South Dakota Law Review

Volume 69 | Issue 1

2024

Reinvigorating Congress's Role in the Administrative State: What the Major Questions Doctrine Suggests About Nondelegation

Sidney J. Hardy

Patrick M. Garry

REINVIGORATING CONGRESS'S ROLE IN THE ADMINISTRATIVE STATE: WHAT THE MAJOR QUESTIONS DOCTRINE SUGGESTS ABOUT NONDELEGATION

SIDNEY J. HARDY†

PATRICK M. GARRY††

In its recent decision in West Virginia v. EPA*, the U.S. Supreme Court struck down administrative rules attempting to dramatically transform the electrical power generating industry. The Court's decision rested on its major questions doctrine, which states that on important enough matters the intent of Congress must be clearly expressed. This doctrine goes against the prevailing trend of deference toward the administrative state, as expressed through the permissive nondelegation and* Chevron *doctrines. While the major questions doctrine seeks to retain some congressional control over important issues, it nonetheless attracts much criticism on an array of grounds. This article proposes an alternative that both addresses the criticism levied against the major questions doctrine and seeks to achieve greater congressional control over agency action. That alternative involves a reinvigoration of the nondelegation doctrine.*

I. INTRODUCTION

In its recent decision in *West Virginia v. EPA*,[1] the U.S. Supreme Court struck down the Environmental Protection Agency's ("EPA") expansive interpretation of a provision in the Clean Air Act that, according to the agency, gave it the power to regulate greenhouse gas emissions for the entire private power industry.[2] This interpretation in turn empowered the agency to effect a major and unprecedented transformation of an important sector of the economy.[3] The Court's decision rested on the somewhat seldom-used major questions doctrine, in which the Court invalidates administrative action on issues of major economic and political importance that Congress would not have wished to delegate to the executive branch.[4]

The major questions doctrine, which the Court officially endorsed in *West Virginia v. EPA*, holds that when an agency attempts to issue an unprecedented

† Federal Clerk for the Honorable Karen E. Schreier in Sioux Falls, South Dakota.

†† Professor of Law, University of South Dakota Knudson School of Law.

1. 142 S. Ct. 2587 (2022).

2. *Id*. at 2616.

3. *Id.* at 2608 ("We decline to uphold EPA's claim of 'unheralded' regulatory power over 'a significant portion of the American economy.'").

4. *Id*. at 2595.

new rule with major consequences, it must show that Congress specifically intended that new rule.[5] Under the doctrine, certain extraordinary cases require clear congressional authorization.[6] This doctrine goes against the almost century-old trend in judicial deference toward empowering the administrative state, in which the judiciary has presumed that Congress intended to delegate wide powers to those agencies.[7] The major questions doctrine places a kind of last-minute brake on administrative authority, holding that some far-reaching issues are just so important that Congress must not have intended to hand them over to executive agencies.[8]

Contradicting as it does the longstanding pattern of deference to administrative authority, the major questions doctrine has come under much criticism, some of which faults the courts for interjecting their own determination of what constitutes an important enough issue that the executive branch is to be denied power.[9] On the other hand, defenders of the doctrine argue that judicial deference to the administrative state has gotten out of hand; without some controls or checks, the administrative state will exert as much power as Congress, but without any real democratic accountability.[10]

This article, while recognizing the criticisms of the major questions doctrine, looks to other ways in which Congress may retain its supremacy over the administrative state. Because of the demise of the nondelegation doctrine and the rise of *Chevron* deference, agencies start with a tremendous amount of unrestrained power.[11] Almost no controls exist at the front end of the agency process, thus leading to the application of the major questions doctrine at the back end.[12] As this article argues, perhaps a revitalization of the nondelegation doctrine could make such drastic judicial controls at the back end—e.g., the major questions doctrine—unnecessary.

II. THE USES OF THE MAJOR QUESTIONS DOCTRINE TO UPHOLD CONGRESSIONAL INTENT

A. WEST VIRGINIA V. EPA

The Supreme Court most recently employed the major questions doctrine in its 2022 decision, *West Virginia v. EPA*.[13] There, in a 6-3 decision, the Court used the doctrine to limit the EPA's ability to regulate greenhouse gas emissions

5. *Id*. at 2609.

6. *Id*.

7. *See infra* Part III (explaining deference and the doctrine of nondelegation).

8. *West Virginia v. EPA*, 142 S. Ct. at 2609.

9. *See infra* Part II (explaining the development, policy rationale, and criticisms of the major questions doctrine).

10. *See infra* Part III (explaining deference and the doctrine of nondelegation).

11. *See infra* Part III (explaining in subpart A the demise of the nondelegation doctrine and rise of *Chevron* in subpart B).

12. *See infra* Part IV (explaining the interaction between the three doctrines).

13. *West Virginia v. EPA*, 142 S. Ct. at 2610.

from coal-based power plants.[14] Specifically, the Court found that the Agency lacked the appropriate congressionally-delegated authority to utilize its "generation shifting approach," which would require utilities to make an expansive shift from coal-generated power to "cleaner" forms of power generation.[15]

In *West Virginia*, the EPA had been acting under the Clean Power Plan ("CPP").[16] The EPA promulgated the CPP in 2015, relying on authority from section 111(d) of the Clean Air Act.[17] Section 111(d) authorizes the EPA to set performance standards to reduce pollutant emissions from existing-power plants.[18] It specifies that the chosen standards must demonstrate the "best system of emission reduction" ("BSER") that the Agency found to be "adequately demonstrated."[19] Under section 111(d), the states retained the authority to set the specific rules regarding emission sources (such as power plants); however, the EPA alone is authorized to determine the emissions limit with which the states must comply.[20] Notably, since its enactment in 1970, section 111(d) had only been used a "handful of times."[21]

Relying on this new-found statutory authority, the EPA began selecting BSERs for not only new coal and gas plants, but also, under the CPP, existing plants.[22] However, the BSER chosen for existing coal-fired plants was drastically different from the systems the EPA had selected for new sources.[23] In fact, the emission limits on existing plants, established by the CPP, were actually stricter than the EPA's emission caps on new plants.[24]

For existing plants, the BSER included three types of "measures" or "building blocks": (1) "'heat rate improvements,'" i.e., practices to more efficiently burn coal; (2) "a shift in electricity production from existing coal-fired power plants to natural gas-fired plants"; and (3) a shift from coal- and gas-fired plants to renewable energy, primarily wind and solar sources.[25] The EPA denoted the second and third measures as "generation shifting" to cleaner sources of electricity.[26] The Agency asserted that plants could effectively "shift" to cleaner energy sources by reducing the plant's production of electricity, building or investing in a plant powered by renewable energy, or purchasing emission allowances or credits from a plant operating below the emissions cap.[27]

---

14. *See id.* at 2615-16.
15. *See id.* at 2593.
16. *Id*. at 2602.
17. *Id*.; *see* 42 U.S.C. § 7411(d).
18. *West Virginia v. EPA*, 142 S. Ct. at 2601.
19. *Id*. (quoting § 7411(a)(1)).
20. *Id*. at 2601-02 (citing 40 CFR § 60.22(b)(5) (2021)).
21. *Id*. at 2602.
22. *Id*.
23. *Id*. at 2602-03.
24. *Id*. at 2604.
25. *Id*. at 2603.
26. *Id*.
27. *Id*.

