a modest effort to ensure that agency actions are consistent with the congressional intentions demonstrated by legislation, modest because it is limited to major questions of policy.

The major questions doctrine nevertheless has the look and feel of a patchwork compromise principle. On the one hand, it is arguable that the major questions doctrine is a needed limitation on the *Chevron* doctrine to which it is an exception. On this view, *Chevron* is itself an effort to impose some judicial control over the administrative state in the absence of a robust nondelegation principle being exercised by the judiciary, and a consistently-employed major questions doctrine can prevent unbridled judicial deference to executive branch agencies.[175] However, if we are making suggestions to the judiciary, one might be a more robust nondelegation doctrine.

Under *Chevron*, where legislative silence may be deemed an implicit delegation of rulemaking power to agencies, it is difficult to see how a major questions exception to *Chevron* can in itself render *Chevron* a meaningful limitation on unbridled executive power. This is especially so if the determination of what is "major" is necessarily vague and not possible to state in precise and judicially manageable terms. Seen in this light, the major questions exception to *Chevron* appears to be a patch placed over Chevron to prevent judicial deference from allowing agencies to govern without real authority delegated from Congress.

It is arguable that the major questions doctrine could be further clarified and made more useful by courts, and that a way to do this is to require a clear indication of statutory authority, with greater claims of regulatory authority requiring a clearer statement

[175] *See* Riley T. Svikhart, Note, *"Major Questions" as Major Opportunities*, 92 NOTRE DAME L. REV. 1873, 1874-75 (2017).

of rulemaking delegation.[176] This approach reminds us what the *Chevron* doctrine has muddied, namely that there should be evidence of congressional delegations of rulemaking power to the executive branch, which cannot otherwise obtain any rulemaking authority at all. But this too points back to the nondelegation doctrine, which requires not only a congressional delegation of authority, but also meaningful guidance from Congress to the executive branch as to the scope of that authority. Still, here, the major questions doctrine to *Chevron* has the look of a patch placed over part of *Chevron* to prevent judicial deference to agencies from becoming a sinkhole that swallows the nondelegation principle altogether.

Joshua Sellers argues that the major questions doctrine is analogous to the canon of avoiding serious constitutional questions.[177] The following features, he suggests, make these similar: both are discretionary with judges, and both take power away from Congress and agencies. Most importantly, both look to congressional intent to prevent the executive branch from implementing a policy in a way that Congress does not intend.[178] This is because Congress presumably does not mean to adopt unconstitutional laws (with regard to the constitutional canon), and courts are to make a careful inquiry into the question whether Congress intended for an agency to undertake implementing a policy with great economic and social or political ramifications.[179]

Sellers is right to analogize these, but there is likely a closer relation still between these two doctrines. Congress must give meaningful guidance to agencies that regulate. Since the courts should exercise their discretion in a way that avoids a serious constitutional question about a statute, the courts should also avoid an interpretation of a statute that, based upon vague or implicit authority, gives an agency carte blanche to regulate in a way that has a major impact on the United States' economy or social or political life. This means that when the courts apply the major questions doctrine, they are also applying the canon to avoid

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[176] Jonathan H. Adler, *West Virginia v. EPA: Some Answers About Major Questions*, 2022 CATO SUP. CT. REV. 37, 39 (2022).

[177] Sellers, *supra* note 150, at 956.

[178] *Id.*

[179] *Id.*

interpreting a statute in a way that leads to an unconstitutional result. Thus, while it is clear that these doctrines are distinct from one another, it is arguable that they are related in the way described. This lends support to the major questions doctrine as a canon of statutory interpretation.[180]

V. PUBLIC CHOICE AND THE ADMINISTRATIVE STATE

This section sets forth the Progressive vision of the administrative state, relying on the historical example offered by President Woodrow Wilson, and analyzes that vision through public choice theory, which uses microeconomic reasoning to examine institutions and organizational behavior. Public choice theory supports rules that impose constraints on agency discretion to minimize social costs from rent-seeking behavior, which includes both pecuniary advantages and non-pecuniary costs imposed by special interests on society to advance the interest group's ideological or symbolic values. A public choice approach supports the nondelegation and major questions doctrines and the Administrative Procedure Act's statutory standard for the scope of review of agency actions.

