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Note 2 after *Brown & Williamson* (pp. 1196-1200) is modified as follows:

2. **Chevron *and "Major" or "Extraordinary" Questions*—**Perhaps *Brown & Williamson*'s reliance on otherwise questionable sorts of legislative history was driven by a deeper concern about whether Congress would have delegated to the FDA the authority to regulate tobacco. Indeed, the majority suggested that *Chevron* deference is less appropriate in an "extraordinary" case, where the legal question is so significant that it is simply implausible that Congress would have implicitly delegated the resolution of that question to an agency. As support for this proposition, the Court cited *MCI v. AT & T*'s conclusion that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." So, we again have the suggestion that the Court, motivated in part by anxiety about delegation, might weaken, or even abandon, the ordinary *Chevron* presumption when the question of statutory construction is somehow "extraordinary."

But it is not clear whether the case for *Chevron* is actually weaker in cases raising exceptionally important issues. After all, as Professor Cary Coglianese observes, "[q]uestions of deep economic and political significance almost axiomatically would seem better addressed by an administrative agency with greater expertise and political accountability." Cary Coglianese, Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1357 (2017) (internal citations and quotation marks omitted). On the expertise point, surely the FDA knows more than the Court about the costs, benefits, and feasibility of regulating tobacco products under the FDCA—and the fact that the decision whether or how to so regulate these products is hugely consequential would seem to make it all the more important to place primary decision-making responsibility in the hands of the experts. As for political accountability, Justice Breyer's *Brown & Williamson* dissent observed that the extraordinarily high political salience of the interpretive question at issue actually *strengthened* the case for *Chevron* deference, because the President and his administration had taken responsibility for the agency's decision and so would be held accountable, for it. Generalizing this point, we might suppose that *Chevron*'s political accountability rationale is at its strongest in the case of a major issue that is likely to attract significant public attention.

So, if the main normative justifications for *Chevron* deference are the agency's comparatively greater expertise and political accountability, one might conclude that the case for *Chevron* deference is at least as strong, and probably stronger, for the most consequential decisions. *See, e.g.*, Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 610–11 (2008); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 232 (2006). The principal response to that assertion is that in sufficiently important cases, the foundational premise of *Chevron*—that Congress lacked a specific intent on the issue, and so can be assumed to have implicitly delegated the matter to the agency—is simply implausible. *See, e.g.*, Coglianese, *supra*, at 1359 (defending the major questions doctrine on the grounds that "it [is] extremely difficult to justify implying that Congress delegated to the agency [the authority] to make (and potentially change)" such a consequential determination). Furthermore, while Justice Breyer's *Brown & Williamson* dissent emphasized the political accountability of the *executive branch* in promulgating tobacco regulations, Justice O'Connor's majority opinion stressed that *Congress* must make the key decisions of on issues of this magnitude—and potentially be held accountable for those decisions. Which of these views do you find more persuasive?

Brown & Williamson's assertion that "[i]n extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation," and that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion" helped lay the foundation for the emergence of what has come to be known as the "major questions doctrine" in administrative law. Under that

doctrine, courts adopt a presumption *against* concluding that Congress delegated to an agency the power to decide a "major" question. The two most important cases in which the Supreme Court has embraced a robust version of the major questions doctrine are *King v. Burwell*, 576 U.S. 473 (2015) and *West Virginia v. EPA*, 142 S.Ct. 2587 (2022).

In *King*, the Court declined to defer to an Internal Revenue Service' (IRS) interpretation of a provision of the Affordable Care Act (ACA) that provided tax credits to subsidize the purchase of health insurance on the health care exchanges established pursuant to the ACA. (*See* pp. 99–114, *supra*.) Chief Justice Roberts' majority opinion noted that ordinarily the *Chevron* framework would govern the inquiry, but the opinion proceeded to cite *Brown & Williamson* for the proposition that the IRS was not be entitled to *Chevron* deference because the issue—the availability of the credits—was a question of such deep economic and political significance that is central to the operation of the statutory scheme. *King*, 576 U.S. at 485–86. In *West Virginia*, the Court invalidated an Environmental Protection Agency (EPA) rule that had set stringent limitations for carbon emissions from coal-fired power plants. The EPA had interpreted the statutory language of the Clean Air Act to allow the agency to set these limits based on what could be achieved by shifting electricity generation away from coal to cleaner sources, such as natural gas and renewables, rather than setting limits based solely on what could be achieved by installing technological or other controls at individual facilities. The Court, in another opinion by Chief Justice Roberts, concluded that the relevant provision of the Clean Air Act did not permit the EPA to require generation shifting. Even though the Court concede that EPA's interpretation had a "plausible textual basis," the Court—citing *Brown & Williamson*, but not mentioning *Chevron*—insisted that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince us otherwise, . . . [t]he agency . . . must point to clear congressional authorization for the power it claims." (internal citations and quotation marks omitted). There is a robust debate over whether cases like *King* and *West Virginia* represent an application, or reasonable extension, of the principle articulated in cases like *Brown & Williamson*, or whether the more recent cases embraced a fundamentally different version of the "major questions doctrine."

The emergence of the modern version of the major questions doctrine is one of the most significant developments in administrative law doctrine over the past two decades, and the extent to which this doctrine will substantially limit *Chevron*, or presage *Chevron*'s demise, is a major focus of discussion and commentary. There is also a normative debate over whether this major questions doctrine, as the Court has developed it, is legitimate and desirable. We will put these questions aside for now, but we will return to them at the end of this chapter. *See infra* Part IV–B.

Part IV of Chapter Five (pp. 1240-1269) is replaced with the following:

IV. *CHEVRON*'S LIMITS

Chevron, as we have seen, establishes a presumption of judicial deference to agency statutory interpretations, and this presumption is based on an assertion, or legal fiction, regarding congressional intent. But is this presumption always (or ever) reasonable? In the previous section, we saw that courts sometimes refuse to give *Chevron* deference to an agency's construction of an otherwise ambiguous statute because the agency's interpretation would implicate some other substantive canon of statutory construction, such as the constitutional avoidance canon or the presumption against preemption. Those cases, however, are still at least ostensibly governed by the *Chevron* framework; when the agency loses, it is because the reviewing court has concluded that the statute is not ambiguous once one has applied the appropriate tools of statutory construction.

Are there also some agency statutory interpretations that should not get *Chevron* deference on the grounds that it is implausible (or undesirable) to presume Congress meant to delegate the resolution of that particular statutory ambiguity to an agency? Perhaps before courts apply the *Chevron* framework, they first need to ask a preliminary question (or set of questions) about whether *Chevron* applies *at all* to the agency interpretation at issue. This preliminary inquiry is sometimes characterized as the question of "*Chevron*'s domain" or as a kind of "*Chevron* Step Zero." *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006). If there is such a "step zero," what does it include? Might the arguments for accepting certain limits on *Chevron*'s domain, if taken seriously, end up drastically curtailing the scope and significance of *Chevron* deference?

In this section, we will consider two of the most consequential potential limits on *Chevron* deference, before turning to questions—which have assumed increasing importance in the last few years—about whether *Chevron* is likely to be abandoned altogether, and if so what the implications of such a substantial change would be for our administrative law system more generally.

A. PROCEDURAL FORMALITY AND *CHEVRON*'S DOMAIN

One of the most important and controversial questions regarding possible limits on *Chevron*'s domain concerns whether the form in which the agency announces its interpretation—and the degree of procedural formality associated with that mode of agency action—are relevant to whether the agency's interpretation is entitled to *Chevron* deference. So far, this chapter has discussed cases in which the reviewing court applied the *Chevron* framework to agency interpretations announced either in notice-and-comment rules or in orders following a formal administrative adjudication. But what about agency interpretations that are announced as *interpretive rules* that do not go through notice and comment? What about interpretations issued in *informal* adjudications, which are subject to minimal procedural requirements? Should *Chevron* apply to these sorts of interpretations as well?

For the first fifteen years after the *Chevron* decision, the Supreme Court did not address these questions directly. During that period, courts of appeals sometimes applied *Chevron* to these less formal interpretive statements, but sometimes they declined to do so on the grounds that these informal pronouncements lacked the "force of law." *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 937 & n.215 (2004). The Supreme Court finally weighed in on this issue with two important decisions issued in consecutive terms: Christensen v. Harris County, 529 U.S. 576 (2000), and United States v. Mead Corp., 533 U.S. 218 (2001).

Christensen involved a dispute over the proper interpretation of the Fair Labor Standards Act (FLSA). Simplifying somewhat, the FLSA allows state and local governments to compensate

employees for overtime work by giving these employees additional "comp time," which entitles them to take time off from work at full pay. If employees don't use their accumulated comp time, though, the employer can be required to pay cash compensation. A local sheriff's department in Harris County, Texas was worried that many of its employees were accruing so much unused comp time that if these employees sought cash compensation, it would place a serious fiscal strain on the county treasury. The county therefore decided to adopt a rule requiring its employees to schedule time off in order to use up some of their accumulated comp time. Before Harris County adopted its new policy, it asked the Administrator of the Labor Department's Wages and Hours Division (the federal agency that oversees enforcement of the FLSA) whether this policy would be acceptable. The Administrator's reply letter stated that unless there was a prior contractual agreement permitting this sort of thing, the FLSA prohibited an employer from compelling an employee to use accumulated comp time. Harris County nonetheless went ahead and adopted its new policy. Several employees sued, alleging that this policy was inconsistent with the FLSA.

The Supreme Court, in an opinion by Justice Thomas, found the interpretation urged by the employees and the Labor Department "unpersuasive." The Court acknowledged, however, that the statute was not entirely clear. Given that concession, the Court had to confront the employees' claim that *Chevron* required the Court to defer to the Administrator's interpretation. In rejecting this argument, Justice Thomas wrote:

> [W]e confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference. . . . Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the "power to persuade," *ibid.*

529 U.S. at 587.

Justice Scalia concurred in the judgment, but he disagreed with the passage quoted above. In Justice Scalia's view, *Chevron* supplied the correct standard of review, and he concurred in the judgment only because he thought that the Administrator's interpretation of the FLSA was unreasonable. Justice Scalia described *Skidmore* as an "anachronism" that had been displaced by *Chevron*, and he emphasized that on numerous occasions the Court had accorded *Chevron* deference to agency positions contained in opinion letters and informal adjudications. *Id.* at 589–91 (Scalia, J., concurring in part and concurring in the judgment). Justice Breyer (who, along with Justices Stevens and Ginsburg, dissented on the merits) argued, to the contrary, that *Skidmore* deference would apply where "*Chevron*-type deference is inapplicable—*e.g.*, where one has doubt that Congress actually intended to delegate interpretive authority to the agency. . . ." *Id.* at 596–97 (Breyer, J., dissenting). To this, Justice Scalia replied that *Chevron* would only be "inapplicable" if the statute were unambiguous (or if there were no authoritative agency interpretation), in which case *Skidmore* would also be inapplicable. Doubts about whether Congress actually intended to delegate interpretive authority to the agency, according to Justice Scalia, are properly considered when the reviewing court is deciding *whether* the statute is ambiguous, but "once ambiguity is established the consequences of *Chevron* attach." *Id.* at 589 n.* (Scalia, J., concurring in part and concurring in the judgment).

Christensen was a kind of dress rehearsal for the more significant decision in *United States v. Mead Corp.* the following Term. As you read the opinions in *Mead*, consider the degree to which the holding is consistent with *Chevron*, and what the practical consequences of the decision might be.

United States v. Mead Corp.

Supreme Court of the United States
533 U.S. 218 (2001)

■ JUSTICE SOUTER delivered the opinion of the Court.

The question is whether a tariff classification ruling by the United States Customs Service deserves judicial deference. The Federal Circuit rejected Customs's invocation of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), in support of such a ruling, to which it gave no deference. We agree that a tariff classification has no claim to judicial deference under *Chevron,* there being no indication that Congress intended such a ruling to carry the force of law, but we hold that under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the ruling is eligible to claim respect according to its persuasiveness.

I

A

Imports are taxed under the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202. Title 19 U.S.C. § 1500(b) provides that Customs "shall, under rules and regulations prescribed by the Secretary [of the Treasury,] . . . fix the final classification and rate of duty applicable to . . . merchandise" under the HTSUS. Section 1502(a) provides that

> "[t]he Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law (including regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned), and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry."[1]

. . . The Secretary provides for tariff rulings before the entry of goods by regulations authorizing "ruling letters" setting tariff classifications for particular imports. 19 CFR § 177.8 (2000). A ruling letter

> "represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked. In the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances." § 177.9(a).

After the transaction that gives it birth, a ruling letter is to "be applied only with respect to transactions involving articles identical to the sample submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter." § 177.9(b)(2). As a general matter, such a letter is "subject to modification or revocation without notice to any person, except the person to whom the letter was addressed," § 177.9(c), and the regulations consequently provide that "no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter," *ibid.* Since ruling letters respond to transactions of the moment, they are not subject to notice and comment before being issued, may be published but need only be made "available for public inspection," 19 U.S.C. § 1625(a), and, at the time this action arose, could be modified without notice and comment under most circumstances, 19 CFR § 177.10(c) (2000). A broader notice-and-comment requirement for modification of prior rulings was added by statute in 1993, . . . and took effect after this case arose.

[1] The statutory term "ruling" is defined by regulation as "a written statement . . . that interprets and applies the provisions of the Customs and related laws to a specific set of facts." 19 CFR § 177.1(d)(1) (2000).

Any of the 46 port-of-entry Customs offices may issue ruling letters, and so may the Customs Headquarters Office, in providing "[a]dvice or guidance as to the interpretation or proper application of the Customs and related laws with respect to a specific Customs transaction [which] may be requested by Customs Service field offices . . . at any time, whether the transaction is prospective, current, or completed," 19 CFR § 177.11(a) (2000). Most ruling letters contain little or no reasoning, but simply describe goods and state the appropriate category and tariff. A few letters, like the Headquarters ruling at issue here, set out a rationale in some detail.

B

Respondent, the Mead Corporation, imports "day planners," three-ring binders with pages having room for notes of daily schedules and phone numbers and addresses, together with a calendar and suchlike. The tariff schedule on point falls under the HTSUS heading for "[r]egisters, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles," HTSUS subheading 4820.10, which comprises two subcategories. Items in the first, "[d]iaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles," were subject to a tariff of 4.0% at the time in controversy. . . . Objects in the second, covering "[o]ther" items, were free of duty. . . .

Between 1989 and 1993, Customs repeatedly treated day planners under the "other" HTSUS subheading. In January 1993, however, Customs changed its position, and issued a Headquarters ruling letter classifying Mead's day planners as "Diaries . . . , bound" subject to tariff under subheading 4820.10.20. That letter was short on explanation, but after Mead's protest, Customs Headquarters issued a new letter, carefully reasoned but never published, reaching the same conclusion. This letter considered two definitions of "diary" from the Oxford English Dictionary, the first covering a daily journal of the past day's events, the second a book including " 'printed dates for daily memoranda and jottings; also . . . calendars. . . .' " Customs concluded that "diary" was not confined to the first, in part because the broader definition reflects commercial usage and hence the "commercial identity of these items in the marketplace." As for the definition of "bound," Customs concluded that HTSUS was not referring to "bookbinding," but to a less exact sort of fastening described in the Harmonized Commodity Description and Coding System Explanatory Notes to Heading 4820, which spoke of binding by " 'reinforcements or fittings of metal, plastics, etc.' "

Customs rejected Mead's further protest of the second Headquarters ruling letter, and Mead filed suit in the Court of International Trade (CIT). The CIT granted the Government's motion for summary judgment, adopting Customs's reasoning without saying anything about deference.

. . . [Mead then took the case to the U.S. Court of Appeals for the Federal Circuit, which] reversed the CIT and held that Customs classification rulings should not get *Chevron* deference. . . . Rulings are not preceded by notice and comment as under the Administrative Procedure Act (APA), 5 U.S.C. § 553, they "do not carry the force of law and are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review." The appeals court thought classification rulings had a weaker *Chevron* claim even than Internal Revenue Service interpretive rulings, to which that court gives no deference; unlike rulings by the IRS, Customs rulings issue from many locations and need not be published. . . .

We granted certiorari in order to consider the limits of *Chevron* deference owed to administrative practice in applying a statute. We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when 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. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent. The Customs ruling at issue here fails to qualify, although the possibility that it deserves some deference under *Skidmore* leads us to vacate and remand.

II

A

When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," *Chevron,* 467 U.S., at 843–844, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. See *id.,* at 844. . . . But whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. "[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,' " Bragdon v. Abbott, 524 U.S. 624, 642 (1998) (quoting *Skidmore,* 323 U.S., at 139–140), and "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ." *Chevron, supra,* at 844 (footnote omitted). . . . The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position, see *Skidmore, supra,* at 139–140. The approach has produced a spectrum of judicial responses, from great respect at one end . . . to near indifference at the other. . . . Justice Jackson summed things up in *Skidmore v. Swift & Co.*:

> "The weight [accorded to an administrative] judgment in a particular case 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, if lacking power to control." 323 U.S., at 140.

Since 1984, we have identified a category of interpretive choices distinguished by an additional reason for judicial deference. This Court in *Chevron* recognized that Congress not only engages in express delegation of specific interpretive authority, but that "[s]ometimes the legislative delegation to an agency on a particular question is implicit." 467 U.S., at 844. Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the 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 a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. *Id.,* at 845. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, see *id.,* at 845–846, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable, see *id.,* at 842–845. . . .

We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed. See, *e.g.*, EEOC v. Arabian American Oil Co., 499 U.S. 244, 257 (1991) (no *Chevron* deference to agency guideline where congressional delegation did not include the power to " 'promulgate rules or regulations' " (quoting General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976))); see also Christensen v. Harris County, 529 U.S. 576, 596–597 (2000) (BREYER, J., dissenting) (where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is "inapplicable"). It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the

fairness and deliberation that should underlie a pronouncement of such force.[11] . . . Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication. That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded, see, *e.g.,* NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256–257, 263 (1995). The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron.*

There are, nonetheless, ample reasons to deny *Chevron* deference here. The authorization for classification rulings, and Customs's practice in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here.

B

No matter which angle we choose for viewing the Customs ruling letter in this case, it fails to qualify under *Chevron*. On the face of the statute, to begin with, the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law. We are not, of course, here making any global statement about Customs's authority, for it is true that the general rulemaking power conferred on Customs, see 19 U.S.C. § 1624, authorizes some regulation with the force of law. . . . It is true as well that Congress had classification rulings in mind when it explicitly authorized, in a parenthetical, the issuance of "regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned," 19 U.S.C. § 1502(a). The reference to binding classifications does not, however, bespeak the legislative type of activity that would naturally bind more than the parties to the ruling, once the goods classified are admitted into this country. And though the statute's direction to disseminate "information" necessary to "secure" uniformity, *ibid.,* seems to assume that a ruling may be precedent in later transactions, precedential value alone does not add up to *Chevron* entitlement; interpretive rules may sometimes function as precedents . . . and they enjoy no *Chevron* status as a class. In any event, any precedential claim of a classification ruling is counterbalanced by the provision for independent review of Customs classifications by the CIT, see 28 U.S.C. §§ 2638–2640. . . .

It is difficult, in fact, to see in the agency practice itself any indication that Customs ever set out with a lawmaking pretense in mind when it undertook to make classifications like these. Customs does not generally engage in notice-and-comment practice when issuing them, and their treatment by the agency makes it clear that a letter's binding character as a ruling stops short of third parties; Customs has regarded a classification as conclusive only as between itself and the importer to whom it was issued, 19 CFR § 177.9(c) (2000), and even then only until Customs has given advance notice of intended change, §§ 177.9(a), (c). Other importers are in fact warned against assuming any right of detrimental reliance. § 177.9(c).

Indeed, to claim that classifications have legal force is to ignore the reality that 46 different Customs offices issue 10,000 to 15,000 of them each year. . . . Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting. Although the circumstances are less startling here, with a Headquarters letter in issue, none of the relevant statutes recognizes this category of rulings as separate or different from others; there is thus no indication that a more potent

[11] See Merrill & Hickman, *Chevron*'s Domain, 89 Geo. L.J. 833, 872 (2001) ("[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply. In delineating the types of delegations of agency authority that trigger *Chevron* deference, it is therefore important to determine whether a plausible case can be made that Congress would want such a delegation to mean that agencies enjoy primary interpretational authority").

delegation might have been understood as going to Headquarters even when Headquarters provides developed reasoning, as it did in this instance. . . .

In sum, classification rulings are best treated like "interpretations contained in policy statements, agency manuals, and enforcement guidelines." *Christensen,* 529 U.S., at 587. They are beyond the *Chevron* pale.

C

To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the "specialized experience and broader investigations and information" available to the agency, 323 U.S., at 139, and given the value of uniformity in its administrative and judicial understandings of what a national law requires, *id.,* at 140. . . .

There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case: whether the daily planner with room for brief daily entries falls under "diaries," when diaries are grouped with "notebooks and address books, bound; memorandum pads, letter pads and similar articles," HTSUS subheading 4820.10.20; and whether a planner with a ring binding should qualify as "bound," when a binding may be typified by a book, but also may have "reinforcements or fittings of metal, plastics, etc.," Harmonized Commodity Description and Coding System Explanatory Notes to Heading 4820, p. 687 (cited in Customs Headquarters letter). A classification ruling in this situation may therefore at least seek a respect proportional to its "power to persuade," *Skidmore, supra,* at 140; see also *Christensen,* 529 U.S., at 587; *id.,* at 595 (STEVENS, J., dissenting); *id.,* at 596–597 (BREYER, J., dissenting). Such a ruling may surely claim the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight.

D

Underlying the position we take here, like the position expressed by JUSTICE SCALIA in dissent, is a choice about the best way to deal with an inescapable feature of the body of congressional legislation authorizing administrative action. That feature is the great variety of ways in which the laws invest the Government's administrative arms with discretion, and with procedures for exercising it, in giving meaning to Acts of Congress. Implementation of a statute may occur in formal adjudication or the choice to defend against judicial challenge; it may occur in a central board or office or in dozens of enforcement agencies dotted across the country; its institutional lawmaking may be confined to the resolution of minute detail or extend to legislative rulemaking on matters intentionally left by Congress to be worked out at the agency level.

Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety. If the primary objective is to simplify the judicial process of giving or withholding deference, then the diversity of statutes authorizing discretionary administrative action must be declared irrelevant or minimized. If, on the other hand, it is simply implausible that Congress intended such a broad range of statutory authority to produce only two varieties of administrative action, demanding either *Chevron* deference or none at all, then the breadth of the spectrum of possible agency action must be taken into account. JUSTICE SCALIA's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety. This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect *Chevron* deference.

Our respective choices are repeated today. JUSTICE SCALIA would pose the question of deference as an either-or choice. On his view that *Chevron* rendered *Skidmore* anachronistic,

when courts owe any deference it is *Chevron* deference that they owe. Whether courts do owe deference in a given case turns, for him, on whether the agency action (if reasonable) is "authoritative[.]" The character of the authoritative derives, in turn, not from breadth of delegation or the agency's procedure in implementing it, but is defined as the "official" position of an agency, and may ultimately be a function of administrative persistence alone.

The Court, on the other hand, said nothing in *Chevron* to eliminate *Skidmore*'s recognition of various justifications for deference depending on statutory circumstances and agency action; *Chevron* was simply a case recognizing that even without express authority to fill a specific statutory gap, circumstances pointing to implicit congressional delegation present a particularly insistent call for deference. Indeed, in holding here that *Chevron* left *Skidmore* intact and applicable where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked, we hold nothing more than we said last Term in response to the particular statutory circumstances in *Christensen,* to which JUSTICE SCALIA then took exception, see 529 U.S., at 589, just as he does again today.

We think, in sum, that JUSTICE SCALIA's efforts to simplify ultimately run afoul of Congress's indications that different statutes present different reasons for considering respect for the exercise of administrative authority or deference to it. Without being at odds with congressional intent much of the time, we believe that judicial responses to administrative action must continue to differentiate between *Chevron* and *Skidmore,* and that continued recognition of *Skidmore* is necessary for just the reasons Justice Jackson gave when that case was decided.[19]

* * * *

Since the *Skidmore* assessment called for here ought to be made in the first instance by the Court of Appeals for the Federal Circuit or the CIT, we go no further than to vacate the judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

■ JUSTICE SCALIA, dissenting.

Today's opinion makes an avulsive change in judicial review of federal administrative action. Whereas previously a reasonable agency application of an ambiguous statutory provision had to be sustained so long as it represented the agency's authoritative interpretation, henceforth such an application can be set aside unless "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," as by giving an agency "power to engage in adjudication or notice-and-comment rulemaking, or . . . some other [procedure] indicati[ng] comparable congressional intent," and "the agency interpretation claiming deference was promulgated in the exercise of that authority."[1] What was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary. And whereas previously, when agency authority to resolve

[19] Surely Justice Jackson's practical criteria, along with *Chevron*'s concern with congressional understanding, provide more reliable guideposts than conclusory references to the "authoritative" or "official." Even if those terms provided a true criterion, there would have to be something wrong with a standard that accorded the status of substantive law to every one of 10,000 "official" customs classifications rulings turned out each year from over 46 offices placed around the country at the Nation's entryways. JUSTICE SCALIA tries to avoid that result by limiting what is "authoritative" or "official" to a pronouncement that expresses the "judgment of central agency management, approved at the highest levels," as distinct from the pronouncements of "underlings[.]" But that analysis would not entitle a Headquarters ruling to *Chevron* deference; the "highest level" at Customs is . . . the Commissioner of Customs with the approval of the Secretary of the Treasury. The Commissioner did not issue the Headquarters ruling. What JUSTICE SCALIA has in mind here is that because the Secretary approved the Government's position in its brief to this Court, *Chevron* deference is due. But if that is so, *Chevron* deference was not called for until sometime after the litigation began, when central management at the highest level decided to defend the ruling, and the deference is not to the classification ruling as such but to the brief. This explains why the Court has not accepted JUSTICE SCALIA's position.

