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MAJOR QUESTIONS ABOUT THE "MAJOR QUESTIONS" DOCTRINE

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After over a decade of hibernation, the United States Supreme Court has awoken the "major questions" doctrine, which has re-emerged in an expanded form. Under the doctrine, a court will not defer to an agency's interpretation of a statutory provision in circumstances where the case involves an issue of deep economic or political significance or where the interpretive question could effectuate an enormous and transformative expansion of the agency's regulatory authority.

While the doctrine's re-emergence in recent Supreme Court cases has already raised concerns, a subtle shift in its application has gone unnoticed. Unlike in earlier cases, where the Court invoked the major questions doctrine under Step One of the Chevron *framework, the Court has recently applied the doctrine in other stages of the* Chevron *analysis.*

For instance, in Utility Air Regulatory Group v. EPA*, the Court first found that the statutory provision at issue was ambiguous under* Chevron *Step One. It then raised the major questions doctrine as part of its Step Two analysis to find that the agency's interpretation was unreasonable. In stark contrast, the Court in* King v. Burwell *invoked the major questions doctrine at* Chevron *Step Zero and thereby declined to apply the* Chevron *framework altogether.*

The re-emergence of the major questions doctrine and its expanded application is significant and raises doctrinal and pragmatic concerns. Accordingly, this Essay seeks to re-introduce the doctrine to the legal community and explain the Court's recent application of the doctrine to demonstrate how and why its newfound scope warrants further study.

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INTRODUCTION

After over a decade of hibernation, the United States Supreme Court has awoken the "major questions" doctrine, which has re-emerged in an expanded form. Under the doctrine, a court will not defer to an agency's interpretation of a statutory provision in circumstances where the case involves an issue of deep economic or political significance or where the interpretive question could effectuate an enormous and transformative expansion of the agency's regulatory authority.

While the doctrine's re-emergence in recent Supreme Court cases has already raised concerns, a subtle shift in its application has gone unnoticed. Unlike in earlier cases, where the Court invoked the major questions doctrine under Step One of the *Chevron* framework,[1] the Court has recently applied the major questions doctrine in other stages of the *Chevron* analysis.

For instance, in *Utility Air Regulatory Group v. EPA*[2] (*UARG*), the Court first found that the statutory provision at issue was ambiguous under *Chevron* Step One. It then raised the major questions doctrine as part of its Step Two analysis to find that the agency's interpretation was unreasonable.[3] In stark contrast, the Court in *King v. Burwell* invoked the major questions doctrine at *Chevron* Step Zero and thereby declined to apply the *Chevron* framework altogether.[4]

But why should we be concerned with both the return and expansion in the application of the major questions doctrine? In short, there are pragmatic, doctrinal, and constitutional problems with the doctrine. These concerns range from the shift of interpretive authority from agencies (thereby raising separation of power issues) to practical problems with having courts determine what constitutes a "major question." And now the substantial concerns are back in play with the appearance of the major questions doc-

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

2. 134 S. Ct. 2427, 2439–42 (2014).

3. *Id*. at 2442–44. The "major questions" doctrine is also referred to by scholars as the "great questions" doctrine or canon or the "major questions exception." *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). Interestingly, however, the Court itself does not use a particular name to identify the doctrine.

4. King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015).

trine in recent Supreme Court cases. Accordingly, this Essay seeks to reintroduce this doctrine to the legal community and explain the Court's recent application of the doctrine to demonstrate how and why its newfound scope warrants further study.

Part I begins by briefly reviewing the *Chevron* doctrine, which represents the foundation of statutory construction cases involving agency interpretations. Part II explains the "major questions" doctrine and its genesis as a canon before the U.S. Supreme Court. Part III then explores the recent cases in which the Supreme Court has invoked the doctrine. It also analyzes the significance of the re-emergence and expansion in the application of the doctrine. The Essay concludes by outlining pragmatic, doctrinal, and constitutional problems with the major questions doctrine to highlight why its reappearance calls for careful attention moving forward.

I. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*

A. *The* Chevron *Two-Step*

This Part offers a brief introduction to the Supreme Court's deference regime under *Chevron U.S.A. Inc. v. National Resource Defense Council, Inc.*[5] Because the background facts and holding in *Chevron* are familiar, they will be only cursorily described here.

The Court in *Chevron* was required to interpret the meaning of "stationary source" as that term was used in the Clean Air Act (CAA).[6] Under its CAA authority, the U.S. Environmental Protection Agency (EPA) enacted a regulation that permitted states "to adopt a plantwide definition of the term 'stationary source.'"[7] Under this definition, a facility could install or modify specific pollution-generating units at a plant without triggering onerous permit conditions, as long as the modification did not increase plantwide emissions.[8]

The question presented, as set forth by the Court, was whether EPA's decision to group all pollution-generating units "as though they were encased within a single 'bubble' [was] based on a reasonable construction of the statutory term 'stationary source.'"[9] Writing for a unanimous 6-0 Court, Justice John Paul Stevens found that EPA's regulation was reasonable, rejecting the U.S. Court of Appeals for the District of Columbia Cir-

5. *Chevron*, 467 U.S. 837.
6. *Id.* at 840 (citing 40 C.F.R. §§ 51.18(j)(1)(i)–(ii) (1983)).
7. *Id.*
8. *Id.*
9. *Id.*

cuit's conclusion that the bubble concept conflicted with the Clean Air Act's purpose to improve air quality.[10]

In reaching its conclusion, the Court established the bedrock two-step test that is generally used when interpreting a statute administered by an agency. Under so-called *Chevron* Step One, a court first consults the statutory language to determine whether Congress has directly spoken on the question at issue.[11] If the court finds that the statute's language is unambiguous, the court's inquiry ends and the agency's interpretation of the statutory provision is therefore irrelevant.[12] But, if there is an ambiguity in the statute or if the statute is silent, the court applies *Chevron* Step Two and decides whether the agency's interpretation is "based on a permissible construction of the statute."[13] If reasonable, the agency's interpretation is controlling.[14]

B. *A Brief Doctrinal Explanation*

The Court in *Chevron* also set forth its basis for deferring to an agency's interpretation of a statute it administers.[15] The Court explained that an agency is empowered to "fill any gap"[16] or resolve statutory ambiguities because Congress's grant of rulemaking authority to the agency creates the presumption that the agency may "make all policy choices within its sphere of delegated authority."[17] Because agencies possess greater political accountability than the judiciary,[18] and also wield unique expertise and experience to administer "technical and complex" regulatory programs,[19] they are in the best position to make difficult policy choices in circumstances where either Congress "inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of

10. *Id.* at 845 (concluding that the EPA's use of the bubble concept was a reasonable policy choice). Justices Marshall, Rehnquist, and O'Connor did not take part in the decision. *Id.* at 866.

