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# “MAJOR QUESTIONS” AS MAJOR OPPORTUNITIES

Riley T. Svihart\*

*“[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”<sup>1</sup>*

## INTRODUCTION

Just three days after securing complete control of Congress in a dominant midterm election that netted their party nine additional Senate seats and a strengthened House majority,<sup>2</sup> Republican opponents of President Barack Obama’s signature healthcare legislation received more good news in the Supreme Court’s announcement that it would hear *King v. Burwell*.<sup>3</sup> The case—in which challengers asserted that residents of states that had declined to establish health insurance exchanges were ineligible to receive tax credits for the purchase of health insurance through *federally* created exchanges<sup>4</sup>—offered what would likely be a final chance for opponents of the Affordable Care Act<sup>5</sup> to dismantle the sweeping law by judicial review.<sup>6</sup>

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\* Candidate for Juris Doctor, Notre Dame Law School, 2018; Bachelor of Arts in Economics & Business, Westmont College, 2015. I dedicate this Note to my parents and family in tremendous gratitude for their love and support. I would like to thank Professor Bill Kelley and Mathew Hoffmann for their critiques, and I am grateful to the staff of the *Notre Dame Law Review* for their tireless and skillful editing.

1 THE FEDERALIST No. 51, at 294 (James Madison) (ABA 2009).

2 Guy Benson, *Final Score: GOP Gains Nine Senate Seats, Will Hold 54–46 Majority*, TOWNHALL (Dec. 8, 2014), <http://townhall.com/tipsheet/guybenson/2014/12/08/final-score-gop-gains-nine-senate-seats-will-hold-5446-majority-n1928620>.

3 135 S. Ct. 475 (2014) (mem.).

4 James Surowiecki, *On Obamacare, the G.O.P. Lays a Trap for Itself*, NEW YORKER (Nov. 18, 2014), <http://www.newyorker.com/news/daily-comment/obamacare-g-o-p-lays-trap>.

5 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered titles of the U.S. Code).

6 Surely, other discrete aspects of “Obamacare” have continued to fuel litigation in the wake of *King*. See, e.g., *Zubik v. Burwell* (*Little Sisters of the Poor*), 136 S. Ct. 1557 (2016) (evaluating the constitutionality of the Affordable Care Act’s contraceptive mandate as applied to religious employers). But in the run-up to *King*, many observers regarded the case to represent the most significant existential threat to Obamacare since twenty-six states and numerous other entities challenged the law’s constitutionality in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2594–96 (2012) (upholding the Affordable Care Act’s individual mandate as a valid exercise of Congress’s power to tax). See, e.g., Jonathan Cohn, *Here’s What the Supreme Court Could Do to Insurance Premiums in Your State*, NEW REPUBLIC (Nov. 11, 2014), <https://newrepublic.com/article/120233/king-v->

When the Court ultimately held for the Obama Administration,<sup>7</sup> the ruling's implications on the future of "Obamacare" dominated the public's attention.<sup>8</sup> However, this political focus obscured another important legal ramification tucked away in Chief Justice Roberts's majority opinion—in refusing to afford *Chevron*<sup>9</sup> deference to the IRS's interpretation of the ambiguous legislative draftsmanship at issue,<sup>10</sup> the Court gave new life to the "major question exception."<sup>11</sup> This exception, its companion legal doctrines, and its potential to play a critical role in restoring the separation and balance of powers envisioned by the framers of our Constitution will be the subject of this Note. Against the backdrop of this discussion, this Note will argue that faithfulness to the Constitution demands that federal courts reinvent their reliance on the exception in a narrow and principled way.

The future of the major question exception is a live question in the wake of *King*. This Note calls on federal courts to embrace the exception, for where a toothless nondelegation doctrine has failed to curtail the ceaseless growth of executive power experienced over the past century, a more aggressively applied major question exception can succeed in ensuring that policy questions of the deepest "economic and political significance"<sup>12</sup> are left exclusively to the people's representatives in Congress. In declining to defer to an executive agency's interpretation of an ambiguous statute, federal courts must themselves assume "the task [of] determin[ing] the correct reading" of Congress's work.<sup>13</sup> This move aggrandizes federal judges and lawmakers at the expense of regulators, but achieves a worthwhile result of

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burwell-how-supreme-court-could-wreck-obamacare-states; Stephanie Mencimer, *The Supreme Court Is About to Hear the Case That Could Destroy Obamacare*, MOTHER JONES (Feb. 9, 2015), <http://www.motherjones.com/politics/2015/02/king-burwell-supreme-court-obamacare>.

7 *King*, 135 S. Ct. at 2496.

8 See, e.g., Kimberly Leonard, *Supreme Court Upholds Obamacare Subsidies*, U.S. NEWS & WORLD REP. (June 25, 2015), <http://www.usnews.com/news/articles/2015/06/25/supreme-court-upholds-obamacare-subsidies-in-king-v-burwell> ("The ruling . . . deals a crippling blow to the law's Republican opponents . . .").

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

10 *King*, 135 S. Ct. at 2489. For an in-depth account of the Affordable Care Act's complex road to passage, see generally John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 LAW LIBR. J. 131 (2013).

11 See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1872 (2013) ("[W]e have applied *Chevron* where concerns about agency self-aggrandizement are at their apogee: in cases where an agency's expansive construction of the extent of its own power would have wrought a fundamental change in the regulatory scheme."). Certainly, if such a "fundamental change" were itself incapable of triggering the major question exception, the exception could be fairly regarded as something of an afterthought prior to *King*. See also David Baake, *Obituary: Chevron's "Major Questions Exception"*, HARV. ENVTL. L. REV. BLOG (Aug. 27, 2013, 5:43 PM), <http://harvardelr.com/2013/08/27/obituary-chevrons-major-questions-exception/> (observing in the wake of *City of Arlington* that "reports of [the exception's] death appear to have been entirely accurate").

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

13 *King*, 135 S. Ct. at 2489.

blunting overgrown executive power in the process. And while increased reliance on the exception is surely incapable of completely reapportioning domestic policymaking power among the three branches,<sup>14</sup> it will also do little to upset the modern reality that agencies must bear the responsibility of being detailed where Congress has only the ability to be general. Viewed through this lens, this Note’s core contention becomes clear—major questions are major opportunities.

This Note will proceed in three parts. Part I will review the baseline doctrine provided by *Chevron*. Part II will chronicle the legal history of the major question exception. And Part III will make the aforementioned practical and constitutional argument; documenting the broad expansion of executive power that has accompanied Congress’s increased tendency to rely exclusively on agencies to craft policy details in Section III.A, and arguing for a reinigorated conception of the major question exception in Section III.B.

### I. CHEVRON DEFERENCE: THE BASICS

The Supreme Court’s decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*,<sup>15</sup> has become an essential staple of administrative law.<sup>16</sup> Before examining *Chevron* and the doctrine it has created, an initial look at the sort of situations in which the doctrine applies is warranted.

In an era in which Congress is forced to leave executive agencies considerable discretion to fill in policy details,<sup>17</sup> agencies must nevertheless tailor their actions to statutes passed by Congress. Though the Supreme Court has been extraordinarily accommodative of Congress’s routine desire to grant executive agencies broad authority to fill in the blanks in pursuit of certain

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14 Whether such a reapportionment would be warranted in a world free of the modern realities that necessitate broad delegation is a separate issue. Compare Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002) (offering an originalist defense of the nondelegation doctrine), and Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991) (advocating “pragmatic formalism” as a judicial mechanism for maintaining the separation of powers), with Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (denying the existence of a nondelegation doctrine), and David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000) (defending the robustness of today’s administrative state).

15 467 U.S. 837 (1984).

16 Indeed, the case “has become the most cited Supreme Court decision in history and the subject of a scholarly literature that would fill libraries.” GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 568 (7th ed. 2016). In his highly influential article, *Chevron Step Zero*, Cass Sunstein observed the case’s tremendous impact.

As a sign of *Chevron*’s influence, consider the fact that the decision was cited 2414 times in its first decade (between 1984 and January 1, 1994), 2584 times in its next six years (between January 1, 1994 and January 1, 2000), and 2235 times in its next five years (between January 1, 2000 and January 28, 2005).

Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 n.1 (2006) (citation omitted).

17 See *infra* Section III.A for a discussion of the reasons behind this modern phenomenon.

policy objectives, it has always acknowledged that naked congressional delegations of legislative power are unconstitutional.<sup>18</sup> Thus, in order to avoid running afoul of the Constitution, Congress must “lay down by legislative act an intelligible principle to which the person or body authorized [to act] is directed to conform.”<sup>19</sup> In practice, this standard has been remarkably easy for Congress to meet.<sup>20</sup> Indeed, only two statutes in history have flunked this test.<sup>21</sup>

Open-ended legislative arrangements rubber-stamped by the Court have included: the Communications Act’s empowerment of the FCC to act as “public convenience, interest, or necessity requires;”<sup>22</sup> the Renegotiation Act’s creation of a Renegotiation Board tasked with determining “excessive profits;”<sup>23</sup> the Public Utility Holding Company Act’s authorization of the SEC to stamp out “unfair[ ] or inequitabl[e]” distributions of voting power;<sup>24</sup> and, the Emergency Price Control Act’s creation of a Price Administrator to “effectuate the purposes of [the] Act” by fixing “fair and equitable” commodity prices.<sup>25</sup>

Under the resulting legal regime, the nondelegation doctrine is indeed a “dead letter,”<sup>26</sup> and Congress is free in practice to leave statutes as designedly vague as it pleases.<sup>27</sup> Quite commonly, then, executive agencies are charged with issuing rules and adjudications that bind the public at a greater

18 See, e.g., *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (“The Constitution provides that ‘[a]ll legislative Powers herein granted shall be vested in a Congress of the United States’ . . . and we have long insisted that ‘the integrity and maintenance of the system of government ordained by the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch.” (first quoting U.S. CONST. art. I, § 1; and then quoting *Field v. Clark*, 143 U.S. 649, 692 (1892))).

19 *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

20 See Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 142 (2011) (“Although the Court has not formally abandoned the nondelegation doctrine, it has upheld many sweeping delegations of lawmaking authority to administrative agencies.” (footnote omitted)).

21 See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935). Because these lone judicial invalidations each occurred in 1935, Professor Sunstein has famously observed that “the [nondelegation] doctrine has had one good year, and 211 bad ones (and counting).” Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

22 47 U.S.C. § 303 (2012); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 194 (1943).

23 Pub. L. No. 82-9, 65 Stat. 7 (1951); *Lichter v. United States*, 334 U.S. 742, 785–86 (1948). For a detailed discussion of the Act, see Robert Braucher, *The Renegotiation Act of 1951*, 66 HARV. L. REV. 270 (1952).

24 Pub. L. No. 74-333, 49 Stat. 803 (1935), *repealed by* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005); *Am. Power & Light Co. v. Sec. & Exch. Comm’n*, 329 U.S. 90, 105 (1946) (alteration in original).

