

MAJOR QUESTIONS ABOUT THE MAJOR QUESTIONS DOCTRINE

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ABSTRACT

The U.S. Supreme Court's King v. Burwell decision upholding the provision of tax credits to individuals purchasing insurance on a federal insurance exchange may have long-standing impacts on administrative law. In particular, the Burwell decision invokes the "major questions" doctrine that states some issues are of such exceptional political and economic consequence that the courts will presume Congress did not intend to delegate the issue to agencies unless the statute is clear. In those circumstances, explicit, rather than implicit, delegation is necessary. At this stage, the bounds of the major questions doctrine are more unclear than clear. The doctrine is unsettled and is therefore defined in the most general of terms, providing little guidance to courts or to federal agencies evaluating their statutory mandates.

This article explores outstanding questions surrounding the major questions doctrine, focusing on the doctrine's impacts on agency decisionmaking post-Burwell. The Article summarizes the Court's use of the major questions doctrine in Burwell, the evolution of the doctrine, and theories regarding its application and long-term importance. It then analyzes cases invoking the major questions doctrine as well as those rejecting the doctrine to identify patterns that may inform agency decisionmaking. The Article demonstrates that there is little distinction between a "hard look" Chevron analysis and a major questions analysis, suggesting that agency litigation strategies will likely proceed in a similar manner in an effort to prevail under either doctrine. The most significant near-term impact of the evolving doctrine may be the chilling due to the uncertainty regarding when an agency has authority to interpret statutory terms. The article concludes by identifying opportunities to

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provide doctrinal clarity through litigation challenging the Clean Power Plan.

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INTRODUCTION

Federal climate policy shared a fateful link with that of healthcare policy throughout the Obama presidency. Both policies were central storylines in national elections since 2008. The congressional debates over both issues occurred in parallel, with the Affordable Healthcare Act becoming law but the American Clean Energy and Security Act stalling in the U.S. Senate.¹ More recently, as the U.S. Environmental Protection Agency (EPA) implemented regulations limiting carbon dioxide (CO₂) from the nation's electric power sector, the Supreme Court's *King v. Burwell*² decision upholding healthcare subsidies may impact the EPA's efforts to defend the

1. See Thomas O. McGarity, *The Disruptive Politics of Climate Disruption*, 38 NOVA L. REV. 393, 448–49 (2014).

2. 135 S.Ct. 2480 (2015).

CO₂ rules in court.

In particular, the *Burwell* decision invokes the major questions doctrine—a doctrine that states some issues are of such “exceptional political and economic” consequence that the courts will presume Congress did not intend to delegate the issue to agencies unless the statute is clear. In those circumstances, explicit, rather than implicit, delegation is necessary. Furthermore, the doctrine states that in those circumstances it is the judiciary’s role, not that of administrative agencies, to interpret congressional intent. Commentary by legal scholars immediately following *Burwell* suggested that the Court’s reliance on the major questions doctrine potentially signals a significant limitation on *Chevron* deference³ and may bode ill for the EPA as it defends the Clean Power Plan, the first federal rule limiting CO₂ emissions from the nation’s fleet of existing power plants.⁴

This Article examines the major questions doctrine in light of the *Burwell* decision, and considers the practical implications of the ongoing uncertainty regarding when and how courts may invoke the doctrine. Regulating greenhouse gas emissions under the Clean Air Act is a classic example of applying an old statute to a new problem.⁵ The modern Clean Air Act was crafted in 1970, with many of the core provisions remaining in place through subsequent amendments. The statute includes broad terms to define the EPA’s authority and obligations, such as “any pollutant,” “reasonably . . . anticipated to endanger public health or welfare,” and “best system of emission reductions.”⁶ Furthermore, Congress last amended the Clean Air Act in 1990, well before climate change was widely recognized as a major environmental issue.⁷ The Clean Power Plan, therefore, is precisely the type of case that is likely to raise questions of

3. Cass Sunstein, *The Catch in the Obamacare Opinion*, BLOOMBERG VIEW (June 25, 2015, 12:48 AM), <http://www.bloombergview.com/articles/2015-06-25/the-catch-in-the-obamacare-opinion> [hereinafter *Burwell* Commentary].

4. See Jonathan H. Adler, *Could King v. Burwell Spell Bad News for the EPA?*, WASH. POST: THE VOLOKH CONSPIRACY (July 3, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/03/could-king-v-burwell-spell-bad-news-for-the-epa/> (noting that the decision could undermine the EPA’s ability for the Clean Power Plan); see also Jody Freeman, *The Chevron Side Step: Professor Freeman on King v. Burwell*, ENVTL. L. PROGRAM EMMETT CLINIC POL’Y INITIATIVE, <http://environment.law.harvard.edu/2015/06/25/the-chevron-sidestep/>.

5. See Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 2–3 (2014).

6. Clean Air Act, 42 U.S.C. § 7401–7671 (2012).

7. See generally *Clean Air Act Requirements and History*, EPA, <http://www.epa.gov/air/caa/requirements.html>, (last visited Apr. 19, 2016) (“In addition to creating programs to solve identified pollution problems, Congress drafted the Act with general authorities that can be used to address pollution problems that emerge over time, such as greenhouse gases that cause climate change.”).

economic and political significance, and provides a useful lens through which to consider the impact of the evolving major questions line of cases.

The Supreme Court answered the most significant of the political and economic questions regarding the regulation of greenhouse gases under the Clean Air Act in *Massachusetts v. EPA*: whether the existing statute granted the EPA the authority to address the new class of pollutants at all.⁸ Not only did the Supreme Court find that the Clean Air Act's definition of "pollutant" clearly applied to greenhouse gases, thereby obviating the need to interpret statutory ambiguity, it also found that the statute required the EPA to determine whether greenhouse gases endanger public health and welfare.⁹ The EPA subsequently answered that question in the affirmative, leading to regulation of both mobile and stationary sources of greenhouse gas emissions.¹⁰ The Court's subsequent decision in *Utility Air Regulatory Group v. EPA (UARG)*¹¹ demonstrated, however, that *Massachusetts v. EPA* did not absolve the EPA of major questions inquiries regarding how the Agency implements limitations on those pollutants.¹² Even before the *Burwell* decision, legal scholars pointed out that litigation over the EPA's Clean Power Plan, the EPA's first effort to limit CO₂ emissions from the fleet of existing fossil fuel-fired power plants, could turn on the major questions doctrine following the Supreme Court's reliance on the doctrine in *UARG*.¹³

More is unclear than clear about the bounds of the major questions doctrine at this stage. The doctrine is defined in the most general of terms, providing little guidance to courts or to federal agencies evaluating their statutory mandates. For example, the Supreme Court released its *Burwell* decision only four days before its decision in *Michigan v. EPA*,¹⁴ another costly and politically contentious ruling. Not only did the Court rely on major questions doctrine in one and *Chevron* in the other without explanation, the executive branch won under the application of major

8. *Massachusetts v. EPA*, 549 U.S. 497, 505–06 (2007).

9. *Id.* at 528–29.

10. *What EPA Is Doing About Climate Change*, EPA, <http://www.epa.gov/climatechange/EPAactivities.html> (last visited Apr. 19, 2016).

11. 134 S. Ct. 2427 (2014).

12. *Id.* at 2441–42 (striking down a Clean Air Act regulation targeting carbon dioxide (CO₂) emissions from stationary sources).

13. See Ann E. Carlson & Megan M. Herzog, *Text in Context: The Fate of Emergent Climate Regulation Under UARG and EME Homer*, 39 HARV. ENVTL. L. REV. 23, 30 (2015); Jody Freeman, *Why I Worry About UARG*, 39 HARV. ENVTL. L. REV. 9 (2015); see also Jody Freeman & Adrian Verneule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 75 ("Surely the regulation of [greenhouse] gases is an economic and political issue of major significance; if *Brown & Williamson* were followed, the Solicitor General argued, the Court could find statutory authority to regulate greenhouse gas emissions only by finding the relevant statutes entirely clear.").

14. 135 S. Ct. 2699 (2015).

questions and lost under the traditional *Chevron* analysis.¹⁵ As it stands, the Court's current treatment of the doctrine echoes of Justice Potter Stewart's famous description of pornography—you know it when you see it.¹⁶

The potential impacts of the evolving major questions doctrine extend far beyond environmental policy, calling into question the role of *Chevron* deference for any federal agency action involving ambiguous statutory language and issues of significant political and economic importance. The doctrinal uncertainty notwithstanding, federal agencies must proceed with their duties. This article explores outstanding questions surrounding the major questions doctrine, focusing on the doctrine's impacts on agency decisionmaking post-*Burwell*. Part I summarizes the role of the major questions doctrine in *Burwell* and the evolution of the doctrine in the U.S. Supreme Court. Part II examines theories regarding the underlying rationale for the doctrine and considers the treatment of the doctrine by lower courts. Part III then focuses on two practical implications of the major questions doctrine that could impact agency decisionmaking: implications for the future of *Chevron* deference and implications for future rulemakings. Part IV concludes by identifying opportunities for the reviewing courts to provide doctrinal clarity through the legal challenges to the EPA's Clean Power Plan.

II. *BURWELL* AND THE EVOLUTION OF THE MAJOR QUESTIONS DOCTRINE

A. *King v. Burwell*

King v. Burwell considered an IRS interpretation of the Patient Protection and Affordable Care Act (Affordable Care Act) that granted federal tax credits to individuals purchasing insurance through a federal healthcare exchange, despite the fact that the language of the Affordable Care Act provided that tax credits “shall be allowed” for taxpayers who purchase their plans through “an Exchange established by the State”¹⁷ Petitioners, four individuals living in Virginia where a state exchange was unavailable, challenged their eligibility for federal tax credits.¹⁸ Without the tax credits, the petitioners' health care expenditures would exceed eight percent of their respective incomes, thus triggering an exemption that would allow them to forgo purchasing the insurance without penalty.¹⁹

15. *Id.* at 2708, 2712; *King v. Burwell*, 135 S. Ct. 2480, 2488–89, 2496 (2015).

16. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

17. See 42 U.S.C. § 18031 (2012); *Burwell*, 135 S. Ct. at 2487.

18. *Burwell*, 135 S. Ct. at 2487–88.

19. *Id.* at 2487.

Writing for the Court, Chief Justice Roberts characterized the provision of tax credits as a core component of the Affordable Care Act.²⁰ The Act depends on three interrelated reforms: requiring insurers operating within a state to accept every individual who applies for insurance; requiring individuals to maintain health insurance coverage or make a payment to the IRS unless the individual would spend more than eight percent of his or her income on health insurance; and granting tax credits “to individuals with household incomes between 100 percent and 400 percent of the federal poverty line.”²¹ Together, the three reforms were intended to prevent an “economic ‘death spiral’” in the insurance industry.²² Without tax credits, fewer citizens could afford health insurance and would hold off until they need it, reducing the number of customers paying into the insurance pool and thus raising costs for everyone.²³

The majority opinion relied heavily on its interpretation of “the context and structure” of the Affordable Care Act as a whole, rather than limiting its analysis to the specific language regarding the provision of tax credits.²⁴ Quoting *FDA v. Brown & Williamson Tobacco Corp.*²⁵ and *Graham County Soil and Water Conservation Dist. v. United States*,²⁶ the Court stated:

[O]ftentimes the “meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.” . . . So when deciding whether the language is plain, we must read the words “in their context and with a view to their place in the overall statutory scheme.” Our duty, after all, is “to construe statutes, not isolated provisions.”²⁷

The death spiral concept and the importance of the interrelated reforms were particularly persuasive to the six Justices making up the *Burwell* majority. However, although the Court ultimately upheld the IRS interpretation, it did so without deferring to the Agency. Instead, the Court invoked the major questions doctrine—a doctrine that is still in its formative stages—to explain that, because the issue at the heart of the case raised questions of deep “economic and political significance,” deference was not appropriate.²⁸

20. *Id.* at 2489.

21. *Id.* at 2486–87.

22. *Id.* at 2486.

23. *Id.* at 2485–86 (“As premiums rose higher and higher, and the number of people buying insurance sank lower and lower, insurers began to leave the market entirely. As a result, the number of people without insurance increased dramatically.”).

24. *Id.* at 2495.

25. 529 U.S. 120, 132–33 (2000).

26. 559 U.S. 280, 290 (2010).

27. *Burwell*, 135 S. Ct. at 2489.