A. The Progressive Vision

One critique of the major questions doctrine is that it obstructs democratic government, which depends upon the view that bureaucratic agencies represent the people because they are overseen by the president and funded by Congress.[181] This view, in American legal thought, dates to the Progressive Era of the last century, which held expert rule in great esteem and counted on the people to assent and stay out of the experts' way.[182] The major questions doctrine has been criticized by scholars who invoke Wilson, Dewey, and others who developed the "[p]rogressive theory

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[180] Note too that "someone looking to cut back on delegations of legislative power may well favor the canon variant of the doctrine – which denies the agency policy-making authority in the absence of an explicit delegation – over the *Chevron*-exception variant – which merely denies the agency interpretive power." Griffith & Proctor, *supra* note 153, at 703.

[181] Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 202-03 (2022).

[182] POSTELL, *supra* note 5, at 169-79.

of the administrative state."[183] This critique fails to acknowledge what political scientists and economists have learned about agency capture and the relative autonomy of the permanent bureaucracy.[184]

Historically, judicial deference to the executive branch emerged as the presidency came to be seen as the people's representative nationwide.[185] The administrative state came into its own in the United States with the Progressive movement of the early twentieth century, which saw in professional administration a way to improve policy by means of expertise in government.[186] Woodrow Wilson's justly famous essay *The Study of Administration* sets forth the Progressive Era's view of the role of administration in government.[187] He traces the growth of administration to the growth of government, which in turn he traces to the emergence of democratic government.[188] The time of monarchies, with their limited aims, has passed, he argues.[189] With the emergence of democratic regimes, the demands of government have multiplied dramatically, because majorities want government to do many tasks and provide many services.[190] As a result, the administration of public policy has become more important than ever and a much larger share of the exercise of governmental power.[191] In a Hegelian vein, Wilson writes:

> The idea of the state and the consequent ideal of its duty are undergoing noteworthy change; and "the idea of the state is the conscience of administration." Seeing every day

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[183] Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2025-26 (2018).

[184] *See infra*, notes 205-245 and accompanying text.

[185] POSTELL, *supra* note 5, at 124.

[186] *See id.* at 167-78.

[187] *See generally* Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887) (examining the history and complexities of public adminatration).

[188] *Id.* at 198-99.

[189] *Id.*

[190] *Id.* at 200.

[191] *Id.* at 201.

> new things which the state ought to do, the next thing is to *see* clearly how it ought to do them.[192]

New and scientific administration arose in Europe, particularly Germany and France, and had to be adapted to American political institutions, which are more decentralized than those in Europe.[193] Scientific administration came later to the United States, Wilson observes, because American political institutions are designed to limit governmental power, while administration centralizes decision making.[194]

In addition, democratic government has inhibited the growth of scientific administration because the United States has allowed majorities and public opinion to rule.[195] And because we have replaced monarchy with democracy, wise elites must convince many and differing persons: "the many, the people, who are sovereign have no single ear which one can approach, and are selfish, ignorant, timid, [and] stubborn," and they themselves are governed in their thinking by "prejudices which are not to be reasoned with because they are not the children of reason."[196] Administration is not political, but it "is directly connected with the lasting maxims of political wisdom, the permanent truths of political progress."[197]

People can trust administrators when administrators are responsible, in the sense of accountability, and "large powers and unhampered discretion seem to me the indispensable conditions of responsibility."[198] The proper role of public opinion in relation to administration is that of "authoritative critic."[199] Political accountability, though, should flow to elected officials "to make public opinion efficient without suffering it to be meddlesome."[200]

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[192] Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 201 (1887) (emphasis added) (quoting LORENZ VON STEIN, HANDBUCH DER VERWALTUNGSLEHRE: DER BEGRIFF DER VERWALTUNG UND DAS SYSTEM DER POLITISCHEN STAATWISSENSCHAFTEN (Vol. 1, 3rd ed.) (1887)).

[193] *See id.* at 201-203.

[194] *See id.* at 206.

[195] *See id.* at 207.

[196] *Id.* at 208.

[197] Wilson, *supra* note 192, at 210.

[198] *Id.* at 213.