25 Pub. L. No. 77-421, 56 Stat. 23 (1942); *Yakus v. United States*, 321 U.S. 414, 427 (1944).

26 Lawson, *supra* note 14, at 329.

27 See *infra* Section III.A for a discussion of the many incentives Congress has for doing so.

level of specificity than whatever broad outlines Congress provided.<sup>28</sup> Any such action on the agency’s part must be based on a permissible interpretation of the underlying statute from which the agency gleans its authority to act in the first place.<sup>29</sup> Thus, parties opposed to a regulation often seek to persuade reviewing courts that an agency based the regulation on a flawed interpretation of the organic statute at issue. The famous two-step inquiry outlined by the Court in *Chevron* deals with this type of case, functionally tipping the scale in favor of agencies by instructing reviewing courts to defer to any reasonable statutory interpretation proffered by the agency.<sup>30</sup>

Formally speaking, *Chevron* directs courts to first assess “whether Congress has directly spoken to the precise question at issue.”<sup>31</sup> If the court finds “the intent of Congress [to be] clear,” it may disregard the agency’s interpretation and “must give effect to the unambiguously expressed intent of Congress.”<sup>32</sup> If, on the other hand, the court deems the statute to be “silent or ambiguous with respect to the [interpretive question],” then it must uphold any “permissible construction of the statute” adopted by the agency.<sup>33</sup> “The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”<sup>34</sup> Thus, as long as an agency’s resolution of a statutory ambiguity is reasonable, its “position [with respect to that ambiguity] prevails” under *Chevron*.<sup>35</sup>

For all its simplicity, *Chevron* relies on no shortage of persuasive theoretical justifications.<sup>36</sup> Indeed, although separate camps have emerged along familiar lines with respect to *Chevron*’s actual application, *Chevron*’s principal

28 See generally Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982) (discussing this tendency and its theoretical implications).

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

30 See Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009).

31 *Chevron*, 467 U.S. at 842.

32 *Id.* at 842–43.

33 *Id.* at 843.

34 *Id.* at 843 n.11.

35 *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2017 (2012). The categorical simplicity of this inquiry has surely contributed to its lasting success. *Chevron*’s most influential predecessor offered a standards-based framework that was much more cumbersome and unpredictable. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“The [degree of deference accorded to an agency’s interpretation] will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . .”); see also Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 n.95 (1985) (listing ten criteria used by the Court in cases preceding *Chevron*). The complexity of such an evaluation made *Chevron*’s simplification particularly refreshing for lower courts, for in the words of Gary Lawson, “[n]o judge really wants to apply a ten-factor test to a foundational inquiry in administrative law cases.” LAWSON, *supra* note 16, at 560.

36 See generally Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271 (2008).

rationale is one that Justice Breyer<sup>37</sup> and Justice Scalia<sup>38</sup> always agreed upon: “Courts defer to agency interpretations of law when, and because, Congress has told them to do so.”<sup>39</sup>

Broadly speaking, Congress issues this “implicit . . . delegation of law-interpreting power to administrative agencies”<sup>40</sup> in the recognition that resolving statutory ambiguities necessitates policymaking, a function better performed by “those with great expertise,” who, as agents of the president, are “accountable to the people” for “resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”<sup>41</sup> Agencies are expert and accountable; courts are not.

Of course, Congress retains the constitutional prerogative to deny agencies this interpretive function, as in the ordinary course Congress alone has the power to legislate,<sup>42</sup> and the judiciary alone the power “to say what the law is.”<sup>43</sup> This reality requires federal courts to engage in a threshold consideration of whether Congress has indeed intended to delegate interpretive authority to the agency at issue.<sup>44</sup> Here, what Thomas Merrill and Kristin E. Hickman have famously dubbed “*Chevron* Step Zero,”<sup>45</sup> became “the central location of an intense and longstanding disagreement” between Justices Breyer and Scalia that remains largely unresolved today.<sup>46</sup> While Justice Breyer’s favored approach would require a functional evaluation of Congress’s most likely intention in the particular case at hand,<sup>47</sup> Justice Scalia’s approach would instead call on courts to establish and maintain “a background rule of law against which Congress can legislate.”<sup>48</sup>

37 See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370–82 (1986).

38 See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–17.

39 Sunstein, *supra* note 16, at 197–98.

40 *Id.* at 192.

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

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

43 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

44 *City of Arlington v. FCC*, 133 S. Ct. 1863, 1882 (2013) (Roberts, C.J., dissenting) (“[T]he ‘category of interpretive choices’ to which *Chevron* deference applies is defined by congressional intent.” (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001))).

45 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, 598 n.10 (2008).

46 Sunstein, *supra* note 16, at 192.

47 Breyer, *supra* note 37, at 371. For a representative example of Justice Breyer’s grappling with *Chevron* during his tenure on the First Circuit, see *Mayburg v. Secretary of Health & Human Services*, 740 F.2d 100, 106 (1st Cir. 1984).

48 Scalia, *supra* note 38, at 517. For a timeless exposition of Justice Scalia’s influential approach to these kinds of questions by the late Justice himself, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

This classic tension between formalism and functionalism is not unique to *Chevron*, but has still prompted the Court to formally consider when deference is appropriate under a preliminary finding that Congress has indeed enacted the statute at issue with a fictional intent to delegate interpretive authority to the responsible agency.<sup>49</sup> In *United States v. Mead Corp.*,<sup>50</sup> the Court implemented a framework for distinguishing those delegations that trigger *Chevron* deference from those that do not. Under *Mead*, deference is owed to an agency where “it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>51</sup> In practice, then, “two factors . . . signal a delegation”<sup>52</sup> that places an interpretation under *Chevron*’s “domain”<sup>53</sup>: “express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed” and “relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”<sup>54</sup>

Although Justice Scalia protested vigorously against the “enormous, and almost uniformly bad” implications he believed *Mead* would engender, he did so alone.<sup>55</sup> In an 8-1 ruling, the Supreme Court allowed *Chevron* to coexist with its more complicated predecessor *Skidmore v. Swift & Co.*,<sup>56</sup> and refused to declare *Chevron* “the sole measure of judicial deference to agency interpretations of statutes” by “relegat[ing *Skidmore*] to the dustbin of history as an ‘anachronism’” as Justice Scalia would have preferred.<sup>57</sup> Although Scalia’s warning that the Court’s failure to lay *Skidmore* to rest would create uncertainty<sup>58</sup> has proved prescient in a handful of relatively rare circum-

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49 See Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2009 (2011) (“The framework for judicial review of agency statutory interpretation rests on a legal fiction: Congress intends to delegate interpretive authority to federal agencies whenever it fails to resolve clearly the meaning of statutory language.”).

50 533 U.S. 218 (2001). It bears noting that, while it does represent the Court’s most famous attempt to settle the scope of *Chevron*, *Mead* was not the first case in which the Court grappled with questions of this nature. See also *Christensen v. Harris Cty.*, 529 U.S. 576 (2000); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 809–11 (2002) (summarizing *Christensen*).

51 *Mead*, 533 U.S. at 226–27.

52 Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 805 (2010).

53 Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001).

54 *Mead*, 533 U.S. at 229, 230.

55 *Id.* at 261 (Scalia, J., dissenting).

56 323 U.S. 134 (1944).

57 Merrill, *supra* note 50, at 808 (quoting *Mead*, 533 U.S. at 250 (Scalia, J., dissenting)).

58 Recall that *Skidmore* and its sister pre-*Chevron* cases used a complicated multitude of factors to determine the degree of deference deserved by an agency. See Diver, *supra* note 35, at 562 n.95. For a more comprehensive examination of the modern interplay between *Skidmore* and *Chevron*, see Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105 (2001).

stances,<sup>59</sup> lower courts have continued to apply broad *Chevron* deference where *Mead* allows with tremendous regularity.<sup>60</sup> As a result, where statutory interpretations by administrative agencies are concerned, *Chevron* is king.

## II. THE MAJOR QUESTION EXCEPTION

While *Chevron*'s rule over the vast landscape of administrative law has been virtually uninterrupted since its announcement in 1984, the Supreme Court has introduced an additional threshold consideration in a subset of "major question" cases. Like the evaluation under *Mead*, the major question exception derails the *Chevron* analysis at "Step Zero" when triggered.<sup>61</sup> Under the controversial exception,<sup>62</sup> reviewing courts can deny *Chevron* deference to "agency interpretations that effect major changes" in American policy.<sup>63</sup> From birth, to death, to rebirth under *King v. Burwell*, this Part charts the doctrinal evolution of the modern major question exception.

The major question exception traces its origins to the 1994 case of *MCI Telecommunications Corp. v. AT&T Co.*<sup>64</sup> Invalidating an FCC rule exempting competitors of AT&T from certain tariff-filing requirements under section 203(b)(2) of the Communications Act,<sup>65</sup> the Supreme Court observed the great unlikelihood that "Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion."<sup>66</sup> Noting the "major[ness]"<sup>67</sup> and "fundamental[ity]"<sup>68</sup> of the

59 See, e.g., *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 116 (1st Cir. 2009) ("Some Circuits including this one have applied the *Skidmore* standard when examining non-precedential agency decisions." (first citing *Doe v. Leavitt*, 552 F.3d 75, 79–80 (1st Cir. 2009); then citing *Godinez-Arroyo v. Mukasey*, 540 F.3d 848, 850 (8th Cir. 2008); then citing *Boykin v. KeyCorp*, 521 F.3d 202, 208 (2d Cir. 2008); and then citing *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1113 (9th Cir. 2007))).

60 Recall that *Chevron* remains the Supreme Court's most cited decision. LAWSON, *supra* note 16, at 568.

61 See Moncrieff, *supra* note 45, at 598 (labeling *MCI* and *Brown & Williamson* as Step Zero cases); Sunstein, *supra* note 16, at 236 (observing major question cases to "bear on the Step Zero question of whether *Chevron* applies").

62 A strong preponderance of criticism of the major question exception has been negative. See, e.g., Christine Kexel Chabot, *Selling Chevron*, 67 ADMIN. L. REV. 481 (2015); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19 (2010); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223; Matthew A. Melone, *King v. Burwell and the Chevron Doctrine: Did the Court Invite Judicial Activism?*, 64 U. KAN. L. REV. 663 (2016); Sunstein, *supra* note 16, at 236–42; Michael C. Pollack, Note, *Chevron's Regrets: The Persistent Vitality of the Nondelegation Doctrine*, 86 N.Y.U. L. REV. 316 (2011); Note, *Major Question Objections*, 129 HARV. L. REV. 2191 (2016).

63 Moncrieff, *supra* note 45, at 598.

64 512 U.S. 218 (1994).

65 47 U.S.C. § 203(b)(2) (2012).

66 *MCI*, 512 U.S. at 231.

67 *Id.* at 227–29.

68 *Id.* at 231–32.

FCC’s purported “modification” of such an “essential characteristic”<sup>69</sup> of the industry at issue, the Court denied the agency *Chevron* deference with respect to its favored interpretation of “modify” and signaled the possible existence of a brand new threshold evaluation.

