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THE MAJOR RULES DOCTRINE: HOW JUSTICE BRETT KAVANAUGH'S NOVEL DOCTRINE CAN BRIDGE THE GAP BETWEEN THE *CHEVRON* AND NONDELEGATION DOCTRINES

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INTRODUCTION

Should major issues of political and economic significance be resolved by unelected agencies when justified primarily on ambiguous statutory authority? How much better is a system in

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which unelected judges determine these issues? Consider Net Neutrality and the regulation of the internet.

In 1996, Congress decided to update the Communications Act with the express purpose of "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal* or State *regulation*."[1] "Information services" were excepted from regulation by the Federal Communications Commission ("FCC") at the same high degree as typical phone companies operating as monopolistic public utilities.[2] And, until 2015, broadband internet service providers continued to operate as information service providers as the internet grew to be one of the most important services in American life. In 2015, however, the FCC decided to switch positions. The FCC determined the phrase addressing which services are covered—"telecommunication service"—was ambiguous, thus granting the FCC the implied delegated authority from Congress to determine whether or not to regulate the internet—an undeniably significant authority.[3] In 2017, after President Trump and FCC Chairman Ajit Pai replaced President Obama and former FCC Chairman Tom Wheeler, the FCC reversed course and deregulated

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat 137 (1996), codified at 47 USC § 230(b) (emphasis added).

[2] See generally, *United States Telecom Association v. FCC*, 855 F.3d 381, 394 (DC Cir 2017) (en banc) (Brown dissenting) (discussing history of regulating internet as an information service).

[3] FCC, In the Matter of Protecting and Promoting the Open Internet, FCC 15-24 (Feb 26, 2015).

the internet.[4] The public submitted millions of comments prior to both rulemakings, to limited effect.[5]

It is notable that a federal agency can find authorization through an ambiguous statutory provision to take both sides of an issue of major economic and political significance while an engaged and frustrated public is left without the ability to have a direct democratic control of the outcome of the rulemaking. Policy positions of major significance swing back and forth, removed from direct accountability, while Congress and the judiciary watch from the sidelines. This has resulted from a combination of an inactive Congress, flagging nondelegation doctrine, and a highly-deferential *Chevron*[6] doctrine.

This Note will argue that in order to remedy this upside-down process, the Court should adopt Judge Brett Kavanaugh's major rules doctrine.[7] The major rules doctrine requires that Congress provide agencies with clear statutory authorization to promulgate rules resolving ambiguities touching upon major political issues. Adopting this doctrine promotes democratic accountability, preserves the constitutional structure, and avoids entangling the judiciary in political questions.

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[4] FCC, In the Matter of Restoring Internet Freedom, WC17-108, 2018 WL 305638 (Jan 4, 2018).

[5] See generally, Elise Hu, *3.7 Million Comments Later, Here's Where Net Neutrality Stands* (NPR, Sept 17, 2014), archived at https://perma.cc/2BFW-FBZS; Jason Koebler, *The FCC Cited Zero of the 22 Million Consumer Comments in its 218-Page Net Neutrality Repeal*, (Motherboard, Jan 4, 2018), archived at https://perma.cc/Y4RQ-8MFF.

[6] *Chevron U.S.A., Inc v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984).

[7] In the weeks leading up to publication of this Note, the Hon. Brett Kavanaugh was elevated to Associate Justice of the Supreme Court of the United States. Since this Note exclusively refers to his writings while serving as Circuit Judge on the United States Court of Appeals for the District of Columbia Circuit, I will hereafter refer to him as Judge Kavanaugh.

Previous efforts have been inadequate to address the underlying issues. The Supreme Court has developed the major *questions* doctrine, which refuses *Chevron* deference to agency interpretations implicating questions of major political and economic significance. Instead, a judge reviews the statute de novo—determining the best reading of the statute without deference to the agency's interpretation.

In contrast, the major *rules* doctrine, as put forward by Judge Kavanaugh, would deny even de novo review, declaring a rule of major economic and political significance unlawful unless Congress provided a clear statement authorizing the agency to do so. Unlike the major questions doctrine, Judge Kavanaugh's major rules doctrine is a healthy compromise between dissatisfaction with the vestigiality of the nondelegation doctrine and concerns over protecting the Congress's ability to address complex regulatory problems by utilizing technical expertise of agencies.

Part I discusses the development of exceptions to the no-longer-blanket *Chevron* presumption of deference. Next, Part I discusses some recent pushes for revival of the nondelegation doctrine. Part I further describes how the major questions doctrine has arisen partly in response to these pushes for revival and why it inadequately addresses the underlying issues. Part II discusses Judge Kavanaugh's recent formulation of the major rules doctrine in *US Telecommunications Association v. FCC*,[8] analyzes what qualifies as a "major rule," and discusses the concept, justification, and impact of applying a clear statement principle. Part III then analyzes the benefits the major rules doctrine holds over the major questions doctrine and addresses potential criticisms.

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[8] 855 F.3d 381 (D.C. Cir. 2017) (en banc) (Kavanaugh dissenting from the denial of re-hearing en banc).

I. BACKGROUND

The Constitution's nondelegation doctrine restricts diffusion of legislative power from Congress to the agencies, but since the New Deal, the application of this doctrine has been crimped to allow for the growth of modern administrative governance. However, the administrative state has grown to the point where many argue for a counterbalancing resurgence of the nondelegation doctrine. But this resurgence runs into a key roadblock: the *Chevron* doctrine promotes diffusion of policymaking authority from Congress to agencies. This can often be justified on the basis of technical expertise, congressional intent, and accountability. But when those justifications are absent, the Court is more apt to reject deference. But when the courts take up the mantle of resolving the underlying policymaking questions under the major questions doctrine, they fail to address the renewed concern for nondelegation raised by scholars and Supreme Court justices in recent years.

A. RESURGENT INTEREST IN THE NONDELEGATION DOCTRINE

Tension in administrative law is rising due to the resurgence of the nondelegation doctrine among scholars and in the Supreme Court (most notably, in the writings of Justices Thomas and Gorsuch). As an important development in American governance, the historical growth of the administrative state has spawned an entire field of scholarly work assessing its merits, justifications, and even constitutionality. One strain has focused on whether the breadth of rulemaking authority afforded federal agencies violates the nondelegation doctrine, which states that Congress may not

delegate *legislative power* to administrative agencies.[9] Opponents counter that because agencies do not actually wield legislative power, but rather executive power taking legislative form, the nondelegation doctrine does not apply to or restrict agency rulemaking.[10] Furthermore, they argue that the administrative state is a practical necessity of modern governance. Some outlet or resolution to this tension is normatively and positively justified, and the Court must find a way to balance these two competing positions. Judge Kavanaugh's major rules doctrine fits this bill.

Proponents of a rejuvenated nondelegation doctrine list multiple concerns with the modern administrative apparatus, each derivative of the central concern: the administrative state's perceived subversion of the Constitution's separation of powers protections. First, they argue that granting agencies the authority to "enact" binding legislative rules over private actions is, in its essence, an improper delegation of legislative power.[11] Second, they contend that the combination of executive, legislative, and judicial functions of government within the "same hands" of federal agencies is "the

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[9] See, for example, *Whitman v. Am Trucking Associations*, 531 U.S. 457, 472 (2001) ("In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted ... in a Congress of the United States.' This text permits no delegation of those powers .... "), citing *Loving v. United States*, 517 U.S. 748, 771 (1996).

[10] See Adrian Vermeule, *Law's Abnegation* 51–53 (2016) (arguing so long as agencies operate under an intelligible principle, there is no delegation of legislative power).

[11] See, for example, *City of Arlington v. FCC*, 569 U.S. 290, 312 (Roberts dissenting) ("Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law….").

very definition of tyranny."[12] Because agencies can often act in all three capacities, they skirt this boundary.

A third complaint, the motivating thrust behind Judge Kavanaugh's major rules doctrine, is the concern that in interpreting overly broad statutory grants of authority, agencies are "engag[ing] in policy choices—in legislative will rather than mere judgment."[13] Agencies likely cannot function without some authority to make policy, but at some point, the proponents argue, the delegation topples the constitutional order. The essence of the nondelegation doctrine, as formulated by Chief Justice Marshall, requires that agency authority to make policy not infringe on Congress's exclusive duty to make fundamental legislative choices:

> Thus far, all roads have led back to Chief Justice Marshall's seemingly unsatisfying formulation for improper delegations. In essence, the formulations examined so far all reduce to the proposition that Congress must make whatever decisions are sufficiently important to the relevant statutory scheme that Congress must make them. In light of these prior efforts, I have elsewhere proposed as the appropriate nondelegation principle: "Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them." In other words, Chief Justice Marshall's circular formulation was right all along, and rather than wind our way back to it indirectly, we might as well take the freeway. The line

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[12] James Madison, *The Federalist Papers, No. 47* 324 (Wesleyan UP 1961) (J. Cooke, ed.) (originally published 1788).
[13] Philip Hamburger, *Is Administrative Law Unlawful?* 115 (University of Chicago Press 2014).

> between legislative and executive power (or between legislative and judicial power) must be drawn in the context of each particular statutory scheme. In every case, Congress must make the central, fundamental decisions, but Congress can leave ancillary matters to the President or the courts.[14]

Several current Supreme Court justices seem to agree with these proponents, viewing the modern administrative state as sometimes crossing the line of making "central, fundamental decisions." Justice Gorsuch, while on the Tenth Circuit,[15] highlighted the incongruity between the rather uncontroversial precept that "Congress may allow the executive to resolve 'details'" and the non sequitur that later developed: "*Chevron* invest[s in agencies] the power to decide the meaning of the law, and to do so with legislative policy goals in mind . . . ."[16] Chief Justice Roberts has also cast a wary eye: "the danger posed by the growing power of the administrative state cannot be dismissed."[17] Justice Thomas has gone so far as to support a complete rejuvenation of the nondelegation doctrine and would declare unlawful all legislative agency rulemaking.[18] Moreover, Justice Gorsuch has actively wondered whether, even if Congress did provide an agency with a clear statement authorizing it to resolve a

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[14] Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 376–77 (2002).
[15] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir 2016) (Gorsuch concurring).
[16] Id. at 1155.
[17] *City of Arlington*, 569 U.S. at 315 (Roberts dissenting).
[18] *Department of Transportation v. Association of Am Railroads*, 135 S.Ct. 1225, 1242 (2015) (Thomas concurring) ("[A]lthough this Court has long recognized that it does not necessarily violate the Constitution for Congress to authorize another branch to make a determination that it could make itself, there are certain core functions that require the exercise of legislative power and that only Congress can perform. The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power."), citing *Wayman v. Southard*, 10 Wheat 1, 43 (1825).

major issue, the agency would be constitutionally permitted to make such a decision.[19]

But, separation of powers is not the only consideration. Those resistant to a rejuvenated nondelegation can argue that two of the three *Chevron* rationales can be ported over to justify crimping nondelegation in favor of broad agency authority to interpret statutory ambiguities: respect for congressional intent to delegate and utilization of agency expertise. Curtailing Congress's ability to delegate technical decisions (many of which are out of its depth) restricts Congress's access to agency expertise, reducing the efficiency and effectiveness of government.[20] Additionally, any fear of abuse of power resulting from an absence of robust separations of powers controls should be balanced against the public good of a powerful administrative apparatus: the ability of the state to promote "poverty relief, health, safety, environmentalism, and consumer protection" and combat excessive, self-interested private abuses of "delegated state power" enabled by unresponsive tort, property, and contract law.[21]

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[19] *Gutierrez-Brizuela v. Lynch*, 834 F.3d at 1153–54 (Gorsuch concurring) ("Even supposing, too, that we could overlook this problem—even supposing we somehow had something resembling an *authentic congressional delegation of legislative authority*—you still might wonder*: can Congress really delegate its legislative authority*—its power to write new rules of general applicability—*to executive agencies?* The Supreme Court has long recognized that under the Constitution 'congress cannot delegate legislative power to the president' and that this 'principle [is] universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.' *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692, 12 S.Ct. 495, 36 L.Ed. 294 (1892). Yet on this account of *Chevron* we're examining, its whole point and purpose seems to be exactly that—to delegate legislative power to the executive branch.") (emphasis added).