[1] It is not entirely clear whether the formulation newly minted by the Court today extends to both formal and informal adjudication, or simply the former.

ambiguity did not exist the court was free to give the statute what it considered the best interpretation, henceforth the court must supposedly give the agency view some indeterminate amount of so-called *Skidmore* deference. Skidmore v. Swift & Co., 323 U.S. 134 (1944). We will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), for years to come. I would adhere to our established jurisprudence, defer to the reasonable interpretation the Customs Service has given to the statute it is charged with enforcing, and reverse the judgment of the Court of Appeals.

I

Only five years ago, the Court described the *Chevron* doctrine as follows: "We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows," Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740–741 (1996) (citing *Chevron, supra,* at 843–844). Today the Court collapses this doctrine, announcing instead a presumption that agency discretion does not exist unless the statute, expressly or impliedly, says so. While the Court disclaims any hard-and-fast rule for determining the existence of discretion-conferring intent, it asserts that "a very good indicator [is] express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed[.]" Only when agencies act through "adjudication[,] notice-and-comment rulemaking, or . . . some other [procedure] indicati[ng] comparable congressional intent [whatever that means]" is *Chevron* deference applicable—because these "relatively formal administrative procedure[s] [designed] to foster . . . fairness and deliberation" bespeak (according to the Court) congressional willingness to have the agency, rather than the courts, resolve statutory ambiguities. Once it is determined that *Chevron* deference is not in order, the uncertainty is not at an end—and indeed is just beginning. Litigants cannot then assume that the statutory question is one for the courts to determine, according to traditional interpretive principles and by their own judicial lights. No, the Court now resurrects, in full force, the pre-*Chevron* doctrine of *Skidmore* deference . . . whereby "[t]he fair measure of deference to an agency administering its own statute . . . var[ies] with circumstances," including "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position[.]" The Court has largely replaced *Chevron,* in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' "totality of the circumstances" test.

The Court's new doctrine is neither sound in principle nor sustainable in practice.

A

As to principle: The doctrine of *Chevron*—that all *authoritative* agency interpretations of statutes they are charged with administering deserve deference—was rooted in a legal presumption of congressional intent, important to the division of powers between the Second and Third Branches. When, *Chevron* said, Congress leaves an ambiguity in a statute that is to be administered by an executive agency, it is presumed that Congress meant to give the agency discretion, within the limits of reasonable interpretation, as to how the ambiguity is to be resolved. By committing enforcement of the statute to an agency rather than the courts, Congress committed its initial and primary interpretation to that branch as well.

There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite.[2] But it was in accord with the origins of federal-court judicial review. Judicial control of federal executive officers was principally exercised through the prerogative writ of mandamus. . . . That writ generally would not issue unless the executive officer was acting plainly beyond the scope of his authority. . . . Statutory ambiguities, in other words, were left to reasonable resolution by the Executive.

The basis in principle for today's new doctrine can be described as follows: The background rule is that ambiguity in legislative instructions to agencies is to be resolved not by the agencies but by the judges. Specific congressional intent to depart from this rule must be found—and while there is no single touchstone for such intent it can generally be found when Congress has authorized the agency to act through (what the Court says is) relatively formal procedures such as informal rulemaking and formal (and informal?) adjudication, and when the agency in fact employs such procedures. The Court's background rule is contradicted by the origins of judicial review of administrative action. But in addition, the Court's principal criterion of congressional intent to supplant its background rule seems to me quite implausible. There is no necessary connection between the formality of procedure and the power of the entity administering the procedure to resolve authoritatively questions of law. The most formal of the procedures the Court refers to—formal adjudication—is modeled after the process used in trial courts, which of course are not generally accorded deference on questions of law. The purpose of such a procedure is to produce a closed record for determination and review of the facts—which implies nothing about the power of the agency subjected to the procedure to resolve authoritatively questions of law.

As for informal rulemaking: While formal adjudication procedures are *prescribed* (either by statute or by the Constitution) . . . informal rulemaking is more typically *authorized* but not required. Agencies with such authority are free to give guidance through rulemaking, but they may proceed to administer their statute case-by-case, "making law" as they implement their program (not necessarily through formal adjudication). See NLRB v. Bell Aerospace Co., 416 U.S. 267, 290–295 (1974); SEC v. Chenery Corp., 332 U.S. 194, 202–203 (1947). Is it likely—or indeed even plausible—that Congress meant, when such an agency chooses rulemaking, to accord the administrators of that agency, *and their successors,* the flexibility of interpreting the ambiguous statute now one way, and later another; but, when such an agency chooses case-by-case administration, to eliminate all future agency discretion by having that same ambiguity resolved authoritatively (and forever) by the courts? Surely that makes no sense. It is also the case that certain significant categories of rules—those involving grant and benefit programs, for example—are exempt from the requirements of informal rulemaking. See 5 U.S.C. § 553(a)(2). Under the Court's novel theory, when an agency takes advantage of that exemption its rules will be deprived of *Chevron* deference, *i.e.,* authoritative effect. Was this either the plausible intent of the APA rulemaking exemption, or the plausible intent of the Congress that established the grant or benefit program? . . .

B

As for the practical effects of the new rule:

1

The principal effect will be protracted confusion. As noted above, the one test for *Chevron* deference that the Court enunciates is wonderfully imprecise: whether "Congress delegated

[2] Title 5 U.S.C. § 706 provides that, in reviewing agency action, the court shall "decide all relevant questions of law"—which would seem to mean that all statutory ambiguities are to be resolved judicially. . . . It could be argued, however, that the legal presumption identified by *Chevron* left as the only "questio[n] of law" whether the agency's interpretation had gone beyond the scope of discretion that the statutory ambiguity conferred. Today's opinion, of course, is no more observant of the APA's text than *Chevron* was—and indeed is even more difficult to reconcile with it. Since the opinion relies upon actual congressional intent to suspend § 706, rather than upon a legal presumption against which § 706 was presumably enacted, it runs head-on into the provision of the APA which specifies that the Act's requirements (including the requirement that judges shall "decide all relevant questions of law") cannot be amended except expressly. See § 559.

authority to the agency generally to make rules carrying the force of law, . . . as by . . . adjudication[,] notice-and-comment rulemaking, or . . . some other [procedure] indicati[ng] comparable congressional intent." But even this description does not do justice to the utter flabbiness of the Court's criterion, since, in order to maintain the fiction that the new test is really just the old one, applied consistently throughout our case law, the Court must make a virtually open-ended exception to its already imprecise guidance: In the present case, it tells us, the absence of notice-and-comment rulemaking (and "[who knows?] [of] some other [procedure] indicati[ng] comparable congressional intent") is not enough to decide the question of *Chevron* deference, "for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." The opinion then goes on to consider a grab bag of other factors—including the factor that used to be the sole criterion for *Chevron* deference: whether the interpretation represented the *authoritative* position of the agency. It is hard to know what the lower courts are to make of today's guidance.

2

Another practical effect of today's opinion will be an artificially induced increase in informal rulemaking. Buy stock in the [Government Printing Office]. Since informal rulemaking and formal adjudication are the only more-or-less safe harbors from the storm that the Court has unleashed; and since formal adjudication is not an option but must be mandated by statute or constitutional command; informal rulemaking—which the Court was once careful to make voluntary unless required by statute, see *Bell Aerospace, supra,* and *Chenery, supra*—will now become a virtual necessity. As I have described, the Court's safe harbor requires not merely that the agency have been given rulemaking authority, but also that the agency have *employed* rulemaking as the means of resolving the statutory ambiguity. (It is hard to understand why that should be so. Surely the mere *conferral* of rulemaking authority demonstrates—if one accepts the Court's logic—a congressional intent to allow the agency to resolve ambiguities. And given that intent, what difference does it make that the agency chooses instead to use another perfectly permissible means for that purpose?) Moreover, the majority's approach will have a perverse effect on the rules that do emerge, given the principle (which the Court leaves untouched today) that judges must defer to reasonable agency interpretations of their own regulations. . . . Agencies will now have high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect.

3

Worst of all, the majority's approach will lead to the ossification of large portions of our statutory law. Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion. As *Chevron* itself held, the Environmental Protection Agency can interpret "stationary source" to mean a single smokestack, can later replace that interpretation with the "bubble concept" embracing an entire plant, and if that proves undesirable can return again to the original interpretation. 467 U.S., at 853–859, 865–866. For the indeterminately large number of statutes taken out of *Chevron* by today's decision, however, ambiguity (and hence flexibility) will cease with the first judicial resolution. *Skidmore* deference gives the agency's current position some vague and uncertain amount of respect, but it does not, like *Chevron, leave* the matter within the control of the Executive Branch for the future. Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed. . . . It will be bad enough when this ossification occurs as a result of judicial determination (under today's new principles) that there is no affirmative indication of congressional intent to "delegate"; but it will be positively bizarre when it occurs simply because of an agency's failure to act by rulemaking (rather than informal adjudication) before the issue is presented to the courts.

One might respond that such ossification would not result if the agency were simply to readopt its interpretation, after a court reviewing it under *Skidmore* had rejected it, by repromulgating it through one of the *Chevron*-eligible procedural formats approved by the Court today. Approving this procedure would be a landmark abdication of judicial power. It is worlds apart from *Chevron* proper, where the court does not *purport* to give the statute a judicial interpretation—except in identifying the scope of the statutory ambiguity, as to which the court's judgment is final and irreversible. (Under *Chevron* proper, when the agency's authoritative interpretation comes within the scope of that ambiguity—and the court therefore approves it—the agency will not be "overruling" the court's decision when it later decides that a different interpretation (still within the scope of the ambiguity) is preferable.) By contrast, under this view, the reviewing court will not be holding the agency's authoritative interpretation within the scope of the ambiguity; but will be holding that the agency has not used the "delegation-conferring" procedures, and that the court must therefore *interpret the statute on its own*—but subject to reversal if and when the agency uses the proper procedures. . . .

I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency—or have allowed a lower court to render an interpretation of a statute subject to correction by an agency. . . .

4

And finally, the majority's approach compounds the confusion it creates by breathing new life into the anachronism of *Skidmore,* which sets forth a sliding scale of deference owed an agency's interpretation of a statute that is dependent "upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"; in this way, the appropriate measure of deference will be accorded the "body of experience and informed judgment" that such interpretations often embody, 323 U.S., at 140. Justice Jackson's eloquence notwithstanding, the rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers.

It was possible to live with the indeterminacy of *Skidmore* deference in earlier times. But in an era when federal statutory law administered by federal agencies is pervasive, and when the ambiguities (intended or unintended) that those statutes contain are innumerable, totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation. To condemn a vast body of agency action to that regime (all except rulemaking, formal (and informal?) adjudication, and whatever else might now and then be included within today's intentionally vague formulation of affirmative congressional intent to "delegate") is irresponsible. . . .

II

. . . It is, to be sure, impossible to demonstrate that any of our cases contradicts the rule of decision that the Court prescribes, because the Court prescribes none. More precisely, it at one and the same time (1) renders meaningless its newly announced requirement that there be an affirmative congressional intent to have ambiguities resolved by the administering agency, and (2) ensures that no prior decision can possibly be cited which contradicts that requirement, by simply announcing that all prior decisions according *Chevron* deference exemplify the multifarious ways in which that congressional intent can be manifested: "[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not

decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded[.]"[4]

The principles central to today's opinion have no antecedent in our jurisprudence. *Chevron,* the case that the opinion purportedly explicates, made no mention of the "relatively formal administrative procedure[s]" that the Court today finds the best indication of an affirmative intent by Congress to have ambiguities resolved by the administering agency. Which is not so remarkable, since *Chevron* made no mention of any *need* to find such an affirmative intent; it said that in the event of statutory ambiguity agency authority to clarify was to be *presumed*. . . .

. . . [M]any cases flatly contradict the theory of *Chevron* set forth in today's opinion, and *with one exception* not a single case can be found with language that supports the theory. That exception, a very recent one, [is] . . . Christensen v. Harris County, 529 U.S. 576 (2000), [in which] the Court said the following:

> "[W]e confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Id.,* at 587.

This statement was dictum, unnecessary to the Court's holding. Since the Court went on to find that the Secretary of Labor's position "ma[de] little sense" given the text and structure of the statute, *id.,* at 585–586, *Chevron* deference could not have been accorded *no matter what* the conditions for its application. See 529 U.S., at 591 (SCALIA, J., concurring in part and concurring in judgment). . . .

III

To decide the present case, I would adhere to the original formulation of *Chevron*. . . . *Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion. Any resolution of the ambiguity by the administering agency that is authoritative—that represents the official position of the agency—must be accepted by the courts if it is reasonable. . . .

There is no doubt that the Customs Service's interpretation represents the authoritative view of the agency. Although the actual ruling letter was signed by only the Director of the Commercial Rulings Branch of Customs Headquarters' Office of Regulations and Rulings, the Solicitor General of the United States has filed a brief, cosigned by the General Counsel of the Department of the Treasury, that represents the position set forth in the ruling letter to be the official position of the Customs Service. . . . No one contends that it is merely a "*post hoc* rationalizatio[n]" or an "agency litigating positio[n] wholly unsupported by regulations, rulings, or administrative practice," Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212 (1988).[6]

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[4] As a sole, teasing example of those "sometimes" the Court cites NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995). . . . The many other cases that contradict the Court's new rule will presumably be explained, like *NationsBank,* as other "modes" of displaying affirmative congressional intent. . . .

[6] The Court's parting shot, that "there would have to be something wrong with a standard that accorded the status of substantive law to every one of 10,000 'official' customs classifications rulings turned out each year from over 46 offices placed around the country at the Nation's entryways," misses the mark. I do not disagree. The "authoritativeness" of an agency interpretation does not turn upon whether it has been enunciated by someone who is actually employed by the agency. It must represent the judgment of central agency management, approved at the highest levels. I would find that condition to have been satisfied when, a ruling having been attacked in court, the general counsel of the agency has determined that it should be defended. If one thinks that that does not impart sufficient authoritativeness, then surely the line has been crossed when, as here, the General Counsel of the agency and the Solicitor General of the United States have assured this Court that the position represents the agency's authoritative view. (Contrary to the Court's suggestion, there would be nothing bizarre about the fact that this latter approach would entitle the ruling to deference here, though it would not have been entitled to deference in the lower courts. Affirmation of the official agency position before this court—if that is thought necessary—is no different from the agency's issuing a new rule after the Court of Appeals determination. It establishes a new legal basis for the decision, which this Court must take into account (or remand for that purpose), even though the Court of Appeals could not. . . .

There is also no doubt that the Customs Service's interpretation is a reasonable one, whether or not judges would consider it the best. I will not belabor this point, since the Court evidently agrees: An interpretation that was unreasonable would not merit the remand that the Court decrees for consideration of *Skidmore* deference. . . .

For the reasons stated, I respectfully dissent from the Court's judgment. . . . I dissent even more vigorously from the reasoning that produces the Court's judgment, and that makes today's decision one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action. Its consequences will be enormous, and almost uniformly bad.

***1. The Theory of* Mead**—Justice Souter's majority opinion characterized *Mead* simply as an extension of *Chevron*, while Justice Scalia's dissent characterized *Mead* as an "avulsive change" that had (unwisely) displaced *Chevron*. What accounts for this difference? Both Justice Souter and Justice Scalia characterized *Chevron* itself as grounded in a presumption about congressional intent. The principal difference between them seems to be that for Justice Souter, this presumption applies only when "the agency's generally conferred authority and other statutory circumstances" make it apparent 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 a space in the enacted law," whereas Justice Scalia saw *Chevron* as establishing an across-the-board presumption that ambiguities in agency-administered statutes are legally equivalent to congressional delegations of authority to the agency.

Justice Scalia and Justice Souter appear to be making competing claims about congressional intent. Yet Justice Scalia has asserted elsewhere that the *Chevron* presumption is not a "100% accurate estimation of . . . congressional intent," but rather is better understood to rest upon "fictional, presumed intent." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517. If so, perhaps his objection was not that the majority's approach was less faithful to some genuine congressional preference, but rather that *Chevron*'s categorical approach to (presumptive) congressional intent is preferable to *Mead*'s case-by-case approach. If that's right, then the dispute between Justice Souter and Justice Scalia may be another manifestation of the longstanding debate over the relative merits of rules and standards, with Justice Scalia extolling the virtues of *Chevron* as a *rule* and Justice Souter (and the other Justices in the *Mead* majority, most notably Justice Breyer) insisting that this issue calls for a more flexible *standard* that would "tailor deference to variety." *Compare* Scalia, *supra*, at 516–517 (arguing that the pre-*Chevron* multi-factor regime was a "font of uncertainty and litigation," which *Chevron* had properly replaced with a clear "background rule of law against which Congress can legislate"), *with* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986) (arguing that it does not make sense to presume that Congress would prefer to have a uniform judicial review doctrine for the wide variety of agency actions) *and* Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 260–61 (1988) (same). Justices Breyer and Scalia continued this rules-versus-standards debate in a number of post-*Mead* cases. *Compare* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (Breyer, J.) (deferring to an agency's interpretation of a statutory term in light of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"), *with id.* at 227 (Scalia, J., concurring in part and concurring in the judgment) (arguing that because the agency's "regulations emerged from notice-and-comment rulemaking[, they] merit deference [and n]o more need be said"); *compare also* National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (asserting that under *Mead* "the existence of a formal rulemaking proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference to an agency's interpretation of a statute"), *with id.* at 1014–15 (Scalia, J.,

dissenting) (arguing that insofar as *Mead* managed to set forth *any* comprehensible rule, it is that some degree of formal process "[is] required—or [is] at least the only safe harbor" for an agency that wants to ensure *Chevron* deference for its interpretation); *see also* SAS Institute, Inc. v. Iancu, 138 S.Ct. 1348, 1364 (2018) (Breyer, J., dissenting) ("I do not . . . treat [*Chevron*] like a rigid, black-letter rule of law, instructing [courts] always to allow agencies leeway to fill every gap in every statutory provision. *See* [*Mead*]. I understand *Chevron* as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended agencies to have. I recognize that Congress does not always consider such matters, but if not, courts can . . . [use] a canon-like, judicially created construct, the hypothetical reasonable legislator, and ask[ ] what such legislators would likely have intended had Congress considered the question of delegating gap-filling authority to the agency.").

Can we resolve this rules-standards dispute based on a judgment as to which approach displays greater fidelity to congressional intent? If not, should we be influenced by policy considerations, such as which approach gives greater power to judges or agencies, or creates more predictability, or is more sensitive to context, or is more likely to track prevailing political preferences? *See* EINER ELHAUGE, STATUTORY DEFAULT RULES 90–96 (2008); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807 (2002). Does it matter, in this regard, whether the basis for *Chevron* deference is an assumption or prediction about *real* congressional intent, or rather a legal fiction designed to further certain underlying values? (*See* pp. 1119–1122, *supra*.) Might there be different *types* of statutory ambiguities, such that sometimes agency interpretation is preferable to judicial interpretation but sometimes the opposite is true? Can this question be answered without first deciding which of the several possible rationales for *Chevron* deference one finds convincing? *See generally* Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 842–49 (2011).

2. **Mead*'s Emphasis on Procedural Formality*—**If *Mead* calls upon courts to make case-specific determinations as to whether Congress would have wanted *Chevron* deference in the case at hand, then courts need some guidance regarding what sorts of evidence tend to indicate that Congress did (or did not) intend to delegate interpretive authority to the agency. Following *Christensen*, the *Mead* Court declared that "a very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorization[ ] to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." So, *Chevron* will presumably apply in cases involving notice-and-comment rulemaking or formal adjudication. *See, e.g.*, Yellow Transp., Inc. v. Michigan, 537 U.S. 36, 45 (2002). But, as *Mead* also made clear, procedural formality is not a *necessary* condition for *Chevron* deference. *See, e.g.*, Edelman v. Lynchburg Coll., 535 U.S. 106, 114 (2002); Barnhart v. Walton, 535 U.S. 212, 221–22 (2002). It is somewhat less clear from *Mead* whether this sort of procedural formality is a *sufficient* condition for *Chevron* deference. Justice Breyer has suggested that it is not, although it is unclear how many other Justices agree with him on this. *See* National Cable & Telecomms Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004–05 (2005) (Breyer, J., concurring).

Justice Scalia's principal objection to *Mead*, as we have seen, was that it abandoned a rule-like conception of *Chevron* deference in favor of a more standard-like case-by-case analysis. Justice Scalia also objected to *Mead*'s emphasis on formal procedures as indicative of congressional intent. Indeed, he described the idea that procedural formality is a good indicator that *Chevron* ought to apply as "quite implausible," because there "is no necessary connection between the formality of procedure and the power of the entity administering the procedure to resolve authoritatively questions of law." Is Justice Scalia right about this? Could one imagine a reasonable legislator concluding that agencies should only have the authority to make decisions that bind with the force of law if they do so through procedures that provide assurances of either broad public participation (notice-and-comment rulemaking) or trial-type guarantees of

procedural fairness (formal adjudication)? Even if there is no *necessary* connection between procedural formality and the authoritativeness of an agency's interpretation, might procedural formality nevertheless be a good *proxy* for congressional intent to delegate to the agency? *See* Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 814–15 (2002); Matthew C. Stephenson, *Statutory Interpretation by Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285, 317 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010). Would establishing this doctrinal connection have good or bad *practical* effects? If it would have good effects, could it be defended on the same grounds as *Chevron* itself: as a useful legal fiction about congressional intent that furthers substantive policy interests?

Could one also argue that something like *Mead* is necessary to prevent agencies from exploiting the "interpretive rule" exception to § 553 notice-and-comment procedures? Recall from Chapter Four (pp. 968–970, *supra*) that one of the key distinctions between interpretive rules and legislative rules is that the former lack the "force and effect of law." If courts were to give *Chevron* deference to agency statutory constructions contained in interpretive rules, on the logic that Congress had implicitly delegated these policy choices to the agency, wouldn't that be equivalent to treating interpretive rules as if they *did* have the "force of law"? *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 940 (2004). Furthermore, one of the reasons that courts often give agencies great latitude in invoking the interpretive rule exception to notice-and-comment rulemaking is the expectation of more aggressive judicial review of agency interpretations issued in such contexts—the "pay me now or pay me later" idea that the agency can avoid procedural formality only at the cost of subjecting its decision to more rigorous judicial scrutiny on the merits. (*See* pp. 980–982, *supra*.) Does this imply that *Mead* (or at least *Christensen*) must be the right way to approach judicial review of the interpretations contained in such documents? *See* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1463–64 (2011); Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 533–34, 564–65 (2006). How might Justice Scalia have responded to that argument?

It is of course possible to accept the *Mead* Court's view that courts should "tailor deference to variety" while resisting the opinion's claim that procedural formality is the most important consideration when deciding whether *Chevron* deference is appropriate. For example, then-Professors (now Judge and Justice, respectively) David Barron and Elena Kagan argued that the applicability of *Chevron* should turn not on procedural formality, but rather on whether the senior agency official to whom authority is granted endorses (and thus takes responsibility for) the agency's interpretive choice—and does so prior to litigation. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201. Professor Anne Joseph O'Connell goes further, arguing that greater sensitivity to political and institutional realities might suggest that

> [i]n assessing how much to defer to an agency's decision, courts perhaps should focus less on the procedures used by the agency . . . and more on the type of agency, the agency's track record, the agency's expertise, the level of presidential and congressional control over the agency, and the timing of the agency's action.

Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 980 (2008). Note that the Barron-Kagan approach is relatively more rule-like (indeed, more rule-like than *Mead* itself), while the approach that Professor O'Connell suggests seems to embrace a multi-factor standard comparable to—perhaps even broader than—the pre-*Chevron* approach. *See* pp. 1099–1101, *supra*.

Do these alternatives strike you as a more appealing way to distinguish between those cases where *Chevron* should apply and those where it should not? There are, of course, other considerations, besides those discussed above, that might be used to determine which agency

interpretations are entitled to *Chevron* deference. Given the broad range of plausible criteria, what is the proper basis for choosing among them?

***3. "Force of Law" in the* Mead *Analysis*—**Although *Mead*, like *Christensen*, emphasized that *Chevron* applies only to agency interpretations that have the "force of law," the agency interpretations at issue in *Mead* and *Christensen* were quite different from one another with respect to their legal force and effect. The opinion letter in *Christensen* was an interpretive rule that had no legal effect. The agency could (and did) initiate an enforcement proceeding against a party that took action contrary to the interpretation stated in the opinion letter, but in such a case, the agency's legal argument would necessarily be (and was) that the defendant violated the *statute*, not the opinion letter. In contrast, the Customs Ruling Letter at issue in *Mead* had legal force with respect to the Mead Corporation. The Customs Service went to great lengths to limit the legal consequences of its Ruling Letters, stating that each such Letter applies only to the particular transaction in which the Letter was issued, and has limited precedential effect. Nonetheless, these Ruling Letters are legally binding orders with respect to the parties whom they address. Could one therefore argue that *Christensen* was right but *Mead* was wrong? Should an agency get *Chevron* deference as long as its interpretation has independent legal effect, even if it is issued with minimal procedural formality? Or is the degree of procedural formality more significant than whether the interpretation has formal legal force?

Mead, then, did not seem to be using the phrase "force of law" in the traditional, formal sense. Rather, the opinion instructed reviewing courts to consult a range of factors to determine whether Congress intended the agency's statutory constructions to be authoritative. Did *Mead* adequately justify its multi-factor approach to determining the force of law question? Are there other factors one might look to when making this determination? *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002) (arguing that a pre-APA convention held that agency rules bind with the force of law when the organic act provides sanctions for violation of such rules); Russell L. Weaver, *The Emperor Has No Clothes:* Christensen, Mead, *and Dual Deference Standards*, 54 ADMIN. L. REV. 173, 175 (2002) (arguing that *Mead*'s "force of law" test is inherently flawed because "Congress never explicitly states that agency interpretations should be 'given the force of law' if articulated in particular formats, and it rarely gives implicit indications of its intent").

