THE DELEGATION DOCTRINE

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After *Gundy v. United States*[1] the Supreme Court seemed poised to revive the nondelegation doctrine.[2] Four justices expressed a willingness to consider nondelegation arguments in a future case, and they were joined by a fifth just a few months later.[3] It was only matter of time before five justices would vote to limit the extent to which Congress could delegate core legislative power to administrative agencies.[4]

Reports of the nondelegation doctrine's resuscitation were greatly exaggerated.[5] Despite all the anticipation and trepidation, the doctrine has yet to be disinterred, and a revival may be as far off as ever. Over the past five years, the Court has taken no meaningful step toward a resuscitation of this moribund constraint on delegation. A majority of the Court has not even been willing to cite nondelegation concerns as sufficient justification for invoking constitutional avoidance to avoid broad constructions of statutory delegations.[6]

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[1] *See* Gundy v. United States, 139 S. Ct. 2116, 2139 (2019).

[2] *See* Peter J. Wallison, *Introduction*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 1–2 (Peter J. Wallison & John Yoo eds., Am. Enter. Inst. 2022) (observing that in *Gundy* "all eight members of the Court participating in the case . . . made clear that the [nondelegation doctrine] is still a viable principle of jurisprudence" and that "a majority of the Court have since signaled they are willing at least to consider a case in which the [doctrine] would be fully revitalized and updated.").

[3] *See Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting) (joined by Roberts, C.J., and Thomas, J.); *id.* at 2131 (Alito, J., concurring in judgment) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Statement of Kavanaugh, J.,) ("Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.").

[4] S*ee* Gary Lawson, *"I'm Leavin' It (All) Up to You":* Gundy *and the (Sort-of) Resurrection of the Subdelegation Doctrine*, 2018–19 CATO SUP. CT. REV. 31, 33 (2019) ("it is very hard to read *Gundy* and not count to five under your breath.").

[5] With apologies to Mark Twain who reportedly sent a telegram to the *New York Journal* stating "reports of my death are greatly exaggerated. *See, e.g.*, Rucker v. United States, 382 F. Supp 2d 1288, 1296 (D. Utah 2005). Twain's actual letter said "the report of my death was an exaggeration." *See* SHELLEY FISHER FISHKIN, LIGHTING OUT FOR THE TERRITORY: REFLECTIONS ON MARK TWAIN AND AMERICAN CULTURE 134 (1998).

[6] While Justice Gorsuch's dissent urging a revitalization of the nondelegation doctrine attracted two supporting votes (Chief Justice Roberts and Justice Thomas), and supportive statements from Justices Alito and Kavanaugh (the latter in his statement respecting the denial of certiorari in *Paul*), his separate opinion espousing nondelegation principles in *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.* was only joined by Justices Thomas and Alito, 595 U.S. 109, 121 (2022) (Gorsuch, J., concurring), and his nondelegation-influenced concurrence in *West Virginia v. EPA* was only joined by Justice Alito. 597 U.S. 697, 735 (2022) (Gorsuch, J., concurring).

The nondelegation doctrine may remain moribund, but the outlines of a *delegation* doctrine may be visible in the Court's recent jurisprudence. Instead of policing the limits on Congress's power to delegate authority to administrative agencies, the Court has instead been focusing on whether the power administrative agencies seek to exercise has been properly delegated by Congress in the first place. This is a meaningful check on agency self-aggrandizement. For without such a delegation of power from the legislature, administrative agencies lack the power to issue regulations or otherwise act with the force of law.

The most obvious manifestation of this emerging delegation doctrine is the Court's recent quartet of "major questions doctrine" cases.[7] In these cases, the Court has emphasized that administrative agencies are born without any regulatory authority in the domestic sphere.[8] Federal administrative agencies have no inherent power to adopt regulations or impose constraints on private conduct. Rather, agencies only have that power which Congress has affirmatively bestowed upon them.[9] And because the constitutional baseline is that all legislative power is vested in Congress, the existence of such power in another branch cannot be presumed. It must be shown. Federal agencies must affirmatively demonstrate that the power they seek to exercise was actually delegated to them by Congress.[10]

A corollary of this delegation principle is that the more expansive, unusual, or unprecedented the authority the agency seeks to exercise, the greater the necessary showing must be. Thus, in the major questions doctrine cases—both those in the latest quartet and those before—the Court has insisted upon clear evidence, if not an actual clear statement, that Congress delegated broad regulatory authority concerning matters of great economic or political significance.[11]

Despite the focus on the Court's recent major questions cases, signs of an emergent delegation doctrine can also be found elsewhere. Most significantly, seeds of a delegation doctrine have been planted within the Court's *Chevron* jurisprudence. The Court's increased reluctance to grant *Chevron* deference to administrative agencies--and its insistence that courts first conclude that

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[7] *See* Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485 (2021) (finding the Centers for Disease Control and Prevention lacked authority to impose an eviction moratorium to prevent the interstate spread of COVID-19); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109 (2022) (finding the Occupational Safety and Health Administration lacked the authority to impose a universal vaccine-or-test requirement on all firms with more than 100 employees); West Virginia v. EPA, 597 U.S. 697 (2022) (finding the EPA lacked the authority under Section 111 of the Clean Air Act to adopt the "Clean Power Plan" to reduce greenhouse gas emissions from power plants); Biden v. Nebraska, 143 S. Ct. 2355 (2023) (finding the Department of Education lacked the authority to forgive student loan principal under the HEROES Act).

[8] *See infra* Part II.

[9] *See West Virginia*, 597 U.S. at 723 ("Agencies have only those powers given to them by Congress.").

[10] *See id.* (noting "'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" (quoting E. Gellhorn & P. Verkuil, *Controlling* Chevron*-Based Delegations*, 20 CARDOZO L. REV. 989, 1011 (1999)).

