DOCTRINAL DESTRUCTION AND *CHEVRON*'S EXTINCTION DEBT

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ABSTRACT

Chevron*, the landmark Supreme Court case urging judicial deference to reasonable agency interpretations of vague or ambiguous statutes, has dominated federal administrative law since 1984. The sudden rise of the major questions doctrine, however, has destroyed* Chevron*'s jurisprudential habitat. Conservation biology suggests that habitat destruction is most devastating to dominant species, often imposing a biological "debt" that must be repaid through extinction. As with biology, so with law: "Major questions" having displaced agency deference,* Chevron *is doomed.*

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INTRODUCTION

This is an article about *Chevron*.[1] It explains how the major questions doctrine and a parallel revival of the nondelegation doctrine may foreshadow or even compel the overruling of *Chevron*. Much of the story turns on Antonin Scalia. His heir in style and temperament, Neil Gorsuch, plays a supporting role. As much as Justice Scalia hated biology, his successors on today's Supreme Court despise the regulatory state. With equal parts inspiration and revulsion, this Article recounts this tale of intellectual dishonesty and jurisprudential vacuity through extended metaphors based on evolution and conservation biology. On points of law and jurisprudence, a page of natural history is worth a volume of political theory.[2]

1. *Cf.* Coleman v. Thompson, 501 U.S. 722, 726 (1991) ("This is a case about federalism."); Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("That is what this suit is about. Power."); PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 164 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) ("This is a case about executive power and individual liberty."). Less facetiously, this Article draws upon *Scalia's Major Mousetrap: The Modest Origins of the Major Questions Doctrine*. James Ming Chen, *Scalia's Major Mousetrap: The Modest Origins of the Major Questions Doctrine*, MICH. ST. L. REV.: MSLR F. (Apr. 7, 2023), https://www.michiganstatelawreview.org/vol-20222023/2023/4/7/scalias-major-mousetrap-the-modest-origins-of-the-major-questions-doctrine [https://perma.cc/UJJ2-9W3T]. This Article represents a far more ambitious effort to connect textualist interpretation, *Chevron*, the major questions and nondelegation doctrines, and the broader fabric of administrative and constitutional law.

2. Or the Christian apologetics of Gilbert Keith Chesterton. *Compare* N.Y. Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921) ("Upon this point a page of history is worth a volume of logic."), *with* Artis v. District of Columbia, 583 U.S. 71, 92 (2018) (Gorsuch, J., dissenting) ("Chesterton reminds us not to clear away a fence just because we cannot see its point. Even if a fence doesn't seem to have a reason, sometimes all that means is we need to look more carefully for the reason it was built in the first place."). The opening paragraph of the *Artis* dissent is memorably and lamentably bad. Justice Gorsuch's writing style evidently impresses some observers. *See* Nina Varsava, *Elements of Judicial Style: A Quantitative Guide to Neil Gorsuch's Opinion Writing*, 93 N.Y.U. L. REV. ONLINE 75 (2018). I am not a fan.

I. DOMINANCE, DISDAIN, AND DOOM

Like the American pika,[3] *Chevron* is toast.[4] Then again, maybe not. *Ochotona princeps* might enjoy a reprieve—as long as you trust the scientific expertise of the Fish and Wildlife Service.[5] Besides, legal extinction, unlike its biological equivalent, need not last forever. Legal precedents do return from jurisprudential death. Five younger Justices[6]—better yet, six[7]—just need to agree that intervening replacements in the legal landscape were "gravely mistaken"[8]—"not just wrong, but grievously or egregiously wrong."[9]

Whatever biological fate awaits the pika, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* faces imminent legal doom. For four decades, *Chevron* has directed federal courts to defer to administrative agencies' interpretations of law, as long as statutory vagueness or ambiguity leaves room for the agency to adopt its own reasonable interpretation.[10]

Chevron's two steps are familiar to every court "review[ing] an agency's construction of the statute which it administers."[11] "First, always, is the question whether Congress has directly spoken to the precise question at issue."[12] Clearly expressed congressional intent ends the analysis, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[13]

On the other hand, if "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute."[14] "Rather, if the statute is silent or

3. *See* J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U. L. REV. 1, 2 (2008).

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

5. *See* Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List the American Pika as Threatened or Endangered, 75 Fed. Reg. 6438 (Feb. 9, 2010).

6. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."); *cf.* William Blodgett, *Just You Wait, Harry Blackmun*, 3 CONST. COMMENT. 3 (1986) (setting this retort to the tune of ALAN JAY LERNER, *Just You Wait*, *in* MY FAIR LADY (Chappell & Co. Inc. 1956)).

7. *See, e.g.*, Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2013); Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003).

8. Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (Gorsuch, J.).

9. *Id.* at 1414 (Kavanaugh, J., concurring in part); *accord* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 342 (2022) (Kavanaugh, J., concurring).

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

11. *Id.* at 842.

12. *Id.*

13. *Id.* at 842-43.

14. *Id.* at 843.

ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[15]

That "permissible construction" warrants judicial deference: "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[16] Deference attaches without the need to determine "that the agency construction was the only one it permissibly could have adopted" or even that the court "would have reached" the same interpretation "if the question initially had arisen in a judicial proceeding."[17]

An accidental landmark,[18] *Chevron* came to command respect and reverence, occupying venerable space while carrying considerable weight across American law. Right[19] and left,[20] observers regarded *Chevron* as the embodiment of a technocratic jurisprudence emphasizing both electoral accountability and scientific expertise.[21] Most agency heads roll upon a change in White House control—and it's a good thing, too.[22] Serving at the pleasure of the President alerts bureaucrats

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15. *Id.*

16. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

17. *Id.* at 843 n.11.

18. *See generally* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253 (2014).

19. *See, e.g.*, Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 284 (1986) (describing *Chevron* as both "evolutionary and revolutionary").

20. *See, e.g.*, Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009 (2011); William N. Eskridge, Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411; Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2592 (2006).

21. *See, e.g.*, Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1272 (2008) ("By embracing pluralism and practical wisdom in statutory interpretation, *Chevron* furnishes an enduring response to the fragmentation of contemporary legal and political theory.").

22. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."); *cf.* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH… AND IT'S A GOOD THING, TOO (1994). *But cf.* Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement concerning the denial of certiorari) ("And these days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations."). Contemporary conservatism has evidently abandoned the idea that "elections have consequences." *E.g.*, Cameron v. EMW Women's Surgical Ctr., P.S.C., 595 U.S. 267, 300 (2022) (Sotomayor, J., dissenting); *see also* Sanders v. Parker Drilling Co., 911 F.2d 191, 217 (9th Cir. 1990) (Kozinski, J., dissenting) ("Ideas have consequences and the ideas embodied in judicial opinions have very direct and immediate consequences."). The even broader notion that "ideas have consequences" was once a bedrock of conservative thought. *See* RICHARD M. WEAVER, IDEAS HAVE CONSEQUENCES (expanded ed. 2013) (1948); Elliott Ash, Daniel L. Chen & Suresh Naidu, *Ideas Have Consequences: The Impact of Law and Economics on American Justice* (Nat'l Bureau of Econ. Rsch.,

to the political consequences of their interpretation and implementation of broad statutory delegations.[23] Better still, agency staff members are learned in something, anything besides law.[24] Judges boast neither of those traits.[25]

In the ecosystem of administrative law, *Chevron* became a dominant species. A decade ago, *Chevron* at its thirtieth anniversary had become "the most-cited administrative law decision of all time."[26] The influential D.C. Circuit, having "drunk the *Chevron* Kool-Aid," elevated that decision to its place of honor atop the nation's most active court in administrative law.[27] Such encomium was neither surprising nor improper, for deference to agency expertise has been a longstanding judicial tradition, stretching back to the nineteenth century.[28]

The regulatory (or administrative) state "touches almost every aspect of daily life."[29] It channels reasonable, informed disagreement into a comprehensive set of bureaucratic rules, monitoring and enforcement mechanisms, and durable expert agencies.[30] The "colossus of

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Working Paper No. 29788, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4045366 [https://perma.cc/L2XK-RJZB].

23. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2333-34 (2001); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985).

24. *See, e.g.*, Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2151-52 (2004). Seriously, in light of the value of a terminal degree in a nonlegal discipline in the contemporary law teaching market, many federal bureaucrats holding both a J.D. and a Ph.D. may have missed their calling in legal academia. *See generally* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

25. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("Judges are not experts in the field, and are not part of either political branch of the Government.").

26. Peter M. Shane & Christopher J. Walker, *Foreword—*Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 (2014) (identifying "over 68,000 total" citations to *Chevron* "on Westlaw—including . . . over 13,500 subsequent judicial decisions, . . . over 41,000 court filings, and . . . nearly 12,000 law review articles and secondary sources"). *See generally* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017); 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 (2008).

27. Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1313, 1317 (2015).

28. *See* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2029 (2018). *But see* Luke Phillips, Comment, Chevron *in the States? Not So Much*, 89 MISS. L.J. 313, 364 (2020) (noting that most states have declined to follow *Chevron*).

29. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010).

30. *See, e.g.*, Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 J. PUB. POL'Y 139 (1997). The literature on the regulatory or administrative state is immense, with subtle differences in flavor by academic discipline, political ideology, and nationality. *See generally, e.g.*,

public administration—the vast public service and regulatory bureaucracies and their countless employees and extensions[—] . . . conduct[s] the daily business" of the regulatory state.[31]

Chevron emphasized the primacy of scientific expertise in the courts of the regulatory state, which "must generally be at [their] most deferential" when an agency "is making predictions, within its area of special expertise, at the frontiers of science."[32] In a world where *Chevron* holds sway, the phrase "social engineering" would no longer be a political epithet, almost always heaved from right to left.[33] *Chevron*'s legal ecosystem supports a jurisprudence that pursues robust and humane policies "with strong and active faith."[34]

If the biological metaphor holds, dominance may have made *Chevron* paradoxically more rather than less vulnerable to extinction. As do many living things, *Chevron* faces the destruction of its habitat. This is the cataclysm described in a 1994 article by David Tilman and his research team, *Habitat Destruction and the Extinction Debt*.[35] Three decades later, in a discipline where influence wanes far more quickly than in law,[36] *Habitat Destruction and the Extinction Debt*

Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121 (2016); Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LITERATURE 401 (2003); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538 (2018); Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); Michael Moran, *Understanding the Regulatory State*, 32 BRIT. J. POL. SCI. 391 (2002); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407 (1990).

31. Bernardo Zacka, *Political Theory Rediscovers Public Administration*, 25 ANN. REV. POL. SCI. 21, 21 (2022).

32. Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983); *see also, e.g.*, Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 656 (1980) (plurality opinion); *id.* at 705-06 (Marshall, J., dissenting).

33. *See* Jim Chen, *Truth and Beauty: A Legal Translation*, 41 U. TOL. L. REV. 261, 262 (2010) ("The term 'social engineering' carries no pejorative connotation. It describes the . . . ultimately noble project . . . of designing institutions to accomplish goals beyond the reach of individuals.").

34. William J. Clinton, Remarks Commemorating the 100th Anniversary of the Thomas Jefferson Building at the Library of Congress, 33 WEEKLY COMP. PRES. DOC. 618, 620 (Apr. 30, 1997) (quoting the last words written by Franklin Delano Roosevelt on the day of his death, April 12, 1945); *accord* Joseph C. Sweeney, *The United Nations: Reflections on Fifty Years, 1945-1995*, 18 FORDHAM INT'L L.J. 1, 2 (1994).

35. David Tilman, Robert M. May, Clarence L. Lehman & Martin A. Nowak, *Habitat Destruction and the Extinction Debt*, 371 NATURE 65 (1994).

36. The speed at which science is and should be conducted warrants a specialized corner within the literature on the discovery and dissemination of ideas. Some experiments take decades or centuries. *See, e.g.*, D.S. Jenkinson, *The Rothamsted Long-Term Experiments: Are They Still of Use?*, 83 AGRONOMY J. 2 (1991). On "slow science" as a counterweight to academia's funding-driven, publish-or-perish culture, see ISABELLE STENGERS, ANOTHER

remains one of the most provocative landmarks in the literature of conservation biology.[37] Eventually if not instantaneously, large-scale habitat destruction dooms many resident species to extinction. Indeed, the time lag between habitat destruction and ultimate extinction may be so long that "a transient excess of rare species" in recently disturbed or fragmented landscapes may supply an "overlooked signature of extinction debt."[38] Though geological time may seem generous in human terms, extinction ruthlessly collects its debts.[39]

Strikingly, Tilman and his colleagues hypothesized that dominant species are the most likely to pay the extinction debt. "These results are surprising because the species initially most abundant in undisturbed habitat fragments can be the most susceptible to eventual extinction."[40] Dominance of one ecosystem may reduce a species' ability to colonize nearby habitats. Endemic species bear the steepest extinction debt.[41] Though some sources have contested this characterization of dominant species,[42] other research has confirmed that habitat destruction, at least under certain conditions, does indeed take its steepest toll on dominant species.[43]

SCIENCE IS POSSIBLE: A MANIFESTO FOR SLOW SCIENCE (Stephen Muecke trans., Polity Press 2018); Lisa Alleva, *Taking Time to Savour the Rewards of Slow Science*, 443 NATURE 271 (2006); Brian Owens, *Long-Term Research: Slow Science*, 495 NATURE 300 (2013). Some discoveries, no matter how rapidly attained, take longer to be noticed. *See, e.g.*, Qing Ke, Emillio Ferrara, Filippo Radicchi & Alessandro Flammini, *Defining and Identifying Sleeping Beauties in Science*, 112 PROC. NAT'L ACAD. SCIS. 7426 (2015); Anthony F.J. van Raan, *Sleeping Beauties in Science*, 59 SCIENTOMETRICS 467 (2004); Anthony F.J. van Raan & Jos J. Winnink, *The Occurrence of 'Sleeping Beauty' Publications in Medical Research: Their Scientific Impact and Technological Relevance*, PLOS ONE, Oct. 2019 (available at DOI: 10.1371/journal.pone.0223373). In general, the speedier the rate of discovery, the shorter the time between publication and irrelevance through eclipse by new research.

37. *See, e.g.*, Mikko Kuussaari et al., *Extinction Debt: A Challenge for Biodiversity Conservation*, 24 TRENDS IN ECOLOGY & EVOLUTION 564 (2009); Oliver R. Wearn, Daniel C. Reuman & Robert M. Ewers, *Extinction Debt and Windows of Conservation Opportunity in the Brazilian Amazon*, 337 SCIENCE 228 (2012).

38. Ilkka Hanski & Otso Ovaskainen, *Extinction Debt at Extinction Threshold*, 16 CONSERVATION BIOLOGY 666, 666 (2002); *see also* Mark Vellend et al., *Extinction Debt of Forest Plants Persists for More Than a Century Following Habitat Fragmentation*, 87 ECOLOGY 542 (2006).

39. *See, e.g.*, David M. Raup, *Biological Extinction in Earth History*, 231 SCIENCE 1528, 1528 (1986) ("Virtually all plant and animal species that have ever lived on the earth are extinct."); David M. Raup, *The Role of Extinction in Evolution*, 91 PROC. NAT'L ACAD. SCIS. 6758 (1994).

40. Tilman et al., *supra* note 35, at 66.

41. *See, e.g.*, Stefan Dullinger et al., *Extinction Debt of High-Mountain Plants Under Twenty-First-Century Climate Change*, 2 NATURE CLIMATE CHANGE 619 (2012); Kostas A. Triantis, *Extinction Debt on Oceanic Islands*, 33 ECOGRAPHY 285 (2010).

42. *See, e.g.*, Michael A. McCarthy, David B. Lindenmayer & Martin Drechsler, *Extinction Debts and Risks Faced by Abundant Species*, 11 CONSERVATION BIOLOGY 221 (1997); Catherine L. Parr & Heloise Gibb, *The Discovery-Dominance Trade-Off Is the Exception, Rather Than the Rule*, 81 J. ANIMAL ECOLOGY 233 (2011).

43. *See, e.g.*, John E. Banks, *Do Imperfect Trade-Offs Affect the Extinction Debt Phenomenon?*, 78 ECOLOGY 1597 (1997); Sara A.O. Cousins, *Extinction Debt in Fragmented*

The particular vulnerability of dominant species to habitat destruction is a special instance of the ecological tradeoff between competition and colonization.[44] In Tilman's model of extinction debt, species that outcompete their neighbors tend to expend less energy on colonization. Consequently, they may not have established footholds outside suddenly shaky habitat.

Even in (or perhaps especially in) biological systems not at equilibrium,[45] interspecific differences in competitive fitness and ability to colonize might account for species diversity.[46] The competition-colonization tradeoff connects Tilman's own pioneering work on ecological networks[47] with niche theories of mutualism (which are neglected relative to competition and predation as ecological and evolutionary mechanisms)[48] and with general ecological mechanisms of interspecific coexistence.[49]

The competition-colonization tradeoff that fuels extinction debt is a readily generalizable and perhaps comprehensively universal principle that appears in many scientific domains. Within ecology, the analogous "dominance-discovery trade-off posits that species differ in their ability to find and use resources quickly, in contrast to their ability to

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Grasslands: Paid or Not?, 20 J. VEGETATION SCI. 3 (2009); Fielding Montgomery, Scott M. Reid & Nicholas E. Mandrak, *Extinction Debt of Fishes in Great Lakes Coastal Wetlands*, BIOLOGICAL CONSERVATION, Jan. 2020 (available at DOI: 10.1016/j.biocon.2019.108386). *See generally* Kristoffer Hylander & Johan Ehrlén, *The Mechanisms Causing Extinction Debts*, 28 TRENDS IN ECOLOGY & EVOLUTION 341 (2013).

44. *See generally, e.g.*, Yue Bin et al., *Testing the Competition-Colonization Trade-Off and Its Correlations with Functional Trait Variations Among Subtropical Tree Species*, SCI. REPS., Oct. 2019 (available at DOI: 10.1016/j.biocon.2019.108386); Richard Levins & David Culver, *Regional Coexistence of Species and Competition Between Rare Species*, 68 PROC. NAT'L ACAD. SCIS. 1246 (1971); Romana Limberger & Stephen A. Wickham, *Competition-Colonization Trade-Offs in a Ciliate Model Community*, 167 OECOLOGIA 723 (2011); Ricardo Martinez-Garcia, Cristóbal López & Federico Vazquez, *Species Exclusion and Coexistence in a Noisy Voter Model with a Competition-Colonization Tradeoff*, PHYSICAL REV. E, Mar. 2021; Erin A. Mordecai, Alejandra G. Jaramillo, Jacob E. Ashford, Ryan F. Hechinger & Kevin D. Lafferty, *The Role of Competition-Colonization Tradeoffs and Spatial Heterogeneity in Promoting Trematode Coexistence*, 97 ECOLOGY 1484 (2016); Miles T. Wetherington et al., *Ecological Succession and the Competition-Colonization Trade-Off in Microbial Communities*, BMC BIOLOGY, Nov. 2022 (available at DOI: 10.1186/s12915-022-01462-5); Douglas W. Yu & Howard B. Wilson, *The Competition-Colonization Trade-Off Is Dead; Long Live the Competition-Colonization Trade-Off*, 158 AM. NATURALIST 49 (2001).

45. *See* Marc William Cadotte, *Competition-Colonization Trade-Offs and Disturbance Effects at Multiple Scales*, 88 ECOLOGY 823 (2007); Alan Hastings, *Disturbance, Coexistence, History, and Competition for Space*, 18 THEORETICAL POPULATION BIOLOGY 363 (1980).

46. *See* V. Calcagno, N. Mouquet, P. Jarne & P. David, *Coexistence in a Metacommunity: The Competition-Colonization Trade-Off Is Not Dead*, 9 ECOLOGY LETTERS 897 (2006).

47. *See* DAVID TILMAN, RESOURCE COMPETITION AND COMMUNITY STRUCTURE (1982).

48. *See* Oscar Godoy, Ignasi Bartomeus, Rudolf P. Rohr & Serguei Saavedra, *Towards the Integration of Niche and Network Theories*, 33 TRENDS IN ECOLOGY & EVOLUTION 287 (2018); Fernanda S. Valdovinos & Robert Marsland III, *Niche Theory for Mutualism: A Graphical Approach to Plant-Pollinator Network Dynamics*, 197 AM. NATURALIST 393 (2021).

