HIDING NONDELEGATION IN MOUSEHOLES

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> Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.[1]

> Just then [Alice] heard something splashing about in the pool a little way off, and she swam nearer to make out what it was: at first she thought it must be a walrus or hippopotamus, but then she remembered how small she was now, and she soon made out that it was only a mouse, that had slipped in like herself.[2]

Under the familiar principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[3] courts apply a two-step inquiry to an agency's interpretation of its statutory authority. First, under Step One, a court asks "whether Congress has directly spoken to the precise question at issue,"[4] and if so, the court "must give effect to the unambiguously expressed intent of Congress."[5] Second, under Step Two, if the statutory provision is ambiguous such that "Congress has not directly addressed the precise question at issue," the court must defer to any "permissible construction of the statute" by the agency[6] and may "reverse [an] agency's decision only if it [is] 'arbitrary, capricious, or manifestly contrary to the statute.'"[7] On the other hand, if an agency's interpretation of an ambiguous provision is not "arbitrary, capricious, or manifestly contrary to the statute," then a court must defer to the agency's interpretation. All of this is hornbook administrative law and well settled. That is, unless the court discovers an "elephant in a mousehole."

In a series of recent cases, the Supreme Court and various courts of appeals have declined to afford deference to agency interpretations where an agency's proposed interpretation relies on an insufficiently definite statutory provision in order to greatly increase the agency's power—even in situations that would seem to suggest statutory ambiguity and would thus warrant *Chevron* deference. Writing for the Court in *Whitman v. American Trucking Ass'ns*, Justice Scalia explained that incongruous turn:

> [R]espondents must show a textual commitment of authority to the EPA to consider costs . . . . [And] that textual commitment must be a clear one. Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one

1. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).
2. LEWIS CARROLL, THE ANNOTATED ALICE 25 (2000).
3. 467 U.S. 837 (1984).
4. *Id.* at 842.
5. *Id.* at 843.
6. *Id.*
7. Texas Coal. of Cities for Util. Issues v. FCC, 324 F.3d 802, 807 (5th Cir. 2003) (quoting *Chevron*, 467 U.S. at 844).

might say, hide elephants in mouseholes.[8]

Justice Scalia's colorful image begot a departure from traditional *Chevron* principles which we dub the elephants-in-mouseholes doctrine: Where an agency uses "vague terms and ancillary provisions" (the mousehole) to alter "the fundamental details of a regulatory scheme" (the elephant), the agency's assertion of authority is forbidden. In effect, the doctrine requires a clear statement in an obvious place for a significant expansion of regulatory authority. Without such a clear statement, the Court not only does not defer to the agency's interpretation of the statute, but it per se forbids the agency action—even if the agency's interpretation is a reasonable interpretation of ambiguous statutory language.[9]

Although the elephants-in-mouseholes doctrine has made repeated appearances in recent Supreme Court decisions and has begun to take hold in the lower appellate courts, it has yet to be squarely addressed by scholars. What is more, despite the voluminous literature on *Chevron*, the elephants-in-mouseholes doctrine has not been identified or taken seriously *as a doctrine*.[10] This Article presents the first sustained analysis of this maturing doctrine, assessing its origins and implications for administrative law.

Because the elephants-in-mouseholes doctrine subverts the traditional *Chevron* scheme, and because it has arisen in recent politically charged cases, including two contentious environmental cases decided last Term,[11] some have sought to explain these decisions in terms of result-oriented motives.[12] That is not our approach. Taking the elephants-in-mouseholes

8. 531 U.S. 457, 468 (2001).

9. This means the *Chevron* two-step is side-stepped, as the elephants-in-mouseholes doctrine does "not say that courts, rather than agencies, will interpret ambiguities. [It] announce[s], far more ambitiously, that ambiguities will be construed so as to reduce the authority of regulatory agencies." Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 244 (2006).

10. *See, e.g.*, Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1149 (1994) (defining *judicial doctrine* as rules that "order[] a course of conduct not by commanding an external goal, but, like an argument, by developing from within that course of conduct, lending to or acknowledging in that conduct a structure whose statement is not exhausted by the statement of the goal to which it may be directed").

11. *See* Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009) (discussing the authority of the EPA to use "cost–benefit analysis when setting regulatory standards"); *see also* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458 (2009) (assessing the authority of the EPA under the Clean Water Act to allow mines to classify slurry as "fill material").

12. *See, e.g.*, Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 346 (2004) ("The most likely example of pro-industry, anti-regulation conservatism run amok is *Brown & Williamson*, [529 U.S. 120 (2000), an elephants-in-mouseholes case] setting aside the FDA's effort to regulate tobacco cigarettes. . . . What is suspicious is that all the Justices largely abandoned their usual methodological preferences . . . . The convenient methodological shifts do suggest that the result was driven by the individual Justices' sympathy, or lack thereof, toward the FDA's undertaking.").

doctrine seriously as a doctrine, this Article proposes that the decisions are not driven by judicial whim but instead by long-standing tenets of administrative law, particularly concerns over excessive delegation to the Executive Branch. We argue, then, that what really lies in the mousehole is neither an elephant nor a mouse—but the ghost of the nondelegation doctrine.

Ever since the *Benzene* case,[13] the Court has sometimes construed statutes narrowly to avoid nondelegation concerns.[14] We argue that the search for elephants in mouseholes is an attempt to "doctrinalize" the *Benzene* approach into a workable test. By creating the elephants-in-mouseholes doctrine, the Court has tried to confine the *Benzene* principle to a particular subset of cases, namely, those that *both* (1) involve a "fundamental" or "extraordinary" expansion of regulatory authority *and* (2) are based on a "vague or ancillary" statutory provision. By using this conjunctive test, the Court addresses a discrete class of potential nondelegation violations without enmeshing itself in a much larger and more aggressive campaign against nondelegation in general. Likewise, by using the elephants-in-mouseholes doctrine, which focuses on a statutory scheme's structure, the Court does not itself have to create an intelligible principle for the agency; instead, it can rely on the principle—*Congress's* principle—already contained in the broader statute to understand specific language that may, by itself, appear to have no intelligible principle. But at the same time, because of this conjunctive requirement, the broader the express delegation, the less appropriate the elephants-in-mouseholes doctrine becomes. Thus, the Court did not invoke the elephants-in-mouseholes doctrine in *Massachusetts v. EPA*: while no one can reasonably argue that regulating greenhouse gases is not an elephant, the language of the statute was quite broad and so was not a mousehole.[15]

The elephants-in-mouseholes doctrine is thus one instance of what Cass Sunstein has dubbed "nondelegation canons."[16] As with the canons

13. Indus. Union Dep't, AFL–CIO v. Am. Petroleum Inst. (*Benzene*), 448 U.S. 607 (1980) (considering whether the Secretary of Labor had the authority to promulgate regulations related to occupational exposure to benzene).

14. *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 455 n.240 (2008) (listing other cases where the Court has construed statutes narrowly to avoid nondelegation concerns).

15. 549 U.S. 497, 497 (2007) ("[T]he Clean Air Act . . . requires that the EPA 'shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in [the EPA Administrator's] judgment cause[s], or contribute[s] to, air pollution . . . reasonably . . . anticipated to endanger public health or welfare.'" (alterations in original)).

16. *See generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) (arguing that some canons of statutory interpretation are nondelegation canons because "they forbid administrative agencies from making decisions on their own").

Sunstein has identified, the elephants-in-mouseholes doctrine is an attempt to address nondelegation concerns indirectly without actually having to decide whether Congress has delegated too much authority to an agency. Sunstein considers this indirect approach to be a virtue—and famously has argued such "nondelegation canons" are more easily administrable, more consistent with a minimalist judicial role, and more congenial to democracy than is judicial enforcement of the traditional nondelegation doctrine. Contrary to Sunstein's optimism, however, we argue that the elephants-in-mouseholes doctrine cannot live up to such lofty ambitions. Instead, in the tradition of John Manning, we argue that though the elephants-in-mouseholes doctrine emerges from principled nondelegation apprehension, the doctrine is not a workable reincarnation of the nondelegation doctrine because it is not amendable to consistent application.[17] One judge's mouse is another judge's elephant, and it ever will be so.

In this Article, we evaluate the elephants-in-mouseholes doctrine as a doctrine, i.e., whether it successfully reflects "rules and principles . . . that are capable of statement and that generally guide the decisions of courts, the conduct of government officials, and the arguments and counsel of lawyers."[18] In Part I, we set forth the doctrine's backdrop and then examine the elephants-in-mouseholes line of cases. In Part II, we critique the doctrine in two ways: first, because it is not susceptible to consistent application, and second—and relatedly—because its premise is in tension with textualist modes of statutory interpretation. Given the elephants-in-mouseholes doctrine is in large part Justice Scalia's handiwork, this failure to offer bright lines or focus on specific statutory text is surprising.

This does not mean, though, that the Court has crafted the doctrine for political ends. Instead, in Part III, we explain the elephants-in-mouseholes doctrine as a nondelegation canon. The Court is alarmed by excessive delegation but is wary about directly enforcing the nondelegation doctrine—so it looks for more judicially manageable proxies. The elephants-in-mouseholes doctrine is one such proxy, a doctrine announced in the very case, *American Trucking*, where the Court effectively abandoned direct enforcement of the nondelegation doctrine.[19] But just because the elephants-in-mouseholes doctrine rests on valid administrative law principles is not enough to justify its continued use. We thus

17. *See generally* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223 (2001) (noting that the use of nondelegation canons creates "significant pathologies").

18. *See* Fried, *supra* note 10, at 1140; *see also* Richard J. Pierce, Jr., *The Supreme Court's New Hyperterxtualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 762 (1995) (explaining the Supreme Court's "managerial role" over the lower federal courts).

19. *See* 531 U.S. 457, 468 (2001) (adopting the elephants-in-mouseholes doctrine).

reluctantly conclude the elephants-in-mouseholes doctrine should be abandoned as a failed enterprise.

I. THE ELEPHANTS-IN-MOUSEHOLES DOCTRINE AS A DOCTRINE

We begin by sketching the origins and evolution of the elephants-in-mouseholes doctrine. As with much else in administrative law, the story begins with *Chevron*—a case that reshaped the law by making statutory ambiguity a doctrinal trigger for deference to agencies.[20] But *Chevron* begged the important question of what counts as ambiguity. And so the elephants-in-mouseholes doctrine emerged as a mechanism for detecting ambiguity (or, more precisely, the lack thereof). As it evolved, however, the elephants-in-mouseholes doctrine became itself ambiguous. It has suffered from inconsistent application, abetting division far more often than inducing consensus.

A. The Chevron *Backdrop*

In *Chevron*, the Court reconceptualized how agency interpretations of the statutes they administer are reviewed by federal courts. Instead of trying to find the best judicial interpretation of federal law, as courts do in nearly every other context, the Court began to treat agencies differently. Courts defer to an agency's interpretation so long as it is reasonable[21]—though it cannot, of course, be reasonable to read a statute in a way that flatly contradicts the text of the statute,[22] as understood by using the traditional tools of statutory construction.[23]

In 1977, Congress amended the Clean Air Act to require certain states "to establish a permit program regulating 'new or modified major stationary sources' of air pollution."[24] After President Reagan was elected, the Environmental Protection Agency (EPA) adopted a plant-wide

20. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (noting that where a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

21. *See* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598 (2009) (noting that a *Chevron* analysis "calls for a single inquiry into the reasonableness of the agency's statutory interpretation").

22. *See id.* at 599 ("If an agency's construction of the statute is contrary to clear congressional intent . . . on the precise question at issue, then the agency's construction is a fortiori not based on a permissible construction of the statute. Step One is therefore nothing more than a special case of Step Two, which implies that all Step One opinions could be written in the language of Step Two." (internal quotations and footnote omitted)).

23. *E.g.*, Pharm. Research & Mfrs. of Am. v. Thompson, 251 F.3d 219, 224 (D.C. Cir. 2001) (noting that at Step One, courts must employ all "traditional tools of statutory interpretation," such as "text, structure, purpose, and legislative history").

24. *Chevron*, 467 U.S. at 840.

definition of *stationary source* such that an existing plant that contained several pollution-emitting devices could install or modify one piece of equipment without triggering the Act's permit requirement if the alteration would not increase the total emissions.[25] The Court unanimously deferred to EPA's interpretation and set out the now-ubiquitous approach for reviewing agency constructions of the statutes they administer:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[26]

To determine whether the agency's interpretation "is based on a permissible construction of the statute," the Court explained that where "legislative delegation to an agency on a particular question is implicit rather than explicit," the Court would refuse to "substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[27] The Court tied its methodology to political accountability. Recognizing that "[j]udges are not experts in the field, and are not part of either political branch of the Government" and agency action involves "policy preferences,"[28] the Court reasoned that when "Congress has delegated policymaking responsibilities" to an agency, the agency should receive deference. The Court noted,

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[29]

According to *Chevron*'s premise, once a statute is deemed ambiguous, making sense of that ambiguity requires more policy choice than interpretive casuistry. And this being so, deference encourages agency accountability, democratic policymaking, and judicial restraint. *Chevron*

25. *Id.*
26. *Id.* at 842–43 (footnotes omitted).
27. *Id.* at 843–44.
28. *Id.* at 865.
29. *Id.* at 865–66.

thus accords critical doctrinal significance to the concept of ambiguity. But *Chevron* begged an important question: What counts as ambiguity? This bedeviling question has been the subject of countless articles[30] and will surely be the subject of many more.[31] It is, after all, difficult to say,

> "what ambiguity *is*; for the word itself is ambiguous. To say a statute is ambiguous could be a claim that ordinary readers of English would disagree about its meaning . . . . Or it could be a private conclusion that, regardless of what others might think, the reader is unsure how best to read the text . . . ."[32]

Moreover, for either definition, ambiguity is often a matter of degree. For instance, even statutory provisions that are so clear that unanimous courts can discern their meaning at *Chevron* Step One are not so clear that there is no case at all for the court to decide.[33] By definition, one of the parties at least thinks there is a *chance* that the court will side with him or her. And often lawyers speak of being "[insert number]%" sure about what a statute means. How much uncertainty, then, do we need for a statute to be ambiguous? *Chevron* does not say.[34]

B. Emergence of the Elephants-in-Mouseholes Doctrine

The elephants-in-mouseholes doctrine emerged as one doctrinal tool for solving *Chevron*'s ambiguity problem. As we will see, however, it is a tool of questionable utility for that original purpose. Although the doctrine is purportedly a canon for discerning clarity in a statute, the doctrine is often

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30. *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006) (discussing the role of political judgments in judicial review of agency interpretations of law due to the ambiguities of statutory language in congressional provisions).