[20] Elena Kagan and David J. Barron, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 246 (2001).

[21] Vermeule, *Law's Abnegation* at 58 (cited in note 10).

Unsurprisingly then, rejuvenation of nondelegation is not a project embraced by all on the Court. Justice Breyer has supported a functionalist, pragmatic view of separations of powers, very much at odds with the formalism forwarded by Justices Gorsuch and Thomas.[22] Justice Kagan has taken a different approach to the problem in her academic writing. Rather than relying on technical expertise, then-Professor Kagan has asserted that *Chevron* and delegation of legislative power is most legitimate when exercised by the politically responsive: those heads of agencies directly influenced by and accountable to the President.[23] Thus, policy (or possibly "legislative") decisions are reserved to the politically accountable, and the fruits of technical expertise can be leveraged without fear of unelected bureaucrats making legislative decisions. But even though Kagan might reject a return to nondelegation, her approach is a direct attempt to address the "potential threat that administrative discretion poses" to separation of powers.[24]

So, on the one hand, there is discontent and concern over the "danger" posed by growth and power of the administrative state. And on the other, we have an entrenched administrative apparatus with its faithful defenders, who may be even more justified than ever considering the exponential growth and complexity of the modern federal government. If the court can accommodate the interests of

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[22] See, for example, *Clinton v. City of New York*, 524 U.S. 417, 471 (1998) (Breyer dissenting) (arguing "the genius of the Framers' pragmatic vision" in only "generally phras[ing] the delegation of "all 'legislative' power to Congress" and "all 'executive' power in the President" allows the Court to interpret them "generously in terms of the institutional arrangements that they permit" and to "find constitutional room for necessary institutional innovation.").

[23] Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2364–72 (2001).

[24] Id. at 2369.

both camps, it may be able to resolve this growing tension in administrative law.[25]

B. THE FALL OF *CHEVRON* AS A BLANKET RULE OF DEFERENCE OVER AMBIGUITIES

The resurgence of interest in nondelegation doctrine is occurring simultaneously with the softening of the *Chevron* doctrine. The Court has begun to limit application of this formerly universally-applied doctrine, providing an opening for those seeking to revive the nondelegation doctrine.

The *Chevron* doctrine is a judicial mechanism designed to interpret ambiguities in statutes by first asking whether Congress has spoken directly to the issue, and then deferring to an agency's interpretation, so long as the interpretation is reasonable.[26] There are three common (though not exclusive) justifications for *Chevron*: (1) the doctrine operates on the assumption that when Congress provides ambiguities, Congress *impliedly delegates* authority to the agency to interpret the provision;[27] (2) agencies have an advantage in interpreting their enabling statutes, generated from their *technical*

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[25] This tension continues to rise. The Supreme Court will hear *Gundy v. United States* in the upcoming October 2018 term. The question presented is whether the "Sex Offender Registration and Notification Act's delegation of authority to the attorney general to issue regulations under 42 U.S.C. § 16913 violates the nondelegation doctrine." As long as the Court continues to show an appetite for reexamining nondelegation and the administrative apparatus, the tension will continue to build.

[26] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516 (1989).

[27] *United States v. Mead Corp*, 533 U.S. 218, 237 (2001) (*Chevron* recognized that even without express authority to fill a specific statutory gap, circumstances pointing to implicit congressional delegation present a particularly insistent call for deference.").

expertise in the field and frequent interaction with the statute;[28] and (3) the *political accountability* of agencies (derivative of the quadrennial presidential elections) provides better responsiveness to public will than if statutory ambiguities were to be determined by life-tenured judges.[29] But in certain situations, where one of these three justifications for *Chevron* does not apply, the Court has been willing to stray from strict adherence, denying deference to agency interpretations.

For example, in *Bowen v. American Hospital Association*, [30] the Court found the Department of Health and Human Services (HHS) did not have specialized, technical expertise over prohibiting discrimination against the disabled under the Americans with Disabilities Act (at least no more so than the 27 other agencies promulgating such rules).[31] Lacking any technical expertise over the subject matter, the Court found no reason to defer to HHS's

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[28] *Chevron*, 467 U.S. at 865 (1984) ("Perhaps [Congress] consciously desired the [agency] to strike the balance . . . thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so.").

[29] Id. at 865–66 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

[30] 476 U.S. 610 (1986).

[31] Id. at 643 n30 (1986) ("Twenty-seven agencies . . . have promulgated regulations forbidding discrimination on the basis of handicap in programs or activities receiving federal financial assistance. The Department of Housing and Urban Development has issued a proposed rulemaking. There is thus not the same basis for deference predicated on expertise as we found with respect to the Environmental Protection Agency's interpretation of the 1977 Clean Air Act Amendments in *Chevron* …").

interpretation of its ADA rulemaking over the Court's own interpretation.[32]

In *United States v. Mead*,[33] the Court found absent the first rationale: intent to delegate. Though the U.S. Customs Service was charged with administering the Harmonized Tariff Schedule—a federal statute dictating tariffs over certain described categories of goods—the Court denied the agency deference to statutory interpretations of particular tariff classifications (issued in "ruling letters"). The problem, the Court said, was that "the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law."[34] The Court used this "force of law" concept as a proxy for determining the implied delegation rationale of *Chevron* was present.[35] Absent the implied delegation, the Customs interpretations were "beyond the *Chevron* pale" and received no deference.[36] In *Mead*, the Court fashioned its most well-known restriction on *Chevron*'s application, now called "*Chevron* step zero."[37]

With cracks now visible in the *Chevron* wall, some justices continue to argue for even more selective and limited application of the doctrine. In *SAS Institute v. Iancu*,[38] Justice Breyer, who

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[32] Id.
[33] 533 U.S. 218 (2001).
[34] *Mead*, 533 U.S. at 231–32.
[35] Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 224 (2006) ("In Mead, the Court appears to be using the "force of law" idea as a heuristic for an implicit delegation--on the theory that when Congress has given an agency the authority to act with legal force, it has also given the agency the authority to interpret statutory ambiguities.").
[36] *Mead*, 533 U.S. at 234.
[37] See generally, Sunstein, *Chevron Step Zero* (cited in note 35).
[38] 138 S.Ct. 1348, 1364 (2018) (Breyer dissenting).

occasionally writes separately to express his own view of *Chevron*,[39] did so again to further explain his view of the doctrine. Breyer argued *Chevron* is merely a "rule of thumb," and that *Chevron* deference should be meted out by courts based substantially on the court's intuition of what degree of deference Congress would have intended (and not as a blanket rule).[40] Breyer suggested looking to a "hypothetical reasonable legislator, [] asking what such legislators would likely have intended had Congress considered the question of delegating gap-filling authority to the agency."[41] Although this approach would detract from *Chevron*'s simple, uniform presumption of Congress's implied congressional delegation, it comports well with *Mead*'s takeaway: when the implied delegation is implausible, judges should not blindly apply *Chevron* deference. Neither is Breyer alone in arguing for a more rigorous threshold determination of whether to apply *Chevron*. Chief Justice Roberts has argued that "[a] court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference. Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue."[42]

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[39] See *City of Arlington*, 569 U.S. at 308–09 (2013) (Breyer concurring) (explaining his view that "the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill").

[40] *SAS Institute*, 138 S.Ct. at 1364 (Breyer dissenting) ("In referring to *Chevron*, I do not mean that courts are to treat that case like a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision. Rather, I understand *Chevron* as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have.").

[41] Id.

[42] *City of Arlington*, 569 U.S. 290, 312 (2013) (Roberts dissenting).

While not dispositive in establishing a rule that interpretations lacking one of the three rationales will fail to merit *Chevron* deference, the Court's recent jurisprudence shows the doctrine is far from an automatic rule of construction. The Court may likewise be persuaded certain other classes of interpretations, also lacking one of the three rationales, may merit special non-*Chevron* treatment. But before delving deeply into such instances it is important to recognize another growing development of administrative law: the nondelegation doctrine.

C. RULES OF MAJOR ECONOMIC AND POLITICAL SIGNIFICANCE: A CONFLICT OF NONDELEGATION AND *CHEVRON*

A particularly acute convergence of the nondelegation and *Chevron* doctrines occurs when an agency promulgates legislative rules of major economic and political significance justified solely upon an ambiguous delegation of authority from Congress. In response, the Court has developed a doctrine—the "major questions" doctrine—which refuses *Chevron* deference to such interpretations, reflecting an understanding that *Chevron*'s justifications do not attach. But the major questions doctrine, as articulated by the Supreme Court, fails to adequately address the underlying concerns presented by issues of major political and economic significance.

Issues of major economic and political significance are those that have animated the country writ large, have massive economic reliance interests, or subject whole industries to new regulation.[43] For example, decisions whether to regulate tobacco products as

[43] *United States Telecom Association*, 855 F.3d 381, 422-23 (D.C. Cir. 2017) (en banc) (Kavanaugh dissenting from the denial of rehearing en banc) (collecting cases).

"drugs,"[44] whether health insurance subsidies are available on federal exchanges,[45] and, as argued here, whether the internet is subject to federal regulation are all issues of major economic and political significance. Obviously, under the consensus administrative framework, agencies *can* be given authority to promulgate regulations over such subjects. But should ambiguities in statutes be interpreted to grant agencies the discretion to determine their own authority to reach high-impact issues? Should courts defer and *assume* Congress *meant* to pass off such issues to agencies? The nondelegation doctrine pushes courts to answer this question in the negative, while *Chevron* and its justifications push courts to continue to defer to agencies, even in such situations. But even if the answer is no and nondelegation wins out over *Chevron*, does merely refusing *Chevron* adequately address the ultimate concern: ensuring Congress determine issues of general welfare and national importance, while agencies and the courts fill in the gaps and details?

Issues of major economic and political significance, under current precedent, are at least entitled to a *Mead*-like exemption from *Chevron*. Deference here is not justified by the traditional three *Chevron* pillars. First, there is no indication Congress meant to delegate these issues, considering their significance and political valence.[46] The Court recently reasserted this principle in *King v. Burwell*. "[*Chevron*] is 'premised on the theory that a statute's

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[44] See *FDA v. Brown & Williamson Tobacco Corp*, 529 U.S. 120 (2000).
[45] See *King v. Burwell*, 135 S.Ct. 2480 (2015).
[46] See *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"); *International Refugee Assistance Project v. Trump*, 883 F.3d 233, 291 (4th Cir. 2018), cert granted, judgment vacated, 138 S. Ct. 2710 (2018) ("Courts require a clear statement of congressional intent before finding that Congress has ceded decisions of great economic and political significance….").

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.'"[47] An ambiguity implicating "a question of deep major economic and political significance" "is one of those cases."[48] Indeed, one empirical study has shown drafters of legislation fully intend to reserve resolution of these issues to the halls of Congress.[49] As in *Mead*, the Court will refuse *Chevron* deference if there is indication rebutting the *Chevron* presumption that Congress intended to delegate a certain authority to an agency.

Nor in these instances can *Chevron* be justified by technical expertise. Issues of major economic and political significance turn on value judgments and policy decisions, not technical specifications. "Even among experts, technical data does not resolve difficult policy questions."[50]

Only the third rationale for *Chevron*—preference for politically accountable actors to interpret ambiguities—supports granting deference on these questions to agencies. But oddly enough, when the political implications of an issue rise, the major questions doctrine flips the script and grants unelected courts unimpeded authority to decide such issues, rather than the (relatively) more

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[47] *King v Burwell*, 135 S.Ct. at 2488–89 (quoting *Brown & Williamson*, 529 U.S. at 159).
[48] Id. at 2489.
[49] *United States Telecom Association*, 855 F.3d 381 at 422 (Kavanaugh dissenting from the denial of rehearing en banc) (quoting Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 1003 (2013) ("[Gluck and Bressman's] empirical study concluded that the major rules doctrine reflects congressional intent and accords with the in-the-arena reality of how legislators and congressional staff approach the legislative function. As one congressional official put it to them: 'Major policy questions, major economic questions, major political questions, preemption questions are all the same. Drafters don't intend to leave them unresolved.'").
[50] Hamburger, *Is Administrative Law Unlawful?* at 314 (cited in note 13).

politically accountable agencies. As such, the major questions doctrine both fails to rebut all of the *Chevron* rationales and fails to address the nondelegation concerns described above.