49. *See* Andrew J. Sieben, Joseph R. Mihaljevic & Lauren G. Shoemaker, *Quantifying Mechanisms of Coexistence in Disease Ecology*, ECOLOGY, Dec. 2022, at 12 (available at DOI: 10.1002/ecy.3819).

monopolize those resources."[50] Comparable tradeoffs abound in other sciences and even the humanities. Such tradeoffs include the exploitation-exploration tradeoff in reinforcement learning,[51] the tension between hit-and-run competition and sit-and-gun incumbent behavior in contestable markets,[52] and prospect-refuge theory in architecture and other visual arts.[53]

Perhaps less obviously so, even the bias-variance tradeoff in machine learning may be understood as a variation on this theme. Slower, more complex algorithms tend to generate more accurate results (lower bias) at the price of greater inconsistency (greater variance)

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50. Cristian L. Klunk & Marcio R. Pie, *No Evidence for Dominance-Discovery Trade-Offs in* Pheidole *(Hymenoptera: Formicidae) Assemblages*, 99 CANADIAN J. ZOOLOGY 1002, 1002 (2021). *See generally* F.R. Adler, E.G. LeBrun & D.H. Feener Jr., *Maintaining Diversity in an Ant Community: Modeling, Extending, and Testing the Dominance-Discovery Trade-Off*, 169 AM. NATURALIST 323 (2007); Cleo Bertelsmeier, Amaury Avril, Olivier Blight, Hervé Jourdan & Franck Courchamp, *Discovery-Dominance Trade-Off Among Widespread Invasive Ant Species*, 5 ECOLOGY & EVOLUTION 2673 (2015); Louise van Oudenhove, Xim Cerdá & Carlos Bernstein, *Dominance-Discovery and Discovery-Exploitation Trade-Offs Promote Diversity in Ant Communities*, PLOS ONE, Dec. 2018 (available at DOI: 10.1371/journal.pone.0209596); Parr & Gibb, *supra* note 42.

51. *See generally, e.g.*, Peter Auer, *Using Confidence Bounds for Exploitation-Exploration Trade-Offs*, 3 J. MACH. LEARNING RSCH. 397 (2002); Michael Castronovo, Francis Maes, Raphael Fonteneau & Damien Ernst, *Learning Exploration/Exploitation Strategies for Single Trajectory Reinforcement Learning*, *in* PROCEEDINGS OF THE TENTH EUROPEAN WORKSHOP ON REINFORCEMENT LEARNING (2013); George De Ath, Richard M. Everson, Alma A.M. Rahat & Jonathan E. Fieldsend, *Greed Is Good: Exploration and Exploitation Trade-Offs in Bayesian Optimisation*, 1 ACM TRANSACTIONS ON EVOLUTIONARY LEARNING & OPTIMIZATION, June 2021; Shin Ishii, Wako Yoshida & Junichiro Yoshimoto, *Control of Exploitation-Exploration Meta-Parameter in Reinforcement Learning*, 15 NEURAL NETWORKS 665, 685 (2002); Michel Tokic, *Adaptive ε-Greedy Reinforcement Learning Based on Value Differences*, *in* KI 2010: ADVANCES IN ARTIFICIAL INTELLIGENCE 203, 203-10 (Rüdiger Dillmann, Jürgen Beyerer, Uwe D. Hanebeck & Tanja Schultz eds., 2010); Mohan Yogeswaran & S.G. Ponnambalam, *Reinforcement Learning: Exploration-Exploitation Dilemma in Multi-Agent Foraging Task*, 49 OPSEARCH 223 (2012).

52. *See generally, e.g.*, WILLIAM J. BAUMOL, JOHN C. PANZAR & ROBERT D. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (1982); Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. ON REG. 111 (1984); William A. Brock, *Contestable Markets and the Theory of Industry Structure: A Review Article*, 91 J. POL. ECON. 1055 (1983); Manfred J. Holler, *The Theory of Contestable Markets: Comment*, 37 BULL. ECON. RSCH. 65 (1985); Michael Spence, *Contestable Markets and the Theory of Industry Structure: A Review Article*, 21 J. ECON. LITERATURE 981 (1983).

53. *See generally, e.g.*, Buket Denoglu, Himli Ekin Oktay & Isami Kinoshita, *An Empirical Research Study on Prospect-Refuge Theory and the Effect of High-Rise Buildings in Japanese Garden Setting*, CITY, TERRITORY & ARCHITECTURE, July 2018; Annemarie S. Dosen & Michael J. Ostwald, *Evidence for Prospect-Refuge Theory: A Meta-Analysis of the Findings of Environmental. Preference Research*, CITY, TERRITORY & ARCHITECTURE, May 2016; Annemarie S. Dosen & Michael J. Oswald, *Methodological Characteristics of Research Testing Prospect-Refuge Theory: A Comparative Analysis*, 56 ARCHITECTURAL SCI. REV. 232 (2013); Edward J. Ruddell & William E. Hammitt, *Prospect Refuge Theory: A Psychological Orientation for Edge Effect in Recreation Requirements*, 19 J. LEISURE RSCH. 249 (1987); Arthur E. Stamps III, *Some Findings on Prospect and Refuge: I*, 106 PERCEPTUAL & MOTOR SKILLS 147 (2008).

among predictions.[54] Striking the optimal balance between bias and variance holds the key to generalizability,[55] perhaps the most coveted yet elusive virtue in computer science.[56] The optimization of machine learning has long hinged on a variant of the exploitation-exploration tradeoff: the relative efficiency of random and grid-based searches of hyperparameter spaces in artificial neural networks.[57] Climate change and resource exhaustion convert the basic tension in artificial intelligence into an existential struggle between accuracy and energy consumption.[58] The prevalence of ideas in other disciplines resembling ecology's competition-colonization and dominance-discovery tradeoffs suggests the presence and functioning of a universal mechanism calibrating the expenditure of finite resources on local exploitation vis-à-vis distant search.[59]

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54. *See, e.g.*, ETHEM ALPAYDIN, INTRODUCTION TO MACHINE LEARNING 76-80 (2d ed. 2010); RICHARD A. BERK, STATISTICAL LEARNING FROM A REGRESSION PERSPECTIVE 55-56 (2008); Frank J.W.M. Dankers et al., *Prediction Modeling Methodology*, *in* FUNDAMENTALS OF CLINICAL DATA SCIENCE 101, 106-09, 107 fig.8.3 (Pieter Kubben et al. eds., 2019); Pedro Domingos, *A Unified Bias-Variance Decomposition for Zero-One and Squared Loss*, *in* PROCEEDINGS OF THE SEVENTEENTH NATIONAL CONFERENCE ON ARTIFICIAL INTELLIGENCE AND TWELFTH CONFERENCE ON INNOVATIVE APPLICATIONS OF ARTIFICIAL INTELLIGENCE 564, 564-69 (2000); Stuart Geman, Elie Bienenstock & René Doursat, *Neural Networks and the Bias/Variance Dilemma*, 4 NEURAL COMPUTATION 1 (1992); Ron Kohavi & David H. Wolpert, *Bias Plus Variance Decomposition for Zero-One Loss Functions*, *in* PROCEEDINGS OF THE THIRTEENTH INTERNATIONAL CONFERENCE ON MACHINE LEARNING 275, 275-83 (1996). For legal treatments of this topic, see James Ming Chen, *Split Decisions: Practical Machine Learning for Empirical Legal Scholarship*, 2020 MICH. ST. L. REV. 1301, 1346; Virginia Foggo, John Villasenor & Pratyush Garg, *Algorithms and Fairness*, 17 OHIO ST. TECH. L.J. 123, 126 n.7 (2021); Aziz Z. Huq, *Constitutional Rights in the Machine-Learning State*, 105 CORNELL L. REV. 1875, 1912-13 (2020); David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. DAVIS L. REV. 653, 697-98 (2017).

55. *See generally, e.g.*, Andrew Delios et al., *Examining the Generalizability of Research Findings from Archival Data*, PROC. NAT'L ACAD. SCIS., July 2022 (available at DOI: 10.1073/pnas.2120377119).

56. *See, e.g.*, I.J. Myung, *Computational Approaches to Model Evaluation*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 2453, 2453-57 (Neil J. Smelser & Paul B. Baltes eds., 2001).

57. *See* James Bergstra & Yoshua Bengio, *Random Search for Hyper-Parameter Optimization*, 13 J. MACH. LEARNING RSCH. 281 (2012); Rafael G. Mantovani et al., *Effectiveness of Random Search in SVM Hyper-Parameter Tuning*, *in* PROCEEDINGS OF THE 2015 INTERNATIONAL JOINT CONFERENCE ON NEURAL NETWORKS (2015).

58. *See* Alexander E.I. Brownlee, Jason Adair, Saemunder O. Haraldsson & John Jabbo, *Exploring the Accuracy-Energy Trade-Off in Machine Learning*, *in* IEEE/ACM INTERNATIONAL WORKSHOP ON GENETIC IMPROVEMENT (2021); Nitthilan Kanappan Jayakodi, Sirine Belakaria, Arhan Deshwal & Janardhan Rao Doppa, *Design and Optimization of Energy-Accuracy Tradeoff Networks for Mobile Platforms via Pretrained Deep Models*, ACM TRANSACTIONS ON EMBEDDED COMPUTING SYS., Jan. 2020, at 4; M.Z. Naser, *Do We Need Exotic Models? Engineering Metrics to Enable Green Machine Learning from Tackling Accuracy-Energy Trade-Offs*, J. CLEANER PROD., Jan. 2023.

59. *Cf.* Per Botolf Maurseth, *Lovely but Dangerous: The Impact of Patent Citations on Patent Renewal*, 14 ECON. INNOVATION & NEW TECH. 351 (2005) (observing that patents receiving citations across diverse fields of technology tend to survive longer than other patents, while patents receiving citations within the same field tend to lapse sooner); Katherine J.

Beyond its uncontroversial observation "that habitat destruction causes extinctions," *Habitat Destruction and the Extinction Debt* issued a dire warning about the "unanticipated effect of habitat destruction": "the selective extinction of the best competitors."[60] Such "species are often the most efficient users of resources and major controllers of ecosystem functions."[61] The centrality of dominant species, especially apex predators, to the proper functioning of ecosystems pervades the literature of conservation biology.[62] Erasing dominant species can trigger a cascade of secondary extinctions.[63]

The importance of dominant species to ecosystem services has a legal parallel, as essential as it is evident. During its ascendancy, *Chevron* played a vital role in modulating the flow of legal meaning, political accountability, and scientific expertise within the complex and highly interdependent mechanisms of federal administrative law. The debasing of *Chevron*'s doctrinal underpinnings—its legal habitat, as it were—can be fairly ascribed to some combination of stochastic drift in the ebb and flow of cases and controversies, the anomalies that emerge in any course of doctrinal development, and a considerable dose of deliberate demolition.

Other issues and cases herald the imminent if not already realized victory of conservative activists in a long-running "5G" war over God,[64]

Strandburg, Gábor Csárdi, Jan Tobochnik, Péter Érdi & László Zalányi, *Law and the Science of Networks: An Overview and an Application to the "Patent Explosion,"* 21 BERKELEY TECH. L.J. 1293, 1348 (2006) ("[P]atents may cite an earlier patent because they build on its technology (what might be termed 'lovely' citations) or because they replace or distinguish its technology ('dangerous' citations).").

60. Tilman et al., *supra* note 35, at 66.

61. *Id.* (footnote omitted).

62. *Compare, e.g.*, Shahid Naeem, Lindsey J. Thompson, Sharon P. Lawler, John H. Lawton & Richard M. Woodfin, *Declining Biodiversity Can Alter the Performance of Ecosystems*, 368 NATURE 734 (1994), *and* John Terborgh, *The Big Things That Run the World—A Sequel to E.O. Wilson*, 2 CONSERVATION BIOLOGY 402 (1988), *with* Trisha B. Atwood & Edd Hammill, *The Importance of Marine Predators in the Provisioning of Ecosystem Services by Coastal Plant Communities*, FRONTIERS IN PLANT SCI., Sept. 2018 (available at DOI: 10.3389/fpls.2018.01289), *and* Neil Hammerschlag et al., *Ecosystem Function and Services of Aquatic Predators in the Anthropocene*, 34 TRENDS IN ECOLOGY & EVOLUTION 369 (2019).

63. *See, e.g.*, Charlotte Borrvall & Bo Ebenman, *Early Onset of Secondary Extinctions in Ecological Communities Following the Loss of Top Predators*, 9 ECOLOGY LETTERS 435 (2006). *See generally* Jedediah F. Brodie et al., *Secondary Extinctions of Biodiversity*, 29 TRENDS IN ECOLOGY & EVOLUTION 664 (2014); Anna Eklöf & Bo Ebenman, *Species Loss and Secondary Extinctions in Simple and Complex Model Communities*, 75 J. ANIMAL ECOLOGY 239 (2006).

64. *See, e.g.*, Carson v. Makin, 596 U.S. 767 (2022); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

guns,[65] gay people,[66] gynecology,[67] and gerrymandering.[68] In the language of biodiversity conservation, these controversies are the flagship species of constitutional law.[69] Alternatively, high-profile, politically salient cases occupy the legal equivalent of high-latitude, high-altitude landscapes favored by American wilderness policy.[70] In less euphemistic terms, the politics if not the science of conservation highlights species and landscapes whose emotional valence disproportionately outweighs their contributions to ecosystem services or the long-term, overall health of the biosphere. Most harshly of all, we might say that the 5G social agenda grabs ample attention without deeply affecting the law's underlying fabric: looks 10, dance 3.[71]

It is *Chevron*, a case known chiefly by lawyers, and the major questions and nondelegation doctrines, esoteric bodies of law either ignored or forgotten by all but the most politically motivated lawyers, that will shape (or distort) policymaking in ways that are insidious precisely because they are less politically salient. The doctrinal equivalent of extinction debt will cripple the basic functions of the regulatory state.

The time has come for the Supreme Court to collect that debt. Justice Neil Gorsuch has openly declared his wish to bury *Chevron* under "a tombstone no one can miss."[72] The Court has granted certiorari in

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65. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

66. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (2022) (Thomas, J., concurring) (urging the Court to "reconsider all of [its] substantive due process precedents, including" Griswold v. Connecticut, 381 U.S. 479 (1965), Lawrence v. Texas, 539 U.S. 558 (2003), and Obergefell v. Hodges, 576 U.S. 644 (2015)).

67. *See, e.g.*, *id.* (majority opinion); Whole Woman's Health v. Jackson, 595 U.S. 30 (2021).

68. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2500 (2019) (holding that partisan gerrymandering claims present political questions beyond the reach of federal courts).

69. *See, e.g.*, Evan Bowen-Jones & Abigail Entwistle, *Identifying Appropriate Flagship Species: The Importance of Culture and Local Contexts*, 36 ORYX 189 (2002); Nigel Leader-Williams & Holly T. Dublin, *Charismatic Megafauna as "Flagship Species," in* PRIORITIES FOR THE CONSERVATION OF MAMMALIAN DIVERSITY: HAS THE PANDA HAD ITS DAY? 53 (Abigail Entwistle & Nigel Dunstone eds., 2000); Diogo Verissimo, Douglas C. MacMillan & Robert J. Smith, *Toward a Systematic Approach for Identifying Conservation Flagships*, 4 CONSERVATION LETTERS 1 (2011); Amy M. Smith & Stephen G. Sutton, *The Role of a Flagship Species in the Formation of Conservation Intentions*, 13 HUM. DIMENSIONS WILDLIFE 127, 127 (2008).

70. *See, e.g.*, Jonathan S. Adams, Bruce A. Stein & Lynn S. Kutner, *Biodiversity: Our Precious Heritage*, *in* PRECIOUS HERITAGE: THE STATUS OF BIODIVERSITY IN THE UNITED STATES 3, 17 (Bruce A. Stein, Lynn S. Kutner & Jonathan S. Adams eds., 2000); A. Dan Tarlock, *Biodiversity Conservation in the United States: A Case Study in Incompleteness and Indirection*, 32 ENV'T L. REP. 10529, 10542 (2002).

71. *Contra* MARVIN HAMLISCH & EDWARD KIEBAN, A CHORUS LINE (1975).

72. Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

two cases that squarely invite the Justices to overrule *Chevron*.[73] Though the Court may not immediately overrule *Chevron*, any reprieve is surely temporary. Dominant in the administrative law ecosystem for four decades, *Chevron* has been slated for extermination.

II. ANTONIN'S ANIMAL SPIRITS

A. *Sweet Home, Antonin Scalia*

Whatever its scientific merits, *Habitat Destruction and the Extinction Debt* had impeccable legal timing. Its publication in 1994 coincided with the law's initial encounters with the science of conservation biology. A pivotal episode in Supreme Court history took place the following year. That story is worth recounting in detail. Despite his defeat in the high court's most prominent battle over conservation biology, Justice Antonin Scalia would make crucial jurisprudential contributions to the major questions and nondelegation doctrines. Every messianic mission must start, however unpropitiously, with a prophet whose voice cries in the wilderness and makes straight the path of the law.[74]

In many respects, the courts of the 1990s were not receptive to innovations in conservation biology. That decade marked the ascendancy of "new paradigms in ecology, none . . . more revolutionary than the idea that nature is not delicately balanced in equilibrium, but rather is dynamic, often unpredictable, and perhaps even chaotic."[75] Consequently, "[t]he emerging discipline of conservation biology" had begun "to place a perceptible strain on the American legal system, particularly laws governing public lands and resources."[76]

Courts generally resisted land management policies based on conservation biology. The Seventh Circuit described "population dynamics, species turnover, patch size, recolonization problems, fragmentation problems, edge effects, and island biogeography" as "uncertain in application" and therefore legally irrelevant to the Forest Service's "concrete" obligations.[77] A district court similarly declined to

73. *See* Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023), *granting cert. to* 45 F.4th 359 (D.C. Cir. 2022); Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2023), *granting cert. to* 62 F.4th 621 (1st Cir. 2023).

74. *See Isaiah* 40:3; *Matthew* 3:3; *John* 1:23.

75. Reed F. Noss, *Some Principles of Conservation Biology, as They Apply to Environmental Law*, 69 CHI.-KENT L. REV. 893, 893 (1994).

76. Robert B. Keiter, *Conservation Biology and the Law: Assessing the Challenges Ahead*, 69 CHI.-KENT L. REV. 911, 911 (1994).

77. Sierra Club v. Marita, 46 F.3d 606, 618, 621, 623 (7th Cir. 1995).

endorse specific techniques for managing "distinct geographic ecosystems . . . inhabited by grizzly bears."[78] Federal agencies have failed to fully exploit adaptive management.[79]

Against a backdrop of judicial resistance to conservation biology as a scientific endeavor, one federal regulation, which embodied a sweeping response to habitat destruction, achieved stunning legal success. Legal summaries of the scientific consensus had already concluded that "the principal cause of biodiversity loss is the fragmentation, degradation, and destruction of ecosystems and habitats through conversion of land to economically productive uses."[80] On this foundation, the Fish and Wildlife Service issued a regulation that included "significant habitat modification or degradation"[81] within the definition of "harm" under the Endangered Species Act—and by extension within that statute's prohibition against the "tak[ing]" of endangered species.[82]

In 1995, one year after the publication of *Habitat and the Extinction Debt*, the Supreme Court upheld the habitat destruction rule in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.[83] Antonin Scalia objected vociferously.[84] "Nino's Nightmare" unfolded

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78. Fund for Animals v. Babbitt, 903 F. Supp. 96, 106 (D.D.C. 1995); *see also* Defs. of Wildlife v. Bernal, 204 F.3d 920, 928 (9th Cir. 2000) (excluding the testimony of an expert witness who "would have testified to . . . background information on conservation biology and pygmy-owls in general, not specific information about pygmy-owls on the site or in the area"); *cf.* Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp., 222 F.3d 677, 683 (9th Cir. 2000) (Fletcher, J., dissenting) (arguing that "the FAA failed to admit or analyze the likely environmental consequences of increased non-stop overseas arrivals resulting from the proposed runway extension" in Maui, especially with respect to the introduction of species alien to the Hawaiian islands). *See generally* Stephanie J. Gliege, Note, *NEPA and the Danger of Alien Species Introduction: Taking a Hard Look at* National Parks & Conservation Ass'n v. United States Department of Transportation, 42 JURIMETRICS 31 (2001).

79. *See* Robert L. Fischman & J.B. Ruhl, *Judging Adaptive Management Practices of U.S. Agencies*, 30 CONSERVATION BIOLOGY 268 (2016).

80. Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 7 (1997); *see also* Richard J. Fink, *The National Wildlife Refuges: Theory, Practice, and Prospect*, 18 HARV. ENV'T L. REV. 1, 65-66 (1994); A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555, 558-59 (1993).

81. 50 C.F.R. § 17.3 (2023). The habitat modification regulation had already been in place for two decades. Fish and Wildlife "originally promulgated the regulation in 1975 and amended it in 1981 to emphasize that actual death or injury of a protected animal is necessary for a violation." Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 691 n.2 (1995) (citing 40 Fed. Reg. 44412, 44416 (Sept. 26, 1975); 46 Fed. Reg. 54748, 54750 (Nov. 4, 1981)). In light of later twists in the politics of biodiversity conservation, it is notable that both the original promulgation and its amendment took place under Republican administrations.

82. *See* 16 U.S.C. §§ 1532(19), 1538(a)(1).

83. 515 U.S. 687 (1995).