[199] *Id.* at 214.

[200] *Id.* at 215.

Twenty-one years later, having observed the growth of administration in response to such major regulatory statutes as the Sherman Antitrust Act and the Interstate Commerce Act, Wilson would emphasize in a public speech that administration in a democratic society requires elected officials to adopt laws that give clear direction to administrators; without such direction, administration becomes arbitrary and even tyrannical.[201] This problem remains a struggle for American administrative law.

But the ideal of administrative discretion remains firmly affixed in American legal thought. Thus, over a century after Wilson's speech, Cass R. Sunstein and Adrian Vermuele contend that rule of law values may prevail within the context of administrative law by following appropriate procedural standards,[202] specifically those advanced by legal theorist Lon Fuller, who developed a set of procedural principles that constituted a normative standard to which laws must adhere to be law.[203] This approach adopts all of Wilson's early confidence in the administrative state and neglects his later concerns about public accountability and the rule of law, which in his case, may justly be attributed to the importance of administrative adjudication as a rule-making force before the advent of the Administrative Procedure Act.[204]

But it transfers those concerns about the rule of law from legislative control to administrative self-control, albeit overseen by the judiciary, which presumably checks administrative discretion. Public choice theory raises doubts about this project because it acknowledges and emphasizes the incentives that motivate all political actors, including state administrators.

[201] *See* WOODROW WILSON, *Law or Personal Power*, *in* WOODROW WILSON PAPERS: SERIES 7: SPEECHES, WRITINGS, AND ACADEMIC MATERIAL, 1873-1923, 758-60 (1908), https://www.loc.gov/resource/mss46029.mss46029-474_0018_1102/?sp=758 [https://perma.cc/TYJ8-32AK].

[202] CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE 5-7 (2020).

[203] *See generally* LON L. FULLER, THE MORALITY OF LAW (Yale Univ. Press rev. ed. 1969).

[204] 5 U.S.C. §§ 551-559.

B. Public Choice Analysis of the Administrative Process

The ideal type of bureaucracy involves rule-bound authority,[205] so that the rules followed by the bureaucracy originate with the political leadership, which in a representative system of government is chosen by the people.[206] Bureaucratic management, at least in a public bureaucracy, has no monetary market value.[207] Furthermore, because the public bureaucracy is generally not part of a functioning competitive market, its decisions cannot be guided by market prices, the efficacy of which is measured by profits.[208]

But this does not mean it has no value. Its value is measured in terms of power, where power is understood as the ability to obtain one's desired policy decisions. Capitalism spurred the emergence of bureaucratic administration in the private sector, which facilitates the growth of firms that can operate efficiently in competitive markets.[209] Essential features of public bureaucracy that shape bureaucratic behavior are a lack of competition and the lack of an opportunity for profit.[210] As a result of these features, bureaucrats have incentives to spend as much as possible.[211]

Private bureaucracies are intended to contribute to the production of measurable profits, but public and nonprofit agencies inherently have the more nebulous objective of improving some aspect of public well-being. Thus, among the classic arguments for regulation as opposed to common law remedies for torts are that there is not a means for prosecuting wrongs where the damages are small and the numbers of persons are large, and another, more general, argument is that social welfare is advanced by regulation.[212]

But this depends upon the idea that there is information available that shows the social welfare advanced by the proposed

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[205] *See* MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 329 (A. M. Henderson & Talcott Parsons trans., Talcott Parsons Ed. 1947).

[206] *See* LUDWIG VON MISES, BUREAUCRACY 36-37 (1944).

[207] *Id.* at 39.

[208] *Id.* at 40-41. *See also* ANTHONY DOWNS, INSIDE BUREAUCRACY 3 (1964).

[209] WEBER, *supra* note 205, at 338.

[210] *See* WILLIAM A. NISKANEN, *Public Policy and the Political Process*, in POLICY ANALYSIS AND PUBLIC CHOICE: SELECTED PAPERS BY WILLIAM A. NISKANEN 302 (1998); *see also* MISES, *supra* note 206, at 37-41.

[211] NISKANEN, *supra* note 210, at 302.