31. *See, e.g.*, Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, J. LEGAL ANALYSIS (forthcoming), *available at* SSRN: http://ssrn.com/abstract=1441860 (investigating how ambiguity in statutes affect judicial review and statutory interpretations based on the policy preferences of judges themselves).

32. *See id.* at 4.

33. *See* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1974 app. B (2009) (compiling data in a table titled *A Sample of Unanimous Decisions Involving "Mixed Panels" Reviewing Complicated and Important Administrative Agency Actions September 2000–July 2008*); *id.* at 1943 n.184 ("Administrative Office of the Courts data on the D.C. Circuit show that dissent rates hover from below 5 percent to 10 percent of cases for which opinions were written.").

34. It is beyond the scope of this Article to delve *too* deeply into the issue of ambiguity. There are, of course, well-documented theoretical difficulties with an ambiguousness standard. *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 379 (1986). It is not this Article's intent to wade into those issues. It is sufficient for our purposes that the elephants-in-mouseholes doctrine seems to be doing something more than the Court's ordinary tests for ambiguousness. *See* Manning, *supra* note 17, at 233 (asserting that the Court exercises a certain policymaking discretion when reviewing an agency's interpretation of a statute).

applied in cases where many members of the Court believe a statute is ambiguous, and their dissenting arguments are not obviously misguided. Moreover, the fact that individual Justices themselves seem to be inconsistent from case to case suggests the elephants-in-mouseholes doctrine can be used to impose clear meaning rather than discern it.

The Supreme Court first expressly announced the doctrine in *American Trucking*, declaring that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." [35] But what might appear at first blush to be merely a pithy phrase—yet another striking animal image by the wordsmith Scalia[36]—is much more than that. The elephants-in-mouseholes doctrine emerged from a pair of the most controversial administrative law cases of the last twenty years. And the doctrine has matured, having been repeatedly applied by both the Supreme Court[37] and the courts of appeals.[38]

1. Precursors

As authority for the elephants-in-mouseholes doctrine, Justice Scalia for the *American Trucking* Court cited two cases: *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*[39] and *FDA v. Brown & Williamson Tobacco Corp.*[40] These citations should raise eyebrows because the opinions are notorious in administrative law circles. Neither

35. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

36. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1817 (2009) (Scalia, J., concurring) ("There is no reason to magnify the separation-of-powers dilemma posed by the Headless Fourth Branch by letting Article III judges—like jackals stealing the lion's kill—expropriate some of the power that Congress has wrested from the unitary Executive." (citation omitted)); Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf."). *See generally* Charles Fried, *Manners Makyth Man: The Prose Style of Justice Scalia*, 16 HARV. J.L. & PUB. POL'Y 529, 530 (1993) (praising Justice Scalia for the "magical conciseness" he exhibits in his opinions).

37. *See supra* Part I.B.

38. *Compare* Am. Bar Ass'n v. FTC, 430 F.3d 457, 469 (D.C. Cir. 2005) (finding an elephant-in-mousehole where Federal Trade Commission claimed authority under financial consumer privacy statute to regulate attorneys in the practice of law), *with* Am. Fed'n of Gov't Employees, AFL–CIO v. Gates, 486 F.3d 1316, 1324–25 (D.C. Cir. 2007) (finding no elephant-in-mousehole where Department of Defense claimed authority under National Defense Authorization Act to curtail collective bargaining with civilian employees), *and* NISH v. Rumsfeld, 348 F.3d 1263, 1269 (10th Cir. 2003) (holding "[w]e simply do not see the elephant in the mousehole" where the military claimed statutory authority to give blind vendors priority in awarding mess hall contracts).

39. 512 U.S. 218 (1994).

40. 529 U.S. 120 (2000).

was a "boring case"—both affected administrative law in profound ways.[41] Given the extensive commentary these particular decisions have generated, it is not unlikely that Scalia's reference to both of them at once was intended to make a broad point to the legal community.

a. MCI Telecommunications Corp. v. AT&T

In *MCI*, the Court was called upon to decide whether the Federal Communications Commission (FCC or Commission) abused its authority by permitting "nondominant long-distance carriers" to bypass having to file rates while a dominant long-distance carrier—AT&T—still had to file them.[42] Justice Scalia, wielding the pen for a divided Court, gave the history of the filed-rate requirement, noting, "When Congress created the Commission in 1934, AT&T, through its vertically integrated Bell system, held a virtual monopoly over the Nation's telephone service. The Communications Act of 1934 . . . authorized the Commission to regulate the rates charged for communication services to ensure that they were reasonable and nondiscriminatory."[43] As part of that regulatory regime, § 203 of the Act required "common carriers [to] file their rates with the Commission and charge only the filed rate."[44]

As often happens, the world changed, but the statute did not. "In the 1970's, technological advances reduced the entry costs for competitors of AT&T in the market for long distance telephone service, [and] [t]he Commission, recognizing the feasibility of greater competition, [therefore] passed regulations to facilitate competitive entry."[45] Relying on its statutory authority to "modify" rate-filing requirements, the Commission relieved "nondominant carriers" of the requirement to file while retaining the requirement for "dominant carriers"—of which AT&T was the only one. In practical effect, this "amounted to a distinction between AT&T and everyone else."[46]

The Court sided with AT&T, concluding that the statutory authority to "modify" did not permit "basic and fundamental changes" to the statutory

41. Neil M. Richards, *The Supreme Court Justice & "Boring" Cases*, 4 GREEN BAG 2D 401, 403 (2001) (defining "boring cases" as those "requiring technical legal analysis such as statutory interpretation and doctrinal analysis" without much impact on "interesting" areas of law and commenting on some examples of such cases).

42. 512 U.S. at 220.

43. *Id.*

44. *Id.*

45. *Id.* Indeed, "some urged that the continuation of extensive tariff filing requirements served only to impose unnecessary costs on new entrants and to facilitate collusive pricing." *Id.*

46. *Id.* at 221.

scheme.[47] In über-textualist form, Justice Scalia instructed that "[t]he word 'modify'—like a number of other English words employing the root 'mod-' (deriving from the Latin word for 'measure'), such as 'moderate,' 'modulate,' 'modest,' and 'modicum'—has a connotation of increment or limitation."[48] The Court discounted *Webster's Third New International Dictionary*—which defined *modify*, inter alia, as "to make a basic or important change in"—observing the dictionary is "widely criticized for its portrayal of common error as proper usage"; that its definitions are inconsistent; that it contradicts other dictionaries; and that, in any case, "[i]n 1934, when the Communications Act became law—the most relevant time for determining a statutory term's meaning—Webster's Third was not yet even contemplated."[49] Thus, the Court held that the word *modify* was unambiguous and rejected the Commission's rule at *Chevron* Step One, even in the face of conflicting dictionaries.[50]

Having resolved the dueling dictionaries, the *MCI* Court went on to reason, "Since an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear, the Commission's permissive detariffing policy can be justified only if it makes a less than radical or fundamental change in the Act's tariff-filing requirement."[51] But what is "a less than radical or fundamental" change? To answer, Scalia explained that "[f]or the body of a law, as for the body of a person, whether a change is minor or major depends to some extent upon the importance of the item changed to the whole. Loss of an entire toenail is insignificant; loss of an entire arm tragic. The tariff-filing requirement is, to pursue this analogy, the heart of the common-carrier section of the Communications Act."[52] Consequently, "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."[53] Though expressing sympathy with the Commission's policy goal of encouraging more-robust telecommunications competition, Scalia closed by accusing the agency of introducing "a whole new regime of regulation (or of free-market competition), which may well be a better regime but is not the one that

47. *Id.* at 225.
48. *Id.*
49. *Id.* at 225–28 & n.8 (citation omitted).
50. This aspect of the decision has been severely criticized as contrary to the principles of *Chevron*. *See, e.g.*, Pierce, *supra* note 18, at 757–58.
51. 512 U.S. at 229 (citations omitted).
52. *Id.*
53. *Id.* at 231.

Congress established."[54]

Justice Stevens, joined by Justices Blackmun and Souter, dissented. Stevens first noted, "The Communications Act of 1934 . . . gives the FCC unusually broad discretion to meet new and unanticipated problems in order to fulfill its sweeping mandate 'to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges,'"[55] and the "Court's consistent interpretation of the Act has afforded the Commission ample leeway to interpret and apply its statutory powers and responsibilities."[56] Because, according to Justice Stevens, Congress specifically intended this flexibility, "it is quite wrong to suggest that the mere process of filing rate schedules—rather than the substantive duty of reasonably priced and nondiscriminatory service—is 'the heart of the common-carrier section of the Communications Act.'"[57]

The dissent next took on the meaning of *modify*, explaining that "[e]ven if the sole possible meaning of 'modify' were to make 'minor' changes," "[w]hen § 203 is viewed as part of a statute whose aim is to constrain monopoly power, the Commission's decision to exempt nondominant carriers is a rational and 'measured' adjustment to novel circumstances—one that remains faithful to the core purpose of the tariff-filing section."[58] Justice Stevens also noted *modify* is "defined in Webster's Collegiate Dictionary as meaning 'to limit or reduce in extent or degree,'" and he explained, with that definition in mind, "The Commission's permissive detariffing policy fits comfortably within this common understanding of the term."[59] Then, referring back to the political accountability grounds underlying *Chevron*, Stevens observed,

> Even if the 1934 Congress did not define the scope of the Commission's modification authority with perfect scholarly precision, this is surely a paradigm case for judicial deference to the agency's interpretation, particularly in a statutory regime so obviously meant to maximize administrative flexibility. Whatever the best reading of § 203(b)(2), the Commission's reading cannot in my view be termed unreasonable.[60]

b. FDA v. Brown & Williamson Tobacco Corp.

In the even more well-known case of *Brown & Williamson*, the Court confronted whether the Food and Drug Administration (FDA), pursuant to

54. *Id.* at 234.
55. *Id.* at 235 (Stevens, J., dissenting) (quoting 47 U.S.C. § 151 (1994)).
56. *Id.*
57. *Id.* at 237.
58. *Id.* at 241.
59. *Id.* at 241–42 (footnote and citation omitted).
60. *Id.* at 244 (footnote omitted).

its authority to regulate "drugs" and "devices" under the Food, Drug, and Cosmetic Act (FDCA), could regulate tobacco. The Court said no, despite a very strong textual argument to the contrary. In fact, the Court openly acknowledged its construction of the Act was "extraordinary."[61]

The text is expansive:

> The Act defines "drug" to include "articles (other than food) intended to affect the structure or any function of the body." It defines "device," in part, as "an instrument, apparatus, implement, machine, contrivance, . . . or other similar or related article . . . which is . . . intended to affect the structure or any function of the body."[62]

It also "grants the FDA the authority to regulate so-called 'combination products,' which 'constitute a combination of a drug, device, or biological product.'"[63] Looking at this broad language, the Clinton Administration saw an opportunity to effect policy—the regulation of tobacco—without having to navigate a hostile Congress.[64] To the President, the FDA did not need more power; Congress had already given enough. Thus, "On August 11, 1995, the FDA published a proposed rule concerning the sale of cigarettes and smokeless tobacco to children and adolescents,"[65] and "determined that nicotine is a 'drug' and that cigarettes and smokeless tobacco are 'drug delivery devices,' and therefore it had jurisdiction under the FDCA to regulate tobacco products as customarily marketed—that is, without manufacturer claims of therapeutic benefit."[66]

In the regulations that followed, the FDA stopped short of forbidding tobacco sales. Instead, it created three broad types of restrictions. First, the regulations beefed up the protections against underage smoking.[67] Second, they restricted how tobacco could be advertised.[68] Finally, "The labeling

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61. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

62. *Id.* at 126 (quoting 21 U.S.C. § 321 (1994)) (first alteration in original) (citation omitted).

63. *Id.*

64. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001) ("Faced . . . with a hostile Congress . . . Clinton . . . turned to the bureaucracy to achieve, to the extent it could, the full panoply of his domestic policy goals [including tobacco regulation].").

65. *Brown & Williamson*, 529 U.S. at 126.

66. *Id.* at 127.

67. *Id.* at 128 ("The access regulations prohibit[ed] the sale of cigarettes or smokeless tobacco to persons younger than 18; require[d] retailers to verify through photo identification the age of all purchasers younger than 27; prohibit[ed] the sale of cigarettes in quantities smaller than 20; prohibit[ed] the distribution of free samples; and prohibit[ed] sales through self-service displays and vending machines except in adult-only locations.").