84. *See id.* at 714-36 (Scalia, J., dissenting).

because a battle of canons ended (at worst) in a draw,[85] and John Paul Stevens, the author of *Chevron*, could defer to Fish and Wildlife on the strength of that agency's superior scientific expertise.[86] Indeed, the Court may have deliberately overstated the case against the Fish and Wildlife Service's habitat modification rule, specifically to wage (and win) a war of words and values over biodiversity conservation.[87]

Sweet Home simmers still. To this day, it remains an object of legal controversy. In 2021, the Biden administration reversed the Trump administration's decision to remove 3.4 million acres from the critical habitat of the northern spotted owl (*Strix occidentalis caurina*).[88] The other bird at issue in *Sweet Home*, the red-cockaded woodpecker (*Dryobates borealis*), may soon be reclassified as threatened.[89] The process for designating threatened and endangered species follows a statutory formula, "necessary and advisable . . . for the conservation of such species,"[90] that dictates a considerable measure of deference to agency discretion.[91]

To be sure, Antonin Scalia scarcely saw the value of conserving endangered species. Even when he was not lamenting the conscription of freehold farmland for "national zoological use,"[92] Justice Scalia emphasized economic standing to contest the designations of threatened and endangered species.[93] Justice Scalia even mocked ecological bases for standing—alas.[94]

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85. The obvious analogy in military history is the tactical victory and strategic defeat of the German army at Kursk in 1943, the largest armor battle ever. *See generally* CHRISTOPHER A. LAWRENCE, THE BATTLE OF PROKHOROVKA: THE TANK BATTLE AT KURSK, THE LARGEST CLASH OF ARMOR IN HISTORY (abr. ed., 2019).

86. *See Sweet Home*, 515 U.S. at 703-04 n.18, 708. *See generally* William N. Eskridge, Jr., *Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J. 865 (2013).

87. *See* Victoria F. Nourse, *Decision Theory and* Babbitt v. Sweet Home*: Skepticism About Norms, Discretion, and the Virtues of Purposivism*, 57 ST. LOUIS U. L.J. 909 (2013).

88. *See* Revised Designation of Critical Habitat for the Northern Spotted Owl, 86 Fed. Reg. 62606 (Nov. 10, 2021).

89. *See* Reclassification of the Red-Cockaded Woodpecker from Endangered to Threatened with a Section 4(d) Rule, 87 Fed. Reg. 6118 (Feb. 3, 2022).

90. 16 U.S.C. § 1533(d).

91. *See* Webster v. Doe, 486 U.S. 592, 600 (1988) (holding that "necessary or advisable" is a statutory formula that "fairly exudes deference" and "foreclose[s] the application of any meaningful judicial standard of review" under 5 U.S.C. § 701(a)(2) as action "committed to agency discretion by law").

92. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 714 (1995) (Scalia, J., dissenting) ("The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.").

93. *See* Bennett v. Spear, 520 U.S. 154, 166, 176-77 (1997).

94. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 566 (1992) (mocking as "beyond all reason" the "animal nexus" and "vocational nexus" theories of standing, "whereby anyone who has an interest in studying or seeing . . . endangered animals anywhere on the globe" or

But Justice Scalia's aversion to biodiversity conservation had no credible basis in the *language* of the law. He invariably delighted in conferring the broadest possible reading upon the verb "take" in the Fifth Amendment,[95] in stark contrast with his narrow reading of the same verb in section 9 of the Endangered Species Act. The only consistency in Justice Scalia's "takes" on these constitutional and statutory disputes was that the landowner always won.[96]

Throughout his tenure on the high court, Justice Scalia also flashed open hostility to science, especially biology. Even though nothing makes sense in biology except in the light of evolution,[97] Justice Scalia took pains to mock the "much beloved secular legend of the Monkey Trial."[98] Equating instruction on evolution with the teaching of biblical creationism or "intelligent design"—nothing more than the velvet glove of soothing rhetoric on the iron fist of theocratic dogma[99]—should have automatically disqualified Antonin Scalia from high office, much less an exalted seat on the Supreme Court.[100] We should have expected nothing less from a Justice who disclaimed any knowledge of molecular biology, or even "belief" in that discipline.[101]

B. *In Principio Erat Verbum*

There was one thing that Antonin Scalia loved as much as he hated science: etymology. Soon after disrupting confrontation clause jurisprudence because the Latin root of *confront* literally means "forehead,"[102] Justice Scalia again used Latin etymology to destroy a

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"anyone with a professional interest in such animals" would have standing to challenge rulemaking under the Endangered Species Act). *But cf.* JOHN CROWE RANSOM, *Bells for John Whitesides' Daughter*, *in* CHILLS AND FEVER 16, 16 (1924) ("The lazy geese, like a snow cloud[,] . . . sleepy and proud, . . . cried in goose, Alas").

95. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). *See generally* John D. Echeverria, *Antonin Scalia's Flawed Takings Legacy*, 41 VT. L. REV. 689 (2017).

96. Jim Chen, *Regulatory Education and Its Reform*, 16 YALE J. ON REG. 145, 161 (1999) (reviewing JEFFREY L. HARRISON, THOMAS D. MORGAN & PAUL R. VERKUIL, REGULATION AND DEREGULATION: CASES AND MATERIALS (1997)).

97. *See* Theodosius Dobzhansky, *Nothing in Biology Makes Sense Except in the Light of Evolution*, 35 AM. BIOLOGY TCHR. 125 (1973); *see also* Ajit Varki, *Nothing in Medicine Makes Sense, Except in the Light of Evolution*, 90 J. MOLECULAR MED. 481 (2012).

98. Tangipahoa Parish Bd. of Educ. v. Freiler, 530 U.S. 1251, 1255 (2000) (Scalia, J., dissenting from the denial of certiorari).

99. *Cf.* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 8 (1987) ("Difference is the velvet glove on the iron fist of domination.").

100. *See generally* Jim Chen, *Legal Mythmaking in a Time of Mass Extinctions: Reconciling Stories of Origins with Human Destiny*, 29 HARV. ENV'T L. REV. 279, 304-15 (2005).

101. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576, 596 (2013) (Scalia, J., concurring in part and concurring in the judgment) (disclaiming "knowledge or even my own belief" in the "fine details of molecular biology").

102. *See* Coy v. Iowa, 487 U.S. 1012, 1016 (1988) ("[T]he word 'confront' ultimately derives from the prefix 'con-' (from 'contra' meaning 'against' or 'opposed') and the noun 'frons'

deregulatory scheme in common carrier regulation. In *MCI Telecommunications Corp. v. AT&T Co.*,[103] he reasoned that *modify* permits only incremental change because that verb's Latin roots—compare the cognates *moderate*, *modulate*, *modest*, and *modicum*—foreclose a broader definition synonymous with *change*.[104] Never mind Justice Scalia's failure to endorse parallel reasoning by Justice Breyer, who invoked the etymological roots of *carry* to hold that the phrase "uses or carries a firearm" covers the transportation of a gun inside the glove compartment of a car or truck.[105]

Remarkably, even though *Sweet Home* was decided just a year after *MCI*, Justice Scalia neglected in *Sweet Home* to deploy any of *MCI*'s elaborate etymological analyses of *modify* and its cognates. The Fish and Wildlife rule in *Sweet Home* had targeted "significant habitat *modification* or degradation."[106] Despite crafting the new phrase "environmental modification" in his *Sweet Home* dissent,[107] Justice Scalia did not cite *MCI*, much less apply his analysis of *modify* from that case. If Justice Scalia had spoken earnestly and not merely opportunistically in *MCI*, he surely would have condemned "significant habitat modification" as an incoherent oxymoron. How can "modification" in the sense of only minor or incremental change possibly accommodate the adjective *significant*? Indeed, the near-synonym for the word *adjective*—*modifier*—conveys exactly the sense of limited change that Justice Scalia had intuitively grasped in *MCI*. Then again, *Sweet Home* was a case about biology, an intellectual blind spot in the mind of Justice Scalia.

In addition to the linguistic tension within the phrase "significant habitat modification," the very idea that *modification*, an etymologically constrained subset of *change*, could suffice to "harm" wildlife dramatically expands the reach of the Fish and Wildlife rule. However low the rhetorical fruit may have hung, Justice Scalia evidently was neither hungry nor clever enough to grab the easy meal.

(forehead)."). *But see* Maryland v. Craig, 497 U.S. 836, 840 (1990) (permitting "a child witness in a child abuse case [to] testify[] against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television").

103. 512 U.S. 218 (1994).

104. *See id.* at 225.

105. *See* Muscarello v. United States, 524 U.S. 125, 128 (1998) (citing roots such as Latin *carum*, Old French *carrier*, and late Latin *carricare* to "explain[] why the first, or basic, meaning of the word 'carry' includes conveyance in a vehicle"). Justice Scalia joined Justice Ginsburg's dissent. *See id.* at 139.

106. 50 C.F.R. § 17.3 (2023) (emphasis added).

107. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 723 (1995) (Scalia, J., dissenting).

Antonin, Antonin![108] If only he had remembered *MCI* from the previous Term, Justice Scalia could have enshrined "significant habitat modification" in the same class of notorious legal contradictions as "absolutely necessary"[109] and "all deliberate speed."[110] If the word *substantially* unifies the meaning of the Equal Access to Justice Act with that of the Administrative Procedure Act and the Federal Rules of Civil Procedure, then surely the word *modify* applies with equal force to the conservation of endangered species and the regulation of telephone companies.[111] In all events, it does "say[] something about [Justice Scalia's] approach" to *Sweet Home* "that the possibility of applying" *MCI*'s reading of *modify* "never crossed [his] mind."[112]

MCI is perhaps most notorious for Justice Scalia's adventures in dictionary shopping and his failure, either deliberate or obtuse, to distinguish between descriptive and prescriptive dictionaries—or even to remember whether *Webster's Third* was on his list of approved dictionaries.[113] But *MCI* should be better known for what may have been Justice Scalia's most consequential failure to observe his own "whole code" rules. First, identical words in diverse statutes should be held to the same meaning.[114] Second, differences in statutory

108. *Compare* WILLIAM FAULKNER, ABSALOM, ABSALOM! (1936), *with* 2 *Samuel* 15:1-17.

109. U.S. CONST. art. I, § 10, cl. 2; *accord* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 343 (1819).

110. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955). *See generally* Jim Chen, *Poetic Justice*, 28 CARDOZO L. REV. 581 (2006).

111. *Cf.* Pierce v. Underwood, 487 U.S. 552, 565 (1988).

112. Chisom v. Roemer, 501 U.S. 380, 412 (1991) (Scalia, J., dissenting).

113. *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 225-28 (1994). *See generally* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 315-30 (1998) (arguing that Justice Scalia's use of dictionaries undermines his purported commitment to textualism); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013); Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77 (2010); Miranda McGowan, *Do As I Do, Not As I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 148-49, 152 (2008) (tracking inconsistencies in Justice Scalia's use of dictionaries); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 243 (1999); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1439 (1994) (contrasting Justice Scalia's use of dictionaries with other Justices' practices). In *MCI*, Justice Scalia evidently forgot that he had cited WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981) with approval just two Terms before. *See* Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 223, 226 (1992) (citing *Webster's Third* to define *solicit* and *activity*). Because *Webster's Third* reported a definition of *modify* that Justice Scalia disparaged as "common error" or even "careless or ignorant misuse" masquerading "as proper usage," *MCI* gave that dictionary zero weight. 512 U.S. at 228 & n.3. But Justice Scalia cited *Webster's Third* before *Wrigley* and after *MCI*. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 466 (2001); Fort Stewart Schs. v. FLRA, 495 U.S. 641, 645 (1990); Lukhard v. Reed, 481 U.S. 368, 374 (1987).

114. *See Pierce*, 487 U.S. at 564-65.

wording dictate divergent interpretations.[115] The whole code rules generalize traditional canons such as *noscitur a sociis*,[116] the rule against surplusage,[117] and *expressio unius est exclusio alterius*[118] to the United States Code writ large, as though the entirety of federal statutory language should be treated as a cohesive and comprehensive linguistic corpus.[119]

In concert, these rules of consistent usage and meaningful variation would confine the impact of *MCI* to those instances where legal language recites that famously modest verb, *modify*, and, through that recitation, limits administrative discretion to adjust the implementation of a statute. By no means is the modest verb *modify* confined to Title II of the Communications Act of 1934. *Modify* appears throughout the United States Code. Justice Scalia failed to cite *MCI* or otherwise evaluate a pivotal 1996 amendment to the Communications Act, which provided that nothing in the Telecommunications Act of 1996 "shall be construed to *modify*, impair, or supersede the applicability of any of the antitrust laws."[120] Without exploring the precise meaning of *modify*, Justice Scalia merely concluded that this "saving clause preserves those 'claims that satisfy established antitrust standards.' "[121] Rule 11 of the Federal Rules of Civil Procedure

115. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 88 (1991).

116. *See, e.g.*, Lagos v. United States, 138 S. Ct. 1684, 1688-89 (2018) (defining *noscitur a sociis* as "the well-worn Latin phrase that tells us that statutory words are often known by the company they keep"). In plain English: Words of a feather flock together.

117. *See, e.g.*, Loughrin v. United States, 573 U.S. 351, 358 (2014) (expressing the " 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute' " (quoting Williams v. Taylor, 529 U.S. 362, 404 (2000))); *accord* Parker Drilling Mgmt. Servs., Ltd. v. Newton, 139 S. Ct. 1881, 1890 (2019).

118. *See, e.g.*, Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 162, 168 (1993). *See generally* John Mark Keyes, *Expressio Unius: The Expression That Proves the Rule*, 10 STATUTE L. REV. 1 (1989); Clifton Williams, *Expressio Unius Est Exclusio Alterius*, 15 MARQ. L. REV. 191 (1931).

119. *See generally In re* Adoption of Baby E.Z., 266 P.3d 702 (Utah 2011); LAW AS DATA: COMPUTATION, TEXT, & THE FUTURE OF LEGAL ANALYSIS (Michael A. Livermore & Daniel N. Rockmore eds., 2019); Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915. "Corpus linguistics is an empirical approach to the study of language that uses large, electronic databases" gathering sources from books, newspapers, magazines, and the like. Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 828 (2018) (footnote omitted).

120. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 143 (codified as amended in scattered sections of 47 U.S.C.) (emphasis added).

121. Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 406 (2004) (quoting Brief for the United States and the Federal Communications Commission as Amici Curiae Supporting Neither Party at 8, Covad Commc'n Co. v. Bell Atl. Corp., 398 F.3d 666 (D.C. Cir. 2005) (No. 02-7057)).

requires "a nonfrivolous argument for extending, *modifying*, or reversing existing law or for establishing new law."[122] No other formula more succinctly summarizes the "course and pattern of legal change in a common law system."[123]

These uses share a common thread. In the Telecommunications Act's saving clause for antitrust claims and in Rule 11, *modify* appears as one component of a three-verb formula purporting to cover all forms of change. The contemporary sense of *modify* as a straightforward synonym of *change*, as recorded in *Webster's Third International Dictionary*, seems better suited to these formulas, relative to the version of *modify* injected into Middle English after the Norman conquest. But we shall never know whether Justice Scalia considered such applications of *modify* to be consistent with Latin etymology and his treatise on the history of that verb in *MCI*.

Politically salient controversies over mitigation of COVID-19 have also hinged on the meaning of *modify*. The Head Start Program for at-risk children directs the Secretary of Health and Human Services to "*modify*, as necessary, program performance standards by regulation applicable to Head Start agencies and programs."[124] The Occupational Safety and Health Act provides a procedure by which the Secretary "may by rule promulgate, *modify*, or revoke any occupational safety or health standard."[125] A federal district court, relying on *MCI*'s authoritative interpretation of *modify* and the semantically and syntactically unassailable observation that "[t]he power to modify is obviously narrower than the power to 'promulgate, modify, or revoke,' " has held that "the power to 'modify' Head Start performance standards" cannot sustain a COVID-19 vaccination mandate.[126]

By contrast, delegations of regulatory power not constrained by a verb as modest as *modify* should be construed according to countervailing evidence of congressional trust in administrative expertise and judgment. In short, if a statute uses less constrained language to authorize discretionary change in direction or policy by the agency, *MCI* should give way to *Chevron*'s default regime. Again, this is a whole code generalization of the familiar Latin canon,

122. FED. R. CIV. P. 11(b)(2) (emphasis added).

123. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 664 (2001).

124. 42 U.S.C. § 9836a(a)(1) (emphasis added).

125. 29 U.S.C. § 655(b) (emphasis added).

126. *See* Louisiana v. Becerra, 629 F. Supp. 3d 477, 490 (W.D. La. 2022), *aff'd in part, vacated in part, remanded*, No. 22-30748, 2023 WL 8368874 (5th Cir. Aug. 29, 2023); *see also* Texas v. Becerra, 577 F. Supp. 3d 527, 540 (N.D. Tex. 2021).

expressio unius est exclusio alterius.[127] To specifically demand modesty at the margins of one regulatory scheme is to permit flexibility and strength through broader delegations elsewhere in the administrative state.

Indeed, authorizations to do more than *modify*—including statutory formulas combining *modify* with other verbs—project the desire of Congress that an agency flex its power and sound judgment. The opposite presumption, as it has come to be embraced by the major questions doctrine, enables the Supreme Court to hide an elephant of a constitutional revolution behind a mousehole containing nothing more than Latin etymology and a colorful metaphor.

Justice Scalia is justly famous for his *Chisom* formula, a "regular method" for statutory interpretation.[128] *Chisom* is not *Chevron*, but it does follow a superficially similar two-step structure. First, Justice Scalia exhorted, "find the ordinary meaning of [statutory] language in its textual context."[129] Second, use "established canons of construction" to determine "whether there is any clear indication" to apply "some permissible meaning other than the ordinary one."[130] Because of its relative briskness, Justice Scalia's *Chisom* formula might be considered the polka of statutory interpretation, whereas *Chevron*'s relatively ponderous two-step follows *alla breve*.[131]

In practice, fixing the membership of that class of "established" canons has proved tricky.[132] Since many canons "rest on sources that are inherently evolutive, such as the common law or the Constitution," we should expect "even established canons [to] evolve over time."[133] The strength, arbitrariness, and virulence of a new strain of the constitutional avoidance canon, for instance, could be said to vary directly with the weakness of the constitutional defect or source of doubt to be avoided.

127. Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 162, 170 (1993).

128. Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

129. *Id.*

130. *Id.*

131. That musical analogy is just my 2¢.

132. *Cf.* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2156 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("A [hotly disputed] problem is determining which constitutional or quasi-constitutional values justify a presumption or plain statement rule.").

133. Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1991 (2005).

The most egregious instance of such a zero-substance clear statement rule may be *Gregory v. Ashcroft*.[134] In light of the vacuity of Tenth Amendment protection for putatively integral state-law functions after *Garcia*,[135] it is hardly surprising that the *Gregory* canon failed to shield the election of state judges from regulation under the Voting Rights Act—on the very day *Gregory* was decided.[136] And that voting rights controversy, *Chisom*, was the very occasion on which Justice Scalia announced his preferred approach to statutory interpretation. The ordinary meaning of words, so one might surmise, carries greater weight in the absence of implausible substantive canons, evidently concocted in service of "old, unhappy, far-off things, / And [legal] battles long ago."[137] On such terms, today's Court wages stealth constitutional law.[138]

C. A Major Mousetrap… and a Missed Opportunity

The nascent "major questions" doctrine is still unfolding. Its consequences will assuredly deepen as that still embryonic doctrine keeps slouching toward Washington.[139] Precisely because the center cannot hold, especially on the threshold of the second coming of a constitutional doctrine long ago rejected but soon to be reborn, we should emphasize how an exercise in bestial rhetoric by Justice Scalia effectively presaged the major questions doctrine. In yet another controversy over air pollution, Justice Scalia announced that Congress "does not . . . hide elephants in mouseholes."[140] This phrase, because of and not merely in spite of its frivolity,[141] appears to have begotten the major questions doctrine in a rush of murine glory.[142]

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134. 501 U.S. 452 (1991).

135. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)).

136. *See* Chisom v. Roemer, 501 U.S. 380, 411-12 (1991) (Scalia, J., dissenting).

137. WILLIAM WORDSWORTH, *The Solitary Reaper*, *in* 2 POEMS 7, 8 (1815); *accord* Kaiser Aetna v. United States, 444 U.S. 164, 177 (1979).

138. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); Anita Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513 (2019); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

139. *Cf.* WILLIAM BUTLER YEATS, *The Second Coming*, *in* THE COLLECTED POEMS OF W.B. YEATS 158 (Wordsworth Editions 2000) ("And what rough beast, its hour come round at last, / Slouches towards Bethlehem to be born?").

140. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

141. *Cf.* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

142. *Cf.* YEATS, *Leda and the Swan*, *in* THE COLLECTED POEMS OF W.B. YEATS, *supra* note 139, at 182.