4. When Is an Agency Interpretation "Authoritative"?—Note the striking disagreement between the *Mead* majority opinion and Justice Scalia's dissent regarding what it takes for an agency decision to be "authoritative." For the majority, an agency interpretation is "authoritative," in the sense of being entitled to *Chevron* deference, if there are sufficient indicators that Congress intended to delegate interpretive authority in this particular context. Procedural formality is the most important indicator of such intent, but *Mead* also emphasized that "46 different Customs offices issue 10,000 to 15,000 of [these Ruling Letters] each year" and that "[a]ny suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting." Justice Scalia agreed that an interpretation issued by a low-level agency official might not be entitled to *Chevron* deference, but in his view once the agency's leadership has endorsed that interpretation, and the United States Department of Justice has defended that view in court, the interpretation becomes the authoritative position of the agency and is therefore worthy of *Chevron* deference.

Doesn't Justice Scalia have a point that the majority's argument about the large number of Ruling Letters issued by low-level officials loses much of its force once the head of the Customs Service, the Secretary of the Treasury, and the Solicitor General of the United States have all endorsed and defended the interpretation contained in such a letter? On the other hand, perhaps there is a tension between Justice Scalia's criterion for "authoritativeness" and the *Chenery I* principle that courts should not consider post hoc litigating positions when evaluating agency action (*see* pp. 895–896, *supra*)? Should it matter whether the agency's leadership endorsed the

subordinate official's construction of the statute before litigation commenced? Perhaps the agency should get *Chevron* deference in those cases, but not in cases where the agency leadership only takes a position during litigation? As noted above, *supra* p. 18, a proposal along these lines is developed and defended in David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201.

***5. The Practical Effects of* Mead**—Let us now consider Justice Scalia's three criticisms of *Mead*'s practical consequences.

a. Unpredictability—Justice Scalia claimed that *Mead* would lead to confusion and protracted litigation in light of both the uncertainty of the criteria for applying *Chevron* deference and the open-endedness of the *Skidmore* standard that would now apply when *Chevron* does not. Some commentators concluded that Justice Scalia's concerns proved well-founded, at least in the immediate aftermath of the decision. *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007); Adrian Vermeule, Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003). Then again, that confusion may well have been short-lived. After all, new doctrines often engender some degree of short-term uncertainty as the courts work out their details. Today, over two decades after *Mead* was decided, how predictable is the doctrine? Is it true, as Professor Jack Beermann has claimed, that "uncertainty over the application of [the *Mead*] doctrine shows no signs of abating"? Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 742 (2014). Or is it the case, as Professor Kristin Hickman asserts, that the Supreme Court and most federal courts have gravitated toward a relatively straightforward "decision tree model" of *Mead* that "seems to resolve most cases fairly predictably . . . and makes *Mead* more workable than its critics suggest"? Kristin E. Hickman, *The Three Phases of* Mead, 83 FORDHAM L. REV. 527, 530 (2014).

Unfortunately, empirical evidence on this question is sparse, and the evidence that does exist is rather mixed. For example, a 2013 survey of agency rule drafting officials (mainly career civil servants) asked whether they thought that "[t]he level of deference (*Chevron*, *Skidmore*, no deference, etc.) that courts apply to a particular agency statutory interpretation is reasonably predictable"; 3% of the respondents strongly agreed, 25% agreed, 49% somewhat agreed, and 23% disagreed with that statement. *See* Christopher J. Walker, *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 722–23 (2014) [hereinafter Walker, *Regulatory State*]. The glass-half-full view of this result is that fewer than one-quarter of agency officials thought that the judicial review standard was not "reasonably predictable," belying predictions that *Mead* would cause "protracted confusion." The glass-half-empty view is that barely more than a quarter of agency officials fully agreed with the claim that the courts' choice of standard *is* "reasonably predictable." Much of how one interprets the results of this study depends on how one chooses to characterize the nearly half of respondents who "somewhat agreed" that the post-*Mead* judicial approach to the standard of review question is "reasonably predictable." (It may also be worth noting here that a survey of more than 1,500 court of appeals cases decided between 2003 and 2013 found that in nearly half of the cases involving an interpretation issued in something less formal than a notice-and-comment rule or formal adjudication, the court still employed the *Chevron* framework. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 38 (2017). That might suggest a degree of unpredictability, although there may be specific contextual factors, other than the procedural formality of the decision, that would help predict whether *Chevron* would apply.)

All in all, it's probably true that *Mead* increased uncertainty regarding the applicable standard of review at least somewhat, even if just how much is still unclear. Assuming for the moment that this is true, how much of a problem is that? For Justice Scalia, it's a big problem. But for Justice Souter, some degree of additional uncertainty is a price worth paying for a more

flexible, nuanced approach to judicial review of agency statutory interpretations. Is this just another instance of the conflict between rule-based and standard-based approaches? If so, how should we figure out which is more appropriate in this context? Is our preference between these approaches based on anything more well-grounded than intuition? Could it be?

Of course, another possibility to consider here is that both Justice Scalia and Justice Souter are overestimating how much an effect a shift from *Chevron* to *Skidmore* will have on actual outcomes. Some have suggested—pointing to factors like the similar agency win-rates in *Chevron* and *Skidmore* cases, as well as the flexibility of both standards—that the change in the standard of review makes little practical difference. *See* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 169–70, 174–75 (2010). Perhaps that's right, but agency officials themselves don't seem to agree with the claim that the standard of review (*Skidmore* versus *Chevron*) makes no difference: In the 2013 survey of agency rule drafting officials discussed above, 83% of respondents agreed or strongly agreed that an agency would be more likely to prevail if *Chevron* rather than *Skidmore* applied—and the remaining 17% "somewhat agreed" with that view. *See* Walker, *Regulatory State*, *supra*, at 722–23. Of course, the perception may not match the reality, and the impact of *Mead* on those matters is still very much an unsettled empirical question.

***b. Increase in notice-and-comment rulemaking*—**Justice Scalia's second practical objection to *Mead* was that it would result in "an artificially induced increase in informal rulemaking," as agencies try to ensure that their interpretations will receive *Chevron* deference by issuing them in notice-and-comment rules rather than in interpretive rules or informal orders.

Do you agree with Justice Scalia that this effect is likely? Recall that when an agency conducts an adjudication and issues a final order on a policy matter covered by an interpretive rule, the agency order must independently defend the merits of its interpretation and its policy position, rather than simply invoking the interpretive rule; the interpretive rule, after all, by definition lacks the force of law. *See* pp. 947–947, 968–970, *supra*. When an agency adopts an interpretation of a statute in an order pursuant to adjudication, the agency's interpretation may be eligible for *Chevron* deference under *Mead*, at least if the adjudication is formal. This effect may diminish the differential impact of *Mead* on the availability of deference. *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 940–41 (2004); *see also* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 321–22 (2010) (arguing that, from the agency's perspective, the expected difference in outcomes under *Chevron* and *Skidmore* deference is not sufficient to influence the agency's decision whether to employ notice-and-comment procedures).

Furthermore, even if *Mead* were to cause agencies to do more notice-and-comment rulemaking, is that necessarily a bad thing? After all, as we saw in Chapter Four (pp. 910–911, 953–956, *supra*), many judges and commentators have expressed concerns about agencies doing too *little* notice-and-comment rulemaking, avoiding the strictures of § 553 by, for example, taking too much advantage of the exception for interpretive rules. If this is indeed a problem, might the alleged vice identified by Justice Scalia actually be a virtue? Perhaps *Mead* is a good way to encourage agencies to employ notice-and-comment rulemaking processes, even when the interpretive rule exception might be available. Then again, perhaps Justice Scalia has a point: If agencies start investing substantial resources in notice-and-comment rulemakings when such elaborate procedures are not necessary, agencies might divert resources from other, more pressing tasks.

Justice Scalia also expressed concern that, in order to guarantee themselves *Chevron* deference, agencies would "rush out barebones, ambiguous rules," which those same agencies would then construe. Justice Scalia's argument here invoked another judicial doctrine, which we do not cover in depth, under which courts generally defer to an agency's construction of the agency's own regulation. (*See* pp. 982–984, *supra*, for a brief discussion.) Without going into this topic in too much detail, perhaps one might respond to Justice Scalia's concern by limiting judicial

deference to administrative interpretations of overly ambiguous notice-and-comment rules. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 244 (2006) (refusing to defer to an agency regulation that "does little more than restate the terms of the statute itself"); Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997) ("A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.' "). Might such an approach, however, run into the same sort of line-drawing problems that trouble the Court's efforts to enforce the nondelegation doctrine? That is, might it require the Court to ask at what point an agency rule is so ambiguous that any resulting interpretation cannot meaningfully be attributed to the rulemaking process—an inquiry that may not be susceptible to judicially manageable standards? *See Gonzales*, 546 U.S. at 277 (Scalia, J., dissenting) (asserting that "broadly drawn regulations are entitled to no less respect than narrow ones"); *see also* Remarks of the Honorable Antonin Scalia for the 25th Anniversary of *Chevron v. NRDC* (April 2009), *in* 66 ADMIN. L. REV. 243, 245–46 (2014) (acknowledging that the "anti-parroting principle" announced in *Gonzales* is useful insofar as it "limits agencies' ability to take advantage of *Mead*'s loophole," but asserting that this principle will require courts "to decide case-by-case whether the agency is parroting or not" and does not eliminate "the perverse incentive for ambiguous agency rulemaking").

***c. Ossification through premature judicial construction*—**Justice Scalia argued that, because a court may need to resolve an interpretive dispute before the agency has had time to issue a *Chevron*-worthy construction, after *Mead* a greater number of interpretive issues would be resolved conclusively by courts rather than agencies. This, Justice Scalia asserted, is bad for all the reasons that *Chevron* deference is good.

Note, however, that Justice Scalia's argument presumes that once a court interprets a statute, the agency cannot issue a different interpretation, even if the agency's interpretation would be considered reasonable under *Chevron*. Four years after *Mead*, the Supreme Court, in an opinion by Justice Thomas, rejected that view: The Court instead held that a judicial construction of a statute administered by an agency is merely provisional; as long as the underlying statutory term is ambiguous, the courts should uphold an agency's alternative interpretation notwithstanding the prior judicial construction. *See* National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); *see also* Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272 (2002).

This did not satisfy Justice Scalia, who viewed *Brand X* as "continu[ing] the administrative law improvisation project [the Court] began . . . in [*Mead*]" by "inventing yet another breathtaking novelty: judicial decisions subject to reversal by executive officers," an outcome Justice Scalia described as both "bizarre" and "probably unconstitutional." *Brand X*, 545 U.S. at 1016–17 (Scalia, J., dissenting); *see also* Remarks of the Honorable Antonin Scalia for the 25th Anniversary of *Chevron v. NRDC* (April 2009), *in* 66 ADMIN. L. REV. 243, 246 (2014) (conceding that *Brand X* "rendered one of my *Mead* predictions moot," but insisting that "the cure is worse than the disease").

The *Brand X* majority, however, insisted that it was not holding that an agency could "overrule" a judicial construction. Rather, because "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong." *Brand X*, 545 U.S. at 983 (majority opinion). Explaining this point further, *Brand X* insisted that the judicial precedent "has not been 'reversed' by the agency, any more than a federal court's interpretation of a State's law can be said to have been 'reversed' by a state court that adopts a conflicting (yet authoritative) interpretation of state law." *Id.* at 983–84.

Which of these positions seems more compelling to you? Did *Brand X* solve the ossification problem Justice Scalia had warned about in *Mead*? Or did it do so only by creating much more serious problems? (For what it's worth, Justice Thomas, the author of the *Brand X* majority opinion, later changed his views and argued that *Brand X* should be revisited and overruled. *See* Baldwin v. United States, 140 S.Ct. 690, 694–95 (2020) (Mem.) (Thomas, J., dissenting from denial of cert.).)

B. THE "MAJOR QUESTIONS DOCTRINE"

Most agency statutory interpretation takes place in the context of what we might think of as the ordinary, day-to-day business of governance. That is not to say this business is unimportant; it is quite important, especially when considered in the aggregate. Nevertheless, the typical case involving a contested agency interpretation is unlikely to be front page news. And even when an agency promulgates a legally contested rule on a high-profile issue, the rule usually at least resembles the sorts of rules that the agency in question often adopts.

But on occasion, an agency takes an action that is, or at least seems to a reviewing court, to be extraordinary in some sense—perhaps in terms of its likely economic, social, or political consequences, or perhaps in terms of the scope of the power that the agency has claimed. If an agency's action can be characterized as "extraordinary," should this alter the way the court assesses a legal challenge to the agency's interpretation of its statutory authority? Might the *Chevron* framework not apply in such cases? After all, the foundational assumption of *Chevron*, as we have emphasized throughout this chapter, is that a statutory ambiguity should be treated as an implicit delegation of decision-making authority to the responsible agency. But just as some find it implausible or inappropriate to assume that Congress would have wanted to authorize low-level bureaucrats to issue binding legal interpretations in informal proceedings (*see* Part IV–A, *supra*), some find it implausible or inappropriate to assume that Congress would have wanted to delegate to agencies the power to take extraordinary actions without clear and specific congressional authorization.

We have already seen a few examples of cases that have suggested something along those lines. Consider, for example, in *MCI v. AT & T*, 512 U.S. 218 (1994), in which Justice Scalia's majority opinion held that the Federal Communications Commission's statutory power to "modify" tariff-filing requirements did not authorize the agency to eliminate those requirements for smaller long distance companies that made up less than 40% of the market. In reaching this conclusion, the majority opinion buttressed its textual argument with the observation that the entire statutory scheme for regulation of long-distance telephone service is "premised upon the tariff-filing requirement" and that "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." 512 U.S. at 231. (*See* pp. 1144, 1154–55, *supra*.) And in *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Court rejected the Food and Drug Administration's assertion of jurisdiction over tobacco products, finding that even under *Chevron*'s deferential framework, the agency's position, though textually plausible, was unambiguously foreclosed by the structure and history of the relevant statute. In reaching this conclusion, Justice O'Connor's majority opinion noted that *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in statutory gaps," and asserted that "[i]n extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." 529 U.S. at 129. The Court, citing *MCI*, rejected the agency's view that it had the statutory authority to regulate tobacco, reasoning 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. In the years following *Brown & Williamson*, a few other cases invoked similar

arguments. *See, e.g.,* Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (declining to defer in part because "[t]he idea that Congress gave the [agency] such broad and unusual authority through an implicit delegation in [a particular statutory provision] is not sustainable"); Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014) (determining that an agency's interpretation was unreasonable under *Chevron* because that interpretation "would bring about an enormous and transformative expansion in [the agency's] regulatory authority without clear congressional authorization," and declaring that the Court "expect[s] Congress to speak clearly if it wishes to assign an agency decisions of vast economic and political significance" (internal citations and quotation marks omitted)).

Still, it was not entirely clear from these opinions whether there was indeed some sort of "major questions" exception to *Chevron*. After all, cases like *MCI*, *Brown & Williamson*, and *Utility Air* were decided *within* the *Chevron* framework. In those cases, the Court treated the allegedly extraordinary nature of the agency's action as evidence that the agency's interpretation of the statute was unreasonable—that the proffered interpretation was, to use an oft-quoted metaphor, an elephant in a mousehole. *Cf.* Whitman v. American Trucking Associations, 531 U.S. 457, 468 (2001). True, in *Gonzales* the Court rejected the applicability of the *Chevron* framework, but in that case the Court offered a range of reasons why *Chevron* deference was inappropriate, making it hard to assess the import of the language regarding the breadth of the authority the agency had asserted. *See* 546 U.S. at 258–269. During this period, some Justices occasionally suggested, in separate opinions, that certain kinds of fundamental questions might lie outside *Chevron*'s domain altogether. *See, e.g.*, National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (suggesting that *Chevron* deference might be inappropriate when "an unusually basic legal question is at issue"); Negusie v. Holder, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part) (arguing that courts should "distinguish . . . between central legal issues and interstitial questions" when deciding whether *Chevron* deference applies). But whether or to what degree there was some sort of "major questions" exception to *Chevron* remained unresolved.

The Court's 2015 decision in *King v. Burwell*, 576 U.S. 473 (2015), embraced such an exception much more clearly. The *King* case concerned the interpretation of a provision in the Affordable Care Act (ACA) that provided tax credits to subsidize the purchase of health insurance on so-called health care exchanges. (*See* pp. 99–114, *supra*.) Because a federal agency—the Internal Revenue Service (IRS)—had issued its interpretation of the provision in question (which appears in the tax code, which the IRS has principal responsibility to implement), one might have thought the Court would apply the *Chevron* framework. But although Chief Justice Roberts' majority opinion ultimately agreed with the IRS's reading of the statute, the Court reached this conclusion independently, without any deference to the agency's view. Indeed, the Court expressly rejected the agency's request for *Chevron* deference. As the Court explained:

> When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*, 467 U.S. 837. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach "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). "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Ibid.*
>
> This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. [The availability of] those credits . . . is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so

> expressly. *Utility Air Regulatory Group v. EPA* 573 U.S. [302, 324] (2014) (quoting *Brown & Williamson*, 529 U.S., at 160). It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort. See *Gonzales v. Oregon*, 546 U.S. 243, 266–267 (2006). This is not a case for the IRS.

King, 576 U.S. at 485–86.

The opinion in *King* was widely seen as going beyond what the Court had done in prior cases like *Brown & Williamson*. In those earlier cases, the Court pointed to the significance of the agency's action in the course of explaining why, even within the *Chevron* framework, the statute unambiguously precluded the agency's reading. *King* did not assert that the relevant provision of the ACA was clear. Indeed, Chief Justice Roberts' majority opinion characterized the relevant portions of the ACA's text as ambiguous. *See King*, 576 U.S. at 490. Normally, as the *King* opinion acknowledged, a court would defer to the agency's reading of an ambiguous statute. But, the Court reasoned, in light of the implausibility of the notion that Congress would delegate a decision of this sort to the IRS, "[i]t is instead [the Court's] task to determine the correct reading of" the provision at issue. *King* was therefore widely understood as embracing a limit on *Chevron*'s domain—similar in kind, though not in content, to cases like *Christensen* and *Mead*. *See, e.g.*, Kent Barnett & Christopher J. Walker, *Toward a Context-Specific* Chevron *Deference*, 81 MISSOURI L. REV. 1095, 1100–02 (2016); Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2412 (2018). *But see* Cary Coglianese, Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1372–74 (2017) (contesting this reading of *King*, and arguing that in fact the significance of the interpretive question is analyzed as part of, rather than prior to, the *Chevron* inquiry).

Many commentators observed that this limitation on *Chevron*'s domain could pose a substantial obstacle to agencies' ability to advance ambitious policy goals through regulatory action. *See, e.g.*, Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2086–87 (2018). This prediction was borne out in a trio of controversial Supreme Court decisions issued during the first two years of the Biden Administration.

The first of those cases, *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S.Ct. 2485 (2021) (*per curiam*), involved a challenge to a decision by the Center for Disease Control (CDC) to extend a moratorium on the eviction of renters. Congress had originally enacted a temporary eviction moratorium as part of its statutory response to the Covid-19 pandemic. When the statutory moratorium lapsed, the CDC extended the moratorium, justifying this decision as a public health measure authorized under § 361(a) of the Public Health Services Act (PHSA). The first sentence of § 361(a) instructs the CDC to issue regulations that are "necessary to prevent the introduction, transmission, or spread of communicable diseases from . . . one State or possession into any other State or possession." The second sentence of § 361(a) states that, for purposes of carrying out or enforcing those regulations, the CDC may provide for the "inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary." 42 U.S.C. § 264(a).

A group of landlords challenged the eviction moratorium as exceeding the CDC's statutory authority, and the District Court agreed. Alabama Ass'n of Realtors v. Department of Health and Human Services, 539 F.Supp.3d 29 (D.D.C. 2021). The District Court analyzed the case under the *Chevron* framework, but concluded that even under that deferential standard, the plain text of § 361(a) precluded the moratorium. *See* 539 F.Supp.3d at 37–40. The District Court's textual analysis relied principally on the *ejusdem generis* canon (the maxim that a catch-all term at the end of a list includes only those items of the same type as those specifically mentioned, *see* pp.

363–382, *supra*) and the presumption against surplusage (the idea that, where possible, courts avoid interpretations that render some of the statutory language irrelevant or redundant, *see* pp. 359–361, *supra*). The District Court pointed out that the second sentence of § 361(a) authorizes a set of specific public health measures (inspection, fumigation, sanitation, and destruction of organisms or items that might spread disease), followed by a broad reference to "other measures." That catch-all term, the court reasoned, does allow for regulations beyond those specifically listed, but only if they are of the same type as the listed measures (*ejusdem generis*); an eviction moratorium, the court concluded, was not sufficiently similar. *See* 539 F.Supp.3d at 38–39. Furthermore, the court continued, the first sentence of § 361(a)—which grants the CDC authority to issue regulations that are "necessary to prevent" the interstate spread of communicable diseases—must be read not as an open-ended grant to adopt *any* such regulations, but rather as limited to the methods that would be authorized under the second sentence; otherwise the second sentence would be superfluous. *See id.* at 40.

The District Court supplemented this textual analysis with two additional arguments. First, the court invoked the constitutional avoidance canon (*see* pp. 384–413, *supra*), noting concerns about whether the CDC's eviction moratorium might violate the Article I nondelegation doctrine or the Commerce Clause. *See* 539 F.Supp.3d at 40. Second, the court invoked the "major questions" doctrine—citing as authority *Brown & Williamson*, *Utility Air*, and *Gonzales*. The court argued that the CDC's interpretation would give the agency sweeping powers that it had never before asserted and that Congress could not have intended to confer on the CDC. As the District Court put it, the Congress that enacted the PHSA in 1944 "did not intend to grow such a large elephant in such a small mousehole." 539 F.Supp.3d at 41 (quoting Loving v. IRS, 742 F.3d 1013, 1021 (D.C. Cir. 2014)). Thus, the court concluded, even under the deferential *Chevron* framework, the CDC had clearly exceeded its statutory authority under the PHSA.

After some complicated procedural back-and-forth not directly relevant here, the case reached the Supreme Court on an emergency appeal. Technically the issue before the Court was whether to lift a stay of the District Court's order (that is, whether to allow the District Court's order blocking the rule to go into effect), but the Court's 6–3 per curiam opinion spoke extsnsively on the question of whether the CDC had the statutory authority to impose an eviction moratorium as a public health measure. The Supreme Court agreed with the District Court that the answer was no.

The Court's per curiam opinion first emphasized that if one "read[s] both sentences [of § 361(a)] together, rather than the first in isolation, it is a stretch to maintain that [this provision] gives the CDC the authority to impose this moratorium." 141 S.Ct. at 2488. Of course, agencies "stretch" statutory language all the time, and *Chevron* often lets them do it, so long as the text is sufficiently elastic. And, notably, the Supreme Court did not seem to go quite as far as the District Court in treating the agency's interpretation as *foreclosed* by the text of the statute. Yet strikingly, and in contrast to the District Court, the Supreme Court did not mention, or even cite, *Chevron*. In the key passage of the opinion, the majority emphasized the major questions doctrine (though without using that term) as the principal reason to reject the CDC's position, reasoning as follows:

> Even if the text were ambiguous, the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'" *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). That is exactly the kind of power that the CDC claims here. At least 80% of the country, including between 6 and 17 million tenants at risk of eviction, falls within the moratorium. While the parties dispute the financial burden on landlords, Congress has provided nearly $50 billion in emergency rental assistance—a reasonable proxy of the moratorium's economic impact. And the issues at stake are not merely financial. The

> moratorium intrudes into an area that is the particular domain of state law: the landlord-tenant relationship. "Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *United States Forest Service* v. *Cowpasture River Preservation Assn.*, 140 S.Ct. 1837, 1850 (2020).
>
> Indeed, the Government's read of § 361(a) would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC's reach, and the Government has identified no limit in § 361(a) beyond the requirement that the CDC deem a measure "necessary." Could the CDC, for example, mandate free grocery delivery to the homes of the sick or vulnerable? Require manufacturers to provide free computers to enable people to work from home? Order telecommunications companies to provide free high-speed Internet service to facilitate remote work?
>
> This claim of expansive authority under § 361(a) is unprecedented. Since that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium. . . . Section 361(a) is a wafer-thin reed on which to rest such sweeping power.
>
> 141 S.Ct. at 2489.

Justice Breyer's dissent, joined by Justices Sotomayor and Kagan, focused mainly on the Court's decision to grant an emergency order vacating the stay, rather than letting the appeal process take its course and deciding the issue only after full briefing and argument. *See* 141 S.Ct. at 2490 (Breyer, J., dissenting).

The next case in the 2021–2022 major questions trilogy, *National Federation of Independent Business v. OSHA*, 142 S.Ct. 661 (2022) (*per curiam*), also involved an agency regulation adopted in response to the Covid-19 pandemic. In September 2021, President Biden directed the Department of Labor's Occupational Health and Safety Administration (OSHA) to promulgate a rule that would compel large employers to require that their workers either get vaccinated or undergo weekly testing. In December 2021, OSHA issued such a rule, with narrow exemptions for employees who work remotely or exclusively outdoors.