68. *Id.* at 128–29 ("The promotion regulations require[d] that any print advertising appear in a black-and-white, text-only format unless the publication in which it appears is read almost exclusively by adults; prohibit[ed] outdoor advertising within 1,000 feet of any public playground or school; prohibit[ed] the distribution of any promotional items, such as T-shirts or hats, bearing the manufacturer's brand name; and prohibit[ed] a manufacturer from sponsoring any athletic, musical, artistic, or other social or cultural event using its

regulation require[d] that the statement, 'A Nicotine-Delivery Device for Persons 18 or Older,' appear on all tobacco product packages."[69]

The regulations were challenged. Aside from invoking the statutory provisions already mentioned, the FDA contended,

> Under 21 U.S.C. § 360j(e), the [FDA] may "require that a device be restricted to sale, distribution, or use . . . upon such other conditions as [the FDA] may prescribe in such regulation, if, because of its potentiality for harmful effect or the collateral measures necessary to its use, [the FDA] determines that there cannot otherwise be reasonable assurance of its safety and effectiveness."[70]

Here, "The FDA reasoned that its regulations fell within the authority granted by § 360j(e) because they related to the sale or distribution of tobacco products and were necessary for providing a reasonable assurance of safety."[71]

Despite the strong case for *Chevron* deference, the Court vacated the FDA's regulations. The Court's reasoning is "puzzling," especially "[f]or a Court that has become increasingly textualist in its orientation to statutes."[72] After setting forth the general contours of *Chevron*, Justice O'Connor for the Court explained, "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."[73] Relying on structure to understand how to read a statute, while obviously difficult, is something that courts frequently do.[74] But the Court's next move was more provocative, as the Court asserted "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand."[75] Justice O'Connor also observed that "[i]n addition, we must be guided to a degree by common sense as to the manner in which

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brand name.").

69. *Id.* at 129.

70. *Id.* (quoting 21 U.S.C. § 360j(e) (2000)).

71. *Id.*

72. *See* Manning, *supra* note 17, at 226 (questioning the Court's textual analysis of the Food, Drug, and Cosmetic Act (FDCA) in *Brown & Williamson*); *see also id.* at 234 ("Perhaps most strikingly, the Court found that Congress had spoken to the precise question at issue, not on the basis of the FDCA, but on the basis of implied 'intent' from legislative acts occurring decades after the FDCA's enactment.").

73. *Brown & Williamson*, 529 U.S. at 132.

74. *See, e.g.*, Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. CIN. L. REV. 1439, 1443–44 (1994) ("[R]esort to structure and structuralism as interpretive tools is increasingly becoming the approach of choice by judges on the bench—at least when faced with seemingly difficult issues of statutory interpretation.") (footnote omitted).

75. *Brown & Williamson*, 529 U.S. at 133.

Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency," citing, with a "*cf.*," to the *MCI* case.[76]

In its "common sense" analysis, the Court argued if the FDA had jurisdiction over tobacco, it would have to ban the sale of tobacco itself, not just regulate its method of sale. But "Congress . . . has foreclosed the removal of tobacco products from the market," given that the *United States Code* explicitly states "'[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare,'"[77] and that "[m]ore importantly, Congress has directly addressed the problem of tobacco and health through legislation on six occasions since 1965."[78] "When Congress enacted these [other] statutes, the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects," but still, "Congress stopped well short of ordering a ban."[79] Thus, "Considering the [Act] as a whole, it is clear that Congress intended to exclude tobacco products from the FDA's jurisdiction."[80]

Then, in closing, the Court explained what drove its conclusion that deference was inappropriate:

> [O]ur inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.
>
> . . . .
>
> As in *MCI*, we are confident that *Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion*.[81]

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented, noting—correctly—"that tobacco products fit within [the

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76. *Id.*
77. *Id.* at 137 (quoting 7 U.S.C. § 1311(a) (2000)).
78. *Id.*
79. *Id.* at 138; *see also id.* at 144 (noting that during the period after the adverse health effects of tobacco use were known, "Congress considered and rejected bills that would have granted the FDA such jurisdiction," and thus it would seem that "Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products").
80. *Id.* at 142.
81. *Id.* at 159–60 (citation omitted) (emphasis added).

FDCA's] statutory language."[82] Justice Breyer observed that even "[i]n its own interpretation, the majority nowhere denies the following two salient points. First, tobacco products (including cigarettes) fall within the scope of this statutory definition, read literally," and "[s]econd, the statute's basic purpose—the protection of public health—supports the inclusion of cigarettes within its scope."[83]

Justice Breyer then averred that the FDA's power to regulate can include methods short of absolute bans. Justice Breyer noted that the Court's reliance on intervening statutes that do not purport to remove FDA jurisdiction do not deprive the FDA of the jurisdiction that Congress gave it, especially given that "the most important indicia of statutory meaning—language and purpose—along with the FDCA's legislative history . . . establish that the FDA has authority to regulate tobacco."[84] In Breyer's view,

> where linguistically permissible, [the Court] should interpret the FDCA in light of Congress' overall desire to protect health. That purpose requires a flexible interpretation that both permits the FDA to take into account the realities of human behavior and allows it, in appropriate cases, to choose from its arsenal of statutory remedies.[85]

Put differently, *Chevron* deference is particularly appropriate in the drug context given the agency's broad jurisdiction over public health—a highly complex field that is in constant technological flux. And Justice Breyer answered the majority's concern for unintended delegation with an assurance that highly consequential agency decisions, by virtue of their importance, will generate political accountability through the Executive Branch.[86]

2. Emergence

Although the elephants-in-mouseholes doctrine was at work in *MCI* and

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82. *Id.* at 161 (Breyer, J., dissenting).
83. *Id.* at 162.
84. *Id.* at 163.
85. *Id.* at 181.
86. Justice Breyer explained,

> [O]ne might claim that courts, when interpreting statutes, should assume in close cases that a decision with "enormous social consequences," should be made by democratically elected Members of Congress rather than by unelected agency administrators. If there is such a background canon of interpretation, however, I do not believe it controls the outcome here.
>
> Insofar as the decision to regulate tobacco reflects the policy of an administration, it is a decision for which that administration, and those politically elected officials who support it, must (and will) take responsibility. And the very importance of the decision taken here, as well as its attendant publicity, means that the public is likely to be aware of it and to hold those officials politically accountable.

Id. at 190 (citations omitted).

Brown & Williamson, it took definite form in a subsequent case, *American Trucking*.

a. Whitman v. American Trucking Ass'ns

In *American Trucking*, the Court addressed § 109(b)(1) of the Clean Air Act (CAA) and the EPA's authority under that section to set national ambient air quality standards or NAAQS (an acronym all too familiar to the D.C. Circuit).[87] The CAA gives the EPA expansive authority. In particular, § 109(b)(1) commands the EPA to set NAAQS, "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety."[88] This broad statutory language poses two questions. First, does the Act delegate too much lawmaking power to the EPA? And second, can the EPA consider implementation costs as part of its "public health" determination?

In a creative decision, the D.C. Circuit held "§ 109(b)(1) delegated legislative power to the Administrator in contravention of the United States Constitution, Art. I, § 1," and "the EPA had interpreted the statute to provide no 'intelligible principle' to guide the agency's exercise of authority."[89] Because in the circuit's view, "the EPA could perhaps avoid the unconstitutional delegation by adopting a restrictive construction of § 109(b)(1)," the court remanded the NAAQS to the agency rather than declaring the statute unconstitutional.[90] On the second issue, the court of appeals unanimously refused to permit the EPA to consider costs.[91]

Justice Scalia, again writing for the Court, first addressed whether economic considerations may play a part in the EPA's decisionmaking.[92] The Court agreed with the D.C. Circuit that such considerations are irrelevant under the plain language of the statute. The text does not refer to economic costs and so the EPA cannot consider them.[93] Though phrases like "public health," "requisite," and "adequate" are open-ended—suggesting liberal agency authority—the Court rejected the argument that "the economic cost of implementing a very stringent standard might produce health losses sufficient to offset the health gains achieved in cleaning the air—for example, by closing down whole industries and thereby impoverishing the workers and consumers dependent upon those

87. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 462 (2001).
88. 42 U.S.C. § 7409 (2006).
89. *Am. Trucking Ass'ns*, 531 U.S. at 463 (citing Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999)).
90. *Id.*
91. *Id.*
92. *Id.* at 464–65.
93. *Id.* at 465 (quoting 42 U.S.C. § 7409(b)(1) (2006)).

industries."[94]

Because Congress had instructed the agency to consider economic costs in many other sections of the Act but not explicitly in this one, Justice Scalia invoked the elephants-in-mouseholes principle. Just as it was "highly unlikely" in *MCI* that Congress would have so indirectly authorized so extensive an agency power, Scalia reasoned, it was equally "implausible that Congress would give to the EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards."[95] After all, considering costs "is *both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned . . . had Congress meant it to be considered."[96]

Then, Scalia directed his attention to the nondelegation doctrine, summarily rejecting the D.C. Circuit's novel notion that, if there was a constitutional problem, the EPA, rather than Congress, could fix it:

> The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise . . . would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.[97]

The Court therefore faced the nondelegation question directly, holding "[t]he scope of discretion § 109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents," and noting,

> In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition."[98]

Justice Scalia further noted that "even in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.'"[99]

Only Justice Thomas, in a concurrence, questioned whether the nondelegation doctrine should be effectively interred. He was "not

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94. *Id.* at 466.
95. *Id.* at 468.
96. *Id.* at 469.
97. *Id.* at 473.
98. *Id.* at 474.
99. *Id.* at 475 (quoting Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999)).

convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power," as "there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'"[100] However, because no party requested the Court to overrule precedent, Justice Thomas left "the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers" for "a future day."[101] Justice Stevens, joined by Justice Souter, also concurred, "wholeheartedly endors[ing] the Court's result and . . . reasons,"[102] though urging the Court to "frankly acknowledg[e]" that "the power delegated to the EPA is 'legislative,'"[103] and that such delegations of legislative power are constitutional.[104]

Interestingly, Justice Breyer also concurred, but he did not focus on the nondelegation doctrine. Instead, he challenged Justice Scalia's elephants-in-mouseholes doctrine, offering his own meta-interpretative rule that "other things being equal, we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation."[105] He nonetheless concurred, however, because he found that in this *particular* case, the specific "legislative history, along with the statute's structure, indicate[d] that § 109's language reflect[ed] a congressional decision not to delegate to the agency the legal authority to consider economic costs of compliance."[106]

3. Application

In the wake of *American Trucking*, the elephants-in-mouseholes doctrine has made four significant appearances—once as the justification for a majority opinion and three more times in dissent.

a. Gonzales v. Oregon

In *Gonzales v. Oregon*, the Court confronted the hot-button question of "whether the Controlled Substances Act [CSA] allows the United States Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure."[107] The State of Oregon legalized assisted suicide, but "[t]he

100. *Id.* at 487 (Thomas, J., concurring).
101. *Id.*
102. *Id.* at 488 (Stevens, J., concurring).
103. *Id.*
104. *Id.* at 490.
105. *Id.* (Breyer, J., concurring).
106. *Id.*
107. 546 U.S. 243, 248–49 (2006).

drugs Oregon physicians prescribe under [the Oregon statute] are regulated under [the CSA]. The CSA allows these particular [pain] drugs to be available only by a written prescription from a registered physician. In the ordinary course the same drugs are prescribed in smaller doses for pain alleviation."[108] Could Oregon allow its doctors to use these pain drugs to help patients end their own lives, or was that contrary to the federal statute?

Again, the relevant statutory text is encompassing:

> To issue lawful prescriptions of Schedule II drugs, physicians must "obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him." The Attorney General may deny, suspend, or revoke this registration if . . . the physician's registration would be "inconsistent with the public interest."[109]

Since the 1970s, the Justice Department had interpreted this to mean "that every prescription for a controlled substance 'be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'"[110]

Using this broad power, in 2001, Attorney General John Ashcroft issued an "Interpretive Rule" that "addresse[d] the implementation and enforcement of the CSA with respect to [the Oregon law]."[111] Ashcroft, relying on advice from the Office of Legal Counsel, ruled "that using controlled substances to assist suicide is not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under the CSA."[112] The question the Court faced was whether that interpretive rule was a valid execution of the statute.

The Court, this time with Justice Kennedy writing, rejected the Attorney General's position—finding *Chevron* deference inappropriate. The Court held that the Attorney General's power did not extend so far as to allow him "to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law."[113] Invoking the elephants-in-mouseholes doctrine, Kennedy rejected the "idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision," explaining,[114]

> The importance of the issue of physician-assisted suicide, which 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. Under the

108. *Id.* at 249 (citation omitted).
109. *Id.* at 250–51 (quoting 21 U.S.C. §§ 822(a)(2), 824(a)(4) (2006)).
110. *Id.* at 250 (quoting 21 C.F.R. § 1306.04(a) (2005)).
111. *Id.* at 249.
112. *Id.*
113. *Id.* at 258.
114. *Id*. at 267.