28. *Id.* at 2488–89. One could reasonably question whether the major questions cases amount to a doctrine due to the limited application and the remaining uncertainties

The characterization of the issue as a major question was a cornerstone for the Court's reasoning, but the doctrine itself received scant attention in the majority opinion.²⁹ Similar to previous decisions relying on the doctrine, the *Burwell* opinion did not explain the bounds of the major questions inquiry, providing little guidance for future applications.³⁰ Instead, the Court devotes just three paragraphs to reject the application of *Chevron* deference to the case, invoke the major questions doctrine, and explain that Congress did not intend to delegate this decision to the IRS.³¹

Justice Scalia penned a visceral dissent, challenging the majority's selective use of context to justify its holding.³² According to the dissent, "context always matters . . . however . . . it is a tool for understanding the terms of the law, not an excuse for rewriting them."³³ For example, Justice Scalia took the majority to task for interpreting the term "by the State" to include federal exchanges, even though the statute distinguishes between states and the federal government numerous times and the Court presumably accepts the plain language in those provisions.³⁴ Rather than interpreting the law to provide access to tax credits, whether or not a State opts to establish an exchange, Justice Scalia concludes:

[T]he Court should have left it to Congress to decide what to do about the Act's limitation of tax credits to state Exchanges. If Congress values above everything else the Act's applicability across the country, it could make tax credits available in every Exchange. If it prizes state involvement in the Act's implementation, it could continue to limit tax credits to state Exchanges while taking other steps to mitigate the economic consequences predicted by the Court. If Congress wants to accommodate both goals, it could make tax credits available everywhere while offering new incentives for States to set up their own Exchanges. And if Congress thinks that the present design of the Act works well enough, it could do nothing. Congress could also do something else altogether, entirely abandoning the structure of the Affordable Care Act. The Court's insistence on making a choice that should be made by Congress both aggrandizes judicial power and encourages

regarding if and when it applies. This Article accepts the view that the cases articulate a rule that applies to "extraordinary cases," and attempts to determine the boundary between those cases that are ordinary and those that are extraordinary.

29. *Id.* at 2489.

30. *Id.*

31. *Id.* at 2488–89.

32. At times, Justice Scalia refers to the majority's reasoning as "absurd," "jiggery-pokery," "[p]ure applesauce," and "somersaults of statutory interpretation." *Id.* at 2496, 2500–01, 2507 (Scalia, J., dissenting).

33. *Id.* at 2497; *see also id.* at 2502 ("context only underscores the outlandishness of the Court's interpretation. Reading the Act as a whole leaves no doubt about the matter: 'Exchange established by the State' means what it looks like it means.").

34. *Id.* at 2497–98.

congressional lassitude.³⁵

Underlying Justice Scalia's dissent is the accusation that the Court's decision was purely political.³⁶ Early analysis of the case suggests that, at the very least, there may be competing motivations underlying Justice Roberts' reasoning.³⁷ For example, by rejecting *Chevron*, the majority's holding prevents future administrations from reinterpreting the tax credit provisions at a later date and, therefore, undermine what Chief Justice Roberts characterized as a central provision of the Affordable Care Act.³⁸ Another reading of *Burwell* suggests that the Court may intend to expand its authority and, therefore, restrict the power of the Executive Branch, at least in "extraordinary cases," by limiting the application of *Chevron* deference.³⁹ *Burwell* may also represent a purely pragmatic attempt to do no harm, suggested by Chief Justice Roberts' concluding statement that "in every case we must respect the role of the Legislature, and take care not to undo what it has done."⁴⁰ Viewed in that light, the *Burwell* Court can be seen as reluctant to interpret a single statutory clause in a manner that could undermine a law that has already gone into effect, that has broad impacts on the economy, and that, if accepted at face value, would throw much of the nation's health insurance industry into a state of chaos.

One could argue that *Burwell* is a logical candidate for applying the major questions doctrine. The provision of healthcare via the Affordable Care Act has been one of the most controversial issues of the Obama presidency and remains a centerpiece of presidential and congressional debates.⁴¹ Billions of dollars were at stake.⁴² Deciding in favor of the petitioners would have caused millions of Americans to lose their healthcare, and states that declined to create their own exchanges would have faced significant increases in insurance rates.⁴³ The case also involved

35. *Id.* at 2506.

36. *Id.* at 2507 (characterizing the majority's holding as proof that "the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites").

37. See Freeman, *supra* note 4.

38. See Chris Walker, *What King v. Burwell Means for Administrative Law*, YALE J. ON REG.: NOTICE & COMMENT (June 25, 2015), <http://www.yalejreg.com/blog/what-king-v-burwell-means-for-administrative-law-by-chris-walker>; see also Freeman, *supra* note 4.

39. Walker, *supra* note 38.

40. *Burwell*, 135 S. Ct. at 2496.

41. For example, between January 2011 and March 2014, the U.S. House of Representatives held 54 votes to overturn or amend the Affordable Care Act. See Ed O'Keefe, *The Fix: The House Has Voted 54 Times in Four Years on Obamacare. Here's the Full List*, WASH. POST (Mar. 21, 2014), <http://www.washingtonpost.com/news/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list/>.

42. *Burwell*, 135 S. Ct. at 2489.

43. See Evan Saltzman & Christine Eibner, *The Effect of Eliminating the Affordable Care Act's*

an instance of an agency reinterpreting specific statutory language in order to effectuate Congress's intent.⁴⁴ Furthermore, the IRS was reinterpreting a statute in order to implement healthcare policy—not an area of IRS expertise—and, therefore, not an area where Congress would rely on implicit delegation.⁴⁵ These factors may limit *Burwell*'s relevance for future cases. *Burwell* does, however, confirm that the major questions doctrine remains a viable, if generally undefined, tool of statutory construction.⁴⁶

B. Evolution of the Major Questions Doctrine

By relying on the major questions framework to justify the pivot away from *Chevron*, while also upholding the agency's approach, the Court invoked a doctrine that has appeared only sporadically since 2000.⁴⁷ The approach aims to address a long-standing challenge for courts—determining whether and to what degree Congress intended to delegate authority to federal agencies. Although the challenge is long-standing, the role of the major questions doctrine in addressing the challenge remains uncertain.

The concern underlying the emergence of the major questions framework is characterized in *Industrial Union Department v. American Petroleum Institute*⁴⁸ (commonly referred to as the *Benzene* case)—unfettered discretion may lead to an inappropriate expansion of agency authority. That decision, cited in subsequent major questions cases, involved a new rule issued under the Occupational Safety and Health (OSH) Act to limit occupational exposure to benzene, a known carcinogen for which no safe

Tax Credits in Federally Facilitated Marketplaces, RAND CORP. (2015). http://www.rand.org/content/dam/rand/pubs/research_reports/RR900/RR980/RAND_RR980.pdf; Linda J. Blumberg et al., *The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums*, URBAN INSTITUTE (Jan. 2015), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000062-The-Implications-King-vs-Burwell.pdf>.

44. *Burwell*, 135 S. Ct. at 2489.

45. *Id.*

46. The Court's rejection of the doctrine in *Massachusetts v. EPA* raised questions regarding the future application of the doctrine. See, e.g., Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593 (2008); see also Nathan Richardson, Draft, *Deference for Realists: How the Resurgent Major Questions Doctrine Is a Safety Valve for Chevron*, at 8–13, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2665214.

47. Austin Schlick & Michael Steffen, *Should Courts Defer the Least When it Matters the Most?: Judicial Deference to Agencies on Major Issues*, MD. B.J., May/June 2016, at 12, 17 (noting "how uncertain and subjective the putative 'major questions canon' is. Not only is the canon out of step with the development of the non-delegation doctrine, it is inconsistently applied as a principle of *Chevron* review.").

48. 448 U.S. 607 (1980).

limit was known.⁴⁹ The OSH Act granted the Labor Department broad authority to set standards to protect worker health and safety, requiring the Labor Secretary to “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”⁵⁰ Without an identifiable safe level, the Labor Department opted for an exposure limit of 1 part per million (ppm) based on the agency’s determination of the lowest level that was technologically feasible.⁵¹

In a plurality opinion, the Court rejected the Labor Department’s approach, concluding that the agency must first “make a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices.”⁵² In language most directly relevant to the evolution of the major questions doctrine, the Court concluded that:

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 If the Government was correct in arguing that neither § 3(8) nor § 6(b)(5) requires 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 under the Court’s reasoning in *A.L.A. Schechter Poultry Corp. v. United States* . . . and *Panama Refining Co. v. Ryan* A construction of the statute that avoids this kind of open-ended grant should certainly be favored.⁵³

In a concurrence, then-Justice Rehnquist suggested that the non-delegation doctrine should apply.⁵⁴

49. *Id.* at 611–12; Occupational Safety and Health (OSH) Act of 1970, 29 U.S.C. § 651–678 (2012).

50. U.S.C. § 655 6(b)(5).

51. *Am. Petroleum Inst.*, 448 U.S. 607 at 631–37 (“In the end [the Occupational Safety and Health Administration’s] rationale for lowering the permissible exposure limit to 1 ppm was based, not on any finding that leukemia has ever been caused by exposure to 10 ppm of benzene and that it will not be caused by exposure to 1 ppm, but rather on a series of assumptions indicating that some leukemias might result from exposure to 10 ppm and that the number of cases might be reduced by reducing the exposure level to 1 ppm If no safe level is established . . . the Secretary’s interpretation of the statute automatically leads to the selection of an exposure limit that is the lowest feasible.”).

52. *Id.* at 642.

53. *Id.* at 645–46. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550–51 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432–33 (1935) are the only two cases finding that a statute was unconstitutional under the non-delegation doctrine.

54. *Am. Petroleum Inst.*, 448 U.S. at 685–86 (Rehnquist, J., concurring) (citations omitted). Then-Justice Rehnquist articulated three justifications for the non-delegation doctrine:

Viewing the legislation at issue here in light of [nondelegation] principles, I believe that it fails to pass muster. Read literally, the relevant portion of § 6(b)(5) is completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he cannot. In the case of a hazardous substance for which a “safe” level is either unknown or impractical, the language of § 6(b)(5) gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line. Especially in light of the importance of the interests at stake, I have no doubt that the provision at issue, standing alone, would violate the doctrine against uncanalized delegations of legislative power. For me the remaining question, then, is whether additional standards are ascertainable from the legislative history or statutory context of § 6(b)(5) or, if not, whether such a standardless delegation was justifiable in light of the “inherent necessities” of the situation.⁵⁵

The plurality did not adopt his viewpoint, nor have subsequent cases.⁵⁶ Nonetheless, the *Benzene* decision and the subsequent major questions line of cases indicate that courts will look for limits on the degree of discretion a statute grants to an agency and may assume that statutory ambiguity indicates that Congress did not expressly delegate authority for some issues. At a minimum, a statute must provide “intelligible standards” identifying the bounds of agency authority, therefore, preventing the Executive Branch from acquiring lawmaking powers.⁵⁷ Rather than relying on a doctrine that requires the Court to articulate constitutional limits to the Legislative Branch’s delegation authority, the Court presumed that Congress did not voluntarily delegate authority in the absence of an identifiable limitation.⁵⁸ For the *Benzene* Court, the intelligible standard was found in the need for scientific data to justify the agency’s action.⁵⁹ Without the limitation, the Labor Department’s authority would have been unbounded.

Prior to his appointment to the Supreme Court, then-professor Scalia

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.

Id.

55. *Id.* at 675–76.

56. *See generally* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2000) (declining to apply the non-delegation doctrine).

57. *Am. Petroleum Inst.*, 448 U.S. at 685–86 (Rehnquist J., concurring in judgment).

58. *Id.*

59. *Id.* at 656.

noted that the *Benzene* case was a turning point for the Court, characterizing the decision as “judicial activism in a new direction . . . reduc[ing], rather than augment[ing], health and safety regulatory impositions on the private sector.”⁶⁰

A 1986 law review article by then-First Circuit Judge Stephen Breyer examining the judicial deference and statutory interpretation in the aftermath of *Chevron* is credited as one of the early sources contributing to the development of the current major questions doctrine.⁶¹ Breyer, writing in the immediate aftermath of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,⁶² noted the tension between expecting federal judges to allow agencies to tackle complex problems, such as protecting public health and the environment on the one hand and the need for vigilant judicial oversight to ensure that administrators do not “exercise their broad powers [in a manner that] lead[s] to unwisely policies or unfair or oppressive behavior” on the other.⁶³ Breyer predicted that the doctrine calling for these conflicting judicial roles was “inherently unstable and likely to change.”⁶⁴ Attempting to reconcile the competing signals, Breyer concluded that “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”⁶⁵

Another key source of the doctrine is *MCI Telecommunications v. AT&T*,⁶⁶ in which the Court considered whether the Communications Act of 1934 authorized the Federal Communications Commission (FCC) to make tariff filing optional for all non-dominant long distance carriers.⁶⁷ The statute allowed the FCC to “modify any requirement” of the tariff requirements.⁶⁸ Petitioners argued that courts must defer to the agency’s choice among available dictionary definitions to interpret the term “modify.”⁶⁹

Similar to a major questions approach articulated by Breyer, the Court determined that “The tariff-filing requirement is . . . the heart of the

60. Antonin Scalia, *A Note on the Benzene Case*, AEI J. ON GOV'T AND SOC'Y, 26–27 (July/Aug. 1980), <http://object.cato.org/sites/cato.org/files/serials/files/regulation/1980/7/v4n4-5.pdf>.

61. Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); see *Chamber of Commerce v. NLRB*, 856 F. Supp. 2d 778, 794–95 (D.S.C. 2012).

62. 467 U.S. 837 (1984).

63. Breyer, *supra* note 61, at 363.

64. *Id.* at 365.