Using data based on the projected reductions in emissions that would flow from the generation shifting methods, the EPA developed equations to determine the emission performance rates for states to implement.[28] "The calculations resulted in numerical emissions ceilings so strict that no existing coal plant would have been able to achieve them without engaging in one of the three means of shifting generation."[29] Further, the EPA's "modeling concluded that the rule would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors."[30]

However, on the day the EPA promulgated the CPP, numerous parties, including twenty-seven states, petitioned for its review.[31] The rule was eventually stayed by the Supreme Court and soon after, due to a change in administrations, the EPA repealed the CPP.[32] The Agency hinged its decision on the major questions doctrine, finding that the CPP exceeded the EPA's congressionally-granted authority under section 111(d).[33] A number of parties and states then petitioned for the review of the EPA's decision to repeal the CPP.[34] The D.C. Circuit held the EPA's "'repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act'—namely, that generation shifting cannot be a 'system of emission reduction' under section 111."[35] Parties defending the repeal of the CPP petitioned for certiorari.[36]

Chief Justice John G. Roberts, writing for the majority, framed the issue as "whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the 'best system of emission reduction' within the meaning of section 111."[37] The Court answered this question by calling upon the major questions doctrine, which "refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[38]

Citing *FDA v. Brown & Williamson*,[39] the Court noted that the inquiry into the authority granted to the agency does not stop with an evaluation of the statutory text or its context.[40] Rather, the inquiry into the statutory meaning should be shaped by the question as to "whether Congress in fact meant to

28. *Id*.
29. *Id*. at 2604.
30. *Id*.
31. *Id*.
32. *Id*.
33. *Id*. at 2604-05.
34. *Id*. at 2605.
35. *Id*.
36. *Id*. at 2606.
37. *Id*. at 2607.
38. *Id*. at 2609.
39. 529 U.S. 120 (2000).
40. *West Virginia v. EPA*, 142 S. Ct. at 2608.

confer the power the agency has asserted."[41] Moreover, "'extraordinary cases' . . . in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[42] In such cases, the Court explained that it would reject expansive statutory construction when it determines that "Congress could not have intended to delegate such a sweeping and consequential authority in so cryptic a fashion."[43]

The Court determined that the case at hand was an "extraordinary case," as described in *Brown & Williamson*, finding that the EPA's regulation of existing power plant's carbon emissions was of such "vast economic and political significance" that such power needed to flow from a "clear statement" from Congress.[44] It reasoned that "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[45]

The EPA's new view of its authority under section 111(d) was a "transformative expansion in [its] regulatory authority" from a formerly non-utilized statute.[46] This new interpretation morphed the statute from one providing general regulatory authority into a sweeping decree—authorizing the EPA to make policy judgements regarding whether it would be "best" to have fewer coal-based power plants.[47] The Court concluded that "the basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself."[48]

Moreover, the Court noted that the CPP "essentially adopted a cap-and-trade scheme, or set of state cap-and-trade schemes, for carbon."[49] Notably, however, Congress had refused to amend the Clean Air Act to implement similar programs like a carbon tax.[50]

Ultimately, the Court held that while capping carbon emissions at a level that would move the nation further from coal generated electricity may have substantial environmental benefits, "it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in section 111(d)."[51] The EPA simply lacked authority to regulate in the realm of a major question.[52]

---

41. *Id*. (quoting Brown & Williamson, 529 U.S. at 159).

42. *Id*. (quoting Brown & Williamson, 529 U.S. at 159-60).

43. *Id*. (quoting Brown & Williamson, 529 U.S. at 160) (internal quotation marks omitted).

44. *Id*. at 2605 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) [hereinafter *UARG*]).

45. *Id*. at 2616.

46. *Id*. at 2595 (quoting *Brown & Williamson*, 529 U.S. at 160).

47. *Id*. at 2612.

48. *Id*. at 2613.

49. *Id*. at 2614.

50. *Id*. (citing American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong., 1st Sess; Climate Protection Act of 2013, S. 332, 113th Cong., 1st Sess.).

51. *Id*. at 2616.

52. *Id*.

Justice Neil M. Gorsuch, in his concurrence joined by Justice Samuel A. Alito, Jr., attempted to place some guideposts for the major question doctrine analysis. He explained that the doctrine mirrors other steadfast judicial canons, specifically the presumption against retroactive liability and sovereign immunity, in that it is a "clear statement rule."[53] According to Gorsuch, the major questions doctrine "works in much the same way to protect the Constitution's separation of powers."[54]

Most importantly, Gorsuch synthesized the Court's case law and highlighted the three (non-exhaustive) situations in which courts should find that an agency decision enters the realm of a "major question."[55] First, he asserted that the doctrine is triggered when an agency "claims the power to resolve a matter of great 'political significance,'[56] or end an 'earnest and profound debate across the country.'"[57] Such matters can be easily identified when Congress has considered and rejected similar bills or actions.[58] Second, the doctrine applies when the agency seeks to regulate "a significant portion of the American economy" or takes actions that result in "billions of dollars in spending" by private persons or entities.[59] Finally, the major questions doctrine may apply when an agency attempts to "intrud[e] into an area that is the particular domain of state law."[60]

Justices Elena Kagan, Steven G. Breyer, and Sonia Sotomayor dissented. Kagan, writing, argued that the majority's decision "strip[ped] the [EPA] of the power Congress gave it to respond to the most pressing environmental challenge of our time."[61] She specifically criticized the majority's use of the major questions doctrine, claiming it "replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules."[62] Kagan went further to explain that the majority had mischaracterized the cases it relied on in applying the doctrine.[63] She maintained the case law "simply insisted that the text of a broad delegation, like any other statute, should be read in context, and with a modicum of common sense."[64] According to Kagan, the previous decisions mentioned by the majority had overturned agency decisions only when (1) the

53. *Id*. at 2617 (Gorsuch, J. concurring).

54. *Id*. (citing United States v. Heth, 3 Cranch 399 (1806) (holding statutes should not be interpreted to apply retroactively unless "no other meaning can be annexed to them"); *see id*. at 2620 ("The Court has applied the major questions doctrine for the same reason it has applied other similar clear-statement rules—to ensure that the government does 'not inadvertently cross constitutional lines.'").

55. *Id*. at 2620-21.

56. *Id*. at 2620 (quoting Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022)).

57. *Id*. (quoting Gonzales v. Oregon, 546 U.S. 243, 267-68).

58. *Id*. at 2621.

59. *Id*. (first quoting *UARG*, 573 U.S. at 324; then quoting King v. Burwell, 576 U.S. 473, 485 (2015) (internal quotations omitted)).

60. *Id*.

61. *Id*. at 2626 (Kagan, J., dissenting) (internal quotations omitted).

62. *Id*. at 2634.

63. *Id*. at 2633.

64. *Id*.

agency operated "outside its traditional lane" or (2) the agency's action conflicted with Congress's broader design.[65] In her view, the CPP did not disrupt either of those principles.[66]

B. DEVELOPMENT AND CRITICISM OF THE MAJOR QUESTIONS DOCTRINE

1. FDA v. Brown & Williamson Tobacco Corporation

FDA v. Brown & Williamson Tobacco Corp. marked the first time that the Court clearly invoked the major questions doctrine. There, the Food and Drug Administration ("FDA") had been granted authority under the Food, Drug, and Cosmetic Act to "regulate, among other items, 'drugs' and 'devices.'"[67] The FDA attempted to regulate the promotion, labeling, and accessibility of tobacco under this authority, reasoning that nicotine is a drug, and cigarettes are "devices" that deliver nicotine.[68] The Court began its analysis with *Chevron*, noting that "[b]ecause this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by [*Chevron*.]"[69] However, the Court went on to explain that when applying *Chevron*, the first step—the inquiry into "whether Congress [had] directly spoken to the precise question at issue"—is "shaped . . . by the nature of the question presented."[70]