In the aftermath of *MCI*, however, “the case’s necessary focus on the word ‘modify’ arguably made the majorness distinction uniquely relevant [to] *MCI*.”<sup>70</sup> The Court entertained a possible major question issue in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,<sup>71</sup> but its “cryptic”<sup>72</sup> discussion of the issue in that case did little to ease the confusion generated by *MCI*’s treatment of the question. Consequently, the Court’s subsequent ruling in *FDA v. Brown & Williamson Tobacco Corp.*<sup>73</sup> is roundly viewed to have heralded the arrival of the modern major question exception.<sup>74</sup>

In *Brown & Williamson*, the Court explained the reasoning behind its refusal to defer to the FDA’s interpretation of “drug” under the Food, Drug, and Cosmetics Act<sup>75</sup> (FDCA) in a considerably more unambiguous fashion. Observing that the agency’s preferred interpretation would group nicotine among a category of “dangerous” drugs incapable of safe usage and subject to prohibition under the FDCA, a 5-4 majority rejected the agency’s interpretive decision to include cigarettes and other tobacco products under section 203(g)(1)(C)’s definition of “drugs” due to its “confiden[ce] that Congress could not have intended to delegate a decision of such economic and political significance to an agency.”<sup>76</sup> In other words, “Congress could not have intended the statutory definition of ‘drug’ to encompass nicotine because Congress could not have intended to authorize FDA’s criminalization of the entire tobacco industry.”<sup>77</sup>

Though *Brown & Williamson* generated considerable hand-wringing among certain commentators,<sup>78</sup> a series of cases embraced its reasoning<sup>79</sup>

69 *Id.* at 231.

70 Moncrieff, *supra* note 45, at 600.

71 515 U.S. 687 (1995).

72 Sunstein, *supra* note 16, at 239.

73 529 U.S. 120 (2000).

74 The *King* majority traced the existence of the major question exception back to *Brown & Williamson*, citing the case indirectly through the vehicle of the more recent *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), which quoted *Brown & Williamson*. In addition, most casebooks begin their discussions of the major question exception with *Brown & Williamson*. See, e.g., LAWSON, *supra* note 16, at 656; JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION & REGULATION: CASES AND MATERIALS 819 (2d ed. 2013).

75 21 U.S.C. §§ 301–97 (2012).

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

77 Moncrieff, *supra* note 45, at 602.

78 See, e.g., Manning, *supra* note 62, at 237 (“[T]he Court’s practice of aggressively narrowing administrative statutes to avoid serious nondelegation concerns . . . raises serious . . . legitimacy concerns . . . .”); see also *Brown & Williamson*, 529 U.S. at 190–91 (Breyer, J., dissenting) (“Presidents, just like Members of Congress, are elected by the public. . . . I do not believe that an administrative agency decision of this magnitude . . . can escape the kind of public scrutiny that is essential in any democracy. And such a review will take place whether it is the Congress or the Executive Branch that makes the relevant decision.”).

until *Massachusetts v. EPA*<sup>80</sup> brought about its “death” in 2007.<sup>81</sup> In an apparent reversal of its stance with respect to the major questions at issue in *MCI* and *Brown & Williamson*, the Court withheld *Chevron* deference from the EPA in spite of the agency’s attempt to adhere to *Brown & Williamson* by selecting an interpretation that would curb, rather than amplify, the economic and political ramifications of the rule.<sup>82</sup> Despite the fact that the EPA intentionally *confined* the ambit of its rule by interpreting section 202(a)(1) of the Clean Air Act to forbid its regulation of certain vehicular emissions, the Court held the statute to “unambiguous[ly]” contravene EPA’s interpretation as, in the Court’s view, the greenhouse gases at issue were “without a doubt ‘physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air.’”<sup>83</sup>

In *Massachusetts*, as in *MCI* and *Brown & Williamson*, the Court reflected on the majorness of the policy question at issue.<sup>84</sup> Irreconcilably, however, the *Massachusetts* Court held that very majorness to compel the EPA’s *involvement* in the matter.<sup>85</sup> Whereas the *MCI* and *Brown & Williamson* majorities sidelined the responsible executive agencies from the effort to discern the correct answer to a highly important interpretive question, the *Massachusetts* Court did just the opposite, prompting many commentators to eulogize *Brown & Williamson* and the nascent major question exception.

A handful of others, however, were perceptive in their attempts to reconcile the divergent cases, as indeed the exception was not yet dead and would be invoked just six years later in *King v. Burwell*.<sup>86</sup> Perhaps the best of these explanations was advanced by Jody Freeman and Adrian Vermeule, who argued that the *Massachusetts* Court’s repudiation of the EPA amounted to “expertise-forcing,” rather than a wholesale rejection of the brand of reasoning employed in *MCI* and *Brown & Williamson*.<sup>87</sup> Grouping *Massachusetts*

79 See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (withholding deference because “[t]he idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation . . . is not sustainable”); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (conversely granting deference due to the “interstitial” quality of the interpretation at issue); *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” (first citing *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994); and then citing *Brown & Williamson*, 529 U.S. at 159–60)).

80 549 U.S. 497 (2007).

81 Moncrieff, *supra* note 45, at 603 (“Seven years later, the major questions exception *died*.”) (emphasis added).

82 *Massachusetts*, 549 U.S. at 530.

83 *Id.* at 529 (alterations in original).

84 The Court accepted the petitioners’ argument that climate change represents the “most pressing environmental challenge of our time.” *Id.* at 505 (quoting Petition for Writ of Certiorari, *Massachusetts*, 549 U.S. 497 (No. 05-1120)).

85 *Id.*

86 135 S. Ct. 2480 (2015).

87 Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 53.

with *Gonzales v. Oregon*<sup>88</sup> and *Hamdan v. Rumsfeld*<sup>89</sup>—other cases in which the Court rejected legal interpretations of the George W. Bush Administration—Freeman and Vermeule argued that the disparate result in *Massachusetts* could be explained by the decision of “Justice Stevens and Justice Kennedy [to join] forces to override executive positions that they found untrustworthy, in the sense that executive expertise had been subordinated to politics.”<sup>90</sup> On this reading, the Bush EPA’s decision not to regulate vehicular emissions for compliance with the Clean Air Act amounted to an unlawful “politicization of administrative expertise” that the Supreme Court felt compelled to strike down.<sup>91</sup>

Whatever the appeal of this explanation, the Court’s subsequent ruling in *City of Arlington v. FCC*<sup>92</sup> dealt the seemingly dormant major question exception an additional blow. In holding that courts remain bound by *Chevron* even when the statutory ambiguity at issue pertains to the agency’s *jurisdiction* over a policy matter,<sup>93</sup> the Court dispensed with another prominent justification for the major question exception—namely, that *Chevron* deference does not apply in cases where agencies have engaged in “[s]elf-aggrandizing interpretations” that constitute “unscrupulous power-grab[s] rather than responsible lawmaking.”<sup>94</sup> On this view, the problem with the FDA’s decision to regulate cigarettes and other tobacco products as “drugs” under the FDCA was that, in so doing, the agency “attempt[ed] to dramatically expand its substantive jurisdiction.”<sup>95</sup> The *City of Arlington* Court rejected that understanding in a masterful opinion by Justice Scalia, dismissing the existence of any distinction between “big, important” interpretations defining the agency’s “jurisdiction,” and other “humdrum, run-of-the-mill stuff.”<sup>96</sup>

Thus, Chief Justice Roberts’s revival of the exception in *King v. Burwell*<sup>97</sup> understandably came as a surprise. Called on to resolve a circuit split over what at first seemed like a quintessential *Chevron* question<sup>98</sup>—whether the ACA’s provision of tax credits for health insurance plans purchased “through

88 546 U.S. 243 (2006) (invalidating the rule of the Bush Attorney General prohibiting doctors from prescribing drugs in aid of physician-assisted suicide).

89 548 U.S. 557 (2006) (holding that trial by military commission violated the Geneva Convention and the Uniform Code of Military Justice).

90 Freeman & Vermeule, *supra* note 87, at 52.

91 *Id.* For a similar argument that agencies “bear[ ] a legal and ethical duty to select the *best* interpretation of [their] governing statute[s]” regardless of their “policy preferences,” see Aaron Saiger, *Agencies’ Obligation to Interpret the Statute*, 69 VAND. L. REV. 1231, 1232 (2016).

92 133 S. Ct. 1863 (2013).

93 *Id.* at 1874.

94 Moncrieff, *supra* note 45, at 614.

95 Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL’Y 203, 250 (2004).

96 *City of Arlington*, 133 S. Ct. at 1868.

97 135 S. Ct. 2480 (2015).

98 See *King v. Burwell*, 759 F.3d 358, 367–76 (4th Cir. 2014) (evaluating the IRS’s interpretation under the two-step *Chevron* framework); *Halbig v. Burwell*, 758 F.3d 390, 398–402 (D.C. Cir. 2014) (same).

an Exchange established by the State under [section] 1311” of the Act<sup>99</sup> authorized the IRS to extend those same credits to residents forced to purchase health insurance through a *federally* created exchange as a result of their state’s refusal to establish its own exchange—the Court cited *Brown & Williamson* and denied the IRS *Chevron* deference altogether.<sup>100</sup> After initially observing that *Chevron*’s two-step framework ordinarily applies where administrative interpretations of statutory ambiguities are involved, the Court categorized the case at hand as “one of those” “extraordinary cases [where] there may be reason to hesitate before concluding that Congress has intended” an “implicit delegation” “to the agency to fill in the statutory gaps.”<sup>101</sup> Here, where the interpretive question at issue concerned one of “the Act’s key reforms” and would affect the price of health insurance and the federal budget tremendously, the legal question was of such “deep ‘economic and political significance’” as to belie the threshold finding that Congress would have intended to delegate resolution of the question to the IRS.<sup>102</sup> Simply put, “[t]his [was] not a case for the IRS.”<sup>103</sup>

Taking the interpretive question for itself, the Court ultimately arrived at the same interpretation as the IRS.<sup>104</sup> But in so doing, the Court not only rekindled the major question exception, but lent it further power by employing it in an unprecedented fashion. Whereas previous major question departures from *Chevron* had occurred in cases where a reviewing court broke with the responsible agency’s favored interpretation, in *King* the Court denied the agency *Chevron* deference but adopted its statutory interpretation anyway. Thus, *King* differed from *MCI* and *Brown & Williamson* in the sense that the Court could not be understood to have utilized the exception in an effort to supplement the reasoning behind its rejection of an agency interpretation with which it disagreed, but instead invoked the exception due to the sheer economic and political significance of the legal question at issue.

In addition, whereas previous invocations of the exception had been employed to resolve various problems of “bare majorness,”<sup>105</sup> “agency aggrandizement,”<sup>106</sup> and “excessive delegation[ ],”<sup>107</sup> the *King* Court added another rationale for denying the IRS deference—namely, the substantial unlikelihood “that Congress would have delegated this [interpretive] decision to the *IRS*, which has no expertise in crafting health insurance policy of

99 26 U.S.C. § 36B(b)(2)(A) (2012).

100 *King*, 135 S. Ct. at 2488–89.

101 *Id.* (internal quotation marks omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

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

103 *Id.*

104 *Id.* at 2496 (“Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress’s plan, and that is the reading we adopt.”).

105 See Moncrieff, *supra* note 45, at 611–13.

106 See *id.* at 613–16.

107 See *id.* at 616–20.

this sort.”<sup>108</sup> While this “lack of expertise” ground was not completely unprecedented,<sup>109</sup> it presumably broadens the applicability of the exception in the wake of *King*.