[11] Whether or not the recent major questions cases are best understood as imposing a clear statement rule, adopting a substantive or linguistic canon of construction, or some combination thereof, and whether the doctrine is desirable or coherent, is already the subject of extensive academic debate. *See, e.g.*, Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. __ (2024 forthcoming); Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, __ CAL. L. REV. __ (2024 forthcoming); Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465 (2024 forthcoming); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023); Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191 (2023); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022). For a fuller listing of recent scholarship on the major questions doctrine, *see* Beau J. Baumann, *Volume IV of the Major Questions Doctrine Reading List*, YALE J. ON REG.: NOTICE & COMMENT, Aug. 14, 2023, https://www.yalejreg.com/nc/volume-iv-of-the-major-questions-doctrine-reading-list-by-beau-j-baumann/.

interpretive authority has been delegated before deferring to any agency interpretation—rests on the same core premise as the Court's recent major questions doctrine decisions.[12] It also suggests that the "new" major questions doctrine is not as new as it might seem, but rather a logical outgrowth of principles the Court has already embraced: Agencies may only exercise power delegated to them by Congress, and the amount of evidence required to demonstrate that authority has been delegated should correlate with the nature and scope of the authority claimed.[13]

In making this claim this essay is both descriptive and prescriptive. It is descriptive in that it seeks to identify doctrinal threads that cut across administrative law doctrine. It is prescriptive in that it suggests that fully embracing the delegation doctrine would result in a more coherent jurisprudence and address many contemporary concerns about the administrative state and the proper role of the judiciary in policing the exercise of delegated power. Rationalizing (and perhaps reforming) the Court's recent major questions holdings in purer delegation terms would insulate them from some of the criticisms levied by scholars and would reduce concerns that they are unprincipled assaults on administrative power. At the same time, focusing on delegation can constrain judicial deference to agency interpretations without requiring a complete abandonment of the *Chevron* doctrine. Following through on the implications of using delegation as a unifying principle can also help move the Court's administrative law jurisprudence in a more positive direction, both by placing the major questions doctrine cases on firmer footing, as well as by making sense of what sorts of delegations—and resulting deference to agency authority—should or should not be troubling to those skeptical of administrative power.

I. THE DELEGATION DOCTRINE

Article I, Section 1 of the Constitution vests the federal government's legislative powers in Congress.[14] Since early in the nation's history, jurists and commentators have maintained that this places some limit on Congress's ability to delegate (or, as some would say, subdelegate[15]) power to other branches of government.[16] As Chief Justice Marshall wrote in *Wayman v. Southard* "It will

[12] *See infra* Part III.

[13] For this author's suggestion of what this sort of principle could look like, see Jonathan H. Adler, *A 'Step Zero' for Delegations*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE (Peter Wallison & John Yoo eds., Am. Enter. Inst. 2022).

[14] U.S. CONST., art. 1, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States").

[15] *See, e.g.*, Lawson, *supra* note 4.

[16] Among recent articles arguing for or against the existence of a nondelegation doctrine as a matter of the original public meaning of the Constitution, *see* Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083 (2023); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323 (2022); Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*," 121 COLUM. L. REV. 277 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388 (2019).

not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative."[17]

This nondelegation principle has been oft repeated in Supreme Court opinions, but rarely observed.[18] Some have said the nondelegation doctrine has had only one good year.[19] The problem, as even Chief Justice Marshall acknowledged, has been identifying a judicially administrable line between permissible delegations of policy-making authority and purportedly impermissible delegations of "strictly and exclusively legislative" powers.[20] While some academics have purported to identify sufficiently determinate measures upon which a judicially enforced nondelegation doctrine could be constructed,[21] the Court has yet to settle on a test that meaningfully constrains the delegation of legislative authority. The current requirement of an "intelligible principle" is readily met by all but the most open-ended statutes.[22] Signs of a reinvigorated and more constraining doctrine are sometimes found within the Court's opinions, but not as part of a definitive holding.[23] Somewhat like the Loch Ness Monster, we think we have glimpsed the doctrine's outlines, but no one has glimpsed it in the flesh.

Whether or not the Article I vesting clause contains a judicially enforceable nondelegation principle, it is unquestionably the source of a *delegation* principle.[24] Specifically, the vesting of all the federal government's legislative powers in the Congress creates a baseline allocation of power, departures from which must be enacted by the legislature. Whether or not some amount of legislative (or quasi-legislative) power is exclusive and inalienable, all such power starts in the legislature's hands and is only ever delegated to administrative agencies because Congress has chosen to do so.

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[17] 23 U.S. (10 Wheat.) 1, 42 (1825) (according to Marshall, "[t]he difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law . . ."); *see also* Shankland v. The Corp. of Wash., 30 U.S. 390, 395 (1831) (Story, J.) ("[T]he general rule of law is that a delegated authority cannot be delegated.").

[18] *See* Whitman v. Amer. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) ("we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

[19] *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (observing that the nondelegation doctrine "has had one good year [1935], and 211 bad ones (and counting)."). *But see* Lawson, *supra* note 4, at 31–32 ("The 'one good year' quip, while undeniably clever, was not entirely accurate"); David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213, 271–72 (2020) (challenging the claim that the nondelegation doctrine has only had "one good year").

[20] *See Wayman*, 23 U.S. at 20 ("The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provisions to fill up the details."); *id.* at 22 ("the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry").

[21] For several such potential tests, see the entries in ADMINISTRATIVE STATE, *supra* note 2.

[22] *See* Whitman, 531 U.S. at 474 ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'").

[23] *See, e.g.*, Indus. Union Dep't v. Am. Petrol. Inst., 48 U.S. 607 (1980) (citing the nondelegation doctrine as justification for adopting a narrowing construction of the statute at issue on grounds of constitutional avoidance).

[24] Alternatively, one might refer to this as an "exclusive delegation doctrine." *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004). As defined by Merrill, the "exclusive delegation doctrine" reflects the postulate that "only Congress may delegate legislative power." *Id.* at 2099.