11. *Id.* at 842.

12. *Id.* at 842–43.

13. *Id.* at 843.

14. *Id.* at 843–44.

15. *Id.* at 865.

16. *Id.* at 843.

17. Melanie E. Walker, Comment, *Congressional Intent and Deference to Agency Interpretations of Regulations*, 66 U. CHI. L. REV. 1341, 1347 (1999).

18. *Chevron*, 467 U.S. at 865 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .").

19. *Id.* (citing Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist., 467 U.S. 380, 390 (1984)); *see also* Walker, *supra* note 17, at 1346–47.

everyday realities."[20] Thus, Congress's delegation to agencies not only stems from the notion that "expert agencies are presumptively better than generalist judges at construing statutory ambiguities,"[21] but also because "a reasonable legislator in the modern administrative state would rather give law-interpreting power to agencies than the courts."[22]

C. Chevron *Step Zero*

The *Chevron* test revolutionized the administrative state.[23] In early iterations of the *Chevron* standard, the analysis was broadly applied to many types of agency interpretations of statutes.[24] But like most doctrines, the *Chevron* analysis evolved. One significant evolution, which Professors Merrill and Hickman identified in their seminal article, Chevron*'s Domain*, involved three related principles that courts now use to determine whether the *Chevron* analysis should apply in the first instance to resolve the interpretive question.[25] This threshold inquiry, which Merrill and Hickman coined *Chevron* Step Zero, operates to define the scope of *Chevron's* implied delegation of interpretive power from Congress.[26]

The first of these questions requires the court to determine "what type of power . . . Congress [must] confer upon an agency in order to trigger the presumption that Congress has impliedly delegated interpretational authority to the agency."[27] In other words, if deference under *Chevron* is based on the view that Congress wanted a particular agency to fill in gaps in a particular statute, what signals that Congress has actually "charged" the agency

20. *Chevron*, 467 U.S. at 865–66 (suggesting that an ambiguity or silence in the statute may have been a result of Congress's inability "to forge a coalition on either side of the question"); *see also* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 25 (2010).

21. Moncrieff, *supra* note 3, at 609.

22. *Id.* at 608.

23. Walker, *supra* note 17, at 1346 ("*Chevron* is one of the most widely discussed cases in the academic literature . . . .").

24. *See, e.g.*, Massachusetts v. Morash, 490 U.S. 107, 116–17 (1989) (finding that the Secretary of Labor's view expressed in a Notice of Proposed Rulemaking and subsequent regulation was entitled to *Chevron* deference); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 844 (1986) (according *Chevron* deference to the Commodity Futures Trading Commission's "long-held position that it has the power to take jurisdiction over counterclaims" in state reparation proceedings); Fed. Deposit Ins. Corp. v. Phila. Gear Corp., 476 U.S. 426, 438–39 (1986) (holding that the Federal Deposit Insurance Corporation's interpretation of a statutory provision was entitled to *Chevron* deference even though not contained in a regulation).

25. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 873 (2001).

26. *Id.*

27. *Id.*

with such power?[28] Assuming that the agency is properly charged, the second inquiry determines the types of agency interpretations that are granted *Chevron* deference.[29] The third and final inquiry seeks to identify which circumstances overcome the presumption that an agency has been granted an implied delegation of interpretive authority.[30]

* * *

Chevron's analytical framework thus now encompasses three distinct steps. The resolution of the interpretive question and level of deference the court gives to the agency hinges on the step at which the court ends its inquiry: Step Zero (where it finds that the *Chevron* framework does not apply, even if the statutory provision is ambiguous); Step One (where the court determines that the statutory provision is unambiguous and therefore applies its plain meaning); or Step Two (where the court defers to the agency's reasonable interpretation of an ambiguous statutory provision).

II. The Original "Major Questions" Doctrine

A. *Introduction*

As its name suggests, the major questions doctrine is invoked in statutory construction cases that raise "major"—as opposed to "interstitial"—questions concerning significant aspects of the agency's regulatory

28. *Id.*

29. *Id.* During the Supreme Court's 2000–2001 term, a pair of Step Zero decisions altered the *Chevron* framework. In 2000, the Court decided *Christensen v. Harris County*, where it found that an agency's statutory interpretation that was expressed in an informal format, such as an opinion letter, did not warrant *Chevron*-style deference. 529 U.S. 576, 587 (2000). The following year, the Court decided *United States v. Mead Corp.*, where it similarly ruled a court should only grant an agency *Chevron* deference when the interpretation of a statute is authorized by Congress and carries with it the force of law. 533 U.S. 218, 237 (2001) ("*Chevron* left *Skidmore* intact and applicable where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked . . . ."). Taken together, these rulings suggest that formal interpretations should be entitled to *Chevron* deference and most informal interpretations should be reviewed under *Skidmore*'s less deferential standard. *Id.*

For example, as a general matter, (1) an agency that Congress has empowered to promulgate legislative rules receives deference for interpretations set forth in such rules; (2) an agency that Congress has empowered to hold binding adjudications receives deference for interpretations set forth in a final adjudication; and (3) an agency that Congress has empowered to both render final adjudications and legislative rules may choose to set forth interpretations that receive deference in either rulemaking or adjudications. Merrill & Hickman, *supra* note 25, at 900–01.

