

ARTICLES

THERE ARE TWO “MAJOR QUESTIONS” DOCTRINES

CASS R. SUNSTEIN*

The Supreme Court is conspicuously uneasy about its Chevron framework, which requires courts to defer to agency interpretations of ambiguous statutes, so long as those interpretations are “reasonable.” One of the principal manifestations of its uneasiness is the “major questions” doctrine, which makes Chevron inapplicable to questions of great “economic and political significance.” The major questions doctrine could well have large implications for administrative law and the administrative state, greatly limiting agencies’ room to make new departures. But the major questions doctrine is actually two separate doctrines, with very different meanings. The weak version is a kind of “Chevron carve-out,” meant to ensure that courts exercise independent judgment, and so do not defer to agencies, in determining the meaning of statutes as applied to especially important questions. By contrast, the strong version flatly prohibits agencies from interpreting ambiguous statutes so as to assert broad new authority over the private sector. In its strong form, the major questions doctrine would sharply limit agency discretion in many domains. Both versions of the major questions doctrine can claim a connection to the nondelegation doctrine. But the arguments on behalf of the weak version are very different from those on behalf of the strong version, which can be seen as an explicit effort to adapt the nondelegation doctrine to current conditions.

INTRODUCTION	476
II. THE LIMITS OF IMPLICIT DELEGATION	480
III. A CLEAR STATEMENT PRINCIPLE	483
IV. LOST ORIGINS.....	484
V. A NOTE ON DRAWING LINES	487
VI. THE WEAK VERSION, EVALUATED	488

* Robert Walmsley University Professor, Harvard University (on leave). Starting in February 2021, the author joined the Biden Administration as Senior Counselor and Regulatory Policy Officer in the Department of Homeland Security. This Essay was substantially completed before that date, and it does not reflect an official position in any way.

VII. THE STRONG VERSION, EVALUATED	489
CONCLUSION	493

INTRODUCTION

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹ decided in 1984, the Supreme Court famously held that if a statute is ambiguous, courts should defer to the agency’s interpretation, so long as that interpretation is “reasonable.”² At the time, as now, *Chevron* was exceedingly controversial.³ It might seem to be inconsistent with the Administrative Procedure Act, which directs courts, not agencies, to interpret statutes.⁴ It might also seem to be in tension with Article III of the Constitution,⁵ as interpreted by *Marbury v. Madison*,⁶ and in particular with the suggestion that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”⁷ (Under *Chevron*, is it emphatically the province of the administrative department to say what the law is?) At the same time, *Chevron* might seem to create a nondelegation problem, or at least to aggravate the existing one(s), insofar as it allows agencies to interpret statutes that define the scope of their authority.⁸

For more than two decades, these objections did not seem to have much of an impact on the Supreme Court.⁹ They are now resonating, and putting a great deal of pressure on the *Chevron* framework.¹⁰ Many of the Justices are skeptical of *Chevron*, which means that its fate is uncertain; no one would be shocked if it is cabined or even overruled.¹¹ A primary manifestation of the

1. 467 U.S. 837 (1984).

2. *Id.* at 844.

3. See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 459–61 (1989) (objecting to *Chevron* in part on the ground that, under its framework, an agency’s interpretation will almost always be controlling); Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 302–03 (1988) (discussing criticisms of *Chevron*).

4. 5 U.S.C. § 706.

5. U.S. CONST. art. III.; see also *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (arguing that *Chevron* “wrests from Courts the ultimate interpretive authority to ‘say what the law is’ and hands it over to the Executive”).

6. 5 U.S. (1 Cranch) 137 (1803).

7. *Id.* at 177.

8. Farina, *supra* note 3, at 478.

9. See Daniel J. Gifford, *The Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 798–801 (2007).

10. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2151 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014) and noting that the Supreme Court has been “reining in” *Chevron*).

11. See Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1615–16, 1669 (2019)

Court’s skepticism is the “major questions doctrine,” which is a clear effort to limit *Chevron*’s reach, or to blunt its force, by depriving agencies of *Chevron* deference in a certain set of cases.¹² To identify that set of cases, the Court has used various formulations, but the basic idea is that when an issue has a very high degree of economic and social significance, *Chevron* does not apply.

In this Essay, I contend that the major questions doctrine has been understood in two radically different ways—weak and strong—and that the two have radically different implications. The weak version suggests a kind of “carve-out” from *Chevron* deference when a major question is involved.¹³ Because *Chevron* does not apply, courts are required to resolve the relevant question of law independently, and without deference to agency interpretations.¹⁴

The strong version, by contrast, operates as a clear statement principle,¹⁵ in the form of a firm barrier to certain agency interpretations.¹⁶ The idea is not merely that courts will decide questions of statutory meaning on their own. It is that such questions will be resolved unfavorably to the agency.¹⁷ When an agency is seeking to assert very broad power, it will lose, because Congress has not clearly granted it that power.

The two versions have different justifications. The weak version is rooted in the prevailing theory behind *Chevron*, which is that Congress has implicitly

(noting that several Justices, on the record, have expressed skepticism about *Chevron* and stating that the argument for overruling it might “not be difficult to sketch”).

12. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000) (signaling the major questions doctrine when declining to extend *Chevron* deference); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (emphasizing the existence of a major question while finding that allowing the Environmental Protection Agency (EPA) to assert its desired authority on the matter would render the statute “unrecognizable” and declining to extend deference); *King v. Burwell*, 576 U.S. 473, 484–86 (2015) (stating that the question of availability of tax credits on a Federal Exchange, a scheme contemplated by the Affordable Care Act and implemented via an Internal Revenue Service (IRS) rule, was of such consequence that it qualified as a major question and exception to the *Chevron* doctrine).

13. See Kevin O. Leske, *Major Questions About the Major Questions Doctrine*, 5 MICH. J. ENV’T & ADMIN. L. 476, 496–97 (2016).

14. See *id.*

15. A clear statement principle requires Congress to “express itself clearly when it wishes to adopt a policy that presses against a favored constitutional value.” John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 401 (2010).

16. See *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 421–22 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (discussing the “major rules doctrine” as a limit on statutory interpretations by agencies).

17. See *Util. Air Regul. Grp.*, 573 U.S. at 324 (2014) (describing the EPA’s interpretation of the rule as unreasonable because it would expand the EPA’s regulatory authority in a transformative way without clear authorization from Congress).

delegated law-interpreting power to the agency.¹⁸ The weak version qualifies that idea by adding that Congress has *not* implicitly delegated agencies the power to decide major questions.¹⁹ By contrast, the strong version is rooted in the nondelegation doctrine, which requires Congress to offer an “intelligible principle” by which to limit agency discretion.²⁰ Drawing from the nondelegation doctrine, the strong version of the major questions doctrine states that if agencies are to exercise certain kinds of power, they must be able to show clear congressional authorization.²¹ As then-Judge Brett M. Kavanaugh put it when sitting on the United States Court of Appeals for the District of Columbia Circuit, the strong version of the “doctrine helps preserve the separation of powers and operates as a vital check on expansive and aggressive assertions of executive authority.”²²

For both theory and practice, the stakes are exceedingly high—whether we are speaking of the weak version, the strong version, or the choice between them. Many agencies, and many administrations, are interested in adopting significant initiatives, asserting novel authority, and breaking with the past (even with longstanding interpretations of statutory provisions). This is especially true at the beginning of a new presidential term, but it can be true as well at the start of a second term, or even in the middle.²³ For example, the Federal Trade Commission might want to rethink its interpretation of Section 230 of the Communications Decency Act—the statutory provision giving broad immunity to Internet service providers,

18. See Leske, *supra* note 13, at 482–83.

19. See *id.* at 483–85.

20. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). On the nondelegation doctrine, see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Gundy v. United States*, 139 S. Ct. 2116 (2019). I do not explore here the many questions raised by efforts to revive or intensify the nondelegation doctrine. For a discussion of these efforts see, for example, David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 *CARDOZO L. REV.* 947 (1999) and Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 *COLUM. L. REV.* 277 (2021). On the close relationship between the strong version of the major questions doctrine and the nondelegation doctrine, see *U.S. Telecom Ass’n*, 855 F.3d at 422 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

21. *U.S. Telecom Ass’n*, 855 F.3d at 422–21 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

22. See *id.* at 417.

23. Elaine Kamarck, *The First 100 Days: When Did We Start Caring About Them and Why Do They Matter?*, Brookings: FIXGOV (Apr. 16, 2021), <https://www.brookings.edu/blog/fixgov/2021/04/16/the-first-100-days-when-did-we-start-caring-about-them-and-why-do-they-matter/> (explaining the historical origin of the 100-days benchmark and noting that presidents can benefit from simply being “stylistically different [than] their predecessors”).

including social media platforms.²⁴ Or the Department of Justice might want to issue a new rule taking some stand on whether and when discrimination based on sexual orientation, or against transgender persons, is a violation of existing statutory provisions.²⁵ Or the Environmental Protection Agency (EPA) might want to alter its approach to fuel economy, perhaps by allowing something like a cap-and-trade program.²⁶ Or the Department of Health and Human Services might want to adopt a new understanding of the Affordable Care Act—expanding its reach, strengthening its prohibitions, or giving more or less flexibility to insurance companies.²⁷

In all of these cases, and many like them, an agency interpretation at least arguably resolves a “major question.” Under the weak version, the agency would lose the benefit of *Chevron* deference—which might well mean that it would face an adverse judicial decision. If courts adopt the weak version, a broad understanding of the scope of the major questions doctrine would make it harder for agencies to adopt significant initiatives, potentially increasing stability but reducing flexibility for the administrative state as a whole. For any administration, such an understanding would amount to a nontrivial and possibly large reduction in its discretionary authority, whether the issue involves discrimination, responses to COVID-19, climate change, food safety, or regulation of social media.

The strong version would have an even larger impact. It would mean that in the face of ambiguity, courts would forbid agencies from making their preferred policy choices unless Congress has given them explicit authorization to do so—at least in cases in which agencies seek (as they often do) to exercise significant new authority.²⁸ Perhaps a general movement toward the strong version of the major questions doctrine should be celebrated as a way of cabining agency power and serving some of the purposes of the nondelegation doctrine. Or perhaps such a movement should be lamented as a way of forbidding agencies from interpreting ambiguous language in a way that takes advantage of their accountability and expertise. However one evaluates the strong version,

24. See 47 U.S.C. § 230.

25. See 42 U.S.C. § 2000e-2 (establishing statutory prohibitions on discrimination on the basis of sex).

26. See Michael Greenstone et al., *Fuel Economy 2.0*, 44 HARV. ENV'T L. REV. 1, 32 (2020) (proposing a framework for an EPA cap-and-trade program and discussing its implementation).