> Government's theory, moreover, the medical judgments the Attorney General could make are not limited to physician-assisted suicide. Were this argument accepted, he could decide whether any particular drug may be used for any particular purpose, or indeed whether a physician who administers any controversial treatment could be deregistered. This would occur, under the Government's view, despite the statute's express limitation of the Attorney General's authority to registration and control, with attendant restrictions on each of those functions, and despite the statutory purposes to combat drug abuse and prevent illicit drug trafficking.[115]

In dissent, Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, argued deference was appropriate. Responding to the majority's invocation of the elephants-in-mouseholes doctrine, Scalia rejoined,

> This case bears not the remotest resemblance to *Whitman*, which held that "Congress . . . does not alter the *fundamental details* of a regulatory scheme in vague terms or ancillary provisions." The Attorney General's power to issue regulations against questionable uses of controlled substances in no way alters "the fundamental details" of the CSA.[116]

Scalia claimed that enforcing the statute against "assisted suicide" would nowise "interfere[] with the prosecution of 'drug abuse' as the Court understands it. Unlike in *Whitman*, the Attorney General's *additional* power to address other forms of drug 'abuse' does *absolutely nothing* to undermine the central features of this regulatory scheme."[117] Scalia then argued "it was critical to our analysis in *Whitman* that the language of the provision did not bear the meaning that respondents sought to give it. Here, . . . the provision is most naturally interpreted to incorporate a uniform federal standard for legitimacy of medical practice."[118]

b. Ali v. Federal Bureau of Prisons

The next sustained invocation of the elephants-in-mouseholes doctrine was not in an administrative law opinion.[119] In *Ali v. Federal Bureau of Prisons*,[120] Justice Breyer cited the doctrine in dissent in a more run-of-the-

115. *Id.* at 267–68 (citation omitted).
116. *Id.* at 290 (Scalia, J., dissenting) (citation omitted).
117. *Id.* at 291.
118. *Id.* (citation omitted).
119. In *Metropolitan Life Insurance Co. v. Glenn*, 128 S. Ct. 2343 (2008), an Employee Retirement Income Security Act (ERISA) case, Justice Breyer, joined by Justices Stevens, Ginsburg, Souter, and Alito, analogized the case to *American Trucking* "to support the claim Congress did not intend courts to review *de novo* 'the lion's share of ERISA plan claims denials,'" for "[h]ad Congress intended such a system of review, . . . it would not have left to the courts the development of review standards but would have said more on the subject." *Id.* at 2350–51. None of the other opinions touched on the elephants-in-mouseholes doctrine. *See id.* at 2352 (Roberts, C.J., concurring); *id.* at 2355–56 (Kennedy, J., concurring in part and dissenting in part); *id.* at 2356–57 (Scalia, J., dissenting).
120. 128 S. Ct. 831 (2008).

mill civil case. The issue was whether Bureau of Prison (BOP) officers fall within the Federal Tort Claims Act (FTCA) exemption for "any other law enforcement officer."[121] A prisoner's property vanished during a transfer. The prisoner sued, alleging BOP officers lost it. The FTCA, however, exempts negligent or wrongful acts arising with respect to "detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer."[122] Justice Thomas, for the Court, found BOP officers are covered by the exemption's language. Rejecting the claim that "'any other law enforcement officer' includes only law enforcement officers acting in a customs or excise capacity," Thomas noted the word *any* "suggests a broad meaning."[123] Indeed, "Congress could not have chosen a more all-encompassing phrase than 'any other law enforcement officer' . . . ."[124]

The Court declined to apply canons of interpretation like *ejusdem generis* or *noscitur a sociis* because "the phrase 'any officer of customs or excise or any other law enforcement officer'" "is disjunctive, with one specific and one general category, not . . . a list of specific items separated by commas and followed by a general or collective term."[125] Moreover, "no relevant common attribute immediately appears from the phrase 'officer of customs or excise.'"[126] Finally, the Court noted that

> [the holding] does not necessarily render "any officer of customs or excise" superfluous; Congress may have simply intended to remove any doubt that officers of customs or excise were included in "law enforcement officers." Moreover, petitioner's construction threatens to render "any other law enforcement officer" superfluous because it is not clear when, if ever, "other law enforcement officer[s]" act in a customs or excise capacity.[127]

Justice Kennedy, writing for Justices Stevens, Souter, and Breyer, dissented. "Statutory interpretation, from beginning to end, requires respect for the text. The respect is not enhanced, however, by decisions that foreclose consideration of the text within the whole context of the statute as a guide to determining a legislature's intent."[128] Kennedy rejected the notion that "there is only one possible way to read the statute"[129] and argued that because of the canons of construction, the text should be understood in reference to the phrase that proceeded it; "[t]he common attribute of officers of customs and excise and other law

121. *Id*. at 833.
122. 28 U.S.C. § 2680(c) (2006).
123. *Ali*, 128 S. Ct. at 835.
124. *Id.* at 837.
125. *Id.* at 839.
126. *Id.*
127. *Id.* at 840 (citation omitted).
128. *Id.* at 841 (Kennedy, J., dissenting).
129. *Id.*

enforcement officers is the performance of functions most often assigned to revenue officers, including, *inter alia*, the enforcement of the United States' revenue laws and the conduct of border searches."[130]

Justice Breyer also dissented, joined by Justice Stevens, in order "to emphasize, . . . that the relevant context extends well beyond Latin canons and other such purely textual devices."[131] He explained,

> As with many questions of statutory interpretation, the issue here is not the *meaning* of the words. The dictionary meaning of each word is well known. Rather, the issue is the statute's *scope*. What boundaries did Congress intend to set? To what circumstances did Congress intend the phrase, as used in *this* statutory provision, to apply?[132]

For Justice Breyer, "The word 'any' is of no help because all speakers (including writers and legislators) who use general words . . . normally rely upon context to indicate the limits of time and place within which they intend those words to do their linguistic work."[133] He rejected a mechanical application of the canons as well: "canons of construction are not 'conclusive' and 'are often countered . . . by some maxim pointing in a different direction.'"[134] Relying on legislative history and the purposes of the FTCA, Breyer concluded the statute should be read narrowly. In closing, Breyer summed up his approach this way: the Court should be guided by "Justice Scalia's . . . easily remembered English-language observation that Congress 'does not . . . hide elephants in mouseholes.'"[135]

c. Entergy Corp. v. Riverkeeper, Inc.

In 2009, the elephants-in-mouseholes doctrine appeared in two major environmental cases. In *Entergy Corp. v. Riverkeeper, Inc.*, the question was whether the EPA can consider costs in promulgating Clean Water Act (CWA) regulations.[136] The CWA requires the EPA to set standards for power plants that "reflect the best technology available for minimizing adverse environmental impact" from their operations.[137] In a way seemingly similar to what happened in *American Trucking*, the EPA promulgated standards for power plants that considered costs—not just what is technologically possible.

For the Court, Justice Scalia—reversing a Second Circuit decision

130. *Id.* at 843.
131. *Id.* at 849 (Breyer, J., dissenting).
132. *Id.*
133. *Id.* at 849–50.
134. *Id.* at 850 (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001)).
135. *Id.* at 851–52 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).
136. 129 S. Ct. 1498 (2009).
137. 33 U.S.C. § 1326(b) (2006).

authored by then-Judge Sonia Sotomayor[138]—held the EPA can consider such costs.[139] Scalia held the agency's approach was valid under *Chevron*, noting that "if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts," then it must be sustained.[140] The EPA's interpretation was reasonable because "[t]he 'best' technology—that which is 'most advantageous'—may well be the one that produces the most of some good, here a reduction in adverse environmental impact. But 'best technology' may also describe the technology that *most efficiently* produces some good."[141] "'Minimize,'" moreover,

> is a term that admits of degree and is not necessarily used to refer exclusively to the "greatest possible reduction." For example, elsewhere in the Clean Water Act, Congress declared that the procedures implementing the Act "shall encourage the drastic minimization of paperwork and interagency decision procedures." If respondents' definition of the term "minimize" is correct, the statute's use of the modifier "drastic" is superfluous.[142]

Likewise, other provisions of the Act use words like *elimination*, which go further than merely minimizing something.[143]

Justice Scalia then rejected the claim that statutory silence about cost–benefit analysis should be understood as forbidding it, even though in other places in the Act Congress authorized the EPA to conduct such cost–benefit analysis. Scalia parried by noting the section at issue gave absolutely no instructions about how it should be applied:

> [It] is silent not only with respect to cost–benefit analysis but with respect to all potentially relevant factors. If silence here implies prohibition, then the EPA could not consider *any* factors in implementing [the section]—an obvious logical impossibility. It is eminently reasonable to conclude that [this] silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost–benefit analysis should be used, and if so to what degree.[144]

American Trucking, moreover, did not bind the Court's holding, because that case merely "stands for the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion."[145]

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138. *See* Riverkeeper, Inc. v. EPA, 475 F.3d 83 (2d Cir. 2007), *rev'd sub nom.* Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009).
139. *Entergy Corp.*, 129 S. Ct. at 1510.
140. *Id.* at 1505.
141. *Id.* at 1506 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 258 (2d ed. 1953)).
142. *Id.* (quoting 33 U.S.C. § 1251(f) (2006)) (citation omitted).
143. *Id.*
144. *Id.* at 1508.
145. *Id.*

Justice Breyer concurred.[146] Relying on legislative history, he noted "the statute reflects a compromise. . . . The final statute does not *require* the Agency to compare costs to benefits when determining '*best available* technology,' but neither does it expressly *forbid* such a comparison."[147] Breyer observed that

> it would make no sense to require plants to "spend billions to save one more fish or plankton." That is so even if the industry might somehow afford those billions. And it is particularly so in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.[148]

Reading the section differently would unreasonably threaten "to impose massive costs far in excess of any benefit."[149]

Justice Stevens, with Justices Souter and Ginsburg, dissented, claiming the EPA's regulations were contrary to the "plain text" of the provision.[150] Justice Stevens explained,

> Unless costs are so high that the best technology is not "available," Congress has decided that they are outweighed by the benefits of minimizing adverse environmental impact. Section 316(b) neither expressly nor implicitly authorizes the EPA to use cost–benefit analysis when setting regulatory standards; fairly read, it prohibits such use.[151]

Justice Stevens also questioned whether cost–benefit analysis is appropriate in environmental cases, as "a regulation's financial costs are often more obvious and easier to quantify than its environmental benefits. And cost–benefit analysis often, if not always, yields a result that does not maximize environmental protection."[152] He continued, "Because benefits can be more accurately monetized in some industries than in others, Congress typically decides whether it is appropriate for an agency to use cost–benefit analysis in crafting regulations," so the Court "should not treat a provision's silence as an implicit source of cost–benefit authority, particularly when such authority is elsewhere expressly granted and it has the potential to fundamentally alter an agency's approach to regulation."[153] Calling the command to minimize environmental harm "an integral part of the statutory scheme," Justice Stevens argued that upholding the EPA's approach was an error, as "Congress . . . 'does not alter the fundamental

146. *Id.* at 1512 (Breyer, J., concurring).
147. *Id.* at 1512–13.
148. *Id.* at 1513 (citation omitted).
149. *Id.* at 1514.
150. *Id.* at 1516 (Stevens, J., dissenting).
151. *Id.*
152. *Id.*
153. *Id.* at 1517.

details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'"[154]

d. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council

In *Coeur Alaska*, the elephants-in-mouseholes doctrine emerged once more, this time in relation to the messy topic of "slurry"—i.e., mine waste.[155] In an extraordinarily complicated area of the law, the Court first addressed "whether the [Clean Water] Act gives authority to the United States Army Corps of Engineers [Corps], or instead to the Environmental Protection Agency (EPA), to issue a permit for the discharge of . . . slurry."[156] Section "404(a) of the CWA grants the Corps the power to 'issue permits . . . for the discharge of . . . fill material.' But the EPA also has authority to issue permits for the discharge of pollutants."[157] The issue then, in *Coeur Alaska*, was whether § 404 applied, and if so, whether the Corps acts contrary to law when it issues permits for "fill" that conflict with EPA rules for "pollutants."[158]

The Court's majority, with Justice Kennedy writing, held the Corps properly issued the permit, noting, "The Act is best understood to provide that if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402" and the EPA's regulations become inapplicable.[159] Environmental groups argued "§ 404 contains an implicit exception . . . [that] does not authorize the Corps to permit a discharge of fill material if that material is subject to an EPA" standard, but Justice Kennedy noted § 404's text was not amenable to this argument: "[Section] 404 refers to all 'fill material' without qualification."[160] Justice Breyer concurred, noting that the majority opinion "reflects the difficulty of applying [the CWA] literally to *every* new-source-related discharge of a 'pollutant.'"[161]

Justice Ginsburg, for herself and Justices Stevens and Souter, dissented, claiming that Congress intended the EPA to have power to regulate slurry given "[t]he statute's text, structure, and purpose."[162] She concluded by invoking the elephants-in-mouseholes doctrine:

154. *Id.* at 1517–18 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).
155. Coeuer Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458, 2463 (2009).
156. *Id.*
157. *Id*.
158. *Id.*
159. *Id.* at 2467.
160. *Id.* at 2469.
161. *Id.* at 2477 (Breyer, J., concurring).
162. *Id.* at 2480 (Ginsburg, J., dissenting).

> Congress, we have recognized, does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." Yet an alteration of that kind is just what today's decision imagines. Congress, as the Court reads the Act, silently upended, in an ancillary permitting provision, its painstaking pollution-control scheme. Congress did so, the Court holds, notwithstanding the lawmakers' stated effort "to restore and maintain the chemical, physical, and biological integrity" of the waters of the United States; their assignment to EPA of the Herculean task of setting strict effluent limitations for many categories of industrial sources; and their insistence that new sources meet even more ambitious standards, not subject to exception or variance. Would a rational legislature order exacting pollution limits, yet call all bets off if the pollutant, discharged into a lake, will raise the water body's elevation? To say the least, I am persuaded, that is not how Congress intended the Clean Water Act to operate.[163]

II. THE TROUBLE WITH ELEPHANTS AND MOUSEHOLES

The elephants-in-mouseholes doctrine presents problems *as a doctrine*. Elephants and mouseholes are in the eye of the beholder, meaning, as a rule of statutory interpretation, the doctrine cannot be applied in a consistent fashion. How do we know whether an agency interpretation *alters* the *fundamental* details of a regulatory scheme rather than simply defining or clarifying those details? And how do we know that the relied-upon statutory provision is "ancillary" to the aim of the statute rather than constituent of it? In other words, we cannot easily know that what we find in the mousehole is truly an elephant—and not just a rather plump mouse. Nor can we easily determine that a statutory provision is sufficiently unimportant to be a mousehole—and not just a rather cramped circus tent. But where an ordinary observer might see ambiguity and uncertainty, the elephants-in-mouseholes doctrine finds antiregulatory certainty. It should be no surprise, then, that the Court applies the elephants-in-mouseholes doctrine seemingly haphazardly; those in the majority one day are in the dissent the next, and vice versa.

