"Major Questions" Moderation

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Abstract

The Chevron *doctrine instructs federal courts to afford deference to reasonable agency interpretations of ambiguous authorizing statutes. Yet in select instances, courts have deviated from* Chevron*'s command. One of the more confounding deviations is found in cases involving "major questions." Under this burgeoning doctrine, courts have appropriated what would appear to be typical deference cases on the basis of the claimed political or economic exceptionality of the stakes. This "major questions exception" is at the center of ongoing debates about the future of* Chevron *deference and administrative governance more broadly.*

This Article appraises the major questions doctrine by way of comparison to two other doctrines under which federal courts deviate from convention and assume principal decisionmaking authority in light of political or economic concerns. The first arises from cases in which an agency interpretation presents a "serious" constitutional question, leading courts to employ the constitutional avoidance canon. The second arises from cases involving state law claims implicating "substantial" federal issues, leading courts to find federal court jurisdiction where it otherwise would not exist.

Both doctrines provide useful comparators, and in examining how they have been applied, valuable insight into the current and future legitimacy of the major questions doctrine is gained. After drawing the comparisons, the Article argues that the "expertise" justification for the constitutional avoidance canon does not extend to the major questions exception. But the "uniformity" justification for the federal court jurisdictional anomaly might justify the major questions exception as well, depending on how it is employed. The Article concludes by presenting a novel proposition for how the major questions doctrine could evolve to promote uniformity concerns. Until more is known about which direction the doctrine is headed, moderation is the best approach.

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Introduction

The U.S. Food and Drug Administration ("FDA"), housed within the Department of Health and Human Services, regulates medical devices, much of the national food supply, cosmetics, and a variety of other consumer products.[1] For most of its history the FDA viewed tobacco products as outside its ambit, yet in the mid-1990s, it took the significant step of issuing regulations designed to combat the deleterious health effects of such products, particularly on children.[2] The regulations were one of several challenges faced by "Big Tobacco" at the time,[3] and the industry fought vigorously to defend its standing. The industry's legal challenge to the FDA regulations was prompt.[4]

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1 *See* Theodore W. Ruger, *The Story of* FDA v. Brown & Williamson*: The Norm of Agency Continuity*, *in* Statutory Interpretation Stories 335, 335 (William N. Eskridge et al. eds., 2011).

2 *See id.*

3 *See* William Haltom & Michael McCann, Distorting the Law 238 (2004) ("Armed with compelling evidence that tobacco executives and scientists knew that nicotine was an addictive substance and the now unassailable scientific consensus on the health dangers it posed, challengers finally mounted an effective challenge to corporate themes emphasizing freedom of choice and assumption of risk.").

4 Statutory Interpretation Stories, *supra* note 1, at 352–53.

Under the canonical *Chevron* doctrine, federal courts afford deference to reasonable agency interpretations of ambiguous authorizing statutes;[5] given the statutory ambiguity over how to define tobacco products, the FDA's regulations were arguably prudent. Such was the determination of the federal district court that initially heard the industry's challenge.[6] The Fourth Circuit, however, reversed the district court's decision, exhibiting skepticism that Congress had delegated so significant a determination to the Agency.[7] The court specifically highlighted the magnitude of the stakes: "At its core, this case is about who has the power to make this type of major policy decision."[8] In the U.S. Supreme Court's 5–4 affirmance, Justice O'Connor's majority opinion sounded a similar note in proclaiming that "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[9]

The presumption underlying the claim—that "major questions" should be resolved by federal courts rather than administrative agencies—continues to frustrate and confound.[10] Prominent commentators perceive it as dangerous and destabilizing.[11] Naturally, one wonders what kind of issue is "major" enough to warrant deviation from *Chevron*'s command.[12] But deeper questions also arise about the relationship between a "major questions exception," the nondelegation doctrine, and rule of law values.[13] All of these questions are compli-

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5 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984).

6 Coyne Beahm, Inc. v. FDA, 966 F. Supp. 1374, 1384, 1391–94, 1397 (M.D.N.C. 1997) (applying *Chevron*).

7 Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155, 176 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000) ("We are thus of opinion that Congress did not intend to delegate jurisdiction over tobacco products to the FDA.").

8 *Id.*

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

10 *See, e.g.*, Lisa Heinzerling, *The Power Canons*, 58 Wm. & Mary L. Rev. 1933, 1937 (2017) (criticizing the presumption and describing it as a "seizure of power"); Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 193 (2006) (critiquing the "'Major Question' trilogy" and arguing that the cases "point in unfortunate directions because they increase uncertainty and judicial policymaking without promoting important countervailing values").

11 *See, e.g.*, Heinzerling, *supra* note 10, at 2003.

12 *See* Sunstein, *supra* note 10, at 243 ("[T]he difference between interstitial and major questions is extremely difficult to administer.").

13 *See* William N. Eskridge, Jr., Interpreting Law 289–90 (2016) (defending what he calls the "major questions canon"); Ilan Wurman, *As-Applied Nondelegation*, 96 Tex. L. Rev. 975, 988 (2018).

cated by the unpredictable appearance of the exception[14] and irresolution over where to situate it in the *Chevron* framework, if at all.[15]

In addition, the doctrine is at the center of ongoing debates about the future of *Chevron* deference and administrative governance more broadly.[16] If courts withhold *Chevron* deference whenever they perceive an agency action to involve uniquely important matters, *Chevron*'s fairly predictable deference regime may be compromised, perhaps fatally. In fact, some scholars view the application of the major questions exception as a nefarious means of undermining the regulatory state.[17] In short, gaining clarity on the major questions doctrine is itself immensely important, yet even more so given its centrality to the broader debate over the legitimacy of the regulatory state itself.[18]

Moreover, the newest member of the Supreme Court, Justice Brett Kavanaugh, indicated support for a robust major questions exception while serving on the D.C. Circuit.[19] Under his reasoning, the exception "would nullify *Chevron* whenever a statute contains an ambiguity and a court regards an agency's regulatory action premised on that ambiguity as 'major.'"[20] Although this approach has been criticized as excessively hostile to agencies and inconsonant with the

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14 *See* Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 261 (2016) (describing the major questions exception cases as "somewhat disjointed"); Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2191 (2016) (describing the application of the exception as "mercurial").

15 Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 607 (2008) ("The trouble is that no conceptualization of the *Brown & Williamson* rule that has been proffered thus far—bare majorness, nonaggrandizement, or nondelegation—ultimately provides a justification for *Chevron* exceptionalism; all three of the underlying rationales are inconsistent with fundamental assumptions of *Chevron* theory."); Sunstein, *supra* note 10, at 243–47.

16 *See* Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 43 PEPP. L. REV. 33, 41 (2015) ("This new major questions doctrine is a major blow to a bright-line, rule-based approach to *Chevron* deference.").

17 *See, e.g.*, Heinzerling, *supra* note 10, at 1938 (asserting that the exception "mask[s] a judicial agenda hostile to a robust regulatory state"); Mila Sohoni, King*'s Domain*, 93 NOTRE DAME L. REV. 1419, 1424 (2018); *cf.* Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Complements?*, 65 EMORY L.J. 1705, 1715 (2016) (noting that "the conservative core Justices have outlined a wide-scale attack on the administrative state").

18 *See, e.g.*, Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1543–46 (2018); Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State under Siege*, 131 HARV. L. REV. 1, 3–6 (2017); Catherine M. Sharkey, *Cutting In on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2361–62 (2018).

19 *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

20 Sohoni, *supra* note 17, at 1435.

Chevron doctrine,[21] Justice Kavanaugh's appointment to the High Court is yet another reason for interrogating the major questions doctrine.

In light of its salience, this Article appraises the doctrine by way of comparison to two other doctrines under which federal courts deviate from convention and assume principal decisionmaking authority in light of political or economic concerns. The first arises from a set of cases in which an agency interpretation presents a *serious* constitutional question, leading courts to employ the constitutional avoidance canon. The second arises from cases involving state law claims implicating *substantial* federal issues, leading courts to find federal court jurisdiction where it otherwise would not exist. These doctrines provide particularly helpful comparators because, like the major questions exception, both rest on what are essentially judicial contrivances. Put differently, both doctrines are aberrational and only apply in rare, yet important scenarios in which courts believe the political or economic stakes to be exceptional.

Consider the doctrines in turn: First, when reviewing agency interpretations, federal courts contemplate whether any constitutional issues exist and, following this, the pertinence of the constitutional avoidance canon.[22] Specifically, this interpretive canon advises nondeference to agency interpretations that "raise serious constitutional problems."[23] Identifying a serious constitutional problem is perhaps the paradigm instance of deeming something politically important and, as such, bears a superficial resemblance to the major questions exception. The resulting doctrine is therefore instructive in evaluating the potential utility of the major questions doctrine.[24]

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21 *See id.* at 1437 ("I think it would be unfortunate if more federal judges were to endorse (or acquiesce in) such efforts to expand the outer ambits and nether limits of the major questions exception.") (footnote omitted); Asher Steinberg, *Another Addition to the* Chevron *Anticanon: Judge Kavanaugh on the "Major Rules" Doctrine*, NARROWEST GROUNDS (May 7, 2017), http://narrowestgrounds.blogspot.com/2017/05/another-addition-to-chevron-anticanon.html [https://perma.cc/H9LK-2FRS]; *see also* Jeffrey Pojanowski, *Cabining the* Chevron *Doctrine the Kavanaugh Way*, LAW & LIBERTY (June 12, 2017), http://www.libertylawsite.org/2017/06/12/cabining-the-chevron-doctrine-the-kavanaugh-way/ [https://perma.cc/CD8N-4HDP] (discussing how "the language of Judge Kavanaugh's dissent arguably contemplates a clear statement rule that bridles administrative expansion while allowing agencies to leverage legislative ambiguity in a deregulatory direction").

22 *See, e.g.*, Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 168 (2001); Rust v. Sullivan, 500 U.S. 173, 178 (1991); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

23 *See, e.g.*, *DeBartolo*, 485 U.S. at 575; NLRB v. Catholic Bishop, 440 U.S. 490, 507 (1979).

24 In fact, some scholars see the major questions exception as an example of constitutional avoidance. *See* Heinzerling, *supra* note 10, at 1937, 1939; John F. Manning, *The Nondelegation*

Second, and more creatively, one might draw a comparison to the doctrine involving so-called "hybrid claims." Hybrid claims—state law claims with federal content—are occasionally adjudicated in federal court, despite the fact that subject matter jurisdiction would be lacking under conventional jurisdictional principles.[25] Importantly, this exception only applies in cases involving substantial political or economic stakes and where the need for interpretive uniformity is high.[26] Once again, the comparison with the major questions doctrine is helpful.

This Article takes these comparable doctrines as benchmarks. If the major questions exception is employed as a broad substantive canon affording federal courts license to evade *Chevron* deference—as is the case with the constitutional avoidance canon—it should be abandoned; the expertise justification for the constitutional avoidance canon does not extend to the major questions exception. If, however, the doctrine evolves in a pragmatic way to promote uniformity concerns, as occurred with the hybrid claims doctrine, it can plausibly be defended. The Article explores this possibility in detail.