Chevron deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[71] However, the Court expressed that in extraordinary cases, "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[72] *Brown & Williamson* warranted such hesitation, as the Court reflected on tobacco's deep history in American society, and Congress's own repeated, express unwillingness to regulate it.[73] The Court explained that "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, [regulated] to agency discretion—and even more unlikely that it would achieve that through . . . subtle" statutory language.[74] In short, the Court held that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[75]

---

65. *Id*.
66. *Id*.
67. *Brown & Williamson*, 529 U.S. at 126.
68. *Id*. at 129.
69. *Id*. at 132.
70. *Id*. at 159.
71. *Id.*
72. *Id.*
73. *Id.* at 159-60.
74. *Id.* at 160 (quoting MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218, 231 (1994)).
75. *Id.*

2. Gonzales v. Oregon

In *Gonzales v. Oregon*,[76] the Court applied the major questions doctrine in considering whether the Controlled Substances Act ("CSA") permitted an attorney general to rescind a physician's license for prescribing drugs commonly used in physician-assisted suicide, even though the procedure was permitted under state law.[77] The CSA allowed state attorney generals to "de-register" physicians if he or she decided it would be in the "public interest."[78] Relying on this authority, Oregon's attorney general determined that assisting suicide ran contrary to public interest and was not a "legitimate medical practice" within the meaning of the CSA.[79] He consequently made prescribing drugs for that purpose unlawful under the CSA.[80]

The Court invalidated the rule, finding that the attorney general lacked the power to declare a procedure protected by state law illegitimate.[81] Recognizing the hot debate on the topic, the Court found it unlikely that Congress would have relied on implicit delegation to grant such a broad and unusual authority.[82] The Court explained that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes."[83] Notably, though, in making its decision, the *Gonzales* Court rejected the application of *Chevron* altogether.[84]

3. Utility Air Regulatory Group v. EPA

In *Utility Air Regulatory Group v. EPA* ("*UARG*"), the Court seemingly invoked the major questions doctrine, without mentioning it by name, during the second step of the *Chevron* analysis, rather than the first.[85] In *UARG*, the Court held that the EPA's promulgation of emission standards for new motor vehicles did not compel, or even permit, the agency to regulate certain stationary sources of pollutants, such as power plants and industrial facilities.[86]

The Court employed the first step of *Chevron*, and concluded the Clean Air Act was ambiguous.[87] It went on to consider the second step—whether the

76. 546 U.S. 243 (2006).
77. *Id.* at 254.
78. *Id*. at 251.
79. *Id*. at 254.
80. *Id*.
81. *Id*. at 258.
82. *Id*. at 267.
83. *Id*. (quoting Whitman v. American Trucking Ass'ns., Inc., 531 U.S. 457, 468 (2001)).
84. *Id*. at 268 ("Since the Interpretive Rule was not promulgated pursuant to the Attorney General's authority, its interpretation of 'legitimate medical purpose' does not receive *Chevron* deference.").
85. *UARG*, 573 U.S. at 324; *see also* Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 461 (2016) ("Unlike previous major questions cases, the Court invoked the major questions doctrine under *Chevron* step two . . . .").
86. *Id.* at 315-28.
87. *Id*. at 313-16.

agency's interpretation was reasonable—and found it was not.[88] Firstly, the agency's interpretation was at odds with the regulatory scheme as a whole.[89] However, instead of stopping there, the Court implied that the agency's interpretation was also unreasonable in light of the major questions doctrine, because it would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[90] The Court cited *Brown & Williamson*, in noting that courts should hesitate to find implied intent where an agency's interpretation impacts a "significant portion of the American economy."[91] Moreover, the Court explained that an agency's claim to have discovered "unheralded power" in a "long-extant statute" should be met with skepticism.[92]

4. King v. Burwell

In *King v. Burwell*,[93] the Court reviewed the Internal Revenue Service's ("IRS") interpretation of the Affordable Care Act ("ACA").[94] The Act's language provided that tax credits "shall be allowed" for those who purchase insurance plans through "an exchange established by the state."[95] However, the IRS interpreted the ACA as making tax credits available to any person enrolled in an exchange, regardless of whether the exchange had been established by the state.[96]

The Court found that the statutory language was ambiguous but declined to engage in a *Chevron* analysis, noting that it was an "extraordinary case" which required hesitation before the finding of implicit delegation.[97] Employing the major questions doctrine, the Court reasoned that because the tax credits involved billions of dollars and affected millions of people, the questions was of "deep economic and political significance."[98] "[H]ad Congress wished to assign that question to an agency, it surely would have done so expressly."[99] Moreover, the Court found that it was particularly unlikely for Congress to have delegated the decision to the IRS, considering it had "no expertise in crafting health insurance policy of this sort."[100]

88. *Id*. at 321.
89. *Id*.
90. *Id*. at 324.
91. *Id*. (quoting *Brown & Williamson*, 529 U.S. at 159).
92. *Id*. (quoting *Brown & Williamson*, 529 U.S. at 159).
93. 576 U.S.473 (2015).
94. *Id.*, 576 U.S. at 485.
95. *Id.* at 484; see 42 U.S.C. § 18031 (2012).
96. *King*, 576 U.S. at 483 (citing 45 CFR § 155.20 (2014)).
97. *Id*. at 485 ("When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron* . . . . In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.") (quoting *Brown & Williamson*, 529 U.S. at 159).
98. *Id*. at 485-86.
99. *Id*. at 486.
100. *Id*.

C. POLICY RATIONALE AND CRITICISMS OF THE MAJOR QUESTIONS DOCTRINE

There are a variety of rationales that scholars have pointed to in support of the major questions doctrine, though none are without their critics. The most prevalent rationales, discussed below, are based on (1) agency aggrandizement, (2) implied delegation, and (3) the nondelegation doctrine.

Some scholars rationalize the major questions doctrine by claiming it is necessary to prevent agency aggrandizement.[101] The theory is founded on the belief that executive agencies, by their very nature, "have an incentive to expand the scope of their jurisdiction, potentially reaching beyond the authority delegated by statute and therefore running afoul of the separation of powers by encroaching on Congress's lawmaking powers."[102] Because of this, when statutory interpretation of an agency's authority directly affects significant policy or major portions of the economy, the court, rather than the agency, should resolve the ambiguities for fear that the agency may be blinded by self-interest.[103] This rationalization has faced some criticism, from scholars arguing that "there is no reason to think that considerations that animate[d] *Chevron* do not [also] apply to large questions."[104] Such critics explain that "to the extent that issues of value are involved, it would appear best to permit the resolution of ambiguities to come from a politically accountable actor rather than the courts."[105]

Others assert that the principle of implied delegation serves as the foundation of the major questions doctrine. This theory is premised, primarily, on an article Justice Breyer wrote prior to becoming a Supreme Court Justice.[106] The article, cited in *Brown & Williamson*, notes that "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[107] In other words, the legal fiction of implied delegation that underlies *Chevron* is not convincing when economically or politically significant issues are at hand.[108] Some commentators push back against this reasoning,

---

101. Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 CARDOZO L. REV. 989, 994 (1999).

102. *See* Monast, *supra* note 85, at 462-63.

103. *Id*. (citing Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 261 (2004); *see also* Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 398 (2016) (arguing that the fear of agency aggrandizement was part of the rationale in *Brown & Williamson*, in which the Court struck down the FDA's "power grab" attempt to regulate tobacco).

104. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 232 (2006).

105. *Id.*

106. *See* Monast, *supra* note 85, at 463; Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 390 (2016).