27. See Patient Protection and Affordable Care Act, 42 U.S.C. §§ 18001–03 (expanding access to healthcare); e.g., *id.* § 18116 (prohibiting discrimination in programs receiving federal financial assistance); *id.* §§ 18002, 18051 (regulating operations of private insurers).

28. See *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (invalidating the EPA's statutory interpretation because it would result in new and transformative authority for the agency without clear authorization from Congress).

there is no doubt that it would have significant consequences.

From the standpoint of theory, the issues are both important and intricate. The weak version requires courts to take a clear stand on the best justification of *Chevron*, which in turn calls for a clarification of that justification. In principle, the weak version could significantly reduce *Chevron*'s reach. The strong version, by contrast, draws on the Constitution itself and is best understood as an effort, at once modest and firm, of reviving a particular reading of Article I, Section I.²⁹ So understood, the strong version could be a harbinger of a large-scale revival of that reading. Even if it is no harbinger, it could be seen as an embodiment, for better or for worse, of a modern effort to resuscitate the nondelegation doctrine in a way that is *relatively* easier to administer, and that does not impose an undue strain on federal judges.³⁰

II. THE LIMITS OF IMPLICIT DELEGATION

Within the Court, *Chevron* rests on a theory of implicit delegation, to the effect that a grant of rulemaking or adjudicative authority carries with it a grant of authority to interpret ambiguous terms.³¹ As the Court put it in 2001:

Since 1984, we have identified a category of interpretive choices distinguished by an additional reason for judicial deference. This Court in *Chevron* recognized that Congress not only engages in express delegation of specific interpretive authority, but that “[s]ometimes the legislative delegation to an agency on a particular question is implicit.” Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which “Congress did not actually have an intent” as to a particular result. . . . We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.³²

Fifteen years before, then-Judge Stephen Breyer also drew attention to congressional instructions and said that *Chevron* is least contentious when the agency is resolving a legal question that appears interstitial, or that cannot be answered without applying the kinds of technical expertise that

29. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

30. It is important to emphasize the word “relatively.” See *infra* Part VII.

31. See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (emphasizing that Congress grants agencies the ability to interpret ambiguous statutory terms both explicitly and implicitly).

32. *Id.* (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837, 844–45 (1984)) (citation omitted).

agencies develop over time.³³ But when an agency is interpreting a major question, he urged, it is hazardous to infer such authority.³⁴ In such cases, the best inference is that Congress wants courts to decide issues of law independently.³⁵ As he put it, “[a] court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”³⁶

On Justice Breyer’s account, we are admittedly dealing here with legal fictions; Congress did not explicitly decide how courts should approach agency interpretations of law. Judges must develop principles of deference by asking about what reasonable legislators, acting reasonably, would want courts to do. In then-Judge Breyer’s words, “[u]sing these factors as a means of discerning a hypothetical congressional intent about ‘deference’ has institutional virtues. It allows courts to allocate the law-interpreting function between court and agency in a way likely to work best within any particular statutory scheme.”³⁷

Within the Supreme Court, the major questions doctrine first appeared in 2000, and it involved an explicit invocation of Justice Breyer’s argument. In *FDA v. Brown & Williamson Tobacco Corp.*,³⁸ the Food and Drug Administration (FDA) interpreted its governing statute to allow it to exercise authority over tobacco products.³⁹ The relevant provision—defining “drug[s]” as “articles (other than food) intended to affect the structure or any function of the body”—seemed to support the FDA’s view or, at worst, to be ambiguous.⁴⁰ Under *Chevron*, the FDA’s interpretation appeared to be lawful. Indeed, Justice Breyer argued that it was, and urged that the Court should defer to the agency.⁴¹

In direct response, the Court invoked “extraordinary cases” to which *Chevron* would not apply:⁴²

33. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (stating that Congress is more likely to focus on answering major questions and thus will defer to agencies for interstitial matters, especially those which require the type of specialized expertise characteristic of federal agencies).

34. *Id.* at 371.

35. See *King v. Burwell*, 576 U.S. 473, 485–86 (2015) (stating that it was the Court’s task to determine the correct reading of statutory language since a major question was at issue and Congress had not expressly assigned that question to the IRS).

36. Breyer, *supra* note 33, at 370.

37. *Id.* at 371.

38. 529 U.S. 120 (2000).

39. *Id.* at 125.

40. *Id.* at 126 (citing 21 U.S.C. § 321(g)(1)(C)).

41. *Id.* at 161–62, 170–71 (Breyer, J., dissenting).

42. *Id.* at 159.