Any exploration of *Chevron* deference must contend with the overwhelmingly vast catalog of scholarship debating its merits.[27] The debate is existential, with some claiming that deference is inevitable,[28] and others that deference is unconstitutional.[29] This Article does not wade into that foundational debate. It takes *Chevron* deference on its own terms and probes the defensibility of the major questions exception in light of *Chevron*'s own governing logic. The central question the Article explores is: When is *Chevron* deviation justified? Ultimately, and after presenting a novel proposition for how the major questions doctrine could evolve to promote uniformity concerns, the Article concludes that until more is known about which direction the doctrine is headed, moderation is the best approach.

Doctrine as a Canon of Avoidance, 2000 SUP. CT. REV. 223, 242 (2001). For my purposes, I find it useful to consider the two separately.

25 *See, e.g.*, John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CIN. L. REV. 145, 148 (2006).

26 *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005).

27 *See, e.g.*, Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1250 (2016).

28 *See, e.g.*, ADRIAN VERMEULE, LAW'S ABNEGATION 14 (2016) ("It would take a sustained effort by the Court, over a generation or more, to reverse the arc of law's abnegation; and for internal legal reasons, because of law's internal imperatives, such an effort is impossible, or so I will argue.").

29 *See, e.g.*, Hamburger, *supra* note 27, at 1250–51 (cautioning judges "about the unlawfulness of their deference and the consequences for them and the entire government").

The Article proceeds as follows: Part I examines the major questions exception, detailing the leading cases in which it has played a part, and the principal critiques of its application. Part II examines the use of the constitutional avoidance canon in the context of judicial review of agency interpretations, drawing parallels to the major questions exception, finding the expertise justification for the former inapplicable to the latter. Part III examines the hybrid claims doctrine, finding its uniformity justification germane to the debate over the merits of the major questions exception. Part IV presents a novel proposition for how the major questions doctrine could evolve to promote uniformity concerns.

I. THE *CHEVRON* REGIME AND THE MAJOR QUESTIONS EXCEPTION

This Part begins by providing a summary of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[30] the foundational deference case, and subsequent cases addressing *Chevron*'s scope. This background is necessary to understand the novelty of the major questions exception. This Part then moves to consider the major questions doctrine and the dissension over its import.

A. Chevron*'s Purpose and Scope*

Chevron involved the question of whether the Environmental Protection Agency's ("EPA") changed interpretation of the term "stationary source" was entitled to deference.[31] In resolving that question and deferring to the EPA's revision, the Supreme Court introduced the familiar two-step process that now governs a large amount of judicial review of agency actions. At "Step One," courts are instructed to consider "whether Congress has directly spoken to the precise question at issue."[32] "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[33] If, however, "the statute is silent or ambiguous with respect to the specific issue,"[34] courts move to "Step Two" and consider whether the agency's interpretation is reasonable.[35] Though *Chevron* deference presents a wide variety of

30 467 U.S. 837 (1984).

31 *Id.* at 840, 857–58.

32 *Id.* at 842.

33 *Id.* at 842–43.

34 *Id.* at 843.

35 *Id.* at 844; *cf.* ESKRIDGE, *supra* note 13, at 290 ("What has made *Chevron* the most-cited statutory interpretation case of all time is that the Court laid out a two-step approach for judges

secondary questions,[36] it remains the "most important decision regarding judicial deference to agency views of statutory meaning."[37]

Chevron deference rests on three premises. First, that Congress, through either explicit or implicit statutory grants of authority, expects agencies to assume policymaking responsibilities.[38] Second, that agencies are politically accountable, whereas courts are not, thereby justifying judicial deference.[39] And third, that deference is warranted in light of agencies' technical expertise.[40] These premises undergird what one might think of as *Chevron*'s purpose, namely, to judiciously allocate policymaking authority.

While *Chevron*'s purpose is both intuitive and long established,[41] its scope is the subject of greater debate. For example, *Chevron* deference was substantially complicated by the Court's decision in *United States v. Mead Corp.*,[42] a case that introduced what has come to be known as "Step Zero."[43] The Court's 8–1 opinion introduced a new, preliminary step into the deference calculus. The initial question for a reviewing court is now whether "Congress delegated authority to the agency generally to make rules carrying *the force of law*, and [whether] the agency interpretation claiming deference was promulgated in the exercise of that authority."[44] Only if both conditions are satisfied should a court proceed to *Chevron* Step One.[45] In short,

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to take in balancing their duties toward the statute and the allowance needed for agency flexibility when elaborating on the statute over time.").

36 Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1077–78 (2016) (raising questions).

37 Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1872 (2015); *see* Sunstein, *supra* note 10, at 188 ("[T]he decision has become foundational, even a quasi-constitutional text—the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies.").

38 *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001).

39 *See Chevron*, 467 U.S. at 865–66.

40 *See, e.g.*, Scialabba v. Cuellar De Osorio, 134 S. Ct. 2191, 2203 (2014); *Chevron*, 467 U.S. at 865.

41 For instance, it is very familiar to congressional staffers. *See* Abbe R. Gluck & 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, 995–96 (2013).

42 533 U.S. 218 (2001).

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

44 *Mead*, 533 U.S. at 226–27 (emphasis added).

45 *See* Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1048 (2007) ("After *Mead*, a court will decide whether or not to award *Chevron* deference to an agency interpretation by asking whether Congress appears to have intended that the court defer to the agency's reasonable interpretation.").

Mead formalized a "*Chevron*-antecedent threshold inquiry"[46] into whether Congress intended to delegate agency actions carrying the force of law.[47]

Mead's holding is nuanced, and subsequent decisions have added only further uncertainty.[48] For instance, in *Barnhart v. Walton*,[49] the Court faced the question of whether the Social Security Act's definition of "disability" had been reasonably interpreted by the Social Security Administration.[50] The Administration's interpretation—which provided benefits only to those who were unable to work for a year—arose "through means less formal than 'notice and comment' rulemaking."[51]

On one reading of *Mead*, the agency's failure to utilize notice-and-comment rulemaking would render its interpretation advisory only, and therefore not entitled to *Chevron* deference. The Court, however, unanimously found such deference to be appropriate:

> [T]he 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 all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[52]

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46 Note, *supra* note 14, at 2195.

47 *See* John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1929–30 (2015) ("Where an organic act delegates interpretive discretion to an agency, the court 'interprets' the organic act, first, by determining the existence of a delegation and, second, by deciding whether the agency has stayed within the bounds set by that delegation (i.e., has 'reasonably' interpreted statutory terms about whose meaning reasonable people can differ)."); Sunstein, *supra* note 10, at 214 ("The linchpin for deference is therefore the power to act with the force of law. Such power follows from the authority to use formal procedures, but it may also be based on other evidence of what Congress intended.").

48 *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1122–23 (2008) ("The clearest effect of *Chevron* at the Supreme Court level is that it has created an increasingly complicated set of doctrinal debates about when this deference regime is applicable (what is now called *Chevron* Step 0), the approach the Court should take and the evidence it ought to consider to determine whether Congress has directly addressed an issue (Step 1), and the relationship of *Chevron* to other deference regimes. *Mead* resolved some of these debates while creating new ones."); Sunstein, *supra* note 10, at 226 ("Step Zero is exceedingly hard for both litigants and courts to handle.").

49 535 U.S. 212 (2002).

50 *See id.* at 214–15.

51 *Id.* at 217, 221.

52 *Id.* at 222.

After *Barnhart*, then, an agency's decision to utilize procedures carrying the force of law might be thought of as a safe harbor of sorts for *Chevron* deference, but procedures alone are not dispositive of whether *Chevron* deference is warranted.

Also important in the deference context are the requirements placed on agencies under the Administrative Procedure Act ("APA").[53] Under § 706(2)(A) of the APA, courts are instructed to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, [or] an abuse of discretion."[54] This standard is designed to ensure that agencies provide adequate reasons for their decisions.[55] Thus, "arbitrary and capricious review" is conceptually similar to the reasonableness inquiry of *Chevron* Step Two, though, as Peter Strauss and Kenneth Bamberger have noted, the emphases of each are a bit different.[56]

Despite this somewhat elaborate, multipart process, reasonable agency interpretations of ambiguous statutes are typically given deference. There is, though, a confounding, "substantive carve-out[]" that further complicates matters.[57] The next Section explores it in detail.

B. The Major Question Exception and the Presumption Against Excessive Delegations

Chevron, *Mead*, and to a lesser extent, *Barnhart*, govern most questions of federal court deference to agency actions. In a curious line of cases, though, the Supreme Court has employed an exception, a supersession of *Chevron*, ostensibly due to the heightened political or economic stakes of the dispute.[58] This "major questions" exception, simply put, is a "[p]resumption against [a] congressional delegation of authority for [an] agency to make fundamental changes to society or the market."[59] The exception has been thoroughly criticized, as it fails to comport with any existing theory of judicial review of agency ac-

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53 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

54 5 U.S.C. § 706(2)(A) (2012).

55 *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5 (2009) ("At its core, arbitrary and capricious review, or 'hard look' review as it is sometimes called, enables courts to ensure that administrative agencies justify their decisions with adequate reasons.").

56 *See* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 624–25 (2009).

57 Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 806 (2010).

58 *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

59 ESKRIDGE, *supra* note 13, at 418.

tions and has been capriciously applied.[60] This Section summarizes the leading cases in which it has played a part.

1. MCI Telecommunications Corp. v. AT&T

Telecommunications regulation in the United States is principally informed by the Communications Act of 1934 ("Act").[61] Among other things, the Act created the Federal Communication Commission ("FCC"), the agency tasked with promulgating regulations to give effect to the Act.[62] One section of the Act "requires communications common carriers to file tariffs" with the FCC, while another authorizes the FCC to "'modify' any requirement" of the same section.[63] Historically, AT&T was a virtual monopolist of the nation's telephone service; however, as technology advanced, competitors were gradually able to enter the marketplace.[64] In an effort to promote competition in the industry, the FCC used its modification authority to issue a regulation exempting all of AT&T's competitors from the tariff filing requirement.[65] AT&T challenged the regulation, arguing that the FCC's action exceeded its authority under the Act.[66]

Upon review, Justice Scalia's 5–4 opinion for the majority adhered to the *Chevron* regime, focusing at first on the Act's plain language.[67] But the opinion went on to note that "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion."[68] In addition, the majority was dubious that "an elimination of the crucial provision of the statute for 40% of a major sector of the industry" was what Congress could have intended.[69] These statements served as an early indication that, to at least some Court members, some issues are perhaps simply too big for agency resolution.[70]

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60 Moncrieff, *supra* note 15, at 607.

61 Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–622 (2012)).

62 *See* MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 220 (1994).

63 *Id.* at 220.

64 *Id.*

65 *See id.* at 220–21.

66 *See id.* at 222.

67 *See id.* at 225.

68 *Id.* at 231.

69 *Id.*

70 *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION 1094 (5th ed. 2014) ("One reading of *MCI* is that it supports a rule or presumption against excessive delegations.").