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

108. *Id*.; *see also* Monast, *supra* note 85, at 463 (stating that in an absence of delegation, *Chevron* does not apply and courts are skeptical of finding implied delegation in cases of major political or economic issues).

pointing out that if Congress had clearly "answered the question," then deference would not be an issue, as the agency would be restrained by Congress's actions.[109] "In other words, it is not enough to simply state that Congress does not leave major regulatory questions open—the fact that a statutory interpretation issue has reached the Supreme Court (or even a lower court) disproves the claim."[110]

Still others believe that the major questions doctrine serves as a modern version of the nondelegation doctrine.[111] Though the nondelegation doctrine has been abandoned, proponents of this rationale argue that the doctrine has been crafted to serve the same purpose.[112] Therefore, under the major questions doctrine, agencies are not permitted to decide major questions because doing so would be an unconstitutional delegation of legislative authority.[113] However, this theory has relatively no basis in the Court's major questions case law.[114]

The primary criticisms for the major questions doctrine hinge on its lack of clarity, as the case law offers little to no explicit guidance.[115] Though the Court in *West Virginia* finally referred to the doctrine explicitly for the first time, it failed to provide any clear rules as to its application.[116] Thus, lower courts are left in the dark as to when and how exactly to apply the doctrine, and agencies blind to how they can prevail if the doctrine does apply.[117]

III. THE LONG DRIFT IN DEFERENCE TO THE ADMINISTRATIVE STATE

A. THE DEMISE OF THE NONDELEGATION DOCTRINE

1. The Constitutional Basis of the Doctrine

The major questions doctrine pushes back against decades of deepening judicial deference toward increasing executive authority. One significant way in

109. Sunstein, supra note 105, at 232.

110. Richardson, *supra* note 103, at 391.

111. Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN L. REV. 19, 52-53, 60-63 (2010) (posing that the major questions doctrine, there referred to as the "elephants in mouseholes doctrine," acts "to limit delegations of authority").

112. *See* Monast, *supra* note 85, at 463; Sunstein, supra note 104, at 232.

113. Richardson, *supa* note 103, at 394 (citing Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2607-08 (2006)).

114. *Id*. (arguing that the theory is not represented in the case law, other than perhaps the "elephants and mouseholes" sub-doctrine highlighted in *Whitman*, 531 U.S. at 468).

115. Andrew Howayeck, *The Major Questions Doctrine: How the Supreme Court's Efforts to Rein in the Effects of Chevron have Failed to Meet Expectations*, 25 RWULR 173, 189 (2020).

116. Jonathan H. Adler, *West Virginia v. EPA: Some Answers About Major Questions*, CATO SUP. CT. REV., 2021-2022, at 37-39 (2022) ("By skimping on statutory analysis and front-loading consideration of whether a case presents a major question, Chief Justice Roberts's opinion failed to provide much guidance for lower courts. It may be clear that statutory ambiguity cannot justify broad assertions of regulatory authority, but *West Virginia v. EPA* provides little clarity on how the invigorated major questions doctrine should inform statutory interpretation.").

117. Monast, *supra* note 85, at 469.

which that authority has been expanded is through judicial refusal to more strictly enforce the nondelegation doctrine.

The textual basis for the nondelegation doctrine exists in Article I, Section 1 of the United States Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[118] The Court has held that this vesting clause prohibits the congressional delegation of legislative authority to the executive.[119]

According to the U.S. Supreme Court, the principle that "Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the [C]onstitution."[120] Chief Justice John Marshall first articulated the principle that "Congress cannot delegate . . . powers which are strictly and exclusively legislative."[121] The rationale for this principle is that "Congress must make whatever decisions are important enough to the statutory scheme in question so that Congress must make them."[122]

The nondelegation principle rests on separation of powers grounds. As James Madison wrote, "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."[123]

The nondelegation doctrine also finds support in the social contract theory pervading the Constitution. As John Locke explained that theory, society can only be regulated by laws enacted by democratic legislatures, since the public has only granted such legislative powers to its elected representatives.[124]

The U.S. Supreme Court has held that an unconstitutional delegation of lawmaking occurs when a congressional statute lacks an "intelligible principle" directing the executive branch in its enforcement and application of the statute.[125] Without such an intelligible principle, a congressional delegation conveys an undue and unlimited degree of discretion to the executive, enabling it to then exercise lawmaking authority.[126]

Despite the nondelegation doctrine being one of the least enforced doctrines in constitutional law, and despite the judiciary's hesitancy to employ the doctrine

---

118. U.S. CONST. art. I, § 1.

119. *See* Mistretta v. United States, 488 U.S. 361, 371-72 (1989). The argument is that by giving "all legislative Powers" to Congress, the Constitution, by implication, gives such powers to no other entity. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472-73 (2001); Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 672-73 (1980) (Rehnquist, J., concurring).

120. Marshall Field v. Clark, 143 U.S. 649, 692 (1892).

121. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

122. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 361 (2002).

123. *See* THE FEDERALIST NO. 47 (James Madison) (internal quotations omitted).

124. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 52-65, 70-75 (C.B. Macpherson ed., Hackett Publishing Co., Inc. 1980) (1690).

125. The nondelegation doctrine holds that a delegation of authority lacking such "intelligible principle[s]" is unconstitutional. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472-76 (2001).

126. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1727 (2002).

as an effective restraint on the passage of power to the administrative state, the doctrine remains the subject of vigorous academic debate.[127]

2. Brief History of the Nondelegation Doctrine

In *J.W. Hampton, Jr. & Co. v. United States*,[128] the Court announced the "intelligible principle" test for determining whether a statute violates the nondelegation doctrine: "If Congress shall lay down by legislative act an intelligible principle to which the person or body . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power."[129]

In 1935, the Court employed this test to strike down various provisions of the National Industrial Recovery Act of 1933 ("NIRA").[130] First in *Panama Refining Co. v. Ryan*,[131] then again in *A.L.A. Schechter Poultry Corp. v. United States.*[132] In *Panama Refining*, the Court struck down an attempted delegation authorizing the President to regulate the transportation of petroleum products, ruling that the provision failed to place any limits on the executive's power to regulate such transportation.[133] Several months later, in *Schechter Poultry*, the Court struck down another provision of the NIRA empowering the President to impose "codes of fair competition" on any trade or industry.[134] The Court found that because the term "fair competition" was undefined, the President possessed "virtually unfettered" discretion in implementing the law.[135]

Since *Schechter Poultry*, however, the Court has never again used the nondelegation doctrine to overturn any legislative delegations from Congress to the executive branch.[136] Because of political opposition to the Court's use of the

---

127. According to one count, the last decade has seen at least fifty scholarly articles published on the subject of the nondelegation doctrine. Travis H. Mallen, *Rediscovering the Nondelegation Doctrine Through a Unified Separation of Powers Theory*, 81 NOTRE DAME L. REV. 419, 419 (2005).

128. 276 U.S. 394 (1928).

129. *Id*. at 409. The challenged provision in *J.W. Hampton* allowed the President to raise tariffs if he found that the existing tariffs did not equalize the differences in production costs between the U.S. and the exporting nation. *Id.* at 401. Although Congress had intended tariffs to equalize the costs of production between the U.S. and foreign countries, the Court recognized that Congress could hardly specify the exact level of every tariff so as to achieve this goal. *Id.* at 404-05, 407. Thus, as long as Congress set forth an intelligible standard regarding its policy, no improper delegation would occur. *Id.* at 404-09.

130. National Industrial Recovery Act of 1933, 73 Pub. L. No. 67, 48 Stat. 195 (1933).

131. 293 U.S. 388 (1935).

132. 295 U.S. 495 (1935).

133. *Panama Refining Co.*, 293 U.S. at 417-18. The Court struck down the statute for failing to set intelligible principles to limit the President's discretion. *Id.* at 429-30.

134. *Schechter Poultry*, 295 U.S. at 521-22.

135. *Id.* at 532, 541-42. The Court stated that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry." *Id.* at 537-38.