Although *King* remains fresh and federal courts have had little opportunity to respond to its version of the major question exception, some lower courts and litigants have already begun to employ the case’s reasoning.<sup>110</sup>

In the term following *King*, for instance, the Supreme Court granted certiorari in a case<sup>111</sup> in which twenty-six states sought to invalidate a pair of high-profile DHS programs that granted enhanced legal status to illegal immigrants that were parents of citizens or lawful permanent residents (DAPA)<sup>112</sup> and shielded certain undocumented immigrants that entered the United States as children from deportation (DACA).<sup>113</sup> Observing that “DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits,” the Fifth Circuit cited *King* in concluding that such a policy question “undoubtedly implicates ‘question[s] of deep economic and political significance.’”<sup>114</sup> Nevertheless, the court elected to “assum[e] *arguendo* that *Chevron* applies,” and proceeded to complete its remaining analysis.<sup>115</sup> Short a Justice, the Supreme Court failed to address the applicability (or lack thereof) of the major question exception in a one-sentence per curiam opinion affirming the Fifth Circuit’s decision by an equally divided Court.<sup>116</sup>

108 *King*, 135 S. Ct. at 2489 (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006)).

109 See *Gonzales*, 546 U.S. at 266 (“The structure of the CSA . . . conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise.”).

110 See *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1024 (6th Cir. 2016) (holding that *Chevron* applied because “[t]his is not an ‘extraordinary’ case” (quoting *King*, 135 S. Ct. at 2488)); *id.* at 1031–32 (Sutton, J., concurring in part and dissenting in part) (“Deference under [*Chevron*] is categorically unavailable” in “extraordinary cases.” (quoting *King*, 135 S. Ct. at 2488 (internal quotation marks omitted))); *Texas v. United States*, 809 F.3d 134, 178, 181–82 (5th Cir. 2015) (“[A]ssuming *arguendo* that *Chevron* applies” as the statute at issue “undoubtedly implicates” major questions); *Suprema, Inc. v. Int’l Trade Comm’n*, 796 F.3d 1338, 1360 (Fed. Cir. 2015) (O’Malley, J., dissenting) (“[W]e should not nonchalantly defer to an agency’s interpretation for questions of ‘deep economic and political significance.’” (citing *King*, 135 S. Ct. at 2488–89)); *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 106 (2016) (the plaintiff relying on *King* “[i]n resisting deference”).

111 See *Texas*, 809 F.3d at 146.

112 See Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship & Immigration Servs., et al. (Nov. 20, 2014) [hereinafter DAPA Memo], [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

113 See Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. (June 15, 2012) [hereinafter DACA Memo], <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

114 See *Texas*, 809 F.3d at 181 (quoting *King*, 135 S. Ct. at 2489).

115 *Id.* at 182.

116 *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

Until federal courts are presented with more opportunities to invoke the exception, the generative capacity of *King* will remain to be seen. The remainder of this Note will attempt to defend *King*'s version of the major question exception in hopes of urging federal courts to follow suit in denying executive agencies *Chevron* deference over statutory interpretations of extraordinary economic and political significance.

### III. ARGUMENT: THE NEED FOR A ROBUST MAJOR QUESTION EXCEPTION

In its various forms, the major question exception has won the affirmation of all but one active Supreme Court Justice at one time or another. Two of the three Justices commonly thought to form the Court's more conservative bloc—Chief Justice Roberts and Justice Thomas—have joined majority opinions invoking the exception.<sup>117</sup> Elsewhere, the Court's more liberal Justices—Justices Ginsburg, Breyer, Sotomayor, and Kagan—have embraced the exception as well.<sup>118</sup> And the Court's influential “swing” Justice,<sup>119</sup> Anthony Kennedy, holds the lone distinction of having voted with the exception-invoking majorities in *both Brown & Williamson* and *King*.<sup>120</sup> In the coming months, these Justices will likely welcome Judge Neil Gorsuch to the Court, who recently questioned whether “the time has come to face the behemoth” of *Chevron* in a magisterial concurrence calling for a pointed reconsideration of *Chevron*'s basis under the Administrative Procedure Act (APA) and the Constitution's “deliberate design.”<sup>121</sup> If Judge Gorsuch harbors such fundamental concerns with *Chevron itself*, then it is no stretch to suggest that he

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117 Chief Justice Roberts authored the Court's opinion in *King v. Burwell*, 135 S. Ct. 2480, 2484 (2015), while Justice Thomas joined Justice O'Connor's majority opinion in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000). For what it's worth, the late Justice Scalia joined the latter opinion as well. *Id.* And it is also quite probable that Justice Alito, who was not around for *Brown & Williamson*, would have joined Justices Scalia and Thomas in the *Brown & Williamson* majority if he had had the chance. See Jeremy Bowers et al., *Which Supreme Court Justices Vote Together Most and Least Often*, N.Y. TIMES (July 3, 2014), <http://www.nytimes.com/interactive/2014/06/24/upshot/24up-scotus-agreement-rates.html> (observing that in the four terms preceding the article's publication, Justice Alito agreed with Justices Scalia and Thomas in eighty-six percent and ninety-one percent of cases respectively).

118 Indeed, each of these Justices joined the Chief Justice's majority opinion in *King*, 135 S. Ct. at 2484.

119 See, e.g., Richard J. Lazarus, *Back to “Business” at the Supreme Court: The “Administrative Side” of Chief Justice Roberts*, 129 HARV. L. REV. F. 33, 61 (2015).

120 *King*, 135 S. Ct. at 2484; *Brown & Williamson*, 529 U.S. at 123.

121 See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149, 1150 (10th Cir. 2016) (Gorsuch, J., concurring). In his opening paragraph, Gorsuch calls *Chevron* an “elephant in the room” that “permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate[s] federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design.” *Id.* Gorsuch's criticism coincides with a shift away from *Chevron* that has gathered increasing momentum in recent years. See Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1868 (2015) (“*Chevron*'s condition [is], if not terminal, at least serious.”).

would likely have no qualms invoking the major question exception in certain cases that would otherwise be governed by *Chevron*.<sup>122</sup>

Of course, the vote of any jurist reflects their comprehensive evaluation of the case at hand, and not merely their opinion as to the legal merits of the court’s use of competing doctrines such as the major question exception in reaching its final decision. Admittedly, this fact may cloud whatever signals can be drawn from the Court’s voting patterns in *Brown & Williamson* and *King*.<sup>123</sup>

Still, the fact that the exception has been applied uniformly across ordinary ideological lines offers a strong starting point for the forthcoming constitutional argument—the theoretical impulse for the major question exception is rooted in common ground.

In its chief concern of preserving the separation of powers understood by James Madison and his contemporaries to be so vital,<sup>124</sup> the major question exception seeks a constitutional end the legitimacy and value of which few would deny. When thus viewed as a supplement to a nonexistent nondelegation doctrine, the strength of the imperative behind the exception is clear.

With that in mind, this Part will argue that the attractiveness of the major question exception’s noble objective outweighs the practical difficulties inherent in the task of shaping and enforcing judicially manageable standards and rules for the exception’s future application. First, this Part will briefly highlight the problem the major question exception can help address—namely, a runaway administrative state that has enabled the executive branch to far outgrow its proper role in the constitutional scheme as a result of a weak nondelegation doctrine and broad judicial deference under *Chevron*. Next, this Part will offer a constitutional defense of the major question exception, and will encourage the development of rules and standards that will enable courts to apply the exception in a manner that does not swallow the many positive aspects of the existing rule.

#### A. *Problem: A Weakened Separation of Powers in an Era of Administrative Dominance*

The dominance of administrative agencies in modern American government is virtually irrefutable.<sup>125</sup> In 2015 alone, the *Federal Register* weighed in

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122 Indeed, one who is willing to consider removing the *foundation* of a house (*Chevron* deference in all cases) would be exceedingly unlikely to protest the removal of *certain rooms* from that house (*Chevron* deference in “major question” cases).

123 Perhaps, as some suggest, this sort of tea-leaf reading obscures a more fundamental point that Justices vote “to advance favored policies and to win approval from audiences they care about.” See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1516 (2010). See generally Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

124 See generally, e.g., THE FEDERALIST NO. 51 (James Madison).

125 The Supreme Court has repeatedly acknowledged as much. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010) (plurality opinion)

at 82,035 pages.<sup>126</sup> The final rule that brings that year of regulation to a close provides an illustrative case study. Issued by the Department of Agriculture, the rule sweeps broadly, covering in mind-numbing detail such diverse subjects as Christmas trees,<sup>127</sup> watermelons,<sup>128</sup> popcorn,<sup>129</sup> softwood lumber,<sup>130</sup> and paper-based packaging.<sup>131</sup>

Needless to say, Congress's delegation of this kind of granular policymaking to administrative agencies is good and healthy. It is also constitutional.<sup>132</sup> Congress delegates such authority under heavy practical constraints and in response to several reasonable incentives—chiefly, its prohibitive lack of time and expertise.

Space on the crowded legislative agenda of Congress is precious,<sup>133</sup> and decisions as to the proper application of commodity promotion laws to milk cartons, as in the case study above, are normally undeserving of Congress's limited attention. Equally fundamental to the delegation equation is the fact that even if Congress *did* want to take up such a specific question, it would likely have no idea where to begin in crafting a sensible answer. Indeed, in the paradigmatic arenas of environmental, energy, securities, and drug regulation, rulemakings are the product of exhaustive consideration and extensive legwork by highly skilled specialists that simply overmatch members of Congress and federal judges in technical expertise.<sup>134</sup>

Add to these constraints constant partisan gridlock within a designedly slow legislative process of bicameralism and presentment<sup>135</sup> that precludes Congress from swiftly responding to emerging regulatory issues and ever

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("[T]he Executive Branch . . . wields vast power and touches almost every aspect of daily life . . ."); *Alden v. Maine*, 527 U.S. 706, 807 (1999) ("[T]he administrative state with its reams of regulations would leave [the framers] rubbing their eyes.") (Souter, J., dissenting).

126 Exemption of Organic Products from Assessment Under a Commodity Promotion Law, 80 Fed. Reg. 82,006, 82,035 (Dec. 31, 2015) (to be codified at 7 C.F.R. pts. 900, 1150, 1160, 1205, 1206, 1207, 1208, 1209, 1210, 1212, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1230, 1260, and 1280) (final rule issued in 2015 ending that year's *Federal Register* on page 82,035).

127 *Id.* at 82,028.

128 *Id.* at 82,026–27.

129 *Id.* at 82,028–29.

130 *Id.* at 82,029–30.

131 *Id.* at 82,032–33.

132 *See supra* notes 17–27 and accompanying text.

133 With its long recesses and Fridays off, Congress seldom works in the classic, *Schoolhouse Rock!* sense. *See, e.g.*, John Bresnahan & Seung Min Kim, *Congress Plans Huge Break During Summer 2016*, POLITICO (Nov. 3, 2015), <http://www.politico.com/blogs/the-gavel/2015/11/house-2016-schedule-215476> (noting that for the entire 2016 calendar year, "the House [was] scheduled to be in session for 111 days").