2. FDA v. Brown & Williamson Tobacco Corp.

MCI's language regarding the substantiality of the FCC's regulation foreshadowed the Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*,[71] discussed in the Introduction. Recall that the case involved the question of whether the FDA could permissibly regulate tobacco products.[72] The Food, Drug, and Cosmetics Act ("FDCA")[73] authorized the FDA to regulate "drugs," defined in the Act as "articles (other than food) intended to affect the structure or any function of the body."[74] The FDA, in contrast to its earlier denial of jurisdiction, chose to regulate nicotine, and in turn, cigarettes and smokeless tobacco as "drug delivery devices" and "combination products."[75]

Justice O'Connor's 5–4 opinion for the majority rejected the FDA's interpretations.[76] Finding that "Congress has directly spoken to the issue,"[77] the Court made much of the "collective premise" of the many tobacco-related pieces of legislation enacted by Congress.[78] Those other pieces of legislation importantly "prohibit[ed] any federal agency from imposing any health-related labeling requirements on cigarettes or smokeless tobacco products."[79] Congress, the Court reasoned, "has acted against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco absent claims of therapeutic benefit by the manufacturer."[80] It was also notable that "Congress considered and rejected bills that would have granted the FDA such jurisdiction."[81]

Further, citing a 1986 essay by Justice Breyer, the Court asserted that "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[82] Going on to state that "[t]his is hardly an ordinary case,"[83] the

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71 529 U.S. 120 (2000).

72 *See id.* at 160.

73 21 U.S.C. §§ 301–399 (2012).

74 *Id.* § 321(g)(1)(C).

75 *Brown & Williamson*, 529 U.S. at 127 (quoting Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,397, 44,402 (Aug. 28, 1996)).

76 *See id.* at 133.

77 *Id.*

78 *Id.* at 139, 143.

79 *Id.* at 156.

80 *Id.* at 144.

81 *Id.*

82 *Id.* at 159. As argued in the essay, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course

Court referenced *MCI* and expressed "confiden[ce] that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[84] The case "remains the clearest statement of what has come to be known as the major questions doctrine."[85]

3. Gonzales v. Oregon

The Controlled Substances Act ("CSA")[86] was passed with the aim of "combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances."[87] The CSA "permits the Attorney General to add, remove, or reschedule substances" for various reasons, though only when supported by "particular findings."[88] The CSA also "regulates the activity of physicians," by requiring registration for various substance-related activities, including the issuance of prescriptions.[89] The case arose after the State of Oregon approved, via ballot measure, a "Death With Dignity" law, permitting the use of "regulated drugs for use in physician-assisted suicide."[90] In response, Attorney General John Ashcroft issued an Interpretive Rule, disallowing the use of the applicable drugs for that purpose, a determination that Oregon then challenged.[91]

Justice Kennedy's 6–3 opinion for the majority invoked the major questions exception in rejecting the Attorney General's interpretation.[92] The opinion noted that the Attorney General's authority did not extend to making medical judgments that were granted, not to

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of the statute's daily administration." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

83 *Brown & Williamson*, 529 U.S. at 159.

84 *Id.* at 160.

85 Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 366 (2016); *see also* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2036 n.86 (2018) ("Though the major questions issue is just one prong of the *Chevron* step one analysis here, it is analytically distinct, and was thus positioned to stand on its own as grounds to withhold deference from an implementing agency.").

86 21 U.S.C. §§ 801–889 (2012).

87 Gonzales v. Oregon, 546 U.S. 243, 250 (2006).

88 *Id.*

89 *Id.* at 250–51.

90 *Id.* at 249.

91 *See id.*

92 *See id.* at 267 ("The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable.").

him, but to the Secretary of Health and Human Services.[93] And the Court questioned the existence of a limiting principle: "Were this argument accepted, [the Attorney General] could decide whether any particular drug may be used for any particular purpose, or indeed whether a physician who administers any controversial treatment could be deregistered."[94] In sum, the Court found the Attorney General's action to be too far reaching for *Chevron* deference.[95]

4. Utility Air Regulatory Group v. EPA

Utility Air Regulatory Group v. EPA,[96] like *Chevron* itself, involved the EPA's interpretation of the term "stationary source" in the Clean Air Act.[97] The "EPA found that greenhouse-gas emissions from new motor vehicles contribute to elevated atmospheric concentrations of greenhouse gases, which endanger public health and welfare by fostering global 'climate change.'"[98] As such, it "promulgated greenhouse-gas emission standards for passenger cars, light-duty trucks, and medium-duty passenger vehicles."[99] Several states challenged the regulations.[100]

Justice Scalia's opinion for a unanimous Court rejected the EPA's interpretation as an exercise of "extravagant statutory power over the national economy"[101] and noted that the interpretation "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[102] In reliance on *Brown & Williamson*, the Court stated that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a

93 *See id.* at 265–66 ("The structure of the CSA, then, conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise."); *see also id.* at 269 ("The deference here is tempered by the Attorney General's lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment."); Aziz Z. Huq, *The Institution Matching Canon*, 106 Nw. U. L. Rev. 417, 438–44 (2012).

94 *Gonzales*, 546 U.S. at 268.

95 *See* Lisa Schultz Bressman, *Deference and Democracy*, 75 Geo. Wash. L. Rev. 761, 779 (2007) ("In *Gonzales*, the administration took a position on an issue subject to public debate essentially by fiat. The Attorney General picked sides for the public without involving or even ascertaining the views of the public." (footnote omitted)).

96 134 S. Ct. 2427 (2014).

97 42 U.S.C. §§ 7401–7671q (2012); *Util. Air Regulatory Grp.*, 134 S. Ct. at 2434.

98 *Util. Air Regulatory Grp.*, 134 S. Ct. at 2437 (quoting Endangerment and Cause or Contribute Findings for Greenhouse Gases, 74 Fed. Reg. 66,496, 66,523, 66,537 (Dec. 15, 2009)).

99 *Id.*

100 *Id.* at 2438.

101 *Id.* at 2444.

102 *Id.*

significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."[103] Accordingly, the case reinforces the deferential divide between "big" matters and ordinary activity.[104]

5. King v. Burwell

The appearance of the major questions exception in *King v. Burwell*,[105] the second major challenge to the Affordable Care Act ("ACA"),[106] affirmed its continued relevance.[107] As was widely reported, the ACA requires individuals to either maintain health insurance, or, in the alternative, pay a tax to the Internal Revenue Service ("IRS").[108] The Act further requires the states to create an "Exchange," intended to facilitate competition among insurance plans.[109] The Act provides subsidies for those "with household incomes between 100 percent and 400 percent of the federal poverty line."[110] The precise issue in the case was whether the subsidies were available in states that refused to create an exchange, leaving the task to the federal government.[111] The language of the ACA expressly referred to exchanges "established by the State," leaving open the question of whether federally-created exchanges triggered the subsidy provisions.[112] The IRS issued a regulation providing the subsidies to all eligible persons, regardless of whether their state's exchange was created by their state or by the federal government.[113]

Chief Justice Roberts's 6–3 opinion for the majority upheld the ACA's command, though notably, did not give *Chevron* deference to the IRS.[114] Instead, the opinion applied the major questions exception at *Chevron* Step Zero (despite the IRS having satisfied *Mead*).[115] Quoting *Brown & Williamson*, the opinion confirmed that "[i]n ex-

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

104 *See* Heinzerling, *supra* note 10, at 1949 ("[T]he *UARG* canon appears to embrace this very distinction: gimlet-eyed scrutiny for 'big, important' agency interpretations, and a *Chevron* pass for the small stuff.").

105 135 S. Ct. 2480 (2015).

106 42 U.S.C. §§ 18001–18122 (2012).

107 *See* Sohoni, *supra* note 17, at 1419–21.

108 *See King*, 135 S. Ct. at 2486.

109 *See id.* at 2485.

110 *Id.* at 2487.

111 *See id.*

112 *See id.* (quoting I.R.C. § 36B(b)–(c) (2012)).

113 *See id.*

114 *Id.* at 2496.

115 *Id.* at 2488–89.

traordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[116] In addition, the opinion claimed that Congress would not have given the IRS authority over the ACA's subsidies, given their importance to the statute:

> The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.[117]

Further, the Court returned to an argument first expressed in *Gonzales* regarding the expertise of the agency under review. The Court found it "unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort."[118] But again, the majority ultimately *upheld* the ACA provision.

In *King*, a new manifestation of the major questions exception appeared. Never before had the Court employed the major questions exception, only to ultimately *agree* with the agency action.[119] And, as observed by Lisa Heinzerling, never before had the Court circumvented the *Chevron* framework when an agency acted in accordance with all of the requisite implementing procedures.[120]

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

117 *Id.* at 2489.

118 *Id.*

119 *See* Note, *supra* note 14, at 2201 ("[T]he Court had never before agreed with an agency's interpretation of a 'big' question. The major question exception had always reinforced various other reasons for rebuffing an agency, as a sort of tiebreaker in close cases."). *But see* Cary Coglianese, Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1359 (2017) ("Rather than casting doubt on *Chevron*, the *King* decision actually reaffirms *Chevron*'s core structure . . . .").

120 *See* Heinzerling, *supra* note 10, at 1960–61 ("The Court had, in the *Chevron* era, never before put the *Chevron* framework entirely to the side in the circumstances presented in *King*: an interpretation of a statute deemed ambiguous, arrived at after notice-and-comment rulemaking, by the agency charged by the statute with making rules to implement the provision interpreted."); *see also* Emerson, *supra* note 85, at 2039 ("The Court nonetheless asserted its interpretive prerogative, wresting power away from the agency, only to conclude that the agency had been right all along. The disagreement was structural—who decides?—rather than substantive—what is the answer?"); Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 93 (2015) ("The *King* majority applies the major questions rule—one of the few canons that actually transfers decisionmaking power *to* courts—and finds the question in *King* too big to assume that Congress

C. *Critiquing the Major Questions Exception*

The major questions exception has been thoroughly criticized. Many view its unpredictable application as highly destabilizing.[121] As described in a Note in the *Harvard Law Review*, "the protean major question exception has an air of judicial improvisation."[122] The erratic nature of its application is understandably of concern. Federal courts purport to honor congressional intent when interpreting statutes. An aggressive major questions exception empowers the judiciary to selectively circumvent the traditional deference regime to uncertain ends. Critics see it as a form of judicial activism, or more threateningly, as a means of undermining the notion of administrative governance.

The exception naturally raises functional concerns. How can one delineate major questions from quotidian ones?[123] What constitutes a matter of "economic and political significance," such that a court should eschew *Chevron*? Moreover, what is the precise relationship between the major questions exception and *Chevron*? As noted above, in *King*, the Chief Justice applied the exception at *Chevron* Step Zero.[124] "*King* chooses *Marbury* over *Chevron* and, in the process, may have announced a more limited deference doctrine for complex statutes."[125] In contrast, in *MCI*, the Court used the exception to bolster its conclusion that the Communications Act of 1934 was unambiguous, a *Chevron* Step One inquiry. More recently, in *Gonzales* and *UARG*, the Court applied the exception while seemingly operating at *Chevron* Step Two. All told, the inconsistent application of the exception undermines its legitimacy.

A larger critique pertains to *Chevron*'s underlying rationales, specifically, that agencies are best situated to resolve complex matters

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implicitly gave it to the agency. *But the Court has no trouble taking and answering that big question itself*.").

121 *See* Heinzerling, *supra* note 10, at 1937, 2003–04 (disaggregating three types of major questions exceptions and cautioning that "they make Congress uncertain of the words it must use to set in motion an active regulatory program and to make agencies rather than courts the interpreters of first resort, and they make agencies uncertain of their interpretive authority").