136. *See, e.g.*, Touby v. United States, 500 U.S. 160, 162, 167 (1991) (sustaining a delegation under the CSA); United States v. Mazurie, 419 U.S. 544, 557 (1975) (sustaining a delegation to regulate liquor on Native American reservations); Lichter v. United States, 334 U.S. 742, 787 (1948) (sustaining a delegation of power to determine excessive profits); Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947) (sustaining a delegation to the Federal Home Loan Bank Administration); Am. Power & Light Co. v. SEC*,* 329 U.S. 90, 96, 106 (1946) (upholding a delegation to the SEC to regulate voting power of

nondelegation doctrine to strike down major programs of the New Deal, as well as the Court's subsequent hesitancy to incur such opposition, the doctrine has been so weakened that it has become virtually unenforceable.

3. The Erosion of the Nondelegation Doctrine

The Great Depression and its New Deal response, fostering the birth of the administrative state, led to a new understanding of the separation of powers principle underlying the nondelegation doctrine. As a result, the Supreme Court for nearly ninety years has not found one violation of the doctrine. The Court has weakened the doctrine because of all the practical concerns with implementing it, the difficulty of drawing lines between permissible and impermissible delegations, and the desire to accommodate congressional flexibility.[137] Peter Schuck argues that such flexibility becomes necessary because "social complexity has made it far more difficult for legislators (not to mention voters) to accurately predict the consequences of their choices so that they can reason their way to a conclusion as to the best policy choice."[138]

Notwithstanding all the arguments for flexibility and practicality, many commentators have resisted writing off the nondelegation doctrine as irrelevant. Some have even argued for a robust revitalization of the doctrine.[139] Peter Wallison argues that in the absence of a meaningful nondelegation principle, "we are headed ultimately for a form of government in which a bureaucracy in Washington—and not Congress—will make the major policy decisions for the country."[140] Philip Hamburger asserts that the nondelegation doctrine flows directly out of the Vesting Clauses, which place all legislative power in Congress.[141] Others have argued that a stronger nondelegation doctrine is needed to avoid the unprecedented expansion of the administrative state.[142]

---

security holders); Bowles v. Willingham, 321 U.S. 503, 516 (1944) (sustaining a delegation to the Price Administrator to regulate rents).

137. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 415-16 (1989) (Scalia, J., dissenting) ("[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.") The Court's unsympathetic response to nondelegation doctrine challenges is reflected by the fact that "the combined vote in the Supreme Court on nondelegation issues from *Mistretta* through *American Trucking* was 53-0." Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330 (2002).

138. Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 778 (1999).

139. *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 135-61 (1995); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 12-21 (1993).

140. PETER WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE 114 (2018).

141. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 387 (2014).

142. *See* D.A. Candeub*, Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 94 (2017); C. Boyden Gray*, The Nondelegation Canon's Neglected History and Underestimated Legacy*, 22 GEO. MASON L. REV. 619, 646 (2015). Gary Lawson has provided an originalist defense of the nondelegation doctrine. Lawson, *supra* note 137, at 337.

4. Judicial Calls for Revival

Sporadic judicial opinions have also called for reviving the nondelegation doctrine. In *Department of Transportation v. Ass'n of American Railroads*,[143] Justice Clarence Thomas argued for a new judicial application that would connect the nondelegation doctrine to the original meaning of that doctrine.[144] In his concurrence in *Industrial Union Department v. American Petroleum Institute*,[145] Justice William H. Rehnquist argued that a delegation to the Secretary of Labor to regulate "to the extent feasible" the levels of benzene to which workers were exposed constituted an improper delegation, since the language "to the extent feasible" did not rise to the level of a meaningful intelligible principle.[146]

Dissenting from the Court's approval of a broad conveyance of authority to the United States Sentencing Commission in *Mistretta v. United States*,[147] Justice Antonin Scalia argued that the delegation amounted to a pure transfer of legislative power in violation of the nondelegation doctrine.[148] As he noted: "What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?"[149] However, because the Commission had no executive duties, it could only have been given lawmaking powers by Congress. Thus, there was no line to draw between executive duties and legislative functions ancillary to those duties, and therefore the delegation was clearly improper, according to Scalia.[150]

Perhaps the most significant judicial sign of life in the nondelegation doctrine came from the D.C. Circuit in 1999. In *American Trucking Ass'ns v. EPA*,[151] the D.C. Circuit, though recognizing that previous Supreme Court opinions had failed to employ a "strong form of the nondelegation doctrine[,]" nonetheless asserted that the unlimited nature of the delegation at issue should inspire a rethinking of applying such a loose nondelegation doctrine that sustains

143. 135 S. Ct. 1225 (2015).

144. *Id*. at 1252.

145. 448 U.S. 607 (1980).

146. *Id.* at 681-85 (Rehnquist, J., concurring). Justice Rehnquist noted that the Court, when looking to find an intelligible principle out of broad language like "to the extent feasible," often tries to add "gloss" to vague delegations of power by turning to the legislative history of the statute at issue. *Id.* at 676. Justice Scalia, however, has often noted the ambiguity of legislative history in interpreting statutory language. *See* Morales v. TWA, Inc., 504 U.S. 374, 385 n.2 (1992).

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

148. *Id.* at 413, 416 (Scalia, J., dissenting).

149. *Id.* at 416. Justice Thomas voiced a similar attitude in his concurrence in *Whitman v. Am. Trucking Ass'ns* when he suggested that in the future he "would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

150. *Mistretta*, 488 U.S. at 420.

151. 175 F.3d 1027 (D.C. Cir. 1999).

all delegations.[152] However, rather than striking down the Clean Air Act for failing to articulate an intelligible principle, the D.C. Circuit instead looked to the agency's interpretation of the statute to see if it in fact contained an intelligible principle.[153] Finding none, the court then remanded to the agency to interpret the statute in a way that contained a proper intelligible principle.[154]

Writing for the Supreme Court, Justice Scalia stated that an agency could not cure an "unconstitutionally standardless delegation of power" by crafting its own intelligible principle.[155] Moreover, Scalia concluded that the Clean Air Act did in fact contain a sufficient "intelligible principle."[156] Citing the deferential precedence of nondelegation cases since the late 1930s, Scalia found that the statutory discretion granted to the EPA "fits comfortably within the scope of discretion permitted by our precedent."[157] Thus, even though the lower court had expressed serious misgivings about the undefined nature of the statutory language and the lack of restraints on executive discretion, thereby giving the Supreme Court a prime opportunity to strike down a delegation based simply on the phrase "requisite to protect public health," the Court nonetheless upheld this delegation because of all the "strikingly similar" delegations it had upheld in the past.[158] Despite this permissive precedent, however, Justice Thomas in his concurrence stated that in a future case he "would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[159]

More recently, Justices Gorsuch and Alito have expressed an interest in revitalizing the nondelegation doctrine.[160] Gorsuch argues that the absence of an enforceable nondelegation doctrine frustrates "the system of government

152. *Id.* at 1037-38. Because the EPA's discretion under the statute was so unlimited as to potentially "send industry not just to the brink of ruin but hurtling over it," the Constitution required a "more precise delegation." *Id.* at 1037.

153. *Id.* at 1038.

154. *Id.* at 1040.

155. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001). Justice Scalia observed that the Court has "never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." *See id.* at 472.

156. *Id.* at 473-76. Justice Scalia observed that the degree of discretion granted by the Act "is in fact well within the outer limits of our nondelegation precedents." *Id.* at 474. He also noted that "[i]n a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency." *Id.* at 472.

157. *Id.* at 476.