But the answer to how the courts should address the conflict between the nondelegation and *Chevron* doctrines continues to be muddled. Seemingly no consistent doctrine addressing the impasse can garner an enduring five votes on the Supreme Court. Judge Kavanaugh while on the D.C. Circuit outlined a compromise path forward: the major rules doctrine. Kavanaugh's major rules doctrine provides an ideal tonic for the Supreme Court's deference dyspepsia.

II. DEFINING THE MAJOR RULES DOCTRINE

The major rules doctrine proposed by Judge Kavanaugh has a simple formulation: major rules implicating issues of deep economic and political significance are presumptively unlawful, absent a statutory clear statement. Though the medicine may appear rather potent, the doctrine would be applied solely to those few rules which exceed the "major" threshold. In order to ensure the doctrine adheres to this strict limitation, there should be a presumption set against a finding of a major rule. Once identified, the doctrine applies a clear statement principle—a well-established judicial mechanism used to ensure clear congressional will and deliberation (e.g., the rule of lenity, the presumption against preemption)—rather than demanding that judges enter the political fray of such high-profile issues as required by the major questions doctrine.

A. JUDGE KAVANAUGH'S MAJOR RULES DOCTRINE

United States Telecom Association v. FCC featured a challenge to the FCC's 2015 Open Internet Order (also known as the "Net Neutrality Rule"), which reclassified the internet as a *telecommunication* rather than *information* service under the Communications Act of 1934, thus subjecting the internet and

internet service providers (ISPs) to heavy restrictions and regulation.[51]

No express authorization from Congress was given to FCC to regulate the internet as a common carrier.[52] In fact, originally, in 2002, the FCC refused to classify broadband as a telecommunications service under the Communications Act, as broadband neither provided telephone services, restricted access through the telephone network, nor exhibited monopolistic characteristics of telecommunications utilities.[53] Broadband services simply were not designed to be included as telecommunications services under the Telecommunications Act of 1996, which amended the Communications Act of 1934 to prevent information services—like broadband internet services—from being unduly regulated like their telecom cousins.[54] Accordingly, the FCC originally "concluded that

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[51] *United States Telecom Association*, 855 F.3d 381 at 383 (Srinivasan concurring in the denial of rehearing en banc).

[52] Id. at 423–24 (Kavanaugh dissenting from the denial of rehearing en banc); see also FCC, In the Matter of Restoring Internet Freedom, WC17-108, 2018 WL 305638, at 9–26 (OHMSV Jan. 4, 2018) (interpreting the Communications Act of 1934 to not clearly allow for regulation of broadband as a telecommunications service).

[53] *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 1001–02 (2005). It must be noted that although *Brand X*'s finding that the FCC did have ultimate authority under *Chevron*'s technical expertise rationale to classify broadband as a telecommunications service under the Communications Act of 1934, Judge Kavanaugh points out that the FCC's classification of broadband as an information service and its resultant limited regulatory impact did not qualify as a major rule, and thus was properly reviewed under *Chevron*: "Court did not have to—and did not—consider whether classifying Internet service as a telecommunications service and imposing common-carrier regulation on the Internet would be consistent with the major rules doctrine. In other words, *Brand X* nowhere addressed the question presented in this case: namely, whether Congress has clearly authorized common-carrier regulation of Internet service providers." *United States Telecom Association*, 855 F.3d 381 at 425 (Kavanaugh dissenting from the denial of rehearing en banc).

[54] *United States Telecom Association*, 855 F.3d 381 at 424 (Kavanaugh dissenting from the denial of rehearing en banc).

'broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.'" [55] This conclusion was in perfect alignment with the stated statutory policy of Congress codified by the Telecommunications Act: "It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal* or State *regulation*."[56] So what authorization did FCC have from Congress to promulgate the Net Neutrality Rule? No more than an ambiguity[57] leveraged to grant the FCC authority to promulgate a major rule. This was a crucial flaw, argued Judge Kavanaugh, and a trigger for the major rules doctrine.[58]

And as Judge Kavanaugh argued, the Net Neutrality Rule's great economic and political significance qualified it as a major rule due to a number of factors. He pointed to how the rule fundamentally transformed the internet[59] with the agency suddenly discovering its

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[55] *Brand X*, 545 U.S. at 1001 (quoting FCC, In Re Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities, 17 FCC Rcd 4798, 4802 (2002)).
[56] 47 USC § 230(b) (emphasis added).
[57] *Brand X*, 545 U.S. at 992 ("the Communications Act is ambiguous about whether cable companies "offer" telecommunications with cable modem service").
[58] *United States Telecom Association*, 855 F.3d 381 at 417 (Kavanaugh dissenting from the denial of rehearing en banc) ("The lack of clear congressional authorization matters. In a series of important cases over the last 25 years, the Supreme Court has required clear congressional authorization for *major agency rules* of this kind.").
[59] Id. at 423–24 ("The net neutrality rule is a major rule because it imposes common-carrier regulation on Internet service providers. (A common carrier generally must carry all traffic on an equal basis without unreasonable discrimination as to price and carriage.) In so doing, the net neutrality rule fundamentally transforms the Internet by prohibiting Internet service providers from choosing the content they want to transmit to consumers and from fully responding to their customers' preferences. The rule therefore wrests control of the Internet from the people and private Internet service providers and gives control to the Government.").

authority under an eighty-one-year-old statute[60] last amended when the internet was being advertised by AOL to the theme song of the Jetsons.[61] The rule had broad applicability[62] and huge financial consequences.[63] It was highly politically-salient, garnering extraordinary mobilized interest,[64] intense public focus,[65] presidential lobbying of an independent agency,[66] and congressional debate and study, with introduction of at least thirteen congressional bills between 2006 and 2016.[67] But Congress never affirmatively

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[60] Id. at 424 ("FCC is relying here on a long-extant statute—namely, the Communications Act of 1934, as amended in 1996.").

[61] Old Technology Archive, *AOL Commercial 1996,* YouTube (Jan 19, 2017), archived at https://perma.cc/J762-EDVF ("Can you believe what's possible these days? Conversations through your computer?!").

[62] *United States Telecom Association*, 855 F.3d 381 at 423 (Kavanaugh dissenting from the denial of rehearing en banc) ("The rule will affect every Internet service provider, every Internet content provider, and every Internet consumer.").

[63] Id. ("The financial impact of the rule—in terms of the portion of the economy affected, as well as the impact on investment in infrastructure, content, and business—is staggering.").

[64] Id. at 423–24 ("[C]onsumer interest groups and industry groups alike have mobilized extraordinary resources to influence the outcome of the policy discussions.").

[65] Id. at 423 ("The public has also focused intensely on the net neutrality debate. For example, when the issue was before the FCC, the agency received some 4 million comments on the proposed rule, apparently the largest number (by far) of comments that the FCC has ever received about a proposed rule.").

[66] Id. at 423–24 ("[E]ven President Obama publicly weighed in on the net neutrality issue, an unusual presidential action when an independent agency is considering a proposed rule.").

[67] Id. at 423–24 ("Congress and the public have paid close attention to the issue. Congress has been studying and debating net neutrality regulation for years. It has considered (but never passed) a variety of bills relating to net neutrality and the imposition of common-carrier regulations on Internet service providers. *See, e.g.*, H.R. 5252, 109th Cong. (2006); H.R. 5273, 109th Cong. (2006); H.R. 5417, 109th Cong. (2006); S. 2360, 109th Cong. (2006); S. 2686, 109th Cong. (2006); S. 2917, 109th Cong. (2006); S. 215, 110th Cong. (2007); H.R. 5353, 110th Cong. (2008); H.R. 5994, 110th Cong. (2008); H.R. 3458, 111th Cong. (2009); S. 74, 112th Cong. (2011); S. 3703, 112th Cong. (2012); H.R. 2666, 114th Cong. (2016).").

chose to amend the Communications Act of 1934 to subject ISPs to common carrier regulation, and no law passed explicitly conferring upon the FCC such authority in its stead.[68] Yet even so, in 2015, "FCC decided to unilaterally plow forward and issue its net neutrality rule."[69]

Under traditional *Chevron* analysis of a regular rule of no great economic or political significance, FCC's decision to implement the Net Neutrality Rule under an ambiguous statutory provision would be granted deference under the theory of implicit delegation of authority from Congress. Indeed, Judge Srinivasan, who concurred in the denial of rehearing en banc, asserted that because the statute left open the question of whether broadband could be regulated as a telecommunications service, Congress impliedly envisioned that the FCC would retain discretion to resolve the ambiguity under *Chevron*.[70] But the major rules doctrine would dictate the opposite outcome. Questioning the assumption of implied delegation to agencies for major rules, Judge Kavanagh argued instead that Congress impliedly *reserves* determination of such major policy issues to itself. Thus, although FCC normally would be free to interpret the ambiguity here in favor of its own authority,[71] because the agency is seeking to implement a *major* rule by relying on an

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[68] *See FCC,* In the Matter of Restoring Internet Freedom, WC17-108, 2018 WL 305638, at 9–26 (OHMSV Jan. 4, 2018) (interpreting the Communications Act of 1934 to not clearly allow for regulation of broadband as a telecommunications service); *United States Telecom Association*, 855 F.3d 381 at 423 (Kavanaugh dissenting from the denial of rehearing en banc).

[69] *United States Telecom Association*, 855 F.3d 381 at 425 (Kavanaugh dissenting from the denial of rehearing en banc).

[70] Id at 383 (Srinivasan concurring in the denial of rehearing en banc) (relying on *Brand X*, 545 U.S. 967).

[71] See *City of Arlington*, 569 U.S. at 312.

ambiguous provision,[72] the court should have denied the agency deference *and* authority:

> Here, the FCC argues that, under *Brand X*, the agency has authority to classify Internet service as a telecommunications service because the statute is ambiguous. The FCC is badly mistaken. *Brand X*'s finding of statutory ambiguity cannot be the source of the FCC's authority to classify Internet service as a telecommunications service. Rather, under the major rules doctrine, *Brand X*'s finding of statutory ambiguity is a bar to the FCC's authority to classify Internet service as a telecommunications service. . . . Under our system of separation of powers, an agency may act only pursuant to statutory authority and may not exceed that authority.[73]

Judge Kavanaugh then applied his synthesis of the major rules doctrine:

> For major rules, moreover, the agency must have clear congressional authorization. The net neutrality rule is a major rule. But Congress has not clearly authorized the FCC to issue that rule. Under the Supreme Court's major rules doctrine, the net neutrality rule is therefore unlawful and must be vacated.[74]

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[72] See *United States Telecom Association v. FCC*, 825 F.3d 674, 702 (D.C. Cir. 2016) (original panel decision finding the FCC was due deference due to the ambiguity of the statute's application to broadband).

[73] *United States Telecom Association*, 855 F.3d 381 at 426 (Kavanaugh dissenting from the denial of rehearing en banc).

[74] Id. Here, Judge Kavanaugh argues the major rules doctrine is already recognized by the Supreme Court, and relabels the major *questions* doctrine the major *rules* doctrine.

Though Judge Kavanaugh labeled the major rules doctrine the "Supreme Court's," it is better understood to be a departure from the muddled status quo. It is, in fact, distinct and new. The major rules doctrine carves a *Mead*-like exception from *Chevron*—like the major questions doctrine—but takes one step further: major rules must be authorized by clear statutory statements, or are otherwise unlawful. This represents a significant departure from and replacement for the major questions doctrine, which holds that statutory ambiguities implicating questions of major political and economic significance are to be reviewed de novo—not be held unlawful.[75] Though Judge Kavanaugh's proposal was rejected by the D.C. Circuit in this case, Judge Kavanaugh was able to highlight a doctrine that could serve as a key compromise between the separations of powers concerns highlighted above and the continuing reticence to chip away at *Chevron* and the modern administrative apparatus.

As the major rules doctrine is further developed throughout this Note, it is important to keep in mind both its rationales and goals. First, the doctrine rebuts the presumption of *Chevron* that Congress intends to delegate authority and deference when it enacts ambiguous statutes: Congress doesn't delegate issues of major

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This note, instead, argues the two are very distinguishable and that major rules doctrine, though supported in great measure, has not yet been entirely adopted by Supreme Court precedent.