30. Merrill & Hickman, *supra* note 25, at 873.

responsibilities.[31] Such aspects include whether the interpretive question implicates the power or scope of the statutory scheme at issue, or where the resolution of the interpretive question could effectuate an enormous and transformative expansion in the agency's regulatory authority.[32] As set forth below, the doctrine's genesis can be traced back to two principal cases—*MCI* and *Brown & Williamson*.

B. *Phone Calls (*MCI*) and Tobacco (*Brown & Williamson*)*

The Supreme Court first invoked the major questions doctrine in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.* (*MCI*).[33] Under the Communications Act of 1934, communications common carriers are required to file tariffs with the Federal Communications Commission (FCC) and then charge customers pursuant to those tariff rates.[34] The Act also authorizes the Commission to "modify" this requirement "in its discretion and for good cause shown."[35] Under this authority, the FCC issued a series of reports and orders in the 1980's that relieved non-dominant long-distance carriers from filing tariffs, leaving only AT&T subject to the filing requirement.[36]

The Court was required to determine whether the FCC could permissibly interpret "modify" to excuse the other carriers from filing tariffs.[37] Although it cited to *Chevron* in its opinion, the Court declared that "the Commission's permissive detariffing policy can be justified only if it makes a less than radical or fundamental change in the Act's tariff-filing requirement."[38]

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31. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 231–34, 236–42 (2006) (discussing interstitial and major questions).

32. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (applying the doctrine because the question at issue was "of deep 'economic and political significance'" (quoting *UARG*, 134 S. Ct. 2427, 2444 (2014))); *UARG*, 134 S. Ct. at 2448 (applying the doctrine and rejecting EPA's interpretation because it "would also bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." (citing Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)); MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994) (applying the doctrine and finding it "highly unlikely" that Congress would entrust an "essential characteristic" of the statutory scheme to agency discretion).

33. *See MCI*, 512 U.S. at 220; *see also*, Sunstein, *supra* note 31, at 236.

34. *MCI*, 512 U.S. at 220.

35. *Id.* at 224 (citing 47 U.S.C. § 203(b)(2) (1988 & Supp. IV)).

36. *See id.* at 221–22 (citing FCC reports and orders).

37. *Id.* at 220 ("These cases present the question whether the Commission's decision to make tariff filing optional for all nondominant long-distance carriers is a valid exercise of its modification authority.").

38. *Id.* at 229.

In reviewing the FCC regulation, the Court found that "rate filings are . . . the essential characteristic of a rate-regulated industry."[39] Furthermore, the filing requirement "was Congress's chosen means of preventing unreasonableness and discrimination in charges"[40] and had "always been considered essential to preventing price discrimination and stabilizing rates."[41] On this basis, the Court concluded that it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion."[42] Moreover, it further noted that it would be "even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."[43]

The Court held that the FCC's regulation amounted to a "fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist."[44] It found "not the slightest doubt" concerning Congress's intended meaning in the statute and therefore rejected the FCC's interpretation.[45]

Six years after *MCI*, the Court cemented the existence of the major questions doctrine within the *Chevron* framework. In *FDA v. Brown & Williamson*, the Court faced the question of whether the Food and Drug Administration (FDA) had the authority to regulate tobacco products.[46] In 1996, the FDA had determined that nicotine was a "drug" within the meaning of the Food, Drug, and Cosmetic Act (FDCA), and consequently issued regulations aimed at reducing tobacco consumption among children and adolescents.[47] The FDA grounded its conclusion on the FDCA's definition of

39. *Id.* at 231.

40. *Id.* at 230 ("There is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination." (quoting Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 440 (1907))).

41. *Id.* (quoting Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 126 (1990)). The *MCI* Court also cited with approval a case which found "filing requirements 'render rates definite and certain, and . . . prevent discrimination and other abuses,'" *id.* (quoting Ariz. Grocery Co. v. Atchison, T. & S.F. Ry. Co., 284 U.S. 370, 384 (1932)), and that the "elimination of filing requirement 'opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish,'" *id.* (quoting Armour Packing Co. v. United States, 209 U.S. 56, 81 (1908)).

42. *Id.* at 231.

43. *Id.*

44. *Id.* at 231–32.

45. *Id.* at 228.

46. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000).

47. *Id.*

"drug," which included "articles (other than food) intended to affect the structure or any function of the body."[48]

The Court first identified that a "threshold issue [was to determine] the appropriate framework for analyzing the FDA's assertion of authority to regulate tobacco products."[49] Because the dispute involved "an administrative agency's construction of a statute that it administers," the Court's review was governed by *Chevron* Steps One and Two.[50] Quoting *Chevron*, the Court recognized that deference was warranted because "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."[51]

However, the Court also noted that its application of *Chevron* was cabined by other principles. The Court stated that its Step One analysis, whether "Congress has directly spoken to the precise question at issue," was impacted by the "nature of the question presented."[52] The Court pointed out that *Chevron* deference is rooted in the principle that Congress implicitly delegated the agency authority to "fill in the statutory gaps."[53] But, "[i]n extraordinary cases," it explained, the Court will not presume that "Congress has intended such an implicit delegation."[54]

The *Brown & Williamson* Court then found that the case involved such extraordinary circumstances. One principal rationale for this finding was that the FDA's assertion of jurisdiction would extend to "a significant portion of the American economy."[55] In support of this proposition, the Court noted how a current U.S. Code provision stated 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."[56] The Court noted that its reasoning in *MCI* was "instruc-

48. *Id.* at 126 (quoting 21 U.S.C § 321(g)(1)(C) (1994 & Supp. III)).

49. *Id.* at 132.

50. *Id.* (reciting *Chevron*'s two-step analysis).

51. *Id.* (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984)). The Court also noted that deference was appropriate based on the "agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated." *Id.* (citing Rust v. Sullivan, 500 U.S. 173, 187 (1991)).

52. *Id.* at 159.

53. *Id.* (citing *Chevron*, 467 U.S. at 844).

54. *Id.* (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.")).

55. *Id.* ("This is hardly an ordinary case.").