Finally, our 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.*⁴³

This is the *Chevron* carve-out theory of the major questions doctrine. Explicitly qualifying *Chevron*, and invoking Justice Breyer's effort to do that, *Brown & Williamson* insists that courts, and not agencies, should interpret ambiguous provisions in "extraordinary cases."⁴⁴ Several later decisions support the same idea.⁴⁵ Of these, the most important is *King v. Burwell*,⁴⁶ which involved tax subsidies under the Affordable Care Act.⁴⁷ The Court explicitly invoked *Brown & Williamson*, understood as a *Chevron* carve-out, and emphasized the sentence quoted above:

"In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS.⁴⁸

It is important to see that the carve-out theory does not necessarily mean that the agency will lose; it means only that the question of law will be resolved independently by courts. In *King v. Burwell*, the agency won.⁴⁹ Even so, the carve-out theory reflects a kind of delegation principle: courts will not lightly take a statutory grant of rulemaking power as a grant of authority to resolve major questions. So understood, the doctrine is relatively weak. It does not prohibit agencies from producing certain substantive outcomes. Instead, it says that courts will make an independent decision about whether agencies can produce certain substantive outcomes.

43. *See id.* (emphasis added) (citation omitted); *see cf.* Breyer, *supra* note 33, at 370 ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.")

44. *Brown & Williamson*, 529 U.S. 120 at 159.

45. *See, e.g., King v. Burwell*, 576 U.S. 473, 484–86 (2015).

46. *Id.* (2015).

47. *Id.* at 478–79.

48. *Id.* at 484–86 (citations omitted).

49. *Id.* at 498.

III. A CLEAR STATEMENT PRINCIPLE

In *Utility Air Regulatory Group v. EPA*,⁵⁰ the Court specified and concretized a very different understanding of the major questions doctrine. The issue was the legality of the EPA’s decision to include greenhouse gases under certain permitting provisions of the Clean Air Act.⁵¹ As in *Brown & Williamson*, the text of the statute in *Utility Air Regulatory Group* seemed to favor the EPA’s interpretation, or at the very least to make it plausible enough to deserve *Chevron* deference.⁵² But the Court nonetheless invalidated that interpretation.⁵³

In the key passage in *Utility Air Regulatory Group*, the Court did not say that because a major question was involved, it would interpret the statute independently. Instead, it said that the EPA’s interpretation was “unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”⁵⁴ Speaking far more broadly, the Court added:

When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.”⁵⁵

It is worth pausing over these words. This is not at all what the Court said in *King v. Burwell*. It is not a claim that because the question had vast economic and political significance, the Court would resolve it on its own, without deference to the agency’s interpretation. The Court said, instead, that if an agency seeks to expand its authority, and to regulate a significant amount of the economy (under “a long-extant statute”), its interpretation will be treated with skepticism.⁵⁶ Congress must confer that authority in plain terms. This is a clear statement principle, one that allows the private sector to operate free from agency control unless and until Congress has (plainly) said otherwise. As then-Judge Kavanaugh put it:

[I]n a narrow class of cases involving major agency rules of great economic and political significance, the Supreme Court has articulated a countervailing canon that constrains the Executive and helps to maintain the Constitution’s separation of powers. For an agency to issue a major rule, Congress must *clearly* authorize the agency to do so. If a statute only *ambiguously* supplies authority for the major rule, the rule is unlawful If an agency wants to exercise expansive regulatory authority over some major social or

50. 573 U.S. 302 (2014).

51. *Id.* at 307.

52. *See id.* at 322.

53. *Id.* at 333.

54. *Id.* at 324.

55. *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

56. *Id.*

economic activity—regulating cigarettes, banning physician-assisted suicide, eliminating telecommunications rate-filing requirements, or regulating greenhouse gas emitters, for example—an *ambiguous* grant of statutory authority is not enough. Congress must *clearly* authorize an agency to take such a major regulatory action.⁵⁷

In reaching its conclusion, the *Utility Air Regulatory Group* Court cited *Brown & Williamson*, which, as it turns out, is the font of *both* versions of the major questions doctrine.⁵⁸ In one passage of *Brown & Williamson*, the Court clearly signaled the stronger version:

This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. In fact, the FDA contends that, were it to determine that tobacco products provide no “reasonable assurance of safety,” it would have the authority to ban cigarettes and smokeless tobacco entirely. Owing to its unique place in American history and society, tobacco has its own unique political history. . . . Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.⁵⁹

The passage is not without ambiguity, and it is perhaps best treated as a statement of the weak version of the major questions doctrine. But it can also be read to suggest that whenever an agency asserts authority to regulate “a significant portion of the American economy,” it will run into trouble unless it can identify a clear, rather than cryptic, grant of authority from Congress.⁶⁰ The key words are “a decision of such economic and political significance,” understood in the context of the “significant portion of the American economy” language.⁶¹ When a decision of that kind is involved, clear congressional authorization might be mandatory. The strong version, then, is a nondelegation canon, forbidding the agency from seizing on ambiguous language to aggrandize its own power (in some sufficiently major and transformative way).

IV. LOST ORIGINS

Thus understood, *Brown & Williamson* is a linear descendent of an important pre-*Chevron* case that it did not cite: *Industrial Union Department v. American Petroleum*

57. U.S. Telecom Ass’n v. FCC, 855 F.3d 381, 419, 421 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

58. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125–26 (2000).

59. *Id.* at 159–60 (citations omitted).