Administrative agencies—as a part of the executive branch—execute the laws that Congress enacts.[25] Any power such agencies wish to exercise in the domestic sphere is the result of a legislative delegation. As the Supreme Court has made explicit, "an agency literally has no power to act . . . unless and until Congress confers power upon it."[26] This is particularly true—indeed, "axiomatic"—when it comes to an agency's authority to promulgate regulations that bind private conduct.[27]

The fact that all power administrative agencies exercise must be the result of a delegation from Congress is a foundational principle within administrative law. What the delegation doctrine is, then, is the instantiation of that fact into a broader principle that informs how courts understand, interpret, and enforce those delegations. This central fact about agency power should inform how the Court considers questions about whether agency power exists in any particular circumstance.[28] It further calls upon courts to carefully consider what sorts of power have been delegated, the scope of that power, and what sorts of incidental authority (if any) may be reasonably implied from the affirmative legislative grant. [29] In any given instance in which an agency seeks to assert authority, the reviewing court must conclude both that Congress delegated to the agency the authority to act, but also that the action the agency wishes to take is within the scope of the granted authority.[30] That an agency has authority to act in a related area or parallel fashion is not, in itself, evidence of delegated authority unless there is evidence to think Congress delegated the related authority.[31]

II. MAJOR QUESTIONS AS DELEGATION QUESTIONS

In four decisions over the past three years, the Supreme Court has stressed the importance of identifying the legislative source of agency power when agencies assert broad authority.[32] In each

[25] For purposes of this discussion, it is not particularly important whether so-called "independent agencies" are properly conceived as a part of the executive branch, for even if such agencies are viewed as existing somewhere outside the bounds of the Constitution's formal tripartite structure, there is still no claim that such agencies have any inherent power. Like those agencies that are indisputably a part of the executive branch, independent agencies only have that power which has been delegated to them.

[26] La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986).

[27] Bowen v. Geo. Univ. Hosp., 488 U.S. 204 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *see also* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in judgement) ("The Executive . . . has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute."); I RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.2, at 408 (5th ed. 2010) ("An agency has the power to issue a legislative rule only if and to the extent that Congress has granted it the power to do so."); Merrill, *supra* note 24, at 2101 ("executive and judicial officers have no inherent authority to act with the force of law, but must trace any such authority to some provision of enacted law."); Levin, *supra* note 11, ("nobody disputes that every agency rule that has the force of law must rest on a grant of legislative rulemaking authority").

[28] *See* Merrill, *supra* note 24, at 2169 ("agencies generally should be denied authority to act with the force of law unless Congress has delegated such power to them.").

[29] *See id.* at 2100 ("The exclusive delegation postulate generates the (often ignored) requirement that Congress must *clearly authorize* an agency to make legislative rules."); *see also* Adler, *Step Zero*, *supra* note 13, at 178–79.

[30] *See* Merrill, *supra* note 24, at 2169.

[31] *See, e.g.*, Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990) ("it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction" (quotations omitted)).

[32] *See supra* note 7.

of these cases, a majority of justices found the agency's assertion of authority lacking, and the evidence of a delegation of authority to be insufficient.

These cases, the latter of which expressly embrace the "major questions doctrine" by name,[33] have prompted substantial commentary and much criticism.[34] In this essay I am less interested in joining the debate over how and why the Court reached its conclusions in each of these cases, or whether the Court has properly identified what questions count as "major," than in highlighting the importance of delegation in the Court's reasoning and outcome in each case. While the precise methodology and interpretive approaches deployed arguably varied across these cases, each emphasized the need for federal agencies to affirmatively demonstrate that Congress had delegated to them the power they sought to exercise, and in each case the Court found the agency's claim wanting.

For the first of these cases, *Alabama Association of Realtors v. Department of Health and Human Services*,[35] the outcome was never in doubt. The Centers for Disease Control and Prevention had first imposed a residential eviction moratorium in September 2020, citing its authority under the Public Health Service Act.[36] The only thing that had prevented five justices from holding it unlawful in the summer of 2021 was that the initial challenge to the CDC's claimed authority reached the Court a month before it was due to expire on its own accord.[37] There was little question Congress had the power to impose an eviction moratorium, or that Congress could expressly authorize the CDC to impose one.[38] Congress had, in fact, done that already.[39] But once Congress refused to extend any such moratorium, the argument that the CDC retained the delegated authority to take that step stood on shaky ground.

Despite the clear indication that a renewed moratorium would not withstand judicial review, the CDC reimposed it with only superficial modifications.[40] Unsurprisingly, a majority of the Court refused to accept the CDC's argument that it was authorized to issue an eviction moratorium pursuant to its authority to "make and enforce such regulations as in [the Surgeon General's] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession."[41] Unlike the sorts of measures identified in the relevant statutory text, an eviction moratorium does not "directly relate to the interstate spread

[33] *See* West Virginia v. EPA, 597 U.S. 697, 724 (2022) ("Under our precedents, this is a major questions case."); Biden v. Nebraska, 143 S. Ct. 2355, 2373 (noting that the Court applied the major questions doctrine in *West Virginia* and Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.).

[34] *See, e.g.*, note 7 and sources cited therein. For this author's critique, *see* Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, 2022 CATO SUP. CT. REV. 37 (2022).

[35] 141 S. Ct. 2485 (2021).

[36] Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292 (Sept. 4, 2020).

[37] *See Ala. Ass'n of Realtors*, 141 S. Ct. 2485 (2021) (Kavanaugh, J., concurring); *see also Ala. Ass'n or Realtors*, 141 S. Ct. at 2487–88 (discussing the Court's prior decision not to vacate the stay).

[38] *See Ala. Ass'n of Realtors*, 41 S. Ct. at 2490 ("If a federally imposed eviction moratorium is to continue, Congress must specifically authorize it."). Whether or not an eviction moratorium might be subject to challenge under other constitutional provisions, such as the Fifth Amendment's takings clause, is a separate question.

[39] *See id.* at 2486 ("When the eviction moratorium expired in July, Congress did not renew it.").

[40] *See* Temporary Halt in Residential Evictions in Communities With Substantial or High Transmission of COVID-19 To Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43244 (Aug. 6, 2021).