The "elephants in mouseholes" dictum overshadowed the doctrinal innovation for which *Whitman v. American Trucking Ass'ns*[143] truly should be known: being only the second of two instances in which the Supreme Court has rejected an agency interpretation of law under *Chevron*'s more typically deferential second step. Despite finding the Clean Air Act "to some extent ambiguous" with respect to "the implementation of revised ozone NAAQS [National Ambient Air Quality Standards]," *Whitman* reasoned that "the [agency went] beyond the limits of what is ambiguous and contradict[ed] what [was] quite clear."[144] In so concluding, *Whitman* relied on *AT&T Corp. v. Iowa Utilities Board*,[145] which had held that the FCC had unreasonably interpreted the words "necessary" and "impair" in the Bell operating company provision of the Telecommunications Act of 1996[146] and therefore earned no deference for its implementing regulation.[147]

Whitman and *Iowa Utilities Board* provided a more mundane—and perhaps vastly underexploited—clarification of *Chevron*. Aside from those two opinions, both written by Justice Scalia, the Supreme Court has never elaborated the ways in which a statute may be vague or ambiguous (and therefore unfit for resolution under *Chevron*'s first step), yet also unsuitable for deference under *Chevron*'s second step because the agency's interpretation of that statute was unreasonable. Read more modestly, Justice Scalia's "elephants in mouseholes" dictum merely counsels courts not to infer, absent better evidence, that Congress would have taken a "roundabout way" or "an obscure path" to achieve "a simple result."[148]

The reframing of *Whitman* as a harbinger of a full-blown major questions doctrine is doubly unfortunate. That decision's colorful "elephants in mouseholes" dictum inspired later doctrinal developments that were not only dreadful in their own right, but wholly unnecessary. *Whitman* and *Iowa Utilities Board* showed the unrealized promise of challenging excessively ambitious agency interpretations as "unreasonable" and therefore unworthy of deference under the second step of *Chevron*. Any form of judicial deference demands that the agency's interpretation fall "within the bounds of reasonable interpretation."[149] "And let there be no mistake: That is a requirement an agency can fail."[150]

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143. 531 U.S. 457 (2001).

144. *Id.* at 481 (citing AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 392 (1999)).

145. 525 U.S. 366 (1999).

146. 47 U.S.C. § 251(d)(2).

147. *See Iowa Utils. Bd.*, 525 U.S. at 392 ("Because the Commission has not interpreted the terms of the statute in a reasonable fashion, we must vacate 47 CFR § 51.319 (1997).").

148. Kloeckner v. Solis, 568 U.S. 41, 52 (2012).

149. City of Arlington v. FCC, 569 U.S. 290, 296 (2013).

150. Kisor v. Wilkie, 139 S. Ct. 2400, 2416 (2019).

That second step has always given rise to the sharpest criticisms of *Chevron*. In practice, the second step has proved too facile in directing judges to defer to agencies. Doctrinaire textualism does not invariably succeed in delivering a decisive blow against agencies in step one. Especially because the toolkit of Antonin Scalia's "new textualism" (namely: dictionaries, etymology, and interpretive canons, but no legislative history except rejected proposals) is so limited in reach and clarity,[151] judges seeking to pierce the veneer of statutory clarity can often find at least a trace of semantic doubt. Time flies like an arrow, after all, and fruit flies like a banana.[152] Put out the light,[153] and then put out the light, the cigar, and the cat.[154] The weakness of step two's toolkit for detecting unreasonableness may yield an instruction to defer, contrary to a reviewing court's political or moral commitments. More robust review of agency interpretations for potential unreasonableness under step two of *Chevron* might be characterized as second-chance textualism.

Among other missed opportunities, a strengthening of *Chevron*'s second step (or at least a more thorough exploration of its mechanisms beyond reflexive deferral upon the discovery of textual uncertainty) might have resolved Antonin Scalia's own paradoxical view of *Chevron*. Justice Scalia acknowledged that his own stronger commitment to inferring "the meaning of a statute . . . from its text and from its relationship with other laws" reduced the rate at which he deferred to agencies.[155] By contrast, judges "who abhor[] a 'plain meaning' rule" and are "willing to permit the apparent meaning of a statute to be impeached by the legislative history" and other extratextual sources of statutory meaning may defer more often.[156]

151. *See generally, e.g.*, James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006).

152. Among other sources, STEVEN PINKER, THE LANGUAGE INSTINCT 209 (William Morrow & Co. 1994) describes these sentences as examples of syntactic ambiguity and antanaclasis, a literary trope in which a single word or phrase is repeated, but in two different senses. *See generally* EDWARD P.J. CORBETT & ROBERT J. CONNORS, STYLE AND STATEMENT 62-63 (1999).

153. WILLIAM SHAKESPEARE, OTHELLO, THE MOOR OF VENICE act. V, sc. 2, l. 7, at 227 (Bantam Classics 2005) ("Put out the light, and then put out the light.").

154. MICHAEL FLANDERS & DONALD SWANN, THE SONGS OF MICHAEL FLANDERS AND DONALD SWANN 143 (Faber ed., Alfred Music 1977); *accord* Anya Bernstein, *Differentiating Deference*, 33 YALE J. ON REG. 1, 7 (2016) (recognizing "multivalence," or the existence of "multiple correct possibilities," among semantic connections between words in a sentence).

155. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

156. *Id.*

Empirical support for Justice Scalia's observations suggests that commitment to textualism raises the probability that a reviewing court applies *Chevron* but reduces the overall rate of success enjoyed by agencies.[157] Justice Scalia admitted that *Chevron* rarely required him "to accept an interpretation which, though reasonable, [he] would not personally adopt."[158]

Justice Scalia was hardly the only judge to have "experience[d] some difficulty in deferring" to other institutions' interpretations at the expense of his own "active, creative approach" to legal language.[159] For instance, Judge Raymond Kethledge of the Sixth Circuit has confessed that he had "never . . . had occasion" in his first decade on the bench "to find a statute ambiguous."[160] Exhorting other judges not to "defer to an executive agency[]" until "the court has exhaustively demonstrated—and not just recited—that every judicial tool has failed" suggests extreme (though not necessarily justified) confidence in the correctness of those interpretive tools.[161]

In spotting the tension within his own approach to *Chevron*, Justice Scalia did more than confess his commitment to an iconoclastic if not strictly idiosyncratic—and often self-contradictory—interpretive method. He charted a road not taken, one of two that "diverged in a wood," plainly was "less traveled by," and might have "made all the difference."[162] Taken at face value and in good faith, Justice Scalia's *Chevron* paradox and the two "second step" cases in which he rejected agency interpretations as unreasonable responses to statutory uncertainty suggest that cases inviting application of the major questions doctrine might be capable of resolution under *Chevron*. Though this "escape hatch [to] the *Chevron* doctrine" more typically assumes the form of "a single, final judicial construction at . . . step one,"[163] *Whitman* and *Iowa Utilities Board* demonstrate the unrealized potential of avoiding deference at *Chevron*'s second step.

Today's Court, however, strides to the bar armed and loaded for mouse. Justice Scalia's "elephants in mouseholes" reasoning—or, more formally, the observation that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or

157. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 992 tbl.3 (1992); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 355-63 (1994) [hereinafter Merrill, *Textualism*].

158. Scalia, *supra* note 155, at 521.

159. Merrill, *Textualism*, *supra* note 157, at 372.

160. Raymond M. Kethledge, *Ambiguity and Agency Cases: Reflection After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 320 (2017).

161. Valent v. Comm'r of Soc. Sec., 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting) ("Agencies are experts at policy, but not necessarily at statutory interpretation.").

162. ROBERT FROST, *The Road Not Taken*, *in* THE ROAD NOT TAKEN AND OTHER POEMS 87, 87 (David Orr ed., Penguin Classics 100th-Anniversary ed. 2015).

163. Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763, 1787-88 (2023).

ancillary provisions"—relied squarely on *MCI*.[164] Paired with a contemporaneous controversy over the reach of the Food and Drug Administration's jurisdiction over tobacco,[165] Justice Scalia's murine dictum has grown into a monstrous doctrine capable of overtaking not only *Chevron*, but also much if not all of the judicial apparatus for reviewing agency interpretations of law.

This mouse comes as a wolf.[166] In further cases contesting the scope of congressional delegations over drugs used in assisted suicide,[167] greenhouse gas emissions from stationary sources,[168] and health insurance tax credits,[169] the Court has rejected assertions of agency jurisdiction whenever the controversy involved a matter of "vast 'economic and political significance' " and the Justices failed to find clear congressional authorization supporting the agency's assertion of regulatory authority.[170] The Justices expressed special skepticism toward the purported "discovery" of newly revealed or realized power latent in long dormant statutes, as if Congress or even the "general public" could attain adverse possession against claims of power by the dreaded regulatory state.[171]

In two COVID-19-related disputes, the Court has summarily rejected the CDC's nationwide eviction moratorium[172] and OSHA's vaccination mandate.[173] Each of these cases concluded that the federal agency had overstepped beyond the more modest limits on the regulatory authority that Congress had conferred. In the politicized law of pandemic response, Neil Gorsuch has objected to every COVID-related legal restriction that has come before the Justices.[174] He has

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164. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (citing MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994)).

165. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000); *accord Whitman*, 531 U.S. at 468.

166. *Cf.* Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("But this wolf comes as a wolf.").

167. *See* Gonzales v. Oregon, 546 U.S. 243 (2006).

168. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014).

169. *See* King v. Burwell, 576 U.S. 473 (2015).

170. *Utility Air*, 573 U.S. at 324.

171. *Id.*

172. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam).

173. *See* Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109 (2022) (per curiam).

174. *See* Austin v. U.S. Navy Seals 1-26, 142 S. Ct. 1301, 1302 (2022) (Alito, J., dissenting, joined by Gorsuch, J.) (supporting a challenge by 35 Navy Seals and other military personnel to a vaccine mandate); *OSHA*, 595 U.S. at 121 (Gorsuch, J., concurring) (disputing "whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people"); Biden v. Missouri, 595 U.S. 87, 98 (2022) (Thomas, J., dissenting, joined by Alito, Gorsuch & Barrett, JJ.) (disputing a federal mandate that medical facilities order their employees, volunteers, and contractors to receive a COVID-19 vaccine); *id.* at 105 (Alito, J., dissenting, joined by Thomas, Gorsuch & Barrett, JJ.); Dr. A v. Hochul, 142 S. Ct. 552 (2021) (Gorsuch, J.,

taken further pains to subjugate "the government's claim of special expertise in a matter of high importance involving public health or safety" to "constitutionally protected [religious] liberty."[175] In describing governmental action "[s]ince March 2020" as perhaps "the greatest intrusions on civil liberties in the peacetime history of this country," Neil Gorsuch plants himself firmly on Team Coronavirus.[176] The acrid odor of hydroxychloroquine and ivermectin,[177] with notes of sodium hypochlorite,[178] permeates the courtroom.

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dissenting) (disputing a New York regulation that required healthcare workers to receive a COVID-19 vaccine); Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69-75 (2020) (Gorsuch, J., concurring). *See generally* John Inazu, *COVID-19, Churches, and Culture Wars*, 18 U. ST. THOMAS L.J. 307 (2022).

175. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021) (statement of Gorsuch, J.).

176. Arizona v. Mayorkas, 143 S. Ct. 1312, 1314 (2023) (statement of Gorsuch, J.).

177. Attacks on standard public health policies, such as vaccination, masking, and "shutdown" restrictions, have become embedded in the politics of pandemic response. Courts often encounter claims grounded in unfounded faith in "alternative medications or supplements such as ivermectin or hydroxychloroquine" and driven by conservative entertainment masquerading as news. McDonald v. Lawson, No. 8:22-CV-01805-FWS-ADS, 2022 WL 18145254, at *1 (C.D. Cal. Dec. 28, 2022); *see also, e.g.*, Salier v. Walmart, Inc., 622 F. Supp. 3d 772, 775 (D. Minn. 2022) (asserting "various tort claims related to Walmart's and Hy-Vee's refusals to fill . . . prescriptions for ivermectin and hydroxychloroquine" for treatment of COVID-19 infections). Such groundless assertions have spread to high governmental office. *See, e.g.*, H. Holden Thorp, *Remember, Do No Harm?*, 378 SCIENCE 231 (2022) (lamenting how Joseph Ladapo, who led "the advocacy group America's Frontline Doctors" to a Supreme Court protest "falsely stating that hydroxychloroquine was a cure for COVID-19" later "became the surgeon general of Florida and a faculty member at the University of Florida College of Medicine"). Neither hydroxychloroquine nor ivermectin has demonstrated clinical effectiveness in treating or preventing COVID-19.

On hydroxychloroquine, see generally S.A. Meo, D.C. Klonoff & J. Akram, *Efficacy of Chloroquine and Hydroxychloroquine in the Treatment of COVID-19*, 24 EUR. REV. FOR MED. & PHARMACOLOGICAL SCIS. 4539 (2020); Neeraj Sinha & Galit Balayla, *Hydroxychloroquine and COVID-19*, 96 POSTGRADUATE MED. J. 550 (2020); Caleb P. Skipper et al., *Hydroxychloroquine in Nonhospitalized Adults with Early COVID-19: A Randomized Trial*, 173 ANNALS INTERNAL MED. 623 (2020). On ivermectin, see generally Andrew Bryant et al., *Ivermectin for Prevention and Treatment of COVID-19 Infection: A Systematic Review, Meta-Analysis, and Trial Sequential Analysis to Inform Clinical Guidelines*, 28 AM. J. THERAPEUTICS e434 (2021); Mario Cruciani et al., *Ivermectin for Prophylaxis and Treatment of COVID-19: A Systematic Review and Meta-Analysis*, 11 DIAGNOSTICS, no. 9, 2021, *correction in* 11 DIAGNOSTICS, no. 12, 2021; Jiawen Deng et al., *Efficacy and Safety of Ivermectin for the Treatment of COVID-19: A Systematic Review and Meta-Analysis*, 114 QJM 721 (2021), *correction in* 115 QJM 706 (2022); Pierre Kory et al., *Review of the Emerging Evidence Demonstrating the Efficacy of Ivermectin in the Prophylaxis and Treatment of COVID-19*, 28 AM. J. THERAPEUTICS e299 (2021), *correction in* 28 AM. J. THERAPEUTICS e813 (2022); MARIA POPP ET AL., COCHRANE DATABASE OF SYSTEMATIC REVS., IVERMECTIN FOR PREVENTING AND TREATING COVID-19 (2022), https://www.cochranelibrary.com/cdsr/doi/10.1002/14651858.CD015017.pub2/full [https://perma.cc/FH2D-7EGH].

178. *See* Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1159-61 (M.D. Fla. 2022) (holding that the word *sanitation*, as used in the Public Health Service Act of 1944, 42 U.S.C. § 264(a), is confined to "cleaning measures" and therefore unable to support a mask mandate issued by the CDC), *vacated as moot sub nom.* Health Freedom Def. Fund v. President of the U.S., 71 F.4th 888 (11th Cir. 2023). *But cf.* Oberheim v. Bason, 565 F. Supp. 3d 607 (M.D. Pa. 2021) (holding that a public school's mask mandate "comfortably

III. ANNUNCIATION AND ARRIVAL

A. A Sordid Second Coming

The inevitable overruling of *Chevron* serves mythological as well as legal and evolutionary purposes. The quasi-religious narrative accompanying the fall of *Chevron* holds two effectively divine heroes at its center: Antonin Scalia and Neil Gorsuch. One Justice has died. Another has risen. The conservative Constitution shall come again.[179]

Justice Scalia's opinion in *Whitman v. American Trucking Ass'ns*[180] shocked *Chevron*'s jurisprudential foundation on a distinct but related front. *Whitman* revived a nearly forgotten constitutional doctrine.[181] After a brief but supposedly inconsequential episode during the constitutional showdowns of the New Deal,[182] the nondelegation doctrine had all but faded into the fossil record of constitutional paleontology[183]—if the doctrine ever had a historical basis at all.[184] As

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clear[ed] this low bar" of rational basis review of a substantive due process claim). Legal consideration of bleach has devolved from *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967), into serious inquiry into the public health impacts of comments by the President of the United States suggesting that bleach and ultraviolet light might "cure" COVID-19. *Compare, e.g.*, Gavin Yamey & Gregg Gonsalves, *Donald Trump: A Political Determinant of Covid-19*, BMJ, Apr. 2020, at 1 (lamenting Trump's contributions to preventable death and illness: "He downplayed the risk and delayed action, costing countless avertable deaths"), *with* Natalia Knoblock & Ryan Malkin, *The Ultraviolet Bleach Corpus*, LINGUISTICS VANGUARD (Apr. 12, 2022), https://doi.org/10.1515/lingvan-2020-0145 [https://perma.cc/LS4Q-LBLP] ("This paper presents a new corpus of computer-mediated communication on the topic of Trump's comments about household disinfectants and ultraviolet light as cures for COVID-19. The corpus, named the Ultraviolet Bleach (UVB) corpus, contains message board comments devoted to Trump's suggestions.").

179. The recitation, "Christ has died[,] Christ is risen[,] Christ will come again[,]" is known as the memorial acclamation. *See generally* Fergus Ryan, Mysterium Fidei! *The Memorial Acclamation and Its Reception in French, English and Polish Missals*, 25 LITURGIA SACRA 69, 75 (2019). This acclamation may be considered a summary of the longer, more theologically comprehensive Nicene Creed. *See* A.E. BURNS, THE NICENE CREED 2-3 (Edwin S. Gorham 1909). The depiction of Justices Scalia and Gorsuch, and to a lesser degree other conservatives on today's Supreme Court, in terms that approach or cross the line of propriety is deliberate. The conservative perversion of constitutional law insults American civic religion in profane terms akin to the desecration of Christianity by politicians who profess a belief in Jesus while defiling Christian doctrine and tradition. I make no apologies for mocking the quasi-religious pretensions of conservative interpretations of the Constitution. *Cf. Lost: The Cost of Living* (ABC television broadcast Nov. 1, 2006) ("I have nothing to confess because I have not sinned. . . . I am proud of what I have done. I have done the best I could with the life I was given.").

180. 531 U.S. 457 (2001).

181. *See generally* William K. Kelley, *Justice Scalia, the Nondelegation Doctrine, and Constitutional Argument*, 92 NOTRE DAME L. REV. 2107 (2017).

182. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

183. *See, e.g.*, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685-88 (1980) (Rehnquist, J., concurring in the judgment) (articulating arguments for invalidating provisions of the Occupational Safety and Health Act under the nondelegation doctrine).

184. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

of the turn of the twenty-first century, the nondelegation doctrine had enjoyed exactly "one good year."[185]

Justice Scalia's *Whitman* opinion scarcely stirred the settled legal substrate. *Whitman* concluded that air quality standards "requisite to protect the public health" by "an adequate margin of safety"[186] were "well within the outer limits of [the Court's] nondelegation precedents."[187] Relative to delegations directing agencies to set "fair and equitable" prices[188] or "just and reasonable" rates,[189] the Clean Air Act—the sprawling statute that bridges *Chevron* with its de facto eclipse, if not sub silentio overruling, by the major questions doctrine—readily provides an "intelligible principle" to guide the exercise of delegated authority.[190]

These seemingly settled principles shifted radically in the 2019 case of *Gundy v. United States*.[191] Argued immediately before Brett Kavanaugh had assumed office after his grueling confirmation hearings,[192] *Gundy* would garner only four total votes in support of Elena Kagan's plurality opinion reaffirming the conventional approach to nondelegation. Justice Kagan described the moribund nondelegation doctrine as a weak source of claims whose resolution "always begins (and often almost always ends) with statutory interpretation."[193] Justice Kagan disposed of the nondelegation claim in accordance with the doctrine's evolution since the New Deal,[194] concluding that the Sex Offender Registration and Notification Act of 2006 requires the Attorney General to apply that statute "to all pre-Act offenders as soon as feasible."[195]

Neil Gorsuch delivered a treatise of a dissent, complete with 107 footnotes urging wholesale reconsideration and immediate revival of the nondelegation doctrine.[196] Three guideposts stood out in his

185. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

186. 42 U.S.C. § 7409(b)(1).

187. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001).

188. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 414 (1944).

189. *See, e.g.*, Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591 (1944).

190. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); *accord* Mistretta v. United States, 488 U.S. 361, 372 (1989).

191. 139 S. Ct. 2116 (2019).

192. Gundy was argued October 2, 2018; Brett Kavanaugh assumed office as an Associate Justice on October 6. *See generally, e.g.*, Christopher N. Krewson & Jean R. Schroedel, *Public Views of the U.S. Supreme Court in the Aftermath of the Kavanaugh Confirmation*, 101 SOC. SCI. Q. 1430 (2020); Julie Novkov, *The Troubled Confirmation of Justice Brett Kavanaugh*, *in* SCOTUS 2018: MAJOR DECISIONS AND DEVELOPMENTS OF THE US SUPREME COURT 125, 125-41 (David Klein & Morgan Marietta eds., 2019).

193. *Gundy*, 139 S. Ct. at 2123 (Kagan, J., plurality opinion).

194. *See id.* at 2129.

195. *Id.* at 2123 (citing Reynolds v. United States, 565 U.S. 432, 442-43 (2012)).