Under the Occupational Safety and Health Act, OSHA has the statutory authority to promulgate "occupational safety or health standards." 29 U.S.C. § 655(b). Usually OSHA must issue such standards pursuant to a process that is more procedurally demanding than the notice-and-comment process under § 553 of the APA. However, OSHA is authorized to promulgate an "emergency temporary standard" (ETS), which is exempt from these procedures, if doing so is necessary to protect employees from a "grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards"; the ETS remains in place until OSHA finalizes a permanent standard through the ordinary process. 29 U.S.C. § 655(c). OSHA promulgated its December 2021 vaccine-or-test rule as an ETS. That rule, which OSHA declared would become effective in January 2022, was immediately challenged by various employer groups, which sought an emergency stay of the rule (that is, an order that the rule could not go into effect until the questions about its legality were resolved by the courts).

Some complicated procedural wrangling ensued, much of it concerning which court should hear the case. The Fifth Circuit initially granted the application for an emergency stay, finding that OSHA's rule was likely unlawful. BST Holdings, L.L.C. v. Occupational Safety and Health Admin., 17 F.4th 604 (5th Cir. 2021). The case was subsequently transferred to the Sixth Circuit, which dissolved the Fifth Circuit's stay, thus allowing OSHA to proceed with its plan to begin implementing the ETS in January 2022. *See* In re: MCP No. 165, 21 F.4th 357 (6th Cir. 2021). The Sixth Circuit reasoned that dissolution of the stay was appropriate because the challengers' legal objections were unlikely to succeed on the merits. With respect to the objection most relevant

here—that OSHA lacked the statutory authority to issue the rule—the Sixth Circuit concluded that the OSH Act "plainly authorizes" this ETS. 21 F.4th at 372. The Sixth Circuit then brushed aside the challengers' invocation of the "major questions doctrine." The court reasoned this doctrine was inapplicable "because OSHA's issuance of the ETS is not an enormous expansion of its regulatory authority." *Id.* at 372. Cases such as *Brown & Williamson* and *Alabama Realtors*, the Sixth Circuit argued, are easily distinguishable, because in those cases the agency claimed to have authority that relevant statutory provisions could not plausibly be read to grant. *See* 21 F.4th at 372–374. But because "OSHA has regulated workplace health and safety, including diseases, for decades," the Covid ETS could not be deemed "a transformative expansion of [OSHA's] regulatory power[.]," 21 F.4th at 374.

The Supreme Court disagreed. In reversing the Sixth Circuit's decision and re-imposing a stay of the ETS, the Court's 6–3 per curiam opinion emphasized that OSHA's ETS, which requires "84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense"—is a "significant encroachment into the lives—and health—of a vast number of employees." *NFIB*, 142 S.Ct. at 665. Thus, the Court concluded, "there can be little doubt that OSHA's mandate qualifies as an exercise" of sorts of the "powers of vast economic and political significance" for which a clear indication of congressional authorization is required. *Id.* (quoting *Alabama Assn. of Realtors*, 141 S.Ct. at 2489). Such a clear indication was lacking here, the Court continued, because the statutory language—which refers to "occupational" health standards designed to protect "employees"—is best read as giving OSHA only the power "to set *workplace* safety standards, not broad public health measures." *NFIB*, 142 S.Ct. at 665. And Covid-19, though *present* in the workplace, is not a distinctly "workplace hazard." Notably, as in *Alabama Realtors*, the *NFIB* Court did not apply the *Chevron* framework—which one might think would be highly relevant to the question whether the OSH Act's reference to "occupational" standards that protect "employees" authorizes OSHA to address hazards *found in* the workplace or only those that are *caused by* (or are in some sense *principally associated with*) the workplace. Indeed, the Court did not mention *Chevron* at all, even in passing.

Justice Gorsuch, in a concurring opinion joined by Justice Thomas, went further in explaining why, in his view, the major questions doctrine is important. Justice Gorsuch explicitly linked the major questions doctrine to the Article I nondelegation doctrine. Citing the *Benzene* case (which, as you may recall, read the OSH Act to require OSHA to make a threshold finding that a substance in the workplace poses a "significant risk" before OSHA may regulate it further, *see* pp. 573–593, *supra*), Justice Gorsuch asserted that "for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine." *NFIB*, 142 S.Ct. at 668 (Gorsuch, J., concurring). According to Justice Gorsuch, the major questions doctrine, like the nondelegation doctrine, "protect[s] the separation of powers and ensure[s] that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands." *Id.* at 669. The major questions doctrine does this, he explained, "by guarding against unintentional, oblique, or otherwise unlikely delegations of legislative power," and stopping an agency from "seek[ing] to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities beyond its initial assignment." *Id.*

Justice Breyer, in a dissent joined by Justices Sotomayor and Kagan, insisted that the Court had badly misconstrued the language of the OSH Act. Justice Breyer agreed with the majority that OSHA is not a "roving public health regulator," but he argued that the OSH Act empowers (indeed, requires) OSHA to "protect employees from all hazards present in the workplace—or, at least, all hazards in part created by conditions there. It does not matter whether those hazards also exist beyond the workplace walls." *NFIB*, 142 S.Ct. at 673 (Breyer, J., dissenting). As for the claim that the OSHA had asserted sweeping authority to impose a regulation with vast economic and social significance, Justice Breyer acknowledged that OSHA's standard "is far reaching—applying to many millions of American workers"—but he pointed out that this is because of the

scope and gravity of the Covid-19 crisis. *See id.* at 675. And while Congress may not have clearly authorized *this particular* ETS, Justice Breyer argued that the statute is designed to empower OSHA to respond to new and unforeseen risks. "Nothing about [the Covid ETS]," Justice Breyer insisted, "is so out-of-the-ordinary as to demand a judicially-created exception from Congress's command that OSHA protect employees from grave workplace harms." *Id.* at 674–675.

The third case in the 2021–2022 major questions doctrine trilogy—which was decided after full briefing and argument, rather than on an application to vacate or grant an emergency stay—was *West Virginia v. EPA*, which involved a challenge to the approach the Environmental Protection Agency took to set emissions limits for greenhouse gases from existing coal-fired power plants. The opinions in the *West Virginia* case more fully flesh out the competing views on the scope and legitimacy of the major questions doctrine, though the case leaves many questions about that doctrine unanswered. As you read the case, consider whether the majority's application of the major questions doctrine is a natural extension of the approach taken by earlier cases—like *MCI*, *Brown & Williamson*, *King*, *Alabama Realtors*, and *NFIB*—or whether *West Virginia* alters or refines the doctrine in some significant way. After reading the opinions, do you feel like you have a fairly clear sense of how the major questions doctrine works, when it applies, and what purposes it serves? And what about the relationship between the major questions doctrine and *Chevron*? Can the major questions doctrine be considered as an extension of the underlying theory of *Chevron*? Is it a limit on *Chevron*'s domain? Or might it perhaps signal an implicit repudiation of *Chevron*?

West Virginia v. Environmental Protection Agency

Supreme Court of the United States
142 S.Ct. 2587 (2022)

■ CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a "standard of performance" for their emission of certain pollutants into the air. That standard may be different for new and existing plants, but in each case it must reflect the "best system of emission reduction" that the Agency has determined to be "adequately demonstrated" for the particular category. For existing plants, the States then implement that requirement by issuing rules restricting emissions from sources within their borders.

Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.

The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.

I

A

The Clean Air Act establishes three main regulatory programs to control air pollution from stationary sources such as power plants. One program is the New Source Performance Standards program of Section 111, at issue here. The other two are the National Ambient Air Quality Standards (NAAQS) program, set out in Sections 108 through 110 of the Act, and the Hazardous

Air Pollutants (HAP) program, set out in Section 112. To understand the place and function of Section 111 in the statutory scheme, some background on the other two programs is in order.

The NAAQS program addresses air pollutants that "may reasonably be anticipated to endanger public health or welfare," and "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." After identifying such pollutants, EPA establishes a NAAQS for each. The NAAQS represents "the maximum airborne concentration of [the] pollutant that the public health can tolerate." *Whitman* v. *American Trucking Assns.*, *Inc.*, 531 U.S. 457, 465 (2001). EPA, though, does not choose which sources must reduce their pollution and by how much to meet the ambient pollution target. Instead, Section 110 of the Act leaves that task in the first instance to the States, requiring each "to submit to [EPA] a plan designed to implement and maintain such standards within its boundaries." *Train* v. *Natural Resources Defense Council*, *Inc.*, 421 U.S. 60, 65 (1975).

The second major program governing stationary sources is the HAP program. The HAP program primarily targets pollutants, other than those already covered by a NAAQS, that present "a threat of adverse human health effects," . . . .

EPA's regulatory role with respect to these toxic pollutants is different in kind from its role in administering the NAAQS program. There, EPA is generally limited to determining the maximum safe amount of covered pollutants in the air. As to each hazardous pollutant, by contrast, the Agency must promulgate emissions standards for both new and existing major sources. Those standards must "require the maximum degree of reduction in emissions . . . that the [EPA] Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable . . . through application of measures, processes, methods, systems or techniques" of emission reduction. § 7412(d)(2). In other words, EPA must directly require all covered sources to reduce their emissions to a certain level. And it chooses that level by determining the "maximum degree of reduction" it considers "achievable" in practice by using the best existing technologies and methods. . . .

The third air pollution control scheme is the New Source Performance Standards program of Section 111. That section directs EPA to list "categories of stationary sources" that it determines "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." §7411(b)(1)(A). Under Section 111(b), the Agency must then promulgate for each category "Federal standards of performance for new sources," §7411(b)(1)(B). A "standard of performance" is one that

> "reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated." § 7411(a)(1).

Thus, the statute directs EPA to (1) "determine[]," taking into account various factors, the "best system of emission reduction which . . . has been adequately demonstrated," (2) ascertain the "degree of emission limitation achievable through the application" of that system, and (3) impose an emissions limit on new stationary sources that "reflects" that amount. Generally speaking, a source may achieve that emissions cap any way it chooses; the key is that its pollution be no more than the amount "achievable through the application of the best system of emission reduction . . . adequately demonstrated," or the BSER. § 7411(a)(1). . . .

Although the thrust of Section 111 focuses on emissions limits for *new* and *modified* sources—as its title indicates—the statute also authorizes regulation of certain pollutants from *existing* sources. Under Section 111(d), once EPA "has set *new* source standards addressing emissions of

a particular pollutant under . . . section 111(b)," 80 Fed. Reg. 64711, it must then address emissions of that same pollutant by existing sources—but only if they are not already regulated under the NAAQS or HAP programs . . . .

Although the States set the actual rules governing existing power plants, EPA . . . decides the amount of pollution reduction that must ultimately be achieved. . . .

Reflecting the ancillary nature of Section 111(d), EPA has used it only a handful of times since the enactment of the statute in 1970. . . . For instance, the Agency has established emissions limits on acid mist from sulfuric acid production. . . ; sulfide gases released by kraft pulp mills. . . ; and emissions of various harmful gases from municipal landfills. . . . It was thus only a slight overstatement for one of the architects of the 1990 amendments to the Clean Air Act to refer to Section 111(d) as an "obscure, never-used section of the law." Hearings on S. 300 et al. before the Subcommittee on Environmental Protection of the Senate Committee on Environment and Public Works, 100th Cong., 1st Sess., 13 (1987) (remarks of Sen. Durenberger).

B

Things changed in October 2015, when EPA promulgated two rules addressing carbon dioxide pollution from power plants—one for new plants under Section 111(b), the other for existing plants under Section 111(d). Both were premised on the Agency's earlier finding that carbon dioxide is an "air pollutant" that "may reasonably be anticipated to endanger public health or welfare" by causing climate change. 80 Fed. Reg. 64530. Carbon dioxide is not subject to a NAAQS and has not been listed as a toxic pollutant.

The first rule . . . established federal carbon emissions limits for new [coal and natural gas-fired] power plants. . . . EPA . . . set [these] emissions limit based on the amount of carbon dioxide that a plant would emit with [certain] technologies [, such as high-efficiency production processes and carbon capture technology,] in place.

The second rule was triggered by the first: Because EPA was now regulating carbon dioxide from *new* coal and gas plants, Section 111(d) required EPA to also address carbon emissions from *existing* coal and gas plants. It did so through what it called the Clean Power Plan rule. . . .

The BSER that the Agency selected for existing coal-fired power plants, however, was quite different from the BSER it had chosen for new sources. The BSER for existing plants included three types of measures, which the Agency called "building blocks." The first building block was "heat rate improvements" at coal-fired plants—essentially practices such plants could undertake to burn coal more efficiently. But such improvements, EPA stated, would "lead to only small emission reductions," because coal-fired power plants were already operating near optimum efficiency. . . .

So the Agency included two additional building blocks in its BSER, both of which involve what it called "generation shifting from higher-emitting to lower-emitting" producers of electricity. Building block two was a shift in electricity production from existing coal-fired power plants to natural-gas-fired plants. . . . Building block three worked the same way, except that the shift was from both coal- and gas-fired plants to "new low- or zero-carbon generating capacity," mainly wind and solar. . . .

The Agency identified three ways in which a regulated plant operator could implement a shift in generation to cleaner sources. First, an operator could simply reduce the regulated plant's own production of electricity. Second, it could build a new natural gas plant, wind farm, or solar installation, or invest in someone else's existing facility and then increase generation there. Finally, operators could purchase emission allowances or credits as part of a cap-and-trade regime. Under such a scheme, sources that achieve a reduction in their emissions can sell a credit

representing the value of that reduction to others, who are able to count it toward their own applicable emissions caps. . . .

Having decided that the [BSER] was one that would reduce carbon pollution mostly by moving production to cleaner sources, EPA then set about determining "the degree of emission limitation achievable through the application" of that system. The Agency recognized that—given the nature of generation shifting—it could choose from "a wide range of potential stringencies for the BSER." 80 Fed. Reg. 64730. . . . The Agency settled on what it regarded as a "reasonable" amount of shift, which it based on modeling of how much more electricity both natural gas and renewable sources could supply without causing undue cost increases or reducing the overall power supply. . . .

From these significant projected reductions in generation, EPA . . . [set] 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 described above. Indeed, the emissions limit the Clean Power Plan established for existing power plants was actually *stricter* than the cap imposed by the simultaneously published standards for *new* plants. . . .

C

. . . [T]he Clean Power Plan never went into effect. The same day that EPA promulgated the rule, dozens of parties . . . petitioned for [judicial] review. . . . [This Court] granted a stay, preventing the rule from taking effect. . . .

[After a change in presidential administration,] EPA . . . repealed the rule in 2019, concluding that the Clean Power Plan had been "in excess of its statutory authority" under Section 111(d). Specifically, the Agency concluded that generation shifting should not have been considered as part of the BSER. The Agency interpreted Section 111 as "limit[ing] the BSER to those systems that can be put into operation *at* a building, structure, facility, or installation," such as "add-on controls" and "inherently lower-emitting processes/practices/designs." . . .

D

. . . The Court of Appeals . . . held that 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. To the contrary, the court concluded, the statute could reasonably be read to encompass generation shifting. . . .

III

A

. . . "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be "shaped, at least in some measure, by the nature of the question presented"—whether Congress in fact meant to confer the power the agency has asserted. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). In the ordinary case, that context has no great effect on the appropriate analysis. Nonetheless, our precedent teaches that there are "extraordinary cases" that call for a different approach—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. *Id.*, at 159–160.

Such cases have arisen from all corners of the administrative state. In *Brown & Williamson*, for instance, the Food and Drug Administration claimed that its authority over "drugs" and "devices" included the power to regulate, and even ban, tobacco products. We rejected that "expansive construction of the statute," concluding that "Congress could not have intended to delegate" such a sweeping and consequential authority "in so cryptic a fashion." *Id.*, at 160. In

Alabama Assn. of Realtors v. *Department of Health and Human Servs.*, 594 U.S. ___, ___ (2021) (*per curiam*), we concluded that the Centers for Disease Control and Prevention could not, under its authority to adopt measures "necessary to prevent the . . . spread of " disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic. We found the statute's language a "wafer-thin reed" on which to rest such a measure, given "the sheer scope of the CDC's claimed authority," its "unprecedented" nature, and the fact that Congress had failed to extend the moratorium after previously having done so. *Id.*

Our decision in *Utility Air [Regulatory Group* v. *EPA*, 573 U.S. 302 (2014)] addressed another question regarding EPA's authority—namely, whether EPA could construe the term "air pollutant," in a specific provision of the Clean Air Act, to cover greenhouse gases. 573 U.S., at 310. Despite its textual plausibility, we noted that the Agency's interpretation would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements. *Id.*, at 310, 324. We declined to uphold EPA's claim of "unheralded" regulatory power over "a significant portion of the American economy." *Id.*, at 324. In *Gonzales* v. *Oregon*, 546 U.S. 243 (2006), we confronted the Attorney General's assertion that he could rescind the license of any physician who prescribed a controlled substance for assisted suicide, even in a State where such action was legal. The Attorney General argued that this came within his statutory power to revoke licenses where he found them "inconsistent with the public interest," 21 U.S. C. § 823(f). We considered the "idea that Congress gave [him] such broad and unusual authority through an implicit delegation . . . not sustainable." 546 U.S., at 267. Similar considerations informed our recent decision invalidating the Occupational Safety and Health Administration's mandate that "84 million Americans . . . either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense." *National Federation of Independent Business* v. *Occupational Safety and Health Administration*, 595 U.S. ___, ___ (2022) (*per curiam*). We found it "telling that OSHA, in its half century of existence," had never relied on its authority to regulate occupational hazards to impose such a remarkable measure. *Id.*

All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, "common sense as to the manner in which Congress [would have been] likely to delegate" such power to the agency at issue, *Brown & Williamson*, 529 U.S., at 133, made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." *Whitman*, 531 U.S., at 468. Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994). . . . We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn.* v. *FCC*, 855 F.3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. *Utility Air*, 573 U.S., at 324. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims. *Ibid.*

The dissent criticizes us for "announc[ing] the arrival" of this major questions doctrine, and argues that each of the decisions just cited simply followed our "ordinary method" of "normal statutory interpretation[.]" But in what the dissent calls the "key case" in this area, *Brown & Williamson*, the Court could not have been clearer: "In extraordinary cases . . . there may be reason to hesitate" before accepting a reading of a statute that would, under more "ordinary" circumstances, be upheld. 529 U.S., at 159. Or, as we put it more recently, we "typically greet" assertions of "extravagant statutory power over the national economy" with "skepticism." *Utility*

Air, 573 U.S., at 324. The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of "clear congressional authorization"—confirms that the approach under the major questions doctrine is distinct.

As for the major questions doctrine "label[]," it took hold because it 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. Scholars and jurists have recognized the common threads between those decisions. So have we. See *Utility Air*, 573 U.S., at 324 (citing *Brown & Williamson* and *MCI*); *King* v. *Burwell*, 576 U.S. 473, 486 (2015) (citing *Utility Air*, *Brown & Williamson*, and *Gonzales*).

B

Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." *Utility Air*, 573 U.S., at 324. It located that newfound power in the vague language of an "ancillary provision[]" of the Act, *Whitman*, 531 U.S., at 468, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. *Brown & Williamson*, 529 U.S., at 159–160; *Gonzales*, 546 U.S., at 267–268; *Alabama Assn.*, 594 U.S., at ___, ___. Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d). *Brown & Williamson*, 529 U.S., at 159–160.

Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. . . . It had never devised a cap by looking to a "system" that would reduce pollution simply by "shifting" polluting activity "from dirtier to cleaner sources." 80 Fed. Reg. 64726. . . .

The Government quibbles with this description of the history of Section 111(d), pointing to one rule that it says relied upon a cap-and-trade mechanism to reduce emissions. See 70 Fed. Reg. 28616 (2005) (Mercury Rule). The legality of that choice was controversial at the time and was never addressed by a court. Even assuming the Rule was valid, though, it still does not help the Government. In that regulation, EPA set the actual "emission cap"—*i.e.*, the limit on emissions that sources would be required to meet—"based on the level of [mercury] emissions reductions that w[ould] be achievable by" the use of "technologies [that could be] installed and operational on a nationwide basis" in the relevant timeframe—namely, wet scrubbers. 70 Fed. Reg. 28620–28621. In other words, EPA set the cap based on the application of particular controls, and regulated sources could have complied by installing them. By contrast, and by design, there is no control a coal plant operator can deploy to attain the emissions limits established by the Clean Power Plan. The Mercury Rule, therefore, is no precedent for the Clean Power Plan. To the contrary, it was one more entry in an unbroken list of prior Section 111 rules that devised the enforceable emissions limit by determining the best control mechanisms available for the source.

This consistent understanding of "system[s] of emission reduction" tracked the seemingly universal view, as stated by EPA in its inaugural Section 111(d) rulemaking, that "Congress intended a technology-based approach" to regulation in that Section. 40 Fed. Reg. 53343 (1975) . . . . A technology-based standard . . . is one that focuses on improving the emissions performance of individual sources. . . .

But, the Agency explained, in order to "control[] CO_2 from affected [plants] at levels . . . necessary to mitigate the dangers presented by climate change," it could not base the emissions limit on "measures that improve efficiency at the power plants." *Id.*, at 64728. . . . Instead, to

attain the necessary "critical CO_2 reductions," EPA adopted what it called a "broader, forward-thinking approach to the design" of Section 111 regulations. *Id.*, at 64703. Rather than focus on improving the performance of individual sources, it would "improve the *overall power system* by lowering the carbon intensity of power generation." *Ibid.* (emphasis added). And it would do that by forcing a shift throughout the power grid from one type of energy source to another. . . .

This view of EPA's authority was not only unprecedented; it also effected a "fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation" into an entirely different kind. *MCI*, 512 U.S., at 231. Under the Agency's prior view of Section 111, its role was limited to ensuring the efficient pollution performance of each individual regulated source. Under that paradigm, if a source was already operating at that level, there was nothing more for EPA to do. Under its newly "discover[ed]" authority, *Utility Air*, 573 U.S., at 324, however, EPA can demand much greater reductions in emissions based on a very different kind of policy judgment: that it would be "best" if coal made up a much smaller share of national electricity generation. And on this view of EPA's authority, it could go further, perhaps forcing coal plants to "shift" away virtually all of their generation—*i.e.*, to cease making power altogether.

The Government attempts to downplay the magnitude of this "unprecedented power over American industry." *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U.S. 607, 645 (1980) (plurality opinion). The amount of generation shifting ordered, it argues, must be "adequately demonstrated" and "best" in light of the statutory factors of "cost," "nonair quality health and environmental impact," and "energy requirements." 42 U.S. C. § 7411(a)(1). . . .

But this argument does not so much *limit* the breadth of the Government's claimed authority as *reveal* it. On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy. . . .

There is little reason to think Congress assigned such decisions to the Agency. For one thing, as EPA itself admitted when requesting special funding, "Understand[ing] and project[ing] system-wide . . . trends in areas such as electricity transmission, distribution, and storage" requires "technical and policy expertise *not* traditionally needed in EPA regulatory development." EPA, Fiscal Year 2016: Justification of Appropriation Estimates for the Committee on Appropriations 213 (2015) (emphasis added). "When [an] agency has no comparative expertise" in making certain policy judgments, we have said, "Congress presumably would not" task it with doing so. *Kisor* v. *Wilkie*, 588 U.S. ___, ___ (2019); see also *Gonzales*, 546 U.S., at 266–267.

We also find it "highly unlikely that Congress would leave" to "agency discretion" the decision of how much coal-based generation there should be over the coming decades. *MCI*, 512 U.S., at 231; see also *Brown & Williamson*, 529 U.S., at 160 ("We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."). The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself. . . . Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d).

The dissent contends that there is nothing surprising about EPA dictating the optimal mix of energy sources nationwide, since that sort of mandate will reduce air pollution from power plants, which is EPA's bread and butter. But that does not follow. Forbidding evictions may slow the spread of disease, but the CDC's ordering such a measure certainly "raise[s] an eyebrow." We would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration. And no one would consider generation

shifting a "tool" in OSHA's "toolbox," even though reducing generation at coal plants would reduce workplace illness and injury from coal dust. . . .[4]

Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions "had become well known, Congress considered and rejected" multiple times. *Brown & Williamson*, 529 U.S., at 144. . . . At bottom, the Clean Power Plan essentially adopted a cap-and-trade scheme, or set of state cap-and-trade schemes, for carbon. . . . Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program. . . . It has also declined to enact similar measures, such as a carbon tax. . . . "The importance of the issue," along with the fact that the same basic scheme EPA adopted "has been the subject of an earnest and profound debate across the country, . . . makes the oblique form of the claimed delegation all the more suspect." *Gonzales*, 546 U.S., at 267–268 (internal quotation marks omitted).

C

Given these circumstances, our precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must—under the major questions doctrine—point to "clear congressional authorization" to regulate in that manner. *Utility Air*, 573 U.S., at 324.

All the Government can offer, however, is the Agency's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction . . . adequately demonstrated." 42 U.S. C. § 7411(a)(1). As a matter of "definitional possibilities," *FCC* v. *AT&T Inc.*, 562 U.S. 397, 407 (2011), generation shifting can be described as a "system"—"an aggregation or assemblage of objects united by some form of regular interaction," Brief for Federal Respondents 31—capable of reducing emissions. But of course almost anything could constitute such a "system"; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents.

The Government . . . looks to other provisions of the Clean Air Act for support. It points out that the Act elsewhere uses the word "system" or "similar words" to describe cap-and-trade schemes or other sector-wide mechanisms for reducing pollution. . . . If the word "system" or similar words like "technique" or "means" can encompass cap-and-trade, the Government maintains, why not in Section 111?

But just because a cap-and-trade "system" can be used to reduce emissions does not mean that it is the kind of "system of emission reduction" referred to in Section 111. Indeed, the Government's examples demonstrate why it is not.