[41] 42 U.S.C. § 264(a) (2002).

of disease by identifying, isolating, and destroying the disease itself."[42] Reading the CDC's statutory authority as a whole, and in context, the Court's majority recognized that it was "a stretch to maintain that § 361(a) gives the CDC the authority to impose this eviction moratorium."[43] Further, the Court explained, even if the language in question could be considered ambiguous, "the sheer scope of the CDC's claimed authority . . . would counsel against the Government's interpretation."[44] As it had noted before, courts "expect Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'"[45] And Congress had not clearly stated that the CDC could regulate housing markets.[46]

Several months later, when the Court was confronted with a challenge to the Occupational Safety & Health Administration's (OSHA) vaccinate-or-test mandate, the story was much the same.[47] As in *Alabama Realtors*, a federal agency was using a longstanding power in a manner that it had not been used before, and in way that was not directly related to the sort of authority Congress had clearly delegated to it. Congress had delegated to the CDC the authority to control the interstate transmission of disease, and the CDC sought to use that authority to reduce hardship to renters facing eviction. Congress had delegated authority to OSHA to control workplace risks to health and safety, and the Biden Administration sought to use that power to increase COVID-19 vaccination rates.[48]

Citing *Alabama Realtors*, the Court in *NFIB* again stressed the need for the agency to show that Congress had delegated such broad authority.[49] While there was no question that the OSH Act delegated to OSHA expansive authority to set occupational health and safety standards, it did not confer the sort of authority OSHA asserted here, and prior to the COVID-19 pandemic, OSHA had never claimed otherwise.[50] Indeed, as the Court noted, the vaccinate-or-test mandate was

[42] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488.

[43] *Id.* Although the Court did not reach the question, there were other problems with the CDC's actions. Among other things, the eviction moratorium was issued as an order, not as a regulation. Thus, in order to be lawful, the moratorium would have to have been a valid order under the CDC's applicable regulations which, as written, did not contemplate something like an eviction moratorium any more than the statutory language did. *See* 42 C.F.R. § 70.2.; *see also* Skyworks Ltd., v. Ctrs. for Disease Control & Prevention, 524 F. Supp. 3d 745, 753 (N.D. Ohio 2021) (noting the applicable regulations were narrower than the statute in that they did not authorize "other measures" beyond those enumerated).

[44] 141 S. Ct. at 2488.

[45] *Id.* at 2489 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (internal citation omitted)).

[46] The Court also noted that it expects a clearer indication from Congress that it has authorized actions that would "alter the balance between federal and state power and the power of the Government over private property." *Id.* (citing United States Forest Serv. v. Cowpasture River Preservation Ass'n, 140 S. Ct. 1837, 1850 (2020)).

[47] Nat'l Fed'n Indep. Bus. v. Dep't of Lab., 595 U.S. 109 (2022).

[48] In announcing the policy, the Biden Administration made explicit that it was part of "a new plan to require more Americans to be vaccinated." *NFIB*, 595 U.S. at 114. That broader protection of public health, as opposed to workplace safety, was a driver of the OSHA rule can also be seen in the design of the rule itself. Among other things, the requirement applied to individual firms based upon the number of employees on the firm's payroll, and not factors one might expect to correlate with the spread of disease, such as the number of workers at a single worksite, the degree of contact among workers, and the like. *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, 61460 (Nov. 5, 2021).

[49] *See NFIB*, 595 U.S. at 117.

[50] *See id.* For example, when OSHA had previously sought to control the spread of communicable disease in the workplace, it required employers to make vaccines available, but did not require employees to be vaccinated. *See* 29 C.F.R. § 1910.1030 (f)(1)(i).

"strikingly unlike the workplace regulations that OSHA has typically imposed."[51] Moreover, the authority OSHA sought to invoke—that of authorizing "emergency temporary standards"—was narrower than that authorizing the adoption of permanent workplace safety standards, making it even more difficult for OSHA to demonstrate that it had, in fact, been delegated the authority it sought to exercise.[52]

Both the CDC eviction moratorium and OSHA vaccinate-or-test mandate cases were considered and decided on an expedited basis. Accordingly, neither opinion offers a fulsome explanation of the doctrinal rationale for the Court's conclusions, but both made quite clear that the burden was upon the agency to demonstrate that Congress had, in fact, delegated to it the sort of broad, expansive authority it sought to exercise. The question in each case was not whether Congress *could* authorize the agencies to adopt expansive disease-control measures, but whether it had actually done so in either of the relevant statutes.

Although it has its own unusual procedural history, *West Virginia v. EPA* was not considered on an expedited basis.[53] With the benefit of a full briefing schedule, the Court had another opportunity to consider an agency's assertion of broad regulatory authority never before deployed under the relevant statutory provisions. And here, again, a majority of the Court was unconvinced that Congress had in fact delegated such authority to the agency.[54] In *West Virginia*, however, the Court offered greater explanation for why such a demonstration is necessary: That while the language of Section 111 allowing the EPA to define and impose a "best system of emission reduction" on fossil-fuel-fired power plants might be plausible "as a matter of 'definitional possibilities,'" when the language is "shorn of all context" there was not enough to justify an assertion of authority as broad as the EPA claimed.[55] Rather, as the Court had emphasized in prior cases (including *Utility Air Regulatory Group v. EPA*, which likewise concerned the regulation of greenhouse gases under the Clean Air Act), "courts 'expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.'"[56] And as the Court had made explicit in *UARG*, that controlling greenhouse gas emissions presents a different challenge than does controlling traditional air pollutants does not authorize the EPA to take liberties with the Clean Air Act's text.[57] As in the COVID-19 cases, the Court expected broad assertions of agency authority to be supported by clear evidence that Congress delegated such authority in statutory text. And as explained by Chief Justice Roberts,

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[51] *NFIB*, 595 U.S. at 118. Just as OSHA's historical practice implementing the OSH Act cut against its ability to adopt a vaccinate-or-test requirement at larger firms, CMS's historical practice imposing conditions on Medicaid and Medicare service providers *supported* its adoption of a more stringent vaccination requirement at covered health care service providers. *See* Biden v. Missouri, 595 U.S. 87 (2022).

[52] *Compare* 29 U.S.C. § 652(8) (defining "occupational safety and health standard" as a standard "reasonably necessary or appropriate to provide safe or healthful employment and places of employment") *with* 29 U.S.C. § 655(c) (authorizing emergency temporary standards where "necessary to protect employees" from a "grave danger"). *See also* Jonathan H. Adler, *A Backgrounder on the Proposed OSHA Vaccination Mandate and Likely Legal Challenges (Updated)*, THE VOLOKH CONSPIRACY, Sept. 11, 2021, https://reason.com/volokh/2021/09/11/a-backgrounder-on-the-proposed-osha-vaccination-mandate-and-likely-legal-challenges/.

[53] For a discussion of *West Virginia*'s procedural history, *see* Adler, *Some Answers*, *supra* note 34, at 46–48.

[54] For a fuller analysis of the Court's decision in *West Virginia*, *see* Adler, *Some Answers*, *supra* note 31.