[212] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 83-87 (6th ed. 2003).

regulation. Typically, there will be no such information available. In the case of the Clean Power Plan, for example, the economic impact statement showed that there would be a great detriment to the public in terms of higher energy costs and unemployment,[213] but there was no showing of offsetting benefits in terms of these metrics.

The dominant approach has the idea that the state has as its objective the maximization of social welfare. This requires that the state knows what social welfare is, but the agencies of the state do not know this and have no way of knowing what this is. This is centrally important to understanding the administrative state. The administrative state has no way of ascertaining the preferences of individuals or of majorities, and for this reason the administrative state must act on its own lights about what is desirable.

When Posner, for example, argues that the optimal tax rate for pollution is where the social marginal benefit equals the social marginal cost of the tax, the kind of calculation he has in mind is purely speculative.[214] The agency, i.e., the EPA, has no idea what the social benefits of the tax it has in mind are. Marginal benefit is measured by willingness to pay, but coercive taxation is not a market and no one decides how much environmental regulation they are willing to pay for, so there is no way to determine whether the resources devoted to taxation or regulation are allocated efficiently. A public agency's success cannot be evaluated in terms of allocative efficiency.

Economic rationality nevertheless applies to the decisions and behavior of government agents. Anthony Downs' *An Economic Theory of Democracy* is an early classic of public choice theory, in which he analyzes the behavior of voters, politicians, and parties using a self-interest concept of rational behavior to predict choice among those in political institutions.[215] One of the weaknesses of the economic analysis of policy making, as of the 1950s (as Downs argued), was its assumption that government is an agency endogenous to markets that exists to maximize (or optimize) social welfare, and that government actors have this objective as their

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[213] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2593 (2022).

[214] POSNER, *supra* note 212, at 392.

[215] *See generally* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

goal.[216] Today, much work has been done to consider the importance of governmental actors, both in elective and bureaucratic offices, as self-interested (however they themselves define their interests), and how this postulate about their behavior may be used to analyze governmental institutions.

There are many reasons why collective choices made by elected officials and implemented by bureaucratic agencies may not reflect public preferences. Only a few of the most relevant are considered here. First, elected officials have their own preferences about public spending and regulation that need not match the preferences of voters. Indeed, as Buchanan notes, advancing one's own political values is a reason to run for office in the first place, and these values may include policy objectives and the satisfaction of exercising power itself.[217] Furthermore, if we assume or agree that some choices are superior to others, using any kind of normative yardstick, whether it be pareto-optimality or any other measure of well-being or justice, there will be some values incorporated into the decision adopted over and above those embodied in the procedures employed to reach those decisions.[218] The fact that bureaucrats have discretion over the implementation of policies means that their preferences impact agency action as well.[219]

Public choice analysis of institutions employs microeconomic reasoning and analysis to examine the behavior of actors in governmental institutions. Like mainstream microeconomics, public choice theory assumes that actors make decisions with a view to their own ends. It is not the case that the ends of governmental actors are only self-regarding, though they may be. Thus, for example, William Niskanen, in his classic of public choice, *Bureaucracy and Representative Government*, offered both mathematical and informal explanations of why bureaucracies tend to grow in terms of their budgets and power exercised.[220]

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[216] DOWNS, *supra* note 215, at 282-91.

[217] JAMES M. BUCHANAN, THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN 156-57 (1975).

[218] *Id.* at 100.

[219] JAMES M. BUCHANAN, *Politics without Romance*, *in* THE COLLECTED WORKS OF JAMES M. BUCHANAN, VOL. I: THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY 56-57 (1999).

[220] *See* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

Bureaucrats tend to want larger budgets and more power, and this affects their institutional behavior in various ways.