65. *Id.* at 370.

66. 512 U.S. 218 (1994).

67. *Id.* at 220.

68. *Id.* at 225.

69. *Id.* at 225–26.

common-carrier section of the Communications Act.”⁷⁰ The Court drew a distinction between the FCC’s authority to modify the form, content, and locations of required filings, as well as defer or waive filings in limited circumstances, versus making tariff filing optional.⁷¹ Because the latter would effectively introduce a new regulatory regime, the Court deemed the FCC’s actions to be much more than a mere modification and therefore declined to defer to the Commission’s interpretation. Instead, the Court concluded that the FCC violated its authority, reasoning that “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.”⁷²

The Court explicitly articulated the major questions doctrine in *Brown & Williamson*, citing both *MCI* and Breyer’s 1986 article.⁷³ In *Brown & Williamson*, the Court considered whether the Food, Drug, and Cosmetic Act (FDCA) granted the Food and Drug Administration (FDA) authority to regulate tobacco products.⁷⁴ After concluding that nicotine met the definition of a “drug” under the FDCA that cigarettes and smokeless tobacco were “combination products” that delivered nicotine to the body, the FDA promulgated regulations intended to reduce tobacco consumption among children and adolescents.⁷⁵ The agency argued that curbing tobacco use by minors could reduce the prevalence of addiction in future generations and the incidence of tobacco-related death and disease.⁷⁶ The Court ruled against the FDA, finding that Congress had clearly precluded the FDA from asserting jurisdiction to regulate tobacco products.⁷⁷

The Court determined that if tobacco products were “devices” under the FDCA, the FDCA would require the FDA to ban the products from the market—an outcome the Court believed would be contrary to congressional intent.⁷⁸ Historical context played an important role in the Court’s analysis.⁷⁹ Although Congress had referred to the negative health

70. *Id.* at 229.

71. *Id.* at 231–32.

72. *Id.* at 231.

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

74. *Id.* at 126.

75. *Id.* at 125.

76. *Id.*

77. *Id.* at 126.

78. *Id.* at 135–37.

79. “The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.” *Id.* at 132–33 (2000) (citing *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (“Ambiguity is a creature not of definitional possibilities but of statutory context.”)).

and addiction aspects of tobacco products on several occasions, the Court found that it stopped “well short of ordering a ban.”⁸⁰ Instead, Congress generally regulated the labeling and advertisement of tobacco products, expressly providing that “it is the policy of Congress that ‘commerce and the national economy may be . . . protected to the maximum extent consistent with’ consumers ‘be[ing] adequately informed about any adverse health effects.’”⁸¹ Moreover, Congress had enacted a separate law stating that “The 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.”⁸² In total, “Congress has directly addressed the problem of tobacco and health through legislation on six occasions since 1965.”⁸³ Based on this history, the Court concluded that a ban of tobacco products by the FDA would plainly contradict Congress’s intent that tobacco products remain on the market.⁸⁴

The *Brown & Williamson* Court described the major questions doctrine as follows:

[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.⁸⁵

The Court continued: “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.”⁸⁶ Finding “that the FDA has the authority to regulate tobacco products” would have required the Court to “not only adopt an extremely strained understanding of ‘safety’ as it is used throughout the Act—a concept central to the FDCA’s regulatory

80. *Id.* at 138.

81. *Id.* at 138–39.

82. *Id.* at 137 (citing 7 U.S.C. § 1311(a) (2012)).

83. *See id.* at 137–38; (citing Federal Cigarette Labeling and Advertising Act (FCLAA), Pub. L. 89-92, 79 Stat. 282; Public Health Cigarette Smoking Act of 1969, Pub. L. 91-222, §§ 2–10, 84 Stat. 87 (1970); Alcohol and Drug Abuse Amendments of 1983, Pub. L. 98-24, § 3, 97 Stat. 175 (1983); Comprehensive Smoking Education Act, Pub. L. 98-474, § 3, 98 Stat. 2200 (1984); Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. 99-252, § 3, 100 Stat. 30 (1986); Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act of 1992, Pub. L. 102-321, § 202, 106 Stat. 394. (1992)).

84. *Id.* at 139.

85. *Id.* at 159 (citing Breyer, *supra* note 61, at 370).

86. *Id.* at 160.

scheme—but also to ignore the plain implication of Congress’s subsequent tobacco-specific legislation.”⁸⁷

Determining the scope of delegation in such a circumstance requires courts to “interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole” and use “common sense as to the manner in which Congress is likely to delegate a policy decision of economic and political magnitude to an administrative agency.”⁸⁸

Lastly, the *Brown & Williamson* Court states that its effort to clarify the scope of authority Congress did and did not intend to delegate under the Act is by no means questioning the seriousness of the problem the FDA is trying to address.

[N]o matter how ‘important, conspicuous and controversial’ the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And in our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.⁸⁹

Breyer dissented, contradicting his 1986 article by arguing that tobacco regulation is such a major political question that it is appropriately addressed by one of the politically-accountable branches—whether it be Congress or the Executive Branch—rather than the courts.⁹⁰ Breyer reasoned that the public was well aware of such a controversial issue as tobacco use, and therefore the check on agency authority would come in the form of elections.⁹¹

While *Whitman v. American Trucking Ass’n*⁹² did not directly invoke the “major political and economic significance” language of *Brown & Williamson*, the holding articulated a similar standard under the *Chevron* doctrine: Congress does not “hide elephants in mouseholes.”⁹³ Evaluating whether the EPA could consider the costs of implementing National Ambient Air Quality Standards (NAAQS) under § 109(b)(1) of the Clean Air Act (CAA), the Court started with the section’s plain language, which “instructs the EPA to set primary ambient air quality standards ‘the attainment and maintenance of which . . . are requisite to protect the public

87. *Id.*

88. *Id.* at 133.

89. *Id.* at 161 (citations omitted).

90. *Id.* at 190–91 (Breyer, J. dissenting); see also Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 241–42 (2006) (discussing Breyer’s conflicting views).

91. *Brown & Williamson*, 529 U.S. at 189–91 (Breyer, J. dissenting).

92. 531 U.S. 462 (2001).

93. *Id.* at 468.

health' with 'an adequate margin of safety.'"⁹⁴ Relying on § 109 and the broader context of the NAAQS provisions, the Court noted the EPA's statutory mandate to "identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an 'adequate' margin of safety, and set the standard at that level" does not include consideration of "the costs of achieving such a standard [as] part of that initial calculation."⁹⁵ Furthermore, numerous other sections of the CAA contained express grants of authorization that permit the EPA to consider costs.⁹⁶ Citing *MCI*, the Court "[found] it 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."⁹⁷

Five years after *American Trucking*, the Court again applied the major questions doctrine in a case considering whether the Controlled Substances Act allows the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure.⁹⁸ In 1994, Oregon became the first state to legalize assisted suicide when it enacted the Oregon Death With Dignity Act (ODWDA).⁹⁹ The ODWDA exempts from civil or criminal liability state-licensed physicians who, in compliance with the specific safeguards, dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient. In 2001, the Attorney General issued an interpretive rule concluding 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 Controlled Substances Act (CSA).¹⁰⁰

The Court invalidated the interpretive rule, finding that the Attorney General's rulemaking power under the CSA did not include the power to declare illegitimate a medical standard for care and treatment of patients that was specifically authorized under state law.¹⁰¹ The Court noted the "earnest and profound debate" regarding physician-assisted suicide, "mak[ing] the oblique form of the claimed delegation all the more suspect."¹⁰²

94. *Id.* at 465 (quoting 42 U.S.C. § 7409(b)(1) (2012)).

95. *Id.* at 465.

96. *Id.* at 467.

97. *Id.* at 468 (citing *MCI Telecomms. v. AT&T*, 512 U.S. 218, 231 (1994)).

98. *Gonzales v. Oregon*, 546 U.S. 243, 248–49 (2006).

99. *Id.* at 249.

100. *Id.*

101. *Id.* at 268 (explaining, "the CSA does not give the Attorney General authority to issue the Interpretive Rule as a statement with the force of law"); *see also id.* at 275 (Scalia, J., dissenting).

102. *Id.* at 267–68 (citing *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)).

The Court reasoned that Congress would not rely on implicit delegation to grant the Attorney General such broad and unusual authority.¹⁰³ Relying on *Brown & Williamson*, the Court asserted its “confiden[ce] that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”¹⁰⁴ Similar to *Burwell*, the *Gonzales* court rejected the application of *Chevron* altogether.¹⁰⁵

The Court revived the major questions doctrine in its 2015 *UARG* decision, but it is an uneasy fit with the previous cases. First, the case turned on a long-standing EPA interpretation of the Clean Air Act—regulation of a pollutant from motor vehicles under Title II of the statute triggering the Title I Prevention of Significant Deterioration (PSD) pre-construction permitting requirements and the Title V operational permitting requirements.¹⁰⁶ This reading of the Act put the EPA in a quandary, as it developed regulations limiting greenhouse gas emissions from passenger vehicles. Under explicit statutory text, the PSD requirements apply to stationary sources that emit over 100 or 250 tons per year (tpy), depending on the class of pollutants.¹⁰⁷ Regulating stationary sources emitting 250 tpy of greenhouse gas emissions would subject tens of thousands of sources to Clean Air Act permitting requirements.¹⁰⁸ Relying on the doctrines of administrative necessity and avoiding absurd results, the EPA promulgated the “Tailoring Rule” to limit PSD and Title V permitting for greenhouse gas emissions to new sources emitting over 100,000 tpy and to sources undergoing major modifications that would result in an increase of at least 75,000 tpy of greenhouse gases.¹⁰⁹

Second, unlike previous major questions cases, the Court invoked the major questions doctrine under *Chevron* step two to reject the EPA’s

103. *Id.* at 267.

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

105. *Id.* at 268 (“Since the Interpretive Rule was not promulgated pursuant to the Attorney General’s authority, its interpretation of ‘legitimate medical purpose’ does not receive *Chevron* deference.”).

106. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2440 (2014) (noting that the EPA has “interpreted ‘air pollutant’ in the PSD permitting trigger” since 1978 and “has informally taken the same position with regard to the Title V permitting trigger” since 1993); see *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004, 17,020–21 (Apr. 2, 2010) (Timing Rule) (Part IV(c) of the regulation clarified that stationary sources of greenhouse gas emissions were subject to regulation once the Tailpipe Rule limiting greenhouse gas emissions from light duty motor vehicles went into effect); *Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25324 (May 7, 2010).

107. 42 U.S.C. § 7479(1) (2012).

108. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2436.

109. *Id.* at 2437.

reasoning.¹¹⁰ Relying on *Chevron* step one, the Court held that the EPA erred in interpreting the Act to automatically compel regulation of a pollutant under Title I permitting programs if the same pollutant is covered by Title II.¹¹¹ Because such a reading was not compelled, the Court concluded that the EPA's interpretation of the statute was unreasonable.¹¹² Congress could not have intended such a sweeping result as subjecting tens of thousands of sources of greenhouse gas emissions to air quality permitting requirements.¹¹³ The major question, therefore, came up in step two of the *Chevron* analysis.¹¹⁴ However, a significant factor leading to the scope of the Agency's reach was the pervasiveness of the class of pollutants at issue (a class of pollutants the Supreme Court previously determined met the Clean Air Act's definition of "pollutant") rather than a novel interpretation of the Act.¹¹⁵

While the Court has neglected to articulate the bounds of the major questions doctrine, *UARG* and *Burwell* reiterate that there exists a category of "extraordinary cases" that raise major economic and political questions that the courts, rather than the agencies, must answer. Furthermore, the Court remains in the midst of a broader debate regarding judicial deference and the proper application of *Chevron*.¹¹⁶

II. SEEKING PATTERNS IN THE APPLICATION OF THE MAJOR QUESTIONS DOCTRINE

Many cases reaching the Supreme Court raise issues of significant economic and political importance and, as Professor Sunstein points out, there is little distinction between those actions that are interstitial and those that are major.¹¹⁷ Pre-*Burwell* scholarship offers a range of theories to decipher the implications of the evolving major questions doctrine. One view suggests that the concern underlying the interstitial-versus-major distinction turns on Executive Branch incentives.¹¹⁸ According to this interpretation, agencies have an incentive to expand the scope of their jurisdiction, potentially reaching beyond the authority delegated by statute and therefore running afoul of the separation of powers by encroaching on

110. *Id.* at 2444.

111. *Id.* at 2442.

112. *Id.* at 2444.

113. *Id.*

114. *Id.* at 2442.

115. *See id.* at 2436.

116. *See, e.g.,* Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141 (2012).

117. Sunstein, *supra* note 90, at 232.

118. *Id.* at 233 ("Perhaps there is less reason to trust agencies when they are making large-scale judgments about statutory meaning.").