60. U.S. Telecom Ass’n, 855 F.3d at 420–421 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

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

Institute,⁶² also known as the *Benzene Case*.⁶³ The legal issue arose as a result of the Occupational Safety and Health Administration’s (OSHA’s) argument that so long as its regulation did not exceed the bounds of “feasibility,” it was entitled to regulate workplace risks, even if those risks could not be shown to be significant.⁶⁴ The text of the relevant statute strongly supported its conclusion. It states:

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, 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 dealt with by such standard for the period of his working life*.⁶⁵

The words “no employee will suffer material impairment” suggest a zero-impairment mandate, such that the agency would be authorized, or even required, to act even if the risk is insignificant, in the sense that the probability of impairment is, for each employee, very small—say, $1/X$, where X is very large.⁶⁶

In the controlling plurality opinion, ruling that the agency must demonstrate that the risk it seeks to regulate is “significant,” Justice John Paul Stevens squarely invoked both the standard nondelegation doctrine and the avoidance canon.⁶⁷ In fact, he combined the two. In his words:

If the Government were correct in arguing that [the statute does not require] that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a “sweeping delegation of legislative power” that it might be unconstitutional A construction of the statute that avoids this kind of open-ended grant should certainly be favored.⁶⁸

In the abstract, the logic seems clear and appealing, but it disintegrates on inspection. Suppose that Congress enacted a statute that said that whenever American workers face a risk (any risk), OSHA must regulate it to the extent feasible. That would be an aggressive, even draconian, statute, but it would hardly offend the (standard) nondelegation doctrine; it would not grant open-

62. 448 U.S. 607 (1980).

63. See Cary Coglianese & Gabriel Scheffler, *Private Standards and the Benzene Case: A Teaching Guide*, 71 ADMIN. L. REV. 353, 360 (2019) (discussing the various administrative law concepts involved in the Benzene Case, including the nondelegation doctrine).

64. See *Am. Petroleum Inst. (Benzene Case)*, 448 U.S. at 639.

65. 29 U.S.C. § 655(b)(5) (emphasis added).

66. *Id.*; see also *Benzene Case*, 448 U.S. at 641 n.46.

67. See *id.* at 646. Under the avoidance canon, when a reviewing court is faced with two interpretations of a statute, one of which would be unconstitutional, the court must adopt the interpretation that will save the statute. See *Blodgett v. Holden*, 275 U.S. 142, 148 (1927). See generally Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275 (2016) (discussing formulations of the avoidance canon and defending it as an interpretive tool and judicial remedy).

68. *Benzene Case*, 448 U.S. at 646.

ended discretion to the agency. On the contrary, it would sharply cabin that discretion, by requiring it to take aggressive action. It would not be entirely unlike some other provisions of health and safety law, which clearly call for such action, and which do not create a (standard) nondelegation problem.⁶⁹

Read in light of *Brown & Williamson*, however, Justice Stevens' reasoning in the *Benzene Case* starts to make more sense. The basic idea is that without a clear statement from Congress, the Court will not authorize the agency to exercise that degree of (draconian) authority over the private sector.⁷⁰ The avoidance canon was not really in play—but the strong version of the major questions doctrine was. In an earlier paragraph of the plurality opinion, which sounds a lot like *Brown & Williamson*, Justice Stevens almost said so, years before that doctrine was formally created:

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 . . . coupled with OSHA's cancer policy. Expert testimony that a substance is probably a human carcinogen—either because it has caused cancer in animals or because individuals have contracted cancer following extremely high exposures—would justify the conclusion that the substance poses some risk of serious harm no matter how minute the exposure and no matter how many experts testified that they regarded the risk as insignificant. That conclusion would in turn justify pervasive regulation limited only by the constraint of feasibility. In light of the fact that there are literally thousands of substances used in the workplace that have been identified as carcinogens or suspect carcinogens, the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit.⁷¹

Understood in this way, the *Benzene Case* stands for the proposition that an agency may not assert such broad authority over American workplaces unless Congress has unambiguously granted it that authority.⁷² *Utility Air Regulatory Group* reiterates and broadens this idea, evidently turning into a general principle of administrative law. With *Utility Air Regulatory Group*, we may fairly say that the major questions doctrine, in its strong form, fully arrived.⁷³

69. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473–77 (2001) (finding that section 109(b)(1) of the Clean Air Act, mandating that the EPA must promulgate national air quality standards “at a level that is requisite to protect public health” did not violate the nondelegation doctrine because the level of discretion allowed to the EPA by the statute was not so broad as to create an impermissible delegation of legislative power).

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

71. *Benzene Case*, 448 U.S. at 645.

72. See *id.* at 645–46.

73. The stronger version of the major questions doctrine can also claim support from *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), where the Court struck down the Federal Communications Commission's (FCC's) broad

V. A NOTE ON DRAWING LINES

An initial concern, applicable to both forms of the doctrine, is that the line between “major” and “nonmajor” questions is not exactly obvious. Whenever an agency exercises jurisdiction over activity, its decision could be characterized as major, and yet no one on the Court has indicated an interest in drawing a line between jurisdictional and nonjurisdictional questions. On the contrary, the effort to create a jurisdictional carve-out attracted exactly zero votes, partly on the ground that the line between jurisdictional and nonjurisdictional questions is illusory.⁷⁴ The major questions doctrine seems to be based on considerations similar to those that once led lower courts to deny *Chevron* deference to jurisdictional determinations, and it is predictably sowing confusion.⁷⁵