[55] *West Virginia*, 597 U.S. at 732.

[56] *Id.* at 730 (quoting Util. Air Regul. Grp. v. EPA, 573 U. S. 302, 324 (2014) (internal quotation marks omitted)).

[57] *Util. Air Regul. Grp.*, 573 U.S. at 323–24.

all three cases relied upon an "identifiable body of law" addressing the "recurring problem" of "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[58]

Biden v. Nebraska did not concern an agency assertion of regulatory authority, but it again presented the Court with an agency seeking to pour new wine out of an old bottle.[59] In this case, the Department of Education sought to use authority under the HEROES Act[60] to forgive an estimated $430 billion in student loans, ostensibly for the purpose of ensuring that loan recipients were "not placed in a worse position financially in relation to" their student loans due to the national emergency triggered by the COVID-19 pandemic.[61] The Secretary of Education claimed that his statutory authority to "waive or modify any statutory or regulatory provision applicable" to covered student loan assistance programs authorized the erasure of loan principle.[62] Once again, the Supreme Court was not convinced.

In *Biden v. Nebraska*, more so than in *West Virginia*, Chief Justice Roberts engaged in a thorough analysis of the relevant statutory text. He further stressed that agencies only have that power and authority that Congress has delegated to them, and that any delegation from Congress has limits that can be identified in the statutory text.[63] The greater the exercise of power sought, the more evidence of delegation is required. After surveying the relevant statutory provisions, the Chief Justice stressed that any authority the Education Department sought to exercise must be pursuant to a legislative delegation. Acting without such an authorization would amount to "seizing the power of the Legislature," thereby allowing it "to enact a program that Congress has chosen not to enact itself."[64] Where an agency seeks to exercise broad and consequential power, more than "a wafer-thin reed" of statutory text is necessary.[65]

These four decisions all apply a variant of the major questions doctrine—the latter two explicitly so.[66] In *West Virginia*, the Chief Justice suggested whether a case presents a "major question" is a threshold inquiry that should color and shape a reviewing court's assessment of the statutory language at issue.[67] In *Nebraska*, on the other hand, Chief Justice Roberts deployed the major questions doctrine as a means to confirm his statutory interpretation, and reinforce the

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[58] *West Virginia*, 597 U.S. at 730.

[59] *See* 143 S. Ct. 2355 (2023).

[60] Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), Pub. L. No. 108–76, 117 Stat. 904 (2003).

[61] *Id.* at § 2(a)(2)(A). For a discussion of why the Biden Administration student loan forgiveness plan is better understood as a politically motivated abuse of emergency powers, *see* Jed Handelsman Shugerman, Biden v. Nebraska*: The New State Standing and the (Old) Purposive Major Questions Doctrine*, 2023 CATO SUP. CT. REV. 209, 212–18 (2023).

[62] *See* 20 U.S.C. § 1098bb(a)(1) ("Notwithstanding any other provision of law, . . . the Secretary of Education . . . may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2)").

[63] *See* 143 S. Ct. at 2368.

[64] *Id.* at 2373 (internal quotation and citation omitted).

[65] *Id.* at 2371 (quoting Ala. Ass'n of Realtors v. Dep't of Health and Human Servs., 141 S. Ct. 2485, 2489 (2021)).

[66] There is already a vibrant literature analyzing the specific approaches to statutory interpretation adopted within the four opinions, and debating whether specific cases, alone or in combination, suggest that the major questions doctrine is a canon of construction, a clear statement rule, or something else. For my own assessment of the first three cases, *see* Adler, *Some Answers*, *supra* note 31, at 52–55.

[67] *See* 597 U.S. at 721.

conclusion that the delegation of power the agency sought to exercise could not be found within the relevant statute.[68] While both rely expressly on the notion that Congress must authorize agency action, *Nebraska* stepped back from the notion that the presence of a "major question" justifies a departure from traditional approaches to statutory interpretation or judicial review of agency action.

Viewed as a progression, *Nebraska* suggests that the Court may be moving toward a delegation doctrine that can be applied across the board to all cases in which courts are called upon to consider whether an agency is acting beyond the scope of its delegated authority. This would be a welcome development, as it would avoid the inherently arbitrary effort to distinguish "major" from ordinary questions, and instead allow reviewing courts to engage in a more traditional judicial inquiry about the scope of delegated authority (an inquiry that is hardly exclusive to the administrative law context). Under such an approach the magnitude or scope of the asserted agency power informs the analysis but is not a separate threshold inquiry, nor would this approach preclude consideration of the extent to which an agency's assertion of power is unusual, unprecedented, or likely unforeseen by the enacting Congress. To the contrary, this approach would embrace such considerations where they are relevant to interpreting the nature and scope of the power delegated by Congress.

III. *CHEVRON* QUESTIONS AS DELEGATION QUESTIONS

Well before the Roberts Court's major questions quartet, seeds of a delegation doctrine could be seen in the Supreme Court's *Chevron* jurisprudence, particularly as it has developed over the past twenty-five years. The role of delegation was not entirely clear in the *Chevron* decision itself, perhaps because Justice Stevens offered multiple rationales for acceding to the Environmental Protection Agency's preferred understanding of what would constitute a "source" for given provisions of the Clean Air Act.[69] Subsequent decisions, however, have made express what may only been implicit in *Chevron* itself: That any authority agencies possess to interpret statutory provisions in line with an administration's policy preferences derives from a delegation of such authority from the legislative branch.

As has been rehearsed many times, the Supreme Court did not understand *Chevron U.S.A. Inc. v. Natural Resources Defense Council*[70] to depart from preexisting approaches to judicial review of agency action.[71] Its concise formulation of a deceptively easy test took on a life of its own nonetheless.[72] First, a reviewing court must look to the statute itself to see whether Congress spoke directly to the question at issue. If so, the statutory text controls, without regard for the agency's preferences. If, however, the statute is ambiguous on the precise question at hand, a reviewing court is to defer to the interpretation offered by the implementing agency, provided

[68] *See* 143 S. Ct. at 2376 (Barrett, J., concurring) ("In this case, the Court applies the ordinary tools of statutory interpretation to conclude that the HEROES Act does not authorize the Secretary's plan. . . . The major questions doctrine reinforces that conclusion but is not necessary to it.").