Congress's lawmaking powers.¹¹⁹ In those circumstances, relying on the courts rather than the self-interested agencies to resolve statutory ambiguity regarding major economic and political issues protects against agency aggrandizement.¹²⁰

UARG and *Burwell* highlight a subcategory of aggrandizement cases that are likely to invoke the major questions doctrine—agency interpretations directly conflicting with clear statutory language and justified as necessary to effectuate a statute's purpose. For example, the *UARG* Court reasoned:

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.”¹²¹

The principle of implied delegation may also explain the emergence of the major questions doctrine.¹²² *Chevron*'s two-step approach is founded on the recognition that Congress may intend to delegate authority to an agency but use ambiguous language to do so.¹²³ In these instances, agencies may implement reasonable interpretations of ambiguous statutory terms. In the absence of delegation, *Chevron* does not apply. This reasoning was a key aspect of Justice Breyer's influential 1986 article and the *Brown & Williamson* decision.¹²⁴ Under this doctrinal explanation, courts are skeptical of claims that Congress relied on implied delegation to address the category of major political and economic issues.

A more expansive interpretation suggests that the Court deploys the major questions approach as a modern version of the non-delegation doctrine.¹²⁵ While the Court has refused to apply the non-delegation doctrine to overturn a statute for over eighty years and has explicitly

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

120. Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 261 (2004); see Moncrieff, *supra* note 46, at 613–16.

121. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

122. Sunstein, *supra* note 90, 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.”).

123. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”).

124. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); Breyer, *supra* note 61; Sunstein, *supra* note 90, at 232.

125. Freeman & Vermeule, *supra* note 13, at 76; Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 52–53, 60–63 (2010) (arguing that the “elephants-in-mouseholes doctrine” serves “to limit delegations of authority”).

rejected the doctrine in recent cases, some scholars argue that canons of statutory construction have evolved to serve a similar purpose.¹²⁶

Professor Moncrieff offers a fourth interpretation: *MCI* and *Brown & Williamson* reflect the Court's "substantive intuition . . . that the agency's action was inappropriate" due to the agency action's ability to undermine an ongoing political debate about a major societal issue—regulation of a rapidly transitioning telecommunication sector in *MCI* and regulation of tobacco products in *Brown & Williamson*.¹²⁷ According to Moncrieff, the Court saw its role as "overseeing a complex game of political bargaining and preventing costly intermeddling between political institutions."¹²⁸

While the non-delegation and political bargaining theories may help explain the Court's rationale, these explanations offer little guidance for agency officials developing new regulations. Achieving the goal of limiting delegation under the major questions doctrine presents the same issues as those that caused the courts to reject the non-delegation doctrine. If, as Justice Scalia explained in *American Trucking*, "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,"¹²⁹ it makes little sense for the Court to seek to achieve the same goal via the major questions doctrine that is similarly lacking in an administrative test.¹³⁰ Similarly, the political bargaining rationale for restricting agency authority offers little to inform agency decisionmaking. Taken to its logical conclusion, this interpretation would argue that any contemporary political debate regarding a controversial societal issue could serve as evidence that a previous Congress did not intend to delegate authority to a federal agency.

In contrast, the agency aggrandizement and implied delegation rationales offer some general guideposts for federal agencies. Litigation outcomes may still be uncertain, but an agency can recognize that new interpretations of broad statutory language, or new interpretations that significantly expand an agency's authority, may trigger the major questions

126. See, e.g., Loshin & Nielson, *supra* note 125 at 57–63 ("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."); Moncrieff, *supra* note 46; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000); Sunstein, *Chevron Step Zero*, *supra* note 90.

127. Moncrieff, *supra* note 46, at 596–97.

128. *Id.* at 597. Specifically, Moncrieff takes issue with the Court's rejection of the major questions argument in *Massachusetts v. EPA* based on the finding that Congress had indeed spoken to the issue by adopting definition of "pollutant" in the Clean Air Act that was broad enough to encompass a new class of pollutants affecting public health and welfare such as greenhouse gas emissions. *Id.* See *infra* section III.B. for a discussion on the treatment of the major questions argument in *Massachusetts v. EPA*.

129. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001).

130. Loshin & Nielson, *supra* note 125, at 65–68.

analysis. Agency officials may then evaluate rulemaking options in that light.

Attempts to interpret when and how courts will rely upon the major questions line of cases become murky when considering the limited instances when the Court has invoked the doctrine, and the cases whose facts would seemingly present major questions but the courts decline to rely on the doctrine. The following subsections explore the outstanding questions regarding the major questions framework through Supreme Court cases where the facts suggest that the doctrine could have applied but did not, and reliance upon the doctrine by lower courts. These cases offer little explicit guidance regarding when the major questions doctrine may apply and whether an agency could expect to prevail if it does. While current major questions precedent does not provide explicit limiting principles for the doctrine, there are jurisprudential patterns that offer insight into the future application of the major questions doctrine.

A. Questions that Are Not Major: Supreme Court Decisions Failing to Invoke the Major Questions Doctrine

Taking the doctrine at face value, there is an expansive pool of past Supreme Court cases that arguably presented major questions of political and economic importance. This subsection focuses on three prominent examples: *Massachusetts v. EPA*,¹³¹ *EPA v. EME Homer City Generation, L.P.*,¹³² and *Michigan v. EPA*.¹³³

Massachusetts v. EPA offers a particularly notable example of the Court's refusal to apply the major questions because the EPA itself argued that the issue before the Court—whether the definition of “pollutant” under Title II of the Clean Air Act incorporated greenhouse gas emissions from motor vehicles—was a major question of political and economic significance. According to the EPA, Congress would have addressed that question specifically if it intended to grant the EPA the authority to limit emissions.¹³⁴ Based on the EPA's view of the statutory language and the major questions doctrine, the EPA was unable to regulate that class of emissions.¹³⁵ The Court rejected this reasoning outright.¹³⁶

Instead, Justice Stevens, writing for the majority, found that there was no

131. 549 U.S. 497, 512 (2007).

132. 134 S. Ct. 1584 (2014).

133. 135 S. Ct. 2699 (2015).

134. *Massachusetts v. EPA*, 549 U.S. at 512.

135. *Id.* (noting the EPA's reliance on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), to argue that Congress did not grant the agency regulatory authority over greenhouse gases).

136. *Id.* at 533–35.

statutory ambiguity in the Clean Air Act's definition of "pollutant" that the courts or the agency needed to resolve.¹³⁷ Justice Stevens distinguished *Brown & Williamson* on two grounds. First, the Clean Air Act would require regulation of the emissions, versus the outright ban of tobacco products contemplated in *Brown & Williamson*.¹³⁸ Second, the EPA did not "identif[y] any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles."¹³⁹

The Court concluded that "there is no reason, much less a compelling reason, to accept EPA's invitation to read ambiguity into a clear statute."¹⁴⁰ Therefore, the case did not present a major question regarding competing interpretations of the statute for the Court to resolve. Instead, the five-justice majority relied on *Chevron* step one to overrule the EPA and require that it determine whether greenhouse gas emissions from motor vehicles endanger public health and welfare.¹⁴¹

Because there was no statutory ambiguity, the Court presumably would have reached the same conclusion had it rejected *Chevron* and, like *Burwell*, jumped to a major questions analysis. As discussed further in Part IV, both inquiries begin by asking whether or not the language is ambiguous. The absence of ambiguity under either doctrine requires the agency to comply with the statute's explicit terms.

EPA v. EME Homer City Generation offers another stark contrast between the arguments for and against invoking the major questions doctrine. The case involved the EPA's effort to implement the "good neighbor" provision in Clean Air Act § 110 requiring upwind states to ensure that air pollution originating from sources within their borders do not "contribute significantly to" their downwind neighbors' inability to meet their respective air quality standards designated pursuant to the Clean Air Act's NAAQS.¹⁴² Rather than basing upwind states' obligations solely on the amount of pollution traveling across state borders in amounts contributing significantly to nonattainment in downwind states, the EPA's Transport Rule took a proportional reduction approach that considered the cost of achieving the reductions when assigning state obligations.¹⁴³

The D.C. Circuit rejected the EPA's approach, concluding that the statutory language lacked support for anything other than sole reliance on a

137. *Id.* at 528–29.

138. *Id.* at 530–31.

139. *Id.* at 531.

140. *Id.*

141. *Id.*

142. *See* *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593 (2014); *see also* 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2012).

143. *EME Homer City Generation*, 134 S. Ct. at 1593.

precise determination of each state's contribution to downwind pollution when setting the standard.¹⁴⁴ The court cited *Brown & Williamson* and *Gonzales* to support its conclusion that the EPA's Transport Rule went well beyond the "good neighbor" language included in § 110.¹⁴⁵ Noting the broader context of the NAAQS program, the appellate court argued:

The good neighbor provision is one of more than 20 SIP requirements in Section 110(a)(2). It seems inconceivable that Congress buried in Section 110(a)(2)(D)(i)(I)—the good neighbor provision—an open-ended authorization for EPA to effectively force every power plant in the upwind States to install every emissions control technology EPA deems "cost-effective." Such a reading would transform the narrow good neighbor provision into a "broad and unusual authority" that would overtake other core provisions of the Act. 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."¹⁴⁶

The Supreme Court reversed, relying on *Chevron* step two to conclude that the Transport Rule was a permissible exercise of the discretion provided to the EPA under the Clean Air Act.¹⁴⁷ Justice Scalia echoed the D.C. Circuit's major questions argument in his dissent, but the Court's 6-2 majority opinion, penned by Justice Ginsburg, was silent on the issue.¹⁴⁸

Michigan v. EPA, published only four days after *Burwell*, is more difficult to reconcile with the major questions doctrine.¹⁴⁹ The rule in question—the Utility Mercury and Air Toxics Standard (Utility MATS)—and the specific issue before the Court—the EPA's obligation to consider costs when the statute is ambiguous—present both economically and politically significant issues. Utility MATS is "among the most expensive rules that EPA has ever promulgated," with costs projected to reach almost \$10 billion,¹⁵⁰ and it was viewed as part of a suite of controversial environmental rules affecting coal-fired power plants that opponents characterized as a key element in the Obama Administration's "war on coal."¹⁵¹ Furthermore, the case

144. *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 28 (D.C. Cir. 2012).

145. *Id.*

146. *Id.* (citing *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) and quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

147. *EME Homer City Generation*, 134 S. Ct. at 1593.

148. *Id.* at 1617 (Scalia, J., dissenting).

149. *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

150. James E. McCarthy, CONG. RESEARCH SERV., EPA'S UTILITY MACT: WILL THE LIGHTS GO OUT? 1 (2012).

151. See, e.g., James Inhofe, *Mercury Rule at Center of the War on Coal*, CNN (June 19, 2012, 10:35 AM), <http://www.cnn.com/2012/06/19/opinion/inhofe-overturn-epa-mercury-standards/index.html>; George L. Seay, et al., *Stop the War on Coal: EPA's Regulatory Initiatives Impacting the Coal Industry*, KENTUCKY COAL ASSOC., at 10–11, <http://www.kentuckycoal.org/documents/whitepapers/Stop%20the%20War%20on%20Coal.pdf>.

involved a threshold question about when regulation was “appropriate and necessary,” and whether the language requires the EPA to consider costs when making the determination.¹⁵²

It would be difficult to argue that the threshold question, involving the regulation of toxic chemicals known to cause severe health effects and billions of dollars of investments, is interstitial rather than major. The question regarding consideration of cost under a provision of the Clean Air Act would, therefore, appear likely to invoke *Brown & Williamson, American Trucking*, and their progeny.¹⁵³ Indeed, the EPA argued that the reasoning in *American Trucking* should apply, although that case involved a separate section of the Clean Air Act—the regulation of criteria pollutants through the NAAQS program under § 109 rather than the regulation of hazardous air pollutants (HAPs) under § 112.¹⁵⁴ Nonetheless, Justice Scalia, writing for the majority, concluded that there is an unquestionable distinction between the requirement in § 109 to set NAAQS at levels “‘requisite to protect the public health’ with an ‘adequate margin of safety’” and the “‘appropriate and necessary’” language in § 112.¹⁵⁵ The former, according to Justice Scalia, establishes a “discrete criterion [that] does not encompass cost; it encompasses health and safety.”¹⁵⁶ The latter, in contrast, “is a far more comprehensive criterion” that, when “read fairly and in context, . . . plainly subsumes consideration of cost.”¹⁵⁷

The *Michigan v. EPA* majority relied exclusively on *Chevron* to determine the meaning of the term in question. Justice Scalia rejected the application of *American Trucking*, characterizing that case as establishing a “modest principle” despite the attention that the “elephants in mouse holes” language has received and its role in the development of the major questions line of reasoning.¹⁵⁸

Similar to *Massachusetts v. EPA*, it is not clear that the Court would have reached a different conclusion under a major questions inquiry. One possible explanation for the reliance on *Chevron* step one is that, in this context, the Clean Air Act explicitly grants that authority and specifies criteria the Agency must consider when determining whether to regulate toxic air emissions from the power sector.¹⁵⁹ This view suggests that

152. *Michigan v. EPA*, 135 S. Ct. at 2704.

153. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 467 (2001).

154. *Michigan v. EPA*, 135 S. Ct. at 2709.