To be sure, the distinction between major and nonmajor questions is not illusory. We should be able to agree that the question in *Brown & Williamson* was major, and the same is true of that in *King v. Burwell*. But is the question in *Utility Air Regulatory Group* so clearly “transformative?” (Is there a difference between “major” and “transformative?”) The relevant distinction is one of degree rather than one of kind; there is a continuum here, not a dichotomy, and courts have no simple way to separate major from nonmajor questions. To administer the distinction, courts must engage in some difficult line-drawing exercises.⁷⁶ Certainly, the idea of “an enormous and transformative expansion in” regulatory authority does provide help.⁷⁷ A question might be major in the ordinary language sense, but the agency’s resolution might not result in such an expansion. Even so, no clear line separates enormous expansions from mere expansions. But we can fairly read the language of *Utility Air Regulatory Group* to hold that the strong version will apply only in extreme cases, in which an agency is seizing on some “unheralded” term to produce a large-scale increase in its own authority.⁷⁸

interpretation of the word “modify,” which would have allowed it to make a fundamental (and deregulatory) change in the longstanding understanding of the underlying statute. While the Court’s opinion largely read as a *Chevron* Step One holding, it can easily be enlisted as an early major questions holding—and the Court has cited it to that effect. *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

74. *City of Arlington v. FCC*, 569 U.S. 290, 297–99 (2013).

75. *See U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 417–21 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (exploring one understanding of the major questions doctrine, but only in dissent, and thus suggesting confusion and uncertainty in lower courts).

76. Note that this is unambiguously true for the *Chevron* carve-out theory.

77. *See Util. Air Regul. Grp.*, 573 U.S. at 303 (noting that it does not apply to the *Chevron* carve-out theory); *see also King v. Burwell*, 576 U.S. 473, 484–86 (2015) (invoking that theory without applying or engaging with that language).

78. *See Util. Air Regul. Grp.*, 573 U.S. at 324.

VI. THE WEAK VERSION, EVALUATED

In its weak form, the major questions doctrine is not hard to defend. It is one thing to attribute to Congress the following instruction: *If an agency is dealing with the meaning of a statutory term with respect to some technical or minor issue, involving application of technical expertise, the agency's interpretation ought to prevail so long as it is reasonable.* It is quite another thing to attribute to Congress a broad grant of authority to an agency to interpret an ambiguous provision to produce some large-scale transformation in the status quo. In light of the evident risks of self-dealing and aggrandizement of power, it might be asked, why should courts assume that Congress intended to do so?

To be sure, Justice Breyer's original defense of the "major questions" idea was different. It was that for such questions, it is more reasonable to expect a congressional resolution: "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."⁷⁹ But if we actually have such a congressional resolution, we do not need a major questions doctrine; *Chevron* Step One would be sufficient.⁸⁰ Viewed through the lens of *King v. Burwell*, the idea must be that it is not reasonable to infer a congressional delegation of law-interpreting power, for genuinely major questions, to the executive branch.

It might be unreasonable to make that inference for two different reasons. The first involves nondelegation concerns: as a kind of clear statement principle, we should not lightly take Congress to have authorized an agency to undertake a large transformation. Such an authorization may or may not be a violation of Article I, Section I of the Constitution, but the authorization would have to be explicit. The second involves the best inference: perhaps it is not reasonable, other things being equal, to assume that Congress authorized an agency to exercise that kind of discretion. A reasonable legislature would not want to confer such authority on agencies. It would be more likely to trust independent courts, at least on questions of this kind.⁸¹

Is this a persuasive defense of the weak version of the major questions doctrine? That is not entirely clear. As we have seen, an initial concern involves administrability.⁸² In principle, scope of review doctrines should be crisp and easy to apply. It is a point against any doctrine if it fails that test. Perhaps that point is not sufficient to reject a doctrine if that doctrine is strongly justified in principle. But, a serious objection to the weak version of the major

79. Breyer, *supra* note 33, at 370.

80. See *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (noting "if the intent of Congress is clear, that is the end of the matter").

81. See, e.g., *King v. Burwell*, 576 U.S. 473 (2015).

82. See *supra* Part V.

questions doctrine, so defended, is that in some of the cases in which it is invoked, agencies may be working with broad or ambiguous terms, best taken as adaptable to new circumstances. It makes good sense to allow agencies to understand those terms in a way that fits those circumstances, rather than to require Congress to make a specific and focused decision on the point. In *Brown & Williamson*, for example, Congress did not offer a list of drugs and direct the FDA to refer to that list. Instead, it provided a broad statutory definition of “drugs” as articles that are “intended to affect the structure or any function of the human body.”⁸³ That phrase plainly authorizes the FDA to act in cases that Congress could not have anticipated because it lacked the relevant information. If it turns out that tobacco is reasonably taken to fall within the statutory definition, has not Congress done the requisite work?

Probably so. A distinction might therefore be drawn between cases in which Congress has enacted a broad term (“drugs,” “unreasonable risk,” or “pollutant”),⁸⁴ best understood to authorize an agency to adapt to new and unanticipated problems, and those in which it has enacted a more specific and narrow term, best understood not to grant agencies the authority to move in dramatic and novel directions.⁸⁵ The general conclusion is that the weak version of the major questions doctrine has a clear and intelligible justification, which can plausibly be taken to override the objection that it creates serious line-drawing problems. The only qualification is that it should not be used in cases in which Congress has enacted a broad or general term.