158. *Id.* at 473. "Because the Supreme Court has found intelligible principles in even the most vague standards, it is difficult to derive standards for the intelligible principles test from federal precedent." Jeffrey A. Wertkin, *Reintroducing Compromise to the Nondelegation Doctrine*, 90 GEO L.J. 1055, 1080 (2002) (footnote omitted). The statutory language of "as public convenience, interest, or necessity requires" was approved in *United States v. Southwestern Cable Co.* 392 U.S. 157, 178 (1968) (quoting 47 U.S.C. § 303(r) (2000)). Even "compelling public interest" was held to be constitutionally sufficient in *Milk Industry Foundation v. Glickman.* 132 F.3d 1467, 1471 (D.C. Cir. 1998).

159. *Whitman*, 531 U.S. at 487 (Thomas, J., concurring).

160. *See* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); *id.* (Alito, J., concurring).

ordained by the Constitution," with the result that "the vesting clauses and indeed the entire structure of the Constitution would make no sense."[161]

5. Nondelegation Doctrine Necessitates the Major Questions Doctrine

As it has evolved, the nondelegation doctrine does not restrain the administrative state from acquiring a virtually unlimited amount of power and discretion.[162] Consequently, with no restraint at the front end, the administrative state acquires as much power as it wishes to exercise. Because of such unlimited power, it is no wonder that courts have concluded that some restraints must be placed on administrative power at the back end—e.g., through the major questions doctrine.[163]

Criticisms abound regarding the major questions doctrine, such as its inconsistency with textualism and its problematic focus on legislative intent.[164] Indeed, the doctrine requires the courts to delve into their discernment of the intentions of Congress regarding the authority and extent of power given to the executive branch. These are legitimate criticisms; however, given the nearly unlimited power already possessed by the administrative state, it is not unreasonable that courts should feel the need to step in during extraordinary cases. Perhaps a revival of the nondelegation doctrine provides a better path toward administrative accountability, since that doctrine involves potentially less judicial intrusion. Indeed, perhaps the calls to revive the nondelegation doctrine will intensify with the growing criticisms of the major questions doctrine.

B. *CHEVRON* DEFERENCE TO THE ADMINISTRATIVE STATE

1. The Chevron *Shift of Power to Agencies*

The *Chevron* doctrine, announced in 1984, marked a significant departure in the way courts review the actions of administrative agencies.[165] In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court issued a groundbreaking opinion mandating the judiciary to defer to an agency's interpretation of a congressional statute with which the agency was charged with

161. *Id.* at 2133-35.

162. The nondelegation doctrine "permits Congress to grant discretion with respect to matters ancillary to a statutory scheme but forbids grants of discretion on fundamental matters." Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 266 (2005). As Professors Seidenfeld and Rossi argue, "[o]nce the reality that officials must be allowed to exercise such discretion is recognized, there is no principled way for the judiciary to draw a line between allowed and prohibited delegations of rulemaking authority." Mark Seidenfeld & Jim Rossi, *The False Promise of the "New" Nondelegation Doctrine*, 76 NOTRE DAME L. REV. 1, 5-6 (2000).

163. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (concluding that the major questions doctrine was a restraint on administrative power).

164. *See* Chad Squitieri, *Major Problems with Major Questions*, LAW & LIBERTY (Sept. 6, 2022), https://perma.cc/7P7X-H8BL.

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

administering.[166] *Chevron* deference requires judicial approval of any reasonable agency interpretation of an ambiguous statute.[167] Moreover, the test of ambiguity is broad: a statutory provision is ambiguous unless a court can find that Congress had spoken "directly" to provide a specific "unambiguously expressed" answer.[168] The agency's interpretation does not have to be the best or the only permissible one, it just needs to be a reasonable one.[169]

This rule of deference exists even though a court might have made a different interpretation if it had considered the issue.[170] According to *Chevron*, agencies, and not courts, "are to use their understanding of policies and values to inform statutory interpretation in cases where statutory language is unclear."[171]

Chevron deference to administrative agencies results from a presumption that Congress intended those agencies to fill in the gaps in ambiguous statutes.[172] According to Professor Garrett, "*Chevron* can be understood as adopting a rule-like presumption that statutory silence or ambiguity should be read as an implicit delegation to agencies."[173] Thus, ambiguity becomes a barometer of congressional intent: "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[174] The actual reason why Congress may have either left or failed to clarify a statutory ambiguity is irrelevant; *Chevron* treats all ambiguities as an "implicit" delegation of authority to the agency charged with administering the statute.[175]

Courts apply the *Chevron* doctrine "even to pure questions of law, about which courts might appear to have a strong claim of superior expertise."[176]

---

166. As the Court stated: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43.

167. *Id.* at 843-44.

168. *Id.* at 843 (implying that ambiguity exists unless Congress had already addressed "the precise question at issue").

169. "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." *Id.* at 843 n.11.

170. *Id.* at 842-43.

171. Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 747 (2004).

172. *See* United States v. Mead Corp., 533 U.S. 218, 219, 229 (2001) (stating that it can be inferred from an "agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills in a space in the enacted law").

173. Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2643 (2003); *see* Mendelson, *supra* note 171, at 743-44.

174. *Chevron*, 467 U.S. at 843-44. Consequently, "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 865-66).

175. *Chevron*, 467 U.S. at 844, 865.

176. Mendelson, *supra* note 171, at 744; *see also* Young v. Cmty. Nutrition Inst., 476 U.S. 974, 981 (1986) (deferring to agency interpretation on a purely legal issue). Prior to *Chevron,* pure questions of law fell within the jurisdictions of the courts. *See* Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492-93 (1947) *superceded on other grounds by statute*, Taft-Hartley Act, Pub. L. No. 86-257, 73 Stat. 535

Consequently, *Chevron* has been treated by commentators and lower courts as a major change in prior law about the scope of judicial review of agency action.[177]

2. Criticisms of Chevron

The *Chevron* doctrine has been barraged with criticism.[178] It has been charged with eroding the separation of powers and intruding on the judiciary's power to interpret the law by shifting to agencies the power to make law through their interpretations of vaguely worded congressional statutes.[179] It is a "fundamental alteration . . . in our constitutional conception of the administrative state."[180] Critics argue that "*Chevron* creates an anti-majoritarian force within agencies and allows them to move policy away from the actual policy intended by Congress."[181] These criticisms reject the presumption that statutory ambiguity expresses a congressional intent for administrative agencies to fill in the gaps.[182] As Elizabeth Garrett notes:

> For many, the key question remains whether *Chevron* leads to deference only, or even mainly, in cases where Congress actually delegated interpretive power to the agencies, or whether the rule is overinclusive, requiring judicial deference even in cases where Congress had no intent or would have preferred a more aggressive judicial stance.[183]

Because of the fear of *Chevron*'s potentially unbounded degree of deference, the push to limit the doctrine began building soon after its announcement.[184] Courts came to see that ambiguity was not always sufficient or even appropriate for determining congressional intent.[185] Consequently, courts began constructing other models or theories aimed at discerning congressional intent, to avoid conferring *Chevron* deference on certain troubling

---

(1959); Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post Chevron Era,* 32 B.C. L. REV. 757, 767 (1991).

177. Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990) [hereinafter *Law and Administration after Chevron*]. As one commentator has argued, *Chevron* is based in part on the questionable premise "that one can distinguish between those situations in which courts are interpreting legislative texts from ones in which they are extrapolating from legislative texts." Caust-Ellenbogen, *supra* note 176, at 761-62.

178. William R. Andersen, *Against Chevron – A Modest Proposal*, 56 ADMLR 957, 960 (2004).

179. *Id*. at 960-61.

180. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989).

181. J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 925 (1996); *see also* Caust-Ellenbogen, *supra* note 176, at 759 ("*Chevron* represents a usurpation of judicial power and results in excessive concentration of power in administrative agencies.").