In addition to the lack of a profit measurement of performance, there are other factors that tend toward increasing agency budgets and expansions of power.[221] Inefficient performance does not make legislators cease funding a public agency, and the agency itself, combined with private interests that benefit from the agency's activity, can become a powerful lobby on the agency's behalf.[222] Agencies seek to increase their budgets and spending because they respond to demands from interests that benefit more from increased agency spending than are imposed costs by increased spending.[223]

Public administration scholar James Q. Wilson asks why Niskanen expects public bureaucracies to seek to increase their budgets since they do not keep any surplus revenue as profit.[224] Wilson actually points toward the answer himself, albeit unintentionally. He argues that government bureaucracies differ fundamentally from private bureaucracies in for-profit business in that government bureaucracies are not profit-seeking organizations, so rather than seeking profits, public bureaucracies seek to operate within the constraints of the legal and political apparatus of which they are part.[225]

One of the principal constraints that limits the capacity of public bureaucracies is their budget, and so they always want a larger budget because this relieves one of the chief constraints under which they operate. Wilson notes occasions where public bureaucracies resisted the expansion of their responsibilities, and thus, of their budgets as well. Wilson explained that because the bureaucracies did not want to accept new responsibilities, their institutional autonomy was reduced as a result.[226] These interests in funding and institutional autonomy have a common source:

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[221] NISKANEN, *supra* note 220.

[222] James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government*, *in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 15-16 (James D. Gwartney & Richard E. Wagner eds. 1988).

[223] DOWNS, *supra* note 208, at 24.

[224] *Compare* NISKANEN, *supra* note 210, with WILSON *infra* note 225.

[225] JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 118 (1989).

[226] *See id*. at 182-83.

public bureaucracies want to loosen constraints on their operations and avoid constraints that would reduce their autonomy.

What does the bureaucrat seek to maximize? Niskanen analyzes this question in terms of the economic theory of the firm.[227] The theory of the firm holds generally that firms form in order to take advantage of the division of labor within one productive entity for the sake of greater efficiency that can be found in multiple firms trading with one another.[228] Thus, the theory of the firm makes profit maximization the end at which owners or managers aim.[229] This does not translate directly into motivations for public bureaucrats, who lead nonprofit agencies.

Nevertheless, public bureaucrats are increasing their "budget," which, broadly interpreted, includes "salary, perquisites of the office, public reputation, power, patronage, output of the bureau, and ease of managing the bureau," and bureaucrats always prefer more to less of these.[230] Stated differently, bureaucrats seek to maximize their budget, understood to mean a collection of values much broader than the amount of dollars Congress allocates to the agency. Employees and factor suppliers also help make agency leaders behave as rational, budget maximizers. Rational bureaucrats, as rational human beings, seek to maximize their utility.[231]

Political review of proposed budgets examines incremental changes, i.e., increases, and the tendency is for budgets to increase every year.[232] One reason for this is that elected officials may represent the economic interests of factor suppliers.[233] In the case of regulatory agencies, there is of course the possibility of agency capture by regulated companies. Bureaucratic agencies may be

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[227] WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36-37 (1971).

[228] *See id.*

[229] *See id.*

[230] *Id.* at 38-39.

[231] DOWNS, *supra* note 208, at 4.

[232] BUCHANAN, *supra* note 219, at 40.

[233] *Id.*

responsive to actors other than Congress to protect and promote their institutional interests.[234]

Political scientists have long noted the phenomena of subgovernments and issue networks that may include industrial and occupational interests; citizen advocacy groups; journalists; government bureaucrats; and individual Congress members, particularly members on key committees that oversee the agencies that regulate or provide services to the industry or policy area that the interest groups and advocates represent.[235] Even though the Congress as an institution may not have a majority of legislative support for a policy, particularly the supermajority needed to overcome the filibuster rule in the Senate, organized interests and key legislators that support a regulatory policy can convince the agency to adopt a rule that satisfies the preferences or interests of the interest group and legislators.

In this way, political actors can obtain the policy they want without incurring the costs of a legislative struggle that they may lose. If they know they would lose such a struggle, the administrative approach is particularly attractive, as it holds out the possibility of success without suffering a legislative defeat that would make it less likely to obtain the desired result through the bureaucracy or otherwise. In addition, presidents themselves may also have a position on the regulatory issue, as did the Obama administration with the Clean Power Plan.[236] Presidents can respond to organized interests or political factions in their own party's base of support and advance their own policy preferences through the administrative process.[237]

Government staff benefit from increasing budgets,[238] and rational bureaucrats prefer more power and more budget to less of these, because the bureaucrat "knows that his career prospects, his chances for promotion and tenure in employment, are enhanced if the size of the distinct budgetary component with which he is

[234] *See, e.g.*, Thomas L. Gais, Mark A. Peterson & Jack L. Walker, *Interest Groups, Iron Triangles and Representative Institutions in American National Government*, 14 BRIT. J. POL. SCI. 161, 161-62 (1984) (discussing iron triangles).