VII. THE STRONG VERSION, EVALUATED

The defense of the strong form of the doctrine is altogether different. It is that large-scale social transformations, especially in the form of *increases* in agency authority, should come about only as a result of some explicit or deliberate congressional instruction or authorization.⁸⁶ They ought not to be a product of congressional silence, inadvertence, or accident. So understood, the strong version of the major questions doctrine is unambiguously connected with the nondelegation doctrine. It might be defended on the ground that whatever we think of wholesale judicial revival of that doctrine, we should be able to agree with the more modest claim that transformative choices should

83. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000).

84. *See id.* at 125 (“drug”); *Benzene Case*, 448 U.S. 607, 710 n.27 (1980) (“unreasonable risk”); *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007) (“pollutant”).

85. *See* Kavanaugh, *supra* note 10, at 2153–54 (stating that courts should defer to agencies when Congress has chosen to use an open-ended term but that they should determine whether the agency’s interpretation is best when the statute uses a specific term).

86. *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 422 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

be allowed, not because of agency interpretations of ambiguous terms, but only because *Congress* has explicitly chosen to allow them.

Return in this light to *Utility Air Regulatory Group*, which was straightforward in its endorsement of the strong version.⁸⁷ But there is an evident challenge to the Court's rationale in that case. After all, *Utility Air Regulatory Group* was decided in the wake of *Massachusetts v. EPA*,⁸⁸ where the Court held that the term "pollutant" in the Clean Air Act, included carbon dioxide, a greenhouse gas.⁸⁹ An air pollutant is explicitly defined as "any air pollution agent or combination of such agents . . . which is emitted into or otherwise enters the ambient air."⁹⁰ Greenhouse gases, and carbon dioxide in particular, seem to fit the statutory definition. But under the reasoning of *Brown & Williamson* and *Utility Air Regulatory Group*, that would not be sufficient. Under that reasoning, *Massachusetts v. EPA* was wrongly decided; the Court should have held that the EPA lacks the authority to regulate greenhouse gases, because any effort to do so would result in "an enormous and transformative expansion in [its] regulatory authority without clear congressional authorization."⁹¹ And while briefs in *Massachusetts v. EPA* made that very argument, no member of the Court accepted or even mentioned it.⁹²

If *Utility Air Regulatory Group* was right, was *Massachusetts v. EPA* wrong? Not necessarily. In the former case, the EPA agreed that the particular program at issue was a poor fit for the greenhouse gas problem, so much so that it had to make some awkward adjustments, inconsistent with the statutory text, to avoid what it saw as absurdity.⁹³ *Utility Air Regulatory Group* could be seen as resting principally on a narrow ground, to the effect that in light of the agency's inability to comply with statutory requirements while applying the program to greenhouse gases, it was clear that Congress did not mean that program to apply to greenhouse gases.⁹⁴ For that reason, the agency violated Step One of *Chevron*.

Whether or not that view is convincing, its centrality to the Court's holding in *Utility Air Regulatory Group* raises the possibility that we should take the "enormous and transformative expansion" language not broadly but in that particular context.⁹⁵ Indeed, the Court's own analysis is easily

87. See *supra* Part III.

88. 549 U.S. 497 (2007).

89. *Id.* at 532.

90. 42 U.S.C. § 7602(g).

91. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 323–24 (2014).

92. See Brief for the Federal Respondent at 21–35, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-112); Brief for the Petitioners at 18–26, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-112).

93. *Util. Air Regul. Grp.*, 573 U.S. at 322–29.

94. See *id.* at 333.

95. *Id.* at 323–24.

understood in this narrower way. As the Court put it: “Since . . . the statute does not compel EPA’s interpretation, it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.”⁹⁶ In this light, the decision can comfortably coexist with *Massachusetts v. EPA*, which did not present that problem, and where the Court thought that the statute plainly included greenhouse gases as pollutants.

It must, however, be acknowledged that the Court’s language in *Utility Air Regulatory Group* could easily have been used to justify the opposite outcome in *Massachusetts v. EPA* itself, and that in successor cases, it could easily be used to create a robust limitation on agency authority—not merely a *Chevron* carve-out, but a prohibition on any agency interpretations of ambiguous terms that produce an “enormous and transformative expansion” in agency authority.⁹⁷ Would such a limitation be a good idea?

An initial answer is that, as with the weak version of the major questions doctrine, the answer depends on statutory language and context. If Congress has chosen to use a broad term—for example, by prohibiting “unreasonable risks” from pesticides—it is entirely legitimate for the agency to understand that term to reach products and activities to which Congress had no objection, even if the result can be an enormous and transformative expansion in agency authority.⁹⁸ But if the agency is seizing on an old provision (such as a definition of “drug”) that had never been thought to apply to a large and apparently distinct sector of the economy (such as tobacco), it is plausible to say that some more explicit kind of congressional authorization should be mandated.⁹⁹

Indeed, it might seem not merely plausible but attractive, at least on the basis of one understanding of the separation of powers. Whether or not the nondelegation doctrine should be revived, we might think that agencies ought not to be authorized to produce a large-scale increase in their own power, or the nature and extent of their authority, based on ambiguous language, from which we cannot be clear that Congress authorized that increase. On this view, the major questions doctrine really is a nondelegation doctrine, if a targeted one; it requires congressional rather than executive authorization for “transformative” expansions in agency authority or “transformative” changes in what agencies can do.