122 Note, *supra* note 14, at 2202. As "anti-cases," the Note examined *Massachusetts v. EPA*, 549 U.S. 497 (2007) and *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

123 *See* Moncrieff, *supra* note 15, at 612 ("In the end, then, a bare majorness line does not provide an administrable rule of decision for future cases because there is no principled difference between a major question and a minor one. Thus, the *Brown & Williamson* rule might not be worthy of mourning or reincarnation in this form; if its only purpose were this prohibition of major executive enactments, the *Brown & Williamson* doctrine would seem excessively error-prone.").

124 *See* King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015).

125 Gluck, *supra* note 120, at 93.

and are more politically accountable than judges. Both premises cut against the use of the major questions exception.[126] The cases comprising the major questions doctrine implicate enormously dense statutory and regulatory sectors. It would seem, then, that any uncertainties arising from statutory ambiguities would be best resolved by agencies.

A final critique of the major questions exception concerns its anti-regulatory bent. As the argument goes, the exception has almost invariably been used in opposition to agency *action*. This limited application ignores the economic and political impact of agency *inaction* and, as such, stifles agency responsiveness: "The Court's cases make clear that only some kinds of very important decisions fit within the canon. In considering 'economic' significance, the Court seems to weigh only the burdens on industry of agency action, not the burdens on regulatory beneficiaries of agency passivity."[127] Insofar as this critique is descriptively accurate, it provides an additional reason for skepticism of the exception.

Not everyone has denounced the exception. William Eskridge Jr. suggests that it may be "defensible along precisely the same lines as *Chevron* itself. The key reason is the strong presumption of continuity for major policies unless and until Congress has deliberated about and enacted a change in those major policies."[128] Blake Emerson argues that the exception should only be applied when agency deliberation is lacking.[129] Nathan Richardson makes a case for the exception, viewing it as "a *Chevron* safety valve, relieving pressure in cases where the

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126 *See* Coglianese, *supra* note 119, at 1357 ("Questions of 'deep "economic and political significance"' almost axiomatically would seem better addressed by an administrative agency with greater expertise and political accountability." (quoting King v. Burwell, 135 S. Ct. 2480, 2489 (2015)) (footnote omitted)); Moncrieff, *supra* note 15, at 612 ("In fact, the majorness of the policy makes the technocratic expertise and democratic accountability of the decisionmaker more relevant, not less.").

127 Heinzerling, *supra* note 10, at 1987; *see* Josh Chafetz, *Gridlock?*, 130 HARV. L. REV. F. 51, 59 (2016) ("The doctrine comes in to forestall the *Chevron* analysis, instituting a special, status-quo-protecting norm *only in cases in which the court deems a 'major question' to be present*. Because, as we have seen, judges are far more likely to find major questions in cases of active regulation, rather than nonregulation or deregulation, the doctrine privileges only nonregulatory baselines, while allowing for regulatory ones to be rolled back more easily."); Sunstein, *supra* note 10, at 246 ("If a nondelegation principle is meant to prevent agencies from significantly altering statutory programs on their own, in a way that goes beyond the ordinary operation of Step One, it would embed an unhealthy status quo bias into administrative law.").

128 ESKRIDGE, *supra* note 13, at 289.

129 *See* Emerson, *supra* note 85, at 2097 ("[T]he agency must have documented a value-oriented process of public engagement for its interpretations of statutory ambiguities to qualify for judicial deference.").

Chevron-Marbury tension is most salient."[130] Writing several years ago, Abigail Moncrieff defended the use of the exception in *MCI* and *Brown & Williamson* as a means of "prevent[ing] institutional intermeddling" between the Executive and Legislative Branches.[131] And Lisa Bressman has argued that its application is sensible when, in light of the broader context, agencies act in undemocratic ways.[132] These respective arguments are insightful. However, as argued in the next Part, the major questions doctrine is best perceived alongside other doctrines under which federal courts deviate from convention and assume principal decisionmaking authority in light of political or economic concerns.

II. *Chevron* and the Canon of Constitutional Avoidance

This Part examines the use of the constitutional avoidance canon in the context of judicial review of agency determinations, drawing parallels to the major questions exception. What is made clear is that the expertise justification for the constitutional avoidance canon does not extend to the major questions exception. Thus, if the exception is employed as a broad substantive canon affording federal courts license to evade *Chevron* deference, it should be abandoned.

A. Agency Deference and the Constitutional Avoidance Canon

The constitutional avoidance canon is a substantive canon that instructs courts to avoid an interpretation of a statute that raises a *serious* constitutional problem. As explained by Justice Hughes, "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[133] One central presumption underlying the canon is that Congress does not in-

130 Richardson, *supra* note 85, at 420.

131 Moncrieff, *supra* note 15, at 621–22 ("[W]hen Congress has, in fact, remained actively interested in a regulatory regime, agencies should be forbidden from enacting regulations that would interfere with ongoing congressional bargaining.").

132 *See* Bressman, *supra* note 95, at 782 ("Cases like *Brown & Williamson* and *Gonzales* demonstrate that the Court sometimes encounters accountability danger signals—signals that the administration has acted without regard to its continuous commitment of accountable government.").

133 Crowell v. Benson, 285 U.S. 22, 62 (1932); *see also* United States v. Del. & Hudson Co., 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

tend "to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils."[134]

Much like the major questions exception, the avoidance canon has been criticized for giving judges the power to usurp legislative and executive authority arbitrarily. Because the canon is potentially relevant whenever "any constitutional doubts about the law"[135] exist, it gives judges a means of issuing advisory constitutional decisions.[136] As Judge Henry Friendly wrote in opposition, "[i]t does not seem in any way obvious, as a matter of interpretation, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them."[137]

More recently, Neal Katyal and Thomas Schmidt criticized the canon as a form of "judicial aggression" that has affected the outcome of several recent Supreme Court cases.[138] More broadly, Katyal and Schmidt see the canon as empowering judges to arbitrarily rewrite statutes in ways that unsettle effective governance:

> Instead of encouraging judges to carefully limit the zone of unconstitutionality, which defines the space in which the elected branches may not operate, avoidance often leaves legislators in the dark. The avoidance canon requires only

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134 Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 466 (1989).

135 John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495, 1496 (1997).

136 *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 259 (2d. ed. 2013) ("But how 'serious' or 'grave' must the constitutional problem be? Is the presence of a non-frivolous constitutional objection sufficient to trigger the canon? Or is something more required, such as the conclusion that a given interpretation would *likely* be unconstitutional, or that resolution of the constitutional issue would require resolution of particularly complex and uncertain questions of constitutional law?"); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 461 (2005) ("[T]he canon has the hybrid quality of quasi-constitutional law. It is a tool of public law on the borderline between constitutional law and subconstitutional law, and between judicial and legislative functions."); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) ("The practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution—to create a judge-made constitutional 'penumbra' that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself."); *cf.* ESKRIDGE, *supra* note 13, at 322 ("Critics maintain that application of modern avoidance is about as arbitrary as being struck by lightning; it is a transformative event but happens rarely and without warning. The struck-by-lightning metaphor is telling, as it suggests (correctly) that judges do not routinely deploy the modern avoidance canon to engage in major statutory invalidation or revision.") (footnote omitted).

137 HENRY J. FRIENDLY, BENCHMARKS 210 (1967).

138 Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2112, 2129–53 (2015).

> that a judge advert to some theoretical "doubt" about a law's constitutionality, which naturally leads to vague and imprecise constitutional analysis.[139]

Relatedly, the discretionary nature of the canon has led to claims that it is selectively employed for political ends.[140]

That said, the canon is defended on several grounds. In addition to arguably honoring Congress's intent, it might be seen as an exercise of the "passive virtues."[141] According to the defense, courts should avoid deciding constitutional questions unless absolutely necessary.[142] Deciding cases on statutory grounds provides Congress with an easier means of overriding decisions with which it disagrees.

Another defense of the canon is that it reinforces constitutional values. As put by Dan Coenen: "Through the use of this so-called 'doctrine of constitutional doubt,' the Court can and does protect fundamental values by eschewing interpretations otherwise ascribable to statutes that would push those statutes into constitutional danger zones."[143] The Court, in playing this protective role, is fully justified in policing constitutional boundaries, as constitutional interpretation is its mandate. Others have offered the very similar defense that the canon is an effective means of reinforcing constitutional norms.[144]

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139 *Id.* at 2112.

140 *See, e.g.*, Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 219–21.

141 *See* ESKRIDGE, *supra* note 13, at 321–22 ("Very often, the Supreme Court *ought* to withhold firm judgment on whether a statute is unconstitutional. If the Justices are not certain that the statute violates the Constitution, they certainly ought not strike it down—but neither should they legitimate the statute when they are not sure it meets the requirements of the Constitution. This is the point of the passive virtues, and one such virtue is the modern avoidance canon."); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111 (2d ed. 1986) ("passive virtues"); Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1608 (2001) ("By reserving constitutional intervention to instances of the most pressing urgency, the Court minimizes potentially power-sapping confrontations with coordinate branches, portrays itself as temperate in character, conserves judicial capital, and, through all this, solidifies its claim to exercise the power of judicial review.").

142 *See* Coenen, *supra* note 141, at 1604.

143 Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1294–95 (2002) (footnote omitted).

144 *See* Frickey, *supra* note 136, at 462 ("The canon . . . seems to be a potentially effective method of at least provisionally protecting underenforeed [sic] constitutional norms."); *see also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 469 (1989) ("The aggressive construction of questionable but not invalid statutes—removing them from the terrain of constitutional uncertainty—is a less intrusive way of vindicating norms that do in fact have constitutional status.").

Notably, the avoidance canon is employed both in cases in which courts are the initial statutory interpreter[145] and in cases involving judicial review of agency interpretations.[146] Some have noted that its use in the agency context raises Article II concerns about the autonomy of the executive branch.[147] But it is difficult to apprehend why Congress would delegate unconstitutional interpretive authority to agencies, and as such, why unconstitutional agency interpretations should be entitled to *Chevron* deference.[148] As John Manning and Matthew Stephenson have written, "one might justify prioritizing the avoidance canon over *Chevron* as a way to narrow congressional delegations of lawmaking power to agencies, at least in certain domains."[149] This way of thinking, for instance, informs Nina Mendelson's argument that federal courts should not defer to agency decisions regarding preemption.[150]

The purpose here is not to offer a comprehensive defense or critique of the canon but to examine how its application resembles the application of the major questions exception and, ultimately, to explore the latter's legitimacy. Looking to a few prominent cases in which the canon was employed is helpful in this regard. In *Edward J.*

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145 *See, e.g.*, Skilling v. United States, 561 U.S. 358, 405 (2010) ("It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction.").

146 *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

147 *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 81 (7th ed. 2015) ("[W]hen the Court practices avoidance in reviewing an agency's interpretation of its own organic act, the Court's reliance on the canon may devalue the executive's own responsibility to determine the constitutionality of action that it undertakes pursuant to authority delegated by Congress.") (citation omitted); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 868 (2001) ("In applying the avoidance canon to executive action, the Court is rejecting the Executive's explicit legal judgment about the meaning of both the statute and the Constitution, not because the statute is unconstitutional but because it is not clearly constitutional.").

148 *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000) ("So long as the statute is unclear, and the constitutional question serious, Congress must decide to raise that question via explicit statement. This idea trumps *Chevron* for that very reason. Executive interpretation of a vague statute is not enough when the purpose of the canon is to require Congress to make its instructions clear.").