155. *Id.*

156. *Id.*

157. *Id.* What was clear to Justice Scalia and the four Justices joining the majority, however, was not clear to the EPA prior to the 2015 decision. In fact, the EPA subsequently considered cost when developing the regulation. *Id.* at 2714 (Kagan, J., dissenting).

158. *Id.* at 2709 (majority opinion).

159. 42 U.S.C. § 7412(b)(2) (2012).

deciphering the specific meaning of the triggering language is a regular, rather than an extraordinary, question of statutory interpretation. Therefore, invoking the major questions reasoning in that context would expand the doctrine well beyond the category of “extraordinary” cases. This post hoc distinction between the traditional application of *Chevron* in *Michigan v. EPA* and reliance on the major questions doctrine in *Burwell* and *UARG* may explain the Court’s underlying rationale, but it provides little guidance for future agency action.

If there is any limiting principle to be gleaned by comparing the Court’s cases invoking the major questions doctrine with those declining to address the doctrine, it is the existence of ambiguity. Where the Court finds that the statutory language is clear, whether it be a broad statutory definition intended to incorporate new circumstances¹⁶⁰ or a statutory term that the Court concludes allows only one interpretation,¹⁶¹ the major questions doctrine will not apply.

Where ambiguity exists, however, there is scant indication when the Court may choose to invoke major questions, as in the cases outlined in this Subpart, *supra*, or apply *Chevron* step two, as in *EME Homer City Generation*. Nor is there an indication whether major questions will apply as an exception to *Chevron* altogether, as in *Burwell*, or whether it will apply as a tool of statutory construction under *Chevron* step two, as in *UARG*. Why does “significant contribution” invite multiple interpretations and signal implied delegation while a “natural reading” of the much broader term “appropriate” signals clear congressional intent? And, why should *Brown & Williamson* and its progeny not apply? By failing to address the latter question, especially in cases where a lower court invokes the doctrine or litigants present major questions arguments, the Court misses an opportunity to articulate its view regarding when the doctrine does and does not apply.

The absence of such clarity has negative impacts for both agencies and courts. Without clarity, agency officials lack clear guidance at the outset of a rulemaking process. At the same time, judges invoking an unbounded doctrine to decide a controversial issue—and cases raising major questions of political and economic consequence are by their nature controversial—are vulnerable to the accusation that they randomly pick doctrines to support their preferred outcome.

160. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007).

161. See, e.g., *Michigan v. EPA*, 135 S. Ct. at 2709.

B. Seeking the Line Between Major and Interstitial Issues in Lower Court Decisions

Lower courts have relied upon the doctrine to conclude that federal banking law did not preempt state law regarding the terms and conditions of foreclosure from applying to a national bank,¹⁶² to overturn an IRS rule that would have allowed the agency “for the first time to regulate hundreds of thousands of individuals in the multi-billion dollar tax-preparation industry,”¹⁶³ and to overturn a state bar association finding that attorneys were considered “financial institutions” under the Financial Services Modernization Act.¹⁶⁴ Each of these cases support the aggrandizement

162. *Fannie Mae v. Sundquist*, 311 P.3d 1004, 1011 (Utah 2013) (“Because such authority was so politically and economically significant, the court was confident that Congress could not have intended to delegate such a decision to an agency in a less-than-clear cryptic . . . fashion.”). The court noted that the delegation for the Comptroller to have the discretion to authorize one state to regulate the terms and conditions of a foreclosure in another state would intrude on the core matters of traditional state sovereignty. *Id.* at 1012.

It is beyond question that . . . the general welfare of society is involved in the security of the titles to real estate and the power to ensure that security inheres in the very nature of [state] government. . . . A delegation of authority to intrude on matters of such intensely local concern may not simply be inferred. Rather, a clear statement of intent to permit the laws of a foreign state to regulate the manner and mode of foreclosure in another state should be required.

Id. Similar to *Brown & Williamson* and *MCI*, “the matter of authorizing one state to regulate non-judicial sales for the foreclosure of real property in another state would be monumental—hardly the sort of interstitial administrative detail that Congress would likely leave for an agency.” *Id.*

163. *Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014). The IRS issued regulations requiring tax-return preparers to register with the IRS, pay annual fees, and complete continuing education courses in response to “problems in the tax-preparation industry.” *Id.* at 1015.

If we were to accept the IRS’s interpretation of Section 330, the IRS would be empowered for the first time to regulate hundreds of thousands of individuals in the multi-billion dollar tax-preparation industry. Yet nothing in the statute’s text or the legislative record contemplates that vast expansion of the IRS’s authority. This is the kind of case, therefore, where the *Brown & Williamson* principle carries significant force. Here, as in *Brown & Williamson*, we are confident that the enacting Congress did not intend to grow such a large elephant in such a small mousehole. In short, the *Brown & Williamson* principle strengthens the conclusion that Section 330 does not encompass tax-return preparers.

Id. at 1021 (citations omitted).

164. *N.Y. State Bar Ass’n v. FTC*, 276 F. Supp. 2d 110, 118 (D.D.C. 2003), *aff’d*, *ABA v. FTC*, 430 F.3d 457, 470–71 (D.C. Cir. 2005).

The *MCI Telecommunications*, *Brown & Williamson*, and [*American Trucking*] cases provide significant guidance in the assessment of whether Congress’s intent was clear with respect to whether attorneys are considered “financial institutions” under the GLBA and therefore subject to its privacy provisions. Each of these cases stands for the proposition 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.” . . . And in this case, the FTC’s interpretation would have

justification for the major questions approach.

A South Carolina District Court decision regarding a National Labor Relations Board (NLRB) regulation demonstrates that the category of “extraordinary cases” is less restrictive than the term would suggest, and makes a compelling argument for limiting the doctrine.¹⁶⁵ The question before the court was whether the NLRB exceeded its authority in violation of the Administrative Procedure Act by promulgating a final rule requiring “all employers subject to the National Labor Relations Act (NLRA) [to] post notices informing employees of their rights under the NLRA.”¹⁶⁶ The NLRB justified its decision on its general rulemaking authority under NLRA § 6 and the claim that there was a “gap” in the Act regarding notice posting.¹⁶⁷

Relying on the major questions doctrine, the court overturned the NLRB regulation based on the following factors: the failure of the NLRB to require notice posting over its seventy-five-year history, the NLRA’s silence on the issue of notice posting despite three “extensive revisions” since its original enactment, and the existence of nine other federal labor statutes requiring notice posting.¹⁶⁸ Those other notice-posting provisions were particularly relevant in the court’s reliance on the major questions doctrine. Citing *Brown & Williamson* and Breyer’s 1986 article, the district court concluded that “Since Congress has required notice posting in at least nine other federal labor statutes, notice posting is clearly a major question, not

that very effect. Relying on Regulation Y, which itself is merely a list of non-banking activities that a bank holding company or its subsidiaries may engage in, the FTC takes the simplistic viewpoint that if an attorney takes part in Regulation Y’s non-banking activities by providing real estate settlement, tax-planning or tax-preparation services, even if these services are offered solely in connection with the practice of law, then the attorney qualifies as a “financial institution” under the GLBA and is subject to its privacy provisions. Implicit in the FTC’s interpretation of the GLBA is its assumption that Congress somehow delegated to the FTC the authority to regulate the ethical conduct of attorneys practicing in certain areas of the law with respect to how these attorneys keep their clients’ information confidential and their dissemination of such information. The FTC comes to this conclusion even though there is no reference to attorneys in the GLBA, but solely because an ancillary regulation that enumerates certain non-banking activities that a bank holding company may engage in lists several activities that are also performed by attorneys engaged in the practice of law. This Court cannot agree that Congress would give the FTC jurisdiction to regulate the ethical conduct of attorneys through such a subtle grant of authority.

Id. at 127.

165. *Chamber of Commerce v. NLRB*, 856 F. Supp. 2d 778 (D.S.C. 2012).

166. *Id.* at 780.

167. *Id.* at 783–84.

168. *Id.* at 795. (“The Board went seventy-five years without promulgating a notice-posting rule, but it has now decided to flex its newly-discovered rulemaking muscles.”).

an interstitial matter.”¹⁶⁹

This case demonstrates the expansive nature of the major questions doctrine in the absence of clearly defined limiting principles and confirms Sunstein’s observation that there is little distinction between those issues that are considered “major” and those that are “interstitial.”¹⁷⁰ NLRB’s interpretation of workers’ rights more clearly falls within the major issues category, whereas the agency’s decision regarding how employers communicate those rights arguably falls on the interstitial side of the spectrum. Furthermore, the invocation of the major questions doctrine is unnecessary. If the court concluded that the posting decision were arbitrary or unreasonable, it could strike down the decision under the existing *Chevron* doctrine without invoking the less-defined major questions rationale.

Although the cases invoking the doctrine shine some light on its relevance and its deficiencies, lower court decisions explaining their rationale for rejecting major questions arguments offer more insight into the reach of the doctrine. For example, in *Verizon v. FCC*¹⁷¹, the D.C. Circuit considered a challenge to an FCC regulation requiring “disclosure, anti-blocking, and anti-discrimination requirements on broadband providers.”¹⁷² The court recognized that “regulation of broadband Internet providers certainly involves decisions of great ‘economic and political significance,’” but found “little reason given this history to think that Congress could not have delegated some of these decisions to the Commission.”¹⁷³ The court concluded that “FCC regulation of broadband providers is no elephant, and section 706(a) [of the Federal Communications Act] is no mousehole.”¹⁷⁴ Highlighting the importance of a statutory limit on an agency’s discretion over significant issues, the court stated:

Of course, we might well hesitate to conclude that Congress intended to grant the Commission substantive authority in section 706(a) if that authority would have no limiting principle. But we are satisfied that the scope of authority granted to the Commission by section 706(a) is not so boundless as to compel the conclusion that Congress could never have intended the provision to set forth anything other than a general statement of policy.¹⁷⁵

Employing similar reasoning, the D.C. District Court rejected a major

169. *Id.* at 796.

170. *See* Sunstein, *Chevron Step Zero*, *supra* note 90, at 233.

171. 740 F.3d 623 (D.C. Cir. 2014).

172. *Id.* at 628.

173. *Id.* at 639 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

174. *Id.*

175. *Id.* at 639–40 (internal citations omitted).

questions argument in a challenge to a Department of Education rule testing compliance with the Higher Education Act's gainful employment mandate "by examining the debt, earnings, and debt repayment of a program's former students."¹⁷⁶ While the court ultimately overturned the Department of Education rule under *Chevron* step two, it first addressed the plaintiff's major questions argument, stating:

The debt measures are a significant regulatory intervention, but they do not suggest that the Department has found "an elephant in a mousehole." . . . Neither the elephant nor the mousehole is present here. Although the Department's regulation is significant, it does not approach the scale of the elephantine interventions described above. Nor is the statutory language the Department invokes especially broad or obscure. Concerned about inadequate programs and unscrupulous institutions, the Department has gone looking for rats in ratholes—as the statute empowers it to do.¹⁷⁷

Both cases rejecting the application of the major questions doctrine acknowledge the economic and political importance of the agency actions under review, and both involve statutory interpretations that significantly expand the agency's reach. A significant difference between these examples and the cases relying on the doctrine to overturn agency actions is the courts' reading of the statutory language that supports agency action in conjunction with limiting principles in the statutory limits on the agency's discretion (thereby rejecting the "elephants in mouseholes" framing).

By declining to apply the major questions doctrine when the statutes in question include limiting principles to bound agency discretion, these two cases offer a promising limitation to the doctrine. Expanding upon this approach in subsequent cases could result in a bounded doctrine that provides a greater degree of predictability for federal regulators at the outset of the rulemaking process, as well as limit the appearance that the judiciary randomly relies upon the doctrine to achieve a court's desired result.

III. THE PRACTICAL IMPLICATIONS OF THE MAJOR QUESTIONS DOCTRINE

The long-term impacts of *Burwell* and the other *Brown & Williamson* progeny remain to be seen. The doctrine is in flux and it will take future cases to articulate firm limiting principles. The doctrinal uncertainty notwithstanding, federal agencies must proceed with their duties, often executing older statutes to address new circumstances.¹⁷⁸ This Part

176. *Ass'n of Private Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133, 137 (D.D.C. 2012) (citing 20 U.S.C. §§ 1001(b)(1), 1002(b)(1)(A)(i), (c)(1)(A) (2012)).

177. *Id.* at 147–48.

178. *See, e.g., Freeman and Spence, supra* note 5, at 63–79.

examines *Burwell's* practical implications for agency decisionmaking, focusing first on the evolving relationship between the major questions doctrine and *Chevron* deference, and then considers *Burwell's* potential impact on agency litigation strategies through the lens of the Clean Power Plan. The section concludes with a discussion of perhaps the most significant near-term impact: the potential chilling effect on agency action created by *Burwell* and the ongoing uncertainty regarding the major questions doctrine.