134 The Supreme Court summed up this view in the 1989 case of *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

135 *See* U.S. CONST. art. I, § 7.

changing circumstances, and the affirmative desirability of leaving the details to regulatory agencies becomes readily apparent.<sup>136</sup>

This fact was not lost on Presidents George W. Bush and Barack Obama, who—spurred by a “do-nothing Congress” that stalled much of their agendas<sup>137</sup>—oversaw dramatic rises in the size and scope of the administrative state. After Bush’s vigorous use of executive orders and signing statements stoked deep controversy,<sup>138</sup> Obama doubled down on his predecessor’s reliance on executive agencies after his party was delivered a sharp rebuke in a historic 2010 election that enabled congressional Republicans to thwart much of his agenda during the remaining six years of his presidency.<sup>139</sup> At his wit’s end with Republican opposition in 2014, Obama famously issued the following declaration, foreshadowing the aggressive regulatory approach he would adopt during the final two years of his presidency:

We are not just going to be waiting for legislation in order to make sure that we’re providing Americans the kind of help that they need. *I’ve got a pen, and I’ve got a phone.* And I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward.<sup>140</sup>

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136 These advantages are surely debatable. Indeed, reasonable minds can disagree as to the economic and political value of imposing such far-flung regulations that cost the American economy an estimated \$1.88 trillion in 2014 alone. CLYDE WAYNE CREWS JR., *COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 2* (2015), <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Ten%20Thousand%20Commandments%202016%20-%20May%204%202016.pdf>. This Note sets that discussion aside, assuming *arguendo* that the benefits commonly associated with delegation are indeed beneficial.

137 See, e.g., Lauren French, *Congress Setting New Bar for Doing Nothing*, POLITICO (Mar. 21, 2016), <http://www.politico.com/story/2016/03/congress-supreme-court-budget-do-nothing-221057>; Peter Grier, *Democrats Unrelenting in Oversight of Bush Administration*, CHRISTIAN SCI. MONITOR (Aug. 5, 2008), <http://www.csmonitor.com/USA/Politics/2008/0805/p02s04-uspo.html>.

138 See, e.g., Michael Abramowitz, *Bush’s Tactic of Refusing Laws Is Probed*, WASH. POST (July 24, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/23/AR2006072300511.html> (“A panel of legal scholars and lawyers assembled by the American Bar Association is sharply criticizing the use of ‘signing statements’ by President Bush that assert his right to ignore or not enforce laws passed by Congress.”).

139 See, e.g., Binyamin Appelbaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016), <http://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html> (“Mr. Obama will leave the White House as one of the most prolific authors of major regulations in presidential history.”); Timothy Noah, *Obama Pushing Thousands of New Regulations in Year 8*, POLITICO (Jan. 4, 2016), <http://www.politico.com/agenda/agenda/story/2016/1/obama-regulations-2016> (“Nearly 4,000 regulations are squirming their way through the federal bureaucracy in the last year of Barack Obama’s presidency—many costing industry more than \$100 million—in a mad dash by the White House to push through government actions affecting everything from furnaces to gun sales to Guantánamo.”).

140 Rebecca Kaplan, *Obama: I Will Use My Pen and Phone to Take on Congress*, CBS NEWS (Jan. 14, 2014), <http://www.cbsnews.com/news/obama-i-will-use-my-pen-and-phone-to-take-on-congress/> (emphasis added).

If presidents are tempted to test the bounds of executive authority, it is tough to blame them. But, as the executive branch and the administrative state it oversees grow in boldness, the need for narrow and principled limitations on *Chevron* is heightened. This recognition has motivated certain members of the Supreme Court to take a harder look at *Chevron* in recent years. Chief Justice Roberts, for one, has recognized that “*Chevron* is a powerful weapon in an agency’s regulatory arsenal.”<sup>141</sup> Citing James Madison’s classic observation that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny”<sup>142</sup> in his dissent in *City of Arlington*, the Chief Justice noted that although “[i]t would be a bit much” to suggest that Madison’s fears have yet been realized, “the danger posed by the growing power of the administrative state cannot be dismissed.”<sup>143</sup> In another recent case, Justice Thomas went so far as to suggest that the Court has “come to countenance” “potentially unconstitutional delegations . . . in the name of *Chevron* deference.”<sup>144</sup> Judge Neil Gorsuch seems to agree with Justice Thomas,<sup>145</sup> and will likely join the Court with serious doubts about *Chevron* in tow.<sup>146</sup>

Whatever the depth of these sentiments in the federal judiciary as a whole, it seems increasingly clear that at some point a regulatory question is so big and important that the general calculus we have come to accept under *J.W. Hampton, Jr., & Co. v. United States*<sup>147</sup> and *Chevron* changes. That is to say that, at some point, in deferring to an administrative agency over a statutory ambiguity implicating a policy question of tremendous significance, Congress and federal courts abdicate their respective constitutional duties to make and interpret the law.

As discussed in Part I, the feeble nondelegation doctrine set forth by *J.W. Hampton* and the tremendous deference afforded to agencies under *Chevron* have allowed executive agencies to surpass their counterparts in the legislative branch in practical policymaking power. It seems obvious enough to most that this modern arrangement skirts Article I of the Constitution, which purports in its very first non-prefatory clause to vest “[a]ll legislative Powers . . . in a Congress of the United States.”<sup>148</sup>

Knowledgeable observers of the undeniable reality that executive agencies exercise quasi-legislative powers “*all the time*”<sup>149</sup> fall essentially into three camps. Virtually impossible to find in the corpus of literature are those that

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141 *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).

142 THE FEDERALIST NO. 47, at 271 (James Madison) (ABA 2009).

143 *City of Arlington*, 133 S. Ct. at 1879 (Roberts, C.J., dissenting).

144 *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring in the judgment).

145 See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

146 See *supra* notes 121–22 and accompanying text.

147 276 U.S. 394, 409 (1928).

148 U.S. CONST. art. I, § 1.

149 Thanks to the great Professor William Kelley for this helpful characterization.

either deny outright the constitutionality of any delegation whatsoever,<sup>150</sup> or those who view delegation as so affirmatively desirable as to pose no problem at all. Most observers, then, land somewhere in the middle of these opposing views<sup>151</sup>—acknowledging that delegation has its benefits and is practically necessary, but conceding that it also distorts the text and history of the Constitution to at least some extent and raises constitutional concerns in certain situations.

This middle ground is precisely where a principled major question exception operates. The exception embraced by the Court in *King* is born of a recognition that although the vast majority of run-of-the-mill legal interpretations by agencies fit the reasonable scheme we have adopted quite neatly, some interpretive questions are of such major importance as to belie the notion that Congress has not already attempted to—or would not otherwise make time to—answer the question itself. The task of answering such questions is wholly Congress’s prerogative under Article I of the Constitution.<sup>152</sup> Any executive authority to craft policy details and interpret statutory ambiguity is a gift of Congress, not an entitlement.<sup>153</sup> Indeed, the very basis for *Chevron* deference is the idea that executive agencies are entitled deference where Congress *intends* them to issue binding policy details.<sup>154</sup>

Congressional attempts to rein in executive agencies are largely ineffectual. The once-effective legislative veto has been ruled unconstitutional,<sup>155</sup> and Congress has little appetite for defunding or abolishing agencies that overstep the bounds of their organic statutes. Proposed legislative fixes<sup>156</sup> and other congressional tools such as appropriations riders, budget cuts, and committee subpoenas are often challenging to enact and tend to be of limited utility.<sup>157</sup> By invoking the major question exception, federal courts can

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150 Professor Philip Hamburger, for one, has argued that administrative power “runs outside the law.” See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 6 (2014).

151 Including the Supreme Court’s controlling “intelligible principle” standard. See *J.W. Hampton*, 276 U.S. at 409.

152 See U.S. CONST. art. I, § 1.

153 Indeed, Congress can settle a statutory ambiguity any way it pleases any time it wants. It can also eliminate an agency’s legal authority in the first place by repealing its organic statute—subject to a presidential veto, of course. See *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power on it.”).

154 See *supra* notes 37–39 and accompanying text; see also *United States v. Mead Corp.*, 533 U.S. 218 (2001).

155 See *INS v. Chadha*, 462 U.S. 919, 959 (1983).

156 See, e.g., Regulatory Accountability Act of 2017, H.R. 5, 115th Congress (2017) (ambitious bill combining a handful of regulatory reforms sought by House Republicans in prior Congresses); Regulations From the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Congress (2017) (bill requiring joint resolution of approval before any “major rule” may take effect and defining as “major” any rule “likely to result in . . . an annual effect on the economy of \$100,000,000 or more” or likely to be sufficiently significant according to other specified criteria).

157 Consider, for example, the treacherous journey to enactment faced by the House’s latest attempt at regulatory reform—even in a relatively friendly political environment.

save Congress the trouble of exercising the limited tools at its disposal in order to check agencies.

*B. Solution: A Judicially Manageable Major Question Exception*

While a robust major question exception is far from the only practical mechanism for curbing the aforementioned administrative excesses, it is among the best for two primary reasons: first, its effectiveness is not handicapped by the shortcomings of the foregoing congressional powers; and second, if applied correctly, it affects only those rare agency statutory interpretations that a reviewing court deems sufficiently important to trigger the exception.

Before proceeding, however, an initial concession is in order. A primary concern with *any* exception to a background rule like *Chevron* is the exception's tendency to diminish the strength and consistency of the rule.<sup>158</sup> This understanding animated Justice Scalia's consistent aversion to standards,<sup>159</sup>

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Although the Regulatory Accountability Act of 2017 successfully passed the House only eight days into the 115th Congress, it must now confront a Senate where a pitched battle over President Donald Trump's replacement of Justice Scalia looms large, and where a crushing backlog of judicial nominations is almost sure to dominate the law-related agenda for at least some time. *See, e.g.*, Bill Mears, *Judging Trump: Supreme Court Choice on President-Elect's Immediate Agenda*, FOX NEWS (Nov. 24, 2016), <http://www.foxnews.com/politics/2016/11/24/judging-trump-supreme-court-choice-on-president-elects-immediate-agenda.html>; Philip Rucker & Robert Barnes, *Trump to Inherit More than 100 Court Vacancies, Plans to Reshape Judiciary*, WASH. POST (Dec. 25, 2016), [https://www.washingtonpost.com/politics/trump-to-inherit-more-than-100-court-vacancies-plans-to-reshape-judiciary/2016/12/25/d190dd18-c928-11e6-85b5-76616a33048d\\_story.html](https://www.washingtonpost.com/politics/trump-to-inherit-more-than-100-court-vacancies-plans-to-reshape-judiciary/2016/12/25/d190dd18-c928-11e6-85b5-76616a33048d_story.html) ("The estimated 103 judicial vacancies that President Obama is expected to hand over to Trump in the Jan. 20 transition of power is nearly double the 54 openings Obama found eight years ago"). Where regulatory reform ranks among the wide-ranging priorities of congressional leadership is another question mark, and it remains to be seen how Trump might respond if presented with a bill whose unhidden purpose is to step on his branch's toes by impeding the regulatory agendas of his and future administrations. *See, e.g.*, David Weigel, *Claiming Mandate, GOP Congress Lays Plans to Propel Sweeping Conservative Agenda*, WASH. POST (Jan. 1, 2017), [https://www.washingtonpost.com/politics/claiming-mandate-gop-congress-lays-plans-to-propel-sweeping-conservative-agenda/2017/01/01/9840338a-ceee-11e6-b8a2-8c2a61b0436f\\_story.html](https://www.washingtonpost.com/politics/claiming-mandate-gop-congress-lays-plans-to-propel-sweeping-conservative-agenda/2017/01/01/9840338a-ceee-11e6-b8a2-8c2a61b0436f_story.html). Of course, Senate Democrats may use the filibuster to prevent a vote on the bill in the first place. *See id.* ("[N]one [of the GOP's regulatory reform agenda] has much buy-in from Democrats. Just one rural Democrat in the 115th Congress . . . voted for [a similar bill taken up by the 114th Congress]."). Or the bill may die on its merits in the Senate regardless. *Id.* This Note takes no position on the merits of this legislation, but assumes *arguendo* that the enormous challenge of successfully aligning this unpredictable collection of moving parts will thwart any attempts to alter the modern legal landscape in which *Chevron* continues to reign supreme as discussed in Part I.