56. *Id.* at 137 (quoting 7 U.S.C. § 1311(a) (1994)).

tive."[57] As in *MCI*, the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[58] It therefore concluded that Congress had "directly spoken to the issue and precluded the FDA from regulating tobacco products."[59]

C. MCI, Brown & Williamson, *and* Chevron *Step One*

These two early cases established the major questions doctrine as part of the statutory interpretation inquiry within the *Chevron* framework. In both *MCI* and *Brown & Williamson*, the Court applied the doctrine within *Chevron's* Step One analysis.

For instance, in *Brown & Williamson*, the Court characterized its holding in *MCI* as falling under Step One: "We rejected the FCC's construction, finding 'not the slightest doubt' that Congress had directly spoken to the question."[60] Likewise, in *Brown & Williamson*, the Court concluded that the FDA did not have authority over tobacco products because "Congress ha[d] directly spoken to the precise question at issue," a Step One inquiry.[61]

Thus, in its *original* form, the major questions doctrine constituted a narrow expansion of the *Chevron* framework whereby the Court, in its *Chevron* Step One analysis, measured the degree to which the issue at hand was "major" to help determine whether the statutory language was plain and unambiguous.

III. Major Questions About the "Major Questions" Doctrine

A. *Introduction*

After its emergence in cases such as *MCI* and *Brown & Williamson*, the Court clearly embraced the major questions doctrine as part of its working "toolkit" for statutory construction. With respect to the doctrine, several observations can be made. First, in key cases such as *MCI* and *Brown & Williamson*, the Court invoked the doctrine as part of its *Chevron* Step One inquiry.[62] But perhaps because the doctrine was only in its infancy, the Court did not engage in a discussion or elaboration of its contours. Nor was there any mention of how the major questions doctrine fit within the *Chev-*

57. *Id.* at 160.
58. *Id.*
59. *Id.* at 160–61.
60. *Id.* at 160 (quoting MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 228 (1994)).
61. *Id.* at 159.
62. *See MCI*, 512 U.S. at 227.

ron analysis or whether it should be applied exclusively at *Chevron* Step One.

Second, since its decision in *Brown & Williamson* in 2000, the Court has declined to invoke the doctrine in cases where justices, litigants, and scholars have argued it would be appropriate to do so.[63] For example, in the Court's groundbreaking decision in *Massachusetts v. EPA*, where the Court held that greenhouse gases were "pollutants" under the Clean Air Act, the major questions doctrine took center stage in the majority opinion.[64] In that case, EPA had argued that its interpretation that the Clean Air Act did not authorize the regulation of greenhouse gases was consistent with *Brown & Williamson* (and the major questions doctrine) because based on the economic and political significance of the decision, Congress could not have intended EPA to regulate greenhouse gases.[65] In finding against EPA, however, the Court expressly explained why EPA's reliance on *Brown & Williamson* was misplaced.[66] Following the Court's opinion, scholars opined that the Court's decision was incorrect on that basis.[67]

Third, when the Court revived the major questions doctrine in 2014 and 2015, it did so in circumstances outside the *Chevron* Step One analysis. The re-emergence of the doctrine is a significant event within our administrative jurisprudence, and its application beyond the Step One inquiry raises separate concerns. Accordingly, this Part explores the evolution of the major questions doctrine in the recent cases of *UARG*[68] and *King*[69] and analyzes inconsistencies in the Court's current approach.

B. UARG v. EPA

The major questions doctrine awoke from its dormancy in a majority opinion in the Supreme Court's decision in *UARG*. The doctrine provided pivotal support for the Court's decision to reject EPA's interpretation of a Clean Air Act provision involving the regulation of greenhouse gases

63. Moncrieff, *supra* note 3, at 594 (arguing that the Court should have applied the major questions doctrine in *Massachusetts v. EPA*, 549 U.S. 497 (2007)); *see also* City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013) (rejecting distinguishing between "big, important" agency interpretations and "humdrum, run-of-the-mill" interpretations when deciding whether to defer under *Chevron*); *Massachusetts*, 549 U.S. at 530–31 (rejecting EPA's arguments that the major questions doctrine should apply in interpreting the statute to preclude regulation).

64. *Massachusetts*, 549 U.S. at 530–31.

65. *Id.*

66. *Id.*

67. Moncrieff, *supra* note 3, at 594.

68. *UARG*, 134 S. Ct. 2427 (2014).

69. *Id.* at 2480.

(GHGs).[70] The case involved challenges to EPA's "cascading series of greenhouse gas-related rules and regulations" promulgated in the wake of the Supreme Court's 2007 conclusion in *Massachusetts v. EPA* that GHGs may be regulated under the CAA.[71] After *Massachusetts v. EPA*, one pivotal question remained: whether EPA's promulgation of GHG emission standards for new motor vehicles compelled the agency to regulate certain "stationary sources" of GHG emissions, such as power plants, industrial facilities, and even smaller sources, like apartment buildings.[72] Relatedly, even if EPA was not *required* to regulate these stationary sources, the question remained whether it was nonetheless *permitted* to do so under the Clean Air Act.

The Court in *UARG* answered these questions in a divided and complex decision.[73] Justice Scalia, joined by Chief Justice Roberts and Justices Thomas, Kennedy, and Alito, described the case as consisting of "two distinct challenges."[74] First, the Court was required to "decide whether EPA permissibly determined that a source may be subject to [certain CAA] permitting requirements on the *sole* basis of the source's potential to emit greenhouse gases."[75] Second, the Court needed to assess whether EPA "permissibly determined that a source *already subject to the [CAA permitting] program* because of its emission of conventional pollutants . . . may be required to limit its greenhouse-gas emissions by" installing certain pollution reducing devices.[76]

To answer the first question, the Court proceeded through three separate inquiries[77]: (1) whether EPA's view was compelled by the statute;[78] (2) if not compelled, whether EPA's view was a reasonable construction of the CAA;[79] and (3) if not reasonable, whether EPA's promulgation of a related CAA rule could cure the unreasonable interpretation.[80]

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70. *Id.* For a comprehensive examination of the case, see Kevin O. Leske, *A Step by Step Look at* UARG v. EPA*: A New Layer of Greenhouse Gas Regulation*, 4 ENVTL. & EARTH L.J. 3 (2014).

71. Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 115 (D.C. Cir. 2012) (citing Massachusetts v. EPA, 549 U.S. 497 (2007)).

72. Leske, *supra* note 70, at 3.

73. *UARG*, 134 S. Ct. at 2430–32.

74. *Id.* at 2438.

75. *Id.* (emphasis added).

76. *Id.* (emphasis added); *see also id.* at 2447 (discussing the permissibility of requirements EPA placed on sources already subject to the CAA permitting program).

77. *Id.* at 2439–47.

78. *Id.* at 2439–42 (Part II-A-1).

79. *Id.* at 2442–44 (Part II-A-2).

80. *Id.* at 2444–46 (Part II-A-3).

Justice Scalia, writing for the majority, first set forth that the Court would follow the *Chevron* standard. Under *Chevron* Step One, the Court inquired whether, under the plain language of the CAA, a source not otherwise regulated because of its emissions of conventional pollutants must be subject to applicable permitting requirements based solely on its potential to emit greenhouse gasses.[81] On this issue, the Court rejected EPA's position that the CAA was unambiguous and held that the statute did not compel such a result.[82] In other words, there was "no insuperable textual barrier" in the CAA preventing EPA from excluding GHG emissions as a permitting trigger.[83]

Because the Court rejected EPA's plain language argument, it turned to *Chevron* Step Two to determine whether EPA's interpretation that the CAA could be construed to regulate "anyway" sources was nonetheless reasonable.[84] The major questions doctrine was invoked in this part of the Court's analysis.[85] Despite recognizing that *Chevron's* deferential framework permitted EPA to "operate 'within the bounds of reasonable interpretation,'"[86] the majority rejected EPA's construction of the CAA. The Court explained that its analysis of the proper interpretation of an ambiguous statutory term is guided by "the specific context in which . . . language is used" as well as "the broader context of the statute as a whole."[87] In other words, "an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole,' does not merit deference."[88]

The Court then rejected EPA's interpretation as "inconsistent with . . . the [Clean Air] Act's structure and design."[89] The Court highlighted that EPA had "repeatedly acknowledged that applying the [relevant CAA] permitting requirements to greenhouse gases would be inconsistent with—in fact, would overthrow—the Act's structure and design."[90] EPA's interpretation would lead to an incredible rise in permit applications, billions of dollars in administrative costs, and "decade-long delays" that would cause

81. *Id.* at 2438–39. The Court called these "non-anyway sources," in contrast to "anyway sources," which are stationary sources already regulated because of their emissions of conventional pollutants. *Id.*

82. *Id.* at 2442.

83. *Id.*

84. *Id.*

85. *Id.* at 2444.

86. *Id.* at 2442 (quoting City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013)).

87. *Id.* (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

88. *Id.* at 2442 (alteration in original) (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2529 (2013)).

89. *Id.*

90. *Id.*

"construction projects to grind to a halt nationwide."[91] The Court cited to EPA's own admission that including smaller sources would result in a "complicated, resource-intensive, time-consuming, and sometimes contentious process."[92]

In addition to the practical implications of EPA's interpretation, the Court reasoned that including smaller stationary sources would contravene Congress's intent.[93] The Court surmised that Congress, in designing the permitting programs at issue, intended to cover "a relative handful of large sources capable of shouldering heavy substantive and procedural burdens."[94] Thus, Congress would have wanted the program to apply to "'hundreds of larger sources,' not 'tens of thousands of smaller sources.'"[95] Even EPA had conceded that one of the permitting programs at issue was "'finely crafted for thousands,' not millions, of sources."[96] An interpretation that allowed EPA to mandate that smaller sources secure permits for their GHG emissions alone would therefore "be 'incompatible' with 'the substance of Congress' [sic] regulatory scheme.'"[97]

After determining that EPA's interpretation was incompatible with the regulatory scheme, the Court concluded that the major questions doctrine also compelled the conclusion that EPA's interpretation was unreasonable under *Chevron* Step Two.[98] EPA's interpretation that GHG emissions alone

91. *Id.* at 2442–43. For example, EPA had conceded that applications for PSD permits would balloon from approximately 800 to about 82 thousand each year. *Id.* at 2443 (citing Tailoring Rule, 75 Fed. Reg. 31,514, 31,557 (June 3, 2010)). Similarly, the administrative costs of the PSD program would skyrocket from $12 million to over $1.5 billion. *Id.* With respect to the Title V program, the Court called the consequences "equally bleak" if sources were required to secure permits based on the potential GHG emissions. *Id.* Permits would be required for over 6 million sources (up from about 15 thousand sources) and administrative costs would rise from $62 million to $21 billion annually. *Id.* (citing Tailoring Rule, 75 Fed. Reg. at 31,562–63). And even more dramatically, "collectively the newly covered sources would face permitting costs of $147 billion." *Id.*

92. *Id.* (quoting Tailoring Rule, 74 Fed. Reg. 55,292, 55,304, 55,321–22 (proposed Oct. 27, 2009)).

93. *Id.* ("[T]he great majority of additional sources brought into the PSD and title V programs would be small sources that Congress did not expect would need to undergo permitting." (quoting Tailoring Rule, 75 Fed. Reg. at 31,533)).

94. *Id.*

95. *Id.* (quoting Tailoring Rule, 74 Fed. Reg. at 55,304, 55,321–22).

96. *Id.* at 2444 (quoting Tailoring Rule, 75 Fed. Reg. at 31,563).

97. *Id.* at 2443 (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156 (2000)). For instance, the majority quoted EPA's admission that inclusion of GHGs as a regulated pollutant under PSD and Title programs would result in a 1,000-fold increase in the statutory permitting thresholds and would therefore "severely undermine what Congress sought to accomplish." *Id.* at 2443 (quoting Tailoring Rule, 75 Fed. Reg. at 31,554).