182. *See* Andersen, *supra* note 178, at 963 (arguing that *Chevron* is based largely on "the widespread acceptance of a fiction" that Congress has intended its ambiguous statute to delegate authority to the agencies, even though "there is seldom any direct evidence of such a delegation").

183. Garrett, *supra* note 173, at 2644.

184. Alison Gocke, *Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 964 (2021).

185. *Id*.

or problematic agency actions.[186] Two such models have been *United States v. Mead Corp.*[187] and the major questions doctrine.[188]

In one attempt to narrow *Chevron* applicability, courts have not deferred to agency interpretations contained in certain interpretive statements not promulgated with procedures allowing for public notice and comment. In *United States v. Mead Corp.*, the Court ruled that *Chevron* only occurs when "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law."[189] According to *Mead*, courts do not have to accord *Chevron* deference to an agency's interpretation of a statute if that interpretation was not made within the informal rulemaking procedures provided by the Administrative Procedure Act.[190] In a retreat from *Chevron*, the *Mead* Court hinged deference on other indicators of legislative intent, such as the degree of procedural formality employed by the agency.[191] Described as "backpedaling" from *Chevron, Mead* sought to make "less agency action . . . qualify for Chevron deference."[192]

Rather than automatically presuming congressional intent from statutory ambiguity, *Mead* tries to better determine actual congressional intent regarding ambiguous delegations of authority.[193] In this way, *Mead* tried to revive somewhat the role of congressional intent within the tidal wave of administrative deference wrought by the nondelegation and *Chevron* doctrines.

Judicial discomfort with the *Chevron* doctrine also led to the restraints imposed by the major questions doctrine, which arose in *FDA v. Brown & Williamson Tobacco Corp.*[194] The issue in *Brown & Williamson* was whether the Court would defer to the FDA's labeling of nicotine as a "drug" within the

186. *Id*.

187. 533 U.S. 218 (2001).

188. *Id*. at 964, 966.

189. *Id.* at 226-27.

190. *Id.* at 230-31.

191. By commanding courts to determine through examining the procedures used by the agency to make its interpretation whether Congress intended that agency to receive deference in is interpretations, *Mead* tried to better serve the purpose of *Chevron*: namely, the fulfillment of congressional intent to delegate interpretive authority to agencies. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 445-46 (1989) (arguing that "a general rule of judicial deference to all agency interpretations of law would be unsound"). Under *Mead*, congressional intent will no longer be presumed strictly from ambiguity: it should also be gauged by the procedural formality used by the agency to make its interpretation. Marking a dramatic departure from *Chevron*, the *Mead* doctrine holds that congressional intent is not to be presumed; courts are now instructed to conduct a kind of pre-*Chevron* inquiry to determine if Congress intended an agency to possess interpretive powers. *See* Michael P. Healy, *Spurious Interpretation Redux:* Mead *and the Shrinking Domain of Statutory Ambiguity,* 54 ADMIN. L. REV. 673 (2002) (explaining that "[s]uch deference will be accorded to agency decisions only when a court concludes that Congress 'expect[ed]' Chevron-type deference based on 'statutory circumstances'").

192. Michael C. Pollack, *Chevron's Regrets: The Persistent Vitality of the Nondelegation Doctrine*, 86 N.Y.U. L. REV. 316, 322 (2011).

193. As the Court explained in a subsequent case, *Chevron* is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

194. *Id.* at 120.

meaning of the Food, Drug and Cosmetic Act,[195] hence subjecting tobacco products to agency regulation.[196] Overturning the agency's interpretation, though recognizing that statutory ambiguity conferred an implicit delegation under *Chevron*, the Court carved out an exception for "extraordinary cases" or major questions, where "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[197]

The Court in *Brown & Williamson* addressed the issue of whether Congress had intended to delegate to the FDA the power to regulate tobacco by examining the importance of the issue in light of previous congressional action on that issue.[198] In its examination, the Court looked to the long history of tobacco-related legislation for insight into congressional intent.[199]

The Court's method in *Brown & Williamson* took a dramatic turn from its normal *Chevron* deference approach.[200] According to the Court, when the case involves "important" or "major" questions of law, Congress is presumed not to have left the issue to an agency to decide.[201] This major question approach, however, creates much uncertainty for the *Chevron* doctrine. Rather than giving full deference whenever the authorizing statute is ambiguous, the courts must now embark upon a "major questions" analysis that necessarily incorporates the uncertainties of judicial determinations of how "important" or "extraordinary" the agency regulation might be.[202]

Application of the major questions doctrine obviously circumvents *Chevron* deference when the agency interpretations involve matters of political or economic importance. Instead of congressional intent being presumed under *Chevron*, it now must be specifically proven under the major questions doctrine.

Critics charge that the major questions doctrine places political power in unelected courts rather than in the somewhat more politically accountable agencies. The major questions doctrine has been called "a mess."[203] Coherent principles underlying the doctrine have not been articulated.[204] Debate has

195. *Id*. at 131; 21 U.S.C. §§ 301-99 (2000).

196. *Id.* at 125-26.

197. *Id.* at 159.

198. *Id.* at 160 ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

199. *Id.* at 140-59.

200. 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, 1325 (2002) ("Faced with what seemed like a perfectly reasonable reading of the statutory text—one that treated nicotine as a 'drug'—the Court refused to defer. Instead, it dug deeper, searching for evidence that would undermine the FDA's chosen reading.").

201. *Brown & Williamson*, 529 U.S. at 159. In view of the importance of the issue, the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160.

202. Molot*, supra* note 200, at 1326. The greatest benefit of *Chevron* "may very well have been its effort to bring some order to a rather messy, contextual search for legislative intent." *Id.* But in *Brown & Williamson*, the Court reverted to a pre-*Chevron* approach and argued that "even if the statutory definition of 'drug' was ambiguous, such ambiguity should not be taken as a delegation." *Id.* at 1327.

203. Gocke, *supra* note 184, at 966-67.

204. *Id.*

raged on how the doctrine fits in with *Chevron* and at what step in the *Chevron* process the doctrine applies.[205]

The major questions doctrine can embroil the courts in a type of political second-guessing, requiring judges to determine whether a particular issue is a major question, which in turn may depend on whether the matter is politically controversial, whether it will have a substantial economic impact, whether Congress has ever attempted and failed to legislate on the matter, and whether the matter involves agency action that is unprecedented or departs from previous agency practice. Another criticism is that the doctrine may be so open-ended as to invite courts to overturn agency action they do not like, simply by terming that action a major question—an action that might then turn courts into policy makers.

A remedy to this criticism might be a revival of a stricter nondelegation doctrine requiring that Congress make the initial and critical policy decisions.[206] After all, the major questions doctrine is rooted in the same constitutional foundation as is the nondelegation doctrine—e.g., the Vesting Clause in Article I, which reads: "All legislative powers herein granted shall be vested in a Congress of the United States."[207] Justice Gorsuch suggested such a revival of the nondelegation doctrine in his concurring opinion in *West Virginia*.[208] Indeed, the major questions doctrine might just be charting a path toward such a nondelegation revival.

IV. THE INTERACTION BETWEEN THE THREE DOCTRINES: DEFERENCE CREATING THE NEED FOR THE MAJOR QUESTIONS DOCTRINE

Just as with the erosion of the nondelegation doctrine, *Chevron* is criticized as an abandonment of judicial safeguards against improper delegation. For this reason, the major questions doctrine can perhaps be seen as a remedial measure: a way of accommodating the transfer of power from Congress to agencies, while still providing some avenue for judicial control when extraordinary circumstances warrant such control.[209]

As Judge Harold Leventhal of the D.C. Circuit explained: "Congress has been willing to delegate its legislative powers broadly—and courts have upheld

205. *Id.* at 975-78. "The *Brown & Williamson* Court applied the major questions doctrine at *Chevron* step one . . . ." *Id*. at 975. In *UARG* the doctrine was applied, "this time at *Chevron* step two . . . ." *Id*. at 976. The Court in *Mead* applied the "major questions doctrine as a *Chevron* step zero test." *Id.* at 978.