158 *See generally* Scalia, *supra* note 48.

159 *See id.*; *see also* Crawford v. Washington, 541 U.S. 36, 68 (2004) ("Vague standards are manipulable.").

balancing tests,<sup>160</sup> case-by-case inquiries,<sup>161</sup> and unconstrained judicial discretion.<sup>162</sup> This core philosophy also motivated Justice Scalia’s opposition to rulings that muddled *Chevron*’s firm and simple two-step inquiry.<sup>163</sup>

The major question exception is not immune to this drawback. Its existence invites judicial discretion. But this Note contends that such discretion can be exercised—as it is in innumerable other places in the law—in a judicially manageable way, and that any uncertainty accompanying such discretion is welcome in comparison to the alternative of an administrative state that will only continue to increase in size and aggressiveness.<sup>164</sup> The more we come to rely on regulation, the harder it is to rid ourselves of such regulation.<sup>165</sup> And as the regulatory footprint of the federal bureaucracy expands to an unprecedented level<sup>166</sup> (and as presidents become increasingly aggressive in deploying executive power to fundamentally reshape major areas of federal policy),<sup>167</sup> the need to remember Article I’s Vesting Clause is as great

160 See, e.g., *Morrison v. Olson*, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) (“The Court has . . . replaced the clear constitutional prescription that the executive power belongs to the President with a ‘balancing test.’”).

161 See, e.g., *O’Connor v. Ortega*, 480 U.S. 709, 730 (1987) (Scalia, J., concurring in the judgment) (“[T]his court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances.” (quoting *Oliver v. United States*, 466 U.S. 170, 181 (1984) (internal quotation marks omitted))).

162 See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting) (“The ‘congruence and proportionality’ standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking.”); *Crawford*, 541 U.S. at 67 (“The Framers . . . were loath to leave too much discretion in judicial hands.” (first citing U.S. CONST. amend. VI (criminal jury trial); then citing U.S. CONST. amend. VII (civil jury trial); and then citing *Ring v. Arizona*, 536 U.S. 584, 611–12 (2002) (Scalia, J., concurring))).

163 See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 352 (1994) (“Although *Chevron* itself was decided before Justice Scalia joined the Court, he has long been perceived as the Court’s most enthusiastic partisan of the two-step method associated with the decision.” (citing Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1663 (1991) (“Justice Scalia is a fierce, sometimes strident defender of *Chevron*.”))). There is, however, some evidence that Scalia had begun to rethink *Chevron* before his death. See, e.g., John F. Manning, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 1, 16 n.29 (“In those days, Justice Scalia was very keen on the *Chevron* doctrine.” (emphasis added) (citing Scalia, *supra* note 38, at 516–17)).

164 Here, a familiar aphorism comes to mind—the perfect is the enemy of good. “Striving to better, oft we mar what’s well.” WILLIAM SHAKESPEARE, *KING LEAR* act 1, sc. 4, l.23 (Burton Raffel ed., Yale Univ. Press 2007).

165 This may explain the Supreme Court’s constant willingness to “steadfastly [find] intelligible principles where less discerning readers find gibberish.” Lawson, *supra* note 14, at 329.

166 See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (“[T]he federal bureaucracy continues to grow; in the last 15 years, Congress has launched more than 50 new agencies.”).

167 President Obama’s unilateral immigration decrees are perhaps the clearest example of this modern phenomenon. See, e.g., DAPA Memo, *supra* note 112; DACA Memo, *supra*

as ever. A candid recognition that the modern administrative state stresses the separation of powers and federal structure is neither novel nor controversial, and is not inconsistent with the practical acceptance that, in a great majority of ordinary cases, regulation is vital and constitutionally appropriate.

Thus, this Note proposes the following framework. Where typical statutory ambiguities are at issue, deference should be widely available to agencies subject only to the pair of low hurdles already in place: (1) *J.W. Hampton's* requirement that the statute from which the agency gleans its authority guide the agency with a sufficiently "intelligible principle,"<sup>168</sup> and (2) *Chevron's* requirement that the agency adopt a reasonable interpretation of a statutory provision that is, in fact, ambiguous.<sup>169</sup> However, where an agency's resolution of a statutory ambiguity implicates a policy decision of "deep 'economic and political significance,'"<sup>170</sup> reviewing courts should confidently withhold *Chevron* deference as the Court did in *King v. Burwell*.<sup>171</sup>

This approach takes a significant step toward restoring the separation of powers envisioned by the framers, and does not depart from the sound theoretical underpinnings of *Chevron*—what Congress says goes, and where Congress has spoken<sup>172</sup> or presumably would have spoken had it foreseen the statutory ambiguity at issue,<sup>173</sup> its intent (like its lawmaking authority) is supreme.

For the following reasons, this Note contends that the task of effectuating such intent is best lodged in federal courts. The first reason is practical—courts are simply better than agencies at interpreting ambiguous statutory

note 113. A top priority of congressional Republicans and the new Trump Administration will be to unwind Obama-era regulations, after the outgoing president laid hundreds of "midnight" rules in place. See, e.g., Midnight Rules Relief Act of 2017, H.R. 21, 115th Congress (2017); John T. Bennett, *GOP Mostly Powerless in Stopping Obama 'Midnight' Regulations*, ROLL CALL (Sept. 19, 2016), <http://www.rollcall.com/news/politics/gop-mostly-powerless-stopping-obama-midnight-regulations>; Dave Boyer, *Republicans Prepare to Repeal Regulations as Obama Racks Up Record*, WASH. TIMES (Nov. 21, 2016), <http://www.washingtontimes.com/news/2016/nov/21/obama-regulation-repeal-in-works/>; Alexis Simendinger, *Obama: Busy with His Pen to the End*, REAL CLEAR POLITICS (Dec. 30, 2016), [http://www.realclearpolitics.com/articles/2016/12/30/obama\\_busy\\_with\\_his\\_pen\\_to\\_the\\_end\\_132681.html](http://www.realclearpolitics.com/articles/2016/12/30/obama_busy_with_his_pen_to_the_end_132681.html).

168 *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

169 *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

170 *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). Although it will admittedly behoove Congress and the Supreme Court to make this trigger less "vague and difficult to administer," such clarification is to be expected in due time. See Note, *The Rise of Purposivism and the Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1239 (2017).

171 *King*, 135 S. Ct. at 2489.

172 See *Chevron*, 467 U.S. at 842–43.

173 See *King*, 135 S. Ct. at 2489 ("[H]ad Congress wished to assign [a major question] to an agency, it surely would have done so expressly." (citing *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014))); see also Breyer, *supra* note 37, at 370 ("Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").

provisions. The second is theoretical—since Congress orders federal courts to review agency actions under the Administrative Procedure Act<sup>174</sup> anyway, encouraging courts to resolve major questions of law adheres to Congress’s original template for the maintenance of a workable administrative state. And the third is structural—assigning courts the task of interpreting such ambiguities allows courts to fulfill their proper role within our constitutional structure.

### 1. Courts Are Better Equipped to Effectively Ascertain and Effectuate Congressional Intent

*Chevron* Step One instructs reviewing courts to “employ[ ] traditional tools of statutory construction” in determining whether an agency’s interpretation is “contrary to clear congressional intent.”<sup>175</sup> This approach follows the “conventional” view<sup>176</sup> that the essential task of statutory interpretation is to “act as Congress’s faithful agent” by striving “to implement the commands of the legislature.”<sup>177</sup> Consequently, determining which of Congress’s coordinate branches is best qualified to be its most faithful agent is critical.

The major question exception, as applied in *King*, asserts that federal courts—rather than agencies—ought to interpret and enforce congressional intent where an implied delegation of interpretive authority to an agency is unclear given the size and nature of the policy question at issue. This approach is legally sound and does not upset “[t]he conventional wisdom” that agency specialization accords agencies “greater ‘expertise’ than courts in figuring out instrumental applications [of ambiguous organic statutes],”<sup>178</sup> because any reasonable agency interpretation of a routine statutory ambiguity for which an implicit delegation on the part of Congress is clear remains entitled to *Chevron* deference. Indeed, only where truly major questions are involved does the judiciary’s comparative advantage in statutory interpretation come into play. For support of this proposition, we need only circle back to the theoretical foundation of the major question exception—where a question is so large as to undercut the threshold finding that Congress would tolerate ceding its ultimate authority to resolve the question to an executive agency, whatever advantage the agency enjoys in expertise and experience in the policy area is irrelevant because Congress retains the final say under Article I.

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174 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

175 *Chevron*, 467 U.S. at 843 n.9.

176 Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010). The view that “federal courts function as the faithful agents of Congress is a conventional one” because Article I assigns exclusive lawmaking authority to Congress. *Id.*

177 Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1502 (2006).

178 See William N. Eskridge, Jr., *Expanding Chevron’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 421.

Because of its aforementioned practical constraints, Congress must often rely on a faithful agent to allow it that “final say” by discerning and enforcing its statutory meaning. There are at least two strong practical reasons for concluding that federal courts are better equipped to provide such a service to Congress.

First, while administrative agencies are staffed primarily by technocrats and bureaucrats, federal courts are staffed by experienced judges and talented law clerks.<sup>179</sup> Second, federal courts are better practiced in the art of statutory interpretation, as they are confronted with statutory ambiguities on a far more regular basis. Compare, for instance, the relative *Chevron*-related workloads of the EPA—one of the administrative state’s most prolific rule issuers—and the D.C. Circuit—the federal court of appeals most frequently charged with reviewing federal regulations. Over the past three years, the EPA has been party to only twelve of the seventy-seven cases in which the D.C. Circuit cited *Chevron*.<sup>180</sup> This discrepancy stems from the fact that while the EPA is responsible for resolving ambiguities in only the small handful of organic statutes relevant to its mandate, the D.C. Circuit is responsible for assessing the reasonableness of statutory interpretations in a far broader range of scenarios.

This edge in legal talent and interpretive experience accords federal courts a comparative advantage over agencies in ascertaining and effectuating congressional intent. Congress’s ability to cede interpretive authority to federal agencies is without question, but where a question is so major that such an intent cannot be clearly imputed to Congress, one of Congress’s coordinate branches must step in to faithfully interpret its work. Courts are best equipped to do so, and the major question exception empowers them to do just that. By acknowledging its comparative advantage in statutory interpretation and reserving its constitutional authority to interpret highly important statutory ambiguities under its ultimate authority to “say what the law is,”<sup>181</sup> the federal judiciary can ensure that the very best reading of Congress’s work is elucidated when interpretive questions of extraordinary economic and political significance arise.

## 2. The APA Mandates Judicial Review of Agency Action

*Chevron* deference has always had an uneasy relationship with the Administrative Procedure Act,<sup>182</sup> which provides that: “To the extent neces-

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179 See, e.g., Ruggero J. Aldisert et al., *Rat Race: An Insider’s Guide on Landing Judicial Clerkships*, 110 PENN ST. L. REV. 835, 838 (2006) (“[C]lerkships are extremely competitive. Applicants are competing against hundreds of other top students from law schools across the country.”).