First, unlike Section 111, the Acid Rain and NAAQS programs contemplate trading systems as a means of *complying* with an *already established emissions limit*, set either directly by Congress . . . or by reference to the safe concentration of the pollutant in the ambient air. . . . In Section 111, by contrast, it is EPA's job to come up with the cap itself. . . . We doubt that Congress directed the Agency to set an emissions cap at the level "which reflects the degree of emission limitation achievable through the application of [a cap-and-trade] system," for that degree is indeterminate. It is one thing for Congress to authorize regulated sources to use trading to comply with a preset cap, or a cap that must be based on some scientific, objective criterion, such as the

[4] According to the dissent, "EPA is always controlling the mix of energy sources" under Section 111 because all of the Agency's rules impose some costs on regulated plants, and therefore (all else equal) cause those plants to lose some share of the electricity market. But there is an obvious difference between (1) issuing a rule that may end up causing an incidental loss of coal's market share, and (2) simply announcing what the market share of coal, natural gas, wind, and solar must be, and then requiring plants to reduce operations or subsidize their competitors to get there. No one has ever thought that the Clean Power Plan was just business as usual. . . .

NAAQS. It is quite another to simply authorize EPA to set the cap itself wherever the Agency sees fit.

Second, Congress added the above authorizations for the use of emissions trading programs in 1990, simultaneous with amending Section 111 to its present form. At the time, cap-and-trade was a novel and highly touted concept. . . . And Congress went out of its way to amend the NAAQS statute to make absolutely clear that the "measures, means, [and] techniques" States could use to meet the NAAQS included cap-and-trade. § 7410(a)(2)(A). Yet "not a peep was heard from Congress about the possibility that a trading regime could be installed under § 111." *Id.*, at 10309.

Finally, the Government notes that other parts of the Clean Air Act, past and present, have "explicitly limited the permissible components of a particular 'system'" of emission reduction in some regard. For instance, a separate section of the statute empowers EPA to require the "degree of reduction achievable through the *retrofit* application of the best system of *continuous* emission reduction." § 7651f(b)(2) (emphasis added). The comparatively unadorned use of the phrase "best system of emission reduction" in Section 111, the Government urges, "suggest[s] a conscious congressional" choice *not* to limit the measures that may constitute the BSER to those applicable at or to an individual source.

These arguments, however, concern an interpretive question that is not at issue. We have no occasion to decide whether the statutory phrase "system of emission reduction" refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER. To be sure, it is pertinent to our analysis that EPA has acted consistent with such a limitation for the first four decades of the statute's existence. But the only interpretive question before us, and the only one we answer, is more narrow: whether the "best system of emission reduction" identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no.

* * *

Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." *New York* v. *United States*, 505 U.S. 144, 187 (1992). But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body. . . .

■ JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring.

To resolve today's case the Court invokes the major questions doctrine. . . . Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees. I join the Court's opinion and write to offer some additional observations about the doctrine on which it rests.

I

A

One of the Judiciary's most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us. To help fulfill that duty, courts have developed certain "clear-statement" rules. These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds. In this way, these clear-statement rules help courts "act as faithful agents of the Constitution." A. Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 169 (2010) (Barrett).

The major questions doctrine . . . protect[s] the Constitution's separation of powers. In Article I, "the People" vested "[a]ll" federal "legislative powers . . . in Congress." Preamble; Art. I, § 1. As Chief Justice Marshall put it, this means that "important subjects . . . must be entirely regulated by the legislature itself," even if Congress may leave the Executive "to act under such general provisions to fill up the details." *Wayman* v. *Southard*, 10 Wheat. 1, 42–43 (1825). Doubtless, what qualifies as an important subject and what constitutes a detail may be debated. . . . But . . . the Constitution's rule vesting federal legislative power in Congress is "vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 692 (1892). . . .

B

. . . Some version of [the major questions doctrine] can be traced to at least 1897, when this Court confronted a case involving the Interstate Commerce Commission. . . . The ICC argued that Congress had endowed it with the power to set carriage prices for railroads. See *ICC* v. *Cincinnati, N.O. & T.P.R. Co.*, 167 U.S. 479, 499 (1897). The Court deemed that claimed authority "a power of supreme delicacy and importance," given the role railroads then played in the Nation's life. *Id.*, at 505. Therefore, the Court explained, a special rule applied:

> "That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used, and if Congress had intended to grant such a power to the [agency], it cannot be doubted that it would have used language *open to no misconstruction*, but *clear and direct*." *Ibid.* (emphasis added).

With the explosive growth of the administrative state since 1970, the major questions doctrine soon took on special importance. In 1980, this Court held it "unreasonable to assume" that Congress gave an agency "unprecedented power[s]" in the "absence of a clear [legislative] mandate." *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U.S. 607, 645 (plurality opinion). In the years that followed, the Court routinely enforced "the nondelegation doctrine" through "the interpretation of statutory texts, and, more particularly, [by] giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta* v. *United States*, 488 U.S. 361, 373, n. 7 (1989). In fact, this Court applied the major questions doctrine in "all corners of the administrative state," whether the issue at hand involved an agency's asserted power to regulate tobacco products, ban drugs used in physician-assisted suicide, extend Clean Air Act regulations to private homes, impose an eviction moratorium, or enforce a vaccine mandate. [S]ee *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *Gonzales* v. *Oregon*, 546 U.S. 243, 267 (2006); *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302, 324 (2014); *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U.S. ___, ___ (2021) (*per curiam*); *National Federation of Independent Business* v. *OSHA*, 595 U.S. ___, ___ (2022) (*per curiam*).[3]

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." Barrett 175. And the constitutional lines at stake here are surely no less important than those this Court has long held sufficient to justify parallel clear-statement rules. At stake . . . [are] basic questions about self-government, equality, fair notice, federalism, and the separation of powers. The major questions doctrine seeks to protect against "unintentional,

[3] At times, this Court applied the major questions doctrine more like an ambiguity canon. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Ambiguity canons merely instruct courts on how to "choos[e] between equally plausible interpretations of ambiguous text," and are thus weaker than clear-statement rules. Barrett 109. But our precedents have usually applied the doctrine as a clear-statement rule, and the Court today confirms that is the proper way to apply it.

oblique, or otherwise unlikely" intrusions on these interests. *NFIB* v. *OSHA*, 595 U.S., at ___ (Gorsuch, J., concurring). The doctrine does so by ensuring that, when agencies seek to resolve major questions, they at least act with clear congressional authorization and do not "exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond" those the people's representatives actually conferred on them. *Ibid.* . . .

II

A

Turning from the doctrine's function to its application, . . . our cases supply a good deal of guidance about when an agency action involves a major question for which clear congressional authority is required.

First, this Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great "political significance," *NFIB* v. *OSHA*, 595 U.S., at ___ (internal quotation marks omitted), or end an "earnest and profound debate across the country," *Gonzales*, 546 U.S., at 267–268 (internal quotation marks omitted). . . . Relatedly, this Court has found it telling when Congress has "'considered and rejected'" bills authorizing something akin to the agency's proposed course of action. [*Brown & Williamson*, 529 U.S., at 144]. That too may be a sign that an agency is attempting to "'work [a]round'" the legislative process to resolve for itself a question of great political significance. *NFIB* v. *OSHA*, 595 U.S., at ___ (Gorsuch, J., concurring).[4]

Second, this Court has said that an agency must point to clear congressional authorization when it seeks to regulate "'a significant portion of the American economy,'" [*Utility Air*, 573 U.S., at 324], or require "billions of dollars in spending" by private persons or entities, *King* v. *Burwell*, 576 U.S. 473, 485 (2015). The Court has held that regulating tobacco products, eliminating rate regulation in the telecommunications industry, subjecting private homes to Clean Air Act restrictions, and suspending local housing laws and regulations can sometimes check this box. See *Brown & Williamson*, 529 U.S., at 160; *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994) (*MCI*); *Utility Air*, 573 U.S., at 324; *Alabama Assn. of Realtors*, 594 U.S., at ___.

Third, this Court has said that the major questions doctrine may apply when an agency seeks to "intrud[e] into an area that is the particular domain of state law." Of course, another longstanding clear-statement rule—the federalism canon—also applies in these situations. To preserve the "proper balance between the States and the Federal Government" and enforce limits on Congress's Commerce Clause power, courts must "'be certain of Congress's intent'" before finding that it "legislate[d] in areas traditionally regulated by the States." *Gregory* v. *Ashcroft*, 501 U.S. 452, 459–460 (1991). But unsurprisingly, the major questions doctrine and the federalism canon often travel together. When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States. See *SWANC*, 531 U.S., at 162, 174.

While this list of triggers may not be exclusive, each of the signs the Court has found significant in the past is present here, making this a relatively easy case for the doctrine's application. The EPA claims the power to force coal and gas-fired power plants "to cease [operating] altogether." Whether these plants should be allowed to operate is a question on which people today may disagree, but it is a question everyone can agree is vitally important. Congress

[4] In the dissent's view, the Court has erred both today and in the past by pointing to failed legislation. But the Court has not pointed to failed legislation to resolve what a duly enacted statutory text means, only to help resolve the antecedent question whether the agency's challenged action implicates a major question. . . .

has debated the matter frequently. . . . And so far it has "conspicuously and repeatedly declined" to adopt legislation similar to the Clean Power Plan (CPP). . . .

Other suggestive factors are present too. . . . The Executive Branch has acknowledged that its proposed rule would force an "aggressive transformation" of the electricity sector through "transition to zero-carbon renewable energy sources." White House Fact Sheet. The Executive Branch has also predicted its rule would force dozens of power plants to close and eliminate thousands of jobs by 2025. . . . And industry analysts have estimated the CPP would cause consumers' electricity costs to rise by over $200 billion. . . . [T]he CPP unquestionably has an impact on federalism, as "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Elec. Cooperative Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). None of this is to say the policy the agency seeks to pursue is unwise or should not be pursued. It is only to say that the agency seeks to resolve for itself the sort of question normally reserved for Congress. As a result, we look for clear evidence that the people's representatives in Congress have actually afforded the agency the power it claims.

B

At this point, the question becomes what qualifies as a clear congressional statement authorizing an agency's action. Courts have long experience applying clear-statement rules throughout the law, and our cases have identified several telling clues in this context too.

First, courts must look to the legislative provisions on which the agency seeks to rely "'with a view to their place in the overall statutory scheme.'" *Brown & Williamson*, 529 U.S., at 133. "[O]blique or elliptical language" will not supply a clear statement. . . . Nor may agencies seek to hide "elephants in mouseholes," *Whitman* v. *American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001), or rely on "gap filler" provisions. So, for example, in *MCI* this Court rejected the Federal Communication Commission's attempt to eliminate rate regulation for the telecommunications industry based on a "subtle" provision that empowered the FCC to "'modify'" rates. 512 U.S., at 231. In *Brown & Williamson*, the Court rejected the Food and Drug Administration's attempt to regulate cigarettes based a "cryptic" statutory provision that granted the agency the power to regulate "drugs" and "devices." 529 U.S., at 126, 156, 160. And in *Gonzales*, the Court doubted that Congress gave the Attorney General "broad and unusual authority" to regulate drugs for physician-assisted suicide through "oblique" statutory language. 546 U.S., at 267.

Second, courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address. . . . Of course, sometimes old statutes may be written in ways that apply to new and previously unanticipated situations. But an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority.

Third, courts may examine the agency's past interpretations of the relevant statute. A "contemporaneous" and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute's original charge to an agency. *United States* v. *Philbrick*, 120 U.S. 52, 59 (1887) . . . . When an agency claims to have found a previously "unheralded power," its assertion generally warrants "a measure of skepticism." *Utility Air*, 573 U.S., at 324.

Fourth, skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise. . . . So, for example, in *Alabama Assn. of Realtors*, this Court rejected an attempt by a public health agency to regulate housing. 594 U.S., at ___. And in *NFIB* v. *OSHA*, the Court rejected an effort by a workplace safety agency

to ordain "broad public health measures" that "f[ell] outside [its] sphere of expertise." 595 U.S., at ___.[5]

Asking these questions again yields a clear answer in our case. As the Court details, the agency before us cites no specific statutory authority allowing it to transform the Nation's electrical power supply. Instead, the agency relies on a rarely invoked statutory provision that was passed with little debate and has been characterized as an "obscure, never-used section of the law." Nor has the agency previously interpreted the relevant provision to confer on it such vast authority; there is no original, longstanding, and consistent interpretation meriting judicial respect. Finally, there is a "mismatch" between the EPA's expertise over environmental matters and the agency's claim that "Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy." Such a claimed power "requires technical and policy expertise *not* traditionally needed in [the] EPA's regulatory development." . . .

III

. . . The dissent . . . suggests that the Court strays from its commitment to textualism by relying on a clear-statement rule (the major questions doctrine) to resolve today's case. But our law is full of clear-statement rules and has been since the founding. Our colleagues do not dispute the point. In fact, they have regularly invoked many of these rules.

If that's not the problem, perhaps the dissent means to suggest that the major questions doctrine does not belong on the list of our clear-statement rules. At times, the dissent appears to dismiss the doctrine as a "get-out-of-text free car[d]." . . . But . . . the dissent also acknowledges that the major questions doctrine should "sensibl[y]" apply in at least some situations. . . . And, of course, our colleagues have joined other applications of the major questions doctrine in the past. See, *e.g.*, *King*, 576 U.S., at 485–486; *Gonzales*, 546 U.S., at 267–268. Nor does the dissent really seem to dispute that a major question is at stake in this case. . . . If this case does not implicate a "question of deep economic and political significance," *King*, 576 U.S., at 486 (internal quotation marks omitted), it is unclear what might.

In the end, our disagreement really seems to center on a difference of opinion about whether the statute at issue here clearly authorizes the agency to adopt the CPP. . . . I join the Court's opinion, which comprehensively sets forth why Congress did not clearly authorize the EPA to engage in a "generation shifting approach" to the production of energy in this country. In reaching its judgment, the Court hardly professes to "appoin[t] itself" "the decision-maker on climate policy." The Court acknowledges only that, under our Constitution, the people's elected representatives in Congress are the decisionmakers here—and they have not clearly granted the agency the authority it claims for itself. . . .

■ JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

. . . The majority says it is simply "not plausible" that Congress enabled EPA to regulate power plants' emissions through generation shifting. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the "best system of emission reduction" for power plants. The "best system" full stop—no ifs, ands, or buts of any kind relevant here. The parties do not

[5] The dissent not only agrees that a mismatch between an agency's expertise and its challenged action is relevant to the major questions doctrine analysis; the dissent suggests that such a mismatch is necessary to the doctrine's application. But this Court has never taken that view. See, *e.g.*, *ICC* v. *Cincinnati, N.O. & T.P.R. Co.*, 167 U.S. 479, 505 (1897) (interstate commerce agency regulating interstate railroad commerce); *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U.S. 607, 645 (1980) (plurality opinion) (workplace safety agency regulating workplace carcinogens); *Brown & Williamson*, 529 U.S., at 159–160 (drug agency regulating tobacco); *King* v. *Burwell*, 576 U.S. 473, 485–486 (2015) (tax agency administering tax credits).

dispute that generation shifting is indeed the "best system"—the most effective and efficient way to reduce power plants' carbon dioxide emissions. And no other provision in the Clean Air Act suggests that Congress meant to foreclose EPA from selecting that system; to the contrary, the Plan's regulatory approach fits hand-in-glove with the rest of the statute. The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms. But that is wrong. A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise. That is what Congress did in enacting Section 111. The majority today overrides that legislative choice. In so doing, it deprives EPA of the power needed—and the power granted—to curb the emission of greenhouse gases.

I

The Clean Air Act was major legislation, designed to deal with a major public policy issue. . . . The Act, as the majority describes, established three major regulatory programs to control air pollution from stationary sources like power plants. The National Ambient Air Quality Standards (NAAQS) and Hazardous Air Pollutants (HAP) programs prescribe standards for specified pollutants, not including carbon dioxide. Section 111's New Source Performance Standards program provides an additional tool for regulating emissions from categories of stationary sources deemed to contribute significantly to pollution. As applied to existing (not new) sources, the program mandates—via Section 111(d)—that EPA set emissions levels for pollutants not covered by the NAAQS or HAP programs, including carbon dioxide.

Section 111(d) thus ensures that EPA regulates existing power plants' emissions of *all* pollutants. When the pollutant at issue falls within the NAAQS or HAP programs, EPA need do no more. But when the pollutant falls outside those programs, Section 111(d) requires EPA to set an emissions level for currently operating power plants (and other stationary sources). That means no pollutant from such a source can go unregulated: As the Senate Report explained, Section 111(d) guarantees that "there should be no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rep. No. 91–1196, p. 20 (1970). Reflecting that language, the majority calls Section 111(d) a "gap-filler." It might also be thought of as a backstop or catch-all provision, protecting against pollutants that the NAAQS and HAP programs let go by. But the section is *not*, as the majority further claims, an "ancillary provision" or a statutory "backwater." That characterization is a non-sequitur. That something is a backstop does not make it a backwater. Even if they are needed only infrequently, backstops can perform a critical function—and this one surely does. . . .

Section 111 describes the prescribed regulatory effort in expansive terms. EPA must set for the relevant source (here, fossil-fuel-fired power plants) and the relevant pollutant (here, carbon dioxide) an emission level—more particularly,

> "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated." § 7411(a)(1).

To take that language apart a bit, the provision instructs EPA to decide upon the "best system of emission reduction which . . . has been adequately demonstrated." The provision tells EPA, in making that determination, to take account of both costs and varied "nonair" impacts (on health, the environment, and the supply of energy). And the provision finally directs EPA to set the particular emissions limit achievable through use of the demonstrated "best system." Taken as a whole, the section provides regulatory flexibility and discretion. It imposes, to be sure, meaningful

constraints: Take into account costs and nonair impacts, and make sure the best system has a proven track record. But the core command—go find the best system of emission reduction—gives broad authority to EPA.

If that flexibility is not apparent on the provision's face, consider some dictionary definitions—supposedly a staple of this Court's supposedly textualist method of reading statutes. A "system" is "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose." Webster's Third New International Dictionary 2322 (1971). Or again: a "system" is "[a]n organized and coordinated method; a procedure." American Heritage Dictionary 1768 (5th ed. 2018). The majority complains that a similar definition . . . from another dictionary . . . is just too darn broad. . . . "[A]lmost anything" capable of reducing emissions, the majority says, "could constitute such a 'system'" of emission reduction. But that is rather the point. Congress used an obviously broad word (though surrounding it with constraints) to give EPA lots of latitude in deciding how to set emissions limits. And contra the majority, a broad term is not the same thing as a "vague" one. A broad term is comprehensive, extensive, wide-ranging; a "vague" term is unclear, ambiguous, hazy. . . . So EPA was quite right in stating in the Clean Power Plan that the "[p]lain meaning" of the term "system" in Section 111 refers to "a set of measures that work together to reduce emissions." 80 Fed. Reg. 64762. Another of this Court's opinions, involving a matter other than the bogeyman of environmental regulation, might have stopped there.

For generation shifting fits comfortably within the conventional meaning of a "system of emission reduction." Consider one of the most common mechanisms of generation shifting: the use of a cap-and-trade scheme. Here is how the majority describes cap and trade: "Under such a scheme, sources that receive a reduction in their emissions can sell a credit representing the value of that reduction to others, who are able to count it toward their own applicable emissions caps." Does that sound like a "system" to you? It does to me too. . . . So what does the majority mean when it says that "[a]s a matter of definitional *possibilities*, generation shifting *can* be described as a 'system'"? (emphasis added). Rarely has a statutory term so clearly applied.

Other statutory provisions confirm the point. The Clean Air Act's acid rain provision, for example, describes a cap-and-trade program as an "emission allocation and transfer *system*." § 7651(b) (emphasis added). So a "system," according to the statute's own usage, includes the kind of cap-and-trade mechanism that the Clean Power Plan relied on. . . . The majority discounts the relevance of . . . those provisions on the ground that they contemplate trading systems only "as a means of *complying* with an *already established emissions limit*." (emphasis in original). That is a distinction, to be sure. But . . . [i]n arguing that EPA's claim of authority here would allow it to take the emissions limit as low as it wants, the majority ignores the varied constraints surrounding the "best system" language. And still more important for interpretive purposes, the distinction appears only in the majority's opinion, not in any statutory language. . . .

There is also a flipside point: Congress declined to include in Section 111 the restrictions on EPA's authority contained in other Clean Air Act provisions. Most relevant here, quite a number of statutory sections confine EPA's emissions reduction efforts to technological controls—essentially, equipment or processes that can be put into place at a particular facility. . . . But nothing like the language of those provisions is included in Section 111. That matters under normal rules of statutory interpretation. As Justice Scalia once wrote for the Court: "We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama* v. *Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005). . . .

The majority breezes past [this point] on the ground that today's opinion does not resolve whether EPA can regulate in some non-technological ways; instead, the opinion says only that

the Clean Power Plan goes too far. That is a puzzling point. . . . If the majority is not distinguishing between technological controls and all others, what is it doing—and how far does its opinion constrain EPA? The majority makes no effort to say. And because that is so, the majority cannot even attempt to ground its limit in the statutory language. I've just shown that restricting EPA to technological controls is inconsistent with Section 111, especially when read in conjunction with other statutory provisions. And the majority provides no reason to think that its (possibly) different limit fares any better. Section 111 does not impose *any* constraints—technological or otherwise—on EPA's authority to regulate stationary sources (except for those stated, like cost). In somehow (and to some extent) saying otherwise, the majority flouts the statutory text.

"Congress," this Court has said, "knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *Arlington* v. *FCC*, 569 U.S. 290, 296 (2013). In Section 111, Congress spoke in capacious terms. It knew that "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." *Massachusetts*, 549 U.S., at 532. So the provision enables EPA to base emissions limits for existing stationary sources on the "best system." That system may be technological in nature; it may be whatever else the majority has in mind; or, most important here, it may be generation shifting. The statute does not care. And when Congress uses "expansive language" to authorize agency action, courts generally may not "impos[e] limits on [the] agency's discretion." *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U.S. ___, ___ (2020). That constraint on judicial authority—that insistence on judicial modesty—should resolve this case.

II

The majority thinks not, contending that in "certain extraordinary cases"—of which this is one—courts should start off with "skepticism" that a broad delegation authorizes agency action. The majority labels that view the "major questions doctrine," and claims to find support for it in our caselaw. But the relevant decisions do normal statutory interpretation: In them, the Court 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. Using that ordinary method, the decisions struck down agency actions (even though they plausibly fit within a delegation's terms) for two principal reasons. First, an agency was operating far outside its traditional lane, so that it had no viable claim of expertise or experience. And second, the action, if allowed, would have conflicted with, or even wreaked havoc on, Congress's broader design. In short, the assertion of delegated power was a misfit for both the agency and the statutory scheme. But that is not true here. The Clean Power Plan falls within EPA's wheelhouse, and it fits perfectly . . . with all the Clean Air Act's provisions. That the Plan addresses major issues of public policy does not upend the analysis. Congress wanted EPA to do just that. . . .

A

"[T]he words of a statute," as the majority states, "must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). We do not assess the meaning of a single word, phrase, or provision in isolation; we also consider the overall statutory design. And that is just as true of statutes broadly delegating power to agencies as of any other kind. In deciding on the scope of such a delegation, courts must assess how an agency action claimed to fall within the provision fits with other aspects of a statutory plan.

So too, a court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate." *Brown & Williamson*, 529 U.S., at 133. Assume that a policy decision, like this one, is a matter of significant "economic and political magnitude." *Ibid.* We know that Congress delegates such decisions to agencies all the time—and often via broadly framed provisions like Section 111. But Congress does so in a sensible way. To decide whether an

agency action goes beyond what Congress wanted, courts must assess (among other potentially relevant factors) the nature of the regulation, the nature of the agency, and the relationship of the two to each other. In particular, . . . Congress does not usually grant agencies the authority to decide significant issues on which they have no particular expertise. So when there is a mismatch between the agency's usual portfolio and a given assertion of power, courts have reason to question whether Congress intended a delegation to go so far.

The majority today goes beyond those sensible principles. It announces the arrival of the "major questions doctrine," which replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules. Apparently, there is now a two-step inquiry. First, a court must decide, by looking at some panoply of factors, whether agency action presents an "extraordinary case[]."If it does, the agency "must point to clear congressional authorization for the power it claims," someplace over and above the normal statutory basis we require. . . .

The majority claims it is just following precedent, but that is not so. The Court has never even used the term "major questions doctrine" before. And in the relevant cases, the Court has done statutory construction of a familiar sort. It has looked to the text of a delegation. It has addressed how an agency's view of that text works—or fails to do so—in the context of a broader statutory scheme. And it has asked, in a common-sensical (or call it purposive) vein, about what Congress would have made of the agency's view—otherwise said, whether Congress would naturally have delegated authority over some important question to the agency, given its expertise and experience. In short, in assessing the scope of a delegation, the Court has considered—without multiple steps, triggers, or special presumptions—the fit between the power claimed, the agency claiming it, and the broader statutory design.

The key case here is *FDA* v. *Brown & Williamson*. There, the Food and Drug Administration (FDA) asserted that its power to regulate "drugs" and "devices" extended to tobacco products. The claim had something to it: FDA has broad authority over "drugs" and drug-delivery "devices," and the definitions of those terms could be read to encompass nicotine and cigarettes. But the asserted authority "simply [did] not fit" the overall statutory scheme. 529 U.S., at 143. FDA's governing statute required the agency to ensure that regulated products were "safe" to be marketed—but there was no making tobacco products safe in the usual sense. *Id.*, at 133–143. So FDA would have had to reinterpret what it meant to be "safe," or else ban tobacco products altogether. Both options, the Court thought, were preposterous. . . . And Congress had created in several statutes a "distinct regulatory scheme" for tobacco, not involving FDA. *Id.*, at 155–156. So all the evidence was that Congress had never meant for FDA to have any—let alone total—control over the tobacco industry. . . . Again, there was "simply" a lack of "fit" between the regulation at issue, the agency in question, and the broader statutory scheme. *Id.*, at 143.