[75] Asher Steinberg, *Another Addition to the Chevron Anticanon: Judge Kavanaugh on the "Major Rules" Doctrine* (Narrowest Grounds, May 7, 2017), archived at https://perma.cc/TMA7-MNF3. ("While the major-questions doctrine misguidedly narrows *Chevron*'s domain, it has nothing at all to say about which way major questions should be decided. It only says that when it comes to major questions, courts must decide de novo (perhaps with Skidmore deference to persuasive agency interpretation) what the statute means, on the theory that when it comes to major questions statutes must mean something. The agency may win on de novo review, as it did in Burwell, or it may not; the exception itself places no thumb on the scale in any particular direction.").

economic or political significance. Second, the doctrine seeks to preserve *Chevron* in matters of technical expertise—the doctrine's application is to be reserved for broad determinations of policy and leaves in place deference to agencies for filling in details. Finally, the doctrine adopts the political accountability rationale of *Chevron* forwarded by Justice Kagan: decisions of import are more legitimate if made by the politically accountable. If ambiguities are more legitimately resolved by the *relatively* more politically accountable agencies than the courts, then their resolution is further legitimized by a doctrine that funnels such decision-making to the more directly politically accountable legislative branch.

B. DEFINING A MAJOR RULE

Courts are loath to enter into the political fray and enforce any rigid boundaries between the two political branches. This reticence arises from two obstacles to enforcement: (1) lack of manageable judicial standards for judging infringements and (2) modern realities requiring deference to Congress' judgment in delegating to agencies the ability to fill in details within complex, comprehensive regulatory apparatuses that have popular support (e.g., Clean Air Act, Communications Act).[76] The major rules doctrine hurdles the latter obstacle (discussed further in Part III). The major rules doctrine is designed to address the former: creating a manageable line for courts to draw when adjudicating nondelegation concerns. This Note explores the factors that should define a "major rule" and thus where this line should be drawn.

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[76] Kagan and Barron, *Chevron's Nondelegation Doctrine* at 246 ("[T]he principal criticisms of the congressional nondelegation doctrine [are] that it insists on too much centralization of decision-making authority in the hands of Congress and that it resists any principled method of judicial enforcement.") (cited in note 20).

The central legal inquiry is whether rulemaking implicates an issue so economically and politically significant that it rebuts the presumption that Congress did implicitly delegate such authority to the agency. Judge Kavanaugh posits a factor test to determine whether a rule is sufficiently significant to qualify as a major rule under the doctrine. How can we formulate a test that is sufficiently concrete to avoid a doctrine which would "prove unpredictable in operation . . . triggered by circumstances that are highly subjective"?[77] Indeed, this threshold determination does not lend itself to concrete, definite tests. However, an examination of Judge Kavanaugh's factors can provide the judiciary with a manageable roadmap. Even so, to limit error in such determinations, there should be a presumption against a finding of a major rule.

The Supreme Court has used "major political and economic significance" as shorthand to refer to the separations of powers concerns created by such highly impactful issues.[78] Borrowing from the major questions doctrine, Kavanaugh's conception attempts to refine this definition by identifying certain features which indicate the presence of a major rule. This Note endorses the Kavanaugh factor test for determining whether a rule is politically or economically significant. But by placing a presumption against a finding of significance, the doctrine can be limited to those cases

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[77] Lisa Heinzerling, *The Power Canons*, 58 Wm. & Mary L. Rev. 1933, 1983–84 (2017).
[78] *United States Telecom Association*, 855 F.3d 381 at 419 (Kavanaugh dissenting from the denial of rehearing en banc) (The major rules doctrine is "grounded in two overlapping and reinforcing presumptions: (i) a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch, *see Benzene Case*, 448 U.S. at 645–46 (Stevens, J., concurring), and (ii) a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies.").

which are supported by the underlying justifications for the major rules doctrine.

1. Factors

Drawing from past Supreme Court cases, Judge Kavanaugh enumerated a number of factors which can assist judges in identifying major rules.[79] These include "the amount of money involved for regulated and affected parties, the overall impact on the economy," a broad effect (including "the number of people affected"), highly mobilized interest groups, vigorous congressional debate, intense public focus, and public presidential advocacy.[80] But even more factors might be included: Justice Breyer also considers "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."[81] Another factor is whether the rule addresses a detail or factual question, or whether the rule is a policy or legislative value judgment.[82] Any one of these factors may be insufficient to indicate a politically or economically significant rule, but in combination, a rule can be elevated to a "major" one.

Economic Impact. Economic significance alone has elevated some rules to major, but the Court sets the bar high: the regulation must

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[79] Id. at 422–24.
[80] Id.
[81] *City of Arlington*, 569 U.S. at 309 (quoting *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)) (enumerating factors to determine whether Congress intended to give an agency authority make interpretations with the force of law).
[82] See *United States v. Nichols*, 784 F.3d 666, 671–72 (10th Cir. 2015) (en banc) (Gorsuch dissenting from the denial of rehearing en banc).

impose significant costs on an *entire* industry, rather than a single subset or particular entity. In *Utility Air Regulatory Group v. EPA*, it was enough that the regulation exerted "extravagant . . . power over the *national economy*" affecting operation of "millions" of potential sources of air pollution.[83] In *MCI Telecommunications Corp. v. AT&T Co.*, [84] whether an "entire industry" (the telecommunications industry) would be regulated was too significant a decision to leave to agency discretion.[85] In *FDA v. Brown & Williamson* the bar was obviously met in an attempt to regulate tobacco and cigarettes, "given the economic and political significance of the tobacco industry."[86]

Political Engagement. Some rules have been found to be significant due in large part to their political purchase. In a separate challenge to Net Neutrality, *Verizon v. FCC*,[87] the D.C. Circuit found "the question of net neutrality" to be of major political and economic significance because it "implicates serious policy questions, which have engaged lawmakers, regulators, businesses, and other members of the public for years." [88] Judge Kavanaugh has also mentioned presidential input, interest group engagement, and public focus as indicators an issue has heightened political intrigue.[89]

Significant Congressional Debate. The proposal and failure of bills in Congress seeking to authorize an agency to regulate an issue is a sign of its political importance, signaling an issue is in the midst of

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[83] *Utility Air Regulatory Group*, 134 S.Ct. at 2444 (emphasis added).
[84] *MCI Telecommunications Corp v. AT&T Co*, 512 U.S. 218 (1994).
[85] Id. at 231.
[86] *Brown & Williamson*, 529 U.S. at 147.
[87] 740 F.3d 623 (D.C. Cir. 2014).
[88] Id. at 634.
[89] *United States Telecom Association*, 855 F.3d 381 at 422-24 (Kavanaugh dissenting from the denial of rehearing en banc).

political debate. Certainly, a de minimis threshold of debate should be found before giving this factor much credence as the purpose of this factor is to indicate whether the issue is sufficiently salient to the degree that Congress is actively engaged with it, not that it is a legislator's pet issue. Congressional debate is not a dispositive showing (the actions of subsequent Congresses have no bearing on meaning of the enacted statute),[90] but the fact that an issue has risen to the level of repeated congressional debate can act as a signal to court that (1) Congress may not believe they have clearly delegated an issue to an agency; and (2) that the issue is of national import and debate.

As stated earlier, the major rules doctrine does not seek to prevent Congress from delegating to agencies the necessary functions of filling out the details of statute. Rather, the major rules doctrine seeks to "ensure[] 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."[91] That an issue is a "subject of an earnest and profound debate across the country" makes claims of implied, "oblique . . . delegation [to an agency] all the more suspect."[92] This idea finds significant support in the existing case law. In *Brown &*

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[90] See *Brown & Williamson*, 529 U.S. at 155 ("We do not rely on Congress' failure to act—its consideration and rejection of bills that would have given the FDA this authority . . . ."; *United States Telecom Association*, 825 F.3d at 703–04 ("'congressional inaction or congressional action short of the enactment of positive law ... is often entitled to no weight' in determining whether an 'agency had statutory authority to promulgate its regulations'" (quoting *Advanced Micro Devices v Civil Aeronautics Board*, 742 F.2d 1520, 1542 (D.C. Cir. 1984)).

[91] *Industrial Union Department, AFL-CIO v. Am Petroleum Institute*, 448 U.S. 607, 685 (1980) (Rehnquist concurring) (emphasis added).

[92] *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

Williamson, the Court noted Congress "convened hearings to consider legislation addressing 'the tobacco problem,'" "considered and rejected several proposals to give the FDA the authority to regulate tobacco," and pointed to six tobacco statutes passed in the intervening years where Congress had opportunity to grant FDA jurisdiction, but refused to do so.[93] This series of congressional actions acted to "ratify" the contemporaneous agency interpretation.[94] If agencies are afforded deference on the assumption of an implied congressional delegation, such vigorous congressional debate acts as convincing countervailing evidence against such an implication.[95]

Magnitude of the Impact. The scale of the issue is also a determining factor in whether an agency interpretation is politically significant. In *Texas v. United States*,[96] the Fifth Circuit addressed the question of whether the Department of Homeland Security ("DHS") had authority under an ambiguous statutory provision to administer the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program.[97] DAPA sought to grant certain categories of illegal aliens—up to 4.3 million persons—a deferred action on any deportations.[98] The dissent noted DAPA was merely an aggregation of individual discretionary deportation decisions—

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[93] *Brown & Williamson*, 529 U.S. at 143–51.
[94] Id. at 157–58.
[95] Id. at 159–60 ("*Chevron* deference 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. . . . This is hardly an ordinary case" due in part because "Congress . . . squarely rejected proposals to give the FDA jurisdiction over tobacco . . . .").
[96] 809 F.3d 134 (5th Cir. 2015).
[97] Id. at 166.
[98] Id.

each of which requires policy decisions—which Congress has already delegated to DHS.[99] But the scale of the issue changed such discretion from an executive, technical question to a legislative one, as Justice Kennedy posited during oral argument:

> JUSTICE KENNEDY: Well, it's *four million people* from where we are now.
>
> GENERAL VERRILLI: Well, you know, *that's a big number*. You're right, Justice Kennedy.
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> JUSTICE KENNEDY: And that's -- and that's the whole point, is that you've talked about discretion here. What we're doing is defining the limits of discretion. And it seems to me that *that is a legislative, not an executive act*.
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> GENERAL VERRILLI: So --
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> JUSTICE KENNEDY: All of the cases -- the briefs go on for pages to the effect that the President has admitted a certain number of people and then Congress approves it. That seems to me to have it backwards. *It's as if -- that the President is setting the policy and the Congress is executing it. That's just upside down*.[100]

Divided 4-4, the Supreme Court upheld[101] the Fifth Circuit's determination that the aggregation of individual, non-major policy choices—exempting 4.3 million people from a statutory requirement—"undoubtedly implicates 'question[s] of deep

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[99] Id. at 218 (King dissenting) (citing *Arizona v. United States*, 567 U.S. 387, 396 (2012)).
[100] Transcript of Oral Argument at 24, *United States v. Texas*, 136 S. Ct. 2271 (2016) No. 15-674 (emphasis added).
[101] *United States v. Texas*, 136 S. Ct. 2271 (2016).

economic and political significance'" and was thus not subject to *Chevron* deference.[102] Thus, the sheer magnitude of a rule, regardless of whether the agency has the authority to perform an action on an individual or atomized scale, may encourage the court to view the rule as major.

Fundamental Statutory Transformations. Interpretations that "bring about an enormous and transformative expansion in [the agency's] regulatory authority without clear congressional authorization" are indicators of a major rule.[103] When an agency justifies a major rule by trying to force a square peg rule through a round hole statutory scheme, the agency cannot claim to be acting in alignment with a congressional delegation of authority. This is especially the case if the agency's interpretation requires statutory legerdemain to allow the interpretation to fit.