A. *Implications for the Future of Agency Deference*

There is ample reason to believe that *Burwell* is a product of a rare set of circumstances that led six Justices to accept a line of reasoning that they may otherwise reject. The specific statutory language is directly at odds with the broader statutory goals, yet implementing the plain language of the statute and denying the tax credits to those purchasing insurance on federal exchanges when state exchanges are unavailable would have broad social and economic implications. Furthermore, the IRS was interpreting a core provision of a healthcare statute. This combination of factors suggests that *Burwell* may live on primarily as it is distinguished from future cases rather than how it is applied. Alternatively, it may indicate an increased tendency for the Court to invoke its own authority to interpret statutes rather than defer to agencies, as suggested by initial reactions by Sunstein, Freeman, and Adler, or it may simply contribute to the ongoing uncertainty regarding the application of *Chevron* and the exercise of judicial discretion.¹⁷⁹

As the cases above demonstrate, applying the major questions inquiry in place of *Chevron* flips the traditional *Chevron* analysis. Both approaches begin by asking whether the statute is clear. If the answer is affirmative, agencies must implement the statute as written.¹⁸⁰ Under *Chevron*, if the language is ambiguous, agencies may make reasonable assumptions about the implicit delegation of authority.¹⁸¹ In contrast, the major questions doctrine interprets statutory ambiguity or silence on issues of major political or economic significance as evidence that Congress did not grant authority to the agency. In those instances, Congress must be explicit. Implicit delegation is insufficient.

At first blush, it may appear that there is a significant distinction between *Chevron* and the major questions doctrine. Although an agency may be more

179. Adler, *supra* note 4; Freeman, *supra* note 4; Sunstein, *supra* note 3; see also Jellum, *supra* note 116.

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

181. *Id.* at 843.

likely to prevail under *Chevron* step two,¹⁸² in practice there is little distance between an inquiry under major questions and the type of narrow *Chevron* step one analysis advocated by Justice Scalia. Scalia, who forcefully asserted the ongoing viability of *Chevron* in *City of Arlington v. FCC*,¹⁸³ believed that it is often possible to determine Congress's intent.¹⁸⁴ If the grant of authority is not explicit then he was likely to find that the authority does not exist.¹⁸⁵ Whether framed as a major question or not, this "hard look" approach to *Chevron* creates a limit on agency discretion. Therefore, the interpretation of the statutory terms and the extent to which a court considers context is as determinative to a case's outcome as the choice between major questions and *Chevron*. A court's holding that a statutory term has but one "natural meaning" precludes deference whether the inquiry occurs pursuant to *Chevron* or major questions.

From the agency perspective, the point at which a court invokes the major questions analysis may also be more determinative than the decision to invoke the doctrine or not. If a court employs major questions in *Chevron*'s step zero, as it did in *Burwell*, it treats the doctrine as a threshold matter regarding Congress's intent to delegate the question to the agencies in the first place.¹⁸⁶ It thus removes the court's willingness to entertain an agency's arguments regarding reasonable delegation. A decision rejecting the agency's interpretation at *Chevron* step zero may prohibit any alternative approach under the statutory provision in question.¹⁸⁷ On the other hand, an agency victory under step zero may preclude future agency actions that depart from the initial interpretation.

If, however, a court treats the major questions doctrine as a tool for statutory construction under *Chevron* step two, the agency may argue that its interpretation is reasonable under the implied delegation. The agency may

182. Compare *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1609 (2014) (upholding the Transport Rule under *Chevron* step two), with *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 28 (D.C. Cir. 2012), *rev'd and remanded*, 134 S. Ct. 1584, 188 L. Ed. 2d 775 (2014) (rejecting the rule under the major questions doctrine).

183. 133 S. Ct. at 1866, 1871 (2013).

184. See, e.g., *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 240 (2011) (finding that the Court's interpretation of the National Childhood Vaccine Injury Act was "the only interpretation supported by the text and structure of the [law]").

185. See, e.g., *Christensen v. Harris Cty.*, 529 U.S. 576, 590 n.* (2000) (Scalia, J., concurring in part and concurring in judgment) ("The implausibility of Congress's leaving a highly significant issue unaddressed (and thus 'delegating' its resolution to the administering agency) is assuredly one of the factors to be considered in determining whether there is ambiguity" (emphasis deleted)).

186. *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015).

187. See *Ass'n of Private Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133, 146 (D.D.C. 2012) (demonstrating that it is possible to survive a *Chevron* step zero analysis and still lose a case at step two).

also retain options even if a court rejects the reasonableness of its initial approach. In *UARG*, for example, Justice Scalia volunteered his view of a reasonable path forward that would survive the *Chevron* and major questions analysis—addressing CO₂ emissions from stationary sources already subject to the PSD permitting program rather than relying on the Tailoring Rule to reinterpret clear statutory language and expand the number of sources subject to the permitting requirements.¹⁸⁸ A major questions *Chevron* step zero analysis rather than a step two analysis presumably would have precluded this alternate approach.

B. Implications for Future Rulemakings: The Chilling Effect

While the uncertainty surrounding the scope and application of the major questions doctrine may not fundamentally alter agency litigation strategies, the jurisprudential ambiguity may have a much more significant impact in the early stages of the rulemaking process. Agency officials make fundamental calculations at the beginning of a rulemaking process regarding what the law requires and what the law allows. Where there are questions about the meaning of a statutory provision, certainty regarding the agency's authority to decipher the ambiguity may determine whether or not the rulemaking process moves forward. Under *Chevron*'s two-step analysis, statutory ambiguity provides the agency an opportunity to put forth a reasonable interpretation. If the agency believes that the courts will apply the major questions doctrine rather than *Chevron* step one and two, it may lack the confidence necessary to proceed.

The facts underlying *Massachusetts v. EPA* highlight the potential for the ambiguity surrounding the major questions doctrine to undermine an agency obligation. In that instance, the EPA relied on its view that regulating greenhouse gases under the Clean Air Act was a major question, and its presumption that the doctrine therefore prohibited agency action, to justify inaction on the suite of pollutants.¹⁸⁹ Third parties were able to initiate the *Massachusetts v. EPA* litigation based on the denial of a rulemaking petition.¹⁹⁰ Without a final agency action for the courts to interpret, agency inaction caused by doctrinal uncertainty may prevent a judicial interpretation at all.

Questions regarding the scope of an agency's statutory authority will continue to arise. History demonstrates that once enacted, major statutes tend to remain in place for decades without substantial revisions or

188. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2450–51 (2014).

189. *Massachusetts v. EPA*, 549 U.S. 497, 512 (2007).

190. *Id.* at 520 (challenging agency denial of petition for rulemaking).

updates.¹⁹¹ The major federal environmental statutes, for example, were largely enacted in the early-to-mid-1970s, and have seen few updates since the original enactment. Congress has enacted two major amendments to the Clean Water Act since enacting the modern version in 1972, once in 1977 and again in 1987.¹⁹² Similarly, the Clean Air Act has seen two major revisions since 1970, with the most recent update in 1990.¹⁹³ For perspective, at the time of the more recent amendments to each of these statutes engineers had not combined hydraulic fracturing technology with horizontal drilling for shale gas extraction,¹⁹⁴ coal was expected to remain the dominant resource for electricity generation for decades to come,¹⁹⁵ nanotechnology was still in the early research and development phases, non-hydro renewable energy technologies were still in the early development phases,¹⁹⁶ and the scientific understanding of the potential impacts of climate change was still developing and thus greenhouse gas emissions were not explicitly addressed in any environmental statutes.¹⁹⁷ The EPA currently applies these aging statutes to address emerging issues. The uncertain breadth of the major questions doctrine has the potential to frustrate this effort. This, in turn, may frustrate congressional intent if the codified language were intentionally broad to address a set of factors that Congress generally anticipated but for which specific facts (e.g., the trajectory of technological developments or reliable data regarding a pollutant's public health impacts) were not available at the time of

191. See, e.g., Gary E. Marchant et al., *What Does the History of Technology Regulation Teach Us About Nano Oversight?* 37 J.L. MED. & ETHICS 724, 726 (2009) ("For most issues, there is little chance of laws being updated except during infrequent policy 'windows' in which circumstances align to bring the issue to a brief moment of congressional attention. Once Congress has acted, it may be years or even decades before the issue is revisited by Congress."); see also David Rejeski, *The Next Small Thing*, 21 THE ENVTL. FORUM 42, 45 (2004) (asserting that the pace of "rapid improvements in products, processes, and organization" exceed the ability of existing regulatory frameworks to keep pace).

192. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972); Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977); Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987).

193. EPA, CLEAN AIR ACT OVERVIEW: 1990 CLEAN AIR ACT AMENDMENT SUMMARY (Oct. 27, 2015), <https://www.epa.gov/clean-air-act-overview/1990-clean-air-act-amendment-summary>.

194. See, e.g., Terry W. Roberson, *The State of Texas Versus the EPA Regulation of Hydraulic Fracturing*, THE HOUSTON LAWYER, March/April 2011, at 24, 25.

195. U.S. Energy Information Administration, *Today in Energy: Competition Among Fuels for Power Generation Driven by Changes in Fuel Prices* (Jul. 13, 2012), <http://www.eia.gov/todayinenergy/detail.cfm?id=7090> (noting the "large build-out of new coal capacity in the 1970s and 1980s").

196. See, e.g., U.S. DEPT. OF ENERGY, ENERGY EFFICIENCY AND RENEWABLE ENERGY, THE HISTORY OF SOLAR, https://www1.eere.energy.gov/solar/pdfs/solar_timeline.pdf.

197. *Massachusetts v. EPA*, 549 U.S. 497, 512 (2007).

enactment.

Regulators already face a number of disincentives to use the existing legal authority to address a technological advancement or to apply the authority in a new manner.¹⁹⁸ The theory of regulatory ossification suggests that the combination of the judicial hard look doctrine and increasing obligations placed on agencies by Congress have caused the rulemaking process to become “increasingly rigid and burdensome.”¹⁹⁹

While some scholars question whether there has in fact been ossification and, if so, whether the hard look judicial review is to blame,²⁰⁰ examples abound where agencies neglect to fulfill statutory obligations.²⁰¹ Buzbee, for example, explores the challenge of regulatory inertia, suggesting “policymakers . . . often have an incentive to maintain the status quo.”²⁰² Buzbee’s analysis focuses specifically on the EPA’s history with Clean Air Act regulations, and finds that it often takes pressure from states or third parties to force the regulators to update performance standards for stationary sources.²⁰³ Doctrinal uncertainty regarding when and how courts will apply the major questions framework has the potential to exacerbate this governance challenge.

The doctrine’s potential chilling effect comes at a time of rapid technological change that is already presenting governance challenges. The “pacing problem” presented by technological advances occurring faster than a system of governance can respond is an ongoing challenge for lawmakers, regulators, and regulated industries alike—potentially frustrating achievement of statutory goals and creating barriers to technology development or deployment.²⁰⁴ For example,

198. Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1703 (2008).

199. Blais & Wagner, *supra* note 198, at 1704 (finding that “the existing institutional structure governing administrative rulemaking is especially ill-suited for revisions of established science- or technology-based environmental and public health standards”); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1411, 1419 (1992).

200. See Blais & Wagner, *supra* note 198, at 1705; William W. Buzbee, *Clean Air Act Dynamism and Disappointments: Lessons for Climate Legislation to Prompt Innovation and Discourage Inertia*, 32 WASH. U. J.L. & POL’Y 33, 39–41 (2010); William S. Jordan, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 395 (2000); Richard J. Pierce, Jr., *Seven Ways to Deossify Rulemaking*, 47 ADMIN. L. REV. 59, 60 (1995); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1417–18 (2007).

201. Buzbee, *supra* note 200, at 41–42.

202. *Id.* at 39.

203. *Id.* at 49.

204. See Braden R. Allenby, *Governance & Technology Systems: The Challenge of Emerging Technologies*, in THE GROWING GAP BETWEEN EMERGING TECHNOLOGIES AND LEGAL-

nanotechnology—the science of manipulating materials on an atomic or molecular scale²⁰⁵—and genetic engineering—the group of applied techniques of genetics and biotechnology to alter an organism’s genetic material²⁰⁶—are both broad terms encompassing a number of established and emerging technologies. Each presents instructive examples of the conundrum facing lawmakers. According to the U.S. Government’s National Nanotechnology Initiative, nanotechnology may “improve, even revolutionize, many technology and industry sectors: information technology, energy, environmental science, medicine, homeland security, food safety, and transportation, among many others.”²⁰⁷ Genetic engineering is already leading to dramatic advances in medical care and food production.²⁰⁸ While both technologies offer undeniable benefits, they also raise concerns about potential new negative health, safety, and environmental impacts.²⁰⁹ Recent studies, for example, suggest that nanotechnology products released into the air may cause similar health impacts as carbon monoxide and particulate matter,²¹⁰ and agricultural applications of genetic engineering raise the risk of increased pesticide use in conjunction with pesticide-resistant seeds, potential negative impacts on native plant populations, and increases in allergens.²¹¹

A range of experts studying these governance challenges call for a nimble regulator to assess the risks on an ongoing basis and address those risks through an interactive process as more information becomes available. For example, Mandel describes a “proactive, flexible form of governance – more of a governance process rather than intractable regulatory rules.”²¹² Key components of this flexible governance process include data

ETHICAL OVERSIGHT: THE PACING PROBLEM, 3–7 (Gary E. Marchant et al. eds., 2011) (discussing the “pacing problem” in technology oversight).