[235] *See id.*

[236] West Virginia. v. EPA, 142 S. Ct. 2587, 2599 (2022).

[237] *See, e.g.*, THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1979).

[238] *See* BUCHANAN, *supra* note 217, at 158-59.

associated increases."[239] Included in the bureaucrat's utility function are the following: "salary, perquisites of the office, public reputation, power, patronage, output of the bureau, ease of making changes, and ease of managing the bureau."[240] It is the total value to the bureaucrat of these that the bureaucrat seeks to maximize.[241]

As Niskanen notes, this does not mean that bureaucrats' interests are wholly self-regarding.[242] On the contrary, a bureaucrat's desire to serve what he or she regards as the public good fits as well as any other motivation in this characterization of the bureaucrat's utility function.[243] Either way, the bureaucrat may advance the goals identified in their utility function by seeking to maximize the bureau's budget, understood as revenue with government funding or consumer purchases as its source.[244] Both the employees of the agency and the government itself as an organization depend upon its leaders to seek incremental increases to the agency's budget, and it is the latter (as opposed to the entire mission and value of the agency) that both executive and congressional reviewers of proposed budgets examine.[245]

An agency leader who fails to earnestly and diligently seek increases to the agency's budget will not keep his or her position for very long.[246] The agency's budget must be large enough to cover the output the agency's "sponsor," i.e., Congress and key committees, wants produced.[247] As agencies age, they seek more power, because expanding the scope of its authority preserves the agency's institutional security.[248]

Additionally, agencies may seek power with considerable autonomy from legislative control: survey evidence of Congress members and agency staff shows that most of each group do not believe that Congress intentionally delegates authority to agencies to regulate major questions or that Congress implicitly delegates

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[239] *See* BUCHANAN, *supra* note 217, at 161.

[240] NISKANEN, *supra* note 210, at 38; *see also* DOWNS, *supra* note 208, at 4.

[241] NISKANEN, *supra* note 210, at 38.

[242] *See id.*

[243] NISKANEN, *supra* note 210, at 39. *See also* DOWNS, *supra* note 208, at 5.

[244] NISKANEN, *supra* note 210, at 38-39.

[245] *See id.* at 40; *see also* DOWNS, *supra* note 208, at 25.

[246] NISKANEN, *supra* note 210, at 40-41.

[247] *Id.* at 42.

[248] DOWNS, *supra* note 208, at 20-21.

regulatory authority to agencies.[249] This data underscores what common sense suggests: that Congress does not unintentionally or impliedly give agencies authority to undertake major policy initiatives, depriving politicians of the opportunity to take credit for them.[250]

Regulatory capture refers to organized interest groups gaining a large measure of control over an agency's policy decisions.[251] It is a well-documented phenomenon supported by the public choice literature as well.[252] Industrial groups may capture regulatory agencies and legislative processes to prevent entry and competition.[253] Public interest groups, such as environmental groups, may also play a role that greatly magnifies their influence on regulatory decision making.[254] Ironically, perhaps, the Progressive-era confidence in the presidency as the representative of the people is undermined by agency capture, and, of course, presidential politics may actively support agency capture by organized interests that support a president's election and reelection efforts. Presidents, as well as agencies, may seek to appease narrow, unrepresentative interests in industry or ideological factions that do not appeal to popular majorities.

Agency or regulatory capture also undermines two of the rationales of *Chevron* deference: public accountability and agency expertise. Capture undermines public accountability because a captured agency is indeed accountable, but to narrow, unrepresentative interests rather than to the general public. Capture undermines the agency expertise rationale in that a captured agency serves ideological or industry interests and concerns rather than relying on their purported expertise in

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[249] Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 156-57 (2017) (citing Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1003 (2013)).

[250] On "credit claiming" as an activity of a rationally self-interested Congress member, see DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 52-61 (1974).

[251] *See* BUCHANAN, *supra* note 217.