206. Such an approach would fulfill Justice Rehnquist's vision of the nondelegation doctrine. Indus. Union Dept. v. Am. Petroleum Inst., 448 U.S. 607, 685, 687 (1980) (Rehnquist, J., concurring).

207. U.S. CONST. art. I, § 1.

208. West Virginia v. EPA, 142 S. Ct. 2587, 2626 (2022) (Gorsuch, J., concurring).

209. *See* Farina, *supra* note 180, at 487 ("The administrative state became constitutionally tenable because the Court's vision of separation of powers evolved from the simple (but constraining) proposition that divided powers must not be commingled to the more flexible (but far more complicated) proposition that power may be transferred so long as it will be adequately controlled.") (emphasis omitted).

such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits . . . ."[210] Under this view, the price of broad delegations and deference to the administrative state may be the power of courts to exert some last-minute supervision through the major questions doctrine. With *Chevron* removing what used to be a judicial check on the power flowing to agencies through an extremely deferential nondelegation doctrine, one of the few checks left on agency power is the major questions doctrine.

The *Chevron* and nondelegation doctrines have somewhat similar justifications and reflect similar aims. Both are grounded on judicial presumptions about congressional intent, and both rely on agencies to fill gaps in the statutes.[211] As one commentator has observed, "the principles behind the nondelegation doctrine also animate the Court's more subtle efforts to narrow *Chevron*."[212]

Chevron may be the logical extension of the nondelegation doctrine. An unenforceable nondelegation doctrine, under which the initial power to set regulatory policy has been conveyed without limits to agencies, naturally leads to congressional statutes containing generalized goals, conferring broad authority on agencies to determine how to accomplish those goals.[213] And because such statutes are necessarily ambiguous, those agencies are then empowered by *Chevron* to issue rules interpreting those statutes.[214]

Perhaps it is through the major questions doctrine that the Court finally decided it could not continue to advance the fiction that Congress makes the important policy decisions and agencies simply carry out those decisions. With

---

210. Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring) (footnotes omitted).

211. Justice Scalia admits that the notion of the *Chevron* approach as reflecting the intent of Congress is a fiction: "In the vast majority of cases I expect that Congress . . . didn't think about the matter at all . . . [consequently] any rule adopted in this field represents merely a fictional, presumed intent . . . ." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989). *Chevron*, however, takes the nondelegation doctrine one step further. With *Chevron*, legislative ambiguity is seen as a signal of congressional intent to delegate policymaking authority. Critics, however, argue that it is folly to assume that "ambiguity or silence constitutes . . . a delegation." *See* Eric M. Braun, Note, *Coring the Seedless Grape: A Reinterpretation of* Chevron U.S.A. Inc. v. NRDC, 87 COLUM. L. REV. 986, 995 (1987). Even those who support the notion of presumed congressional intent admit that "the evidence supporting the presumption that Congress generally intends agencies to be the primary interpreters of statutory ambiguities is weak." Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain* 89 GEO. L.J. 833, 871 (2001).

212. Michael Pollack, *Chevron's Regrets: The Persistent Vitality of the Nondelegation Doctrine*, 86 N.Y.U. L. REV. 316, 327 (2011).

213. *See* Schuck *supra* note 138 (discussing the frequency of broad legislative delegations)*; see also* Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 411 (1987) (arguing that courts in the past have almost always approved broad congressional delegations to agencies).

214. *See* J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power,* 81 TEX. L. REV. 1443, 1452-54 (2003). Even though the agencies may not exercise full legislative powers in interpreting statutes, the Court has admitted the agency rulemaking is often quasi-legislative in nature. *See* INS v. Chadha*,* 462 U.S. 919, 954 n.16 (1983) (citing Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935)) (stating that the "Court has referred to agency activity as being 'quasi-legislative' in character").

Chevron and the nondelegation doctrines working in tandem to consolidate power in the administrative state and insulate agencies from outside controls, the major questions doctrine becomes almost an inevitability to ensure at least some end-of-the-line role for the courts and Congress.[215]

The way *Chevron* has made ambiguity a means of delegation reflects the degree to which courts have attempted to accommodate the administrative state. Indeed, with the nondelegation doctrine allowing Congress to empower agencies with only the vaguest of directions, it is probably too late at the *Chevron* stage for the courts to be concerned about congressional intent. There can hardly be a significant inquiry into congressional intent once the nondelegation doctrine has permitted agencies to possess policymaking power with virtually no guidelines. In this respect, *Chevron* becomes an almost automatic result from the deferential nature of the nondelegation doctrine. It is difficult to have a strict *Chevron* doctrine in the wake of an extremely permissive nondelegation doctrine. Therefore, with the combination of a strong *Chevron* doctrine and a lax nondelegation doctrine, something is clearly needed to keep the administrative state accountable to Congress—and that something is the major questions doctrine.

In *West Virginia*, the Court does not even mention *Chevron* deference, despite the case involving the EPA's interpretation of its statutory power, which after all is what *Chevron* is all about.[216] Perhaps this absence of mention suggests that the Court is either moving away from *Chevron* deference or is preparing to abandon it altogether. And without as wide a *Chevron* deference as currently exists, there may be less need for as frequent an application of the major questions doctrine.

Both the major questions and nondelegation doctrines are grounded in principles of congressional delegation. Both doctrines, at least theoretically, presuppose that Congress must make the big decisions. Thus, because of this synchronicity, one way to ease up on the major questions doctrine would be revive a stricter application of the nondelegation doctrine.

V. CONCLUSION

As they currently stand, all three doctrines—nondelegation, *Chevron,* and major questions—face a torrent of criticism. The first two doctrines are usually criticized for giving too much power to the administrative state, at the expense of Congress. The third doctrine is criticized for placing too much power in the courts, at the expense of the administrative state. The one policy-making branch of government that is never criticized for possessing too much power is Congress. Therefore, perhaps the solution to the quandary occupied by all these

215. Farina, *supra* note 180, at 514 (arguing that *Chevron* is a way to reconcile "the reality of regulatory power within the framework of representative democracy"). "Given our seemingly irreversible commitment to the administrative state and Congress's apparent inability to direct it meaningfully," a *Chevron*-type approach is almost an inevitability. *Id.* at 515.

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

doctrines is to refocus on Congress. And the way to do that may be to concentrate on the nondelegation doctrine, and to require that Congress express its intent more clearly and specifically prior to handing matters over to the administrative state.

A revival of the nondelegation doctrine may itself remedy some of the flaws and criticisms of the other two doctrines, as well as reinvigorating the separation of powers scheme laid out in the Constitution. By requiring Congress to more clearly state its intentions, the courts may take a step toward ending the legal fictions—e.g., the *Chevron* fiction that by leaving a statute ambiguous Congress intended administrative agencies to fill in the gaps, and the fictions involved in the nondelegation doctrine in which courts have found the vaguest and most generalized statutory terms to constitute a sufficiently detailed intelligible principle.

A virtually unenforceable nondelegation doctrine has institutionalized the role of ambiguity in delegations of power to executive agencies. Indeed, this institutionalization of ambiguity has become a pillar of the architecture of contemporary government. The major questions doctrine takes a desperate stab at this institutionalization; but the better answer might just be to more directly address the institutionalization through a rethinking of the nondelegation doctrine.