[69] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

[70] *Id.*

[71] *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES (Peter L. Strauss ed., 2006).

[72] *See Chevron*, 467 U.S. at 842–43.

that interpretation represents a "permissible" interpretation of the relevant text.[73] As Justice Stevens's opinion for the Court made clear, the analysis was meant to identify what matters Congress had determined, and what matters Congress had left to resolution by the agency as a policy matter.[74] In practice, it has often meant that agencies have wide latitude to implement complex statutory programs in accord with the executive branch's policy preferences, even if this means departing from the most plausible understanding of the statute.[75]

As the *Chevron* doctrine became a fixture in administrative law, various justifications were offered for it. Some argued courts should defer to agencies because agencies, unlike courts, are politically accountable.[76] Others stressed the value of agency expertise and familiarity with the subject matter, particularly when compared to that of judges.[77] Others noted that deferring to agency interpretations would produce more uniformity in federal law than relying upon the potentially disparate interpretations offered by judges in various circuits and districts across the country.[78] Still others suggested that *Chevron* may be a logical outgrowth of constitutional separation of powers principles.[79]

The Supreme Court, for its part, recognized the strength of various policy rationales for a *Chevron*-like deference regime, but ultimately made clear that none of these arguments could explain when or why courts should defer to agency interpretations. After all, agencies have no inherent authority to explain or interpret what the law means for anyone but themselves.[80] Any justification for deferring to an agency's interpretation or binding policy decision had to rest with Congress and its choice to delegate such authority to an agency.[81] If agencies have the power to resolve ambiguities or fill gaps in complex statutory schemes, it is not because giving agencies such authority is a good idea that courts should respect. It is because Congress has delegated such power to them.

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[73] *Id*.

[74] *Id.* at 843, 864–65.

[75] In one of his last opinions on the Court, Justice Kennedy lamented that too many lower courts granted agencies "reflexive deference" when applying *Chevron*, and suggested this would require the Court "to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision." *See* Pereira v. Sessions, 585 U.S. 198, 221 (2018) (Kennedy, J., concurring). Wrote Kennedy, "The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary." *Id.*

[76] *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (the relevant policy determinations are "not for the courts but for the political branches"); *see also* Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. REG. 283 (1986); *Chevron*, 467 U.S. at 864 ("Such policy arguments are more properly addressed to legislators or administrators, not to judges.").

[77] *See, e.g.*, Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 589–90 (1985); *see also Chevron*, 467 U.S. at 865 ("Judges are not experts in the field").

[78] *See, e.g.*, Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121–22 (1987).

[79] *See, e.g.,* Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 269–70 (1988); Starr, *supra* note 76, at 283.

[80] *See Chevron*, 467 U.S. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is *entrusted to administer*") (emphasis added).

[81] *Id.* at 843 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.") (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

One of the first decisions to make this explicit was *Adams Fruit Co. v. Barrett*, in which the Court explained that "a precondition to deference under *Chevron* is a congressional delegation of administrative authority."[82] For there to be deference, it must be the result of legislative intent.[83] And while legislative intent need not always be explicit on the face of the statutory text, it cannot not be presumed without reason. In *Christensen v. Harris County*, for instance, the Court concluded that a delegation of interpretive authority could not be implied where Congress failed to delegate to an agency the authority to act with the force of law.[84]

The Court made explicit that *Chevron* deference must rest on a delegation rationale in *United States v. Mead*, in which the Court denied deference to the U.S. Customs Service's tariff classification rulings because the Court could not find any reason to believe Congress had intended these classifications to carry such weight.[85] Indeed, the structure of the program made any claim that Congress had sought to delegate such authority "self-refuting."[86]

Rather than automatically applying whenever there is a statutory ambiguity, *Mead* explained that *Chevron* would only apply "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[87] Thus, while a statutory ambiguity may be necessary for *Chevron* deference, it is not sufficient, for there can be no deference unless the Court can conclude that Congress actually conferred the authority to resolve that ambiguity to the agency.

The facts of *Chevron* serve as a useful illustration. The choice between competing interpretations of the phrase "stationary source" was not a linguistic or interpretive exercise. Rather, it was a policy choice.[88] Congress had instructed the Environmental Protection Agency to implement a permitting regime for such sources and left to the agency the authority to fill in the details about how that program would operate, within the confines of the enacted statutory text.[89] There was nothing in the text of the statute (or, for that matter, in the legislative history[90]) upon which to rest the choice between a definition of "source" that would impose more rigid emission caps and one that would provide firms with more operational flexibility.[91] It was a policy question to be resolved by the administrative agency to which Congress had delegated the authority to issue regulations with the force of law to implement the program.

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[82] 494 U.S 638, 649 (1990).

[83] *See* Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465, 479, n.14 (1997) (noting that *Chevron* deference is grounded in "congressional intent").

[84] 529 U.S. 576, 587–88 (2000).

[85] 533 U.S. 218 (2001).

[86] *Id.* at 219.

[87] *Id.* at 226–27.

[88] *Chevron*, 467 U.S. at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.").

[89] *Id.* ("the EPA's definition of the term 'source' is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth. The Regulations which the Administrator has adopted provide what the agency could allowably view as an effective reconciliation of these twofold ends." (cleaned up)).

[90] *Id.* at 862 (noting the legislative history was "unilluminating").

[91] *Id.* (noting the statutory language was "not dispositive" of how "stationary source" should be interpreted).

Recognizing that *Chevron* deference rests on delegation has a range of implications, some of which I have sketched out elsewhere.[92] A few are worth highlighting here. First, as already suggested, it is not ambiguities or statutory gaps or poor legislative drafting that triggers *Chevron* deference. It is rather the delegation of authority. Just because a statute is difficult to parse or does not make sense is no reason to defer to the agency. After all, unless Congress has delegated such authority to the agency, it has no such authority.