196. *See id.* at 2131-48 (Gorsuch, J., dissenting). *See generally* Jonathan Hall, Note, *The Gorsuch Test:* Gundy v. United States*, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175 (2020).

dissent. First, Justice Gorsuch conceded "that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.' "[197] Second, Justice Gorsuch observed that Congress "may make the application" of a "rule governing private conduct" contingent upon "executive fact-finding."[198] Third, preexisting executive and judicial powers "already within the scope" of those branches' constitutionally assigned responsibilities may be the subject of congressional delegation.[199]

Although Justice Gorsuch's vision of nondelegation has yet to reach its apotheosis in an opinion for the Court, it will almost certainly achieve one of two disequilibria. The first (and admittedly less likely) possibility is that Justice Gorsuch's effort to revive nondelegation will fail on its own terms. Exceptions for the grinding executive drudgery of "filling in the details" and "fact-finding," conceded with as much grudging condescension as Justice Gorsuch could muster, may swallow an abortive attempt to revive the nondelegation doctrine. One Justice's "important subject[]," after all, is another Justice's "intelligible principle."[200]

The more probable disequilibrium lies at the other extreme: nondelegation will spring back to life and undercut much of the legal apparatus of the contemporary regulatory state. "[I]f SORNA's delegation is unconstitutional," Justice Kagan observed, "then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs."[201] Confident that "Congress is hardly bereft of options" in response to a tightened vision of delegation, Justice Gorsuch denied that his alternative constitutional paradise would "spell doom for what some call the 'administrative state.' "[202] The terrifying meaninglessness of his "details" and "fact-finding" exceptions virtually guarantee the arbitrary invalidation of federal legislation on subjective, idiosyncratic grounds known only to Justices privy to a constitutional dogma that is "unsound in principle and unworkable in practice."[203]

Crucially, Justice Gorsuch explicitly connected the nondelegation and major questions doctrines: "Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its

197. Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

198. *Id.*

199. *Id.* at 2137 (quoting David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1260 (1985)).

200. *Compare* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825), *with* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

201. *Gundy*, 139 S. Ct. at 2130.

202. *Id.* at 2145 (Gorsuch, J., dissenting).

203. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985).

legislative power by transferring that power to an executive agency."[204] In a 2022 concurrence, Justice Gorsuch again emphasized that the "nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials."[205] Even though Justice "Gorsuch's call for a new nondelegation doctrine" remains a chimera (for the moment), the "logic" of that doctrine "seems to have been channeled into the major questions doctrine."[206]

But one of the Court's nondelegation precedents after 1935 (doubtlessly Neil Gorsuch's favorite year)[207] had already rebuffed the "suggestion that we must construe" a contested statute narrowly to avoid "a serious question of unconstitutional delegation of legislative power."[208] A single response, that a challenged statute is "clearly sufficient to meet any delegation doctrine attack," repels both the shark of the nondelegation doctrine and its remora of a closely affiliated version of the constitutional avoidance canon.[209]

For her part, Elena Kagan had drawn her own connections between *Chevron*, statutory interpretation, and delegation eighteen years before *Gundy*.[210] The inconclusive stalemate in *Gundy* gave Justice Gorsuch hope, even in defeat, that the Court would "in time again assume" what he considered the Justices' "constitutional responsibility."[211] The grand scheme joining *Chevron*, clear-statement expressions of the constitutional avoidance canon, and the nondelegation doctrine as substantive constitutional law had fully come of age.

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204. Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

205. Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring); *accord* West Virginia v. EPA, 142 S. Ct. 2587, 2619-20 (2022) (Gorsuch, J., concurring).

206. Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 498 (2023).

207. MY FAVORITE YEAR (Metro-Goldwyn-Mayer 1982).

208. Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 558-59 (1976) (quoting Brief for the Respondents at 42, *Algonquin*, 426 U.S. 548 (No. 75-382)).

209. *Id.* A lower court opinion rather remarkably anticipated the contretemps in *Gundy*. Three months before the Supreme Court decided *Gundy*, a judge on the Court of International Trade swam into doctrinally treacherous waters and expressed "grave doubts" over *Algonquin*, 426 U.S. 548, even "[w]hile acknowledging the binding force of that decision." Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1346-47 (Ct. Int'l Trade 2019) (Katzman, J., concurring dubitante), *aff'd*, 806 Fed Appx. 982 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 133 (2020). Such a path may be the only way forward for a lower court in a system of precedent that leaves to the Supreme Court "the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

210. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201.

211. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 589 (1985) (O'Connor, J., dissenting).

B. The Mouse That Roared: A Major Breakthrough

The 2022 case of *West Virginia v. EPA*[212] wove these strands into a new set of principles with the explicit name of the "major questions doctrine."[213] This novel doctrine purports to address the "particular and recurring problem" of "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[214] The specific failure in *West Virginia* evidently lay in the agency's purported discovery of a "newfound power" in the latent, untapped potential of an incidental "gap filler" and the assertion of "a regulatory program that Congress had conspicuously and repeatedly declined to enact" on its own.[215]

Like *Chevron*, *Whitman*, and even *Massachusetts v. EPA*,[216] *West Virginia* involved the implementation of the Clean Air Act. Section 111(a) of that statute directs the Environmental Protection Agency to set "[f]ederal standards of performance for new [stationary] sources" of air pollution by "determin[ing]," according to "the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements," the "best system of emission reduction."[217]

Chief Justice Roberts treated factors such as "cost," "health and environmental impact," and "energy requirements" not as "limits" on the agency, but rather as a revelation of "the breadth of . . . claimed authority."[218] And precisely because the word "system" permits a wide range of "definitional possibilities,"[219] the Chief Justice treated that word as "an empty vessel," a fatally "vague statutory grant."[220] Semantic uncertainty, a signal for deference under *Chevron*, became instead a pretext for wholesale insertion of the judicial view of a regulatory program.[221] In this instance, the Court concluded that

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212. 142 S. Ct. 2587 (2022).

213. *Id.* at 2609.

214. *Id.*

215. *Id.* at 2610.

216. 549 U.S. 497 (2007).

217. 42 U.S.C. § 7411(a)(1); *accord West Virginia*, 142 S. Ct. at 2601.

218. West Virginia v. EPA, 142 S. Ct. 2587, 2612 (2022).

219. FCC v. AT&T Inc., 562 U.S. 397, 407 (2011).

220. *West Virginia*, 142 S. Ct. at 2614 (rejecting the EPA's definition of a "system" as "an aggregation or assemblage of objects united by some form of regular interaction" (quoting Brief for the Federal Respondents at 31, *West Virginia*, 142 S. Ct. 2587 (Nos. 20-1530, 20-1531, 20-1778, 20-1780)).

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

the agency had "effected a 'fundamental revision of the statute, changing it from [one sort of] scheme . . . of regulation' into an entirely different kind."[222]

West Virginia represented the first time that a majority opinion by the Supreme Court had identified the "major questions doctrine" by name.[223] Chief Justice Roberts could scarcely bring himself to embrace this nomenclature; he used this name, seemingly, only because lower courts had adopted the moniker[224] or because the dissent had goaded him into acknowledging the doctrinal innovation.[225]

Writing separately, Justice Gorsuch styled his opinion as a "concurrence." He chose an apt label, albeit for reasons that warrant etymological exegesis. Foreign cognates of the English word *concurrence*, all derivative of medieval Latin *concurrentia* ("running together"), typically denote *competition* in the sense of "rivalry." *Donc on dit "concurrence" en français—und auf Deutsch sagt man "Konkurrenz."* Alongside *wedijver* and *rivaliteit*, *concurrentie* denotes rivalrous competition in Dutch.[226] English alone treats *concurrence* as a species of *agreement*, albeit one with rivalrous overtones better conveyed by the German word *Übereinstimmung*. The relevant emperor is neither truly holy nor Roman, but surely king of the Franks.[227] Neil Gorsuch's concurrence in *West Virginia* carries the Carolingian connotation of a true competitor to the Chief Justice's opinion for the Court.

Favoring temerity over timidity, Justice Gorsuch again volunteered three major guideposts for finding a major question whenever an agency engages a question of political significance, economic significance, or traditional coverage by state law.[228] His concurrence and Chief Justice Roberts's majority, in concert, identified various other considerations, such as the agency's reliance on "vague," "modest," or even "subtle" or "oblique" terms, to the exclusion of more directly applicable language.[229] Departures from traditional authority or previous

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222. *West Virginia*, 142 S. Ct. at 2612 (alterations in original) (quoting MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994)); *see also id.* at 2609 ("Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme." (quoting *MCI*, 512 U.S. at 229)).

223. *See* Alli Orr Larsen, *Becoming a Doctrine*, 76 FLA. L. REV. 1 (2024).

224. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022).

225. *See id.* at 2609.

226. I appreciate my Michigan State colleague Charles Delmotte's help with the Dutch language. Among these three words, *concurrentie* lies at a greater morphological distance from the Germanic core of Dutch than *rivaliteit* and certainly *wedijver*.

227. *See generally* ALESSANDRO BARBERO, CHARLEMAGNE: FATHER OF A CONTINENT (Allan Cameron trans., 2004).

228. *See West Virginia*, 142 S. Ct. at 2620-21 (Gorsuch, J., concurring).

229. *Id.* at 2609 (majority opinion); *id.* at 2622 (Gorsuch, J., concurring).

agency practice weigh heavily against agency engagement of a major question,[230] especially if such assertions of regulatory power lie near or beyond the perceived limits of agency expertise.[231]

Differences in enthusiasm aside, Chief Justice Roberts and Justice Gorsuch painted the major questions doctrine with the same broad strokes. Both of them also paid homage to Justice Scalia's jurisprudential contributions. Whereas the Chief Justice's opinion for the Court in *West Virginia* quotes *MCI*,[232] Justice Gorsuch's radically bolder concurrence invokes both *Whitman*'s "elephants in mouseholes" dictum and *MCI*'s reliance on the limits inherent in the verb *modify*.[233] The major questions doctrine truly is the mouse that roared.[234]

The major questions doctrine resembles a deliberate perversion of *Chevron*. *West Virginia* expresses a two-step process of its own. Once the reviewing court has decided that the policy at issue is major, its first step consists of an inquiry into the linguistic clarity of any statutory delegation. If the pivotal language of the statute is unclear in any respect, then the administrative claim of authority must be invalidated. Alternatively, if the language does manage to be clear—a condition never attained in any of the major questions cases from the doctrine's origins in *MCI* and *Whitman* to its realization in *West Virginia*—the court is free to interpret the statute absent the agency's intervention or innovation.

A more charitable interpretation of the major questions doctrine is that *West Virginia* urges a return to the pre-*Chevron* approach to judicial review of agency interpretations of law.[235] Under the guise of "identif[ying] . . . telling clues" that might distinguish clear from muddled congressional statements, Justice Gorsuch's concurrence invokes factors such as legislative text and structure, "the age and focus of the statute," "the agency's past interpretations," and possible "mismatch[es] between an agency's challenged action and its congressionally assigned mission and expertise."[236] These are traditional indicia of the "weight" that courts will assign to an agency's interpretation of law, given "the thoroughness evident in its consideration,

230. West Virginia v. EPA, 142 S. Ct. 2587, 2622-23 (2022) (Gorsuch, J., concurring).

231. *Id.* at 2623.

232. *Id.* at 2609, 2612 (majority opinion).

233. *See id.* at 2622 (Gorsuch, J., concurring).

234. *See* LEONARD WIBBERLEY, THE MOUSE THAT ROARED (Little, Brown & Co. 1955).

235. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 140-45 (1976); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("[T]he rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."). *See generally* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 559-67 (1985).

236. West Virginia v. EPA, 142 S. Ct. 2587, 2622-23 (2022) (Gorsuch, J., concurring).

the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[237]

This is by no means a new turn in conservative legal dogma, at least as articulated by Justices Gorsuch and Scalia. In a spirited fight over so-called *Auer* or *Seminole Rock* deference to agencies' interpretations of their own regulations,[238] Justice Gorsuch argued that deference to administrative interpretations of law would "abdicat[e]" the judicial obligation under section 706 of the Administrative Procedure Act (APA) to "decide all relevant questions of law."[239] This reading of section 706 drives Justice Gorsuch's frontal attack on *Chevron*.[240] Justice Gorsuch classifies agency interpretations of law alongside other "agency action[s], findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[241]

To like effect, Justice Scalia has described the "elaborate law of deference to agencies' interpretations of statutes and regulations" as "[h]eedless of the original design of the APA" and faithless to "§ 706's directive that the 'reviewing court . . . interpret . . . statutory provisions.' "[242] Soon enough, the virtues and vices of this reframing of administrative law will become apparent.

C. From Doctrinal Cladogenesis to Constitutional Apocalypse

This skeletal sketch of the major questions doctrine should suggest some sort of symphonic agreement: obviously, nothing good comes of legal reliance on etymology, especially the classical philology of the fanciest, most erudite words in contemporary English.[243]

237. *Skidmore*, 323 U.S. at 140; *see also* Diver, *supra* note 235, at 562 n.95 (listing some of the factors relevant to analysis under cases such as *Skidmore* and *Gilbert*, 429 U.S. at 140-45).

238. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019) (upholding the deference doctrine of Auer v. Robbins, 519 U.S. 452 (1997), and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), with qualifications to ensure that an agency's power to interpret its own regulations is "potent in its place, but cabined in its scope").

239. *Id.* at 2432 (Gorsuch, J., concurring in the judgment) (quoting 5 U.S.C. § 706).

240. *See* Buffington v. McDonough, 143 S. Ct. 14, 16-17 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

241. 5 U.S.C. § 706(2)(A); *accord Buffington*, 143 S. Ct. at 16-17 (Gorsuch, J., dissenting from the denial of certiorari); *Kisor*, 139 S. Ct. at 2432 (Gorsuch, J., concurring in the judgment); *see also, e.g.*, FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

242. Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment) (second and third alterations in original) (quoting 5 U.S.C. § 706).

243. Deciphering *σαρκασμός* and *ειρωνεία* is left as an exercise for the reader.

Anything rendered in Greek or Latin (let alone both of those languages) is almost assuredly jurispathic.[244]

Contrary to that old Latin saw, *natura non facit saltum* (nature does not make leaps),[245] modern evolutionary biology recognizes that cladogenesis, or speciation, tends to occur in geologically rapid episodes called punctuated equilibria.[246] The legal equivalent of punctuated equilibrium might consist of an extinction event that was slow in coming, but explosive in the number of new doctrines that replace old, discarded doctrines in rapid succession. Contrary to suggestions that stability in personnel encourages doctrinal innovation, the arrival of three Justices appointed by Donald Trump and the formation of a conservative supermajority has spurred swift doctrinal turnover at the Supreme Court.[247] Evolution, in whatever domain, runs gradually—until cascading effects interrupt its usual course and punctuate the course of time with intense spasms.[248]

We should affirmatively expect to see the major questions doctrine exhibiting at least these three traits. First, it might emerge at the expense of previous legal regimes concerning congressional delegations of power. Second, and without contradiction, the new doctrine might be accompanied by at least one other new doctrine (or the reawakening of a previous doctrine) drawing its lifeforce from the

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244. *See, e.g.*, Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); Robert C. Post, *Who's Afraid of Jurispathic Courts?: Violence and Public Reason in* Nomos and Narrative, 17 YALE J.L. & HUMAN. 9 (2005); John Valery White, *Reactions to Oppression: Jurisgenesis in the Jurispathic State*, 100 YALE L.J. 2727 (1991).

245. This saying appears in the works of Gottfried Wilhelm von Leibniz, Carl Linneaus, Charles Darwin, and Alfred Marshall. *See, e.g.*, CHARLES DARWIN, THE ORIGIN OF SPECIES 205 (6th ed. 1872). *See generally* Geoffrey Fishburn, Natura Non Facit Saltum *in Alfred Marshall (and Charles Darwin)*, 40 HIST. ECON. REV. 59 (2004). A more formidable quartet would be hard to assemble. The smooth differentiability of the calculus, however, does not describe evolutionary processes, in nature or in law. A willingness to forget founders is a critical difference between the scientific and the literary cultures. "A science which hesitates to forget its founders is lost." ALFRED NORTH WHITEHEAD, THE AIMS OF EDUCATION AND OTHER ESSAYS 162 (1929); *accord* EDWARD O. WILSON, CONSILIENCE: THE UNITY OF KNOWLEDGE 199 (1998) ("[P]rogress in a scientific discipline can be measured by how quickly its founders are forgotten."); *cf.* JAMES LOVELOCK, GAIA: A NEW LOOK AT LIFE ON EARTH 70 (1979) ("It is somewhat cynically said that the eminence of a scientist is measured by the length of time that he holds up progress in his field.").

246. *See* Niles Eldredge & Stephen Jay Gould, *Punctuated Equilibria: An Alternative to Phyletic Gradualism*, *in* MODELS IN PALEOBIOLOGY 82, 82-115 (Thomas J.M. Schopf ed., 1972); Stephen Jay Gould, *Punctuated Equilibrium—A Different Way of Seeing*, NEW SCI., Apr. 15, 1982, at 137; Stephen Jay Gould & Niles Eldredge, *Punctuated Equilibria: The Tempo and Mode of Evolution Reconsidered*, 3 PALEOBIOLOGY 115 (1977).

247. *Compare* Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003) (arguing that the lack of turnover enabled the later Rehnquist Court to pursue new doctrinal directions), *with* Jim Chen, *Judicial Epochs in Supreme Court History: Sifting Through the Fossil Record for Stitches in Time and Switches in Nine*, 47 ST. LOUIS U. L.J. 677 (2003) (marshaling empirical evidence linking doctrinal turnover with changes in Supreme Court personnel).

248. This is the overarching theme of KENNETH J. HSÜ, THE GREAT DYING: COSMIC CATASTROPHE, DINOSAURS, AND THE THEORY OF EVOLUTION (1986).

asphyxiation of its predecessor. Finally, ancestral and descendant doctrines may continue to coexist, at least momentarily.[249] In law as in biology, the critical question is whether evolution—defined either as variance in phenotypes or in doctrinal content—increases more as a function of speciation events (punctualist evolution) or as a function of time (gradualist evolution).[250]

The major questions doctrine represents not just one but two closely intertwined doctrinal revolutions. Both spring from the febrile imagination of Neil Gorsuch. The artificial, even purposeful, isolation of a subpopulation of *Chevron*-class cases has affected both the cohort of "major questions" and the larger population of *Chevron* cases. Within the "major questions" splinter of the larger "administrative" or "regulatory" clade in American law, hybridization with the closely related nondelegation doctrine has rapidly distinguished this new legal lineage from ancestral *Chevron*.[251]

But *Chevron*, the major questions doctrine, and the nondelegation doctrine all occupy the same ecosystem within the broader legal biosphere. No other case typifies the confluence of all three doctrines better than *Whitman*.[252] *Chevron*'s disappearance from *West Virginia* bodes ill for the ancestral stock. However else we might tell this story of doctrinal evolution, it is not legal anagenesis, metaphorically defined as the gradual accretion of stochastic genetic changes and slow transformation on a single branch in the phylogenetic tree of the law.[253] Revolution, far more abrupt and destructive, is running riot.[254]

The explicit establishment of the major questions doctrine takes place in the shadow of Justice Gorsuch's efforts to revive the nondelegation doctrine. By a single vote, *Gundy* had fallen short of splitting a shorthanded, eight-Justice Court into equal halves (and thereby affirming without opinion a lower court's rejection of a constitutional

249. *See* Alan H. Cheetham, *Tempo of Evolution in a Neogene Bryozoan: Rates of Morphological Change Within and Across Species Boundaries*, 12 PALEOBIOLOGY 190 (1986); *cf.* Alan H. Cheetham, *Tempo of Evolution in a Neogene Bryozoan: Are Trends in Single Morphologic Characters Misleading?*, 13 PALEOBIOLOGY 286 (1987) (recognizing that single distinctions in morphology are unimportant in distinguishing between ancestral species and their descendants).

250. *See* Melanie J. Hopkins & Scott Lidgard, *Evolutionary Mode Routinely Varies Among Morphological Traits Within Fossil Species Lineages*, 109 PROC. NAT'L ACAD. SCIS. 20520, 20520 (2012).

251. *Cf.* Luke C. Strotz & Andrew P. Allen, *Assessing the Role of Cladogenesis in Macroevolution by Integrating Fossil and Molecular Evidence*, 110 PROC. NAT'L ACAD. SCIS. 2904 (2013).

252. 531 U.S. 457 (2001).

253. *Cf.* Warren D. Allmon, *Species, Lineages, Splitting, and Divergence: Why We Still Need "Anagenesis" and "Cladogenesis,"* 120 BIOLOGICAL J. LINNEAN SOC'Y 474 (2017).

254. *Cf.* A.L.A. Schechter Poultry Corp. v United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring) ("This is delegation running riot.").

attack on SORNA).[255] In response to Justice Gorsuch's call to resurrect a robust account of nondelegation that could strike down an act of Congress, Justice Alito announced he would wait until a majority of Justices becomes "willing to reconsider the approach" that the Court has taken since 1935.[256]

Justice Kavanaugh, who joined the Court too late to participate in *Gundy*, has since revealed his willingness to supply the fifth vote to revisit the nondelegation doctrine. In a statement respecting a denial of certiorari, Justice Kavanaugh praised "Justice [Gorsuch's] scholarly analysis" in *Gundy* of "the Constitution's nondelegation doctrine" and anticipated "further consideration" of his colleague's "important points . . . in future cases."[257] Presciently enough, in work published before his ascension to the Supreme Court, Justice Kavanaugh had identified "two challenges for the judge as umpire" in his tribute to Justice Scalia: "statutory ambiguity and constitutional exceptions."[258]

Justice Kavanaugh's statement also explicitly tied the nondelegation doctrine to the major questions doctrine as "a closely related statutory interpretation doctrine."[259] He did recognize a key difference, however. In his description of the major questions doctrine, Justice Kavanaugh contemplated upholding "congressional delegations to agencies of authority to decide major policy questions" as long as "Congress expressly and specifically delegates that authority."[260] By contrast, Justice Gorsuch's vision of nondelegation would limit agencies to "less-major or fill-up-the-details decisions."[261]

The spectrum from *Chevron* to the major questions and nondelegation doctrines covers these very patches of contested jurisprudential turf. The nondelegation doctrine, in particular, represents "the pole star of the conservative legal movement's project."[262] In the

255. *See* Durant v. Essex Co., 74 U.S. (7 Wall.) 107, 110 (1868) ("[N]o affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made."); *cf.* 28 U.S.C. § 2109 (directing, for certain cases failing to attain a quorum within the Supreme Court, that "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court"). *See generally* Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643 (2002).

256. Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment).

257. Paul v. United States, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari).

258. Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907 (2017).

259. *Paul*, 140 S. Ct. at 342 (statement of Kavanaugh, J., respecting the denial of certiorari).

260. *Id.*

261. *Id.*

262. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323, 2325 (2022). *See generally* Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENV'T L.J. 379 (2021).

meanwhile, absent explicit support for a revitalized nondelegation doctrine, the Court will presumably continue to vindicate that doctrine's underlying constitutional values through "the interpretation of statutory texts . . . that might otherwise be thought to be unconstitutional."[263] The choice between major questions and nondelegation scarcely matters: "Whichever the doctrine," Justice Gorsuch has admitted, "the point is the same."[264]

For the moment, the major questions doctrine can be expected to bear the greater jurisprudential burden. Until the Court successfully exhumes and formally resurrects the nondelegation doctrine, the major questions doctrine will serve as the clear statement rule for a doctrine that has lain fallow,[265] at a deeper level of dormancy than *Gregory v. Ashcroft*[266] occupied in order to advance the repudiated Tenth Amendment doctrine of *National League of Cities v. Usery*.[267]

American law seems doomed to reprise "the myth of the Sleeping Beauty," in which "the earth-goddess sinks into her long winter sleep when pricked" by her spindle.[268] Her frigid "cosmic palace" locks "all . . . in icy repose, naught thriving . . . until the kiss of the golden-haired sun-god reawakens life."[269] A judicial demigod bearing a more maleficent corona can scarcely be imagined. Hail Gorsuch, full of fire, blessed are you among judges.[270]

IV. THE STRUCTURE OF A JURISPRUDENTIAL REVOLUTION

A. Neither Necessary nor Proper

Uncertainty clouds the circumstances under which the Court will declare that it has found the next "major question" that lies beyond the judicially constrained competence of an administrative agency. Since legal issues can readily be characterized as either "major" or routine

263. Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989); *accord* West Virginia v. EPA, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring). *See generally* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021).

264. Nat'l Fed. of Indep. Bus. v. OSHA, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

265. *See generally* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223 (2000).

266. 501 U.S. 452 (1991).

267. 426 U.S. 833 (1976).

268. JOHN FISKE, MYTHS AND MYTH-MAKERS: OLD TALES AND SUPERSTITIONS INTERPRETED BY COMPARATIVE MYTHOLOGY 13 (1872).

269. *Id.*

270. *Cf. Luke* 1:28.

upon judicial whim, few if any stable limiting principles constrain the major questions doctrine.[271] Even the slightest hint of "political disagreement" can supply "evidence of majorness."[272]

Such an anxious finger on the trigger of the major questions doctrine is hasty and unwise. Our polity is "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[273] Our nation has eschewed "immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."[274] Delegations of authority over public health, to name just one example, can scarcely ask administrators of Medicare and Medicaid to do more than safeguard the "health and safety" of those programs' beneficiaries.[275] A contrary insistence would demand that Congress must "have anticipated both the unprecedented COVID-19 pandemic and the unprecedented politicization of the disease to regulate vaccination against it."[276] Seen in that light, the major questions doctrine is the howl of a judiciary dedicated to the protection of losers who not only failed to foresee future crises, but also failed to command democratic majorities when calamity ultimately strikes.[277]

Today's Court lacks even the uncharacteristic modesty displayed by Justice Scalia in declining an opportunity to exclude *Chevron* from agency determinations of their own jurisdiction.[278] Just as every exercise in statutory interpretation by an agency determines its jurisdiction in some sense, every question of federal law is major in that it represents an effort by Congress, consistent with the letter and the spirit of the Constitution, to address matters entrusted to national legislative authority by a fundamental law otherwise dedicated to preserving the prerogatives of state and local governments.[279] The appropriate solution in both situations is the same: rather than "establishing an arbitrary and undefinable category of agency

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271. *See, e.g.*, Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Non-Interference (Or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 607 (2008) ("[T]he existing literature has almost unanimously concluded that the *Brown & Williamson* rule lacks a coherent justification. . . . There is not, in the abstract, any reason to prevent agencies from making major decisions.").

272. Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1014 (2023).

273. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted).

274. *Id.*

275. Florida v. Dep't of Health & Hum. Servs., 19 F.4th 1271, 1288 (11th Cir. 2021).

276. *Id.*

277. Speaking of losers… Yes, dammit, Trump lost.

278. *See* City of Arlington v. FCC, 569 U.S. 290, 305-07 (2013).

279. *See McCulloch*, 17 U.S. (4 Wheat.) at 421.

decisionmaking that is accorded no deference," courts should "tak[e] seriously, and apply[] rigorously, in all cases, statutory limits on agencies' authority."[280]

The jurisprudential arrogance of the major questions doctrine comes into sharp relief upon even cursory consideration of the weapons that courts may wield in order to curb questionable claims to delegated authority. In addition to the woefully underutilized second step in the traditional *Chevron* analysis,[281] full deployment of the traditional heuristic toolkit should suffice. *Chevron* itself directed reviewing courts to "employ[] traditional tools of statutory construction."[282] Those "traditional tools" include interpretive canons, both intrinsic and substantive,[283] even if the relationship between *Chevron* and the substantive canons is strained.[284]

As courts climb the ladder of substantive canons, tension with statutory text and plain meaning will surely rise. Like other clear statement rules, the major questions doctrine "ignores . . . well-established precedent and announces a rule that is . . . both unwise and infeasible."[285] The important and "remarkable" point is that the major questions doctrine "is completely unnecessary to the proper resolution" of any case in which this doctrinal excrescence might be avoided.[286]

Beyond the narrower domain of administrative controversies squarely covered by *Chevron*, the Supreme Court has routinely deployed some combination of the rule of lenity and the conventional avoidance canon to ensure that the federal government, in the name of "prevent[ing] chemical warfare," does not needlessly "reach into the kitchen cupboard."[287] At a broad level of generality, the rule of lenity provides that "statutes imposing penalties are to be 'construed strictly' against the government and in favor of individuals."[288]

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280. *Arlington*, 569 U.S. at 307.

281. *See supra* Section II.C.

282. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984); *accord* Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019).

283. *See* INS v. St. Cyr, 533 U.S. 289, 298-300 & nn.11-12, 320-21 n.45 (2001).

284. *See generally* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64 (2018).

285. Gregory v. Ashcroft, 501 U.S. 452, 474 (1991) (White, J., concurring in part, dissenting in part, and concurring in the judgment).

286. *Id.*

287. Bond v. United States, 572 U.S. 844, 866 (2014); *see also* United States v. Bass, 404 U.S. 336, 350 (1971).

288. Bittner v. United States, 598 U.S. 98, 101 (2023) (opinion of Gorsuch, J., joined by Jackson, J.) (quoting Commissioner v. Acker, 361 U.S. 86, 91 (1959)).

As it does in cases not involving the legislative delegation of penal authority,[289] the rule of lenity plays a powerful role in demanding clarity in the delegation of criminal rulemaking power to administrative agencies.[290] Even then, invocation of those substantive canons exacts a price paid through the deprecation of statutory text and judicial intrusion into legislative prerogative. In refusing to admit that statutory language commands the "sweeping and unsettling" application of an international chemical weapons convention to violence within a neighborly love triangle, "the Court shirks its job and performs Congress's."[291] Escalating quasi-constitutional firepower by invoking the major questions doctrine plunges judges into policymaking spheres best reserved for Congress and the expert agencies charged with applying scientific insight to public policy.

As an exercise in constitutional law, the major questions doctrine represents a regrettable frolic and detour. Cloaked in profane vestments and bedecked in the "splendid bauble[s]" of vacant legal rhetoric,[292] the major questions doctrine lurks in the "penumbras" and "emanations" of conservative constitutional theology.[293] It is admittedly rude to mock the Court by comparing Justice Gorsuch's jurisprudential obsession to the suggestion that constitutional law should protect rights of privacy and personhood. Those doctrines, of course, have drawn much mockery at the rightmost edge of American law and politics.

289. *See, e.g.*, McDonnell v. United States, 579 U.S. 550, 567 (2016) (acknowledging that "vague corruption laws" may "implicate serious constitutional concerns"); 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."); McNally v. United States, 483 U.S. 350, 359-60 (1987) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."); *cf.* United States v. Enmons, 410 U.S. 396, 410-11 (1973) (rejecting a "broad concept of extortion" that could trigger "an unprecedented incursion into the criminal jurisdiction of the States"). October Term 2022 continued the Court's trend of narrowing the interpretation of federal criminal statutes that can be used to prosecute political corruption and financial misconduct. *See* Percoco v. United States, 598 U.S. 319 (2023); Ciminelli v. United States, 598 U.S. 306 (2023).

290. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 542 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); Fed. Power Comm'n v. New Eng. Power Co., 415 U.S. 345, 352-33 (1974) (Marshall, J., concurring in the result in No. 72-1162 and dissenting in No. 72-948); United States v. Sharpnack, 355 U.S. 286, 297-98 (1958) (Douglas, J., dissenting); United States v. Robel, 389 U.S. 258, 269 (1967) (Brennan, J., concurring in the result). *But cf.* Touby v. United States, 500 U.S. 160, 165-66 (1991) (declining to decide whether "Congress must . . . provide more specific guidance" whenever Congress authorizes another branch to promulgate regulations that contemplate criminal sanctions).

291. *Bond*, 572 U.S. at 867 (Scalia, J., concurring in the judgment).

292. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

293. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

Upon further reflection, however, the law should treasure the primordial substantive due process case of *Griswold v. Connecticut*.[294] That case should be revered for John Marshall Harlan's magisterial defense of "[j]udicial self-restraint" through "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."[295] One should regret even hinting that Neil Gorsuch, now become Vishnu, destroyer of legal worlds,[296] deserves membership in Justice Harlan's genuinely conservative tradition. But such regret does not nullify this admittedly opportunistic effort to expose the mendacity of the major questions doctrine and its principal proponents.

B. Neither Necessary nor Advisable

Even at analytical levels falling short of constitutional significance, the strange insistence on "major questions" offends the law. The major questions doctrine as stealth constitutional law—or, more politely, the clear statement rule defending underenforced norms embedded within the nondelegation doctrine—contradicts affirmative congressional limits on judicial review. Section 701(a) of the Administrative Procedure Act contemplates two circumstances under which courts should decline altogether to review agency action.[297] The first such instance, statutory preclusion of judicial review,[298] admittedly requires a strong "indication that Congress sought to prohibit judicial review," an affirmative " 'showing of "clear and convincing evidence" of . . . legislative intent' to restrict access to judicial review."[299]

By contrast, the category of "agency action . . . committed to agency discretion by law"[300] applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' "[301] The Supreme Court has recognized a category of cases lying

294. *Id.*

295. *Id.* at 501 (Harlan, J., concurring in the judgment).

296. "I am become Death, destroyer of worlds." This quotation from the *Bhagavad-Gita*, attributed to Robert Oppenheimer, is hard to attribute with any authority or reliability. But sources crediting the physicist are legion. *See, e.g.*, Braden R. Allenby & Dave Rejeski, *The Industrial Ecology of Emerging Technologies*, 12 J. INDUS. ECOLOGY 267, 267 (2008).

297. 5 U.S.C. § 701(a). *See generally* Webster v. Doe, 486 U.S. 592, 599-601 (1988).

298. 5 U.S.C. § 701(a)(1).

299. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967)); *see also* Heckler v. Chaney, 470 U.S. 821, 830 (1985) ("[Section 701(a)(1)] applies when Congress has expressed an intent to preclude judicial review."); *Abbott*, 387 U.S. at 141; Brownell v. Tom We Shung, 352 U.S. 180, 185 (1956).

300. 5 U.S.C. § 701(a)(2).

301. *Overton Park*, 401 U.S. at 410 (quoting the legislative history of the Administrative Procedure Act at S. REP. NO. 752, at 26 (1945)).

beyond judicial review, "even where Congress has not affirmatively precluded review," whenever "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[302] The canonical instance where a court is asked to presume "that judicial review is not available" involves "[r]efusals to take enforcement steps."[303] Such instances, as the administrative equivalent of exercising discretion not to prosecute, lies admittedly far from the usual circumstances inviting application of the major questions doctrine.

The Court has recognized other circumstances under which agency action is committed to agency discretion by law. Section 102(c) of the National Security Act of 1947, for instance, authorizes the director of the Central Intelligence Agency, "in his discretion," to terminate any CIA employee "whenever he shall deem such termination necessary or advisable in the interests of the United States."[304] The "language and structure" of this statute, of its own force, does more than "exhibit[] the Act's extraordinary deference to the Director['s]" termination decisions.[305] The statutory design alone "indicate[s] that Congress meant to commit individual employee discharges to the Director's discretion, and that § 701(a)(2) accordingly precludes judicial review of these decisions."[306]

In fairness, most congressional delegations deemed suitable for the major questions doctrine will trigger neither of section 701(a)'s exclusions from judicial review. The Clean Power Plan, for instance, assuredly followed statutory criteria that both the EPA and a reviewing court could apply. It was the Supreme Court, not the agency, that deemed factors such as "cost," "health and environmental impact," and "energy requirements" irrelevant to the Plan's legality.[307] Although it does not appear plausible for the agency to argue that these elements of section 111(a) of the Clean Air Act convey such an intense congressional desire for deference as to trigger the Administrative Procedure Act's section 701(a)(2) exception for actions "committed to agency discretion by law," the Court has not distinguished statutory language broad enough to preclude judicial review of all agency actions taken under its authority from agency actions that so extravagantly exploit broad statutory language that a reviewing court must disqualify the entire regulatory program.[308] In the spirit though not the letter of the Administrative Procedure Act, it is the major questions doctrine that

302. *Heckler*, 470 U.S. at 830.

303. *Id.* at 831.

304. 50 U.S.C. § 3023; *accord* Webster v. Doe, 486 U.S. 592, 594 (1986).

305. *Webster*, 486 U.S. at 601.

306. *Id.*

307. West Virginia v. EPA, 142 S. Ct. 2587, 2612 (2022).

308. *Id.*

feels arbitrary, capricious, and abusive of the discretion entrusted to the judiciary.[309] No clear line divides commitment to agency discretion by law from an invitation for judicial review that is major in theory but fatal in fact.[310]

C. *On the Money*

Among the potential triggers for applying the major questions doctrine, the judicial branch is especially untrustworthy in evaluating economic questions.[311] "[A] reviewing Court," after all, is "in no position to assess the precise economic significance of . . . exceptions to" a hypothetically "perfectly functioning market."[312] As between the "dismal science" of economics[313] and the "gay science" of poetry,[314] federal judges will almost always favor literary over technical thought and qualitative over quantitative analysis.[315]

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309. *Cf.* 5 U.S.C. § 706(2)(A).

310. *Cf.* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing "the aggressive 'new' equal protection" as prescribing "scrutiny . . . 'strict' in theory and fatal in fact"). Gunther's dichotomy has become entrenched in the rhetoric of constitutional commentary. *See, e.g.*, Matthew D. Bunker, Clay Calvert & William C. Nevin, *Strict Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMMC'N L. & POL'Y 349 (2011); Ozan O. Varol, *Strict in Theory, but Accommodating in Fact?*, 75 MO. L. REV. 1243 (2010); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

311. *See, e.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 100 (2007) ("[T]he statutory language is technical, and we are not statisticians."); AEP Tex. N. Co. v. Surface Transp. Bd., 609 F.3d 432, 443 (D.C. Cir. 2010) ("[Courts] do not sit as . . . panel[s] of statisticians, but as . . . panels of generalist judges."); City of Los Angeles v. U.S. Dep't of Transp., 165 F.3d 972, 977 (D.C. Cir. 1999) ("[W]e do not sit as a panel of referees on a professional economics journal . . . ."); Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 39 (2d Cir. 1980) ("The average accident trial should not be converted into a graduate seminar on economic forecasting."), *cert. denied*, 451 U.S. 971 (1981).

312. Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 507 (2002).

313. This description of economics, at once derogatory and ubiquitous, *see, e.g.*, Burton G. Malkiel, *Foreword* to CHARLES WHEELAN, NAKED ECONOMICS: UNDRESSING THE DISMAL SCIENCE 3, 4 (3d ed. 2019); Heinz D. Kurz, *On the Dismal State of a Dismal Science?*, 69 INVESTIGACIÓN ECONÓMICA 17, 22 (2010), originates in the work of nineteenth-century Scottish philosopher Thomas Carlyle. The subject and title of Carlyle's work offend contemporary sensibilities to such a degree that any invocation of economics as the "dismal science" should invite introspection into the link between classical economics and racial rhetoric in political discourse. *See generally* DAVID M. LEVY, HOW THE DISMAL SCIENCE GOT ITS NAME: CLASSICAL ECONOMICS AND THE UR-TEXT OF RACIAL POLITICS 3-4 (2001).

314. The most famous description of poetry as the "gay science" stems from Friedrich Nietzsche's masterwork, *Die Fröhliche Wissenschaft*. *See* FRIEDRICH NIETZSCHE, THE GAY SCIENCE: WITH A PRELUDE IN RHYMES AND AN APPENDIX OF SONGS 5-6 (Walter Kaufmann ed. & trans., Vintage Books 1974) (1882). A twenty-first-century English translation of *Die Fröhliche Wissenschaft* might choose the word *happy* over the word *gay*.

315. *Compare* C.P. SNOW, THE TWO CULTURES: AND A SECOND LOOK 22 (2d ed. 1964) (decrying the cultural divide between the literary and scientific cultures of contemporary society), *with id.* at 70 (identifying "something like a third culture," a community of social scientists "concerned with how human beings are living or have lived"). *See generally* Jim

To be sure, federal law does expect judges to engage in some measure of economic analysis. Federal courts have long fashioned an elaborate set of economically informed rules to animate the Sherman Act's primary prohibitions against collective actions "in restraint of trade" and against "monopolization."[316] The Sherman Act's competing tradition, traceable to the nearly contemporaneous Interstate Commerce Act of 1887,[317] has rested on not one but two of the broadest formulas for congressional delegation over the national economy: certification of entry (and exit) according to the "public interest" (and sometimes the public's "convenience" and/or "necessity" as well), plus the setting of "just and reasonable" and perhaps "nondiscriminatory" rates.[318]

Whereas antitrust delegates a modest mandate over economic analysis to the federal courts, statutes in the common-carrier tradition of the Interstate Commerce Act give regulatory agencies more than a strictly procedural sense of primary jurisdiction over economic questions.[319] Unlike the retrospective form of deference under *Chevron*,

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Chen, *The Midas Touch*, 7 MINN. J.L. SCI. & TECH., at i (2006); Jim Chen, *Food and Superfood: Organic Labeling and the Triumph of Gay Science over Dismal and Natural Science in Agricultural Policy*, 48 IDAHO L. REV. 213 (2012).

316. 15 U.S.C. §§ 1-2. The dormant commerce clause comprises an entirely distinct body of economically informed federal common law. *See generally* Jim Chen, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 MINN. L. REV. 1764 (2004). Economic analysis under the dormant commerce clause shares many commonalities with antitrust law. *See* Jim Chen, *The Vertical Dimension of Cooperative Competition Policy*, 48 ANTITRUST BULL. 1005, 1022-23 (2003). Jurisprudential pressure on the dormant commerce clause, particularly by Justices Scalia and Thomas, may unite that vast body of law with the *Chevron* doctrine in the red list of legal ideas slated for extirpation and extinction. *Compare* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 312 (1997) (Scalia, J., concurring) (expressing willingness to continue enforcing limited aspects of dormant commerce clause doctrine "on *stare decisis* grounds," despite describing "the so-called 'negative' Commerce Clause [as] an unjustified judicial invention, not to be expanded beyond its existing domain"), *and* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (repudiating dormant commerce clause analysis in its entirety), *with* Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 377-89 (2023) (opinion of Gorsuch, J.) (distinguishing but not overruling the dormant commerce clause balancing test of Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)). This is an idea I must leave for another day—and ideally not another scholar.