But even if we do not have a broad term (“unreasonable risk” or “pollutant”), there is a counterargument. Under modern circumstances, Congress is highly

96. *Id.* at 324.

97. *Id.*

98. *Env’t Def. Fund, Inc. v. EPA*, 489 F.2d 1247, 1254 (D.C. Cir. 1973).

99. *See supra* text accompanying notes 38–49.

polarized, and congressional bandwidth is limited; legislative changes can be exceedingly difficult to obtain, even when there is strong national support for them. We can readily agree that agencies should not be permitted to go beyond congressional *limitations* on their authority. But where statutes are genuinely ambiguous (as, for example, in *Brown & Williamson*), there is a plausible argument for application of *Chevron*, or at least for the weak version of the major questions doctrine, in which courts decide the legal issue independently—but less so for the strong version, which disables agencies from acting unless Congress has unambiguously authorized them to do so. To put the point succinctly: the strong version of the major questions doctrine can be understood as “Congress-forcing”; but what if Congress is highly unlikely to respond to the force? What if Congress will decline to act, perhaps because of political polarization, perhaps because of simple bandwidth problems?

On one view, the best answer is straightforward. Accountability demands a congressional resolution, even if it is difficult to obtain. And there is also the interest in liberty. Before an agency brings the force of government to bear against individuals, it must be because Congress has authorized it to do so, and if agencies seek to exercise some broad new authority, one that is genuinely “transformative,” the same point might hold even more emphatically.¹⁰⁰ But these arguments are not obviously convincing. Those who reject the strong version of the major question doctrine might respond that agencies are accountable as well, because the president oversees them,¹⁰¹ and also because of the requirements of modern administrative law, which involve multiple safeguards, including the process of notice-and-comment rulemaking.¹⁰² Critics of the strong version might respond as well that liberty is compromised not only when government intrudes itself into private ordering, but also when private ordering results in (for example) environmental degradation, racial discrimination, and serious harms to public health and safety.¹⁰³ These are obviously fundamental issues, going

100. Some agency decisions that involve major questions might reduce, rather than increase, agency authority. But it is no accident that the most prominent cases, and the general appeal of the strong version of the doctrine, involve increases in that authority. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126–127 (2000) (attempting to expand jurisdictional authority to regulate tobacco products); *Util. Air Regul. Grp.*, 573 U.S. at 310–12 (exceeding its statutory authority when it attempted to reduce greenhouse gas emissions).

101. I am bracketing there the questions raised by the so-called “independent” agencies. See Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President’s Statutory Authority over Independent Agencies*, 109 *GEO. L.J.* 634 (2021), for a discussion on the questions raised by the so-called “independent” agencies.

102. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J.L., ECON., & ORG.* 81, 82 (1985).

103. See generally CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN:*

to the heart of the constitutional structure in the modern era. My purpose here is not to resolve them but to identify them, and to make it clear that the strong version of the major questions doctrine rests on independent and distinctly controversial grounds.

CONCLUSION

The major questions doctrine has already had large consequences for administrative law and national regulation, and it promises many more. In many circumstances, agencies adopt new initiatives that depart from past practice, that embody novel interpretations, and that at least arguably answer a "major question." Such initiatives are especially common at the start of a presidential term, but they could also be found at the end and in the middle. The major questions doctrine stands as a significant obstacle to such initiatives.

In this Essay, I have argued that there are two major questions doctrines, not one. The weak version holds that if agencies are resolving a question of fundamental importance about the meaning of federal law, they will not receive *Chevron* deference. They might nonetheless win, but only if a court has decided, independently, that they should. By contrast, the strong version holds that if an agency is exercising power in some novel or transformative way, and especially if they are suddenly exercising broad authority over some sector of the economy, they must be able to show explicit congressional authorization. If a statute is ambiguous, agencies will lose. They do not merely lose deference; they lose.

The justification for the weak version is that even if we infer that Congress wants courts to defer to some agency interpretations of law, it is best not to infer that Congress wants courts to defer to interpretations of extraordinary significance. The risk of self-dealing, or of aggrandizement of power, is too great. The justification for the strong version is that whether or not courts should revive the nondelegation doctrine, they should adopt a clear statement principle: agencies cannot engage in genuinely transformative actions, especially if they involve the assertion of significant new authority over the private sector, simply because a statutory provision is ambiguous. They must show unambiguous congressional authorization.

Both versions of the major questions doctrine might be challenged on the ground that their scope is unclear and hence that they raise serious problems of administrability. They might also be questioned on the ground that in some cases, a broad or general statutory term is involved, and that in such cases, it makes sense to conclude that Congress has delegated interpretive authority to the relevant agency. I have also suggested that in the modern era, the

REDEEMING THE ADMINISTRATIVE STATE (Harv. Univ. Press 2020) (addressing objections to the constitutionality and legitimacy of the modern administrative state and arguing in favor of its legitimacy).

nondelegation defense of the strong version runs into serious objections. But the most important point lies elsewhere. The two major questions doctrines are very different. Each must be applied, and evaluated, on its own terms.