The majority's effort to find support in *Brown & Williamson* for its interpretive approach fails. It may be helpful here to quote the full sentence that the majority quotes half of. "In extraordinary cases," the Court stated, "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." 529 U.S., at 159. For anyone familiar with this Court's *Chevron* doctrine, that language will ring a bell. The Court was saying only—and it was elsewhere explicit on this point—that there was reason to hesitate before giving FDA's position *Chevron* deference. And what was that reason? The Court went on to explain that it would not defer to FDA because it read the relevant statutory provisions as negating the agency's claimed authority. . . . In reaching that conclusion, the Court relied . . . not on any special "clear authorization" demand, but on normal principles of statutory interpretation: look at the text, view it in context, and use what the Court called some "common sense" about how Congress delegates. *Ibid. That* is how courts are to decide, in the majority's language, whether an agency has asserted a "highly consequential power beyond what Congress could reasonably be understood to have granted."

The Court has applied the same kind of analysis in subsequent cases—holding in each that an agency exceeded the scope of a broadly framed delegation when it operated outside the sphere of its expertise, in a way that warped the statutory text or structure. In *Gonzales* v. *Oregon*, 546 U.S. 243 (2006), we rejected the Attorney General's assertion of authority (under a broad "public interest" standard) to rescind doctors' registrations for facilitating assisted suicide, even in States where doing so was legal. We doubted Congress would have delegated such a "quintessentially medical judgment[]" to "an executive official who lacks medical expertise." *Id.*, at 266–267. And we pointed to statutory provisions in which Congress—in opposition to the claimed power—had "painstakingly described the Attorney General's limited authority" to deregister physicians. *Id.*, at 262.[3]

Later, in *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302 (2014), the Court relied on similar reasoning to reject EPA's efforts to regulate "millions of small" and previously unregulated sources of emissions—"including retail stores, offices, apartment buildings, shopping centers, schools, and churches." *Id.*, at 328. Key to that decision was the Court's view that reading the delegation so expansively would be "inconsistent with" the statute's broader "structure and design." *Id.*, at 321. The Court explained that allowing the agency action to proceed would necessitate the "rewriting" of other "unambiguous statutory terms"—indeed, of "precise numerical thresholds." *Id.*, at 321, 325–326. (In quoting one cryptic sentence of *Utility Air* as supporting its new approach, the majority ignores the nine preceding pages of analysis of the statute's text and context, see 573 U.S., at 315–324.)

And last Term, the Court concluded that the Centers for Disease Control and Prevention (CDC) lacked the power to impose a nationwide eviction moratorium. *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U.S. ___, ___–___ (2021). The Court held that other statutory language made it a "stretch" to read the relied-on delegation as covering the CDC's action. *Id.*, at ___. And the Court raised an eyebrow at the thought of the CDC "intrud[ing]" into "the landlord-tenant relationship"—a matter outside the CDC's usual "domain." *Ibid.*

The eyebrow-raise is indeed a consistent presence in these cases, responding to something the Court found anomalous—looked at from Congress's point of view—in a particular agency's exercise of authority. In each case, the Court thought, the agency had strayed out of its lane, to an area where it had neither expertise nor experience. The Attorney General making healthcare policy, the regulator of pharmaceutical concerns deciding the fate of the tobacco industry, and so on. And in each case, the proof that the agency had roamed too far afield lay in the statutory scheme itself. The agency action collided with other statutory provisions; if the former were allowed, the latter could not mean what they said or could not work as intended. FDA having to declare tobacco "safe" to avoid shutting down an industry; or EPA having literally to change hard numbers contained in the Clean Air Act. There, according to the Court, the statutory framework was "not designed to grant" the authority claimed. *Utility Air*, 573 U.S., at 324. The agency's "singular" assertion of power "would render the statute unrecognizable to the Congress" that wrote it. *Ibid.* (internal quotation marks omitted).

B

The Court today faces no such singular assertion of agency power. . . . [N]othing in the Clean Air Act . . . conflicts with EPA's reading of Section 111. Notably, the majority does not dispute that point. . . . That fact alone makes this case different from all the cases described above. As to the other critical matter in those cases—is the agency operating outside its sphere of expertise?—the

[3] Similarly, in *King* v. *Burwell*, 576 U.S. 473 (2015), we relied on *Brown & Williamson* in declining to defer to the Internal Revenue Service's construction of the Affordable Care Act. We thought it highly "unlikely that Congress would have delegated" an important decision about healthcare pricing to an agency with "no expertise in crafting health insurance policy." 576 U.S., at 486.

majority at least tries to say something. It claims EPA has no "comparative expertise" in "balancing the many vital considerations of national policy" implicated in regulating electricity sources. But that is wrong.

. . . Consider the Clean Power Plan's component parts—let's call them the what, who, and how—to see the rule's normalcy. The "what" is the subject matter of the Plan: carbon dioxide emissions. This Court has already found that those emissions fall within EPA's domain. . . . This is not the Attorney General regulating medical care, or even the CDC regulating landlord-tenant relations. It is EPA . . . acting to address the greatest environmental challenge of our time. So too, there is nothing special about the Plan's "who": fossil-fuel-fired power plants. In *Utility Air*, we thought EPA's regulation of churches and schools highly unusual. But fossil-fuel-fired plants? Those plants pollute—a lot—and so they have long lived under the watchful eye of EPA. . . .

Finally, the "how" of generation shifting creates no mismatch with EPA's expertise. As the Plan noted, generation shifting has a well-established pedigree as a tool for reducing pollution; even putting aside other federal regulation, both state regulators and power plants themselves have long used it to attain environmental goals. . . . The technique is, so to speak, a tool in the pollution-control toolbox. And that toolbox is the one EPA uses. So that Agency, more than any other, has the desired "comparative expertise." The majority cannot contest that point frontally. . . . Instead, the majority protests that Congress would not have wanted EPA to "dictat[e]," through generation shifting, the "mix of energy sources nationwide." But that statement reflects a misunderstanding of how the electricity market works. *Every* regulation of power plants—even the most conventional, facility-specific controls—"dictat[es]" the national energy mix to one or another degree. That result follows because regulations affect costs, and the electrical grid works by taking up energy from low-cost providers before high-cost ones. Consider an example: Suppose EPA requires coal-fired plants to use carbon-capture technology. That action increases those plants' costs, and automatically (by virtue of the way the grid operates) reduces their share of the electricity market. So EPA is always controlling the mix of energy sources. In that sense (though the term has taken on a more specialized meaning), everything EPA does is "generation shifting." The majority's idea that EPA has no warrant to direct such a shift just indicates that courts sometimes do not really get regulation.[5]

Why, then, be "skeptic[al]" of EPA's exercise of authority? . . . Although the majority offers a flurry of complaints, they come down in the end to this: The Clean Power Plan is a big new thing, issued under a minor statutory provision. . . . I have already addressed the back half of that argument: In fact, there is nothing insignificant about Section 111(d), which was intended to ensure that EPA would limit existing stationary sources' emissions of otherwise unregulated pollutants (however few or many there were). And the front half of the argument doesn't work either. The Clean Power Plan was not so big. It was not so new. And to the extent it was either, that should not matter.

As to bigness—well, events have proved the opposite: The Clean Power Plan, we now know, would have had little or no impact. The Trump administration's repeal of the Plan created a kind of controlled experiment: The Plan's "magnitude" could be measured by seeing how far short the industry fell of the Plan's nationwide emissions target. Except that turned out to be the wrong

[5] The majority's only response to the argument above similarly reveals a misperception as to the practical impact of different regulatory techniques. According to the majority, there is an "obvious difference" between changing the energy mix by conventional technological regulation and doing so by measures like cap and trade. But in fact there is not. . . . [G]eneration shifting can effect a significant—or instead an insignificant—change in the energy mix; and the same is true of technological regulations. It all depends on the specifics: There is no necessary connection (in either direction) between the *kind* of regulation and the magnitude of its effect. For example, a rule requiring the use of carbon-capture technology would have shifted far more electricity production from coal-fired plants than the Clean Power Plan would have. In suggesting that cap-and-trade programs are somehow more suspect, the majority merely serves to disadvantage what is often the smartest kind of regulation: market-based programs that achieve the biggest bang for the buck. . . .

question, because the industry didn't fall short of the Plan's goal; rather, the industry exceeded that target, all on its own. And it did so mainly through the generation-shifting techniques that the Plan called for. . . .

The majority thus pivots to the massive consequences generation shifting *could* produce—but that claim fares just as poorly. On EPA's view of its own authority, the majority worries, some future rule might "forc[e] coal plants to 'shift' away virtually all of their generation—*i.e.*, to cease making power altogether." But looking at the text of Section 111(d) might here come in handy. For the statute imposes, as already shown, a set of constraints—particularly involving costs and energy needs—that would preclude so extreme a regulation. . . . And if the majority thinks those constraints do not really constrain, then it has a much bigger problem. For "traditional" technological controls, of the kind the majority approves, can have equally dramatic effects. . . . If generation shifting can go big, so too can technological controls (assuming, once again, that the statute's text is ignored). The problem (if any exists) is not with the channel, but with the volume.

The majority's claim about the Clean Power Plan's novelty . . . is also exaggerated. As EPA explained when it issued the Clean Power Plan, an earlier Section 111(d) regulation had determined that a cap-and-trade program was the "best system of emission reduction" for mercury. In the majority's view, that rule was different because the "actual emission cap" for the contemplated cap-and-trade scheme was based on the use of a plant-specific technology—namely, wet scrubbers. But the approval of cap and trade allowed EPA to make the emissions limits more stringent than it otherwise could have, because EPA knew that plants unable to cost-effectively install scrubbers could instead meet the limits through generation shifting. EPA could have designed the Clean Power Plan in the same way—say, by setting emissions limits based on carbon-capture technology, with the expectation that many plants would avail themselves of an approved cap-and-trade program instead. The majority gives no reason to think Section 111(d) allows that approach but disallows the Clean Power Plan. In both, generation shifting is operating to increase the strictness of emissions limits. . . .

In any event, newness might be perfectly legitimate—even required—from Congress's point of view. I do not dispute that an agency's longstanding practice may inform a court's interpretation of a statute delegating the agency power. But it is equally true, as *Brown & Williamson* recognized, that agency practices are "not carved in stone." 529 U.S., at 156–157 (internal quotation marks omitted). Congress makes broad delegations in part so that agencies can "adapt their rules and policies to the demands of changing circumstances." *Id.*, at 157. To keep faith with that congressional choice, courts must give agencies "ample latitude" to revisit, rethink, and revise their regulatory approaches. *Ibid.* So it is here. Section 111(d) was written . . . to give EPA plenty of leeway. The enacting Congress told EPA to pick the "best system of emission reduction" (taking into account various factors). In selecting those words, Congress understood—it had to—that the "best system" would change over time. Congress wanted and instructed EPA to keep up. To ensure the statute's continued effectiveness, the "best system" should evolve as circumstances evolved—in a way Congress knew it couldn't then know. EPA followed those statutory directions to the letter when it issued the Clean Power Plan. It selected a system . . . that achieved greater emissions reductions at lower cost than any technological alternative could have, while maintaining a reliable electricity market. Even if that system was novel, it was in EPA's view better—actually, "best." So it was the system that accorded with the enacting Congress's choice.

And contra the majority, it is that Congress's choice which counts, not any later one's. The majority says it "cannot ignore" that Congress in recent years has "considered and rejected" cap-and-trade schemes. But under normal principles of statutory construction, the majority *should* ignore that fact (just as I should ignore that Congress failed to enact bills barring EPA from implementing the Clean Power Plan). As we have explained time and again, failed legislation

"offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress" adopted. *Bostock* v. *Clayton County*, 590 U.S. ___, ___ (2020) (internal quotation marks omitted). . . . Return to *Brown & Williamson*, which all agree is the key case in this sphere. It disclaimed any reliance on "Congress' failure" to grant FDA jurisdiction over tobacco. 529 U.S., at 155. Instead, the Court focused on the statutes Congress "*ha[d]* enacted," which created "a distinct regulatory scheme" for tobacco, incompatible with FDA's. *Ibid.* (emphasis added). Here, as I've shown and the majority effectively concedes, there is nothing equivalent. . . .

III

Some years ago, I remarked that "[w]e're all textualists now." Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015). It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards. Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed. . . .

It is not surprising that Congress has always delegated, and continues to do so—including on important policy issues. As this Court has recognized, it is often "unreasonable and impracticable" for Congress to do anything else. *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946). In all times, but ever more in "our increasingly complex society," the Legislature "simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). Consider just two reasons why.

First, Members of Congress often don't know enough—and know they don't know enough—to regulate sensibly on an issue. Of course, Members can and do provide overall direction. But then they rely, as all of us rely in our daily lives, on people with greater expertise and experience. Those people are found in agencies. . . .

Second and relatedly, Members of Congress often can't know enough—and again, know they can't—to keep regulatory schemes working across time. Congress usually can't predict the future—can't anticipate changing circumstances and the way they will affect varied regulatory techniques. Nor can Congress (realistically) keep track of and respond to fast-flowing developments as they occur. . . . The "best system of emission reduction" is not today what it was yesterday, and will surely be something different tomorrow. So for this reason too, a rational Congress . . . enables an agency to adapt old regulatory approaches to new times, to ensure that a statutory program remains effective. . . .

In short, when it comes to delegations, there are good reasons for Congress (within extremely broad limits) to get to call the shots. Congress knows about how government works in ways courts don't. More specifically, Congress knows what mix of legislative and administrative action conduces to good policy. Courts should be modest.

Today, the Court is not. Section 111, most naturally read, authorizes EPA . . . to decide that generation shifting is the "best system of emission reduction" for power plants churning out carbon dioxide. Evaluating systems of emission reduction is what EPA does. And nothing in the rest of the Clean Air Act, or any other statute, suggests that Congress did not mean for the delegation it wrote to go as far as the text says. In rewriting that text, the Court substitutes its own ideas about delegations for Congress's. And that means the Court substitutes its own ideas about policymaking for Congress's. The Court will not allow the Clean Air Act to work as Congress instructed. . . .

The subject matter of the regulation here makes the Court's intervention all the more troubling. Whatever else this Court may know about, it does not have a clue about how to address climate change. And let's say the obvious: The stakes here are high. Yet the Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening. Respectfully, I dissent.

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1. Competing Conceptions of the Major Questions Doctrine—Justice Kagan's dissent correctly observed that *West Virginia* was the first time that a Supreme Court majority opinion used the phrase "major questions doctrine." But neither the terminology nor the general idea was new. Indeed, back in 1986, then-Judge Breyer observed 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." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986). The "major questions" terminology gained more traction, at least in the academic literature, in the 2000s, in the wake of decisions like *MCI*, *Brown & Williamson*, and *Gonzales*. In commentaries on those cases, scholars noted the possibility that the Court might be crafting some sort of "major questions exception" to *Chevron*. *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 231–234 (2006); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 226, 241 (2006); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593 (2008). And in the decade preceding *West Virginia*, the term took hold as a convenient shorthand for the suggestion, in these and other cases, such as *King v. Burwell*, that the Court might not defer to an agency's resolution of "major questions" of statutory meaning. Chief Justice Roberts' majority opinion in *West Virginia* therefore observed, in response to Justice Kagan's suggestion that the Court had invented a brand-new doctrine on the spot, that the major questions label "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."

But at the time *West Virginia* was decided, it was far from clear what legal principle these earlier cases were best understood as embracing. Indeed, as several commentators pointed out, the prior cases could be read as embracing different sorts of "major questions doctrines," which bear a surface similarity but have quite different implications. *See, e.g.*, Alison Gocke, Chevron*'s Next Chapter: A Fig Leaf for the Nondelegation Doctrine?*, 55 U.C. DAVIS L. REV. 955, 966–88 (2021); Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021); Kevin O. Laske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479 (2016). Consider three possible ways that, under the pre- *West Virginia* case law, the "majorness" of an agency's action might affect how a reviewing court assesses whether the agency's interpretation is permissible:

First, a reviewing court might treat the significance of the power the agency claims as *part of* the *Chevron* inquiry into whether the agency's interpretation is reasonable. If the text of a statutory provision, read in context, clearly indicates that the agency's powers are meant to be narrow and limited, then a reviewing court might well conclude that even under *Chevron*'s deferential standard, the statute cannot be read to give the agency broad, sweeping powers. Put another way, if the statute is unambiguously a mousehole, then the court would properly reject an agency's purported discovery of an elephant hiding within. On that understanding, the so-called "major questions doctrine" isn't really a distinct doctrine so much as a label for a particular sort of structural inference, one of the ordinary tools of statutory construction. *MCI v. AT & T*, 512 U.S. 218 (1994), seems to fit this model: In that case, the FCC claimed that its statutory

authority to "modify" the rules concerning long distance carriers' rate-filing obligations allowed the agency to eliminate the rate-filing requirement for smaller carriers, thus promoting more market competition. In rejecting that claim, Justice Scalia's majority opinion emphasized not only that the key statutory term, "modify," implies a small or incremental change, but also that the rate-filing requirement is central to the overall structure of the Communications Act, making it unreasonable, even under the *Chevron* framework, to interpret the term "modify" to empower the agency to eliminate rate-filing requirements for certain carriers altogether. *See* pp. 1139–1150, 1154–1155, *supra*.

Second, the major questions doctrine might be conceived as part of an implicit "*Chevron* Step Zero" inquiry, placing certain (major) interpretive decisions outside of *Chevron*'s domain. On this version of the major questions doctrine—which would operate like *Mead*—reviewing courts would resolve "major" interpretive questions without *Chevron* deference to the agency's view. (Unlike *Mead*, the relevant major questions cases suggest that the court should resolve these issues de novo, rather than applying *Skidmore* respect or something similar.) As in *Mead*, the rationale for this sort of major questions doctrine is that the presumption undergirding *Chevron*—that a statutory ambiguity ought to be treated as an implicit congressional delegation of authority to the agency—is inappropriate when the issue is sufficiently major. Congress, the argument goes, would typically prefer to decide major issues for itself. The case that most clearly embraces something like this approach to the major questions doctrine is *King v. Burwell*, 576 U.S. 473 (2015), where Chief Justice Roberts' majority opinion said explicitly that the *Chevron* framework would not apply to the IRS's interpretation of a provision in the Affordable Care Act in light of the improbability that Congress would have delegated such a significant question to the IRS. The Court ultimately agreed with the IRS's reading of the textually ambiguous statute, not out of any deference to the IRS, but on the basis of inferences from the statute's overall structure and the context in which it was enacted. *See* pp. 99–114, *supra*.

Third, the major questions doctrine could be understood not merely as a reason to withhold *Chevron* deference, but as a presumption *against* an interpretation that would allow an agency to take extraordinary actions on issues of deep economic and social significance. This "nondelegation" version of the major questions doctrine proceeds from the same starting point as the Step Zero version—the idea that Congress is unlikely to delegate major issues to agencies—but takes it further. In the Step Zero version, the reviewing court does not treat a statutory ambiguity as an implicit delegation to the agency, and as a result, the court decides the issue de novo. Under the nondelegation version of the doctrine, when a major question is at issue, not only does the court decline to apply the usual *Chevron* presumption that statutory ambiguity implies delegation to the agency, but the court adopts the *opposite* presumption: an ambiguous statute should be interpreted as *not* delegating to the agency the authority to take extraordinary actions. This is one way of understanding the Court's reasoning in the *Benzene* case, a pre-*Chevron* case in which Justice Stevens' plurality opinion held that OSHA could not tighten the workplace exposure limits for benzene unless the agency first made a threshold finding that exposures at current levels were "unsafe." *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U.S. 607 (1980) (plurality opinion). Though purportedly an interpretation of the statute, the *Benzene* plurality justified its seemingly strained interpretation in part by emphasizing that "it is unreasonable to assume that Congress intended to give [OSHA] the unprecedented power over American industry that would result from the Government's view" of the relevant statutory provisions, and that the Court should therefore favor "[a] construction of the statute that avoids this [potentially unconstitutional] open-ended grant" of statutory authority. *See* pp. 573–591, *supra*.

All three of these versions of the major questions doctrine can be characterized as addressing the problem of "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted," as Chief Justice Roberts put it in his *West Virginia*

majority opinion. But the three versions are nevertheless quite different, and it is not always clear which version of the doctrine various cases mean to adopt (or whether the opinions in those cases even recognize the differences).

Consider, for example, *Brown & Williamson*. In Justice Kagan's view, the *Brown & Williamson* Court relied "on normal principles of statutory interpretation," and concluded that the FDA's interpretation was not entitled to deference because "the relevant statutory provisions . . . negat[ed] the agency's claimed authority." That understanding, which corresponds to the first of the three versions of the major questions doctrine sketched above, is certainly plausible, especially given that *Brown & Williamson* purported to employ the deferential *Chevron* framework, and the opinion prominently cited *MCI*, which also employed that framework. Yet the language of *Brown & Williamson*—which emphasized that in extraordinary cases "there may be reason to hesitate before concluding that Congress has intended" the sort of "implicit delegation" that *Chevron* presumes—could also be read to support the second, "*Chevron* Step Zero" version of the major questions doctrine. Indeed, Chief Justice Roberts cited this language in his *King* majority opinion (which Justice Kagan joined) when explaining why the *Chevron* framework was inappropriate in that case. 576 U.S. 473, 485–86. And some language in the *West Virginia* majority opinion seems to treat *Brown & Williamson* as embracing "a requirement of 'clear congressional authorization'" before reading a statute to authorize agencies to exercise sweeping powers in extraordinary cases, which sounds like the third version of the major questions doctrine—the "nondelegation" version.

As for *West Virginia* itself, Justice Kagan's dissent (joined by Justices Breyer and Sotomayor) clearly embraced the first of the three versions of the major questions doctrine sketched above (though Justice Kagan would emphasize that the "major questions doctrine," properly understood, is not a distinct doctrine, but rather a label that scholars have attached to a particular form of structural inference—the stuff of "ordinary" statutory interpretation). Justice Gorsuch's concurrence (joined by Justice Alito) just as clearly embraced the third version, treating the major questions doctrine as a tool for implementing the values underlying the nondelegation doctrine, and therefore insisting on a clear statement of congressional intent to delegate before reading a statute to confer sweeping powers on the agency. The majority opinion in *West Virginia* also appears to have embraced the third version of the doctrine, although perhaps not quite as clearly and emphatically as the concurrence. As noted earlier, the majority opinion does not mention *Chevron* deference, even in the context of explaining why this case falls outside of *Chevron*'s domain. And the Court does not simply say that it will decide for itself, after de novo review, whether Section 111 authorizes the Clean Power Plan. Instead, Chief Justice Roberts' *West Virginia* opinion emphasizes that the major questions doctrine, as (allegedly) established in prior cases, "counsels *skepticism* toward EPA's claim that Section 111 empowers it to devise carbon emission caps based on a generation shifting approach" (emphasis added), and requires the government to "point to *clear* congressional authorization" if it wishes to overcome that skepticism (internal quotation marks omitted) (emphasis added).

Notice that *King v. Burwell* is not necessarily inconsistent with *West Virginia*, even though the former case adopted what the above typology classified as the "*Chevron* Step Zero" version of the major questions doctrine, while the latter case adopted the "nondelegation" version of the doctrine. *King* was a case in which *any* answer the agency gave to the question at issue—Are ACA tax credits available to those who purchase insurance on health care exchanges set up by the federal government?—would have enormous economic and political significance. There was no way for the IRS to answer that question without making a "major" decision, in the relevant sense. By contrast, in *West Virginia* the question at issue—May the EPA take generation shifting into account when setting carbon emission caps for coal-fired power plants?—is not inherently "major"; rather, the issue is that an *affirmative answer* to that question would have vast economic and political consequences. Thus, the "major questions" terminology is often misleading, because in

many cases the concern is not so much with the "majorness" of the *question*, but rather with the specific way in which the agency has *answered* that question. Someone who embraces the "nondelegation canon" version of the major questions doctrine would likely decide *King* using the same approach that the Court took in that case: Because *any* resolution of the statutory ambiguity would count as a "major" decision, the Court should decide which reading of the statute is best. It would make no sense to say that the Court should be "skeptical" of the IRS's (highly consequential) conclusion that the tax credits are available if the Court would be equally "skeptical" if the IRS had come to the opposite, equally consequential conclusion.

That said, it would have been possible for the *West Virginia* Court to have embraced the second version of the major questions doctrine (the "Step Zero" version), while eschewing the stronger nondelegation version. Had the Court taken that route, presumably it would have declared, first, that because the question whether the BSER calculation may incorporate generation shifting has vast economic and political significance, the Court would evaluate the agency's interpretation de novo rather than within the *Chevron* framework. Then, the Court would have decided whether the text of Section 111, read in context, was best understood to permit that approach or not—and would have done so without any special "skepticism" of the notion that Congress might indeed have conferred such power on the agency. The fact that the *West Virginia* Court did not do this suggests that the Court has now wholeheartedly embraced the nondelegation version of the major questions doctrine. Does that seem right to you? Do you think the majority opinion clearly settles the matter, or is there still room to argue that the majority did not go quite as far as Justice Gorsuch's concurrence in this direction?