317. Pub. L. No. 49-104, 24 Stat. 379, *repealed by* Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

318. *See* Mistretta v. United States, 488 U.S. 361, 417-18 (1989) (Scalia, J., dissenting). The literature on these so-called "regulated industries" and their governing statutes is vast. My own views appear in works such as Jim Chen, *The Second Coming of* Smyth v. Ames, 77 TEX. L. REV. 1535, 1547-49 (1999); Jim Chen, *The Nature of the Public Utility: Infrastructure, the Market, and the Law*, 98 NW. U. L. REV. 1617 (2004) (reviewing JOSÉ A. GÓMEZ-IBÁÑEZ, REGULATING INFRASTRUCTURE: MONOPOLY, CONTRACTS, AND DISCRETION (2003)); and Jim Chen, *The Death of the Regulatory Compact: Adjusting Prices and Expectations in the Law of Regulated Industries*, 67 OHIO ST. L.J. 1265 (2006).

319. "The doctrine of primary jurisdiction applies when a claim is originally cognizable in the courts but involves issues that fall within the special competence of an administrative agency. Under the doctrine, a court can stay litigation and refer such issues to the agency for its decision." Bryson Santaguida, *The Primary Jurisdiction Two-Step*, 74 U. CHI. L. REV.

primary jurisdiction (and every other species of federal court abstention) "provid[es] before-the-fact deference notwithstanding judicial jurisdiction over a matter."[320] The historical balance struck by Congress has given federal courts dominion over market structure and industrial organization through a sort of codified common law power under the antitrust laws as the "Magna Carta of free enterprise."[321] Simultaneously, Congress empowered agencies such as the Federal Energy Regulatory Commission and the Federal Communications Commission to exert comprehensive authority over entry, rates, and universal service obligations in critical sectors of the economy.

Justice Scalia himself has recognized that some degree of delegation is inevitable: "[N]o statute can be entirely precise, and . . . some judgments, even some judgments involving policy considerations, must be left to the officers executing the law."[322] In an "increasingly complex society," Congress must "delegate power under broad general directives" in order "simply" to "do its job."[323] Any other course would be "unreasonable and impracticable."[324]

Even within the nineteenth-century scheme pairing the Interstate Commerce Act with the Sherman Act, which predated even more ambitious delegations of power over human health and the environment, some of the most spectacular failures have involved naked judicial conclusions that would resonate within the modern "major questions" framework. Despite the breadth of the Sherman Act, the Supreme Court has imprudently placed certain industries or activities entirely beyond the reach of the antitrust laws.[325]

1517, 1517 (2007). *See generally* United States v. W. Pac. R.R., 352 U.S. 59, 62-65 (1956); Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964); Aaron J. Lockwood, *The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review*, 64 WASH. & LEE L. REV. 707, 708 (2007).

320. Santaguida, *supra* note 319, at 1518.

321. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

322. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting); *accord* West Virginia v. EPA, 142 S. Ct. 2587, 2643 (2022) (Kagan, J., dissenting).

323. *Mistretta*, 488 U.S. at 372; *accord West Virginia*, 142 S. Ct. at 2642 (Kagan, J., dissenting).

324. Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946); *accord West Virginia*, 142 S. Ct. at 2642 (Kagan, J., dissenting); Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 559-60 (1976); *see also* Yakus v. United States, 321 U.S. 414, 424 (1944) ("The Constitution . . . does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action."); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1695 (1975) (recognizing "that Congress has . . . been unable or unwilling to muster" the resources needed for "[d]etailed legislative specification of policy").

325. *See* United States v. E.C. Knight Co., 156 U.S. 1 (1895) (sugar refining); Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200 (1922) (baseball); *cf.* Flood v. Kuhn, 407 U.S. 258, 285 (1972) (refusing to overrule *Federal Baseball Club* and its judicially created antitrust exemption for baseball).

Rate regulation, whose very raison d'être commits expert agencies to set the reasonable prices that no antitrust court has ever claimed the competence to set,[326] has provided courts with further opportunities to demonstrate their propensity for economic misjudgment. For nearly half a century, the Supreme Court prescribed close judicial review of the adequacy of regulatory rates, on constitutional grounds no less, until it finally relented and endorsed a countervailing regime granting broad deference to administrative ratemaking.[327] Judicial valuation of public utility companies, recognized from its inception as an "embarrassing question,"[328] eventually degenerated into "the most speculative undertaking imposed upon [courts] in the entire history of English jurisprudence."[329]

After seven decades of trying to outwit expert agencies in matters of economic regulation, the Supreme Court ultimately confessed that "neither law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders."[330] Whatever humility the high court might have learned from its inability to credibly substitute judicial for administrative discretion in ratemaking has given way to an arrogant assumption that courts instinctively know when a regulatory agency has overstepped heretofore unspoken congressional limits on the agency's mandate.

Judicial missteps of this character and this magnitude, once consigned to a category of decisions at once lamentable and laughable, have gained new life under the major questions doctrine. The presence of $80 billion in expected economic benefits, almost certain to disable agency intervention under the major questions doctrine, would be regarded in almost any other interpretive regime as evidence of sound administrative judgment.[331] Citing statutory and regulatory definitions of "major rule[s]" and "[s]ignificant regulatory action," a federal district court has set the threshold as low as $100 million in economic

326. *See, e.g.*, United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) ("The reasonable price fixed today may through economic and business changes become the unreasonable price of to-morrow."); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212-14 (1940); *cf.* 5 U.S.C. § 551(4) (including "the approval or prescription for the future of *rates*, wages, corporate or financial structures or reorganizations thereof, *prices*, facilities, appliances, services or allowances therefor" within the Administrative Procedure Act's definition of a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" (emphases added)).

327. *Compare* Smyth v. Ames, 169 U.S. 466, 470 (1898), *and* Missouri *ex rel.* Sw. Bell Tel. Co. v. Pub. Serv. Comm'n, 262 U.S. 276, 277 (1923), *with* Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591 (1944).

328. *Smyth*, 169 U.S. at 546; *accord* Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989).

329. West v. Chesapeake & Potomac Tel. Co., 295 U.S. 662, 689 (1935).

330. *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 790 (1968).

331. *See* Michigan v. EPA, 576 U.S. 743, 764 (2015) (Kagan, J., dissenting).

impact.[332] The untrained, "naked" judicial eye, so eager to find more than a trace of commercial nexus or significance a quarter century ago,[333] now treats evidence of considerable economic impact as its newest pretext for sacrificing the prerogatives of the political branches to the policy preferences of usually conservative and always unelected judges. Vindicated by these historical twists, *Lochner* laughs.[334]

A potentially major question, with enormous practical consequences, loomed in the 2022 Term: how expansively would the Court describe the Department of Education's power to "waive or modify any statutory or regulatory provision applicable to . . . student financial assistance programs"?[335] As it did with obscenity, the Court struggled to intelligibly define a major question. Especially when a politically hostile administration commands the White House, hard-core Justices will know a major question when they see one.[336]

In *Nebraska v. Biden*,[337] Chief Justice Roberts described the Biden administration's loan forgiveness program as "staggering by any measure."[338] He estimated the program's cost as "nearly one-third of the Government's $1.7 trillion in annual discretionary spending."[339] Justice Barrett's concurrence, however, took pains to disavow (sub silentio) Justice Gorsuch's maximalist reading of the major questions doctrine as a way to overprotect the Vesting Clause of Article I by "load[ing] the dice" through a clear statement rule safeguarding the nondelegation doctrine.[340] Instead, she stressed a less ambitious defense of the major questions doctrine as a "common sense" interpretive principle.[341]

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332. 5 U.S.C.A. § 804(2)(A) (defining a "major rule" as, inter alia, "any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in . . . an annual effect on the economy of $100,000,000 or more"); Exec. Order No. 12,866, 58 Fed. Reg. 51735, 51738 (Sept. 30, 1933) (defining "[s]ignificant regulatory action" as, inter alia, "any regulatory action that is likely to result in a rule that may . . . [h]ave an annual effect on the economy of $100 million or more"); *accord* Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1165 (M.D. Fla. 2022), *vacated as moot sub nom.* Health Freedom Def. Fund v. President of the U.S., 71 F.4th 888 (11th Cir. 2023).

333. United States v. Lopez, 514 U.S. 549, 563 (1995) (lamenting that "no . . . substantial effect" on interstate commerce "was visible to the naked eye"); *accord* United States v. Morrison, 529 U.S. 598, 612 (2000).

334. Lochner v. New York, 198 U.S. 45 (1905).

335. 20 U.S.C. § 1098bb; *see* Nebraska v. Biden, 52 F.4th 1044 (8th Cir. 2022), *cert. granted*, 143 S. Ct. 477 (2022); Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644, 654 (N.D. Tex. 2022), *cert. granted before judgment sub nom.* Dep't of Educ. v. Brown, 143 S. Ct. 541 (2022), *and vacated and remanded sub nom.* Dep't of Educ. v. Brown, 600 U.S. 551 (2023).

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

337. 143 S. Ct. 2355 (2023).

338. *Id.* at 3273.

339. *Id.*

340. *Id.* at 2378 (Barrett, J., concurring).

341. *Id.* at 2379.

Ultimately, Justice Kagan is surely correct in reading Congress's power to "waive or modify" student loan conditions as permitting the full range of administrative options "from minor changes all the way to major ones."[342] Any another reading negates not only "waive," but also even the disjunctive "or." Again, Justices resisting the allure of the major questions doctrine appear to be the only jurists who actually read the statute.

Unlike questions surrounding the doctrine's substantive content and triggering conditions, the "sole consistency" in the major questions framework will be clear: the government always loses.[343] Major questions, whenever found, operate as a deregulatory one-way ratchet. The major questions doctrine "require[s] clear congressional language to enable an ambitious regulatory agenda but not to disable one."[344] By contrast, agencies seeking unilateral regulatory disarmament can easily find a textual basis for statutory abnegation.[345]

Technology-forcing schemes, such as those in *Verizon Communications, Inc. v. FCC*[346] and *West Virginia v. EPA*, will be especially vulnerable to the major questions doctrine.[347] The very act of demanding technology not yet invented or deemed inconsistent with a narrow definition of economic rationality is almost guaranteed to be "major." Nevertheless, in the face of calls for cost-benefit analysis or scaling back environmental commitments according to commercial convenience, Congress knows exactly how to demand feasibility analyses[348] or direct agencies not to "jeopardize" wildlife.[349] Though

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342. *Id.* at 2395 (Kagan, J., dissenting).

343. *Cf.* United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) ("The sole consistency that I can find is that . . . the government always wins.").

344. Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1938 (2017).

345. *See* William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509, 1538-39 (2019).

346. 535 U.S. 467 (2002).

347. *See generally, e.g.*, Alan S. Miller, *Environmental Regulation, Technological Innovation, and Technology Forcing*, 10 NAT. RES. & ENV'T 64 (1995); D. Bruce La Pierre, *Technology-Forcing and Federal Environmental Protection Statutes*, 62 IOWA L. REV. 771 (1977).

348. 29 U.S.C. § 655(b)(5) (directing the Secretary of Labor to regulate "toxic materials or harmful physical agents" according to "the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity"); *accord* Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 509 (1981) ("[C]ost-benefit analysis by OSHA is not required by the statute because feasibility analysis is."). *See generally* Wesley A. Cann, Jr., *Cost-Benefit Analysis vs. Feasibility Analysis: The Controversy Resolved in the* Cotton Dust *Case*, 20 AM. BUS. L.J. 1 (1982); Joseph E. Hadley, Jr. & Gerald L. Richman, *The Impact of* Benzene *and* Cotton Dust*: Restraints on the Regulation of Toxic Substances*, 34 ADMIN. L. REV. 59 (1982).

349. 16 U.S.C. § 1536 (1976) (directing federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined . . . to be critical"); *accord* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 198 (1978).

the major questions doctrine depicts both legislative delegation and agency interpretation as "running riot,"[350] in reality "[o]ne would be hard pressed to find . . . statutory provision[s] whose terms were any plainer."[351]

Since neither history nor the economy follows a static script, some program is always bound to exert "unprecedented power over American industry."[352] The first cut, as the popular song goes, is the deepest.[353] Had *Sweet Home* arisen under the influence of the major questions doctrine, the Supreme Court almost assuredly would have characterized the habitat modification rule as an "unprecedented" expansion in the coverage of the Endangered Species Act. *Sweet Home*'s evenly matched battle of canons between Justices Stevens and Scalia would have failed to establish a clear congressional intent to treat habitat destruction as a violation of section 9's prohibition against the taking of an endangered species.

In matters of public health policy, conservation biology, or climate change mitigation, the major questions doctrine is calculated to ensure that no agency ever dares to eclipse entrenched expectations beyond a judicially determined threshold of political or economic tolerability. At a minimum, requiring elaborate legislative instructions would raise the cost of legislation and choke off new legal initiatives.[354] The major question "mousehole," so it seems, conceals a gargantuan anti-regulatory elephant prepared to wage the social and economic wars dearest to the contemporary Republican Party.[355]

350. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

351. *Tenn. Valley Auth.*, 437 U.S. at 173.

352. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 645 (1980); *accord* West Virginia v. EPA, 142 S. Ct. 2587, 2612 (2022).

353. CAT STEVENS, THE FIRST CUT IS THE DEEPEST (Deram Records 1967). Notable versions of this song have been recorded by P.P. Arnold, Rod Stewart, and Sheryl Crow.

354. *See* Merrill, *supra* note 24, at 2146; Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 331 (1987).

355. *See* Bernstein & Staszewski, *supra* note 163, at 20 n.119 ("The conservative attack on *Chevron* . . . gained steam during the Obama administration and accelerated as the federal judiciary became more conservative."). *See generally* Gregory A. Elinson & Jonathan A. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475 (2022); Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619 (2021).

D. Normal Jurisprudence Through Normal Science

Even if one insists (against all evidence) that federal judges are as competent in the dismal science of economics as the gay science of poetry, the judiciary's collective incompetence in natural science should lie beyond dispute. It is a truth universally acknowledged, that a federal judge in possession of life tenure, must be in want of scientific training.[356] To the extent that the major questions doctrine urges judges to reject the superior expertise of regulators, resistance to this dogma may need to follow paths dictated neither by the scientific method nor by mathematically precise logic, but rather by the narrative arts.[357] A rhetorically modest extension of Antonin Scalia's whole code rules will do[358]: reasoning, whether legal or scientific, should treat comparable subjects comparably—while drawing meaningful distinctions wherever they appear.

Consequently, one path toward evading or defeating the major questions doctrine lies in characterizing the government's policy as one of long standing and any change as merely incremental. The swirl of cases surrounding responses to the COVID-19 pandemic demonstrates this defense against this novel and virulent doctrine. It is hard to characterize an executive order as "bring[ing] about an enormous and transformative expansion in regulatory authority" when past orders have already "imposed [similar] requirements."[359]

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356. *Cf.* JANE AUSTEN, PRIDE AND PREJUDICE 5 (Penguin Books 2003) (1813) ("It is a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife.").

357. Francis Slade, *On the Ontological Priority of Ends and Its Relevance to the Narrative Arts*, *in* BEAUTY, ART, AND THE POLIS 58-69, 58 & n.1 (Alice Ramos ed., 2000) ("In what can be considered to be the fundamental sentence of *Sein und Zeit* Heidegger asserts that 'possibility stands higher than actuality [*Höher als die Wirklichkeit steht die Möglichkeit*],' which means that there are no ends, there are only purposes, or as Heidegger calls them, 'projects' (*Entwurf*). This is why ethics disappears from the account of human existence in *Sein und Zeit* to be replaced by authenticity (*Eigentlichkeit*) and resoluteness (*Entschlossenheit*)." (footnotes omitted) (quoting MARTIN HEIDEGGER, SEIN UND ZEIT 38, 42-43, 297-98 (Max Niemeyer Verlag 1967))). *See generally* Keith Oatley, *Creative Expression and Communication of Emotions in the Visual and Narrative Arts*, *in* HANDBOOK OF AFFECTIVE SCIENCES 481, 481-502 (Richard J. Davidson, Klaus R. Scherer & H. Hill Goldsmith eds., 2003). Heidegger's complicity in Germany's Nazi regime has put the legacy of the twentieth century's greatest philosopher under severe scrutiny. *See generally* RICHARD WOLIN, HEIDEGGER IN RUINS: BETWEEN PHILOSOPHY AND IDEOLOGY (2023). *But see* ANTONIA GRUNENBERG, HANNAH ARENDT AND MARTIN HEIDEGGER: HISTORY OF A LOVE (Peg Birmingham, Kristina Lebedeva & Elizabeth von Witzke Birmingham trans., Ind. Univ. Press 2017) (recounting the intellectual history of the twentieth century through the romance and reconciliation of Hannah Arendt and Martin Heidegger).

358. *Compare supra* Section II.B (describing Justice Scalia's "whole code" generalizations of structural canons such as *expressio unius*, *noscitur a sociis*, and the rule against surplusage), *with* DEIRDRE N. MCCLOSKEY, THE RHETORIC OF ECONOMICS (2d ed. 1998) (describing economics and other social sciences as exercises in rhetoric and cognate narrative arts).

359. Georgia v. President of the U.S., 46 F.4th 1283, 1313-14 (11th Cir. 2022) (Anderson, J., concurring in part and dissenting in part).

Vaccination mandates, even against a virus of unprecedented lethality, are hardly "surprising" when they are viewed against the backdrop of the epidemics that swept through twentieth-century America.[360] Hoary legal precedents such as *Jacobsen v. Massachusetts*[361] and *Zucht v. King*[362] recognized the power to mandate vaccination as part of the traditional police power.

Another federal court repelled a major questions claim by reasoning that National Guardsmen have long faced vaccine mandates, dating back to George Washington's order to vaccinate the Continental Army against smallpox.[363] This history undermined the governor of Oklahoma's claim that Department of Defense directives requiring COVID-19 vaccination of National Guardsmen had violated the major questions doctrine, even independent of "considerations relating to the deference which courts should ordinarily accord to military judgments."[364] Even Neil Gorsuch has conceded that "the government's early, longstanding, and consistent interpretation" can supply "powerful evidence" of the meaning of a "statute, regulation, or other legal instrument."[365] As Justice Gorsuch has admitted in a tactical refusal to apply what he called "the no-elephants-in-mouseholes canon," many an "elephant has never hidden in a mousehole; it has been standing before us all along."[366]

In civilian as well as military settings, it defies belief that sane judges must remind the nation that "healthcare workers have long been required to obtain inoculations for infectious diseases, such as measles, rubella, mumps, and others . . . because required vaccination is a common-sense measure designed to prevent healthcare workers, whose job it is to improve patients' health, from making them sicker."[367] Because the "problem of statutory interpretation in

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360. *Id.* at 1316; *cf.* Livingston Educ. Serv. Agency v. Becerra, 589 F. Supp. 3d 697, 703 (E.D. Mich. 2022) (observing that a COVID-19 vaccine mandate took place against the backdrop of Head Start Program requirements, dating from 1975, that grant recipients facilitate " 'all recommended immunizations,' including diphtheria, pertussis, tetanus, polio, and measles"), *vacated and remanded*, No. 22-1257, 2023 WL 4249469 (6th Cir. June 29, 2023).

361. 197 U.S. 11, 24-26 (1905).

362. 260 U.S. 174, 176 (1922).

363. *See* Oklahoma v. Biden, 577 F. Supp. 3d 1245, 1261-62 (W.D. Okla. 2021).

364. *Id.*; *see also* Austin v. U.S. Navy Seals 1-26, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring) (rejecting the judiciary's efforts to "insert[] itself into the Navy's chain of command, overriding military commanders' professional military judgments," with respect to a petition by Navy Seals seeking a religious exemption from the Navy's COVID-19 vaccination requirement).

365. Kisor v. Wilkie, 139 S. Ct. 2400, 2426 (2019) (Gorsuch, J., concurring in the judgment) (emphasis omitted); *accord* Georgia v. President of the U.S., 46 F.4th 1283, 1312 (11th Cir. 2022) (Anderson, J., concurring in part and dissenting in part).

366. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (2020).

367. Florida v. Dep't of Health & Hum. Servs., 19 F.4th 1271, 1288 (11th Cir. 2021) (citing Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61555, 61567-68 (Nov. 5, 2021)).

these cases is indeed no different" from interpretive challenges elsewhere in the law, courts should never assume that the mere mention of the major questions doctrine "automatically permits" its proponent "to win."[368] Practical "distinctions among *end*, *purpose*, and *consequence*," after all, "make possible the narrative arts or what Aristotle called 'poetry.' "[369]

E. The Post-Textualist Paradigm

Even more strikingly, the major questions doctrine has become wholly unmoored from plain meaning and other conventional tools of statutory interpretation. It is a wholly synthetic, "made-up" contrivance,[370] an "unnatural[]" clutch of "heightened-specificity requirements" aimed at "thwarting . . . adequate responses to unforeseen events."[371]

The Chief Justice's majority opinion in *West Virginia* admitted that all previous "regulatory assertions" reversed by the doctrine "had a colorable textual basis."[372] "[T]he approach under the major questions doctrine is distinct" from "routine statutory interpretation."[373] Insisting that "something more than a merely plausible textual basis for the agency action is necessary," the Court demands that "[t]he agency . . . must point to 'clear congressional authorization' for the power it claims."[374] *West Virginia* thus confirms what lower courts had already realized before the Supreme Court formally endorsed this line of reasoning: the major questions doctrine serves as "an independent bar to the . . . invocation of *Chevron*."[375] Even more bluntly: once a major question enters the courtroom, "*Chevron* has no role to play."[376]

The history of ideas speaks of intellectual revolutions that overthrow "normal science."[377] A wholly unprecedented paradigm has displaced the previous regime combining the presumed primacy of text with deference to agency expertise as a way of resolving textual uncertainty. Whenever textualism threatens to "frustrate broader goals"

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368. Muscarello v. United States, 524 U.S. 125, 139 (1998).