[252] *Id.*

[253] George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. & MGMT. SCI. 3, 4-6 (1971).

[254] *See generally* Richard L. Hall & Kristina C. Miler, *What Happens After the Alarm? Interest Group Subsidies to Legislative Overseers*, 70 J. POL. 990 (2008).

problem-solving. Both of these rationales favoring deference to agency interpretations of statutes have their historical origins in optimistic Progressive-era confidence in public-spirited bureaucrats engaged in scientific administration of policy for the common good. What scholars know about public administration and regulation today is neither so optimistic nor so simple.

Asymmetries of information are another reason for agency capture. Asymmetries of information refer to the fact that personnel in agencies, the organized interests that lobby them, and key congressional members on committees that oversee those agencies will possess much more information about the narrow policy areas of interest to them than will the general public. While *Chevron* celebrates the expertise of agency staff, this expertise also liberates them from political control to the extent that they have more information about what they are doing, and its real cost and value, than do the elected officials who would control over them.

Legislators benefit from having an interest group with expertise on the subject matter of the agency's focus by taking an intense interest in the agency's activities. Legislators are more likely to create an agency that can be effectively overseen by organized interest groups that can provide them with information on the agency's performance to promote agency capture.[255] Much of the time, the general public will be unaware of policy initiatives being pursued through regulatory agencies by organized interest groups, key congressional members and agency staff.

One of the supporting rationales of *Chevron* deference is that agencies have public accountability to the public through the Presidency. Asymmetries of information undermine that rationale; while much of the time the public will have no idea what agencies are doing, organized interests monitor and lobby on behalf of policies that interest them. The Progressive-era optimism about presidents serving as the people's representative and implementing the people's preferred policies through executive agencies is naïve.

[255] *See* Jeffrey S. Banks & Barry R. Weingast, *The Political Control of Bureaucracies Under Asymmetric Information*, 36 AM. J. OF POL. SCI. 509, 519 (1992).

C. The Major Questions and Nondelegation Doctrines and the Administrative State

The object of constitutional rules in the public choice approach is to minimize the external costs of both public and private activity, offset by the costs of the political process itself.[256] In the public choice approach to collective action, there is not some "public good" that exists outside of the preferences of the individuals that are part of a group.[257] Instead, there are the preferences of individuals, and these cannot be summed or maximized because they are not subject to any but an ordinal scale of value in which we know that persons want more or less of any given good. A unanimously-chosen alternative is Pareto-superior to any other opposed by any citizen, but the costs of reaching such a decision through bargaining and vote trading can be impracticably high.[258]

For this reason, it is desirable that constitutional rules are made with a supermajority requirement to reduce the likelihood of rent-seeking behavior by interests that will have greater difficulty obtaining their narrow interests by this means.[259] These can establish constraints on government by structural means, such as federalism and the separation of powers and individual rights.[260] For ordinary legislation, constitutional rules may authorize legislative action by a simple majority, which reduces the costs of decision and is constrained by constitutional rules.[261]

The major questions and nondelegation doctrines can be analyzed within the public choice framework. Legal rules like thee which constrain legislatures and bureaucratic agencies by requiring a clear legislative statement that the agency is authorized to exercise a kind of authority make it more difficult for legislative

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[256] WILLIAM NISKANEN, *The Pathology of Politics*, *in* POLICY ANALYSIS AND PUBLIC CHOICE: SELECTED PAPERS BY WILLIAM A. NISKANEN 307, 313-14 (1998).

[257] 10 GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY, IN THE COLLECTED WORKS OF JAMES M. BUCHANAN 1, 44 (1985).

[258] BUCHANAN, *supra* note 217, at 39-41.

[259] *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

[260] Peter H. Aranson, *Procedural and Substantive Constitutional Protection of Economic Liberties*, *in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 300 (James D. Gwartney & Richard E. Wagner, eds., 1988).

[261] BUCHANAN & TULLOCK, *supra* note 259, at 171-88.

minorities and interest groups to impose costs on other persons in society because they may not be able to obtain the legislative support needed for legislative or regulatory rules that offer rent-seeking or non-pecuniary benefits to some at the expense of everyone else.