98. *Id.* at 2444.

could trigger CAA permitting requirements, it concluded, "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[99] The Court cited both *Brown & Williamson* and *MCI* for the proposition that in circumstances where an agency's interpretation impacts "a significant portion of the American economy," courts must be wary to endorse such an interpretation without clear direction by Congress.[100] EPA's admission that its interpretation would transform the CAA into a statute that would be "unrecognizable to the Congress that designed it" further reinforced the conclusion that EPA's view was unreasonable.[101] Thus, the Court found that the agency's interpretation fell "comfortably"[102] within the category of interpretations that "do[ ] not merit deference."[103]

The second issue presented in the case was whether EPA "permissibly determined that a source *already subject to the [CAA permitting] program* because of its emission of conventional pollutants (an 'anyway source') may be required to limit its greenhouse-gas emissions" by having to install certain pollution reducing devices.[104] The provision at issue required that the best available control technology (BACT) be applied "for each pollutant subject to regulation" under the CAA.[105] Here, the Court concluded its Step One analysis in favor of the EPA, holding that the BACT provision unambiguously applies to GHG emissions from "anyway sources."[106]

With respect to the major questions doctrine, the Court further explained that even if the plain text of the provision did not compel the Court's conclusion, there was no practical problem that would render EPA's interpretation unreasonable under *Chevron* Step Two.[107] In other words, the major questions doctrine would not apply because EPA's interpretation was not "so disastrously unworkable" as to "result in such a dramatic expansion

99. *Id.*

100. *Id.* (quoting and citing *Brown & Williamson*, 529 U.S. at 159, 160) (citing MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994); Indus. Union Dept., AFL–CIO v. Am. Petroleum Inst., 448 U.S. 607, 645–46 (1980) (plurality opinion)).

101. *Id.* at 2442, 2444 (noting in its *Chevron* Step One analysis that it would have been entirely consistent with the CAA (and the Court's decision in *Massachusetts*) for EPA "to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written").

102. *Id.* at 2444.

103. *Id.* at 2442.

104. *Id.* at 2438 (emphasis added); *see also id.* at 2447 (discussing the permissibility of requirements EPA placed on sources already subject to the CAA permitting program).

105. *Id.* at 2448.

106. *Id.*

107. *Id.*

of agency authority" or "extend[ ] EPA jurisdiction over millions of previously unregulated entities."[108] Rather, the interpretation would merely "moderately increas[e] the demands EPA (or a state permitting authority) can make of entities already subject to its regulation."[109] Moreover, the Court found that it was not clear that "EPA's demands will be of a significantly different character from those traditionally associated with" the requirements to which such sources are already subject.[110] Thus, the Court twice addressed the major questions doctrine in its *Chevron* Step Two analysis, but with different results.[111]

C. King v. Burwell

A year after *UARG*, the Court invoked the major questions doctrine again in *King*. This time, it did at so at *Chevron* Step Zero, thereby declining to apply the *Chevron* framework altogether.

At issue in *King*[112] was a provision of the Patient Protection and Affordable Care Act (ACA) concerning tax credits available to individuals.[113] The ACA's goal is to provide universal health care. In furtherance of this goal, the ACA instituted a series of health insurance reforms applicable to all states.[114] The first reform was to enact health insurance market regulations that "barred insurers from denying coverage to any person because of his health" (the "guaranteed issue" requirement) and prohibited "insurers from charging a person higher premiums for the same reason" (the "community rating" requirement).[115]

The second reform requires that individuals secure health insurance coverage or face an Internal Revenue Service (IRS) penalty (the "coverage requirement").[116] To ensure that individuals would not wait to buy health insurance until they became ill, Congress enacted this coverage mandate to "minimize this adverse selection and broaden the health insurance risk pool

108. *Id.*

109. *Id.*

110. *Id.* at 2449.

111. *Id.* at 2444, 2448–49.

112. King v. Burwell, 135 S. Ct. 2480 (2015).

113. *Id.* at 2485 (2015); The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at scattered titles and sections of U.S.C.).

114. *King*, 135 S. Ct. at 2485.

115. *Id.* at 2485–86 ("[E]ach health insurance issuer that offers health insurance coverage in the individual . . . market in a State must accept every . . . individual in the State that applies for such coverage." (quoting 42 U.S.C. § 300gg–1(a) (2012))). The Court found that "[t]he Act also bars insurers from charging higher premiums on the basis of a person's health." *Id.*

116. *Id.* (citing 26 U.S.C. § 5000A (2012)).

to include healthy individuals, which will lower health insurance premiums."[117]

The third reform provides tax credits to low income individuals to make health coverage more affordable. For instance, "individuals with household incomes between 100 percent and 400 percent of the federal poverty line" are eligible for such tax credits and are allowed to use these credits to buy insurance directly from to the individual's insurer in advance.[118]

To effectuate these reforms, the ACA also requires each state to create an "Exchange" for individuals to shop for health insurance coverage.[119] If a state decides not to establish an Exchange, the Secretary of Health and Human Services (HHS) "shall . . . establish and operate such Exchange within the State."[120]

The question in *King* was "whether the Act's tax credits are available in States that have a Federal Exchange rather than a State Exchange."[121] Although the ACA states that tax credits "shall be allowed" for any "applicable taxpayer," it also provides that the tax credit amount depends in part on the taxpayer's enrollment in a health insurance plan through "an Exchange *established by the State* under section 1311 of the [ACA]."[122]

The IRS interpreted the provision to mean that individuals were eligible for credits when insurance was purchased in either a State or a Federal Exchange.[123] Specifically, the IRS rule determined tax credit eligibility based on enrollment in an insurance plan through "an Exchange,"[124] which is further defined as "an Exchange serving the individual market . . . regardless of whether the Exchange is established and operated by a State . . . or by HHS."[125]

The parties challenging the IRS interpretation, on the other hand, maintained that tax credits were not available for individuals who enrolled in insurance plans through a Federal Exchange. They argued that based on the statute, a Federal Exchange is not "an Exchange established by the State under [42 U.S.C. § 18031]."[126]

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117. *Id.* (quoting 42 U.S.C. § 18091(2)(I) (2012)). The act exempts the coverage requirement for an individual who "has to spend more than eight percent of his income on health insurance." *Id.* at 2486–87 (citing 26 U.S.C. §§ 5000A(e)(1)(A), (e)(1)(B)(ii)).