The FDA's tobacco rule, for example, violates this proscription against square-peg-round-hole interpretations. In the late 1990s, FDA decided to regulate tobacco, viewing the product to be "unsafe" and "dangerous."[104] In doing so, FDA relied on its ambiguous authority to regulate unsafe drugs under the Food, Drug, and Cosmetic Act ("FDCA").[105] The FDCA required all drug products deemed unsafe to be banned and removed from the markets. However Congress, since passing the FDCA, enacted numerous statutes explicitly contemplating tobacco's continued presence on the

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[102] *Texas v. United States*, 809 F.3d at 181.
[103] *Utility Air Regulatory Group*, 134 S. Ct. 2427, 2444 (2014).
[104] *Brown & Williamson*, 529 U.S. at 134 (quoting Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 FR 44396-01).
[105] Id. at 130.

markets.[106] This vise required FDA to simultaneously find tobacco safe (to comply with statutes restricting FDA from removing tobacco from the markets) and unsafe (in order to allow the agency to regulate the drug) under the FDCA.[107] This is precisely the kind of absurd, ill-fitting regulatory result one would expect when an agency is applying a square peg statute to a round hole regulatory endeavor.

And so too in *Utility Air Regulatory Group v. EPA*,[108] the Court encountered an agency (EPA) that attempted to promulgate a new regulation based on an ambiguous term ("air pollutant") despite certain contrary indications in the statute. EPA attempted to regulate emissions of unconventional greenhouse gas pollutants[109] from stationary sources by rewriting express statutory mandates requiring regulation of all sources in excess of 250 tons to mean sources in excess of 100,000 tons. The Court held that because EPA's interpretation would be "inconsistent with—[and] in fact, would overthrow—the Act's structure and design" and "would be 'incompatible' with 'the substance of Congress' regulatory scheme,'" it was an impermissible interpretation.[110] Otherwise, the Court

> would deal a severe blow to the Constitution's separation of powers. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, "faithfully execute[s]" them. The power of executing the laws necessarily includes both authority and

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[106] Id. at 137 ("Congress, however, has foreclosed the removal of tobacco products from the market.").
[107] Id. at 130.
[108] 134 S. Ct. 2427, 2444 (2014).
[109] Unconventional because it "greenhouse-gas emissions tend to be 'orders of magnitude greater' than emissions of conventional pollutants . . . " Id. at 2436.
[110] Id. at 2443–45 (quoting *Brown & Williamson*, 529 U.S. at 156).

> responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.[111]

The Court, thus, has shown that it will deny deference when agencies interpret ambiguities to promulgate square peg major rules under ambiguous language when the statute presents only round holes.[112] This the major questions and major rules doctrines have in common. In Part III, we see the critical point where the two diverge.

Long Extant Statutes and Newly Discovered Interpretations. A court may be able to rebut an implied delegation of authority for a major rule if the agency is seeking to deviate from a contemporary or customary understanding of its grant of authority. This factor reflects the "strong presumption of *continuity for major policies* unless and until Congress has deliberated about and enacted a change in those major policies. . . . [b]ecause a major policy change should be made by the most democratically accountable process—Article I, Section 7 legislation—this kind of continuity is consistent with democratic values."[113] Justice Breyer has suggested "the careful consideration

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[111] Id. at 2446 (quoting U.S. Constitution, Art II, § 3) (citing *Medellín v. Texas*, 552 U.S. 491, 526–27 (2008)) (citations omitted).

[112] However, the Court would go on to uphold regulation of greenhouse gases on "anyway" sources, which meet the 100 or 250-ton threshold for other identified conventional pollutants. Id. at 2449.

[113] *United States Telecom Association v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh dissenting from the denial of rehearing en banc) (emphasis added) (quoting William N. Eskridge Jr, *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 288 (Foundation 2016).

the agency has given the question over a long period of time" is a consideration of whether to grant the agency deference.[114]

This factor was critical in *U.S. Chamber of Commerce v. DOL*,[115] where the Fifth Circuit addressed whether the Department of Labor's fiduciary rule (for the first time subjecting to fiduciary duties and liability to investment advisors) under the Employee Retirement Income Security Act. After finding the rule economically significant, [116] the court took issue with DOL's reversal of the customary interpretation[117] in favor of a novel one.[118]

2. Fitting the Pieces Together

This formulation is susceptible to attack as a "totality-of-the-circumstances" test, disfavored by many, including the late Justice Scalia. Scalia attacked such frameworks as "really, of course, not a test at all but an invitation to make an ad hoc judgment regarding congressional intent." [119] But the premise of both *Chevron* and the major rules doctrine is an assessment of congressional intent. It may be that Scalia was more concerned that such a factor-driven test would give too much room to judges to insert their own judgments,

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[114] *City of Arlington*, 569 U.S. at 309 (2013) (quoting *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)) (enumerating factors to determine whether Congress intended to give an agency authority make interpretations with the force of law).
[115] *United States Chamber of Commerce v. Department of Labor*, 885 F.3d 360 (5th Cir. 2018).
[116] Id. at 368 (the rule "has already spawned significant market consequences, including the withdrawal of several major companies . . . from some segments of the brokerage and retirement investor market").
[117] Id. at 380–81 ("it took DOL forty years to 'discover' its novel interpretation . . . ").
[118] Id. ("DOL's turnaround from its previous regulation that upheld the common law understanding of fiduciary relationships alone gives us reason to withhold approval or at least deference for the Rule.").
[119] *City of Arlington*, 569 U.S. at 307 (2013).

creating an unworkably imprecise definition of a major rule.[120] In this sense, ad hoc assessments of congressional intent may present "a recipe for uncertainty, unpredictability, and endless litigation."[121] But to a certain degree, uncertainty in measuring political and economic significance is inescapable. Scalia himself applied the "economically and politically significant" test and failed to provide a precise definition.[122]

Because crystallizing the definition of "economically and politically significant" is such a tricky endeavor,[123] it may be tempting for scholars and lower court judges to avoid the doctrine altogether, for fear of error. Rather than introduce the risk of misidentification of major rules—and by definition inserting themselves into major political debates—lower courts may leave the doctrine's application to the Supreme Court. However, then-Judge Gorsuch argued that normative justifications make the endeavor worth the risk:

> [H]ow do you know an impermissible delegation of legislative authority when you see it? By its own telling, the

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[120] See Heinzerling, 58 Wm. & Mary L. Rev. at 1986 (Economic and political significance is "not an objective test of statutory meaning. The very identification of issues as economically and politically significant in the relevant way involves subjective judgments.") (cited in note 77).

[121] *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001).

[122] See *Utility Air Regulatory Group*, 134 S. Ct. 2427 (2014). But see Steinberg, *Chevron Anticanon* (cited in note 75) (arguing *Utility Air Regulatory Group* was a Step One *Chevron* decision without an ambiguous provision, and thus not an exception to the doctrine at all).

[123] *Telecom Association*, 855 F.3d at 423 (2017) (Kavanaugh dissenting from the denial of rehearing en banc) ("To be sure, determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality. So there inevitably will be close cases and debates at the margins about whether a rule qualifies as major.").

> Court has had a hard time devising a satisfying answer. *But the difficulty of the inquiry doesn't mean it isn't worth the effort.* After all, at stake here isn't just the balance of power between the political branches who might be assumed capable of fighting it out among themselves. At stake is the principle that the scope of individual liberty may be reduced only according to the deliberately difficult processes prescribed by the Constitution, a principle that may not be fully vindicated without the intervention of the courts.[124]

Thus, to a growing number of justices on the Court, defining the edges of this major rules doctrine is a judicial imperative under the existing strictures of the Constitution.

3. Presumption

In an effort to lessen the ill-effects of an imprecise test, this Note suggests imposing a key restraint to limit the major rules doctrine's application to only the most errant grants of deference and inappropriate delegations of legislative power. Under this framework, opponents of an agency rulemaking must overcome a presumption of being "non-major." Probability is one rationale for such a presumption (considering the vast majority of rules are relatively insignificant). [125] Presumptions also act to engender

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[124] *Nichols*, 784 F.3d at 671 (2015) (Gorsuch dissenting from the denial of rehearing en banc) (emphasis added).

[125] See 2 *McCormick on Evidence* § 343 at 682 (2d ed. George E. Dix et al. eds.) ("[T]he most important consideration in the creation of presumptions is probability"). On the point that the majority of rules are relatively insignificant, see, for example, the Congressional Research Service's report which found only 100 of the 3,271 rules finalized in 2010 were "major" under one proposed Congressional definition of "major rules." *Congressional Research Service, REINS Act: Number and Types of "Major Rules" in Recent Years 6* (Feb. 24, 2011), archived at https://perma.cc/3Z95-7DDW.

stability in application.[126] Moreover, placing the burden of persuasion on opponents of regulations matches the overall deferential posture of the courts to the political branches, limiting this doctrine's application only to the most demonstrable and clear violations.

It is true that no matter the lines drawn, determining whether a rule is "major" will require fact-based inquiries on the scope of the rule's impact, both economically and politically. Judge Kavanaugh's factors attempt to provide guidance to making this calculation. The presumption prevents the judiciary from policing technical determinations properly delegated to agencies under the current administrative law paradigm.

4. Application of the Major Rules Test

It may be helpful to understand the test through further example. Take the rescission and modification of national monument designations. In 2017, President Trump modified the Grand Staircase-Escalante National Monument previously proclaimed by President Obama under the authority of the Antiquities Act,[127] significantly reducing the size of the monument.[128] The statute, however, merely affords the President the ability "in his discretion, to *declare* . . . historic landmarks."[129] Recently, environmental groups filed suit arguing this action exceeded the scope under the statute: "declare" encompasses designation, and does not entail reduction or

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[126] Id.
[127] Establishment of the Bears Ears National Monument, Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).
[128] Presidential Proclamation Modifying the Bears Ears National Monument, archived at https://perma.cc/U57G-25Y4.
[129] The Antiquities Act of 1906, 54 U.S.C. § 320301 et seq.

abolition.[130] Federal land use in the western United States is a highly contested political issue. Safeguarding objects of historic and scientific interest, protecting the scenic beauty of America's landscapes, preserving recreational opportunities, and preserving habitat are critical issues for many nationwide, while restricted access to and use of federal land is a commonly heard complaint from local denizens. Indeed, debate over land use in the West has risen to multiple armed conflicts between ranchers and federal agents.[131] The new interpretation of a *long extant statute* further suggests Congress did not impliedly delegate this authority. The Attorney General in 1938 understood the Antiquities Act to mean it "does not authorize [the President] to abolish [national monuments] after they have been established." [132] These factors—political engagement and a new interpretation of a long extant statute—indicate Congress did not

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[130] Complaint at ¶¶ 145–47, *The Wilderness Society v. Trump*, No. 1:17-cv-02587 (D.D.C. Dec. 4, 2017) ("The President has the authority to regulate federal public lands only to the limited extent that Congress has delegated that authority to the President. In issuing his December 4, 2017 Proclamation, President Trump exceeded his authority under the Antiquities Act, 54 U.S.C. § 320301 et seq. Under the Act, Congress authorized the President to designate federal public lands as national monuments, but not to abolish them either in whole or in part. As a result, the Trump Proclamation revoking monument status from nearly half of the Grand Staircase-Escalante National Monument exceeds the scope of the President's authority, is ultra vires and unlawful. Even if President Trump's action were, as he termed it, a "modif[ication]" of the Grand Staircase-Escalante National Monument and not an abolition, the result would be the same: nearly 900,000 previously protected acres of land have now been stripped of monument status. The President has no authority to modify a monument in this way.").

[131] See Jason Wilson, *Oregon Militia Threatens Showdown with US Agents at Wildlife Refuge*, The Guardian (Jan. 3, 2016), archived at https://perma.cc/558Y-8AAS; Michael Martinez, *Showdown on the Range: Nevada Rancher, Feds Face Off over Cattle Grazing Rights*, CNN (Apr. 12, 2014), archived at https://perma.cc/ZG4T-QQHA.