Second, and relatedly, it is the job of the reviewing court to interpret the statute in the first instance, and that necessarily includes determining what power has been delegated to the agency. This is a question for the court, and not one that can be resolved by the agency, for if delegation is the basis for deference, a judicial determination that a delegation has taken place must precede any consideration of the agency's views.[93]

To be sure, the Court has not always been steadfast in hewing to this understanding of *Chevron*. *City of Arlington v. FCC*, in particular, is a notable departure,[94] but it is not alone.[95] Nonetheless, the weight of the Court's *Chevron* jurisprudence has rested on the delegation rationale, as have many decisions in the U.S. Court of Appeals for the D.C. Circuit.[96] Just as clarifying that recent "major questions" holdings can be understood as operationalizing the principle that all agency power must have been delegated by Congress, ensuring that any deference to agencies is likewise the result of a legislative delegation would clarify and ground existing doctrine.

IV. CHEVRON QUESTIONS AND MAJOR QUESTIONS AS DELEGATION QUESTIONS

It has become common to claim that there are "two major questions doctrines" and that the Roberts Court's recent major questions decisions represent a stronger or more aggressive version of the doctrine.[97] Yet as the foregoing discussion should make clear, both the major questions doctrine and the Court's post-*Mead* conception of *Chevron* share a common root: Delegation. In

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[92] *See* Jonathan H. Adler, *Restoring* Chevron*'s Domain*, 81 MO. L. REV. 983 (2016); *see also* Thomas W. Merrill and Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001).

[93] *See* City of Arlington v. FCC, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting) ("A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference. Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue."); *see also* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1564 (2009) ("if delegation really is antecedent to deference, as *Mead* insists, it cannot be that courts should defer to an agency's views on whether a delegation has taken place").

[94] *See id.*

[95] *See, e.g.*, Scialabba v. Cuellar de Osorio, 573 U.S. 41 (2014) (plurality) (finding an intra-statutory conflict was sufficient to trigger *Chevron* deference); *see also* Adler, *Restoring*, *supra* note 81, at 996–98 (discussing why deference in such circumstances conflicts with a delegation-based understanding of *Chevron*).

[96] *See e.g.*, Ethyl Corp. v. EPA, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."). Another example of potential interest to lawyers is Am. Bar Ass'n v. FTC, 430 F.3d 457 (D.C. Cir. 2005) in which the court reaffirmed that "[m]ere ambiguity in a statute is not evidence of congressional delegation of authority." *Id.* at 469 (quoting Michigan v. EPA, 268 F.3d 1075, 1082 (D.C. Cir. 2001)).

[97] *See generally*, Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021). *See also* Eli Nachmany, *There Are Three Major Questions Doctrines*, YALE J. ON REG. (July 16, 2022), https://www.yalejreg.com/nc/three-major-questions-doctrines.

this regard both should be understood as instantiations of the delegation doctrine. Both seek to determine whether Congress delegated power to an agency.

In a widely cited 2021 article, Professor Cass Sunstein argued that "the major questions doctrine has been understood in two radically different ways—weak and strong—and that the two have radically different implications."[98] The "weak version" entails denying *Chevron* deference to agencies in cases involving a major question, whereas the "strong version . . . operates as a clear statement principle" that precludes certain agency interpretations, such as those that expand agency authority.[99] While it is certainly true that some applications of the major questions doctrine arise in a *Chevron* context and others do not, this account glosses over the unifying principle that can be found across major questions cases and that aligns them with the delegation conception of *Chevron* that has become dominant in the Court's jurisprudence.

Denying *Chevron* deference about matters of profound economic and political significance means denying agencies the fundamentally legislative-like authority of deciding whether or not to regulate such matters. As Sunstein notes, granting *Chevron* deference in such instances "might seem to create a nondelegation problem," particularly insofar as it might allow agencies to define the scope of their own jurisdiction.[100] Thus the "weak version" of the major questions doctrine, no less than the "strong version," entails greater judicial reluctance to find that Congress has delegated authority to an agency.

To illustrate this point consider *FDA v. Brown & Williamson Tobacco Corp.*, in which the Court concluded that the Food and Drug Administration lacked the authority to regulate tobacco and cigarettes as drugs and drug-delivery devices.[101] At one level, the Court rejected the claim that the FDA had the power—indeed, the obligation—to subject tobacco products to the broader regulatory regime governing drugs and medical devices because Congress had "clearly precluded" applying the Food, Drug, and Cosmetic Act (FDCA) to tobacco products.[102] Yet the Court also explained that, insofar as the text of the FDCA could be considered to be ambiguous, the broader context and the stakes involved undercut the claim that any residual ambiguity in the statute represented "an implicit delegation" to the FDA.[103] *Brown & Williamson* is often cited as an early major questions case, but it also fits comfortably into the Court's jurisprudence requiring evidence of Congress's intent to delegate authority before conferring deference to an agency.

Note further that had the Court granted *Chevron* deference to the FDA in *Brown & Williamson*, it would have done more than allow for the FDA regulation of tobacco products under the FDCA. Granting *Chevron* deference would have granted the FDA the truly awesome power to decide whether tobacco products *should* be regulated under the FDCA. Such legislative-like authority is broader and more consequential than a statutory obligation to regulate tobacco products as drugs or medical devices. Thus, the power the FDA would have claimed under *Chevron* in *Brown &*

[98] Sunstein, *supra* note 97, at 477.
[99] *Id.*
[100] *Id.* at 476; *see also* Sales & Adler, *supra* note 93, at 1539–40.
[101] 529 U.S. 120 (2000).
[102] *Id.* at 125.
[103] *Id.* at 159.

Williamson is actually far greater than that which Congress ultimately delegated to the FDA in subsequent tobacco legislation.[104]

King v. Burwell further illustrates the point.[105] Despite concluding that the relevant statutory text was ambiguous, the Chief Justice concluded that *Chevron* deference was inappropriate because there was no indication that Congress had sought to delegate to the Internal Revenue Service the authority to determine whether or not tax credits would be available on exchanges established by the federal government.[106] This was a question of vast economic and political significance but not solely because millions of dollars from the federal treasury were at stake. Had the Court granted *Chevron* deference to the IRS, it would have been granting more than mere interpretive authority. It would have been giving the IRS the discretionary authority to exercise the momentous policy choice of whether tax credits to support the purchase of individual health insurance policies would be available in the vast majority of states.[107] And while conferring *Chevron* deference would have produced the same immediate outcome—making such tax credits available—it would also have given the IRS the authority to change its mind in the future in accord with changes in control of the executive branch. So, although the Court ultimately agreed with the agency's interpretation, it could not conclude that Congress had delegated to the agency authority to make that determination.