This uncertainty is unacceptable for a judicial doctrine. After all, "The reason why [law] is a profession, why people will pay lawyers to argue for them or to advise them," is because they "want to know under what circumstances" they must fear the force of the state[164] and "[t]he . . . notion of unknowable law is *literally* Orwellian."[165] Justice Scalia has noted,

> Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law

163. *Id.* at 2484 (citations omitted).

164. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

165. NetworkIP, LLC v. FCC, 548 F.3d 116, 122 n.5 (D.C. Cir. 2008) (citing GEORGE ORWELL, ANIMAL FARM (1946)).

> must have the means of knowing what it prescribes. . . . There are [thus] times when even a bad rule is better than no rule at all.[166]

It is obvious that there is a problem when a line of cases fails to produce a workable rule that can guide the decisionmaking of the regulated public. This problem plagues the elephants-in-mouseholes doctrine, as it is far from clear in practice when the doctrine applies and when it does not. The reason, moreover, why the elephants-in-mouseholes doctrine cannot be consistently applied is also obvious: its focus on "structure" quickly devolves into "strongly purposiv[ist] interpretative techniques,"[167] which, following from his dissent in *Ali*, is how Justice Breyer expressly understands the doctrine.[168] To interpret specific text by reference to a broad statutory purpose is to treat lightly one of the key insights of modern textualism, namely, that statutes often have no *one* overarching purpose that can explain each clause. Indeed, once a court starts looking for purposes instead of looking at words, the zone of possible disagreement expands, as *many* purposes—even conflicting purposes—may be found in complex regulation.[169]

A. Inconsistent Application

As the preceding tour through the Court's jurisprudence illustrates, the Court has failed to offer a clear rule for when the elephants-in-mouseholes doctrine applies. For instance, in *MCI*, Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas found an elephant in a mousehole, but Justices Blackmun, Stevens, and Souter did not.[170] In *Brown & Williamson*, the same majority spotted another elephant hiding in the wall, but Justices Stevens, Souter, Ginsburg, and Breyer saw nothing of the sort.[171] On the other hand, in *Gonzales*, Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer trapped big game, but this time Chief Justice Roberts and Justices Scalia and Thomas said it was just a regular rodent.[172] In other decisions, only a dissenting minority could discern an elephant in a mousehole—Justices Breyer and Stevens in *Ali*,[173]

166. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

167. *See* Manning, *supra* note 17, at 235.

168. Ali v. Federal Bureau of Prisons, 128 S. Ct. 831, 849–52 (2008) (Breyer, J., dissenting) (describing how Justice Breyer would have approached the issue in question in *Ali* using a purposive interpretative method).

169. *See id.* at 850–51 (noting that different canons of construction contradict each other and concluding that the Latin canons are not helpful in this situation).

170. *See supra* Part I.B.i.1.

171. *See supra* Part I.B.i.2.

172. *See supra* Part I.B.iii.1.

173. *See supra* Part I.B.iii.2.

and Justices Stevens, Souter, and Ginsburg in *Entergy*[174] and *Coeur Alaska*.[175] All of the Justices said there was an elephant and a mousehole in *American Trucking*, but Justice Breyer's concurrence suggests that to him that was a special case.[176] Quite curiously, the only members of the Court who were in the majority in every one of these cases were Justices O'Connor and Kennedy, the "so-called swing Justices."[177]

But if these cases are viewed carefully, it becomes clear that it was not the "swing Justices" who swung—it was the rest of the Court. Until 2009, Justice Kennedy consistently found elephants in mouseholes, and during her years on the Court, Justice O'Connor always did. It was the other Justices who oscillated. In many of these cases, Justices Scalia and Thomas saw elephants in mouseholes, but in *Gonzales*, *Ali*, *Entergy*, and *Coeur Alaska*, they just saw an ordinary mouse. On the other hand, Justices Stevens and Souter saw unlawful mouseholes in *Gonzales*, *Entergy*, and *Coeur Alaska* (and Stevens saw another in *Ali*), but both Justices perceived ample regulatory room in *MCI* and *Brown & Williamson*. Justices Breyer and Ginsburg also saw an elephant hiding in a mousehole in *Gonzales* (and Breyer saw another in *Ali*, not to be outdone by Ginsburg spotting two, in *Entergy* and *Coeur Alaska*), but neither found one in *Brown & Williamson*.[178] So who was right? Were the respective agency's policy choices just "too big"? Were the respective statutory hooks just "too small"? The difficulty, of course, is that reasonable minds can, and quite evidently do, disagree. No position taken by any of the Justices in any of these cases is obviously correct. This is a problem if the rule of law is the law of rules.[179] How can lower courts follow this line of authority? What advice can a lawyer give a client?

In *MCI*, the Court rejected the FCC's rule because it held the term *modify* suggests a small regulatory change, not a statutory overhaul. But why? The dissenters argued that even under the majority's narrow definition of *modify*, the FCC's rule was permissible because the regulatory

174. *See supra* Part I.B.iii.3.

175. *See supra* Part I.B.iii.4.

176. *See supra* Part I.B.ii.1.

177. *See, e.g.*, Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347, 349–50 (2003) ("On issues of social policy and federalism, Rehnquist Court decision making is largely defined by two Justices—Sandra Day O'Connor and Anthony Kennedy.").

178. Chief Justice Rehnquist was replaced by Chief Justice Roberts before *Gonzales* was decided, so we do not know whether he would have sided with Justices Scalia and Thomas or Justices O'Connor and Kennedy, the other members of the majority in *MCI* and *Brown & Williamson.*

179. Scalia, *supra* note 166, at 1179 ("Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law.").

change was not *that* dramatic.[180] Justice Stevens also argued that Congress intended the FCC to have elephantine discretion, so there was no mousehole problem at all. The best the majority could say in response was the agency's view violated the "heart" of the statute. Likewise, in *Brown & Williamson*, the Court, relying on "common sense," held, *despite* the language of the relevant statute, that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[181] The Court thought regulating tobacco was an elephant, but there was no elephant pen, no circus, no trumpets and fanfare—and thus rejected the FDA's authority.[182] The dissenters, however, while agreeing that regulating tobacco is an elephant, nonetheless argued the plain language of the statute did not create a mousehole. By using broad language, Congress deliberately empowered the FDA to make these kinds of policy decisions in order to protect the public health.

In *Gonzales*, Justice Kennedy and the majority saw both an elephant—the regulation of assisted suicide—and a mousehole—the Attorney General's registration authority. But Justice Scalia merely saw an everyday mouse.[183] Indeed, even *American Trucking* raises questions, despite the fact that the entire Court found both an elephant and a mousehole.[184] After all, is the notion that the EPA can consider costs in setting air-quality standards really an honest-to-goodness elephant? And are seemingly broad words like *public health*, *adequate*, and *requisite* just mouseholes, or do they reflect congressional authorization for the EPA to consider a wide variety of factors in making its decision? And is *American Trucking*, which prohibited considering costs, consistent with *Entergy Corp.*, which allowed it?

As one reviews the short history of the elephants-in-mouseholes doctrine, it becomes apparent that those who are in the majority one day are in the dissent the next, and vice versa, and that no consistent doctrinal rule for the Court has emerged. It is exceedingly difficult, for instance, to reconcile *Brown & Williamson* with *Gonzales*, yet nearly the entire Court flipped positions. To apply *Chevron* in this puzzling way puts the Court on a dangerous path to "I know it when I see it"—indeed, ironically, if an agency's own decisionmaking were so muddled, a court might strike its test down as arbitrary and capricious.[185]

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180. *See supra* Part I.B.i.1.
181. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 160 (2000).
182. *See supra* Part I.B.i.2.
183. *See supra* Part I.B.iii.1.
184. *See supra* Part I.B.ii.1.
185. Ne. Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166–67 (D.C. Cir. 1990) (holding arbitrary and capricious the FCC's waiver of financial qualification for cellular company because the agency did "not articulate any standard by which [the court could] determine the

B. Tension with Textualism

Modern textualist theory explains why the elephants-in-mouseholes doctrine is doomed to incoherence. The doctrine depends on there being an overarching statutory purpose that can explain each specific provision of a statute; what else does it mean to say a statute has a "heart" or a change is "fundamental"? But that purposivist premise collides into the insights of textualist theory, which says that often statutory "schemes" have no single purpose. As Manning has explained, given the realities of the legislative process, each statutory phrase must stand by itself, and to read specific language in reference to broad statutory purposes (which the Court somehow must divine) is to upset or even undermine Congress's precise bargain.[186] Because there often is no one purpose, it is not surprising that judges cannot agree on what the purpose is. In other words, the elephants-in-mouseholes doctrine's entire premise rings false. *Of course* Congress hides elephants in mouseholes, or at least tries to.

In this age of textualism,[187] it is now well understood that often "statutes [are] products of innumerable and sometimes hasty and pragmatic compromises,"[188] and the "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action."[189] After all, "Congress may be unanimous in its intent

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policy underlying the waiver").

186. *See* Manning, *supra* note 17, at 247–48 (describing the implications of narrow construction of statutes on the legislative process).

187. *See, e.g.*, Marjorie O. Rendell, *2003—A Year of Discovery:* Cybergenics *and Plain Meaning in Bankruptcy Cases*, 49 VILL. L. REV. 887, 887 (2004) ("We are all textualists now. No doubt the major methodological development in Supreme Court jurisprudence over the last few decades has been the ascendancy of the plain meaning approach to interpreting statutes.").

188. Abbott Labs. v. Young, 920 F.2d 984, 994 (D.C. Cir. 1990).

189. Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373–74 (1986).

> Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved. Whether these issues have been identified (so that the lack of their resolution might be called intentional) or overlooked (so that the lack of their resolution is of ambiguous portent) is unimportant. What matters to the compromisers is reducing the chance that their work will be invoked subsequently to achieve more, or less, than they intended, thereby upsetting the balance of the package.

Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983).

> Modern textualism, which emerged in the late twentieth century, maintains that, contrary to the tenets of strong intentionalism, respect for the legislative process requires judges to adhere to the precise terms of statutory texts. In particular, textualists argue that the (often unseen) complexities of the legislative process make it meaningless to speak of 'legislative intent' as distinct from the meaning conveyed by a clearly expressed statutory command.

John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises."[190] Thus, the "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."[191] In short, for modern textualists, "Congress has no intent or purpose distinct from those explicitly stated in the statutory text."[192] Under this compromise-heavy conception of legislation, democratic theory requires courts to enforce specific text and not attempt to find unifying coherence where there is none.[193]

One need not be a card-carrying textualist, however, to acknowledge that the legislative process is complicated and that legislation is often the result of many congressional compromises, which are reflected in statutory text.[194] Indeed, anyone who watched even in passing the legislative debates surrounding the economic stimulus packages in late 2008 and early 2009 can have no doubt that legislating is an untidy business, full of hard-nosed politics in every sense of the term.[195] But once one acknowledges statutes are often the result of compromises, a serious theoretical flaw in the Court's elephants-in-mouseholes doctrine is exposed: On what basis can it be said that Congress "does not alter the fundamental details of a regulatory

190. *Dimension Fin. Corp.*, 474 U.S. at 374.

191. *Id.*

192. Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 552 (2009); *see also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 685 (1997) ("Intent is elusive for a natural person, fictive for a collective body." (quoting Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994))); Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 92 (1984).

193. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (1997) ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.").

194. Then-Judge Scalia's opening in *Community Nutrition Institute v. Block* is only funny because this complexity is so well understood. *See* 749 F.2d 50, 51 (D.C. Cir. 1984) ("This case, involving legal requirements for the content and labeling of meat products such as frankfurters, affords a rare opportunity to explore simultaneously both parts of Bismarck's aphorism that 'No man should see how laws or sausages are made.'").

195. To be clear, we cast no aspersions towards these "political" aspects of the legislative process. Legislation, after all, may have its faults, but "critical analysis is misleading if it proceeds on the premise that those defects should be measured by the 'nirvana' standard, where any deviation from an unobtainable ideal is grounds for criticism." Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 109–110 (1991). Instead, the true basis for putting one's faith in the democratic process is not a naive belief that it will always produce the best results, but a lack of naiveté about the alternatives. Or, as Winston Churchill once put it, "democracy is the worst form of Government except all those other forms that have been tried from time to time." *Id.* at 110 (quoting OXFORD DICTIONARY OF MODERN QUOTATIONS 55 (Tony Augarde ed., 1991)).

scheme in vague terms or ancillary provisions"? How can a court decide what is "fundamental" and what is "ancillary," if there is no one purpose that explains each specific provision of the statute?

Think about it this way. Does anyone doubt that "Congress" inserts clauses in bills that agencies can use to produce profound policy shifts? It has been observed, for example, that legislatures attempt to avoid criticism for policy choices by transferring the blame to other entities.[196] If so, it would be hardly surprising for legislators to add provisions in omnibus bills that, employing ordinary *Chevron* analysis, can be used by the administering agency to implement a consequential policy change, but to do so while deliberately seeking not to leave *too* many congressional fingerprints. Or, in a scenario that ought to be familiar to all transactional lawyers trading redlines in the midst of a frenzied deal, it is realistic to assume that some congressional faction might try to "pull a fast one" on others by injecting into a bill a provision with far-reaching effects.[197]

These sorts of things obviously happen, but the elephants-in-mouseholes doctrine pretends otherwise.[198] There may be reasons to craft such a legal

196. *See, e.g.*, Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 477 & n.281 (1999) (noting "legislators will try to shift blame to the IRS for the embarrassment of Congress's own making" as "Senators and Representatives vote to add new incentives, subsidies, anti-abuse rules, exemptions, transitional rules, and obscurities to the law—then thunder against the complexity of the 'IRS Code,' as if the IRS, not Congress, enacted those complexities"); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 56–57 (1982) ("But by having an agency enforce the regulation the congressman can shift some degree of both the credit and blame to the agency. The degree to which a legislator succeeds in shifting credit or blame to the agency can vary, and will determine his choice of agency or judicial enforcement. If he succeeds in shifting to the agency a preponderantly large part of the blame, then the legislator will prefer agency regulations to judicially enforced statutes. Conversely, if delegation shifts credit for the benefits to the agency, then the legislator will prefer the judicially enforced statutes to regulation by agency.")