Even if we conclude that *West Virginia* purports to have settled the doctrinal question of how to understand the major questions doctrine, it is still worthwhile to reflect on which version of the doctrine, if any, makes the most sense. How much does the answer to this question turn on the answers to empirical questions—such as how likely it is that Congress would delegate major issues to agencies, or authorize agencies to respond to new situations with significant and unprecedented regulatory actions? *Cf.* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Legislative Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901, 1003–04 (2013) (reporting the results of a survey of congressional staffers, which found that most of these staffers thought that although agencies should have the power to address "details of [statutory] implementation," agencies should not have the authority to decide "major policy questions," which are the province of Congress). How much does the evaluation of different versions of the major questions doctrine turn on the answers to normative questions regarding the desirability of broad delegations to agencies? It is quite clear that Justice Gorsuch's embrace of an especially robust form of the major questions doctrine is derived from his deep skepticism of delegation, which he views as inconsistent with constitutional commitments to democratic self-government and the separation of powers. It seems equally clear that Justice Kagan's contrary view is animated by a classic New Deal-style view that broad delegations serve the public interest, because, as she puts it, "Members of Congress often don't know enough—and know they don't know enough—to regulate sensibly on [many] issue[s]," and "can't know enough—and again, know they can't—to keep regulatory schemes working across time." Does one's view on the right framing of the major questions doctrine depend on which of these competing perspectives one finds more persuasive?

2. What Counts as a "Major" Question?—One obvious challenge for applying the major questions doctrine is the difficulty of articulating a judicially manageable standard for determining when an agency action is sufficiently "major" for the major questions doctrine to apply. It seems clear that the doctrine does not apply to every agency action that might be considered "major" in the ordinary sense of that term, or in the more specialized sense in which the term "major" (or synonyms like "significant") is used in other administrative law contexts. Consider the fact that the Office of Information and Regulatory Affairs (OIRA) typically

categorizes a rule as "significant" or "major" if the rule has an expected annual economic impact over $100 million, or if certain other criteria are satisfied. Yet the major questions doctrine appears to apply to a more limited category of agency rules. After all, in 2019 alone federal agencies promulgated 75 regulations deemed "major" by OIRA, *see supra* p. 500, but even by the most generous count, there have been fewer than ten Supreme Court cases in the last fifty years that have relied on any version of the major questions doctrine. It is of course possible that the *Alabama Realtors–NFIB–West Virginia* trilogy may presage a drastic expansion of the major questions doctrine, especially if Justices Gorsuch and Thomas prevail in their efforts to use this doctrine as part of a broader revitalization of the nondelegation doctrine. *See* pp. 568–573, *supra*. But at least for now, the set of questions deemed sufficiently "major" to trigger the major questions doctrine is substantially smaller. What does that set contain? How will or should courts determine whether a given agency action is "major" in that sense?

There are at least two aspects of the "What counts as major?" question, which are related but distinct. First, we might ask, "Major in what sense? Along what dimension?" Second, we might ask, "How major—on the relevant dimension or dimensions—does the question or action have to be?"

The first question arises because an agency rule may have "major" consequences on some dimensions but not on others. For example, a rule's significance for the overall operation of the relevant statutory scheme may not always correlate strongly with a rule's economic significance or political salience. By way of illustration, consider a possible contrast between *MCI* and *Brown & Williamson*. The interpretive question in *MCI*—whether the FCC could eliminate the rate-filing requirement for certain long-distance carriers—arguably would have worked a fundamental transformation in the character and operation of the statutory scheme, but probably had relatively little political salience with the general public. In contrast, the interpretive question in *Brown & Williamson*—whether the FDA could regulate tobacco as a drug under the Food, Drug and Cosmetic Act (FDCA)—had enormous political salience but had quite limited implications for the broader functioning of the FDCA as a whole. Does or should this matter? Does it make sense to distinguish different sorts of "major questions" along these lines, and if so, where (if anywhere) is the case for invoking the major questions doctrine stronger and where is it weaker?

Similarly, the relevance of the *political controversy* surrounding the issue addressed by an agency rule is often distinct from the predicted *economic impact* of the rule. To be sure, more economically consequential rules are, all else equal, more likely to be politically salient. But this correlation is not always tight. Some economically significant agency actions do not, for whatever reason, attract much public attention. And sometimes an agency rule implicates a political controversy that is disproportionate to the rule's objective economic impact. Indeed, the Clean Power Plan may be an example of the latter. As Justice Kagan's dissent pointed out, the actual economic impact of the Clean Power Plan, had it gone into effect, would have been zero—the generation-shifting that the rule sought to require by 2030 had already occurred by 2019, thanks to technological changes and market forces. But even if we ignore that and focus on the predicted economic impact of the rule at the time it was enacted, the Clean Power Plan's expected economic costs, though large, were not wildly out of proportion to the costs of other significant environmental regulations. *See* Brief of Amicus Curiae Richard L. Revesz in *West Virginia v. EPA*, 2022 WL 278669, at 8–9 (observing that, even if one uses the high end of the EPA's cost estimates, "[t]he estimated costs of the Clean Power Plan were . . . unexceptional for EPA pollution-control rules," and substantially lower than the costs of several other major rules recently adopted by other agencies). But the Clean Power Plan was far more politically controversial than other rules with similar or higher projected compliance costs, and this is almost certainly because of the fraught and polarized politics of climate change.

Justice Gorsuch's *West Virginia* concurrence explicitly recognized the distinction between economic and political significance, though he insisted that the Clean Power Plan was "major" on

both dimensions. (Chief Justice Roberts' majority opinion, though less systematic in enumerating the relevant dimensions of significance, also mentions both politics and economics, and treats both as relevant.) Should both of these factors matter, and if so, how and why? With respect to the *political* significance of the issue the agency is addressing, should it matter whether the issue was, or would have been, politically salient *at the time the statute was enacted*, or is that irrelevant as long as the issue is politically significant *today*? At the time Congress enacted Section 111, whether or how to address climate change could not possibly have been politically salient, because climate change was not something that anyone outside a small community of scientists were thinking about. Is that a reason not to apply the major questions doctrine in a case like *West Virginia*—or an even stronger reason to do so?

And what about the fact that sometimes an agency rule deals with an issue that Congress has debated but failed to address through legislation? Does that suggest, as Justice Gorsuch argues, that the agency's action is more likely to implicate a major question? Why would that be? Is the idea that Congress is more likely to consider legislation on major questions? Perhaps—but Congress considers and debates legislation on a whole range of matters that are not "major" in any meaningful sense. Maybe the idea is that the agency rule, if upheld, would prematurely cut off legislative debate on a matter of public controversy, and that this is more harmful if the issue is "major." *See* Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 622 (2008) (arguing that the major questions doctrine should be understood, or reframed, as "a doctrine of noninterference, designed to prevent institutional intermeddling between the Executive and Legislative branches"). But there are at least two problems with that argument.

First, this claim does not explain why ongoing congressional debate—and failed prior legislation—on an issue establishes that the issue in question is major. It may be that cutting off legislative debate is worse when the issue is a major one (though this is contestable), but if the question at issue is *whether* the issue is in fact "major," then the fact that upholding the rule would end a legislative debate would not seem germane to that question. *See* Moncrieff, *supra*, at 621 (acknowledging that her "noninterference" principle is "orthogonal to majorness").

Second, why would the agency rule cut off debate? If Congress objects to the Clean Power Plan, it could enact legislation disapproving it. (As Justice Kagan pointed out, Congress had in fact considered legislation that would do just that, but this legislation also failed to pass.) Indeed, the Congressional Review Act creates a special fast-track process that Congress can use to pass a resolution disapproving major agency rules (where "major" here is determined by OIRA's criteria, which would presumably apply to all rules considered "major" under the major questions doctrine, as well as many others). *See* pp. 619–622, *supra*. In some prior cases, the Court had suggested a concern about the possibility that a *federal* rule might cut off democratic debate over an important question that was playing out at the *state* level. *See. e.g.*, Gonzales v. Oregon, 546 U.S. 243, 249 (2006). But that concern is not present here. At the federal level, why would the democratic process end just because the agency puts a rule in place? Is the idea that the agency's adoption of a rule would disrupt legislative negotiations, perhaps because the agency rule would give one side most of what it wants, thus undermining the incentive to compromise, or perhaps by unsettling a delicate and ongoing process in midstream? *See* Moncrieff, *supra*, at 624 (suggesting that the agency rules at issue in *MCI* and *Brown & Williamson* "altered the stakes in Congress's game of public choice, potentially wasting time and resources by forcing stakeholders and legislators to adjust their negotiating positions to a new baseline"). Perhaps—but why should we assume that the appropriate baseline for legislative negotiations is agency inaction? The parties' bargaining positions and leverage in legislative negotiations may *change* as a result of an agency's (major) rule, but what is the normative or empirical argument for treating the negotiations that would occur in the absence of the rule as more democratically legitimate than

those that would occur in the presence of the rule? And what about the possibility that the agency's intervention—or the possibility that such intervention might occur—might *spur* legislative negotiations that might not otherwise take place?

Even if we can figure out what dimensions—legal, economic, political, etc.—matter for "majorness," a court applying the major questions doctrine would still need to address a second question: How "major" is "major enough" to trigger the doctrine? Are there reasonably objective criteria for conducting such an assessment? Or does it inevitably entail something like an "I know it when I see it" test? Even proponents of a strong version of the major questions doctrine have conceded that the latter is more likely. *See* United States Telecom Ass'n v. FCC, 855 F.3d 381, 422–423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (acknowledging that "determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality," and that the Supreme Court had not established a "bright-line test that distinguishes major rules from ordinary rules"). Does this raise concerns about whether the major questions doctrine can be applied in a consistent and principled way? Might such an open-ended version of the major questions doctrine risk of "swallowing *Chevron*'s rule"? Mila Sohoni, King*'s Domain*, 93 NOTRE DAME L. REV. 1419, 1419, 1425 (2018). And what of the fact—noted by several commentators—that in a number of prior cases, the Court had conspicuously declined to invoke, or even mention, the major questions doctrine when upholding agency actions that seem, on their face, to have a comparable degree of political and economic significance as the agency rules at issue in cases like *Brown & Williamson* and *King*? *See, e.g.*, Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 465–69 (2016); 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, 603–06 (2008); Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2196–2202 (2016).

On this concern about the alleged subjectivity and uncertainty regarding the major questions doctrine's scope, it might be worth recalling Justice Scalia's *Mead* dissent, in which he argued that the Court had replaced "a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce" with a "presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary." 533 U.S. 218, 239 (2001) (Scalia, J., dissenting). Justice Scalia further predicted that "[t]he principal effect [of the *Mead* decision] will be protracted confusion," given that the test "the Court enunciates [for whether *Chevron* deference applies] is wonderfully imprecise," consisting of a "grab bag" of factors. *Id.* at 245. *See also* pp. 1252, 1254–1255, *supra*. Putting aside the question whether Justice Scalia was correct in his predictions regarding *Mead* itself (*see* pp. 1265–1266, *supra*), might one advance the same basic criticism against the major questions doctrine, at least as that doctrine was applied in cases like *Alabama Realtors*, *NFIB*, and *West Virginia*? How might defenders of those opinions respond? And if you do think that the major questions doctrine will create substantially greater uncertainty about whether a given agency rule will be upheld (at least if that rule deals with a topic that might be considered important or controversial), what effects might this have on agency behavior? Might it produce a kind of chilling effect, deterring agencies from issuing rules that *might* be invalidated under the major questions doctrine, given how time-consuming and resource-intensive the rulemaking process is? *See* Monast, *supra*, at 476–80; Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 197, 205 (2022); Daniel Hornung, Note, *Agency Lawyers' Answers to the Major Questions Doctrine*, 37 YALE J. ON REG. 759, 792 (2020). If so, then the true impact of the major questions doctrine may be substantial even if the doctrine continues to be used relatively rarely. And many of the rules that the major questions doctrine deters might not have actually been considered "major" if the question had been litigated. If that empirical hypothesis is correct, would this chilling effect be a bad thing or a good thing? Why?

A closely related point: The difficulty of articulating clear standards concerning what counts as sufficiently "major" naturally gives rise to concerns that judges deciding whether to apply the major questions doctrine will be influenced (perhaps subconsciously) by their own political preferences. This is what Justice Kagan seems to have in mind when she warns that the *West Virginia* Court has "substitute[d] its own ideas about policymaking for Congress's," and claims that the Court has insisted on a degree of specificity that it probably would not have demanded in a case "involving a matter other than the bogeyman of environmental regulation." Whether or not you agree with Justice Kagan's specific contention here, does she have a point in saying that it is troubling to make so much turn on such a subjective doctrine? After all, the decision whether the agency's rule triggers the major questions doctrine will often be outcome-determinative. If the major questions doctrine does not apply, then, under *Chevron*, the agency will win unless the statute clearly forecloses the agency's rule. If the major questions doctrine does apply (at least if it is the strong version embraced by the *West Virginia* Court), then the agency will lose unless the statute clearly authorizes the agency's rule. If "majorness" is in the eye of the beholder, then the beholder has a whole lot of power. *See* Josh Chafetz, *Gridlock?*, 130 HARV. L. REV. FORUM 51, 57 (2016) (arguing that "[t]he major questions doctrine aggrandizes judges, who decide in any given case both how to frame the issue and how important that issue is"). How do you think the Justices in the *West Virginia* majority would respond to this concern?

We might also ask whether the evident uncertainty and subjectivity of the major questions doctrine—and the fact that this doctrine has evolved so much and comes in so many forms—is in tension with the nondelegation values that the major questions doctrine is supposed to advance. Is it problematic for the Court, in effect, to assume that Congress delegated to it pursuant to the open-ended terms of the Administrative Procedure Act relatively unchanneled discretion to determine and redetermine the binding standard of review for questions of statutory law? What intelligible principle guides the Court's frequent and ongoing revision of that standard of review? Put another way, does the Court seem to act as if it has been implicitly entrusted with undefined authority to structure the vital institutional relationship between reviewing courts and agencies in the modern regulatory state? Might one resist that characterization, on the grounds that the Court must adopt *some* view on how it ought to review agency legal interpretations of various kinds, and the Court, far from usurping Congress's prerogatives, is doing its best to craft an appropriate set of default assumptions to apply in the absence of clear congressional instructions?

3. When Is Congressional Intent to Delegate Major Authority Sufficiently "Clear"?— If a court determines that an agency's action is "major" enough to trigger the major questions doctrine, does this mean the agency loses? Not necessarily. The statute might still be read to grant the agency the authority it asserts. But how is a court to make that determination? Under what circumstances will or should a reviewing court decide that a statute does indeed delegate to an agency the authority to enact a "major rule" or decide a "major question"? As noted above, one aspect of this question concerns whether the court reviews the agency's claim of statutory authority deferentially, neutrally, or skeptically. *See* Note 1, *supra*. Additionally, one must consider what sorts of factors are relevant to this inquiry. Although the majority opinion touches on these questions, we will begin our exploration of this topic with the dissenting and concurring opinions, which are more systematic and explicit in laying out their preferred criteria for determining whether the statutory language and structure authorizes "major" agency action.

In Justice Kagan's view, the question whether the statute permits the agency's "major" action should be reviewed deferentially, just like other "ordinary" questions of statutory interpretation. Her dissent notes two ways that the scope or significance of the agency's claimed authority might matter within this framework: If the scope or nature of the power the agency claims "would . . . conflict[] with, or even wreak[] havoc upon, Congress's broader design," or if the agency is "operating [so] far outside its traditional lane . . . that it had no viable claim of expertise or experience." If neither of these two factors is present, and the agency's interpretation "plausibly

fit[s]" the text of the statute, the statute should, in Justice Kagan's view, be read as authorizing the agency's action.

Justice Gorsuch's concurrence, as we have seen, embraces the stronger nondelegation version of the major questions doctrine, which he characterizes as a clear statement rule. But what sort of "clear statement" does Justice Gorsuch have in mind? One possibility is that he thinks a statute cannot be read to authorize an agency to adopt a rule of "vast economic and political significance" unless the statute in question clearly and expressly authorizes *that particular* agency rule. Yet despite Justice Gorsuch's enthusiasm for a robust nondelegation doctrine, he does not appear to go that far. Rather, in addressing the question of "what qualifies as a clear congressional statement authorizing an agency's [major] action," he identifies four "telling clues." Let's consider each of them and think about whether these four factors are indeed useful in distinguishing those cases where Congress has clearly indicated a desire to delegate to an agency the authority to issue rules of great economic and political significance.

Interestingly, Justice Gorsuch's first and fourth factors closely parallel the two factors that Justice Kagan identified in her dissent. First, Justice Gorsuch invokes the no-elephants-in-mouseholes idea, emphasizing—with citations to *Brown & Williamson*, *MCI*, and *Gonzales*—that obscure, cryptic, subtle, or oblique statutory language cannot plausibly be read to authorize broad, transformative, and dramatic assertions of agency power. Justices Kagan and Gorsuch disagree on how deferentially or skeptically a court should evaluate an agency's claim that that its assertion of authority fits with the statutory language, but they agree, at least in principle, that a sufficient mismatch would render the agency's action unlawful. The fourth factor Justice Gorsuch mentions concerns a different sort of mismatch—a "mismatch between an agency's challenged action and its congressionally assigned mission and expertise." Here again, Justice Kagan might disagree with Justice Gorsuch as to just how great the mismatch must be to deprive the agency of authority, but she agrees with the general idea that an agency should lose if it has strayed too far out of its "traditional lane."

As for Justice Gorsuch's second and third "clues," they both evince a concern with *novelty*, as distinct from *fit*. Justice Gorsuch suggests that "an agency's attempt to deploy an old statute focused on one problem to new and previously unanticipated situations" is a "warning sign," especially when the agency's interpretation is of recent vintage. But Justice Gorsuch stops short of treating these factors as dispositive, recognizing that "sometimes old statutes may be written in ways that apply to new and previously unanticipated situations." That's reasonable enough. But the key question then becomes the meaning of that "sometimes." When? How do we know? After all, Justice Kagan argues that Section 111 of the Clean Air Act is *precisely* the sort of "old statute" that is "written in [a way] that [applies] to new and previously unanticipated situations." Justice Gorsuch's concurrence (and Chief Justice Roberts' majority opinion) disagree with this—but why? Again, one possible response would be to insist that the agency has no authority to adopt a major rule unless the statute expressly authorizes that *specific* rule (or that specific type of rule). But neither the majority nor the concurrence seems to go that far. So why does the fact that an agency's interpretation might be new and unexpected matter?

Perhaps Justice Gorsuch is getting at something like this: the "fit" between an agency's action and its purported statutory authorization is a matter of degree. The more the agency appears to be stretching the statutory language—and the more the agency seems to be drifting out of its lane—the more likely the court is to find that the agency's action is unlawful. The novelty of the agency's interpretation, relative to the age of the statute, may influence how much stretching of the language the court will tolerate. An agency action that a reviewing court might otherwise view as too "major" to derive from the statutory language might appear more plausible if the agency has adhered to that interpretation, or something like it, for decades. On the flip side, perhaps a court will be quicker to find a mismatch if the statute is very old and the agency's interpretation is very new.

Is that convincing? Or do you find that account ultimately non-responsive to Justice Kagan's assertion that Section 111 is precisely the sort of broad statute that Congress intended the agency to apply in creative ways to new problems?

There's another, more general question about Justice Gorsuch's approach here. Recall that Justice Gorsuch asserts that the major questions doctrine is a clear statement rule, which implies that a court should only find that Congress has authorized the agency to take a major action if the statute contains a sufficiently clear statement to this effect. But the four factors Justice Gorsuch lists are not clues that the statute *does* authorize major agency action; they are all clues that the statute *does not* authorize such action. That seems puzzling. If the major questions doctrine operates like other clear statement rules—such as the presumption that federal statutes do not apply extraterritorially, or the presumption that federal statutes do not interfere with the traditional sovereign prerogatives of state governments—then this absence of authorization would be the presumptive starting point, and the question would be whether that presumption has been overcome. What do you make of this? Does it suggest that perhaps, rhetoric notwithstanding, Justice Gorsuch does not treat the major questions doctrine as a conventional clear statement rule? What other explanation might you give?

What about Chief Justice Roberts' majority opinion? That opinion, after all, is the controlling opinion, and therefore the one that lower courts, litigants, and Members of Congress will need to scrutinize most closely when trying to figure out the contours of the major questions doctrine going forward. Does that opinion provide useful guidelines regarding when a statute ought to be read to authorize agencies to take actions that count as "major" for major questions doctrine purposes? Justice Gorsuch asserts that his concurrence merely elaborates on the same factors that the majority treats as relevant. Do you agree? Take another look at Part III–C of the majority's opinion, which is where Chief Justice Roberts purports to explain why Section 111 does not offer sufficiently "clear congressional authorization" to overcome the Court's "skepticism" that Congress authorized the EPA to set carbon emissions caps based on what could be achieved through generation shifting. Based on the language in this section, or elsewhere in the majority's opinion, what do you think a statute would need to say in order to authorize the agency to take major action? The Court says that Section 111's broad reference to a "system" of emissions reduction "is not close to the sort of clear authorization required by our precedents." What would be? Suppose you were a Member of Congress drafting a statute to address some general issue or problem, and you wanted language that would be capacious enough to support significant agency action to address unforeseen aspects of the problem that may arise in the future. That is, suppose you wanted to draft a statute that, to borrow Justice Gorsuch's language, is indeed "written in [a] way[] that appl[ies] to new and previously unanticipated situations[.]" How would you write such a statute, in light of the *West Virginia* decision? Does the current caselaw provide sufficient guidance? If not, is that a problem, and how could it be solved?

4. Different Types of "Mismatch"—As the previous note pointed out, all three opinions in *West Virginia* emphasize two related but distinct notions of "fit." First, the opinions all endorse the principle that an agency may not squeeze an interpretive elephant into a statutory mousehole. This sort of mismatch may arise because the statutory text and structure connote a constrained, limited sort of agency authority that cannot be read to authorize the broad power claimed by the agency (as in *MCI*), or because accepting the agency's expansive interpretation would produce outlandish results that could only be avoided through ad hoc alterations or exceptions to the statutory scheme (as in *Brown & Williamson*). But all three of the *West Virginia* opinions also recognized a different sort of "mismatch" problem: a mismatch between the regulation's subject matter and the agency's traditional areas of expertise. This kind of mismatch had also been discussed in earlier cases. For example, the *Gonzales v. Oregon* Court expressed skepticism that Congress would have intended to delegate decisions regarding medical practice to the Attorney General, 546 U.S. 243, 266–267 (2006), and the *King v. Burwell* Court, citing *Gonzales*, declared

that it is "unlikely that Congress would have delegated [decisions regarding the availability of Affordable Care Act (ACA) subsidies] to the *IRS*, which has no expertise in crafting health insurance policy," 576 U.S. 473, 485–486 (2015).

Opinions invoking the major questions doctrine sometimes refer to both sorts of mismatch, and for that reason it is easy to conflate them, but they are not the same. An agency may make a rule that is entirely in its wheelhouse, yet still assert authority that cannot be squared with the statutory text. In *MCI*, the Federal Communications Commission was making telecommunications policy, and in *Brown & Williamson*, the Food and Drug Administration was making health and safety determinations. In neither case did the Court suggest that the problem was that the agency was getting into policy domains beyond its competence. In other cases, like *Gonzales* and *King*, the concern that the agency had drifted "out of its lane" was much more central. In principle, that latter sort of mismatch could arise even if there is no serious concern about a mismatch between the narrowness of the statute's text or structure and the breadth or ambition of the agency's action. In short, mismatch between the statutory scheme and the agency's rule is not the same as mismatch between the subject of the agency's rule and the agency's traditional expertise; nether type of mismatch is necessary or sufficient for the other type.

With respect to mismatch between an agency's traditional areas of expertise and the public policy topic addressed by the rule—the "agency out of its lane" concern—it is worth pausing to ask what this has to do with "major questions" at all. It is not hard to imagine this sort of mismatch arising in cases that do not come anywhere close to implicating either "fundamental legal questions" or issues of "vast economic and political significance." To see this, consider a hypothetical variant on *King*. That case, again, involved the IRS's interpretation of an Internal Revenue Code provision concerning the availability of ACA tax credits. In the real case, Chief Justice Roberts' majority opinion noted *both* that "[t]he tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people," *and* that the IRS "has no experience in crafting health insurance policy of this sort." 576 U.S. at 485–86. What if a case arose in which only the second of these factors, not the first, was present? Suppose, for example, that the IRS interpreted some obscure provision of the tax code, also relevant to health care subsidies, that affected only a small number of people. In this hypothetical example, the question would not be considered "major" by anyone's lights—but the degree of "mismatch" between the agency's expertise and the policy domain would be just as great as in *King*. Should that sort of mismatch matter when deciding whether to uphold the agency's interpretation? If the answer is yes, then perhaps cases like *West Virginia* are misleading in suggesting that this kind of mismatch is part of the inquiry under the *major questions* doctrine; instead, courts would need to consider, as a separate and distinct Step Zero inquiry, whether the agency has sufficient policy expertise to merit *Chevron* deference. (It is perhaps worth recalling here that the pre-*Chevron* approach to judicial review of agency statutory interpretation considered a variety of factors, including the extent to which the subject matter implicated the agency's technical expertise. *See* p. 1100, *supra*.) If the answer is no—if *Chevron* would apply, in the ordinary fashion, to a "normal" case even when the agency has taken some action outside of its "traditional lane"—then one might reasonably ask why this factor should come into play as part of the major questions doctrine.

What do you think? How, if at all, should a court take into account the fact that an agency's action may address policy issues that the agency in question usually does not handle, and for which it may lack relevant expertise? Do you share the intuition that courts should be more skeptical of an agency that does not "stay in its lane"? Are these concerns important only in the context of questions that are "major" in some other sense? Why or why not?