149 MANNING & STEPHENSON, *supra* note 136, at 829.

150 Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 718 (2008) ("Because agencies lack an institutional focus on the value of retaining an independent state role and preserving state sovereignty, courts should be reluctant to read a statute to authorize an agency to declare state law preempted."); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 799 (2004) ("[T]he analysis suggests several factors that, taken together, weigh against *Chevron* deference to administrative interpretations of state law preemption.").

DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,[151] the question before the Court was whether a union's distribution of handbills at a mall, discouraging customers from shopping at the mall in objection to the union's wages, violated the National Labor Relations Act ("NLRA").[152] The NLRA prohibits unions from engaging in "unfair labor practices."[153] Disputes of this sort are initially resolved by the National Labor Relations Board ("NLRB").[154] The NLRB found the union's activities to violate the express terms of the NLRA and rejected the union's argument that its activities constituted protected speech under the First Amendment.[155] The NLRB, in fact, expressly presumed the NLRA's constitutionality.[156]

The Eleventh Circuit reversed the NLRB's decision, expressing "serious doubts" about the NLRA's constitutionality as applied to the union's activities.[157] The Court unanimously affirmed the Eleventh Circuit's decision, declaring that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[158] Having identified "serious [constitutional] questions," the Court interpreted the NLRA so as to avoid First Amendment concerns.[159] Tellingly, no *Chevron* deference was given. The Court spoke in obligatory terms—"we must independently inquire whether there is another interpretation, not raising these serious constitutional concerns"—in finding an alternate construction of the statute.[160]

The obligatory characterization is revealing. At its core, the case involved a labor dispute, an issue clearly within the expertise of the

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151 485 U.S. 568 (1988).

152 29 U.S.C. §§ 151–169 (2012).

153 *Id.* § 158(b)(4).

154 *See DeBartolo*, 485 U.S. at 571.

155 *Id.* at 572–73 ("The Board observed that it need not inquire whether the prohibition of this handbilling raised serious questions under the First Amendment, for 'the statute's literal language and the applicable case law require[d]' a finding of a violation." (quoting 273 N.L.R.B. 1431, 1432 (1985))).

156 *Id.* at 573 (stating NLRB's position that "we will presume the constitutionality of the Act we administer" (quoting 273 N.L.R.B. 1431, 1432 (1985))).

157 Fla. Gulf Coast Bldg. & Constr. Trades Council v. NLRB, 796 F.2d 1328, 1332–46 (11th Cir. 1986).

158 *DeBartolo*, 485 U.S. at 575.

159 *Id.*

160 *Id.* at 577–78 ("We . . . conclude . . . that the section is open to a construction that obviates deciding whether a congressional prohibition of handbilling on the facts of this case would violate the First Amendment.").

NLRB. Yet, the Court suggested that it was institutionally compelled to deviate from convention and interpret the NLRA itself. To be sure, the Court purported to do so in keeping with congressional intent,[161] but the saving construction given to the NLRA was, of course, its own. Courts understandably exercise this authority sparingly. As Justice Holmes once wrote, "to declare an Act of Congress unconstitutional . . . is the gravest and most delicate duty that this Court is called on to perform."[162] In *DeBartolo*, the importance of preserving First Amendment speech rights justified deviating from *Chevron*.

Consider, in contrast, *Rust v. Sullivan*,[163] in which a sharply divided Court disagreed about the canon's applicability. The case involved regulations issued by the Department of Health and Human Services ("HHS"), designed to enforce the Public Health Service Act ("PHSA").[164] The PHSA provided "federal funding for family-planning services" but prohibited the use of the funds "in programs where abortion is a method of family planning."[165] The dispute centered on whether the HHS regulations—attaching various conditions on the receipt of the funds—were permissible under the statute's terms.[166]

The regulations prohibited fund recipients from providing "counseling concerning the use of abortion as a method of family planning or provid[ing] referral[s] for abortion as a method of family planning."[167] Recipients were also prohibited from doing anything to "encourage, promote or advocate abortion."[168] And any abortion-related projects run by recipients were required to be "physically and financially separate" from the funded projects.[169] The regulations were challenged by potential fund recipients as both inconsistent with the statute's terms and unconstitutional under the First and Fifth Amendments.[170]

Chief Justice Rehnquist's 5–4 opinion for the majority acknowledged the PHSA's ambiguity and gave *Chevron* deference to the HHS regulations.[171] Only then did he consider the avoidance canon, giving

161 *See id.* at 575 ("The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

162 Blodgett v. Holden, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring).

163 500 U.S. 173 (1991).

164 42 U.S.C. §§ 201–300 (2012); *see Rust*, 500 U.S. at 177–79.

165 *Rust*, 500 U.S. at 178 (quoting 42 U.S.C. § 300a-6).

166 *See id.* at 183.

167 *Id.* at 179 (quoting 42 C.F.R. § 59.8(a)(1) (1989)).

168 *Id.* at 180 (quoting 42 C.F.R. § 59.10(a) (1989)).

169 *Id.* at 180–81 (quoting 42 C.F.R. § 59.9 (1989)).

170 *See id.* at 181.

171 *See id.* at 184 ("We need not dwell on the plain language of the statute because we agree

credence to the plaintiff's constitutional claims, though ultimately finding the claims to be minor and, therefore, too insubstantial to justify deviating from *Chevron*.[172] In contrast, three of the dissenters perceived the regulations to violate the First and Fifth Amendments,[173] with Justice O'Connor, also in dissent, applying the canon, but reserving final judgment on the constitutionality of the regulations.[174] In *Rust*, then, the debate among the Justices was about the seriousness of the constitutional problems presented by the HHS regulations; no Justice, however, questioned the relevance of the canon in resolving the case.[175] *Rust* is precisely the type of case that critics of the canon reference: the Justices could not agree on how serious the constitutional concerns were, affirming the critics' view that the canon is subject to arbitrary application.[176]

Despite the critics' claims, though, lower courts have proven capable of discerning serious constitutional problems. In *Williams v. Babbitt*,[177] the Ninth Circuit took up the question of whether an early twentieth-century statute prohibited non-Alaskan natives from owning and selling reindeer in the state.[178] The governing agency, the Interior Board of Indian Appeals ("IBIA"), had interpreted the statute to prohibit non-Alaskan natives from doing so.[179] Plaintiffs challenged that determination, alleging that the agency's interpretation constituted an equal protection violation.[180]

The court properly identified the canon's limiting principle,[181] as well as its governing logic: "[t]his reading of *DeBartolo* and *Rust* does

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with every court to have addressed the issue that the language is ambiguous."); *id.* at 187 ("Having concluded that the plain language and legislative history are ambiguous as to Congress' intent in enacting Title X, we must defer to the Secretary's permissible construction of the statute.").

172 *See id.* at 191 ("[T]he constitutional arguments made by petitioners in these cases are [not] without some force . . . .").

173 *See id.* at 209 (Blackmun, J., dissenting) ("It cannot seriously be disputed that the counseling and referral provisions at issue in the present cases constitute content-based regulation of speech."); *id.* at 215 (Blackmun, J., dissenting) ("By far the most disturbing aspect of today's ruling is the effect it will have on the Fifth Amendment rights of the women who, supposedly, are beneficiaries of Title X programs.").

174 *See id.* at 224 (O'Connor, J., dissenting) ("In these cases, we need only tell the Secretary that his regulations are not a reasonable interpretation of the statute; we need not tell Congress that it cannot pass such legislation.").

175 *See id.* at 204–05 (Blackmun, J., dissenting).

176 *See, e.g.*, FRIENDLY, *supra* note 137, at 205; Katyal & Schmidt, *supra* note 138, at 2112.

177 115 F.3d 657 (9th Cir. 1997).

178 *See id.* at 659.

179 *See id.*

180 *Id.* at 663.

181 *See id.* at 662 ("*Rust* and *DeBartolo*, read together, require courts to scrutinize constitu-

not offend *Chevron*'s underlying principles and preserves the balance of power between the judicial and the political branches."[182] The court went on to find the plaintiffs' equal protection concerns to be serious and adopted a saving construction of the Act.[183]

Whitaker v. Thompson,[184] decided by the Court of Appeals for the District of Columbia Circuit, involved the question of whether an FDA labeling decision properly applied the FDCA.[185] The plaintiffs argued that the FDA improperly classified their product as a "drug claim" (as opposed to a "health claim") and that the improper classification constituted a First Amendment violation of plaintiffs' commercial speech rights.[186] In considering the relevance of the canon, the court found it appropriately employed only when there is "a comparatively high likelihood of unconstitutionality, or at least some exceptional intricacy of constitutional doctrine."[187] The court found that not to be the case.[188]

As demonstrated by these cases, courts occasionally wrestle with the challenge of distinguishing serious constitutional matters from immaterial ones. As shown, courts use the canon to assume principal decisionmaking authority in a narrow class of cases in which the political consequences of giving agencies deference are perceived to be uniquely high, i.e., when agencies infringe on constitutional boundaries. The next Section compares the canon to the major questions exception.

B. Questions, both Serious and Major

With the above background, one can more directly draw the comparison between the constitutional avoidance canon and the major questions exception. Both are employed in rare, yet important scenarios in which courts believe the political or economic stakes to be ex-

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tional objections to a particular agency interpretation skeptically. Only if the agency's proffered interpretation raises *serious* constitutional concerns may a court refuse to defer under *Chevron*.").

182 *Id.*

183 *See id.* at 666 ("The constitutional questions raised by the IBIA's interpretation are grave and, as intervenors and amici point out, implicate an entire title of the United States Code. We see no reason to unnecessarily resolve them when a less constitutionally troubling construction is readily available.").

184 353 F.3d 947 (D.C. Cir. 2004).

185 *Id.* at 948–49.

186 *Id.* at 948, 952.

187 *Id.* at 952.

188 *Id.* ("[W]e do not find Whitaker's First Amendment objection so powerful as to require us to abandon or qualify *Chevron* deference.").

ceptional. On one level, identifying a serious constitutional problem is no less discretionary than identifying a major question. In both instances, courts must interrogate congressional intent, often by way of legislative history, and make a judgment about whether a particular agency interpretation comports with that intent.[189]

In fact, in some cases, the canon and the exception can operate in tandem. For instance, in *Gonzales v. Oregon*[190]—discussed in Section I.B.3—Justice Kennedy invoked both the major questions exception and identified "obvious constitutional problems" associated with the Attorney General's interpretation of state and local laws.[191] But a closer examination of the canon's and the exception's respective rationales reveal their dissimilarity.

Take the canon. As detailed above, those who defend it emphasize that Congress almost certainly does not intend to delegate authority to agencies to engage in unconstitutional actions.[192] To the extent that *Chevron* deviation is justified by congressional intent, this is as compelling a defense of the canon as exists.

And again, given their institutional expertise in constitutional interpretation, courts are likely much better than agency officials at identifying serious constitutional problems. In the best of circumstances, use of the avoidance canon can inspire a Court–Congress constitutional dialogue. Agencies may have a role to play in this dialogue as well, particularly given the direct communication they have with Congress, but because they have a specialized focus on statutory implementation, it is reasonable to assume that constitutional boundaries are not their principal concern.

As a safeguard, then, the canon performs an important function, all the more so because there is no obvious point in the *Chevron* regime where constitutional concerns are analyzed. At *Chevron* Step Zero, the focus is on the question of whether Congress empowered an agency to act with the force of law. At Step One, the focus is on whether a statute's terms are ambiguous. And at Step Two, it is on the reasonableness of an agency's action. Further, under § 706(2)(A) of the APA, courts evaluate the soundness of agencies' decisions "in

189 *Compare* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (employing the constitutional avoidance canon on a union's First Amendment claim), *with* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 148–49 (2000) (finding that Congress did not intend to give the FDA jurisdiction over tobacco products).