197. *See, e.g.*, John M. Baker, *Dr. Strangebill or How the Last Congress Learned to Stop Worrying and Love Substantive Due Process*, 54 FED. LAW., Oct. 2007, at 42 (explaining how a clause directing courts to apply a robust substantive due process doctrine in property rights cases passed the House of Representatives, with speculation that

> some unidentifiable person—a staff member, a developer, a lobbyist, or perhaps even a member of Congress—had included th[e] language in the takings bill . . . hoping that the unusual political dynamics created by the *Kelo* [*v. City of New London*, 545 U.S. 469 (2005)] backlash and an election year, plus the congressional Republicans' renowned party discipline, created a once-in-a-lifetime opportunity to pull a fast one. Indeed, the failure of this provision to attract any flak from any member of the majority party during the subcommittee hearing or floor consideration—and the unwillingness of any member of any party to offer any amendments to the bill on the House floor—make such a strategy seem brilliant.

(endnote omitted)).

198. Indeed, if conduct of this sort did not happen, the lobbyists who read carefully the countless iterations of bills being debated during the legislative process may be doing so for no real reason and clients may be paying those lobbyists for no real reason. We will trust the market on this one. Moreover, consistent with "the interest-group branch of public

fiction,[199] but pretending away reality makes it difficult to give effect to Congress's compromise, as reflected in the specific textual provisions of a statute.[200] After one acknowledges that legislation often is the result of "back-room deals"[201] and diverse individual compromises, as the Court has done and its theoretical defense of textualism in part presupposes, then no one should be surprised that searching for a comprehensive purpose is often a futile exercise, as different textual clauses may be motivated by different purposes. It consequently is not at all surprising that the Court has found it difficult to apply the elephants-in-mouseholes doctrine or that Justice Breyer has unambiguously linked the elephants-in-mouseholes doctrine to purposivism.[202]

III. A NONDELEGATION JUSTIFICATION FOR THE ELEPHANTS-IN-MOUSEHOLES DOCTRINE

The elephants-in-mouseholes doctrine is contrary to traditional *Chevron* analysis. Even in the face of text that supported the regulations, as in *Brown & Williamson*, the Court nullifies agency action, and even when the statute is ambiguous, as in *MCI* and *Gonzales*, the Court denies deference. The doctrine also is in tension with modern textualism. It in effect requires a court to posit a statutory purpose and then evaluate whether agency action is consistent with that posited statutory purpose. With these theoretical difficulties lurking in the background, it should be unsurprising that courts have trouble applying this doctrine in a consistent manner.

Why, then, has the Court created the elephants-in-mouseholes doctrine instead of simply deferring under *Chevron*? Is not a broad but ambiguous

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choice theory, which argues that legislation is an economic good purchased by interest groups," many consider "[*a*]*ctual statutory language* [*to be*] *the dearest legislative commodity*" up for grabs. Manning, *supra* note 192, at 687 (emphasis added) (citing, inter alia, William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971)).

199. *See, e.g.*, Sunstein, *supra* note 9, at 232 ("The most plausible source of the idea that courts should not defer to agencies on larger questions is the implicit delegation principle accompanied by an understanding of what reasonable legislators would prefer. Judge Breyer appeared to think that Congress should be understood to want agencies to decide interstitial questions, but to prefer that courts resolve the larger ones, which are necessary to clarify and stabilize the law."); *see also* Bressman, *supra* note 192, at 555–56 (arguing that the majority's approach in *Gonzales* was "based on realistic assumptions about legislative behavior").

200. *See* Manning, *supra* note 17, at 228 ("Narrowing a statute in this way . . . threatens to unsettle the legislative choice implicit in adopting a broadly worded statute.").

201. *See* Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1006 (2006) (suggesting that the Judiciary should not allow individual rights to be subjected to the public policies implemented by Congress through these sort of behind-the-scenes deals).

202. Ali v. Fed. Bureau of Prisons, 128 S. Ct. 831, 850–51 (2008) (Breyer, J., dissenting).

statutory provision a paradigmatic case for *Chevron* deference? We contend the explanation is not results-orientated decisionmaking but instead is found in long-standing principles of administrative law. Although the Court has effectively given up policing the nondelegation doctrine directly, the Court is still concerned about agencies making important policy choices. So the Court has attempted to craft a new canon of statutory construction to minimize what it perceives to be excessive delegation. It surely is no coincidence that the same decision heralding the death of the nondelegation doctrine also simultaneously announced the birth of the elephants-in-mouseholes doctrine.[203] Even if Congress has enacted a broadly phrased statute, and even if under traditional *Chevron* principles the agency's policy choice is permissible, when the Court believes that the agency's use of its discretion is too substantial vis-à-vis the asserted statutory hook, it will void that agency action and require Congress to affirmatively grant the specific power at issue. Accordingly, while not striking down statutes under the nondelegation doctrine, the Court has nonetheless wielded the elephants-in-mouseholes doctrine to limit delegations of authority.

A. The Nondelegation Doctrine

Whether accurately or not,[204] the Court has reasoned that because the Constitution vests "all legislative Powers" in Congress, "Congress generally cannot delegate its legislative power to another Branch."[205] As the Court has emphasized, "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the

203. *See supra* Part I.B.ii.1.

204. Eric Posner and Adrian Vermeule have argued there is no constitutional basis for this doctrine. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002); Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. CHI. L. REV. 1331, 1331 (2003) ("[T]he standard nondelegation doctrine has no real pedigree in constitutional text and structure"). This argument, unsurprisingly, has not gone unrefuted. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1328 (2003) (supplying "some reasons for doubting" the theory put forth by Posner and Vermeule); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 237 (2005) (arguing that the Constitution does contain limitations on the extent to which Congress can delegate discretion to agencies). Though not necessary for our purposes (it is not relevant whether we believe in the constitutional foundation of the nondelegation doctrine, only that the Court does), we think, for the reasons set forth in this Part, the doctrine is more than just "a controversial theory that floated around the margins of nineteenth-century constitutionalism—a theory that wasn't clearly adopted by the Supreme Court until 1892, and even then only in dictum." Posner & Vermeule, *Interring the Nondelegation Doctrine*, *supra*, at 1722.

205. Mistretta v. United States, 488 U.S. 361, 371–72 (1989) (citations and internal quotation marks omitted).

integrity and maintenance of the system of government ordained by the Constitution."[206] Hence, "the conventional doctrine requires Congress to supply something like an 'intelligible principle' to guide and limit executive discretion."[207]

In addition to the Constitution's separation-of-powers principle, the nondelegation doctrine has found numerous policy justifications.[208] And its historical roots run deep—from John Locke to John Marshall. In his *Second Treatise of Government*, published in 1690, John Locke wrote,

> The power of the *legislative*, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands.[209]

Chief Justice Marshall also distinguished between "those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[210]

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206. Field v. Clark, 143 U.S. 649, 692 (1892). Indeed, as Justice Scalia has put it:

> It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature. Our Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*.

Mistretta, 488 U.S. at 415 (Scalia, J., dissenting). Justice Scalia's formulation of the doctrine, focusing as it does on the legislative branch making policy with the executive branch having a limited role, invites the question of the judiciary's role as recipient of delegated power. Margaret Lemos recently has offered a compelling argument that the nondelegation doctrine should also apply when the federal judiciary makes important policy decisions, such as in the antitrust context. *See* Lemos, *supra* note 14, at 463–64 (arguing that Courts provide the content and substantive meaning of the Sherman Act and, in doing so, contravene "the formal nondelegation doctrine").

207. Sunstein, *supra* note 16, at 318.

208. Justice Rehnquist observed,

> [T]he nondelegation doctrine serves three important functions. First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Indus. Union Dep't, AFL–CIO v. Am. Petroleum Inst. (*Benzene*), 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring) (citations omitted).

209. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 75 (C.B. Macpherson ed., 1980) (1690).

210. Lawson, *supra* note 204, at 236 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

Additionally, "by virtue of requiring legislators to agree on a relatively specific form of words, the nondelegation principle seems to raise the burdens and costs associated with the enactment of federal law."[211] Though this may create a "status quo bias [in] administrative law,"[212] these "burdens and costs" can also be seen as "an important guarantor of individual liberty, because they ensure that national governmental power may not be brought to bear against individuals without a consensus, established by legislative agreement on relatively specific words."[213] As Manning puts it, "Even the quickest look at the constitutional structure reveals that the design of bicameralism and presentment disfavors easygoing, high volume lawmaking."[214] Indeed, "the cumbersomeness of the [constitutional] process seems obviously suited to interests that contradict the 'more is better' attitude that has come to be almost an unconscious assumption of public law."[215] Because delegation enables "lawmaking on the cheap," adherence to the nondelegation doctrine safeguards important "interests by forcing specific policies through the process of bicameralism and presentment."[216] Moreover, "the nondelegation doctrine also promotes rule of law values" similar to those protected by "the void for vagueness doctrine" in the criminal context.[217] For instance, "By ensuring that those asked to implement the law be bound by intelligible principles, the nondelegation doctrine" serves the purpose of "provid[ing] fair notice to affected citizens and also to discipline the enforcement discretion of unelected administrators and bureaucrats."[218]

Despite the arguments in favor of applying the nondelegation doctrine (especially for "highly sensitive decisions"),[219] however, the Court has applied it only twice to invalidate statutes—both in 1935, one of which "provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'"[220] This is so despite many ripe opportunities, including a statute giving an "agency power to fix the prices of commodities at a level that 'will be generally fair and equitable and will effectuate

211. Sunstein, *supra* note 16, at 320.
212. Sunstein, *supra* note 9, at 246.
213. Sunstein, *supra* note 16, at 320.
214. John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 198 (2007).
215. *Id*. at 199.
216. Manning, *supra* note 17, at 240.
217. *See* Sunstein, *supra* note 16, at 320.
218. *Id.*
219. *Id.* at 317.
220. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

the . . . purposes of th[e] Act,'"[221] statutes "authorizing regulation in the 'public interest,'"[222] and a statute granting the "Securities and Exchange Commission authority to modify the structure of holding company systems so as to ensure that they are not 'unduly or unnecessarily complicate[d]' and do not 'unfairly or inequitably distribute voting power among security holders.'"[223] As Sunstein sees it, for nondelegation, "the conventional doctrine has had one good year, and 211 bad ones (and counting)."[224]

The principal reason that the Court does not enforce the nondelegation doctrine more vigorously is that no method has been created that can police the boundary between law execution and delegation in an analytically coherent and principled way.[225] As explained by Justice Scalia,

> [W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.[226]

No judicially administrable test has been created that captures this nuance, "hence [enforcing] the nondelegation doctrine . . . violate[s] its own aspirations to discretion-free law."[227] For instance, the best articulation that Chief Justice Taft could come up with is that "the limits of delegation 'must be fixed according to common sense and the inherent

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221. *Id.* (citing Yakus v. United States, 321 U.S. 414, 420 (1944)).

222. *Id.* (citing Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–27 (1943); N.Y. Cent. Secs. Corp. v. United States, 287 U.S. 12, 24–25 (1932)).

223. *Id.* (citing Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946)).

224. Sunstein, *supra* note 16, at 322.

225. Justice Scalia has argued that it is a misunderstanding of the nondelegation doctrine to distinguish between "unconstitutional delegations of legislative authority" and "lawful delegations of legislative authority," because "the latter category does not exist." Loving v. United States, 517 U.S. 748, 776–77 (1996) (Scalia, J., concurring). Instead, "[l]egislative power is [always] nondelegable," but Congress can "*assign responsibilities* to the Executive . . . as the agent of the People," though "[a]t some point the responsibilities assigned can become so extensive and so unconstrained that Congress has in effect delegated its legislative power." *Id.* at 777. This position has not gone unrebutted. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 490 (2001) (Stevens, J., concurring) ("[W]hen Congress enacted § 109, it effected a constitutional delegation of legislative power to the EPA.").

226. Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). Just as the theory of the nondelegation doctrine has a long-standing pedigree, the practice of actual delegation has been occurring since the earliest days of the Republic. For instance, "The first Congress granted military pensions, not pursuant to legislative guidelines, but 'under such regulations as the President of the United States may direct.'" Sunstein, *supra* note 16, at 322 (citing An Act Providing for the Payment of the Invalid Pensioners of the United States, 1 Stat. 95 (1789)).