As cases like *Brown & Williamson* and *King* illustrate, decisions to deny *Chevron* deference to agency interpretations where the scope of the agency's own authority or other major questions are at stake, are just as much about determining how much power Congress has delegated to an agency as are major questions cases in which the Court directly addresses the substantive scope of agency authority without mention of *Chevron* at all. It is misleading to suggest that the former cases involve a "weaker" version of the major questions doctrine, as they are just as much about the delegation of power to an administrative agency. If, as the Court has repeatedly held, broad assertions of regulatory authority require greater or more explicit evidence of legislative delegation, there is no reason that the most recent quartet of major questions cases should have come out differently than the *Chevron*-related major questions cases that preceded them.

V. FINDING ANSWERS IN *ARLINGTON*

Seeds of a broader delegation doctrine can be seen in both the Court's recent major questions decisions, as well as in the Court's *Chevron* jurisprudence. Indeed, both sets of cases spring from the same roots: A recognition that agencies only have that authority that Congress has delegated to them. Thus, whenever an agency asserts authority to regulate, or even to interpret a law that

[104] *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in scattered sections of 5, 15, and 21 U.S.C.).

[105] 576 U.S. 473 (2015).

[106] *Id.* at 485–86. For an explanation of why the Court was wrong to conclude that the relevant provisions of the Patient Protection and Affordable Care Act were ambiguous, *see* Jonathan H. Adler & Michael F. Cannon, King v. Burwell *and the Triumph of Selective Contextualism*, 15 CATO SUP. CT. REV. 35 (2015).

[107] *See* 576 U.S. at 485–86 ("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.").

the agency administers, the agency bears the burden of demonstrating that it has been granted the power it seeks to exercise.

As it happens, Chief Justice Roberts outlined the foundation of a unified delegation doctrine in *City of Arlington v. FCC*, albeit in dissent.[108] As it also happens, Chief Justice Roberts was the author of both *West Virginia v. EPA* and *Biden v. Nebraska.*

The question presented in *City of Arlington* was whether courts should apply *Chevron* deference to statutory ambiguities that implicate the scope or existence of an agency authority.[109] Justice Scalia, writing for the majority, refused to accept that applying *Chevron* deference to such questions should be treated differently from any other statutory ambiguity.[110] While acknowledging that "*Chevron* is rooted in a background presumption of congressional intent," he concluded that there was no basis for subjecting agency interpretations to greater scrutiny when the scope of an agency's authority was arguably at stake.[111] More significantly, he rejected the idea that the burden should be upon the agency to show that the power it would assert has in fact been delegated. Whereas the delegation doctrine would counsel that the question is whether a desired exercise of agency power was delegated, Justice Scalia concluded that "the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not."[112]

Chief Justice Roberts took the opposite view, articulating the foundational premises of a delegation doctrine. Wrote Roberts:

> A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference. Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.[113]

Whereas Justice Scalia heralded the use of *Chevron* to provide "a stable background rule against which Congress can legislate,"[114] Chief Justice Roberts noted that this formulation "begs the question of what that stable background rule is."[115] Added Roberts, "if the legitimacy of *Chevron* deference is based on a congressional delegation of interpretive authority, then the line is one the Court must draw."[116] The power to offer a binding interpretation of a federal statute, like any other power an administrative agency might seek to exercise, must derive from a grant from Congress. And as when other agency powers are challenged, it is up to the courts, in the first instance, to determine whether the power claimed has been delegated.

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[108] *See* City of Arlington v. FCC, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting).

[109] In this sense, *City of Arlington* involved a question very similar to the proximate question presented in *Loper Bright Enters. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), and *Relentless, Inc. v. United States Dep't of Com.*, 62 F.4th 621 (1st Cir. 2023).

[110] *City of Arlington*, 569 U.S. at 296–97.

[111] *Id.* at 296.

[112] *Id.* at 301.

[113] *Id.* at 312 (Roberts, C.J. dissenting).

[114] *Id.* at 296 (majority opinion).

[115] *Id.* at 326 (Roberts, C.J. dissenting).

[116] *Id.* at 325.

CONCLUSION

Now that Justice Scalia is no longer on the Court, it appears that Chief Justice Roberts's vision of *Chevron*'s applicability may be on the ascendance. If this delegation doctrine is to flower, the Court will need to take a broader and more principled approach to delegation than has been exhibited in the major questions doctrine cases to date. Rather than sorting cases artificially into those that are "major" and those that are not, the Court should instead recognize that it is always the agency's burden to demonstrate that power it seeks to exercise has been delegated, and that evaluating agency claims of authority requires a broad, context-sensitive inquiry into what Congress enacted. Such inquiries must start with the statutory text, to be sure, but they must also be sensitive to the nature of statutory drafting. As then-Judge Breyer noted in a 1985 lecture, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of [a] statute's daily administration."[117]

The question of what power has been delegated to an agency is not meaningfully different from other inquiries courts routinely engage in to determine the scope and extent of power any other principal has delegated to an agent. In all such contexts, the broader, more extensive, more unusual, less precedented, or less expected the power claimed, the more evidence that such power has been delegated one would expect to find. This is not an innovation in statutory interpretation, but a restatement of what Courts have done in many contexts for quite some time.[118]

The foundation of the delegation doctrine is that Article I vests legislative power in the hands of the Congress, and only through congressional action—legislation—can power to act with the force of law be given to administrative agencies. In every case, whether and how much power has been given is a matter for courts to decide, and both the magnitude and nature of the power asserted should inform the inquiry into whether such power was delegated. If Congress wishes to depart from the Constitution's baseline allocation of power, it must affirmatively do so, and courts should not presume such departures without evidence they have been accomplished.

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[117] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN L. REV. 363, 370 (1986); *see also* 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) (reporting legislative drafters surveyed "realize[d] that courts use ambiguity as a signal of delegation . . ." but this "does not mean that they intend to delegate whenever ambiguity remains in finalized statutory language.").

[118] *See* Capozzi, *supra* note 11, at 197–208 (describing how courts have long been sensitive to the scope or scale of delegated authority when determining whether such authority was delegated); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 11–12 (1990) (noting courts were less likely to defer to agencies where a "major question" is at issue).