[132] Mark Squillace, *Presidents Lack the Authority to Abolish or Diminish National Monuments* 103 Va. L. Rev. 55, 58 (quoting Proposed Abolishment of Castle Pinckney National Monument, 39 Op Attorney General 185 (1938)).

delegate to the President the ability to resolve the major issue of whether the Antiquities Act allows for rescission of National Monuments.[133]

However, the vast majority of rules will not qualify under this doctrine. In *Chevron*, for example, the EPA interpreted whether "stationary source" would be measured on a plant-wide or smokestack basis. First, the issue did not exceed the threshold for *major economic impact*. Certainly, the rule itself implicated issues of heavy economic costs to power plant operators, but the question was not whether the agency had the *authority* to regulate an *entire industry*—Congress had already granted the EPA the authority under the statute to regulate air pollutants from stationary sources. Instead, the issue was whether in achieving certain clean air standards set by Congress, the EPA would allow facilities to comply at the factory or smokestack level. No other factor—e.g., reinterpretation of a long extant statute, fundamental statutory transformation, stymied Congressional efforts—was significantly present. The rule did not qualify as major under this test.

Once a rule is determined to be major, what should a judge do with it? Here, clear statement principles provide a sure path forward.

C. CLEAR STATEMENT PRINCIPLE

Clear statement principles restrict both courts and agencies from resolving ambiguities in a particular way unless Congress expressly indicates that was its will. First, the court determines, as a threshold matter, whether the clear statement rule applies. Under the major

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[133] The courts could theoretically afford the President *Chevron* deference in this situation, as he has been delegated directive authority by name by Congress. See Kagan at 2377–78 (2001) (cited in note 23); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 Colum. L. Rev. 263, 307 (2006).

rules clear statement principle, that entails the court determining whether an agency is attempting to implement a major rule. Second, the court determines whether Congress has made a clear statement. Applied to the major rules doctrine, the judge ascertains whether Congress has clearly and unambiguously authorized the agency action.

Federal law is replete with examples of clear statement principles. Each safeguard a valued principle against undue infringement. For example, the courts require "clear and convincing evidence of congressional intent" before they will rule judicial review has been precluded by statute.[134] So too will courts invalidate rules if they sense the interpretation of the ambiguity infringes on the vertical separation of powers: "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." [135] There is some support for a horizontal separation of powers clear statement canon as well.[136] The major rules doctrine implicates issues of separation of powers as well, auguring for application of a clear statement principle in the major rules doctrine context.

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[134] *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 671 (1986).

[135] See *Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 543 (2002) (citations omitted) ("When Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."); *Solid Waste Agency of N. Cook City v. United States Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

[136] See Admin. Assessment of Civil Penalties Against Fed. Agencies Under the Clean Air Act, 21 U.S. Op. Office Legal Counsel 109 (1997) (The "clear statement rule of statutory construction . . . is applicable where a particular interpretation or application of an Act of Congress would raise separation of powers concerns . . . ").

So too do clear statement principles have particular purchase in the context of issues of heightened economic and political importance. Such economic considerations were implicated in applying this clear statement principle in the Benzene Case: "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 of [the statute] . . . ."[137] On the political side, an example can be found in *Diamond v. Chakrabarty*, where the defendant sought patent protection for a genetic engineering of a living organism.[138] Justice Brennan in dissent argued for a clear statement principle along the contours of the major rules doctrine for political issues. Where there is "an absence of legislative direction, the courts should leave to Congress the decisions whether and how far to extend the patent privilege into areas *where the common understanding has been that patents are not available*."[139] The majority argued the statute's ambiguity required an expansive reading.[140] But Brennan replied that clear statements should be required where an ambiguity implicates major policy issues: "It is the role of Congress, not this Court, to broaden or narrow the reach of the patent laws. *This is especially true where*, as here, the composition sought to be patented *uniquely implicates matters of public concern*."[141] Brennan's primary concern here was to limit a *judicial* (as opposed to agency) expansion of the statute, underscoring the importance of the major rules

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[137] *Industrial Union Department*, 448 U.S. at 645 (1980).
[138] 447 U.S. 303, 303 (1980).
[139] Id. at 319. (Brennan dissenting) (emphasis added).
[140] Id. at 322.
[141] Id.

doctrine as compared to judicially-empowering major questions doctrine.

In effect, the major rules doctrine would function as a subset of clear statement principles, referred to by Professor Cass Sunstein as "nondelegation canons." [142] "These canons impose important constraints on administrative authority, for agencies are not permitted to understand ambiguous provisions to give them authority to venture in certain directions; a clear congressional statement is necessary."[143] Because the major rules doctrine (along with other nondelegation canons) is restricted to a limited number of cases invoking major decisions (rather than detailed, technical questions), the result avoids gutting the administrative apparatus (as a full rejuvenation of the nondelegation doctrine may) and improves effectiveness of the regulatory apparatus:

> [T]he nondelegation canons have the salutary function of ensuring that certain important rights and interests will not be compromised unless Congress has expressly decided to compromise them. Thus the nondelegation canons lack a central defect of the conventional doctrine: While there is no good reason to think that a reinvigorated nondelegation doctrine would improve the operation of modern regulation, it is entirely reasonable to think that for certain kinds of decisions, merely executive decisions are not enough.[144]

Moreover, rather than reinvigorating the entirety of the nondelegation doctrine, discrete and focused nondelegation canons

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[142] Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 331 (2000).
[143] Id. at 330.
[144] Id. at 338.

like the major rules doctrine can do the work while avoiding the unmanageability of the atrophied nondelegation doctrine.[145]

In the short time since *USTA*, circuit judges have already begun to cite Judge Kavanaugh's major rules dissent and have implemented it through this clear statement rule formulation. For instance, in *International Refugee Assistance Project v. Trump*, two Fourth Circuit judges in concurrence would have applied the major rules doctrine as a nondelegation canon to hold that the President was not delegated the authority to enact a nationality-based quota system based on a statutory ambiguity, even though he was *expressly* delegated significant generalized authority. [146] Judge Gregory's concurrence argued that this

> clear-statement rule guards against unnecessary erosion of separation of powers and political accountability by *insisting that the legislature directly confront the benefits and implications of these decisions*. Here, the power claimed by the Government, even if not exercised to its full extent, is at least as broad as it was in cases where courts have applied the major questions canon. . . . [T]he President does not, within the confines of the Constitution, decide major questions that are within the legislative function.[147]

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[145] Id. ("Courts do not ask the hard-to-manage question whether the legislature has exceeded the permissible level of discretion, but pose instead the far more manageable question whether the agency has been given the discretion to decide something that (under the appropriate canon) only legislatures may decide. In other words, courts ask a question about subject matter, not a question about degree.").

[146] *International Refugee Assistance Project v. Trump*, 883 F.3d 233, 274 (4th Cir. 2018), as amended (Feb. 28, 2018) (Gregory concurring), cert granted, judgment vacated on other grounds, 138 S. Ct. 2710 (2018).

[147] Id. at 291–92.

Judge Wynn's concurrence directly cited Sunstein's canons in finding a similar nondelegation canon controlled: "[t]hat canon forbids courts from construing a 'broad generalized' delegation of authority by Congress to the executive as allowing the executive to exercise that delegated authority in a matter that 'trench[es]' upon fundamental rights."[148]

Examining the Net Neutrality Rule under this fleshed out major rules doctrine proposed here, the court would first determine whether the rule was major. As discussed above, the FCC's rule to regulate ISPs had enormous economic impact, saw significant public and political engagement, was the subject of significant congressional debate without amendment to the statute, had the potential of a sweeping impact on the lives of Americans and of the communications industry, and was a newly discovered interpretation of a long extant statute.[149] A judge could safely view the Net Neutrality Rule as major, even with a presumption against such a finding.

The court would then determine whether Congress expressly resolved the issue of whether the FCC is authorized to regulate broadband under the Telecommunications Act. Does the Act clearly grant the FCC the authority to regulate internet as a telecommunications service? No, it is ambiguous at best.[150] Absent this clear statement, the court cannot defer to the agency's interpretation of the ambiguity, nor can the court *itself* interpret the ambiguity to presume what is required by the clear statement principle. Unless and until Congress expressly grants FCC the

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[148] Id. at 326–27 (Wynn concurring) (quoting *Kent v. Dulles*, 357 U.S. 116, 129 (1958)).
[149] See above Section II.A.
[150] *Brand X*, 545 U.S. at 992.

authority to regulate broadband, neither the court nor the agency could interpret the ambiguity to allow for the expanded authority of the FCC to regulate the provision of internet services as a telecommunications service. The court would be required to hold the FCC has no such authority.

III. EVALUATING THE MAJOR RULES DOCTRINE

A. ADVANTAGES OVER THE MAJOR QUESTIONS DOCTRINE

A clear statement principle addresses the nondelegation concerns of those wary of the growth and power of the administrative state without granting excessive discretion to the judiciary branch in its stead. The major questions doctrine fails in this respect. The major questions doctrine—featuring de novo judicial review rather than a clear statement principle—would result in judicially-resolved ambiguities authorizing major rules, rather than a congressionally-driven resolution. According to the rule applied in *King v. Burwell*, once the courts find the agency action is a major rule without explicit congressional authorization, the court will infer Congress had no intent to delegate the question to the agency.[151] However, under major questions doctrine employed in *King*, such a finding places no restrictions on the judiciary from making those decisions in the agency's stead. As Justice Scalia predicted in *City of Arlington*, "[t]he effect would be to transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal

[151] *King v. Burwell*, 135 S. Ct. 2480 (2015).

courts."[152] The ultimate function of the major rules doctrine is to restrict major policy decisions from being decided outside of Congress: to ensure "important choices of social policy are made by Congress."[153] The Court should "reshoulder the burden of ensuring that Congress itself make the critical policy decisions" and not insert itself into such decisions.[154] A rule which merely transfers resolution of major issues from agencies to courts fails the doctrine's ultimate purpose of ensuring legislative power is exercised by Congress.[155]

King is a prime example of the proper identification of a major rule with an improper judicial response. Chief Justice Roberts rejected the idea that an issue so critical to the Affordable Care Act that it could create a *death spiral* for the government's health insurance exchanges was intended by Congress to be determined by the IRS.[156] Rather, Chief Justice Roberts created a direct role for the

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[152] *City of Arlington v. FCC*, 569 U.S. 290, 304 (2013).

[153] *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 687 (1980) (Rehnquist concurring).

[154] Id.

[155] This could be thought of as a corollary to political question jurisprudence, which states that the judiciary is restrained from inserting itself into resolving major policy debates. In the lodestone political question case *Baker v. Carr*, Justice Brennan concluded that political questions are "essentially a function of the separation of powers" in much the same manner as nondelegation concerns are. 369 U.S. 186, 217 (1962). One of Brennan's indicating factors for political questions is "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion . . . " Id.

[156] *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. *Utility Air Regulatory Group at* 2444(2014) (quoting *Brown & Williamson*, 529 U.S., at 160). It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. See *Gonzales v. Oregon*, 546 U.S. 243, 266–267, (2006). This is not a case for the IRS.").

judiciary in interpreting the statute in the stead of the agency.[157] In *King*, Scalia's warning in *City of Arlington* comes to fruition, as the issue is not whether Congress is to make a critical decision, "'but about whether it will be the [agency] or the federal courts that draw the lines to which they must hew.' These lines will be drawn either by unelected federal bureaucrats, or by unelected (and even less politically accountable) federal judges."[158] Thus, the major questions doctrine may be improperly used to transfer resolution of major issues from agencies to the courts and fails to address the ultimate concern of nondelegation: ensuring decisions of major import are exclusively resolved by Congress.

The difference between the two doctrines is rather stark: the major questions doctrine grants the judiciary the opportunity to interpret the statute de novo while the major rules doctrine operates as a clear statement principle, restricting the courts from gleaning from an ambiguity an implied agency authority.