227. Sunstein, *supra* note 16, at 321.

necessities of the governmental co-ordination.'"[228] Some help. Because there is no easily administered test to distinguish constitutional execution from unconstitutional delegation, in *American Trucking*, the Court, with the exception of Justice Thomas, in effect gave up on directly enforcing nondelegation as a constitutional doctrine, noting that "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"[229] Moreover, aside from these "serious problems of judicial competence," directly enforcing the doctrine "would greatly magnify the role of the judiciary in overseeing the operation of modern government," and might not "do anything to improve the operation of the regulatory state."[230] For these reasons, and because enforcing the nondelegation doctrine would "embroil[] courts in direct conflict with Congress"—thus causing "destabilizing effects on . . . the government, the regulated parties, and the public" and forcing Congress to either reenact the statute or accept a gap in regulation—the Court is reluctant to do so, especially with nothing more to rest on than a difficult-to-administer test.[231]

B. Nondelegation Canons

While the Court has stopped directly policing the line between what is permissible and what is not, it has not surrendered the principles that underlie the nondelegation doctrine. Instead, the doctrine "has been relocated rather than abandoned."[232] Because it cannot be judicially administered in a principled way, the Court has had to look for proxies to enforce the nondelegation doctrine. One common method has been to interpret broadly phrased statutes more narrowly than their text suggests, thus avoiding nondelegation concerns. Indeed, the Court itself has stated, "In recent years, our application of the nondelegation doctrine principally

228. *Mistretta*, 488 U.S. at 415–16 (Scalia, J. dissenting) (quoting J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)). This is similar to Justice O'Connor's statement in *Brown & Williamson* that courts "must be guided to a degree by common sense" in determining whether "Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

229. Whitman v. Am. Trucking Ass'ns, 531 U.S. at 474–75 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

230. Sunstein, *supra* note 16, at 321; *see also id.* at 327 (noting that giving the Judiciary power to enforce the nondelegation doctrine might itself violate the principles of the nondelegation doctrine, as there are no "clear standards" the Judiciary can employ when exercising this power "to second-guess legislative judgments").

231. Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1419 (2000).

232. *See* Sunstein, *supra* note 16, at 315–16 (arguing that the nondelegation doctrine is thriving and still used by federal courts, albeit as a series of smaller, specific rules rather than as a doctrine per se).

has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that otherwise be thought to be unconstitutional."[233]

For instance, in the oft-cited *Benzene* case,[234] Justice Stevens, writing for a plurality (and using language reminiscent of the elephants-in-mouseholes cases), was confronted with 28 U.S.C. § 655(b)(5), which stated that the Secretary of Labor,

> in promulgating standards dealing with toxic materials or harmful physical agents . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard . . . for the period of his working life.[235]

The Court noted,

> Wherever the toxic material to be regulated is a carcinogen, the Secretary [of Labor] has taken the position that no safe exposure level can be determined and that [the statute] require[d] him to set an exposure limit at the lowest technologically feasible level that will not impair the viability of the industries regulated.[236]

Despite the Act's broad language,[237] Stevens rejected this view, holding the Department was required to "find, as a threshold matter, that the [toxin] poses a significant health risk in the workplace and that a new, lower standard is therefore 'reasonably necessary or appropriate to provide safe or healthful employment and places of employment.'"[238] Stevens noted, "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view," and if the Department's view was upheld, "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under [principles of nondelegation]."[239]

Consistent with this approach, Cass Sunstein has argued that the nondelegation doctrine has not been interred but "merely . . . renamed and relocated" to "a set of nondelegation canons, which forbid executive

233. *Mistretta*, 488 U.S. at 373 n.7.

234. Indus. Union Dep't, AFL–CIO v. Am. Petroleum Inst. (*Benzene*), 448 U.S. 607 (1980); *see also* Lemos, *supra* note 14, at 455 n.240 (citing other cases decided along similar grounds, i.e., constructing textually broad statutes narrowly so as to avoid nondelegation problems).

235. *Benzene*, 448 U.S. at 612.

236. *Id*. at 613.

237. *See* Manning, *supra* note 17, at 244 (describing § 6(b)(5) of the Occupational Safety and Health Act as containing "very open-ended regulatory criteria").

238. *Benzene*, 448 U.S. at 614–15 (citing 28 U.S.C. § 652(8) (2000)).

239. *Id.* at 645–46.

agencies from making certain decisions on their own."[240] For instance, according to Sunstein, under these canons "Congress must affirmatively authorize the extraterritorial application of federal law" and "[w]hen treaties and statutes are ambiguous, they must be construed favorably to Native American tribes."[241] Similarly, "agencies will not be permitted to construe statutes in such a way as to raise serious constitutional doubts," "to interpret ambiguous provisions so as to preempt state laws," "to apply statutes retroactively," or to exempt some from taxes or withhold benefits from veterans.[242] Also, as illustrated by the *Benzene* case, there is "a genuinely novel nondelegation principle" (unlike the others, this one is wholly "a creation of the late twentieth century") that says "agencies are sometimes forbidden to require very large expenditures for trivial or de minimis gains. If Congress wants to be 'absolutist' about safety," it must make a clear statement, but by themselves "agencies will not be allowed to take ambiguous language in this direction."[243]

Sunstein favors the use of these easily administrable canons, at least compared to directly enforcing the nondelegation doctrine, "because they are subject to principled judicial application, and because they do not threaten to unsettle so much of modern government."[244] In other words, for courts, nondelegation canons are "a more cautious way of promoting the relevant concerns."[245] In theory, by these canons, which "find[] clarity in ambiguity in order to deprive an agency of discretion," "the Court effectively may block the delegation of policymaking authority" but without directly standing in the way of congressional will.[246] Though they are "barriers" when applied ex post, going forward they need not be "[s]o long as government is permitted to act when Congress has spoken clearly."[247] "In this way, the nondelegation canons [can be] understood as a species of judicial minimalism, indeed democracy-forcing minimalism . . . ."[248]

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240. Sunstein, *supra* note 16, at 315.

241. *Id.* at 316 (explaining that in these circumstances the agency's own judgment is not relevant to the determination of the meaning of the treaty or statute).

242. *Id.* at 331–32, 334.

243. *Id.* at 334–35 (footnote omitted).

244. *Id.* at 315.

245. *Id.* at 332.

246. Bressman, *supra* note 231, at 1411–12.

247. Sunstein, *supra* note 16, at 335.

248. *Id.* David Driesen argues, with some force, that it is improper to characterize most of Sunstein's normative canons as *nondelegation* canons. David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 24 (2002). For instance, he contends these canons "reflect no particular concern with the problem that Sunstein focuses upon, delegation to administrative agencies"; instead, they implicate substantive values, "regardless of whether an agency has an interpretative role." *Id.* (citation omitted). Though this point is well taken, we think Sunstein's canons can be

C. The Elephants-in-Mouseholes Doctrine as a Nondelegation Canon

Despite the criticism of some of these cases—particularly *Brown & Williamson*, which has been called "an unalloyed act of judicial activism, the sort of activism that conservatives normally decry"[249]—the elephants-in-mouseholes doctrine was not created to enable the Court's pursuit of its own policy preferences, nor does it inevitably do so. For instance, as Richard Pierce has observed, *MCI* is noteworthy because it "does not seem to fit the conservative agenda."[250] Likewise, the policy in *American Trucking* was almost certainly contrary to *Justice* Scalia's policy preferences: "[T]he Clean Air Act emerge[d] looking much like it did when enacted, placing health above all other interests, pursuing (unreachable) risk-free goals—in short, a classic example of '1970s environmentalism'"[251] of the sort derided by *Professor* Scalia.[252] Nonetheless, for the Court, Scalia's "methodological commitments compelled the interpretation the statute received."[253] Unfortunately, because the elephants-in-mouseholes doctrine cannot be administered in a consistent way, its invocation "[is] likely to suffer from the appearance, and perhaps the reality, of judicial hostility to the particular program at issue."[254]

Instead of being a cloak for judicial policymaking, we contend the elephants-in-mouseholes doctrine is the Court's latest attempt to implement

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deemed to reflect nondelegation concerns as well. In particular, because the interests implicated by these canons are important, the Court will allow them to be set aside, but only if Congress itself so states. In other words, the Court has determined that these questions are for Congress alone to decide.

249. David C. Vladeck & Alan B. Morrison, *The Roles, Rights, and Responsibilities of the Executive Branch*, *in* THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT 169, 175 (Herman Schwartz ed., 2002).

250. *See* Pierce, *supra* note 18, at 780 n.185.

251. Herz, *supra* note 12, at 342.

252. *See, e.g.*, *id.* at 338 (noting that prior to becoming a judge, Justice Scalia was the editor of *Regulation* magazine and his "strong deregulatory convictions . . . were on prominent display"). Though Scalia expressed muscular criticisms of many federal laws, *see, e.g.*, JAMES B. STAAB, THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA 15 (2006) (As editor of *Regulation*, Scalia labeled an amendment to the Freedom of Information Act as "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost/Benefit Analysis Ignored." (quoting Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar.–Apr. 1982, at 15)), it is, of course, an unfair caricature—to be clear, not one we ascribe to Professor Hertz—to say Justice Scalia categorically opposes *all* federal regulation. *See, e.g.*, Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL'Y 19, 22 (1982) (There is an "unfortunate tendency of conservatives to regard the federal government, at least in its purely domestic activities, as something to be resisted, or better yet (when conservatives are in power) undone, rather than as a legitimate and useful instrument of policy. Such an attitude is ultimately self-defeating, since it converts the instrument into a tool that cuts only one way.").

253. Herz, *supra* note 12, at 342.

254. Sunstein, *supra* note 16, at 327.

a delegation-policing approach similar to that used in the *Benzene* case. In particular, as in *Benzene*, to minimize excessive delegation, the Court uses statutory interpretation instead of judicial invalidation, thereby avoiding direct enforcement of the nondelegation doctrine. Following *American Trucking*, the Court will not actively forbid nondelegation qua nondelegation, but the Court still believes it can protect the values served by the nondelegation doctrine.

There is, however, an important difference, and one that has not been appreciated in the literature,[255] between the elephants-in-mouseholes doctrine and the most aggressive statutory approach to the problem of delegation. The elephants-in-mouseholes doctrine is an *intermediate* doctrine. The Court has not given up on delegation, but it does not use statutory construction in the most forceful possible way to confine it either. Instead, the Court has limited this canon to only a particular subset of nondelegation cases. In this way, the elephants-in-mouseholes doctrine is designed to be a more judicially manageable and less controversial method of limiting excessive delegation.

We will be precise. The most aggressive version of a nondelegation canon would require the Court itself to "posit[] a plausible background purpose to restrict otherwise broad and unqualified statutory language"[256] in *all* cases where the Court confronts a broad delegation of authority, no matter how the text actually reads, and no matter how difficult it is to find such a plausible principle. The elephants-in-mouseholes doctrine does not do this. Instead, it aspires to a more mechanical and more modest application. The elephants-in-mouseholes doctrine purports to apply *whenever* there is (1) a broad exercise of power (2) premised upon an ancillary statutory provision. Likewise, though the Court did so in *Brown & Williamson* and *Gonzales*, under the elephants-in-mouseholes doctrine, it is not logically necessary to consider legislative history or postenactment congressional action.[257] Instead, again at least in theory, the Court can just examine the statutory text, guided by "common sense,"[258] to determine if the proffered interpretation greatly expands agency authority on the basis

255. Sunstein, for instance, has articulated his theory of "major questions"—which omits *Gonzales* and *American Trucking*—but does not reference this two-part test. *See* Sunstein, *supra* note 9, at 236–47. Likewise, in her excellent article on the major question doctrine, Abigail Moncrieff does not address this feature of the Court's doctrine, in fact failing to mention elephants-in-mouseholes at all. *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, 607–20 (2008).

256. *See* Manning, *supra* note 17, at 244.

257. *See, e.g.*, Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 773 (2007) (noting that in both cases the Court "considered subsequent legislative history").

258. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

of minor statutory authorization and, if so, forbid the action. This is intended as a more manageable test.

At the same time, the elephants-in-mouseholes doctrine's intermediacy also renders it more modest. Because the doctrine only applies when there is *both* a significant expansion of agency authority *and* an ancillary statutory hook, many potential violations of the nondelegation doctrine cannot be averted by this particular canon. As long as the cited statutory authorization is not a mere "mousehole," the elephants-in-mouseholes doctrine is irrelevant, even for very broad delegations of legislative authority. Instead, under the doctrine's logic, the broader the delegation's terms, the less appropriate is the elephants-in-mouseholes inquiry.[259] But the Court nonetheless accepts this underinclusiveness as the necessary cost of manageability.

An example of the elephants-in-mouseholes doctrine's underinclusiveness is found in *Massachusetts v. EPA*.[260] There, Justice Stevens for the Court "held that EPA contravened the Clean Air Act [] when it *refused* to regulate vehicular emissions of greenhouses gases."[261] Whether EPA can regulate such gases, with the resulting costs on the economy, is surely a major policy question,[262] and the agency, in fact, disavowed such authority on the grounds that it was too much power.[263] No member of the Court, however, cited the elephants-in-mouseholes doctrine, including Justice Scalia in his *Chevron*-heavy dissent.[264] The reason, we contend, the elephants-in-mouseholes doctrine was not invoked in *Massachusetts v. EPA* is that the statutes at issue there empower the EPA Administrator to set emission standards for "any air pollutant . . . which in his judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare," with *air pollutant* defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or

259. In fact, applying the elephants-in-mouseholes doctrine may actually *encourage* broad delegations. If Congress wants to delegate with confidence, it will be forced to "use meaningless standards in statutes that delegate power to agencies in order to avoid the high risk of judicial interpretations inconsistent with Congress's intent." Pierce, *supra* note 18, at 777.

260. 549 U.S. 497 (2007).

261. Moncrieff, *supra* note 255, at 603.

262. *See, e.g.*, WILLIAM W. BEACH ET AL., HERITAGE FOUND. CTR. FOR DATA ANALYSIS, THE ECONOMIC COSTS OF THE LIEBERMAN–WARNER CLIMATE CHANGE LEGISLATION (2008), http://www.heritage.org/Research/EnergyandEnvironment/cda08-02.cfm (estimating the costs of EPA regulation of greenhouse gases to be "at least $1.7 trillion and [up to] $4.8 trillion by 2030 (in inflation-adjusted 2006 dollars)").

263. 549 U.S. at 512; *see also* Moncrieff, *supra* note 255, at 603–07 (discussing EPA's argument for refusing to regulate greenhouse gases).