One final observation here: Determining whether the agency has drifted out of its lane is not only rather subjective, but it also depends considerably on the level of generality at which the

agency's "lane" is defined. In *West Virginia*, after all, Justice Kagan pointed out that the case involved the Environmental Protection Agency making a rule to protect the environment, using regulatory instruments that the agency had previously used (sometimes with express congressional authorization) in other contexts. Chief Justice Roberts' majority opinion, by contrast, characterized the EPA as having asserted authority to make national energy policy, addressing issues concerning electricity transmission, distribution, and storage—issues that the EPA itself acknowledged were outside its traditional areas of expertise. Or consider *King*, which is often treated as the quintessential example of a case in which an agency's interpretation is not entitled to deference because the agency (here the IRS), though responsible for administering the statutory provision in question, lacks the requisite expertise on the key public policy issue (here, health insurance policy). Yet strikingly, in footnote 3 of his concurrence, Justice Gorsuch explicitly characterizes *King* as a case where there was *not* "a mismatch between [the] agency's expertise and its challenged action," on the grounds that *King* involved a "tax agency administering tax credits." That's accurate, in a sense. But it's hard to see why one could not just as easily characterize *West Virginia* as a case involving "an environmental agency administering an environmental statute." If the degree of mismatch between the agency's expertise and the policy area addressed by the rule is indeed a relevant consideration, is there a principled way to determine the appropriate level of generality at which each of these factors should be determined?

***5. Textualism and Substantive Canons Revisited*—**If you covered the material in Chapter Two on substantive canons of statutory construction, you might recall that there is a question, occasionally debated in the scholarly literature, about whether substantive canons are consistent with textualism. *See* pp. 408–410, *supra*. After all, a substantive canon, by its nature, instructs a court to select an interpretation that may differ from the interpretation that the court would otherwise embrace, and to do so either because of a presumption about likely congressional intent (based on sources or assumptions beyond the statutory text) or to further some value or policy that is not derived from the statute itself. Insofar as textualists claim that respect for legislative supremacy requires judges to adhere to the statute's text—as that text would be understood by an ordinary reader familiar with the relevant semantic context—substantive canons therefore seem problematic. *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010) [hereinafter Manning, *Clear Statement Rules*]. So-called clear statement rules may be especially problematic, because these strong canons sometimes instruct judges to deviate from the more natural semantic meaning of statutory text that is not "ambiguous" in the usual sense, if the statute is not sufficiently clear and explicit. *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 253–55; Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 88. Nevertheless, textualist and non-textualist judges alike regularly deploy substantive canons, and some textualist theorists, including Justice Scalia and Justice Barrett, have proposed ways to reconcile textualism with at least some substantive canons. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1990).

In *West Virginia*, this debate spilled from the pages of the law reviews into the pages of the U.S. Reports, albeit briefly. Justice Kagan's dissent succinctly articulated the alleged inconsistency of substantive canons with textualism, accusing "[t]he current Court [of being] textualist only when being so suits it. When [textualism] would frustrate [the Court's] broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards." To this, Justice Gorsuch responded—accurately—that "our law is full of clear-statement rules and has been since the founding." He further pointed out—also accurately—that Justice Kagan and the other two dissenters (Justices Breyer and Sotomayor) "have regularly invoked many of these rules." *See, e.g.*, United States v. Wong, 575 U.S. 402, 409–410 (2015) (majority opinion by Justice Kagan) (applying a "clear statement rule" that statutory procedural rules do not limit a court's jurisdiction unless the statute contains a plain statement to that effect);

Loughrin v. United States, 573 U.S. 351, 362 (2014) (majority opinion by Justice Kagan) (embracing the principle that the Court should not "assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction . . . in the absence of a clear statement") (internal citations and quotation marks omitted). Those rejoinders, while fair enough if taken as responses to Justice Kagan's suggestion that the Court's use of clear statements rule is categorically improper, do not really engage the heart of Justice Kagan's suggestion that clear statement rules are inconsistent with textualism. Justice Gorsuch's more sustained and substantive defense of clear statement rules—including but not limited to the major questions doctrine—appeared earlier in his concurrence. That defense relied on an argument advanced by then-Professor Barrett in a 2010 law review article. Citing to that article, Justice Gorsuch insisted that clear statement rules are legitimate exercises of the judicial power—and consistent with textualist principles—because these rules "help courts 'act as faithful agents of the Constitution'" by "ensur[ing] that the government does not inadvertently cross constitutional lines" (quoting Barrett, *supra*, at 169, 175). In other words, although judges must ordinarily follow congressional instructions, judges—including textualist judges—have a superseding obligation to enforce the Constitution, and clear statement rules are techniques for discharging that higher duty of constitutional enforcement.

Do you find that argument convincing? Does it imply that the major questions doctrine—and all other valid clear statement rules—are really all versions of the constitutional avoidance canon? (*See* pp. 384–413, *supra*.) If so, how would one reconcile that position with the view—expressed in several recent opinions joined by Justice Gorsuch—that the avoidance canon only "comes into play when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction," and "has no application" otherwise? Jennings v. Rodriguez, 138 S.Ct. 830, 842 (2018) (internal citations and quotation marks omitted). *See also, e.g.,* Iancu v. Burnetti, 139 S.Ct. 2294, 2301 (2019). Justice Gorsuch's *West Virginia* concurrence explicitly states, in footnote 3, that the major questions doctrine is a "clear-statement rule" rather than a (weaker) "ambiguity canon." But how can that be, if the only justification for substantive canons is that they are ways to avoid constitutional problems, and the constitutional avoidance canon itself operates as what Justice Gorsuch calls an "ambiguity canon" rather than a clear statement rule? How do you think Justice Gorsuch would explain this apparent tension?

More importantly, does Justice Gorsuch's defense of clear statement rules depend on the assertion that it would be *unconstitutional* to read a statute like Section 111 to delegate to the agency the authority to take action on a major question? *Cf.* Industrial Union Dept., AFL–CIO v. American Petroleum Institute, 448 U.S. 607 (1980) (plurality opinion) (defending a more restrictive reading of the Occupational Health and Safety Act on the grounds that the alternative embraced by the agency might violate the constitutional nondelegation doctrine). *See* pp. 573–591, *supra*. If not, then what is the justification for declining to read the delegation broadly, if (as Justice Kagan insists) that is the most natural reading of the statutory language? Is Justice Gorsuch implicitly suggesting that because the Court under-enforces the nondelegation doctrine in the constitutional context, it is reasonable and legitimate for the Court to compensate for that under-enforcement via techniques of statutory construction such as the major questions doctrine? Justice Gorsuch does not put the point quite that way, but do you find that a convincing reconstruction of his argument? *See* Riley T. Svikhart, Note, *"Major Questions" as Major Opportunities*, 92 NOTRE DAME L. REV. 1873, 1874 (2017) (arguing that a robust major questions doctrine compensates for a "toothless" nondelegation doctrine). If not, can you give an account of how the major questions doctrine, or other clear statement rules, could plausibly derive from federal judges' obligation to enforce the Constitution, if the outcomes disfavored by these clear statement rules are not actually unconstitutional?

As for Justice Kagan, is she being entirely consistent when she denounces the Court's use of clear statement rules as atextual get-out-of-text-free cards? After all, as noted above, Justice

Gorsuch is correct when he points out that all three of the dissenters have, at various times, deployed such canons. To be sure, these earlier cases did not involve the major questions doctrine. But the sharp language of Justice Kagan's *West Virginia* dissent seems to imply a *general* objection to invoking clear statement rules to justify deviating from what would otherwise be the best reading of the text. Is Justice Kagan being inconsistent? Maybe she is—or maybe she has revised her views over time. Or maybe, as Justice Gorsuch suggests, Justice Kagan's objection isn't really to clear statement rules in general, but rather to the inclusion of the major questions doctrine as a member in good standing of the family of legitimate substantive canons.

There is also another, related possibility: Perhaps Justice Kagan is not so much critiquing substantive canons as such, but rather criticizing what she perceives as the selective and policy-driven way that the current Court tends to apply these canons. That understanding of her objection naturally invites questions about whether it is possible to develop and maintain a more objective and predictable set of principles for determining when various clear statement rules apply. It also raises questions about whether certain canons are more susceptible to manipulation. Perhaps, then, Justice Kagan's objection here is closely connected to concerns about the subjectivity of determining when a question counts as sufficiently "major" for the major questions doctrine to apply. *See supra* note 2. That may well be. But even if the use of substantive canons were perfectly objective and predictable, one could still question whether such canons are consistent with strong versions of textualism, at least when adherence to a given substantive canon is not essential to prevent an actual violation of the Constitution. *See* Manning, *Clear Statement Rules*, *supra* at 418–19. What is your perspective on that critique? Is it valid, and if so, what consequences follow for the theory and practice of statutory interpretation more generally?

C. THE DEMISE OF *CHEVRON*?

This chapter, as you have surely noticed, has revolved around *Chevron*: precursors to *Chevron*, the structure of *Chevron*, justifications for *Chevron*, critiques of *Chevron*, applications of *Chevron*, interaction between *Chevron* and other interpretive tools, limits to *Chevron*'s domain, and so on and so forth. There is a reason for this. Notwithstanding legitimate questions about just how much *Chevron* changed prior law, and about how much practical impact *Chevron* has had on substantive outcomes, *Chevron* doctrine has been the central organizing principle for a central topic in administrative law—judicial review of agency statutory interpretations—for nearly four decades. Though it may have taken a few years before *Chevron* assumed its position of prominence, *Chevron* fairly quickly emerged as the fixed point around which the doctrine on this issue revolved. To be sure, *Chevron* has always had its critics, but until fairly recently the critiques of *Chevron* did not pose a serious threat to its status as the keystone case for judicial review of agency statutory interpretations.

Times have changed. As a formal matter, *Chevron* is still good law. But skepticism about its legitimacy has intensified and migrated from law reviews and academic conferences into judicial opinions and mainstream political discourse. And debates over *Chevron*, though not quite as polarized as some other hot-button legal issues, have become more ideological, with conservatives and libertarians criticizing *Chevron* on the ground that it overly empowers bureaucracy and undermines constitutional checks and balances, and progressives rallying to *Chevron*'s defense as an appropriate way to implement constitutionally valid delegations. *See* Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 523–34 (2022); Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. Rev. 619, 657–77 (2021). This shift is striking, especially in light of the fact that for the first several years after *Chevron* was decided, the most pointed critiques of the doctrine tended to come from progressive scholars and judges, while conservative scholars and judges were some of *Chevron*'s most forceful advocates. *See* Elinson & Gould, *supra* at 508–15; Green, *supra*, at 630–42. And for much of the period of what we might characterize as

Chevron's heyday—from the early 1990s through the early 2010s—debates over *Chevron* did not break down along predictably ideological or philosophical lines. But that is no longer the case.

At the Supreme Court, Justices Thomas and Gorsuch have been pressing for reconsideration of *Chevron*, writing a string of concurring and dissenting opinions making the case that *Chevron* is unconstitutional and should be overruled. *See, e.g.*, County of Maui v. Hawaii Wildlife Fund, 140 S.Ct. 1462, 1482 (2020) (Thomas, J., dissenting) (joined by Gorsuch, J.); Baldwin v. United States, 140 S.Ct. 690, 690–694 (2020) (Thomas, J., dissenting from denial of cert.); PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S.Ct. 2051, 2057 (2019) (Thomas, J., concurring in the judgment) (joined by Gorsuch, J.); BNSF Railway Co. v. Loos, 139 S.Ct. 893, 908–909 (2019) (Gorsuch, J., dissenting) (joined by Thomas, J.); Michigan v. EPA, 576 U.S. 743–761–764 (2015) (Thomas, J., concurring); Perez v. Mortgage Bankers Assn., 575 U.S. 92, 115–126 (2015) (Thomas, J., concurring in the judgment). *See also* Pereira v. Sessions, 138 S.Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (expressing concern about "[t]he type of reflexive deference" often associated with *Chevron*, and urging reconsideration, "in an appropriate case, [of] the premises that underlie *Chevron* and how courts have implemented that decision"). Though none of the other sitting Justices has been as openly skeptical of *Chevron* as Justices Thomas and Gorsuch, some of those Justices—most notably Chief Justice Roberts and Justice Kavanaugh—have signaled their desire to more narrowly constrict the scope of *Chevron*'s domain. *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150–2154 (2016) (book review).

There is some evidence that this growing resistance to *Chevron* is having an impact, at least at the Supreme Court. The last time a Supreme Court majority opinion relied on *Chevron* to uphold an agency decision was in 2016, in an opinion by Justice Breyer. *See* Cuozzo Speed Technologies, LLC v. Lee, 579 U.S. 261, 276–280 (2016). *But see id.* at 286 (Thomas, J., concurring) (claiming that the statutory provision at issue in this case "contains an express and clear conferral of authority" to the agency, meaning that the decision "does not rest on *Chevron*'s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency"). The most recent case in which a Justice appointed by a Republican President wrote a controlling opinion deferring to an agency interpretation under *Chevron* was a unanimous opinion by Chief Justice Roberts back in 2011. *See* Mayo Foundation for Medical Educ. and Research v. United States, 562 U.S. 44, 52 (2011). (In 2018 Justice Alito wrote a dissent that criticized the Court for failing to grant *Chevron* deference to an agency interpretation. *See* Pereira, 138 S.Ct. at 2129 (Alito, J., dissenting) (concluding that "a straightforward application of *Chevron* requires us to accept the Government's interpretation of the provision at issue," and pointedly noting that "unless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law").) The Court has continued to cite *Chevron* in several post-2016 cases, but in those cases the majority opinions have not actually deferred to agencies, typically because the Court determines that the statute is clear, *see, e.g.,* Johnson v. Guzman Chavez, 141 S.Ct. 2271, 2291 n.9 (2021); Pereira, 138 S.Ct. at 2113–2114; Wisconsin Central Ltd. v. United States, 138 S.Ct. 2067, 2074 (2018), or because the interpretive question at issue lies beyond *Chevron*'s domain, *see, e.g.,* Salinas v. U.S. Railroad Retirement Bd., 141 S.Ct. 691, 700 (2021), Smith v. Berryhill, 139 S.Ct. 1765, 1778–1779 (2019), Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1629–1630 (2018).

Furthermore, in the last few years there have been several notable cases where the Court has conspicuously omitted any mention of *Chevron*—even to reject its applicability—despite the fact that the lower court opinions under review in those cases devoted substantial attention to *Chevron* (sometimes deferring, sometimes not). The 2021–2022 major questions trilogy discussed in Part IV–B, *supra*—Alabama Association of Realtors v. Department of Health and Human Services, 141 S.Ct. 2485 (2021) (*per curiam*), National Federation of Independent Business v. Occupational Safety and Health Administration, 142 S.Ct. 661 (2022) (*per curiam*), and West

Virginia v. EPA, 142 S.Ct. 2587 (2022)—are particularly striking in their failure to cite *Chevron*. There are other examples as well. *Compare, e.g.*, Metropolitan Hospital v. HHS, 712 F.3d 248, 254–269 (6th Cir. 2013) (deferring under *Chevron* to a Department of Health and Human Services (HHS) rule interpreting a provision in the Medicare Statute), Catholic Health Initiative Iowa Corp. v. Sebellius, 718 F.3d 914, 920 (D.C. Cir. 2013) (same), *and* Empire Health Foundation v. Azar, 958 F.3d 873, 884–886 (9th Cir. 2020) (applying *Chevron* framework but concluding that a prior circuit precedent unambiguously foreclosed HHS's interpretation), *with* Becerra v. Empire Health Foundation, 142 S.Ct. 2354 (2022) (Supreme Court opinion resolving this circuit split by "approv[ing] HHS's understanding" of the relevant statutory provision, but without mentioning *Chevron*). *Compare also* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S.Ct. 2367, 2380–2381 (2020) (agreeing with the government's interpretation without applying or mentioning *Chevron*), *with id.* at 2397 (Kagan, J., concurring) (finding the statue ambiguous and insisting that "*Chevron* deference was built for cases like these").

What are we to make of this? One possibility is that *Chevron*'s demise is imminent. But even some Justices who are skeptical of *Chevron* in its current form might be reluctant to formally overrule it. As Cass Sunstein has pointed out, "overruling *Chevron* would create an upheaval—a large shock to the legal system, producing confusion, more conflicts in the courts of appeals, and far greater politicization of administrative law." Cass R. Sunstein, *Zombie* Chevron*: A Celebration*, 82 OHIO ST. L.J. 565, 572 (2021). Even for those who find the normative arguments against *Chevron* compelling, overruling the decision after all this time would raise a host of questions. As Professor Sunstein observes, these questions would include: "What would happen to the countless regulations that have been upheld under the *Chevron* framework?", "Would the overruling of *Chevron* be prospective only? What would that even mean?", and "How would *Chevron* itself, or the many cases like it, be decided? What if agency expertise really is relevant?" *See id.* (footnotes omitted). *See also* Green, *supra*, at 701–702 (noting that overruling *Chevron* would mean that "[h]undreds of precedents that have relied on and applied administrative deference might be invalid," and would damage the stability and credibility of the administrative law system more generally).

Another possibility is that *Chevron* will not be formally overruled, but will be rendered largely toothless. In that scenario, the Court would continue to simply ignore *Chevron* even in cases where it would seem relevant, and an increasing number of lower courts—taking their cue from the Supreme Court—might do the same. Or perhaps the *Chevron* framework will remain intact, and courts will continue to cite it, but a combination of more robust limits on *Chevron*'s domain—including, for example, an expansive version of the major questions doctrine, *see* Part IV–B, *supra*, and more aggressive attempts to discern a clear statutory meaning in those cases where *Chevron* applies—will substantially curtail *Chevron*'s relevance, particularly in high-profile cases. Indeed, for well over a decade, observers have been suggesting something like this has already been happening to the doctrine. *See, e.g.*, Sunstein, *supra*, at 570; Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007); Nathan Richardson, *Deference Is Dead (Long Live* Chevron*)*, 73 RUTGERS U. L. REV. 441 (2021) (hereinafter Richardson, *Deference*).

An alternative perspective, however, suggests that *Chevron* (as modified by *Mead*) will continue to provide the standard approach for the mine-run of cases—with courts generally deferring to agencies' plausible readings of the statutes they administer, at least if those interpretations appear in rules or formal orders. There may be a handful of cases that involve especially high-profile or controversial issues, or that for some other reason make their way onto the Supreme Court's docket, and in these cases *Chevron* may well be sidelined, ignored, or cabined—but those cases would remain the exceptions rather than the rule. Those embracing this perspective might emphasize that we should be cautious about drawing overly broad conclusions about *Chevron*'s overall importance from handful of Supreme Court cases. As Professors Kristin

Hickman and Aaron Nielson put it, because "lower court judges regularly rely on *Chevron*," and "the Supreme Court rarely reverses those decisions," it follows that "*Chevron* continues to play a significant role in the law, even if it is rarely cited by the Justices." Kristen E. Hickman & Aaron Nielson, *The Future of* Chevron *Deference*, 70 DUKE L.J. 1015, 1017 (2021). Intriguingly, Professor Nathan Richardson previously suggested that the major questions doctrine may actually help to preserve *Chevron*, by acting as a kind of "safety valve" that allows the Court to avoid deferring to agencies in a small set of high-stakes cases—cases that, in the absence of the "major questions" safety valve, might prompt the Court to overrule or more sharply limit *Chevron*. Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONNECTICUT L. REV. 355, 409, 420 (2016). *But see* Richardson, *Deference*, *supra*, at 514 (declaring that he is "no longer convinced that [this] view on the major questions doctrine is correct," principally because "there is just not much mainline *Chevron* deference to protect . . . at the Supreme Court," and because the major questions doctrine has hardly ever been applied in the lower courts, "where meaningful deference persists").

Consistent with the idea that *Chevron* is still the dominant approach in "ordinary" cases, several studies have found that lower court judges—especially those who hear a large share of administrative law cases—continue to rely on *Chevron* deference to resolve challenges to agency statutory interpretations. *See* Kent Barnett & Christopher Walker, Chevron *in the Circuit Courts*, 111 MICH. L. REV. 1 (2017); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1348–1350 (2018). *See also* Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. 147, 161–162 (2017) (predicting, in light of their empirical findings, that circuit courts will "not meaningfully abandon *Chevron* review even if [the major questions doctrine] gave them a colorable ground for doing so," given that circuit courts have not enthusiastically embraced other doctrinal justifications for avoiding *Chevron* in certain types of cases). That said, the empirical studies just mentioned are from several years ago (the Barnett and Walker study examined cases decided between 2003 and 2013, while the Gluck and Posner analyzed surveys and interviews conducted between 2015 and 2017). The escalating criticism of *Chevron*'s constitutional legitimacy, and the turn away from *Chevron* at the Supreme Court level, are more recent phenomena, with the key shift occurring between 2013 and 2016. *See* Green, *supra*, at 647–648, 660–661, 657–677. And there appears to be some suggestive evidence that *Chevron*'s sway at the lower court level declined after 2016. Although citation counts are crude and unreliable measures of a case's influence, the trends here are striking: In the first decade of the twentieth century (from January 1, 2000 through December 31, 2009), federal courts of appeals favorably cited *Chevron* in an average of just over 200 reported cases per year. From the start of 2010 through the end of 2016, that number dropped to an average of 175 cases per year. From 2017 through the end of 2021, the number of reported court of appeals cases favorably citing *Chevron* had dropped even further, to an average of 131 per year.

What does that trend suggest for *Chevron*'s importance at the court of appeals level? To draw confident inferences about the meaning of this apparent decline, we would need to know a great many more things. For example, although we know the number of cases that cited *Chevron*, we do not know (unless we put in substantially more work) the number of cases in which the courts of appeals *could* have (or should have) cited *Chevron* but did not do so. *Cf.* William N. Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008) (attempting to determine the number of Supreme Court cases that are "*Chevron*-eligible," and calculating cases that use *Chevron* as a fraction of that number); Natalie Salmanowitz & Holger Spamann, *Does the Supreme Court Really Not Apply* Chevron *When It Should?*, 57 INT'L REV. L. & ECON. 81 (2019) (using a different method for calculating "*Chevron* eligible" cases and reaching very different conclusions from those of Eskridge & Baer, *supra*). Citation counts may also be influenced by the behavior of agencies and potential litigants, which jointly determine how many challenges to

agency statutory interpretations come before the courts of appeals. *Cf.* Yehonatan Givati, *Strategic Statutory Interpretation by Administrative Agencies*, 12 AM. L. & ECON. REV. 95 (2010). Still, the overall trend in lower court citations is intriguing, and appears to paint a mixed picture: courts of appeals, in contrast to the Supreme Court, continue to cite and rely on *Chevron* quite often, but they do so less frequently than they did a decade ago.

Turning back to the Supreme Court, is it possible that *Chevron* might retain more vitality at the Court than the conventional wisdom maintains? True, the Court has not relied on *Chevron* to uphold an agency decision in quite some time. But we should keep in mind both that agencies usually prevail in *Chevron* cases in the courts of appeals, and that the Supreme Court has a discretionary docket. It could be that the cases in which the current Court would apply *Chevron* never reach the Court in the first place—if the agency won below on *Chevron* grounds, and the Court declines to hear the case, the Court never has the occasion to invoke *Chevron* favorably. Now, an important piece of evidence against this hypothesis is the fact, noted earlier, that in several recent cases the Court has conspicuously omitted any citation to *Chevron* even when the Court has upheld the government's interpretation. This might signal that at least five Justices are now *Chevron* skeptics. An alternative explanation, though, might be that Justices Thomas and Gorsuch are so opposed to *Chevron* that any mention of the case would likely provoke a separate opinion, and their colleagues prefer to avoid splintering the majority opinion if possible. This creates a strong incentive to avoid invoking *Chevron*, so long as the agency would win on other grounds. If that alternative explanation is accurate, then Justices Thomas and Gorsuch may be having an impact on the Court's citation practices that is disproportionate to their colleagues' actual agreement with their substantive views—an effect that is perhaps analogous to the impact that Justices Scalia and Thomas had on the Court's citations to legislative history (*see* pp. 278–279, *supra*). Of course, the 2021–2022 major questions doctrine trilogy (*Alabama Realtors*, *NFIB*, and *West Virginia*) does announce (or reaffirm, depending on your point of view) that the Court will not permit expansive and politically controversial exercises of regulatory authority—particularly in areas like public health and environmental protection—that are based on novel or unexpected readings of old statutes. But since such cases are, by definition, unusual, the Court's embrace of the major questions doctrine does not necessarily indicate the wholesale abandonment of *Chevron* at the Supreme Court. To be clear, it *may* mean this—but we do not yet know.

In sum, *Chevron*'s future—and, more generally, the future of judicial doctrine on review of agency statutory interpretation—is more uncertain than it has been in more than three decades. Some have declared *Chevron* dead or dying. *See, e.g.*, Joshua Matz, *The Imminent Demise of* Chevron *Deference?*, TAKE CARE (June 21, 2018), https://takecareblog.com/blog/the-imminent-demise-of-Chevron-deference. Others have insisted that reports of *Chevron*'s death have been greatly exaggerated—or that even if the Court were to disavow *Chevron*, the principle of judicial deference to agency statutory interpretations would persist in some other form, under some other name. *See, e.g.*, Lisa Schultz Bressman & Kevin M. Stack, Chevron *Is a Phoenix*, 74 VAND. L. REV. 465 (2021); Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017); Christopher J. Walker, *Toward a Context-Specific* Chevron *Deference*, 81 MISSOURI L. REV. 1095 (2016). This uncertainty may affect how lawyers structure their arguments, either when defending or challenging agency action. *See, e.g.*, Anthony Caso, *Attacking* Chevron*: A Guide for Practitioners*, 24 CHAP. L. REV. 633 (2021); Daniel E. Walters, Chevron *on the Chopping Block*, 52 No. 5 ABA TRENDS 4, 6, (2021); Daniel Hornung, Note, *Agency Lawyers' Answers to the Major Questions Doctrine*, 37 YALE J. ON REG. 759 (2020). Similarly, agencies may need to recalibrate their willingness to stretch the statutory text to achieve their policy objectives. The uncertainty of *Chevron*'s future also invites reflection on some of the normative questions that this chapter has raised about the possible defenses and critiques of *Chevron*'s theory and practical effects, whether or how *Chevron*'s scope ought to be cabined, and,

more broadly, the appropriate allocation of decision-making authority among the various branches and institutions of the U.S. government.