Consider one possible example that may arise in the context of Title VII of the Civil Rights Act of 1964. Title VII makes it unlawful for an employer to "discriminate against any individual" on the basis of the "individual's race, color, religion, *sex*, or national origin."[159] The issue of whether sexual orientation is a protected class under discrimination laws certainly qualifies under the threshold determination as an issue of *heightened political engagement*—hardly any modern issue has been more hotly debated than society's

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[157] *King*, 135 S. Ct. at 2489 ("It is instead our task to determine the correct reading of Section 36B.").
[158] *City of Arlington*, 569 U.S., at 305 (2013) (quoting *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 379 n 6).
[159] 42 U.S.C. § 2000e-2(a) (emphasis added).

treatment of sexual orientation.[160] Title VII is also a long extant statute. The Equal Employment Opportunity Commission's ("EEOC") first ruling on the issue, in 1991, found "Title VII's prohibition of discrimination based on sex *does not include sexual preference or sexual orientation*."[161] Furthermore, the EEOC itself discussed the variance with Congress's contemporaneous meaning in its *newly discovered interpretation*: "the members of Congress that enacted Title VII in 1964 and amended it in 1972 were likely not considering the problems of discrimination that were faced by transgender individuals,"[162] as did the Ninth Circuit in holding "Congress had only the traditional notions of 'sex' in mind"[163] which do not include sexual orientation or sexual preference.[164] Finally, as many courts have noted, the issue has been subject to *significant congressional debate*: "Congress has frequently considered amending Title VII to add the words 'sexual orientation' to the list of prohibited characteristics, yet it has never done so."[165] Despite this settled

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[160] *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 361 (7th Cir. 2017) ("Of course there is a robust debate on this subject in our culture, media, and politics. Attitudes about gay rights have dramatically shifted in the 53 years since the Civil Rights Act was adopted."); see also *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[161] *Karen Johnson, Appellant*, EEOC DOC 05910858, 1991 WL 1189760, at *3 (Dec. 19, 1991) (emphasis added).

[162] *Mia Macy*, EEOC DOC 0120120821, 2012 WL 1435995, at *9 (Apr. 20, 2012).

[163] *DeSantis v. Pacific Telephone and Telegraph* Co., 608 F.2d 327, 329 (9th Cir. 1979), abrogated by *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001).

[164] *Complainant v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641, at *9 (July 16, 2015).

[165] *Hively*, 853 F.3d at 344 (7th Cir. 2017); see also *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) ("Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation. *See, e.g.*, Employment Non-discrimination Act of 1996, S.2056, 104th Cong. (1996); Employment Non Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non–Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994).").

interpretation, EEOC has offered an interpretation updating Title VII to include sexual orientation, finding "sex" to be ambiguous.[166] This interpretation, thus, qualifies as a major rule under the major rules doctrine.

Lacking a clear congressional command resolving the issue, there is little to stop a reversal of this EEOC reinterpretation, in the same manner Net Neutrality was recently reversed. Imagine the chaos were the court to afford deference to the EEOC's interpretation of sex, only to have the agency reverse itself after each presidential election. The major rules doctrine is intended to avoid wild swings between positions on issues of political and economic significance outside the legislative process, and also avoid their determination by unelected, unaccountable agencies.[167] The costs borne by LGBT individuals and regulated parties alike by such stark reversals are magnified when the issues are so massive in scope as to qualify as economically or politically significant. The major rules doctrine would reject the EEOC's interpretation as unlawful, and require

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[166] See *Mia Macy*, EEOC DOC 0120120821, 2012 WL 1435995, at *9 (Apr. 20, 2012); *Complainant v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641, at *9 (July 16, 2015).

[167] See *Rust v. Sullivan*, 500 U.S. 173, 222 (1991) (Stevens dissenting) ("The entirely new approach adopted by the Secretary in 1988 was not, in my view, authorized by the statute. The new regulations did not merely reflect a change in a policy determination that the Secretary had been authorized by Congress to make. Rather, they represented an assumption of policymaking responsibility that Congress had not delegated to the Secretary.") (citations omitted). But see also *Rust*, 500 U.S. 173, 186–87 (1991) ("This Court has rejected the argument that an agency's interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the statute in question. In *Chevron*, we held that a revised interpretation deserves deference because an initial agency interpretation is not instantly carved in stone and the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. An agency is not required to establish rules of conduct to last forever, but rather "must be given ample latitude to adapt its rules and policies to the demands of changing circumstances.") (citations omitted).

Congress, which provides for access, accountability, and representation, to make a substantive determination on the issue.[168]

However, under the major questions doctrine, judges would become new legislators. Take, for example, the approach Judge Posner takes in *Hively v. Ivy Tech*, which addressed this very Title VII issue.[169]

> I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of "sex discrimination" that the Congress that enacted it would not have accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch.[170]

This is hardly the optimal outcome for many proponents of a return to nondelegation principles. Judge Sykes wrote to criticize Judge Posner's approach: "the result is a statutory amendment courtesy of unelected judges. . . . [T]he result is . . . the circumvention of the legislative process by which the people govern themselves."[171] The underlying rationale behind major rules—that questions of certain magnitude are reserved by Congress—is thwarted by the combination of major questions doctrine and the heterogeneous

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[168] Interestingly, the Seventh Circuit rejected deference to the EEOC, even though the EEOC interpretation accorded with the court's ultimate disposition. *Hively*, 853 F.3d at 344 (2017).
[169] Id at 339 (2017).
[170] Id. at 357 (2017) (Posner concurring).
[171] Id. at 360 (2017) (Sykes dissenting).

views of statutory interpretation within the federal judiciary. A clear statement principle avoids this outcome entirely, preserving such decisions for elected representatives under the constitutional structure.[172]

The major questions doctrine is also subject to criticism as both antidemocratic and liable to violate norms of judicial restraint: the doctrine *encourages* the courts to interject themselves into separation of powers cases concerning issues replete with extreme political debate. If used too often, the major questions doctrine runs the risk of flouting Justice Frankfurter's dire warning:

> The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.[173]

These nondemocratic criticisms fall along familiar nondelegation lines.

> If the nondelegation doctrine seeks to promote legislative responsibility for policy choices and to safeguard the process of bicameralism and presentment, it is odd for the judiciary to implement it through a technique that asserts

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[172] *Hively* at 373 (2017) (Sykes dissenting) ("Common-law liability rules may judicially evolve in this way, but statutory law is fundamentally different. Our constitutional structure requires us to respect the difference.").
[173] *Baker v. Carr*, 369 U.S. 186, 267 (1962).

> the prerogative to alter a statute's conventional meaning and, in so doing, to disturb the apparent lines of compromise produced by the legislative process.[174]

But, as Chief Justice Rehnquist noted, a clear statement principle envisioned by the major rules doctrine, which would invalidate regulations rather than allowing either the agency or courts to interject themselves, allows the court to preserve, rather than detract from, the substantive authority of Congress.[175]

B. CRITICISMS

The major rules doctrine faces many criticisms, new and old. Critics may argue the nondelegation doctrine is too difficult to administer judicially.[176] Moreover, it is anti-regulatory and anti-democratic by artificially restricting application of legislation (and thus congressional will). They may further argue that the doctrine's insistence on maintaining formal separation of powers in a modern government (which requires extensive technical expertise to design and execute) is impossible and would create systemic, inferior

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[174] Lisa Heinzerling, *The Power Canons*, 58 Wm. & Mary L. Rev. 1933, 1979 (2017) (cited at note 77).

[175] *Industrial Union Department*, 448 U.S. at 687 (1980) (Rehnquist concurring) ("[f]ar from detracting from the substantive authority of Congress, a declaration that the first sentence of § 6(b)(5) of the Occupational Safety and Health Act constitutes an invalid delegation to the Secretary of Labor would preserve the authority of Congress.").

[176] Kagan and Barron, 2001 S.Ct. Rev. at 246 ("[T]he principal criticisms of the congressional nondelegation doctrine [are] that it insists on too much centralization of decision-making authority in the hands of Congress and that it resists any principled method of judicial enforcement.") (cited in note 20).

outcomes.[177] But the major rules doctrine is designed to address arguments against a reinvigorated nondelegation doctrine. It is targeted to rare circumstances and directly addresses *Chevron*'s underlying rationales. It further confronts agencies at their authority's lowest ebb. Thus, the major rules doctrine is able to rebut many of the criticisms that have sunk other efforts at rejuvenation of the nondelegation doctrine.

Some may argue that the major rule factor test may be too difficult to apply in borderline cases. Judge Kavanaugh admits to falling back on a "you know it when you see it" test. Such a test may "prove unpredictable in operation . . . triggered by circumstances that are highly subjective."[178] Does relying only on whether a rule is sufficiently significant present an unmanageable standard to judges? Undoubtedly, the formulation introduces concerns of discretion and uncertainty. Indeed, some of the appeal of *Chevron* is that it applies uniformly, regardless of the party in power. But the identification of major rules is an objective test, based on real world indicators such as economic impact, congressional debate, new-found statutory interpretations. Where the discretion comes into play is where the threshold is set for becoming a major rule. Moreover, whether *Chevron* even applies (step zero), and if so, whether a provision is ambiguous (step one) both involve some level of judicial

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[177] Id. ("Critics of the congressional nondelegation doctrine aver that given the complexity of modern government, Congress cannot address all issues demanding resolution and that, even if Congress could do so, its decisions often would reflect deficient knowledge and experience. For this reason, the objection proceeds, a meaningfully enforced nondelegation doctrine would have severe adverse consequences for effective governance.").

[178] Heinzerling, 58 Wm. & Mary L. Rev. at 1983–84 (cited in note 77).

discretion.[179] No longer is *Chevron* a simple, straightforward presumption in practice. Still, it may be that a totality of the circumstances test is not the best measure. Alternatives may include deemphasizing a finding of major economic or political significance by requiring a secondary indication of lack of congressional intent to delegate. Judges could set bright line rules, setting arbitrary thresholds of economic impact or political debate, but few would argue such thresholds are practicable or desirable. Regardless, judging the intent of Congress is an irreducibly messy business, but the major rules approach is aided by the objective factors discussed above, which find significant support in Supreme Court jurisprudence.

Perhaps a bigger threat than misapplication due to insufficiently clear threshold determinations is deliberate or biased application in pursuit of a judge's particular ideological views. Implementing a discretionary exception to *Chevron,* a door opens to ideological one-sided applications of the doctrine—a "deference for me, not for thee" problem where judges only label as major those rules which may not fit their ideological preferences. A determined judge could just as easily leverage the major rules doctrine into finding for an agency whose rule she supported as she can use *Chevron*'s step one ambiguity determination to achieve the same end. However, simply determining at the outset whether to start down the *Chevron* or major rules path does not guarantee an outcome: judges still must perform

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[179] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch concurring) ("[L]ong lingering questions linger still about just how rigorous *Chevron* Step One is supposed to be. In deciding whether Congress has 'directly spoken' to a question or left it 'ambiguous,' what materials are we to consult? The narrow language of the statute alone? Its structure and history? Canons of interpretation? Committee reports? Every scrap of legislative history we can dig up? Some claim to have identified at least three potential variants of *Chevron* jurisprudence governing the line between Step One and step two in the Supreme Court's case law.").

the analysis, and must do so persuasively. Though the major rules doctrine does not solve the determined activist judge problem (and maybe no rule could), the doctrine at least provides an avenue for a dutiful judiciary to return legislative issues back to Congress, a path to which neither *Chevron* nor the major questions doctrine provide access.

Some argue that requiring delegations of authority to agencies be accompanied by clear statements by Congress addressing future major issues requires that Congress "fabricate a crystal ball" to address future issues.[180] Congress *has* acted, they argue, since Congress frequently writes open-ended statutes with the specific purpose of eliminating a general public "mischief," and "subtle inventions and evasions for continuance of the mischief" should be "suppressed."[181] Building coalitions to enact regulatory statutes is demanding and many worry that a strict construction doctrine like the one proposed by Judge Kavanaugh will unduly circumscribe and frustrate the purposes behind enacted legislation.[182] This criticism is improperly leveled at the major rules doctrine. Application of the major rules doctrine is limited to cases of vast political and economic significance, issues so important it is implausible Congress

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[180] Heinzerling, 58 Wm. & Mary L. Rev. at 1948 ("In fact, Congress must not only be clear, but also clairvoyant. Congress must anticipate that it will not have foreseen all problems that will arise and that will come within a statute's regulatory range. Congress must then foresee that the agency to which it has given regulatory authority will, when new problems arise, try to address those problems with its existing authority even though—because the problems are new—the agency has not addressed them before. Having foreseen all of these events, Congress then must use statutory language that pellucidly covers the future problems and gives the agency the power to address them. The Court might as well have instructed Congress to fabricate a crystal ball.") (cited at note 77).

[181] *Heydon's Case*, 76 Eng. Rep. 637 ¶¶ 2–3 (Ex. 1584).

[182] See Heinzerling, 58 Wm. & Mary L. Rev. (cited in note 77).