264. Massachusetts v. EPA, 549 U.S. at 558–60 (Scalia, J., dissenting).

matter which is emitted into or otherwise enters the ambient air."[265] This is capacious agency authorization. Regulating greenhouse gases is obviously an "elephant," but no member of the Court found the broad statutory language to be a "mousehole." Consequently, even for a significant and highly costly expansion of agency authority, the elephants-in-mouseholes doctrine could do no work.[266]

IV. WHY THE ELEPHANTS-IN-MOUSEHOLES DOCTRINE SHOULD STILL BE ABANDONED

Though the intermediate elephants-in-mouseholes doctrine may appear to be a better proxy for the nondelegation doctrine than the most aggressive statutory approach to nondelegation, the elephants-in-mouseholes doctrine still should be abandoned. Better does not mean good enough. Just as with the most aggressive statutory approach, the elephants-in-mouseholes doctrine still poses problems for judicial legitimacy and judicial administration that are too serious to be allowed to persist.

First, there are legitimacy problems. The notion that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions" is premised more in normative aspiration than legislative reality and is startlingly out of sync with the Court's modern approach to statutory language. As reflected in the Court's theoretical justifications of textualism, the legislative process is complicated, and in the rough-and-tumble of democratic politics it is not at all unthinkable that Congress *does* "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"—if only the Court will let it. The Court's conclusion to the contrary, therefore, raises profound questions about the judicial function: Is it really the Court's place to upend Congress's bargain by reading a statute to mean something other than what Congress understood it to mean, as expressed in the text?

The elephants-in-mouseholes doctrine's failure to reflect realistically the legislative process matters a great deal because reading a statute in an unusual way to achieve normative goals apart from those selected by Congress imposes costs on the lawmaking process. Given "[legislative] inertia and multiple demands on Congress's time," it is likely that Congress

265. 42 U.S.C. §§ 7521(a)(1), 7602(g) (2000).

266. Abigail Moncrieff argues that *Massachusetts* "unceremoniously killed [the] fledgling" *Brown & Williamson* line of cases because "[t]he substantive logic in *Massachusetts* is, in the end, fundamentally incompatible" with the Court's "major question" doctrine. *See Moncrieff*, *supra* note 255, at 595, 598. This is not necessarily true, if *Massachusetts* is seen as a non-mousehole case and thus distinguishable from *Brown & Williamson*. Of course, it is difficult to find the statutory language in *Brown & Williamson* to be a mere mousehole, so this distinction may not be warranted.

will simply retain the Court's construction of the statute, meaning the canons, "in practice, [may] operate as more than presumptions" but actually as "barriers . . . with respect to purely administrative (or executive) judgment on the matters in question."[267] For the Court to impose such lawmaking costs raises questions about judicial legitimacy.[268]

Some might argue that it need not matter whether the elephants-in-mouseholes doctrine reflects what actually happens in Congress. They may point out that, like other canons of construction, the elephants-in-mouseholes doctrine protects a normative value apart from merely discerning legislative meaning—and that this is an acceptable judicial practice.[269] That counterargument, however, is unsatisfactory because we doubt it is ever appropriate for a court to implement constitutional "values" if it requires setting aside an otherwise-normal reading of a statute. To be sure, if a statute is unconstitutional, a court must not let it stand. But it is a different question altogether whether a court can modify an otherwise-standard reading of a statute in its pursuit of something else. As put by Justice Scalia, "Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it."[270] So do we. And even if a court can set aside otherwise standard readings in some instances to protect some values, this is neither such an instance nor value. Again as put by Justice Scalia, some normative canons—for instance, the rule of lenity—may be justified by "sheer antiquity."[271] But even though the nondelegation doctrine has been a feature of American law since, at the latest, Chief Justice Marshall,[272] no such historical pedigree supports the elephants-in-mouseholes doctrine as a normative canon of construction.[273] While Sunstein finds it "easy to

267. Sunstein, *supra* note 16, at 335, 339.

268. *See* Manning, *supra* note 17, at 238 (noting that the nondelegation doctrine prevents Congress from delegating its legislative powers to the Judiciary).

269. For instance, as noted by Kenneth Bamberger, it is well accepted that methods of statutory interpretation "also implicate a variety of background norms—like respect for the rights of regulated parties, protection of the interests of states and Native American tribes, avoidance of government bias, and separation of powers—inspired, not by Congress's command, but by the substantive and structural concerns of the Constitution." Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 66 (2008).

270. SCALIA, *supra* note 193, at 29; *see also* Manning, *supra* note 17, at 256 ("[I]f the Court alters the meaning of an open-ended statute in order to avoid nondelegation concerns, it apparently disturbs whatever choice or compromise has emerged from that process. This creates the perverse result of attempting to safeguard the legislative process by explicitly disregarding the results of that process.").

271. SCALIA, *supra* note 193, at 29.

272. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (holding that Congress cannot delegate to the courts those "powers which are strictly and exclusively legislative").

273. Sunstein, *supra* note 16, at 341 (noting that the nondelegation canon is generally

imagine the introduction of new canons" to address new "problems in regulatory law,"[274] we are less enthusiastic.

Another counterargument in favor of the elephants-in-mouseholes doctrine is that it is used in response to *Chevron*, a pro-delegation canon. Since *Chevron* also does not have a historical pedigree, on what basis can one condemn as illegitimate the Court's failure to apply *Chevron* in an instance where there are countervailing issues at stake? But if the Court finds an elephant in a mousehole, it does more than merely decide the question de novo. Instead, it categorically denies the agency action.[275] Moreover, this counterargument is better understood as an argument against *Chevron* altogether, for if an antidelegation canon of construction is suspect as contrary to congressional intent, then why isn't a pro-delegation canon also suspect? The appropriateness of *Chevron* in *any* case is a question we leave for another day, though we do agree that *Chevron* Step One must receive more than a cursory nod.

Second, and in any event, the elephants-in-mouseholes test is not judicially administrable. When it comes to actually implementing the doctrine, judges acting in good faith will not agree—the line between rodent and pachyderm is not definable. The elephants-in-mouseholes doctrine is thus anything but "easily administrable."[276] Indeed, problems of judicial administration similar to those that plague the nondelegation doctrine also afflict its more evanescent proxy, as there is no consistent way to determine when the doctrine should apply. For instance, applying the canon that "unless Congress has spoken with clarity, agencies are not allowed to apply statutes retroactively, even if the relevant terms are quite unclear,"[277] is much easier to do than asking whether an otherwise-permissible construction of a statute is nonetheless invalid because the resulting policy implications are "too important."[278] When we leave *Chevron*'s world of words and enter into a realm of purposivism by asking questions like "what is the heart of this statute?"[279]—which the search for elephants in mouseholes requires—consistent, predictable adjudication is no longer possible. What results instead is more reminiscent of *Church of*

"no longer reflected in current law").

274. *Id.* at 341–42.

275. *See* Sunstein, *supra* note 9, at 244 (explaining that if the Court construes ambiguities as against regulatory authority, the major questions doctrine can be viewed as outside the *Chevron* framework altogether).

276. *Id.* (describing the nondelegation canons as "easily administrable, pos[ing] a less severe strain on judicial capacities, and risk[ing] far less in the way of substantive harm").

277. *Id.* at 332 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)).

278. Moncrieff, *supra* note 255, at 600.

279. *See, e.g.*, MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 229 (1994) (holding that the FCC does not have the power to make tariff filing optional because the tariff-filing requirement is "the heart of the common-carrier section of the Communications Act.").

the Holy Trinity v. United States[280]—Justice Scalia's favorite example of unprincipled statutory interpretation[281]—than of the Court's modern jurisprudence.[282]

Indeed, because the Court's cases are not consistent on their own terms, scholars have attempted to find the *real* rule that explains them. These efforts, however, actually further demonstrate why the elephants-in-mouseholes doctrine has to go. One of the most impressive academic defenses of the Court's cases is offered by Lisa Bressman. Noting the apparent conflict between *Gonzales*, *Brown & Williamson*, and *Massachusetts v. EPA*, she attempts to reconcile the cases by isolating "precisely what makes those questions extraordinary."[283] Her conclusion "is that these cases are best understood to tell administrations that they may not disregard larger governmental or public interests and still expect to command judicial deference," meaning "an administration may not issue a rule knowing that Congress opposes its substance and would need supermajority support to reverse it," nor may an administration "resolve a politically charged issue essentially by fiat, knowing that the people presently are engaged in active debate."[284] Under Bressman's view, which is similar to Abigail Moncrieff's,[285] the Court should consider signals sent by "subsequent legislative history" and other sources as to "the likely preferences of Congress," as well as the robustness of "public debate" and other factors speaking to the "current legal or social context," such as whether the "authority is exercised in a manner that serves the interests of all and not just some."[286] "Put differently, political accountability must contain a functional component as well as a formal one,"[287] and agency actions that raise "moral, legal, and practice issue[s]" should receive less deference than merely "technical" decisions by the agency.[288]

Bressman's attempt to reconcile these cases strikes us as plausible, but

280. 143 U.S. 457 (1892).

281. *See* SCALIA, *supra* note 193, at 18–23 (criticizing *Church of the Holy Trinity* by stating "Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former.").

282. *See* Manning, *supra* note 17, at 227 n.24 (likening an elephant-in-mousehole case to *Church of the Holy Trinity*).

283. Bressman, *supra* note 257, at 765.

284. *Id.*

285. *See* Moncrieff, *supra* note 255, at 596, 642–45 (2008) (explaining that courts should not defer when there are "simultaneous efforts" by "the Executive and in Congress to effect change[] in a single regulatory domain," and should consider what Congress was doing before the agency's announced action, after the actual action, and the substance of agency oversight).

286. Bressman, *supra* note 257, at 773–81 (describing factors the Court should consider in answering these challenging questions).

287. *Id.* at 782.

288. Bressman, *supra* note 192, at 598.

that is hardly comforting, and we have little doubt that her analysis—as it requires judges to don the hats of political scientists—would be distasteful to a more formalist judge. She herself acknowledges this "nuanced" approach to *Chevron* may be a "cure . . . worse than the disease," as it requires, among other things, for "judges to read an administrator's (and the President's) mind," raising both separation of powers and practical issues, especially as the facts necessary to make the requisite evaluations may be difficult to acquire.[289] Her attempt to reconcile the cases also requires "attribut[ing] to Congress the intent that agencies interpret statutes in light of current congressional preferences,"[290] but this is a form of "legislative self-delegation"[291] that is prohibited by *INS v. Chadha*,[292] as it allows a subsequent Congress to exercise authority outside of bicameralism and presentment.[293]

Aside from constitutional concerns, moreover, any approach like that proposed by Bressman to explain the Court's precedent is also not amenable to consistent implementation. Courts are not equipped to play political prognosticator, evaluating just how seriously the public is debating an issue or what Congress's likely views are on the subject. How would a court even begin to articulate a doctrinal rule that could encompass these factors? How much public discussion and "consensus" is necessary, and how intense and widespread must that public discussion be before the Court should stop deferring to the Executive Branch?[294] And just when does a "technical" issue become a "moral" one?[295] Though it may be able to explain the Court's decisions, Bressman's approach is hardly the stuff of which enduring doctrine is made.

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289. Bressman, *supra* note 257, at 784–85.

290. *Id.* at 788.

291. Manning, *supra* note 192, at 675.

292. 462 U.S. 919, 944–59 (1983) (holding that the congressional veto provision is unconstitutional).

293. For instance, what if Congress intended the President to interpret statutes according to the preferences of a congressional committee? Such a possibility seems squarely foreclosed by *Chadha*. If so, what is the principled difference between that scenario and one where Congress intends the President to interpret statues according to the preferences of a later Congress?

294. Bressman, *supra* note 257, at 797–98 (considering the role public opinion played in recent Supreme Court decisions).

295. *See, e.g.*, Posting of Eoin O'Carroll to Bright Green Blog, http://features.csmonitor.com/environment/2009/02/16/us-considers-pika-protection-due-to-warming/ (Feb. 16, 2009) (explaining the debate over whether to classify the pika—what you get if you "cross a rabbit with a hamster, make it very sensitive to heat, and deposit it on mountains throughout the western United States"—as an endangered species due to global warming affecting its habitat).

CONCLUSION

In a series of cases where deference was appropriate, at least under *Chevron* itself, the Court has forbidden agency action. Citing the principle that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes," the Court has invalidated agency interpretations, even going so far as to vacate an agency decision that was actually permitted under the best reading of the statutory text. The Court has done this to protect nondelegation values without having to directly enforce the nondelegation doctrine. In fact, *American Trucking*, the case where the Court first explicitly announced the elephants-in-mouseholes doctrine, is also the case where the Court effectively abandoned directly enforcing the line between constitutional execution and unconstitutional delegation. The elephants-in-mouseholes doctrine thus is best understood as an example of what Sunstein has dubbed nondelegation canons.

Good intentioned though it is, the elephants-in-mouseholes doctrine is doomed to failure because it cannot be administered in a principled way. The cases employing the doctrine have been inconsistent and will ever be so. Just as administering the nondelegation doctrine itself has proven impossible, applying this test is a task that judges just cannot do. At the same time, the Court's imposition of this canon is of dubious legitimacy given that this doctrine's premise does not accurately reflect the legislative process. The Court must decide whether it wants to continue down this dead-end street or whether instead it will defer to the Executive Branch, a "political branch" that is "directly accountable to the people."[296] While the perfect solution would be for Congress to make important policy decisions itself, the best available solution is for courts to defer to the Executive Branch by applying traditional *Chevron* principles. Though we acknowledge the compelling constitutional concerns driving the Court's analysis, we reluctantly conclude that the hunt for elephants-in-mouseholes should be abandoned as a failed doctrine.

296. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).