118. *Id.* at 2487 (citing 42 U.S.C. §§ 18081, 18082 (2012)).

119. *Id.* (citing 42 U.S.C. § 18031(b)(1) (2012)).

120. *Id.* (citing 42 U.S.C. § 18041(c)(1) (2012)).

121. *Id.*

122. *Id.* (quoting 26 U.S.C. § 36B(a)–(c) (2012) (emphasis added)).

123. *Id.* (citing Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,378 (May 23, 2012) (to be codified at 26 C.F.R. pt. 602)).

124. *Id.* (quoting 45 C.F.R. § 1.36B-2 (2013)).

125. *Id.* (quoting 45 C.F.R. § 155.20 (2014)).

126. *Id.* at 2488.

A circuit split resulted as to the applicability of tax credits. The Fourth Circuit interpreted the ACA as "ambiguous and subject to at least two different interpretations."[127] It then granted deference to the IRS under *Chevron* Step Two.[128] In a separate challenge, the D.C. Circuit struck down the IRS Rule, holding under *Chevron* Step One that the ACA "unambiguously restricts" the tax credits to state Exchanges.[129]

The Supreme Court, diverging from the reasoning of both Circuits, found for the first time that the application of the major questions doctrine rendered the *Chevron* analysis inapplicable in this case.[130] It first acknowledged that the Court "often" applies the *Chevron* two-step framework, which "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."[131] But, the Court quoted its opinion in *Brown & Williamson*, explaining that "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[132] Because the issues at stake in *King* were, according to the Court, of such "extraordinary" significance, the Court found that Congress had not empowered either HHS or the IRS to receive *Chevron* deference for its interpretation of the ACA.[133] The Court indicated that it was especially wary of implying such a delegation to the IRS, in particular, because the agency "has no expertise in crafting health insurance policy of this sort."[134]

The Court explained that the eligibility for tax credits was a key feature of the ACA that affects "billions of dollars in spending each year" as well as "the price of health insurance for millions of people."[135] Quoting *UARG*, the Court found that availability of such credits on the Federal Exchange was therefore "a question of deep 'economic and political significance' that is central to this statutory scheme."[136] Thus, the Court asserted, if Congress had wanted an agency to resolve such a significant issue, it would have expressly indicated so.[137]

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127. *Id.* (quoting King v. Burwell, 759 F.3d 358, 372 (4th Cir. 2014)).
128. *Id.* (citing *King*, 759 F.3d at 377).
129. *Id.* (quoting Halbig v. Burwell, 758 F.3d 390, 394 (D.C. Cir. 2014)).
130. *Id.* at 2489.
131. *Id.* at 2488 (citing Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).
132. *Id.* at 2488–89 (quoting *Brown & Williamson*, 529 U.S. at 159).
133. *Id.* at 2489.
134. *Id.*
135. *Id.*
136. *Id.* (quoting *UARG*, 134 S. Ct. 2427, 2444 (2014)).
137. *Id.* at 2489. The Court also opined that it was "especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort." *Id.* (citing Gonzales v. Oregon, 546 U.S. 243, 266–67 (2006)).

Rather than apply *Chevron*'s deferential standard, therefore, the Court determined that it must itself "determine the correct reading" of the tax credit provision.[138] The Court reasoned that "[i]f the statutory language is plain, [the Court] must enforce it according to its terms."[139] To determine whether the plain language resolved the question, the Court looked to the provision's words in context and the "overall statutory scheme."[140] In other words, the Court made clear that its duty was "to construe statutes, not isolated provisions."[141] Ultimately, the Court concluded that the ACA "allows tax credits for insurance purchased on any Exchange created under the Act."[142]

D. *The Major Questions Doctrine and the* Chevron *Analysis*

Contrasting the Court's application of the major questions doctrine in *MCI* and *Brown & Williamson* with the Court's application in recent cases such as *UARG* and *King* demonstrates that the Court has shifted its approach in applying the *Chevron* framework. Moreover, the varied approaches cannot be easily reconciled with one another, raising questions about how the major questions doctrine will be applied in future cases.

For instance, in *UARG*, the Court rejected EPA's interpretation by applying the major questions doctrine at *Chevron* Step Two.[143] The question remains, why didn't the Court follow *MCI* or *Brown & Williamson* to find that EPA's interpretation was foreclosed by the plain language of the CAA at Step One? To be sure, the ACA provision appeared ambiguous. If the Court had applied the major questions doctrine in its analysis of *Chevron* Step One, like it did in *Brown & Williamson*, the Court could have reached the same result.

In *Brown & Williamson*, the Court found that the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context"[144] and that when engaging in a plain language analysis, the Court reads the provisions "in their context and with a view to their place in the

138. *Id.* at 2489.

139. *Id.* (citing Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010)).

140. *Id.* at 2489 (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

141. *Id.* at 2489 (quoting Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 290 (2010)).

142. *Id.* at 2496.

143. *UARG*, 134 S. Ct. 2427, 2444 (2014)).

144. *Brown & Williamson*, 529 U.S. at 132 (citing Brown v. Gardner, 513 U.S. 115, 118 (1994)).

overall statutory scheme."[145] This approach would have supported a finding that the plain language foreclosed EPA's interpretation under *Chevron* Step One based on the significant impact EPA's interpretation would have had on the economy, as well as the conflict with the overall CAA statutory scheme of the CAA (that EPA conceded).[146]

Additionally, the application of the doctrine in *UARG* is questionable in light of the Court's subsequent analysis in *King*. Given the *UARG* Court's conclusion that EPA's interpretation "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization,"[147] why didn't the Court find the *Chevron* framework inapplicable and instead task itself with "determin[ing] the correct reading" of the provision, like it did in *King*?[148] In fact, in both *UARG* and *King* the Court cited *Brown & Williamson* for the proposition that where major questions are involved, courts should look for express or clear indications of Congress's intent that the agency should resolve such questions.[149] What therefore accounts for the *Chevron* framework being applicable in *UARG*, but not in *King*?