A legal rule, such as the *Chevron* doctrine, which allows bureaucratic agencies to regulate without clear legislative authorization, enables legislative minorities and interest groups to obtain regulatory actions that impose exploitative costs on the public. *Chevron* judicial deference prevents the courts from checking the power of such interests to extract rents or non-pecuniary benefits (such as ideological or symbolic values). For these reasons, public choice theory would command clear statement rules such as the major questions and nondelegation doctrines and disapprove of rules that unleash administrative discretion, such as *Chevron*.

If the courts are looking for a way to limit the autonomy of the administrative state, there are indeed other avenues for doing so.[262] As Justice Gorsuch[263] and Thomas Merrill[264] suggest, for example, the Administrative Procedure Act clearly indicates that the courts are to review agency interpretations of law and reject them if they are erroneous. The APA requires a reviewing court to "hold unlawful and set aside agency action . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]"[265] As *Mistretta v. United States* demonstrates, the nondelegation doctrine is baked into the separation of powers; the fact that it has not been used to invalidate congressional legislation for a long time does not mean that it is not part of our constitutional doctrine.[266]

In *Mistretta*, for example, the Court upheld that United States Sentencing Commission's delegated authority to draft sentencing guidelines, in part because the Commission had "sufficiently

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[262] Perhaps the Court might be more willing to consider a "context-specific" *Chevron* deference without Justice Scalia on the Court. *See* Christopher J. Walker, *Toward a Context-Specific Chevron Deference*, 81 MO. L. REV., 1095 (2016).

[263] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

[264] MERRILL, *supra* note 4, at 230.

[265] 5 U.S.C. § 706(2)(C).

[266] *See generally* Mistretta v. United States, 488 U.S. 361 (1989).

specific and detailed" direction from Congress, relying on *J.W. Hampton, Jr. & Co. v. United States*'[267] "intelligible principle" concept.[268] The "intelligible principle" understanding of nondelegation is believed by some observers to differ from that of *Panama Refining* and *Schecter* in giving agencies more leeway in interpreting federal law.[269]

However, as Postell shows, this principle had been appealed to throughout the country's history, both in the federal and state governments, which were anxious to preserve republican control over the state apparatus.[270] The nondelegation doctrine, and its cousin, the major questions doctrine, are principles that can impose constraints on exploitative political activity employing the bureaucratic process.

Justice Gorsuch seems right to regard the major questions doctrine as serving the same constitutional values as does the nondelegation principle.[271] Public choice theory supports, as does Justice Gorsuch, a reinvigorated nondelegation doctrine to constrain the administrative state. On one view, the major questions doctrine is a means of limiting the administrative state in the absence of a meaningfully applied nondelegation doctrine in the courts.[272] Indeed, the level of conflict in American politics today may suggest that there may be hope for a renewed interest in the nondelegation doctrine: "the rise of polarization, hyperpartisanship, and authoritarianism within the political sphere requires further thinking about the[] presumptions and rationales" of *Chevron* deference.[273]

Thus, if an administration seeks to deliberately void congressional intent through administrative agencies, the major questions doctrine might not be such a bad idea. But this is the reason for the nondelegation doctrine and the reasonableness review of agency interpretations of law in the Administrative

[267] 276 U.S. 394, 409 (1928).

[268] *Mistretta*, 488 U.S. at 374.

[269] *See, e.g.,* Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1076 (2019).

[270] POSTELL, *supra* note 5, at 69-93.

[271] Gundy v. United States, 139 S.Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

[272] *See generally* Svikhart, *supra* note 175.

[273] Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 783 (2017).

Procedure Act. The judiciary's function in this context is to preserve the separation of powers.

CONCLUSION

Public choice theory offers a conceptual framework from which to consider the rationales of the major questions and nondelegation doctrines in the context of representative government. The high level of confidence reposed in the administrative state is the product of a bygone era. Political actors and agencies are able to use the administrative process for rational strategic behavior that imposes costs on society that are borne more heavily by those who do not favor them and are in this sense exploitative. By establishing structural obstacles to exploitative and rent-seeking behavior, the major questions and nondelegation doctrines are means of avoiding harms and promoting transparency and political accountability in lawmaking, both legislative and regulatory.