190 546 U.S. 243 (2006).

191 *See id.* at 264.

192 *See supra* Section II.A.

technocratic, statutory, or scientifically driven terms."[193] Courts are rightfully empowered to consider constitutional concerns as part of their review.

In contrast, many of the concerns that have been raised in the major questions doctrine would seem to be duplicated in either *Chevron* Step Two or arbitrary and capricious review under § 706(2)(A) of the APA.[194] For instance, in *Brown & Williamson*, the Court focused on the fact that Congress had considered and rejected a number of bills that would have afforded the FDA the jurisdiction it sought.[195] This inquiry into the relevant legislative history both can and does already occur at *Chevron* Step Two—the construction of a major questions exception to undertake this inquiry is therefore unnecessary.[196]

Thus, use of the constitutional avoidance canon as a benchmark gives insight into the legitimacy of the major questions exception. The contrast explicates why the expertise justification that animates use of the avoidance canon does not extend to the major questions exception. As many have observed, it is not obvious that Congress means to withhold major issues from agencies; in fact, there are compelling arguments to be made that the delegation of major issues is precisely what Congress desires.[197] That is, Congress may sensibly wish to turn complex enforcement matters involving major political or economic matters over to expert agencies.[198] This, of course, is not a presumption that holds when it comes to constitutional concerns, where judicial expertise is at its highest.

In sum, if the exception continues to be employed as a broad substantive canon affording federal courts license to evade *Chevron* deference, it should be abandoned. The avoidance canon serves as a useful comparator. While it too is subject to substantial critique, it can be justified based on the expertise that courts have in identifying constitutional problems. No such justification supports a major questions exception.

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193 Watts, *supra* note 55, at 5.

194 *See* Note, *supra* note 14, at 2211–12.

195 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 131 (2000).

196 *See* Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 329–31 (1990).

197 Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 156 (2017).

198 The empirical data is mixed. *See id.* at 156–57.

The next Part discusses another doctrine in which federal courts, in cases with what they perceive to be heightened stakes, make complicated choices about the breadth of their authority.

III. Federal Question Jurisdiction and Hybrid Claims

This Part examines the case law involving federal courts' jurisdiction over so-called "hybrid claims." Much like what is now occurring in the major questions doctrine, the Court struggled for many years to define the scope of its reviewing authority over claims of this sort.[199] In *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,[200] a workable framework was finally settled upon.[201] This framework—and the uniformity justification supporting it—provides another useful comparator for the major questions exception. If the major questions doctrine evolves in a pragmatic way to promote uniformity concerns, it could yet prove tenable.

A. Federal Courts' Jurisdiction over Hybrid Claims

At first glance, the relationship between the major questions exception and federal question jurisdiction may seem attenuated, if not wholly disparate. What does an abstruse administrative law puzzle have to do with the question of whether a case is properly heard in state or federal court? To reiterate, in both contexts one sees federal courts deviating from convention and assuming principal decision-making authority in light of political or economic concerns.[202] Indeed, the conceptual overlap between federal courts' vertical power sharing[203] and horizontal power sharing[204] is considerable. As Cass Sunstein has written, "*Chevron* can be seen . . . as a close analogue to *Erie Railroad Co. v. Tompkins*—as a suggestion that law and interpretation often involve no 'brooding omnipresence in the sky' but instead discretionary judgments to be made by appropriate institutions."[205]

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199 *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005).

200 545 U.S. 308 (2005).

201 *See id.* at 314.

202 *See supra* Section I.C.

203 *E.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

204 *E.g.*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

205 Sunstein, *supra* note 10, at 206 (footnotes omitted) (quoting S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)); *see also* Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us about the Rest of Statutory Interpretation*, 83 Fordham L. Rev. 607, 625–26 (2014) ("When *Erie* was decided, at the dawn of the New Deal era, it was state courts that received the transfer of law-deciding power; in the modern era of the regulatory state, it is federal agencies."); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. Cal. L. Rev. 405, 425–28 (2008) (associating the "realist assault on formalism"

As background, the jurisdiction of the federal courts is prescribed by Congress, though in practice federal courts enjoy substantial control over its breadth.[206] Few cases and controversies are settled by federal courts; most legal disputes are resolved in state courts. Article III of the Constitution extends federal subject matter jurisdiction to cases "arising under" federal law.[207] Article III established the Supreme Court and left it to Congress to establish lower federal courts.[208] This delegation includes the power to define the jurisdiction of the lower federal courts.[209]

Congress exercised this power in passing 28 U.S.C. § 1331, which replicates the "arising under" language from Article III.[210] The Court, however, has interpreted the statutory grant of federal question jurisdiction more narrowly than the constitutional command.[211] The best-known limitation on federal question jurisdiction, a staple of introductory civil procedure courses, is the "well-pleaded complaint" rule. The rule instructs federal courts to exercise jurisdiction only when a complaint expressly invokes a federal question.[212]

A second means of establishing federal question jurisdiction, of central interest in this Article, exists when federal content is "sufficiently 'direct' or 'central' to the dispute to justify access to the federal

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with both *Erie* and "the birth of the modern administrative state"); Kathryn A. Watts, *Adapting to Administrative Law's* Erie *Doctrine*, 101 Nw. U. L. Rev. 997 (2007) (likening *Erie* and *National Cable & Telecommunications Ass'n v. Brand X Internet Services.*, 545 U.S. 967 (2005)).

206 *See* F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 Ala. L. Rev. 895, 902 (2009) ("Although the Court has recognized that the Constitution assigns Congress the role of defining inferior federal jurisdiction, as a practical matter the courts have played an equally prominent role in shaping federal jurisdiction. That is because courts must interpret jurisdictional statutes in order to determine whether they have jurisdiction over a particular case.").

207 U.S. Const. art. III, § 2.

208 *Id.* art. III, § 1; *see also* Hessick, *supra* note 206, at 900 ("Entrusting Congress with the power to create inferior federal courts was the result of a compromise at the Constitutional Convention. The members of the Convention agreed on the need for a supreme national court to ensure the primacy and uniform interpretation of the Constitution and federal laws, but there was disagreement on the need for inferior federal courts.").

209 *See* Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 Ind. L.J. 309, 312 (2007) ("[T]he federal judicial power created in Article III is not self-executing, and Congress must vest it in the lower federal courts by statute.").

210 *See* Hessick, *supra* note 206, at 907 ("The deliberate repetition of the language from Article III in the federal question statute strongly suggests that Congress meant to confer on the federal district courts the full 'arising under' jurisdiction permitted by the Constitution . . . .").

211 *Id.* at 909–10 (describing the contrasting interpretations).

212 *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 154 (1908); Freer, *supra* note 209, at 317–18.

courts."[213] Put differently, the inquiry turns on whether a "federal element" of consequence exists, such that a case that would normally be resolved in state court be heard, instead, in federal court.[214] For nearly one hundred years, the Court failed to settle the question of whether federal jurisdiction exists over claims of this sort, described by Richard Freer as "admixtures of state and federal law."[215] Irreconcilable decisions bedeviled courts and commentators alike. In 2005, the Court provided some clarity in *Grable*, introducing a list of factors that now govern the jurisdictional resolution of these hybrid claims.[216] Below, this Article briefly summarizes the prior case law before analyzing *Grable*. The analysis sheds light on how federal courts' exercise of jurisdiction over hybrid claims resembles federal courts' application of the major questions exception.

Justice Holmes's decision in *American Well Works Co. v. Layne & Bowler Co.* ("*Well Works*")[217] offered an early pronouncement on how to treat hybrid claims.[218] The case involved a dispute between two companies that manufactured pumps.[219] One of the companies allegedly slandered and libeled the other by stating that its competitor's pump infringed a United States patent.[220] The question at issue was whether a federal court had jurisdiction over the case.[221]

Writing for a unanimous Court, Justice Holmes found the case to arise under state, not federal, law, despite the fact that the validity of the federal patent might arise during the litigation:

> But whether it is a wrong or not depends upon the law of the State where the act is done, not upon the patent law, and

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213 Freer, *supra* note 209, at 309–10 (footnote omitted).

214 FALLON ET AL., *supra* note 147, at 821.

215 RICHARD D. FREER, CIVIL PROCEDURE 216 (3d ed. 2012). Such cases evaluate the "centrality" of the federal issue to an otherwise state law claim. *See* Freer, *supra* note 209, at 310 ("The Supreme Court sent conflicting signals regarding centrality in the first third of the twentieth century and then ignored the topic for fifty years."); *see also* Andrew D. Bradt, Grable *on the Ground: Mitigating Unchecked Jurisdictional Discretion*, 44 U.C. DAVIS L. REV. 1153, 1160 (2011) ("The Supreme Court has periodically grappled with this problem, alternating between more restrictive and expansive approaches.").

216 *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 309, 314 (2005).

217 241 U.S. 257 (1916).

218 *Id.*

219 *Id.* at 258.

220 *Id.* at 258–59 ("The allegation of the defendants' libel or slander is repeated in slightly varying form but it all comes to statements to various people that the plaintiff was infringing the defendants' patent and that the defendant would sue both seller and buyer if the plaintiff's pump was used.").

221 *See id.* at 259–60.

> therefore the suit arises under the law of the State. A suit arises under the law that creates the cause of action. The fact that the justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract.[222]

By heavily emphasizing the underlying cause of action, Justice Holmes established that federal issues that were merely incidental to state law claims were insufficient to confer federal court jurisdiction.

Smith v. Kansas City Title & Trust Co.[223] marked the first of several shifts in approach. The case arose after a company shareholder sought to prevent the company from investing in farm loan bonds that were authorized by the Federal Farm Loan Act of 1916 ("FFLA").[224] The shareholder alleged that the FFLA was unconstitutional and that under state law the company was prohibited from investing in unconstitutional bonds.[225]

The underlying cause of action, then, arose under state law, and under *Well Works* would not fall within the parameters of federal question jurisdiction. The Court nevertheless found federal jurisdiction to exist, noting that "the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question."[226] There is no consensus on why the Court abandoned the uncomplicated approach to jurisdiction articulated in *Well Works*. But scholarly commentary evinces a belief that the stakes of the case justified hearing it in federal court.

One commentator described the FFLA as "the most lavish extension of federally sponsored credit to a faltering industry ever recorded."[227] The statute was a reflection of the growing political influence of agricultural interests in Washington.[228] And perhaps most

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222 *Id.* at 260.

223 255 U.S. 180 (1921).

224 Pub. L. No. 64-158, 39 Stat. 360; *Smith*, 255 U.S. at 195.

225 *Smith*, 255 U.S. at 214 (Holmes, J., dissenting) ("The defendant is a Missouri corporation and the right claimed is that of a stockholder to prevent the directors from doing an act, that is, making an investment, alleged to be contrary to their duty. But the scope of their duty depends upon the charter of their corporation and other laws of Missouri.").

226 *Id.* at 201.