"obliquely" delegated such authority through open-ended statutes.[183] Furthermore, requiring that Congress speak clearly before inferring that the statute provides for unfettered regulatory power is more democratic than granting the ambiguity—more likely a sign of a *lack* of consensus on the particular provision in Congress and *lack* of cohesive purpose—the same status as if it clearly authorized the agency to issue the major regulation.[184] Such ambiguities are dictional prizes, concessions bled from the drafters by opponents of bills. To gloss the meaning of the ambiguity with the enacting coalition's ultimate purpose is to bias its interpretation against its true meaning.[185] An interpretive theory that treats ambiguities and clear statements as granting the same amount of regulatory authority to agencies is undemocratic and ignores realities of the legislative process.

Many will argue removing *Chevron* deference over questions of economic and political significance will result in objectively worse outcomes. For one, deliberation in the agencies over these issues, it is argued, is sufficient and even superior to that offered by judges who would "cut off debate" by applying a blanket rule.[186] Additionally,

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[183] *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

[184] See Jack M. Beerman, *End the Failed Chevron Experiment Now*, 42 Conn. L. Rev. 779, 798 (2009).

[185] If anything, the ambiguity should be resolved against the drafters, as a *contra proferentem*, on the theory that if the enacting coalition had votes to resolve the issue in their favor, they would have.

[186] Heinzerling, 58 Wm. & Mary L. Rev. at 2000 ("In UARG and Michigan, an agency's years-long, public processes of outreach and reason-giving--and close attention to the whole set of legal constraints under which it believed it was operating--meant little compared to the Court's rage over regulatory ambition. In all of these cases, it was the agencies, not the Court, which operated openly and publicly, subject to continuous oversight by Congress and the White House and to the basic administrative law command to explain themselves with reasons and evidence. Interpretive principles like

as Justice Kagan has argued, political accountability *is* a separate rationale for deference under *Chevron*, insofar as the agencies are more accountable than the unelected judiciary. However, *Chevron* can also inflame political gamesmanship as it "encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."[187] The major rules doctrine is designed to limit that behavior.

Proponents of a rejuvenated nondelegation doctrine might criticize this doctrine as a half-measure, and one that still allows Congress to delegate *resolution* of major political issues, so long Congress does so through a clear statement. Indeed, Chief Justice Roberts suggests this is so:

> Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive. . . . [which] means ensuring that the Legislative Branch has in fact delegated lawmaking power to an agency within the Executive Branch, *before the Judiciary defers to the Executive on what the law is*.[188]

Viewed in this light, the major rules doctrine may still fail to ensure Congress exercises its legislative authority by not forcing Congress to resolve the issue itself. The difference here is, for example, between Congress *itself* deciding whether to regulate a

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the power canons, with their simplifying assumptions and barely concealed antipathy to regulatory ambition, are perfect instruments for cutting off debate. They are not instruments for promoting it.") (cited in note 77).

[187] Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016).

[188] *City of Arlington*, 569 U.S. at 327 (Roberts dissenting) (emphasis added).

major issue, and Congress passing along that decision of whether to do so or not onto the agency.

Indeed, *Massachusetts v. EPA* serves to illustrate this understanding.[189] Whether carbon dioxide is a pollutant under the Clean Air Act seems have the markings of a major issue of political and economic significance. The Clean Air Act is analogous to the FDCA at issue in *Brown & Williamson* in key respects.[190] Both statutes were enacted decades earlier, prior to conception of the major ill that the executive-branch interpretation sought to remedy (global warming and lung cancer, respectively), and the statutes were subsequently amended multiple times but with no amendment asserting clear congressional intent that an unconventional product (carbon dioxide and tobacco, respectively) was envisioned to be covered. [191] "[P]olicymakers in the Executive and Legislative Branches of our Government . . . continue[d] to consider regulatory, legislative, and treaty-based means of addressing global climate change," but never actually succeeded in authorizing the EPA to regulate greenhouse gases.[192] Quite oddly enough, the EPA, pointing

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[189] 549 U.S. 497 (2007).

[190] See discussion above in Section II.B.

[191] *Mass. v. EPA*, 549 U.S. at 560 (Scalia dissenting) (Even the EPA concluded there was no congressional authorization: "EPA concluded that since 'CAA authorization to regulate is generally based on a finding that an air pollutant causes or contributes to air pollution,' 68 Fed. Reg. 52928, the concentrations of CO2 and other greenhouse gases allegedly affecting the global climate are beyond the scope of CAA's authorization to regulate. '[T]he term "air pollution" as used in the regulatory provisions cannot be interpreted to encompass global climate change.'").

[192] Id. at 535 (Roberts dissenting) ("Global warming may be a 'crisis,' even 'the most pressing environmental problem of our time.' Pet. for Cert. 26, 22. Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it. It is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative

to *Brown & Williamson*, was the one arguing the agency had no such authority to legislate on such a major issue based on an ambiguity![193] The Court instead held EPA *must* make such a decision, even though the issue is a major one with unquestionable political and economic significance.[194] The majority found Congress could—and had—delegated to the EPA the decision of whether to regulate carbon dioxide.[195] Even the dissent tepidly agreed: "I am willing to assume, for the sake of argument, that . . . [if the Administrator] has no reasonable basis for deferring judgment he must grasp the nettle at once [i.e. make the endangerment finding and resolve the major issue]."[196] No justices voiced any nondelegation concerns, all seemingly comfortable with leaving the major issue of whether to subject power generators to greenhouse gas emission regulation in the hands of an agency. Thus, even under the major rules doctrine, if the Court determines Congress granted the agency the authority to regulate with the force of law, the agency is empowered to resolve an issue of major political and economic significance.

There are two responses to this criticism. First, if Congress expressly authorizes an agency to actually resolve an issue, then the underlying rationale of the major rules doctrine—that Congress reserves such issues to itself—is, quite simply, defeated. Second, the major rules doctrine does stop short of complete rejuvenation of the

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Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change.").

[193] Id. at 529–32 (2007).

[194] Id. at 528.

[195] *Mass. v. EPA* at 528 ("On the merits, the first question is whether § 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change. We have little trouble concluding that it does.").

[196] Id. at 550. The dissent would go on to argue that EPA's decision to *not make a decision* also deserved *Chevron* deference.

nondelegation—and intentionally so. The major rules doctrine is a compromise solution seeking to bridge the gap between proponents of a fully enforced nondelegation doctrine, and those who view the administrative state as serving a necessary function in a modern, complex governmental regulatory regime. The political costs of requiring actual resolution of major issues are higher than merely requiring that Congress expressly delegate them.

Critics argue that increasing the cost of decision-making has the potential to exacerbate existing political deadlock. One reason major issues continue to be ping-ponged back and forth between the agencies and courts is because Congress often abnegates its own legislative authority.[197] A doctrine that restricts Congress's ability to avoid making firm decisions on major political issues—at least without a clear statement indicating their intention—would likely increase the problem of gridlock. Not only does it force Congress to take head-on major issues of political and economic significance, but it also requires them to speak clearly on the subject. Such a scheme, according to influential D.C. Circuit Judge Bazelon (a key figure in the development and debate of the modern administrative state), is impractical.[198] Yet, the response to this criticism is simple and

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[197] Adrian Vermeule, *Law's Abnegation* 60 (2016) ("[C]lassical lawmaking institutions themselves generated an emergent solution that partially compromises the separation of powers in pursuit of other goods, with those goods arising from the aggregate of statutory grants of authority to administrative agencies and from statutory provisions combining functions in administrative agencies.") (cited in note 10).

[198] David L. Bazelon, *Coping with Technology Through the Legal Process*, 62 Cornell L. Rev. 817, 822 (1977) ("An alternative, of course, would be to give these decisions back to the legislators. While this has some appeal in theory, I fear that it is not very practical to expect a relative handful of legislators somehow to keep tabs on all the wide-ranging and complex activities in which the government is involved today. For a good many years the courts tried, through the "non-delegation doctrine," to impose some limitations on legislative delegations of responsibility. That doctrine has now been largely

forceful: extra-constitutional regimes are not made more valid simply because Congress does not function efficiently. As Justice Thomas has noted, political inventions designed to grease the wheels of government and make the legislative process smoother are severely restricted by the design and function of the Constitution:

> Fundamentally, the argument about agency expertise is less about the expertise of agencies in interpreting language than it is about the wisdom of according agencies broad flexibility to administer statutory schemes. "But policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and ... sets out ... how those powers are to be exercised." Even in the face of a perceived necessity, the Constitution protects us from ourselves.[199]

While sitting on the Tenth Circuit, then-Judge Gorsuch echoed Justice Thomas' perspective that in order to protect individual liberty the legislative process should be difficult: "At stake is the principle that the scope of individual liberty may be reduced only according to the deliberately difficult processes prescribed by the Constitution . . . ." [200] Not even if the issue has low political or economic significance can agencies supersede Congress: "[N]o matter how important, conspicuous, and controversial the issue, . . . an

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abandoned, because it simply didn't work, and I see little likelihood that it will be revived.").

[199] *Perez v. Mortgage. Bankers Association*, 135 S. Ct. 1199, 1223 (2015) (internal citations omitted).

[200] *United States v. Nichols*, 784 F.3d 666, 671 (10th Cir. 2015) (en banc) (Gorsuch dissenting from the denial of rehearing en banc).

administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[201]

Some may suggest that the major rules doctrine is unnecessary, arguing legislative rules passed by agencies are exercises of executive power, and not legislative power. Under the "completion theory," the agencies are "carrying out or completing a legislative plan" and merely "adding specification to *statutory policy choices*—a core executive task."[202] But such an argument, that a particular agency rule is nonlegislative, falls apart should the legislative plan fail to make such "statutory policy choices." If agencies are making the policy choices, rather than merely filling in details and "adding specification," then the agencies cannot be said to be performing this executive "completion" function, and instead are exercising legislative power. Because major rules are such policy choices, agencies cannot promulgate them under ambiguous authorization without violating separation of powers, providing strong support for the version of the major rules doctrine proposed by Judge Kavanaugh.

The major rules doctrine is designed to validate the original constitutional function of Congress by addressing each of these criticisms: it is applied only when the agency's rules are at their least democratic; when it is least likely Congress intended to delegate the issue to technical agency experts; and is limited only to those rules with exceptionally heightened significance, with a precautionary presumption against a finding that a rule is major. The major rules

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[201] *Wyoming v. United States Department of the Interior*, 136 F. Supp. 3d 1317, 1336–37 (D. Wyo. 2015), vacated and remanded sub nom. *Wyoming v Sierra Club*, No. 15-8126, 2016 WL 3853806 (10th Cir. July 13, 2016).

[202] Vermeule *Law's Abnegation* at 77–78 (emphasis added) (cited in note 10) (citing Jack Goldsmith and John F. Manning, *The President's Completion Power*, 115 Yale L. J. 2280 (2006)).

doctrine is a half-measure, stopping well-short of full rejuvenation. It is tailored to avoid the shoals that have sunk so many nondelegation schooners before.

CONCLUSION

Both the design of the Constitution and our democratic traditions compel an interest in reserving legislative power to the legislative branch and the directly politically accountable. While some delegation of authority is necessary—and often beneficial—in administering a complex regulatory scheme, such delegation should be restricted as much as possible to instances where Congress has clearly intended such a result and where technical expertise is beneficial, rather than merely allowing Congress to avoid making politically difficult policy choices. Inferring the delegation of issues of major economic and political significance through ambiguities fits neither of these justifications. Judge Kavanaugh's major rules doctrine is a novel judicial doctrine, which has the potential to bridge the divide between those seeking to protect agencies' ability to leverage their technical expertise and those seeking a rejuvenation of Congress's role in determining issues of major economic and political significance. Application of a clear statement principle for delegation of authority to agencies on these major issues is a mechanism of forcing critical policy decisions, rather than details and technical questions, back into the legislature, avoiding resolution of such issues by the relatively less accountable agencies and courts. Indeed, Judge Kavanaugh's major rules doctrine avoids the potential of delegitimizing the courts through excessive insertions into the political realm, and further avoids the frustration of regulated parties providing millions of comments in an ultimately futile attempt to influence policy decisions by unelected, independent agencies.