It could be that *King* represents the anomaly. The Court in *King* provides no obvious justification for dispensing with the *Chevron* framework altogether based on the "extraordinary" importance of the issue.[150] For instance, it did not indicate that the issue presented was more important or more exceptional than the questions raised in other major questions cases, such as *UARG* or *Brown & Williamson*, in order to explain why the *Chevron* framework would not apply. Indeed, the opinion appears to conflict with the Court's 2013 decision in *City of Arlington v. FCC*, where the Court rejected the distinction between "big, important" agency interpretations and "humdrum, run-of-the-mill" interpretations when deciding whether to defer under *Chevron*.[151]

Furthermore, as a practical matter, the *King* Court could have applied the *Chevron* framework and the major questions doctrine simultaneously to reach the result that it did, as in *MCI*, *Brown & Williamson*, and *UARG*. As scholars have observed, the *King* Court could have reached the same result

145. *Id.* at 133 (quoting Davis v. Mich. Dept. of Treasury, 489 U.S. 803, 809 (1989)); *see also* King v. Burwell, 135 S. Ct. 2480, 2489 (2015).

146. *UARG*, 134 S. Ct. at 2444.

147. *Id.*

148. *King*, 135 S. Ct. at 2489.

149. *UARG*, 134 S. Ct. at 2427 (quoting *Brown & Williamson*, 529 U.S. at 159); *King*, 135 S. Ct. at 2489 (quoting *Brown & Williamson*, 529 U.S. at 133).

150. *King*, 135 S. Ct. at 2489.

151. City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013).

as it did under either of the *Chevron* steps.[152] For instance, under *Chevron* Step One, the *King* Court could have determined that the plain language of the statute permits tax credits under either state or federal exchanges. Echoing the reasoning in its *Chevron* Step One analysis in *Brown & Williamson*, the Court could have read the tax credit provision "in [its] context and with a view to [its] place in the overall statutory scheme."[153] In fact, the *King* Court cited *Brown & Williamson* when explaining how it would undertake its own independent analysis.[154] Thus, its failure to apply the *Chevron* framework is puzzling. Similarly, the Court could have found the statute to be ambiguous and then upheld the IRS interpretation, which accorded with its own reading of the statute, as reasonable under *Chevron* Step Two.

Will *King* stand for the proposition that invocation of the major questions doctrine now precludes application of the *Chevron* framework? Or will the Court continue to apply *Chevron* on an ad hoc basis notwithstanding the simultaneous application of the major questions doctrine? The doctrine's reemergence leaves such questions unresolved, calling for further study by scholars and a meaningful reconsideration by the Court to help bring clarity to this important issue of administrative law.

Conclusion

The major questions doctrine is back and here to stay. Standing alone, it raises legitimate doctrinal, pragmatic, and constitutional concerns. First, when the Court applies the doctrine, it diminishes the deference that an agency normally receives, thereby shifting interpretive authority to the courts. In the extreme case where, upon invoking the doctrine, the Court declines to apply the *Chevron* framework at all, this effectuates a significant transfer of power from agencies to the judiciary.

Second, as scholars have also argued, significant questions arise when courts decide whether to invoke the doctrine, given its practical consequences. For instance, how do courts determine which cases involve "major questions," a decision that then alters the traditional deferential framework?[155] And when courts determine that a case involves a major question,

152. *See* Jody Freeman, *The* Chevron *Sidestep*, Harvard Environmental Law Program (June 25, 2015), http://environment.law.harvard.edu/2015/06/the-chevron-sidestep/.

153. *Brown & Williamson*, 529 U.S. at 133 (quoting Davis v. Mich. Dept. of Treasury, 489 U.S. 803, 809 (1989)); *see also King*, 135 S. Ct. at 2489.

154. *Id.*

155. Moncrieff, *supra* note 3, at 611–12; *see also* Loshin & Nielson, *supra* note 20, at 45 (major questions are "in the eye of the beholder").

how does this impact their ultimate resolution of the interpretive question at issue?[156]

Third, the application of the major questions doctrine undermines the *Chevron* framework itself, as well as implicates separation of powers concerns. Deference to agencies under *Chevron* is premised on the assumption that Congress intended to delegate interpretative authority to agencies.[157] Invoking the doctrine where significant policy questions are at issue thereby shifts power from the executive branch to the judiciary to "make policy."[158]

Fourth, as a matter of doctrine, when courts assess whether the case involves an issue that would work a transformative shift in the agency's power or would create a fundamental change in the statute, it creates a "tension with textualism."[159] In other words, the purposivist approach used to assess whether a case involves a major question "collides into the insights of textualist theory, which says that often statutory 'schemes' have no single purpose."[160] Thus, the doctrine is difficult to reconcile with a leading theory of statutory interpretation.

The expanded invocation of the major questions doctrine during the statutory construction analysis raises additional concerns. Analyzing the original application of the major questions doctrine in *MCI* and *Brown & Williamson*, as well as the Court's changing application in recent cases such as *UARG* and *King*, demonstrates that the Court now applies the doctrine at (1) *Chevron* Step One; (2) *Chevron* Step Two; and (3) *Chevron* Step Zero (thereby sidestepping the *Chevron* framework altogether). These recent applications have resulted in an unpredictable framework for statutory construction, one that could undermine the goals of consistency, fairness, and transparency in our administrative state.[161] The ultimate impact of this lack of uniformity remains to be seen, but, all told, major questions remain about the "major questions" doctrine.

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156. Loshin & Nielson, *supra* note 20, at 45 (arguing that the "zone of possible disagreement expands" when courts look to statutory purpose to determine whether the major questions doctrine applies).

157. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 846 (1984).

158. Moncrieff, *supra* note 3, at 612–13 (arguing that the "majorness exception violates *Chevron*'s theory of institutional capacity, empowering judges relative to agencies in the interpretation of 'major' questions").

159. Loshin & Nielson, *supra* note 20, at 49.

160. *Id.* That is, "[h]ow can a court decide what is 'fundamental' and what is 'ancillary,' if there is no one purpose that explains each specific provision of the statute?" *Id.* at 51.

161. *Id.* at 45 (arguing that "the doctrine cannot be applied in a consistent fashion"); Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1174–75 (2014).