227 Paul J. Kern, *Federal Farm Legislation: A Factual Appraisal*, 33 COLUM. L. REV. 984, 986 (1933).

228 *See* Alice M. Christensen, *Agricultural Pressure and Governmental Response in the United States, 1919–1929*, 11 AGRIC. HIST. 33, 33 (1937) (describing "the prevalent view that the role of the Government was to assist the farmer in becoming a more efficient producer as the best means of assuring a continuance of his new prosperity").

significantly, the costs of *not* hearing the case in federal court were apparent:

> If the Court had held in *Smith* that the district court lacked jurisdiction, the only consequence would have been delay . . . . In the meantime, a bad situation would only have become worse. The value of outstanding farm bonds would have plummeted even more, and the market for more bond sales would have disintegrated. The country was already suffering dislocations brought on by the war and could scarcely afford further unsettlement in the economy. The Court had already postponed action on the case for months, apparently to hear Holmes out. By the winter of 1921, it was time to clear the air.[229]

Viewed in this light, the case betrays the Court's sensitivity to the economic and political stakes.[230] A less momentous case, one in which the federal element was of less magnitude, would have warranted a different outcome. What was needed was a uniform response to a complicated problem. *Smith* offers an early example of the Court responsibly assessing economic and political significance and adjusting its jurisdiction accordingly.[231] One might read the case, therefore, as involving a "major question." Observed by David Shapiro, "[c]ases like *Smith* arise infrequently, but the issue—the ability of a party to invest in federally authorized securities—was a matter of great federal moment."[232] It by no means rendered the resolution of subsequent hybrid claim cases simple, but it did demonstrate a judicial proficiency that may be underappreciated.[233]

Fifteen years after *Smith*, the Court issued its decision in *Gully v. First National Bank*.[234] There, one bank conveyed all of its debts and liabilities to another bank on the condition that the grantee bank pay

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229 Larry Yackle, *Federal Banks and Federal Jurisdiction in the Progressive Era: A Case Study of* Smith v. K.C. Title & Trust Co., 62 U. KAN. L. REV. 255, 308–09 (2013).

230 *See* John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?*, 76 TEX. L. REV. 1829, 1838 (1998) (stating that in *Smith*, "the stakes were high, the issue urgent, and the case of national importance").

231 *But see* Patti Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After* Merrell Dow, 52 OHIO ST. L.J. 1477, 1512–13 (1991) (commenting that the *Smith* opinion "did not explore the substantive interests at stake to support its conclusion").

232 David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 570 (1985).

233 *See* William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 907 (1967) ("What is surprising is the continuing belief that there is, or should be, a single, all-purpose, neutral analytical concept which marks out federal question jurisdiction.").

234 299 U.S. 109 (1936).

all of the grantor bank's outstanding obligations.[235] The grantee bank failed to pay state taxes that were owed in Mississippi and was sued by the state tax collector.[236] The grantee bank sought to remove the case to federal court, "upon the ground that the power to lay a tax upon the shares of national banks has its origin and measure in the provisions of a federal statute."[237] Thus, the underlying cause of action was state contract law, but the terms of the federal statute that permitted Mississippi to tax the grantee bank were likely to arise in the litigation.

The Court found the "elements of federal jurisdiction" to be lacking.[238] The nature of the case resembles *Smith*—a state law claim was brought that indirectly implicates a federal statute. But the stakes in *Gully* were hardly comparable, and the need for a uniform response was less apparent. The opinion expressly commented on its obligation to weigh significance in hybrid claim cases:

> This Court has had occasion to point out how futile is the attempt to define a "cause of action" without reference to the context. To define broadly and in the abstract "a case arising under the Constitution or laws of the United States" has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation . . . . To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.[239]

Unlike in *Smith*, *Gully* presented no issue of national significance.

So stood the hybrid claims doctrine for fifty years. It was not until the 1986 case of *Merrell Dow Pharmaceuticals Inc. v. Thompson*[240] that the doctrine was further refined. Plaintiffs brought several tort claims arising under Ohio law against Merrell Dow for damage allegedly caused by one of its drugs.[241] One of the claims was for misbrand-

235 *See id.* at 111.

236 *See id.* at 111–12.

237 *Id.* at 112.

238 *Id.* at 114.

239 *Id.* at 117–18 (citation omitted).

240 478 U.S. 804 (1986).

241 *See id.* at 805–06.

ing the drug in violation of the FDCA.[242] Under Ohio law, the misbranding constituted a rebuttable presumption of negligence.[243] As such, the question of whether Merrell Dow had in fact violated the FDCA would be at the center of the litigation.

Justice Stevens's 5–4 opinion for the majority denied federal question jurisdiction.[244] In doing so, the opinion treated the lack of a private right of action in the FDCA as a factor that "cannot be overstated."[245] That factor had not been significant in prior cases of this type. The opinion also acknowledged the need to consider "[t]he importance of the nature of the federal issue" in hybrid claim cases, finding the misbranding issue to be "insufficiently 'substantial.'"[246] The nuances of the opinion warrant caution in drawing any significant conclusions, particularly given the seeming importance placed on the absence of a private right of action in the FDCA.

Despite the confusion introduced by *Merrell Dow*, the hybrid claims doctrine was helpfully clarified in *Grable*.[247] The Internal Revenue Service ("IRS") seized property owned by Grable & Sons to satisfy the company's tax delinquency.[248] Notice of the pending seizure had been made by way of certified mail.[249] Following the seizure, the property was sold to Darue Engineering.[250] Five years later, Grable & Sons brought a quiet title action against Darue Engineering, claiming that its title to the property was invalid, because the Internal Revenue Code ("IRC") requires the use of personal service, not service by certified mail.[251] Darue Engineering sought to remove the case to federal court, based on the centrality of the IRC's notice provision to the resolution of the dispute.[252] The Court unanimously upheld federal question jurisdiction and, in doing so, announced a multifactor test to use when assessing jurisdiction over hybrid claims.[253]

The test is as follows: First, *Grable* asks whether a state law claim necessarily raises a federal issue.[254] In essence, this factor examines

242 *Id.* at 805.
243 *Id.* at 804.
244 *See id.* at 807.
245 *Id.* at 812.
246 *Id.* at 814, 815 n.12.
247 Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005).
248 *See id.* at 310.
249 *See id.*
250 *See id.*
251 *See id.* at 311.
252 *See id.*
253 *See id.* at 309, 314.
254 *See id.* at 314.

the mere presence of federal content. The presence of such content is, of course, essential for finding federal question jurisdiction.[255]

Second, and crucially, *Grable* emphasizes that the federal content must be "actually disputed and substantial."[256] As noted, "[i]t has in fact become a constant refrain in such cases that federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum."[257]

It is this factor that best approximates the emphasis on "economic and political significance" animating the major questions exception. In *Grable* itself, the Court found that "[t]he meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court. The Government has a strong interest in the 'prompt and certain collection of delinquent taxes.'"[258] Third, *Grable* considers the "congressionally approved balance of federal and state judicial responsibilities."[259] This factor does very little work on its own.[260] At a minimum, however, it "must include appropriate consideration of the importance of permitting state courts to maintain control of their ability to develop state law."[261]

So, in short, after decades of uncertainty about how to determine when state law claims with federal content might be appropriate for resolution in federal courts, the Court introduced a workable test that preserves state court predominance, yet permits federal courts to entertain a narrow class of claims for which federal court resolution makes the most sense.[262] That narrow class of claims "turn on substantial questions of federal law, and thus justify resort to the experience,

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255 *See id.* at 315.

256 *Id.* at 314.

257 *Id.* at 313.

258 *Id.* at 315 (quoting United States v. Rodgers, 461 U.S. 677, 709 (1983)).

259 *Id.* at 314.

260 *See* Freer, *supra* note 209, at 338 ("Finally, *Grable* requires that the exercise of jurisdiction not upset the 'congressionally approved balance of federal and state judicial responsibilities.' On this score, of course, the Court is asking for a survey of the nonexistent." (quoting *Grable*, 545 U.S. at 314) (footnote omitted)).

261 *Id.* at 339.

262 *See* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 58–59 (2011) ("Hybrid rules may prove to be as intractable as clear jurisdictional rules. But there are reasons to believe that hybrid rules have some promise, and at least more promise than unified clear jurisdictional rules. The first step toward finding out is in acknowledging that overarching clarity in jurisdictional rules is inherently complex, difficult, and, in most cases, illusory."); *cf.* Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 550 (2012) ("Current law thus understands the centrality test and at least part of the substantiality test to be standard-like. It would be desirable to migrate

solicitude, and *hope of uniformity* that a federal forum offers on federal issues."[263] The next Section compares the *Grable* test to the major questions exception.

B. Questions, both Substantial and Major

As a benchmark, what insight does the hybrid claims doctrine offer into the viability of the major questions doctrine? There is little to be gleaned from its discussion of congressional intent. Seeking congressional intent in the context of federal question jurisdiction is complicated by the license that federal courts have to determine the boundaries of their own jurisdiction. While, in theory, that same latitude applies to federal courts when reviewing agency actions, in practice the *Chevron* regime substantially delimits that latitude. Overall, then, approaching the comparison by way of congressional intent is unproductive.

What about expertise? The *Grable* test rests in part on the "experience" federal courts have with federal law—an experience that state courts ostensibly lack.[264] As detailed in Section II.B—comparing the constitutional avoidance canon and the major questions exception—no credible defense of the major questions doctrine, at least as it currently stands, can rest on expertise. Agencies are populated by technocrats with decades of experience administering their authorizing statutes; judges are generalists by comparison.

There is, however, another justification—central to the hybrid claims doctrine—that might support the major questions exception as well: the uniformity justification, namely, that federal courts may deviate from convention in unique political and economic circumstances in the interest of promoting federal uniformity across a given subject area. That is, it may be the case that federal courts are institutionally advantaged in making pragmatic judgments about how to harmonize various federal interests. In *Grable*, recall that the Court underscored

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these standards away from the jurisdictional boundary to discretionary abstentions, leaving a reconstructed rule-based boundary.").

263 *Grable*, 545 U.S. at 312 (emphasis added). Lower courts appear to be adept at following *Grable*'s commands. *See, e.g.*, St. Mary's Reg'l Med. Ctr. v. Renown Health, 35 F. Supp. 3d 1275, 1285 (D. Nev. 2014) ("Whereas *Grable* stressed that a federal agency had a significant interest in the statutory interpretation at issue, here, because the FTC Draft Complaint would, at most, serve as an alleged fact to support Plaintiffs' case-specific . . . claim, no strong agency interest exists."); West Virginia *ex rel.* Morrisey v. Pfizer, Inc., 969 F. Supp. 2d 476, 485 (S.D.W. Va. 2013) ("Thus the federal question in this case does not pose the same type of importance to the federal system as that in *Grable*; the question here is highly factual and a state court's resolution of any federal issues here would be of little consequence to later litigants in other actions.").

264 *Grable*, 545 U.S. at 312.

the IRS's interest in collecting delinquent taxes and that the prospect of state courts reaching inconsistent decisions on the import of the IRS's notice obligations was sufficient to justify resolving the case in federal court.[265]

Are there equivalent uniformity concerns in the agency context? The final Part presents a novel proposition for how the major questions doctrine could evolve in a pragmatic way to promote uniformity concerns.