205. *Nanotechnology*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/nanotechnology> (last visited Apr. 25, 2016).

206. *Genetic Engineering*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/geneticengineering> (last visited Apr. 25, 2016).

207. NAT’L NANOTECHNOLOGY INITIATIVE, BENEFITS AND APPLICATIONS, 1, <http://www.nano.gov/you/nanotechnology+benefits>.

208. See, e.g., Gregory N. Mandel, *Emerging Technology Governance*, in INNOVATIVE GOVERNANCE MODELS FOR EMERGING TECHNOLOGIES, 44, 44 (Gary E. Marchant et al. eds., 2013).

209. Gary E. Marchant et al., *Risk Management Principles for Nanotechnology*, 2 NANOETHICS 43, 47 (2008).

210. Bashir M. Mohamed et al., *Citrullination of Proteins: A Common Post-Translational Modification Pathway Induced by Different Nanoparticles In Vitro and In Vivo*, 7 NANOMEDICINE 1181, 1181 (2012).

211. See, e.g., Charles N. Benbrook, *Impacts of Genetically Engineered Crops on Pesticide Use in the U.S.—The First Sixteen Years*, 24 ENVTL. SCIENCES EUROPE 1 (Sept. 2012), <http://link.springer.com/content/pdf/10.1186%2F2190-4715-24-24.pdf>.

212. See Mandel, *supra* note 208, at 45.

gathering,²¹³ industry stewardship, governance adaptability, agency coordination, and stakeholder engagement.²¹⁴ The ideal role for formal regulation, according to Mandel's scheme, seeks to fill regulatory gaps as technologies mature and more information becomes available.²¹⁵

Lawmakers may seek to address these challenges by incorporating broad terms that allow administrative flexibility. But broad terms also invite ambiguity. Relying on flexible statutory language to address an emerging issue, such as limiting CO₂ emissions from existing power plants in a cost-effective manner, may raise significant economic and political issues and thus invoke the major questions framework. Without doctrinal clarity, an agency is less able to assess its statutory authority or the political risks associated with moving forward with regulation or not.

IV. DOCTRINAL CLARITY VIA THE CLEAN POWER PLAN LITIGATION

The litigation over the EPA's Clean Power Plan offers an opportunity to clarify the reach of the major questions doctrine. Although *Massachusetts v. EPA* addresses the threshold question regarding the EPA's authority to regulate greenhouse gas emissions, the EPA's effort to regulate CO₂ emissions from existing power plants unquestionably involves issues of major political and economic significance. First, climate policy is among the most politically charged issues of the past decade.²¹⁶ Second, regulating CO₂ emissions from the electric power sector could contribute to significant increases in electricity rates in states with high CO₂ emission levels. Existing power plants vastly outnumber new or modified power plants in the United States, and retrofitting these existing facilities to comply with new emission standards is generally more expensive than addressing emission limits during the initial construction phase. In the greenhouse gas context in particular, there are limited options for achieving significant emission reductions at existing facilities. Installing more efficient boilers or turbines may result in a five to ten percent efficiency improvement,

213. *Id.* at 52 ("One of the greatest challenges facing emerging technology governance is scientific uncertainty concerning the potential human health and environmental impact of a technology.").

214. *Id.* at 52–61.

215. *Id.* at 55.

216. See, e.g., *Trump Finds Common Ground With Cruz in Opposition to Carbon Tax*, BLOOMBERG (June 7, 2016), <http://www.bloomberg.com/politics/articles/2016-03-30/trump-finds-common-ground-with-cruz-in-opposition-to-carbon-tax>; Sabrina Siddiqui, *Marco Rubio Attacks EPA and Pledges to Reverse Key Obama Climate Moves*, THE GUARDIAN (Sept. 2, 2015), <http://www.theguardian.com/us-news/2015/sep/02/marco-rubio-energy-policy-epa-climate-change>; Timothy Cama, *States Seek Delay of EPA Climate Change Rule*, THE HILL (Aug. 5, 2015), <http://thehill.com/policy/energy-environment/250360-states-seek-delay-of-climate-rule>.

although the actual level of achievable reductions is highly source-specific.²¹⁷ Additional source-specific emission reductions would require installing technologies to capture CO₂ emissions—a technology that is widely considered too costly to apply to existing facilities. In addition, any major facility upgrade would likely trigger New Source Review requirements, potentially resulting in requirements to comply with the most recent emission limits for other regulated pollutants.²¹⁸

A. Section 111(d) of the Clean Air Act

Assessing the legality of the EPA's Clean Power Plan first requires examining whether Congress intended to create a flexible statutory scheme that both authorized the agency to take action and delegated authority to the agency's expert opinion regarding the best approach.²¹⁹ Congress designed Title I of the Clean Air Act to incorporate new information regarding technology and risk over time and instructed the EPA to react to that information when necessary to protect public health. The NAAQS section requires the EPA to review air quality standards for "criteria pollutants" at least every five years to ensure that it adequately protects public health and welfare and specifies the process for incorporating additional pollutants into the NAAQS program.²²⁰ The HAP section also requires periodic reviews and indicates how the EPA may list additional hazardous pollutants.²²¹

Similarly, § 111 of the Clean Air Act instructs the EPA to define categories of stationary sources of air pollutants that "cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," develop performance standards for new sources or sources emitting those pollutants, and review those standards at least every eight years.²²² It also applies to existing stationary sources when three criteria are met. The first two criteria are straightforward: § 111(d) applies if (1) the pollutant is regulated under § 111 and (2) the existing source would be subject to that regulation if it were a new or modified source.²²³ CO₂ emissions from existing fossil fuel-fired power plants meet

217. David Hasler, Sargent & Lundy, LLC, Coal-Fired Power Plant Heat Rate Reductions, Final Report, at 1 (Jan. 22, 2009), <https://www.epa.gov/sites/production/files/2015-08/documents/coalfired.pdf>.

218. Sarah K. Adair et al., *New Source Review and Coal Plant Efficiency Gains: How New and Forthcoming Air Regulations Affect Outcomes*, 70 ENERGY POL'Y 183 (2014).

219. Carlson & Herzog, *supra* note 13.

220. See 42 U.S.C. §§ 7408–7409 (2012).

221. *Id.* § 7412.

222. *Id.* § 7411(b)(1)(A)–(B).

223. *Id.* § 7411(d)(1).

both criteria.²²⁴

The third criterion is in dispute. During the 1990 Clean Air Act amendments, the House of Representatives and the Senate adopted alternate language defining the circumstances when § 111(d) applies. Under the Senate version, § 111(d) would apply if a *pollutant* was not also regulated as a criteria pollutant or an HAP, while the House version of § 111(d) would only apply if the *source category* covered by the regulation was not also regulated under §§ 108–110 or 112.²²⁵ The pollutant CO₂ is not regulated under §§ 108–110, but coal-fired power plants are included as a source category under § 112.²²⁶ The EPA points to the “gap filling” purpose of § 111(d), the ambiguity in the House amendment, and the clarity in the Senate amendment to conclude that Congress intended the section to apply to pollutants that are neither regulated as criteria pollutants nor hazardous pollutants.²²⁷

Section 111(d) embraces the cooperative federalism structure that is common in environmental statutes. Under the law, the EPA develops guidance for the states, approves or denies the state plans, and may issue federal performance standards in the event that a state plan is deemed insufficient.²²⁸ The states, however, have the primary responsibility for developing the performance standards.²²⁹ Unlike the requirements for new and modified sources, § 111(d) does not require a uniform national standard, thereby allowing states to develop tailored plans for the existing sources within their borders.²³⁰

The performance standards must “[reflect] the degree of emission limitation achievable through the application of the best system of emission

224. Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015).

225. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 108(g), 302(a), 104 Stat. 2467, 2574 (1990).

226. The EPA promulgated the Mercury and Air Toxics Rule (MATS) in 2012, limiting hazardous air pollutant (HAP) emissions from coal-fired power plants. *See* National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-institutional Steam Generating Units, 77 Fed. Reg. 9304, 9306 (Feb. 16, 2012) (to be codified at 40 C.F.R. pt. 60). The Supreme Court reversed the rule in part, but kept the rule in place on remand. *See* Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015).

227. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

228. *See* 40 C.F.R. § 60.22 (2015).

229. *See* 42 U.S.C. § 7411(d)(1) (2012).

230. *See id.* § 7411(b), (d).

reduction”²³¹ When identifying the best system, the EPA must consider “the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements”²³² Furthermore, the EPA administrator may only choose among systems that have been “adequately demonstrated.”²³³

There is little regulatory precedent applying § 111(d) and no direct judicial precedent interpreting the broad statutory language in the section, thereby requiring the EPA to interpret the statute as it seeks to limit CO₂ emissions from the existing fleet of fossil fuel-fired power plants.²³⁴ The EPA has previously interpreted § 111(d) to allow emissions averaging or trading among covered sources rather than requiring action at each covered source, including emission standards for municipal waste conductors and the 2005 Clean Air Mercury Rule (CAMR).²³⁵ Petitioners challenging CAMR, issued pursuant to § 111(b) and § 111(d), argued that the statute requires continuous emissions reductions at every source subject to the rule.²³⁶ The court overturned the rule for other reasons and did not address the range of options available to the EPA under § 111(d).²³⁷

B. The Clean Power Plan

The EPA promulgated the Clean Power Plan in October 2015 to require the fleet of existing fossil fuel-fired power plants to reduce CO₂ emissions.²³⁸ The rule defines the “best system of emission reductions” as a suite of measures, including increased efficiency at coal-fired power plants, increased utilization of natural gas plants, and expanded reliance on renewable energy resources.²³⁹ Together, the EPA projects that these

231. *Id.* § 7411(a)(1).

232. *Id.*

233. *Id.*

234. See Jonas Monast et al., *Regulating Greenhouse Gas Emissions from Existing Sources: Section 111(d) and State Equivalency*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10,206, 10,215 (2012).

235. See Emission Guidelines for Municipal Waste Combustor Metals, Acid Gases, Organics, and Nitrogen Oxides, 40 C.F.R. § 60.33b(d) (2015); Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005).

236. Final Opening Brief of Environmental Petitioners at 34, *New Jersey v. EPA*, No. 05-1097, 2007 WL 2155491 (C.A.D.C. July 23, 2007). Section 111(b) applies to new sources and major modifications, while § 111(d) applies to existing sources. See 42 U.S.C. § 7411(b), (d).

237. *New Jersey v. EPA*, 517 F.3d 574, 577–78 (D.C. Cir. 2008).

238. 80 Fed. Reg. 64,661 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

239. EPA, FACT SHEET: COMPONENTS OF THE CLEAN POWER PLAN: SETTING STATE GOALS TO CUT CARBON POLLUTION EPA, (last updated Aug. 13, 2015), <http://www2.epa.gov/cleanpowerplan/fact-sheet-components-clean-power-plan>. The official categories are fossil fuel-fired electric steam generating units (primarily coal-fired units) and stationary

measures would result in a 32% reduction in power sector CO₂ emissions below 2005 levels.²⁴⁰ The rule identifies individual state goals based on the number and size of covered power plants within each state.²⁴¹

The rule allows the states to choose among a number of options when drafting plans to meet their respective CO₂ emissions targets. States may choose between a rate-based approach (based on units' heat rate efficiency or tons of CO₂ emitted per megawatt hour of generation) or a mass-based approach (based on tons of CO₂).²⁴² State plans may also allow regulated power plants to engage in emission trading, increase demand-side energy efficiency policies and programs, and expand use of biomass resource, combined heat and power, and waste heat to reduce generation at fossil fuel-fired units subject to the rule.²⁴³ States may also adopt a model rule developed by the EPA or opt for a federal plan implemented by the EPA.²⁴⁴

The EPA's definition of "best system of emission reduction" departs from the historical application of performance standards under § 111 that focus on actions that can take place at a covered unit. While there is general agreement that the states are unrestricted in their ability to look across the electricity sector for actions that may reduce emissions from the covered entities, there is debate over whether the EPA can set the state emissions targets based on cost-effective strategies occurring beyond the covered units, resulting in emission reductions at the unit (referred to as "outside the fenceline").²⁴⁵ Challenges to the rule argue that the EPA may only consider emission reduction alternatives that occur at the covered

combustion turbines (primarily natural gas combined cycle generating units). EPA, FACT SHEET: OVERVIEW OF THE CLEAN POWER PLAN (last updated Aug. 6, 2015), <http://www2.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan>.; EPA, Electric Utility Generating Units 9 (signed Aug. 3, 2015), <http://www2.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule.pdf>.

240. EPA, FACT SHEET: OVERVIEW OF THE CLEAN POWER PLAN, *supra* note 239.

241. See 80 Fed. Reg. 64,661, 64,707 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

242. See *id.* at 64,673.

243. *Id.*

244. *Id.* at 64,666.