180 Westlaw search, Feb. 2017.

181 See U.S. CONST. art. III; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

182 Judge Gorsuch’s concurrence in *Gutierrez-Brizuela v. Lynch* brings this tension into clear relief. See 834 F.3d 1142, 1152–53 (10th Cir. 2016) (Gorsuch, J., concurring) (observing the “riddle” in which courts “are not fulfilling [the] duty” “expressly assigned to them by the APA and . . . often . . . compelled by the Constitution itself” “to interpret the law”).

sary to decision and when presented, the reviewing court shall decide all relevant questions of law, [and] . . . interpret . . . statutory provisions.”<sup>183</sup> Thus, statutes “would seem to be bound by Congress vesting ultimate interpretive authority in the reviewing court, unless the statute explicitly specified that the agency was to have such authority.”<sup>184</sup> Because “[v]irtually no statutes do so,”<sup>185</sup> the Supreme Court has been forced to reconcile the apparent inconsistency between *Chevron*’s command to reviewing courts to defer to reasonable agency interpretations of genuine statutory ambiguities and APA section 706’s command to reviewing courts to “decide all relevant questions of law.”<sup>186</sup>

The Supreme Court offered its most explicit explanation in *United States v. Mead Corp.*<sup>187</sup> Chief Justice Roberts summed up the Court’s reasoning in that case in his *City of Arlington* dissent: “We do not ignore [the APA’s] command when we afford an agency’s statutory interpretation *Chevron* deference; we respect it. We give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities ‘with the force of law.’”<sup>188</sup> Another prominent conceptualization asserts that *Chevron* Step Two is “nothing more than standard arbitrary and capricious review” as mandated by section 706(2)(a) of the APA.<sup>189</sup>

Whatever the strength of these explanations,<sup>190</sup> the continued vitality of the APA nevertheless suggests that Congress envisions federal courts playing a substantial role in confining delegated administrative power. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>191</sup> and showed through a “combined use of *Skidmore* deference, the APA’s substantial-evidence standard, and oblique references to *Chevron* in the same statutory section” that it “is not troubled by *Chevron*’s apparent inconsis-

183 5 U.S.C. § 706 (2012).

184 Mark Seidenfeld, *Chevron’s Foundation*, 86 NOTRE DAME L. REV. 273, 278–79 (2011).

185 *Id.* at 279.

186 *Compare* *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984), *with* 5 U.S.C. § 706.

187 533 U.S. 218 (2001).

188 *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting) (quoting *Mead*, 533 U.S. at 229) (citing Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 27–28 (1983) (“[T]he court is not abdicating its constitutional duty to ‘say what the law is’ by deferring to agency interpretations of law: it is simply applying the law as ‘made’ by the authorized law-making entity.”)).

189 Stephenson & Vermeule, *supra* note 30, at 604 n.28 (citing Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1296 (1997)). For a more thorough summary of this view by a prominent commentator, see Gary S. Lawson, *Reconceptualizing Chevron and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377, 1377–80 (1997).

190 Numerous commentators have argued that *Chevron* deference contravenes the APA’s judicial review provisions. *See, e.g.*, John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–99 (1998).

191 Pub. L. No. 111-203, 124 Stat. 1376 (2010).

tency with the APA.”<sup>192</sup> Congress’s decision to tolerate the ongoing coexistence of *Chevron*, *Skidmore*, and the APA’s judicial review provisions indicates that Congress wants both of its coordinate branches to help resolve ambiguities in its work product.<sup>193</sup>

The major question exception accommodates this apparent goal of Congress by calling on courts to supersede interpretive authority delegated to the executive only where the interpretive question at issue is of such a major nature as to undermine the threshold finding that Congress intended to make such a delegation in the first place. Given Congress’s continued reliance on the APA’s judicial review framework—and its modern re-visitation of the issue in Dodd-Frank—it is clear that federal courts have at least some role to play in resolving statutory ambiguities. Urging courts to intervene where such a resolution is sure to effect a major change in federal policy furthers this congressional goal and provides Congress its best chance at having its intent with the provision at issue enforced without having to subsequently resort to amending an interpretation with which it disagrees. The competing suggestion that administrative agencies have *exclusive* authority to resolve all statutory ambiguities subject only to *Chevron*’s lax requirements<sup>194</sup> is a far more difficult case to make in light of the APA.<sup>195</sup>

192 Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 7 (2015); see 12 U.S.C. § 25b (2012).

193 If anything, Congress’s approach in Dodd-Frank solidifies the executive branch’s role in the interpretive process, as it explicitly declares a congressional intent to delegate interpretive authority to agencies where such authority has long been thought to rest on a “legal fiction” of such congressional intent. See Barnett, *supra* note 192, at 7 n.25. Regardless, with respect to a vast majority of the broad range of current organic statutes enacted prior to Dodd-Frank, such authority is still premised on a legal fiction. See, e.g., David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212 (acknowledging that “Congress . . . rarely makes its intentions about deference clear”); Seidenfeld, *supra* note 184, at 278 (observing similarly that “Congress does not directly address the question of which institution—agency or court—is authorized to fill gaps or resolve ambiguities in the vast majority of regulatory statutes”).

194 Under *Chevron*, a reviewing court “need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.11 (1984) (first citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981); then citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); then citing *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 75 (1975); then citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965); then citing *Unemployment Comp. Comm’n v. Aragon*, 329 U.S. 143, 153–54 (1946); and then citing *McLaren v. Fleischer*, 256 U.S. 477, 480–81 (1921)). Instead, the court must conclude that the agency’s interpretation was merely one of a handful of reasonable interpretations. See *id.* This is a low bar for agencies to clear. See Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2588 (2006) (“*Chevron* means that courts must uphold reasonable agency interpretations even if they would reject those interpretations on their own.”).

195 See generally Duffy, *supra* note 190.

### 3. Historical Practice and Constitutional Structure Encourage Courts to Assume Interpretive Authority over Questions of Extraordinary Significance

In his dissent in *City of Arlington*, Chief Justice Roberts offered a helpful reminder of the federal judiciary’s proper role in *Chevron* cases.<sup>196</sup> Building off his most famous predecessor’s declaration that “[i]t is emphatically the province and duty of the judicial department to say what the law is,”<sup>197</sup> Roberts framed the core principle that animates the major question exception:

A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference. Courts defer to an agency’s interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.<sup>198</sup>

The framers carefully designed the Constitution’s structure under an ever-present understanding that centralized power is the enemy of liberty.<sup>199</sup> Just as the framers “deci[ded] that the legislative power of the Federal government [must] be exercised in accord with a single, finely wrought and exhaustively considered, procedure,”<sup>200</sup> their design of the Constitution compels the judiciary to carefully “guard its role”<sup>201</sup> as “the final arbiter of the meaning of the Constitution.”<sup>202</sup> The major question exception offers federal courts a tangible and manageable vehicle for doing so.

Former House Speaker John Boehner was right to warn that “[i]f [President Obama] can get away with making his own laws, future presidents will have the ability to as well.” His reminder that “[t]he House has an obligation to stand up for the Constitution” was equally correct,<sup>203</sup> but federal courts bear such an obligation as well. Several commentators have suggested that

196 See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877–86 (2013) (Roberts, C.J., dissenting).

197 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J., majority opinion).

198 *City of Arlington*, 133 S. Ct. at 1877 (Roberts, C.J., dissenting).

199 See generally 1 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* (Thomas Nugent trans., Colonial Press rev. ed. 1900) (1748) (warning against the tendency of the legislative and executive powers to blend in republican governments); see also Matthew P. Bergman, *Montesquieu’s Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1, 18 (1990) (observing Montesquieu’s tremendous influence over the American Founders).

200 *INS v. Chadha*, 462 U.S. 919, 951 (1983).

201 Donald J. Kochan, Note, *Constitutional Structure as a Limitation on the Scope of the “Law of Nations” in the Alien Tort Claims Act*, 31 CORNELL INT’L L.J. 153, 154 (1998).

202 Andrew T. Bond, Note, *Parting the Chevron Sea: An Argument for Chevron’s Greater Applicability to Cabinet than Independent Agencies*, 90 NOTRE DAME L. REV. 397, 408 (2014).

203 Elise Viebeck, *House Republicans Sue President Obama*, HILL (Nov. 21, 2014), <http://thehill.com/policy/healthcare/224992-house-republicans-file-suit-against-obama>. Of course, this view is dearly held on both sides of the aisle, and the same must be said for *all* presidents.

*Chevron* deference contravenes *Marbury* and entails an unlawful abdication of this duty.<sup>204</sup> This Note makes no such contention—where the “resolution of statutory ambiguities requires . . . resolving ‘competing interests,’”<sup>205</sup> the executive’s political accountability and comparative advantage in technical expertise generally justifies the judiciary’s deference to its judgment.<sup>206</sup>

The major question exception acknowledges the functional wisdom behind congressional delegation and *Chevron* deference and does not undermine *Chevron* in the vast run of cases. It does, however, propose that in some cases of a truly extraordinary nature Congress would not—or at least should not—stomach such a delegation.

But might this discussion shroud a more fundamental point? Perhaps some interpretive questions may not legitimately be left to the executive in the first instance due to the sheer national significance of the policy decisions their resolution will entail. This suggestion has several analogues in constitutional law. The political question doctrine<sup>207</sup> and the various protections of certain executive officers from congressional removal<sup>208</sup> are but a few.

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204 See, e.g., Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2637 (2003) (“*Chevron*’s command to courts to defer to certain reasonable agency interpretations of statutes is superficially an uneasy fit with [*Marbury*].” (citations omitted)); Harold M. Greenberg, *Why Agency Interpretations of Ambiguous Statutes Should Be Subject to Stare Decisis*, 79 TENN. L. REV. 573, 604 (2012) (acknowledging that “the coexistence of the *Chevron* and *Marbury* conventions [may be] . . . problematic.” (citations omitted)); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1262 (2002) (“The concern among scholars and judges that *Chevron* may have gone too far in relinquishing judicial authority . . . may be motivated in part by an underlying sense that *Chevron*’s surrender of power is at odds with *Marbury* . . . .” (citations omitted)); Rossi, *supra* note 58, at 1108 (“*Chevron* . . . has taken on canonical status as the ‘counter-*Marbury*.’” (citations omitted)); Sunstein, *supra* note 194, at 2589 (“*Chevron* is properly understood as a kind of counter-*Marbury* for the administrative state.”). See generally Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986).

205 See Sunstein, *supra* note 194, at 2587.

206 See *id.* at 2587–88; see also Bond, *supra* note 202, at 408 (“[T]he proper way to view *Chevron*[ ] . . . is to contextualize the case as one that upheld the judiciary’s power to say what the law is (but to cabin its ability to draft judicial legislation and policy).”).

207 See *Baker v. Carr*, 369 U.S. 186, 211 (1962) (holding that where “a matter has . . . been committed by the Constitution to another branch of government” it is a nonjusticiable political question); see also *Nixon v. United States*, 506 U.S. 224, 252–53 (1993) (Souter, J., concurring) (“[T]he political question doctrine is ‘essentially a function of the separation of powers’ . . . existing to restrain courts ‘from inappropriate interference in the business of the other branches of Government.’” (first quoting *Baker*, 369 U.S. at 217; and then quoting *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990))).