IV. The Major Questions Exception and Uniformity

The foregoing discussion has illustrated how federal courts, when applying the major questions exception, the constitutional avoidance canon in the agency context, and the hybrid claims doctrine, deviate from convention and assume principal decisionmaking in light of political or economic concerns. As such, it is instructive to compare the three contexts and explore their underlying rationales. As argued, the uniformity justification underlying the hybrid claims doctrine is particularly germane to the debate over the merits of the major questions exception. This final Part presents a novel proposition for how the major questions doctrine could evolve in a pragmatic way to promote uniformity concerns.

Agencies operate both independently and in concert with other agencies. Some agency coordination is dictated by the President.[266] Other types of coordination are dictated by enabling statutes.[267] Agencies themselves engage in informal forms of coordination.[268] Naturally, cross-agency coordination is particularly important in large, complex regulatory schemes.[269]

A recurrent concern among both courts and administrative law scholars is whether *Chevron* deference should be given to agencies

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265 *Id.* at 315.

266 *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2246 (2001).

267 *See, e.g.*, Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 Sup. Ct. Rev. 201, 202–03 (referring to "statutes that allocate interpretive authority either to multiple administrative agencies or to a mix of federal and state institutions"); Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 Colum. L. Rev. 1789, 1806 (2015) ("Several agencies are often jointly responsible for implementing a single piece of very long legislation."); Bijal Shah, *Congress's Agency Coordination*, 103 Minn. L. Rev. (forthcoming 2019) (manuscript at 9–31) (on file with author) (describing "statute-based coordination").

268 Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1156 (2012).

269 *See* Gluck et al., *supra* note 267, at 1806 (referencing cross-agency coordination in the context of implementation of the Affordable Care Act).

when implementing a statute that is jointly enforced by multiple agencies.[270] As a general matter, deference is given to "an agency's construction of the statute which *it* administers,"[271] but statutes administered by multiple agencies present deference complexities, as do general statutes—like the Freedom of Information Act[272]—which "bear on the business of multiple agencies."[273] Although the language and legislative history of a statute may provide some guidance about Congress's intent,[274] clarity of intention is often difficult to discern. In response to this dilemma, scholars have made a number of important observations.

Much of the scholarly literature supports giving *Chevron* deference to agencies with overlapping statutory authority. For instance, some argue that judicial concerns about agency coordination should, for the most part, not alter the traditional *Chevron* regime.[275] In other words, the fact that a statute is administered by multiple agencies should not influence courts' deference decisions. Others have even claimed that multiple-agency implementation holds the potential of improving administrative outcomes.[276] These views are more than adequately justified by *Chevron*'s purposes: "When Congress gives multiple agencies notice-and-comment rulemaking authority in a single statute, without discussing judicial review, one cannot justify not according *Chevron* deference to *any* agency simply because there are multiple agencies in the picture without bringing in some additional, trumping norm like accountability or expertise."[277] Because expertise and accountability are potentially enhanced when multiple agencies administer a statute, one might even think that a default rule favoring *Chevron* deference is warranted.[278]

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270 Gersen, *supra* note 267, at 219–37 (exploring this concern).

271 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) (emphasis added).

272 5 U.S.C. § 552 (2012).

273 Gersen, *supra* note 267, at 220.

274 Shah, *supra* note 267, at 15–16 (systematically recording authorizing language).

275 Freeman & Rossi, *supra* note 268, at 1208–09.

276 Gersen, *supra* note 267, at 211 ("Congress might use overlapping or underlapping jurisdiction as a mechanism for encouraging the development and accurate revelation of information by agencies, or as a means of controlling agency conduct and substantive policy choices.").

277 Gluck et al., *supra* note 267, at 1852.

278 *See, e.g.*, Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 353 ("Under [the model of judicial review as agency coordinator], when faced with an interpretation by an agency that operates in shared regulatory space, courts would solicit input from the other relevant agencies. And, to the extent that there is agreement among the different agencies, *Chevron* deference is especially warranted (regardless of whether all of those agencies are parties before the court).").

But what is the appropriate form of judicial review when multiple statutes implicate a shared regulatory arena? That is, what is the preferred judicial approach in a scenario where overlapping jurisdiction under a single statute is absent, yet multiple statutes implicate the same regulatory sphere? These types of "fragmented delegations"[279] are uniquely perplexing.

The major questions exception might be a justifiable means of achieving consonance among multiple statutes, enforced by multiple agencies, impacting particularly important regulatory sectors. The reason is that federal courts are well positioned to assess such cross-agency harmonization and, in turn, vindicate broader uniformity concerns. To be clear, this is not the justification that the Court has relied on in the extant major questions doctrine. But there are elements of the doctrine that support this possibility.

What does harmonization entail? At a minimum, it involves viewing agency actions that undermine and conflict with broader administrative goals with suspicion at *Chevron* Step Two. For example, if multiple agencies, operating under the authority of several statutes, are tasked with protecting the environment, a regulation from the EPA that clearly undermines that purpose could be denied *Chevron* deference under the major questions exception. By refusing deference in this circumstance, the reviewing court would promote uniformity concerns across the administrative state.

Recall that "*Chevron*'s purpose," i.e., the premises upon which it rests, are that Congress expects agencies to assume policymaking responsibilities, that agencies are politically accountable, and that deference is prudent in light of agencies' technical expertise.[280] Use of the major questions exception as described does not offend any of these premises.

For one, it is reasonable to assume that Congress does not intend for an agency to upset or undermine important regulatory goals that have been reinforced through the passage of multiple statutes.[281] This

279 Freeman & Rossi, *supra* note 268, at 1134 n.2.

280 *See supra* notes 38–40 and accompanying text.

281 The same could be said for important regulatory goals evinced through longstanding agency interpretations. *See* Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1877 (2015) ("Specifically, I believe that courts confronting an agency-driven interpretive change should seek to determine whether the motivation for the change is purely political, or is based on an exercise of the agency's policy expertise and judgment. That is, courts should look for the presence of traditional factors that support changes in longstanding legal rules and seek to ascertain whether the agency's interpretive switch is based on such factors.").

understanding was apparent in *Brown & Williamson* when the Court stated that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand."[282] In looking to several other tobacco-related statutes, the Court observed that "Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position that it lacks jurisdiction under the [enabling statute] to regulate tobacco products."[283]

Other cases reinforce the Court's interest in promoting uniformity concerns when confronted with fragmented delegations. For instance, in *National Ass'n of Home Builders v. Defenders of Wildlife*,[284] the Court was faced with two seemingly irreconcilable statutes: the Clean Water Act[285] and the Endangered Species Act.[286] The majority opinion based its decision to defer to the EPA's interpretation on the fact that its "reading harmonize[d] the statutes."[287]

Similarly, in *Massachusetts v. EPA*,[288] a case reviewing the EPA's decision *not* to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act, the majority looked to the broader regulatory sphere in overriding the Agency's determination. The Agency had argued that various "congressional actions and deliberations" evidenced Congress's intent to deny it the authority to regulate greenhouse gas emissions.[289] The Court, in contrast, saw the existence of several other statutes pertaining to climate change[290] as a clear indication of Congress's desire to permit regulation in the area:

> And unlike EPA, we have no difficulty reconciling Congress' various efforts to promote interagency collaboration and research to better understand climate change with the Agency's pre-existing mandate to regulate "any air pollutant" that may endanger the public welfare. Collaboration and research do not conflict with any thoughtful regulatory effort; they complement it.[291]

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

283 *Id.* at 144.

284 551 U.S. 644 (2007).

285 33 U.S.C. §§ 1251–1387 (2012).

286 Pub. L. No. 93-205, 87 Stat. 884 (codified as amended in scattered sections of 7 and 16 U.S.C.); *Defs. of Wildlife*, 551 U.S. at 649 ("These cases concern the interplay between two federal environmental statutes.").

287 *Defs. of Wildlife*, 551 U.S. at 666.

288 549 U.S. 497 (2007).

289 *Id.* at 529.

290 *Id.* at 530 n.28.

291 *Id.* at 530 (citation and footnote omitted).

This cross-statutory inquiry could form the core of a limited major questions doctrine.

An emphasis on statutory harmonization throughout regulatory sectors is also in keeping with *Chevron*'s premise of political accountability. Agencies' placement in the executive branch, and relationship to the President, are understood to ensure their political accountability. At the same time, though, political accountability is clearly conveyed through Congress's establishment of broad regulatory schemes. Accordingly, courts' promotion of cross-agency harmonization arguably best promotes political accountability, particularly when multiple statutes, passed by multiple Congresses, communicate the same message.[292] Thus, we might think of the major questions exception as a means of employing what is known as the "Whole Code Rule."[293] The Whole Code Rule is a tool of statutory interpretation that construes statutory ambiguities in accordance with other laws that apply to the same general issue.[294] This usage promotes uniformity concerns.

Similar logic applies with regard to *Chevron*'s other premise—that agencies should be deferred to in light of their technical expertise. While such expertise is already evaluated under § 706(2)(A) of the APA as part of arbitrary and capricious review, that inquiry does not inherently involve uniformity considerations.[295] Courts are, by comparison, superior institutions for evaluating the degree to which a given agency action comports with related statutory commands.[296]

This proposal, of course, raises a variety of supplemental questions: What should the standard be for determining when a regulatory scheme is harmonized, and when should courts find a given agency action to undermine that scheme? What is the baseline for defining important regulatory sectors?[297] These questions are outside of the scope of this Article. The aim here has simply been to present a preliminary case for how the major questions exception could evolve in a pragmatic way to promote uniformity concerns.

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292 *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys., 515 U.S. 687, 692, 700, 707–08 (1995).

293 ESKRIDGE ET AL., *supra* note 70, at 686.

294 *Id.*; *see, e.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 88–92 (1991).

295 *See supra* notes 53–56 and accompanying text.

296 *See* Bamberger & Strauss, *supra* note 56, at 623–25 (endorsing the consideration of normative canons at *Chevron* Step Two).

297 At a minimum, one can imagine relatively uncontroversial applications of the exception in, for instance, the environmental and financial sectors.

Conclusion

The major questions doctrine is an oddity, yet at least in one sense it is less aberrational than many have assumed. Under at least two other doctrines, courts deviate from convention and assume principal decisionmaking authority in light of political or economic concerns. This Article has appraised the major question doctrine by way of comparison to those two doctrines and identified a rationale under which it may prove tenable.

Under the first doctrine, which derives from the use of the constitutional avoidance canon in the context of judicial review of agency determinations, federal courts deviate from traditional *Chevron* deference when they perceive a serious constitutional issue. The canon is somewhat arbitrarily applied, and though justifiable on multiple grounds, its predominant rationale undermines the legitimacy of the major questions exception. Accordingly, if the exception continues to operate as a broad substantive canon affording federal courts license to evade *Chevron* deference, it should be abandoned.

The second doctrine, the hybrid claims doctrine, demonstrates that there may be institutional gains to be had by permitting federal courts to deviate from convention and assume principal decisionmaking authority when doing so promotes uniformity concerns. That rationale has proven valuable in the context of federal question jurisdiction and could serve a similar function in the administrative law context.

Properly calibrating the use of the major questions exception is a task for another day, but a focus on uniformity concerns—in particular, harmonization across multiple agencies when multiple statutes implicate the same regulatory sector—is one possible way of responsibly cabining the breadth of the major questions exception. Until more is known about the direction in which the doctrine is headed, moderation is the best approach.[298]

298 *See* Barnett & Walker, *supra* note 197, at 149 (stating that "the federal judiciary has a lot more work to do in explicating the new major questions doctrine and its place under *Chevron*'s delegation theory.").