245. Compare Megan Ceronsky & Tomás Carbonell, § 111(d) of the Clean Air Act: The Legal Foundation for Strong, Flexible & Cost-Effective Carbon Pollution Standards for Existing Power Plants, Env'tl. Def. Fund (revised 2014), <http://edf.org/content/111d-clean-air-act>, and Daniel A. Lashof et al., Closing the Power Plant Carbon Pollution Loophole: Smart Ways the Clean Air Act Can Clean Up America's Biggest Climate Polluters, Nat. Res. Def. Council, 2-3 (2013), <http://www.nrdc.org/air/pollution-standards/files/pollution-standards-report.pdf>, with N.C. Dept. of Env't & Nat. Res., N.C. § 111(d) Principles, 10-11 (2014), https://ncdenr.s3.amazonaws.com/s3fs-public/Air%20Quality/rules/EGUs/NC_111d_Principles.pdf, and Hunton & Williams, ESTABLISHMENT OF STANDARDS OF PERFORMANCE FOR CARBON DIOXIDE EMISSIONS FROM EXISTING ELECTRIC UTILITY GENERATING UNITS Under CLEAN AIR ACT § 111(d) (Apr. 2013), <http://www.publicpower.org/files/PDFspdfs/nsps111PDFs/NSPS111%28d%29Analysis29analysis29Analysis.pdf>.

facilities (i.e., inside the fence-line) when determining the “best system of emission reductions.”²⁴⁶

C. Addressing Major Questions Arguments in Clean Power Plan Litigation

Petitioners challenging the Clean Power Plan raise a number of statutory and constitutional arguments, including reliance on *Burwell* to argue that *Chevron* deference should not apply and *UARG* to argue that even if *Chevron* does apply, the Agency should lose during a major questions analysis in *Chevron* step two.²⁴⁷ The remainder of this Paper focuses on two distinct aspects of § 111 that potentially trigger a major questions analysis: (1) whether the EPA has the authority to regulate CO₂ emissions from the power sector under § 111(d) due to the discrepancy in the House and Senate versions of § 111(d) in the 1990 Clean Air Act Amendments and (2) whether the EPA’s interpretation of the “best system of emission reductions,” and in particular the beyond-the-fenceline approaches, exceeds the authority delegated by Congress.²⁴⁸ The following subsections explore each argument and identify opportunities for the D.C. Circuit or the Supreme Court to provide clarity regarding major questions should either court determine that the doctrine applies.

1. The EPA’s Authority to Regulate Power Sector CO₂ Emissions under §111(d)

The discrepancy between the House and Senate versions of the 1990 amendments to § 111(d) is an important threshold issue. If, as challengers to the Clean Power Plan assert, the two provisions are consistent with one another, the language of the Clean Air Act forecloses the EPA from implementing the rule altogether.²⁴⁹ Alternatively, courts could view the EPA’s resolution of the conflicting language as significantly expanding the agency’s regulatory authority over the power sector, thus triggering the *Burwell/UARG* line of major questions analysis. Should the court apply the major questions doctrine rather than a pre-*UARG Chevron* step two analysis,

246. Opening Brief of Petitioners on Core Legal Issues at 50–56, *W.Va. v. United States EPA*, Case #15-1363 (D.C. Cir. Feb. 19, 2016) [hereinafter Petitioners’ Opening Brief].

247. *Id.*, 32–35; see Respondent EPA’s Initial Brief at 41, *W.Va. v. United States EPA*, Case #15-1363 (D.C. Cir. Mar. 21, 2016) [hereinafter EPA’s Initial Brief] (arguing that the Clean Air Act “clearly delegates to EPA authority to fill gaps in the Act concerning the appropriate amount of pollution reduction that should be obtained from long-regulated major pollution sources” and pointing out that “*Chevron* itself involved major sources and EPA’s construction of the Act.”), https://www.edf.org/sites/default/files/content/epa_merits_brief_-_march_28_-_2016.pdf. This article was completed before oral arguments in the case.

248. Petitioners’ Opening Brief, *supra* note 246, at 50–51, 68.

249. EPA’s Initial Brief, *supra* note 247.

there is an opportunity to expand upon *Burwell's* contextual approach to provide greater clarity for future cases.

Reading Title I of the Clean Air Act in conjunction with the holding in *Massachusetts v. EPA*, there is a strong argument that the EPA may proceed under § 111(d) due to a regulatory gap that would otherwise exist and that Congress intended to avoid.²⁵⁰ The 1990 Clean Air Act amendments—the same amendments that resulted in conflicting language in § 111(d)—define 177 HAPs, identify a rigid technology standard for limiting those emissions from covered sources, and specify a process by which the EPA must decide whether to include the power sector among § 112 covered sources.²⁵¹ CO₂ emissions are not included in the list of HAPs and do not meet the criteria by which the EPA may add a pollutant to the list.²⁵²

Nor is CO₂ included in the list of six “criteria pollutants” covered by the NAAQS program.²⁵³ Furthermore, NAAQS most directly applies to pollutants with regional and local impacts. CO₂ and other greenhouse gases are globally-mixing pollutants, meaning there is nothing an individual state can do to ensure that it maintains attainment with a CO₂ NAAQS or come into attainment if the standard is set below the current global concentration.²⁵⁴ These complications do not foreclose greenhouse gas regulation under the NAAQS provisions,²⁵⁵ but they do undermine the argument that Congress intended for NAAQS to serve as the *primary* option for regulating power sector emissions of a class of pollutants covered by the Clean Air Act.²⁵⁶

250. 80 Fed. Reg. 64,661, 64,715 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

251. 42 U.S.C. § 7412 (2012).

252. *Id.*

253. 40 C.F.R. 50 (2015).

254. 42 U.S.C. § 7411(d)(1).

255. See, e.g., Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799 (2008); Ari R. Lieberman, *Turning Lemons into Lemonade: Utilizing the NAAQS Provisions of the Clean Air Act to Comprehensively Address Climate Change*, 21 BUFF. ENVTL. L.J. 1 (2013); Timothy J. Mullins & M. Rhead Enion, *(If) Things Fall Apart: Searching for Optimal Regulatory Solutions to Combating Climate Change Under Title I of the Existing CAA if Congressional Action Fails*, 40 ENVTL. L. REP. 10864 (2010); Rich Raiders, *How EPA Could Implement a Greenhouse Gas NAAQS*, 22 FORDHAM ENVTL. L. REV. 233 (2011); Nathan Richardson et al., *Greenhouse Gas Regulation Under the Clean Air Act: Structure, Effects, and Implications of a Knowable Pathway*, 41 ENVTL. L. REP. 10098 (2011).

256. See *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that greenhouse gas emissions are pollutants as defined by the Clean Air Act). Greenhouse gases do not meet the Clean Air Act's definition of HAPs. If the courts removed section 111(d) as an option, the only remaining statutory mechanisms for implementing meaningful greenhouse gas emission limits for stationary sources under the Clean Air Act would be NAAQS or section 115—a provision that has never been utilized. See also Michael Burger et al., *Legal Pathways to Reducing Greenhouse Gas Emissions Under Section 115 of the Clean Air Act* (2016),

If the EPA cannot regulate CO₂ emissions from sources also regulated under § 112, then there is a gap in the regulatory system—a gap that a natural reading of the language contained in § 111(d) along with the broader context of the goals and provisions of Title I suggests that Congress intended to close. The expansive method of contextual analysis relied upon by the *Burwell* and *Brown & Williamson* decisions, therefore, supports a reading of the statute that allows the EPA to regulate CO₂ emissions from existing sources while also regulating the sector under § 112.²⁵⁷

2. Interpreting “Best System of Emission Reductions”

The second major questions challenge focuses on the definition of the statutory term “best system of emission reduction[s].”²⁵⁸ If a reviewing court views the EPA’s consideration of outside-the-fenceline emission reduction options as regulating the electricity sector generally rather than focusing solely on the sources with direct compliance obligations under § 111(d), it may be particularly likely to invoke the major questions doctrine.

The EPA reasonably argues that this statutory scheme expressly delegates authority to tailor the application of the statutory scheme to achieve the most cost effective approach based on the specific source category and pollutant.²⁵⁹ This reading of the statute suggests that Congress identified the factors the EPA must consider in an express delegation of authority, but intentionally left the end result open. These limiting principles thus provide a pathway for the court to avoid a major questions inquiry and potentially prevail under *Chevron* step one.²⁶⁰

It is likely, however, that a court would find that the phrase “best system” is ambiguous, thereby requiring a more expansive inquiry under either major questions or *Chevron* step two in order to determine the bounds of the authority delegated by Congress. The EPA’s explanation of the overall statutory scheme will thus play an important role in its defense. For example, the Agency points to the fact that § 111 already applies to fossil fuel-fired power plants to argue that the Clean Power Plan is not a dramatic expansion of EPA authority.²⁶¹ Furthermore, the EPA can point

https://web.law.columbia.edu/sites/default/files/microsites/climate-change/legal_pathways_to_reducing_ghg_emissions_under_section_115_of_the_caa.pdf.

257. See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); see also Breyer, *supra* note 61.

258. 42 USC § 7411(a).

259. EPA’s Initial Brief, *supra* note 249, at 41.

260. *Verizon v. FCC*, 740 F.3d 623, 639–40 (D.C. Cir. 2014) (citing *Brown & Williamson*, 529 U.S. at 160 and *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001)).

261. EPA’s Initial Brief, *supra* note 249, at 42–43.

to the provision requiring consideration of costs, along with energy sector impacts and the broad term "system" to indicate that Congress intended the EPA to tailor its regulatory schemes under § 111(d) to the specific circumstances and did not limit the agency to only consider those "inside-the-fence" options at sources subject to the regulation.²⁶²

Under either *Chevron* or major questions, a court will first evaluate whether the term "system" is ambiguous on its face. If so, the *Chevron* analysis will ask whether the agency's interpretation of the statute was reasonable while the major questions inquiry would turn on the court's own view of Congress's intent.²⁶³ Either approach should uphold the EPA's broad authority to regulate power sector CO₂ emissions under § 111(d) of the Clean Air Act. The statute does not define the phrase best system of emission reduction, nor does it define any of the words within this key phrase.²⁶⁴ The performance standard definition does, however, include important language defining the scope of the "best system" determination.²⁶⁵ First, as is obvious from the term itself, the EPA's determination must justify why its option represents the "best" system for reducing emissions, and is not simply one of a number of options.²⁶⁶ Second, the EPA must consider cost, non-air quality health and environmental impacts, and other energy system impacts.²⁶⁷ Finally, the best system of emission reduction must be "adequately demonstrated."²⁶⁸ Together, these general terms define the scope of the EPA's discretion and place important limitations on the regulatory options for reducing CO₂ emissions from existing power plants.

Importantly for the purpose of this paper, the limiting principles embedded in the performance standard definition offer the D.C. Circuit and potentially the Supreme Court the opportunity to expressly indicate that the major questions doctrine does not apply when statutes include flexible language indicating congressional intent to delegate authority while also identifying criteria bounding the scope of the delegation. Alternatively, even if the court finds that the major questions doctrine does apply, the decision could indicate that the limiting principles create a presumption that Congress intended to grant the agency authority to act. Either approach would provide important limitations on the major questions

262. 42 USC § 7411(a).

263. *King v. Burwell*, 135 S. Ct. 2480, 2489; *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *Armstrong*, *supra* note 120.

264. 42 USC § 7411(a).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

doctrine, nudging it from a “you-know-it-when-you-see-it” standard to a workable—and bounded—tool of statutory construction.²⁶⁹

CONCLUSION

There are a number of compelling arguments for limiting the major questions doctrine. From a pragmatic governance perspective, federal agencies tasked with governing complex, rapidly changing circumstances need clarity regarding their authority to interpret statutes. Statutory language may suggest that Congress intentionally designed laws to be flexible enough to address emerging issues, but uncertainty regarding the agency’s ability to interpret the language may delay or prevent a rulemaking process. Doctrinal clarity may assist agencies as they determine the scope of their authority. Judges may prefer a limited executive and, conversely, an empowered legislature.

From a judicial legitimacy perspective, the lack of clarity regarding the circumstances under which the major questions doctrine applies may undermine the judiciary’s authority as an objective arbiter. Whether or not one believes that the judiciary should curtail executive branch authority, relying on doctrinal uncertainty to achieve the goal is an unacceptable means to the end. Without limiting principles, the major questions doctrine could be viewed as a tool for any judge to strike down statutes with which she does not agree. Furthermore, judicial decisions striking down an agency interpretation when the language is unclear not only limits the executive, but elevates the judiciary. If the rejected agency interpretation hewed closer to the intent of the majority of Congress at the time of enactment than the subsequent judicial decision, the court not only elevates itself above the executive, but also above the legislative branch.

269. For a perspective on the important role of the major questions doctrine, see Richardson, *supra* note 43 (arguing that the major questions doctrine provides courts with an option to overturn agency actions that exceed the appropriate bounds of their statutory authority while also preserving *Chevron* deference).

* * *