208 See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496 (2010) (holding that multi-layer for-cause removal protections imposed by Congress contravened “Article II’s vesting of the executive power in the President”); *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988) (acknowledging that the critical issue in removal cases is determining whether “Congress [has] interfere[d] with the President’s exercise of the

This Note raises this possibility purely for the sake of argument, as its assertion invites an illustrative rejoinder: If a policy choice is so important that Congress cannot vest its resolution in the *executive* branch, then why should the *judicial* branch claim the authority to make such a policy choice in selecting an interpretation of the ambiguous provision at issue? The simplest answer is that federal judges are not exercising policymaking power when they invoke the major question exception, but are instead allowing (or requiring) *Congress* to make the relevant policy choice by faithfully interpreting the ambiguous language at issue in a way that best suits Congress's intent and meaning.<sup>209</sup>

Given the Court's habit of upholding congressional delegations of practically *any* "intelligib[ility],"<sup>210</sup> ambiguous statutory provisions abound.<sup>211</sup> In the face of such ambiguity, Congress needs another branch to function as its handmaiden in statutory interpretation. Most commonly, Congress invites the executive to perform this task.<sup>212</sup> This frequent arrangement brings myriad functional benefits, but places commensurate strain on the balance and separation of federal powers. For its part, *Chevron* fosters deeper imbalance among the branches by affording agencies even greater leeway in federal policymaking.<sup>213</sup> The federal judiciary has a constitutional duty to ease such disparities, and the major question exception provides an effective and (relatively) undisruptive mechanism for doing so.

But this raises a final concern: Does the exception grant judges undue discretion to overturn reasonable agency interpretations under the guise of "majorness?"<sup>214</sup> Acknowledging that this difficulty is probably unavoidable,

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'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II").

209 This argument relies on this Note's prior assertion that federal courts are better than agencies at "using dictionaries, consulting statutory structure, deploying canons of construction, [and/or] relying on legislative history" in order to correctly resolve statutory ambiguities. Sunstein, *supra* note 194, at 2587. *But see id.* at 2582 (arguing that "[t]here is no reason to believe that in the face of statutory ambiguity, the meaning of federal law should be settled by the inclinations and predispositions of federal judges.>").

210 See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *supra* notes 17–25 and accompanying text.

211 Cf. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (book review) ("Several substantive principles of interpretation—such as constitutional avoidance, use of legislative history, and *Chevron*—depend on an initial determination of whether a text is clear or ambiguous.>").

212 See *supra* Part I.

213 See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) ("[*Chevron*] certainly seems to have added prodigious new powers to an already titanic administrative state.>").

214 Justice Scalia would likely be first in line to raise this concern. See *supra* notes 159–63 and accompanying text. I take heart, however, in the fact that Scalia also sounded the alarm that the administrative state *of nearly three decades ago* posed a grave threat to American government, for "in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous." *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting); see also Manning, *supra* note 163.

this Note contends that the ends of working to preserve the separation of powers justify the means of furnishing judges with the kind of discretion that may enable occasional arbitrariness and capriciousness.

Judicial discretion is present in a bevy of areas in the law,<sup>215</sup> most notably in the law of civil procedure, which provides the very cornerstone of civil litigation.<sup>216</sup> Federal judges routinely manage such discretion in a responsible manner and can do likewise with *King's* major question exception. Courts can also be counted on to develop doctrines to guide future applications of the major question exception as they are presented with more cases like *Brown & Williamson* and *King*.<sup>217</sup> If we doubt their ability to do so, Article III and Chief Justice Marshall's timeless words in *Marbury* should ease these worries, for if federal courts have any constitutional role, it is to interpret and declare the meaning of the law.<sup>218</sup>

Congress also has an important role to play, as it may legislate a bright-line rule for distinguishing 'major' questions from 'nonmajor' ones. It can also overturn statutory interpretations with which it disagrees,<sup>219</sup> and often has in the past.<sup>220</sup> In fact, even *erroneous* interpretations by reviewing courts in major question cases will generate a positive byproduct, forcing Congress to take up the important policy question itself as the branch vested with

215 Justice Frankfurter once observed the inescapable nature of judicial discretion. See *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 489 (1951) ("There are no talismanic words that can avoid the process of judgment. . . . [W]e cannot escape . . . the use of undefined defining terms.").

216 See, e.g., Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2198 (1989) ("While only ten of the 86 [Federal Rules of Civil Procedure] use [ ] the term discretion explicitly, the courts of appeals soon identified at least forty rules that were thought to repose discretion in the district court." (citing Maurice Rosenberg, *Judicial Discretion of the Trial Court Viewed from Above*, 22 SYRACUSE L. REV. 635, 655 (1971))).

217 The clear-statement rule announced in another recent case provides an initial example of the kind of standards courts can draw. See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000))).

218 Additional comfort for those skittish to vest such discretion in federal courts can be drawn from the general agreement among federal judges with Justice Thomas's following description of the judicial role. See *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) ("[T]he law before the Court today 'is . . . uncommonly silly' . . . [and] [i]f I were a member of the Texas Legislature, I would vote to repeal it. . . . Notwithstanding this, I recognize that as a Member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to 'decide cases "agreeably to the Constitution and laws of the United States.'" (quoting *Griswold v. Connecticut*, 381 U.S. 479, 530 (1965) (Stewart, J., dissenting))).

219 See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) ("In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes."), *superseded by statute as stated in Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

220 See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

exclusive legislative authority<sup>221</sup> and the branch most politically accountable to the people.<sup>222</sup>

The particular contours of these practical solutions are for courts and Congress to develop, but in any case, the major question exception’s positive impact on the separation of powers is alone sufficient to justify a reinvigorated reliance on the exception in the aftermath of *King*. Here again, increased acceptance of the exception may offer the solution, for as the exception is invoked more frequently, Congress and the Supreme Court will be compelled to curb the judicial discretion inherent in the triggering phrase “deep ‘economic and political significance’”<sup>223</sup> by laying down legislative markers, hard dollar amounts, clarifying dicta, and the like.

#### CONCLUSION

Congress’s surrender of much of its legislative authority to the bloated modern administrative state has, in the words of Justice Scalia, created “a sort of junior-varsity Congress”<sup>224</sup> that imperils the separation of powers. As Congress’s dependence on executive agencies deepens, so too does an ever-growing stream of regulations that reshape American policy in a manner that the framers deemed best left to the legislature.<sup>225</sup> With increasing regularity, Congress and the federal judiciary have also begun to accommodate the executive’s desire to enact broad and sweeping changes to the economic and political landscape *unilaterally*.<sup>226</sup> These modern developments underscore

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221 U.S. CONST. art. I, § 1.

222 Consider, for instance, the following real-life example. Should federal tax credits be extended to residents of states that have declined to establish health insurance exchanges? Congress can and should answer this major question itself if a reviewing court is unable to do so effectively in its interpretation of whatever language Congress has already put on the books with respect to the issue. See *King v. Burwell*, 135 S. Ct. 2480 (2015).

223 *Id.* at 2489 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

224 *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

225 See, e.g., THE FEDERALIST NO. 51, at 294 (James Madison) (ABA 2009) (“In republican government, the legislative authority necessarily predominates.”).

226 Congressional decisions like that of House Republicans to sue the Obama Administration over President Obama’s extensive unilateral immigration actions are few and far between, and are often met with harsh criticism. See David G. Savage, *Judge Allows Unusual House GOP Lawsuit Against President to Proceed*, L.A. TIMES (Sept. 9, 2015), <http://www.latimes.com/nation/la-na-obamacare-gop-lawsuit-20150909-story.html> (“Many lawyers saw the House suit as unprecedented.”); Elise Viebeck, *House Republicans Sue President Obama*, HILL (Nov. 21, 2014), <http://thehill.com/policy/healthcare/224992-house-republicans-file-suit-against-obama>. While agencies have always—appropriately in most situations—borne the political character of the incumbent administration, they are beginning to reflect the hyper-partisanship and -politicization of the rest of the modern political world with increasing regularity. Then-Justice Rehnquist candidly recognized the tendency of agencies to behave politically in 1983. See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (“The agency’s changed view . . . seems to be related to the election of a

the need for federal courts to reassert their constitutional authority to check the power of administrative agencies—even in some cases that would initially appear to fall within the sacred “domain” of *Chevron*.<sup>227</sup>

While gradual refinement of its triggering phrase is admittedly necessary, the Supreme Court’s most recent iteration of the exception in *King v. Burwell*<sup>228</sup> provides an ideal mechanism for doing so. Where a statutory ambiguity creates a policy question of “deep ‘economic and political significance,’”<sup>229</sup> reviewing courts should refrain from granting agency interpretations *Chevron* deference in the absence of a threshold determination that Congress has delegated the resolution of such a question to the agency (absent a textual suggestion to the contrary). *Chevron* deference is predicated on such a delegation,<sup>230</sup> and is not warranted where the ambiguous language at issue suggests to a reviewing court that Congress would prefer to answer the question itself. Answering such policy questions is Congress’s constitutional role, and preserving the Constitution’s careful separation of powers is the judiciary’s. *King v. Burwell*’s version of the major question exception provides federal courts a major opportunity to fulfill this constitutional duty.

A look at the exception’s unsatisfying alternatives reveals its beauty. While a wholesale rejection of the exception would promise the executive even greater leeway in selecting interpretations that alter American policy in a fundamental way, a wholesale rejection of *Chevron* would at best cause the sort of stare decisis turmoil inevitably provoked by the fall of a case of *Chevron*’s exceptional influence,<sup>231</sup> and would at worst throw the baby—the countless ordinary agency statutory interpretations that have long been deemed constitutional and essential to modern governance<sup>232</sup>—out with the

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new President of a different political party.”). Rehnquist subsequently observed that “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations,” but it is certainly debatable whether resolutions of statutory ambiguities entailing policy decisions of extraordinarily high stakes are better left to Congress and courts as Congress’s faithful agents. *Id.* This Note argues as much.

227 *King v. Burwell* was such a case. See *King v. Burwell*, 759 F.3d 358, 375 (4th Cir. 2014) (affording IRS’s interpretation *Chevron* deference); *Halbig v. Burwell*, 758 F.3d 390, 402 (D.C. Cir. 2014) (analyzing the provision at issue under the *Chevron* framework but withholding deference from IRS’s interpretation because “the meaning of section 36B appears plain”).

228 135 S. Ct. 2480 (2015).

229 *Id.* at 2489 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

230 See *id.*; Sunstein, *supra* note 16, at 192, 198 (“Courts defer to agency interpretations of law when, and because, Congress has told them to do so.”).

231 See Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1463–68 (2013) (recounting various theoretical justifications of stare decisis).

232 As on prior occasions, this Note assumes *arguendo* that the modern arrangement under *Chevron* is indeed a practical necessity. As Judge Gorsuch has suggested, life would surely go on without *Chevron*. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th

bathwater. The major question exception resides in the palatable middle ground between these uncomfortable extremes, and federal courts should apply it confidently in the future.

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Cir. 2016) (Gorsuch, J., concurring) (“We managed to live with the administrative state before *Chevron*. We could do it again.”).