369. Slade, *supra* note 357, at 58. Once again: law at its highest as a human calling demands poetic justice. *See generally* Chen, *supra* note 110.

370. Biden v. Nebraska, 143 S. Ct. 2355, 2400 (2023) (Kagan, J., dissenting).

371. *Id.* at 2385.

372. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

373. *Id.*

374. *Id.*

375. Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1164 (M.D. Fla. 2022), *vacated as moot sub nom.* Health Freedom Def. Fund v. President of the U.S., 71 F.4th 888 (11th Cir. 2023).

376. *In re* MCP No. 165, 20 F.4th 264, 281 (6th Cir. 2021) (Sutton, C.J., dissenting from the denial of initial hearing en banc), *stayed sub nom.* Nat'l Fed. of Indep. Bus. v. OSHA, 142 S. Ct. 661 (2022).

377. *See generally* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (4th ed. 2012).

within the Justices' thinly disguised political agenda, "special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."[378] Indeed, Justice Gorsuch's paean to the major questions doctrine dispenses entirely with "citing the statutory text."[379] The clear statement rule that is triggered whenever five Justices spot a major question operates mostly in defense of a constitutional phantom whose strongest authority is a political science dissertation masquerading as a judicial dissent.[380] As Justice Scalia observed in response to an exercise in constitutional avoidance and clear statement that he happened to dislike, no "interpretive exercise" is ever "simple" when a court's "result-driven antitextualism befogs what is evident."[381]

All exceptions to normal legal science invite efforts to shift the paradigm toward those exceptions—with no assurance that such shifts will improve the law or the lot of those it binds. Just as "emergency powers . . . tend to kindle emergencies,"[382] the very existence of a major questions doctrine tempts courts to treat all statutory questions as major. Lake Wobegon has no monopoly on children, or laws, deemed above average.[383]

The most charitable defense of the major questions doctrine may lie in the observation that it follows a long tradition of judicial efforts to discern congressional intent without necessarily being bound by the strict letter of the law. Stephen Breyer, who almost assuredly would have joined Justice Kagan's dissent in *West Virginia*, once acknowledged that "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[384] Inasmuch as the major questions doctrine attempts to discern congressional intent, a good-faith effort to apply that doctrine should treat it "as a tool of statutory interpretation along with all other available tools."[385]

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378. West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

379. *Id.* at 2641 n.21.

380. *See* Gundy v. United States, 139 S. Ct. 2116, 2131-48 (2019) (Gorsuch, J., dissenting).

381. Bond v. United States, 572 U.S. 844, 868 (2014) (Scalia, J., concurring in the judgment).

382. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

383. Garrison Keillor's *Prairie Home Companion* broadcast described Lake Wobegon as an idyllic paradise where "all the children," in a sentimental if mathematically impossible way, "are above average." *See generally, e.g.*, Rachel M. Hayes & Scott Schaefer, *CEO Pay and the Lake Wobegon Effect*, 94 J. FIN. ECON. 280 (2009); Gary W. Phillips, *The Lake Wobegon Effect*, 9 EDUC. MEASUREMENT 3 (1990).

384. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); *accord* Georgia v. President of the U.S., 46 F.4th 1283, 1314 (11th Cir. 2022) (Anderson, J., concurring in part and dissenting in part).

385. *Georgia*, 46 F.4th at 1314.

On this perhaps optimistically benign view of the major questions doctrine, a reviewing court should merely remember to scour extratextual sources of statutory meaning, lest the implementing agency and its reviewing court give too much credence to the unadorned text.[386] "It is a familiar rule," after all, "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[387] To describe the major questions doctrine as a parish within the jurisprudential *Church of the Holy Trinity*, however, scarcely constitutes a stirring endorsement of Antonin Scalia's commitment to textualism.[388]

"Each generation has its theory of statutory interpretation."[389] Laws,[390] regulatory agencies,[391] and entire schools of legal[392] and political thought[393] follow the cycles that define all living things. Even the lifecycle of entire species seems constrained by geological history; according to the Raup-Seposki "kill curve,"[394] 350 million years appears to mark the maximum lifespan of any species.[395]

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386. *Cf.* Biden v. Nebraska, 143 S. Ct. 2355, 2384 (2023) (Barrett, J., concurring) (describing the major questions doctrine as a "common sense" principle that reaffirms the primacy of statutory context and prevents absurd administrative adventures that exceed legislative expectations).

387. Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).

388. *See* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 108 (2007) (Scalia, J., dissenting) (criticizing *Holy Trinity* as "a judge-empowering proposition if there ever was one," from which the contemporary "Court has wisely retreated . . . in words if not always in actions"); Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 471 (1989) (Kennedy, J., concurring in the judgment) (criticizing *Holy Trinity*'s conclusion that the United States is a "Christian nation" and the decision's "susceptibility to abuse" of its open-ended interpretive method); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 21 (1998).

389. Diver, *supra* note 235, at 552.

390. *See, e.g.*, Fed. Power Comm'n v. E. Ohio Gas Co., 338 U.S. 464, 489 (1950) (Jackson, J., dissenting) ("[R]egulatory measures are temporary expedients, not eternal verities . . . .").

391. *See* MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 74 (1955) ("The life cycle of an independent commission can be divided into four periods: gestation, youth, maturity, and old age."); JOHN KENNETH GALBRAITH, THE GREAT CRASH, 1929, at 171 (2d ed. 1961) ("[R]egulatory bodies, like the people who comprise them, have a marked life cycle. In youth they are vigorous, aggressive, evangelistic, and even intolerant. Later they mellow, and in old age . . . they become . . . either an arm of the industry they are regulating or senile.").

392. *See, e.g.*, GRANT GILMORE, THE AGES OF AMERICAN LAW (1977).

393. *See, e.g.*, ARTHUR M. SCHLESINGER, JR., THE CYCLES OF AMERICAN HISTORY (1986).

394. *See* David M. Raup, *A Kill Curve for Phanerozoic Marine Species*, 17 PALEOBIOLOGY 37 (1991); David M. Raup & J. John Sepkoski, Jr., *Periodicity of Extinctions in the Geologic Past,* 81 PROC. NAT'L ACAD. SCIS. 801 (1984); David M. Raup & J. John Sepkoski, Jr., *Periodic Extinction of Families and Genera*, 231 SCIENCE 833 (1986).

395. *See* J. Laherrère & D. Sornette, *Stretched Exponential Distributions in Nature and Economy: "Fat Tails" with Characteristic Scales*, 2 EUR. PHYSICAL J. B 525, 534 (1998).

Legal life cycles are much shorter, of course, and they elapse at a rate that allows the fortuitously long-lived members of this profession to witness the rise and fall of multiple schools of jurisprudence. Textualism belonged to the previous legal generation.[396] Today's jurists honor the old traditions, if at all, by hoisting the Jolly Roger.[397] Against comprehensive efforts to crucify American law upon a rood of rigid commitments to conservative dogma, a meek protest squeaks: "I would stick to the text."[398]

As goes textualism, so goes *Chevron*. The rise of the major questions doctrine has tracked the decline of textualism and *Chevron*. In retrospect, *Chevron* appears to have peaked in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[399] a complex controversy over different modes of delivering broadband Internet access. A lesson from the science of exhaustible resources seems apt[400]: you don't know you've hit the peak till it's past.[401] Though *West Virginia* did not directly address *Chevron*—indeed, neither the Chief Justice nor Justice Gorsuch cited *Chevron*, except through the title of a law review article[402]—it no longer seems safe to trust *Brand X*'s holding that stare

396. *See generally* William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611 (2023); Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265 (2020); Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 855-64 (2013) (reviewing ANTONIN SCALIA & BRYAN G. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)).

397. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1755-56 (2020) (Alito, J., dissenting) ("The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a [nontextualist] theory of statutory interpretation . . . ."); *cf.* Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 315-17 (2021) (evaluating the nominal claim by all three opinions in *Bostock* to a textually dictated, objective meaning of "sex discrimination" or "discrimination on the basis of sex[]").

398. Sackett v. EPA, 598 U.S. 651, 727 (2023) (Kavanaugh, J., concurring in the judgment); *accord id.* at 710 (Kagan, J., concurring in the judgment).

399. 545 U.S. 967 (2005).

400. The most celebrated instance of this phenomenon is "peak petroleum." *See, e.g.*, M. KING HUBBERT, NUCLEAR ENERGY AND THE FOSSIL FUELS 22 (1956); Adam R. Brandt, *Testing Hubbert*, 35 ENERGY POL'Y 3074 (2007); Alfred J. Carvallo, *Hubbert's Petroleum Production Model: An Evaluation and Implications for World Oil Production Forecasts*, 13 NAT. RES. RSCH. 211 (2004); M. King Hubbert, *Energy from Fossil Fuels*, 109 SCIENCE 103 (1949); Steve Sorrell & Jamie Speirs, *Hubbert's Legacy: A Review of Curve-Fitting Methods to Estimate Ultimately Recoverable Resources*, 19 NAT. RES. RSCH. 209 (2010); Steve Sorrell, Jamie Speirs, Roger Bentley, Richard Miller & Erica Thompson, *Shaping the Global Oil Peak: A Review of the Evidence on Field Sizes, Reserve Growth, Decline Rates and Depletion Rates*, 37 ENERGY 709 (2012). Less familiar, but arguably more dire, is the problem of "peak phosphorus." *See, e.g.*, Timothy M. Beardsley, *Peak Phosphorus*, 61 BIOSCIENCE 91 (2011); Dana Cordell & Stuart White, *Peak Phosphorus: Clarifying the Key Issues of a Vigorous Debate About Long-Term Phosphorus Security*, 3 SUSTAINABILITY 2027 (2011). And yes, lawyers should care about these phenomena. *See* James Ming Chen, *Anthropocene Agricultural Law*, 3 TEX. A&M L. REV. 745, 757-58 (2016).

401. Or, more musically: "You don't know what you've got till it's gone." JONI MITCHELL, *Big Yellow Taxi*, *on* LADIES OF THE CANYON (Reprise Records 1970).

402. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (citing Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 CARDOZO L. REV. 989, 1011 (1999)).

decisis "override[s] an agency's interpretation" with *Chevron* deference only when "a court's prior interpretation of a statute . . . held the statute unambiguous."[403] Clarence Thomas, author of *Brand X*, has repudiated his own decision and cast doubt on the very constitutionality of *Chevron* deference.[404]

The domain of "major questions" appears to lie at the other end of a continuum whose starting point is *United States v. Mead Corp.*[405] That decision confined *Chevron* to decisions carrying the "force of law" and made in furtherance of an agency's duly delegated lawmaking authority.[406] Agency interpretations not attaining *Chevron* deference would nevertheless warrant judicial respect for their "power to persuade," even in the absence of "power to control."[407] The years between *Mead* and *Brand X* marked a period of intense intellectual foment, as commentators struggled to calibrate the spectrum of deference from *Mead* to *Chevron*.[408]

Far from Justice Scalia's dire prediction that *Mead* would become "one of the most significant opinions ever rendered . . . [on] the judicial review of administrative action," with "enormous, and almost uniformly bad," repercussions,[409] *Mead* has stabilized questions surrounding low-leverage congressional delegations to agencies.[410] Administrative interpretations that fall short of carrying the force of law are described as deserving "*Skidmore* respect," or some level of judicial solicitude beneath *Chevron*, deference.[411] *Mead* motivates calls to deny *Chevron* deference to informal agency adjudication,[412] particularly in entire bodies of law (such as immigration adjudication) that depend on

403. *Brand X*, 545 U.S. at 984. This holding resolved what had been a long-running tension between *Chevron* and stare decisis. *See, e.g.*, Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225 (1997); Rebecca Hanner White, *The Stare Decisis "Exception" to the* Chevron *Deference Rule*, 44 FLA. L. REV. 723 (1992).

404. *See* Michigan v. EPA, 576 U.S. 743, 760-64 (2015) (Thomas, J., concurring).

405. *See* United States v. Mead Corp., 533 U.S. 218, 261 (2001) (Scalia, J., dissenting).

406. *Id.* at 226-27 (majority opinion).

407. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

408. *See, e.g.*, Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 812 (2002); Adrian Vermeule, Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

409. *Mead*, 533 U.S. at 261 (Scalia, J., dissenting).

410. As usual, Justice Scalia had weak clairvoyance and even worse taste. *See generally* Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053 (2017).

411. *See, e.g.*, Price v. Stevedoring Servs. of Am., Inc., 697 F.3d 820, 832-33 (9th Cir. 2012); Richard Murphy, *The Last Should Be First—Flip the Order of the* Chevron *Two-Step*, 22 WM. & MARY BILL RTS. J. 431, 436 (2013); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1127 (2001). *See generally* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*,*"* 112 COLUM. L. REV. 1143 (2012).

412. *See* Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931 (2021).

that mode of decisionmaking.[413] *Mead* is most typically evaluated as *Chevron* "step zero," a prelude to the more familiar two steps leading to judicial deference.[414] In the words of the history and philosophy of science, *Mead* became "normal science," a routine component in the quotidian practice of the *Chevron* paradigm.[415]

The real threat to *Chevron* does not stem from uncertainty over assertions of authority or administrative interpretations commanding something less than judicial deference. By analogy to the Goldilocks principle in biology, astrobiology, and astrophysics,[416] *Chevron* occupies a zone that is "just right" between the "too cold" domain of *Mead* and *Skidmore* and the "too hot" domain of the major questions doctrine. Having survived pease porridge cold, *Chevron* may choke on pease porridge hot and in the pot, nine Justices old.[417] If we trade the enchantment of nursery rhymes and fairy tales for the more formal language of complex systems,[418] *Chevron* might have survived the COLD world of constrained optimization with limited deviations,[419] but may not adapt to the HOT conditions of highly optimized tolerance.[420]

These attributes of complex systems find ready expression in administrative law. *Mead* and *Skidmore* control a COLD jurisprudence whose constrained, limited inquiries probe the clarity or depth of a congressional delegation. COLD jurisprudence contents itself with

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413. *See* Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (2021).

414. *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

415. Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986) (quoting T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10 (2d ed. 1970)).

416. *See, e.g.*, Seamus J. Martin, *Oncogene-Induced Autophagy and the Goldilocks Principle*, 7 AUTOPHAGY 922 (2011); Michael R. Rampino & Ken Caldeira, *The Goldilocks Problem: Climatic Evolution and Long-Term Habitability of Terrestrial Planets*, 32 ANN. REV. ASTRONOMY & ASTROPHYSICS 83 (1994); George N. Somero, *The Goldilocks Principle: A Unifying Perspective on Biochemical Adaptation to Abiotic Stressors in the Sea*, 14 ANN. REV. MARINE SCI. 1 (2022); W. von Bloh et al., *Habitability of the Goldilocks Planet Gliese 581g: Results from Geodynamic Models*, ASTRONOMY & ASTROPHYSICS, Apr. 2011.

417. *See* WALTER A. HAZEN, EVERYDAY LIFE: COLONIAL TIMES 34 (1997).

418. *Compare* BRUNO BETTELHEIM, THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES (1976), *with* DIDIER SORNETTE, CRITICAL PHENOMENA IN NATURAL SCIENCES: CHAOS, FRACTALS, SELFORGANIZATION AND DISORDER: CONCEPTS AND TOOLS (2000).

419. *See, e.g.*, Simge Küçükyavuz & Ruiwei Jiang, *Chance-Constrained Optimization Under Limited Distributional Information: A Review of Reformulations Based on Sampling and Distributional Robustness*, 10 EURO J. COMPUTATIONAL OPTIMIZATION 100030 (2022); Rommel G. Regis, *Constrained Optimization by Radial Basis Function Interpolation for High-Dimensional Expensive Black-Box Problems with Infeasible Initial Points*, 46 ENG'G OPTIMIZATION 218 (2014).

420. *See, e.g.*, J.M. Carlson & John Doyle, *Highly Optimized Tolerance: A Mechanism for Power Laws in Designed Systems*, 60 PHYSICAL REV. E 1412 (1999); J.M. Carlson & John Doyle, *Highly Optimized Tolerance: Robustness and Design in Complex Systems*, 84 PHYSICAL REV. LETTERS 2529 (2000).

optimizing expert agencies' incremental steps toward understanding and fulfilling their statutory mandates. The contemporary Court's emerging interpretive approach, by contrast, burns at the personal fever and fervor of Neil Gorsuch, as that Justice seeks to inflame the politicized passions underneath the nondelegation and major questions doctrines.

In multiple senses, the major questions doctrine is coming in HOT. The major questions doctrine is hot in the way *Mead* as *Chevron* step zero or *Skidmore* respect is cold. Claims of regulatory authority vulnerable to characterization as engaging major questions tend to be far broader than on-the-fly characterizations of imported paper products as notebooks or diaries. As a departure from *Chevron*, a major questions inquiry is much hotter than its equivalent under *Mead* or *Skidmore*. Respect for the power to persuade, if not deference to interpretations claiming the power to bind, commits a court to review the extent to which an agency has invested scientific expertise, legal reasoning, and political capital in an exercise in statutory interpretation.

By contrast, the identification of a major question triggers de novo review and the complete substitution of judicial discretion for its administrative equivalent. Indeed, substantial commitments of scientific, legal, and political effort—the very factors that bridge the gap between *Skidmore* respect and *Chevron* deference—invite the wholesale substitution of judicial for administrative decisionmaking under the major questions doctrine.

V. *CHEVRON*'S EXTINCTION DEBT IN AMERICAN LAW'S NO-ANALOG FUTURE

The real-world context of *West Virginia v. EPA* supplies a final, illuminating metaphor. As the most powerful driver of widespread habitat destruction, climate change produces ecosystems that have no historical antecedent.[421] These "no-analog" ecosystems also describe paleontological landscapes that have no contemporary equivalent.[422]

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421. *See* Douglas Fox, *Back to the No-Analog Future?*, 316 SCIENCE 823 (2007); Diana Stralberg et al., *Re-Shuffling of Species with Climate Disruption: A No-Analog Future for California Birds?*, PLOS ONE, Sept. 2009 (available at DOI: 10.1371/journal.pone.0006825); John W. Williams & Stephen T. Jackson, *Novel Climates, No-Analog Communities, and Ecological Surprises*, 5 FRONTIERS ECOLOGY & ENV'T 475 (2007).

422. *See, e.g.*, Alexander Correa-Metrio et al., *Rapid Climate Change and No-Analog Vegetation in Lowland Central America During the Last 86,000 Years*, 38 QUATERNARY SCI. REVS. 63 (2012); Samuel D. Veloz et al., *No-Analog Climates and Shifting Realized Niches During the Late Quaternary: Implications for 21st-Century Predictions by Species Distribution Models*, 18 GLOB. CHANGE BIOLOGY 1698 (2012); John W. Williams et al., *Model Systems for a No-Analog Future: Species Associations and Climates During the Last Deglaciation*, 1297 ANNALS N.Y. ACAD. SCIS. 29 (2013).

Constant and radical reshuffling of ecological communities confounds the task of predicting, let alone preparing for, the effects of climate change.[423]

The imminent implosion of *Chevron* and the decades of regulatory policy fostered by its jurisprudence of deference to technocratic expertise heralds an intense, chaotic doctrinal transition. Pending sweeping new legislation, the immediate practical effect of the Supreme Court's climate change decisions is to prevent the regulation of greenhouse gas emissions (at least from stationary sources) by any branch of the federal government. Both the majority[424] and the dissent[425] acknowledged that *West Virginia*, paired with the Court's holding that section 111(d) of the Clean Air Act, forecloses the application of the federal common law of nuisance.[426] That legal conclusion prevents both the Environmental Protection Agency and the federal judiciary from intervening in the battle against anthropogenic climate change. Doctrinal fallout from these decisions will therefore be evaluated under governmental paralysis in the face of an existential environmental crisis.

Though the Supreme Court has described climate change as "the most pressing environmental challenge of our time,"[427] these decisions all but undercut meaningful responses to the ongoing calamity. The world released 59 billion metric tons of carbon dioxide in 2019, 12% more relative to 2010 and 54% more relative to 1990.[428] Welcome to Anthropocene America,[429] a country that may contribute more than any other to depleting earth's nonrenewable resources and to resetting

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423. Fox, *supra* note 421, at 825; Williams & Jackson, *supra* note 421, at 475.

424. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2613 (2022).

425. *See id.* at 2636-37 (Kagan, J., dissenting).

426. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424-26 (2011).

427. Massachusetts v. EPA, 549 U.S. 497, 505, 535 (2007) (Roberts, J., dissenting); *accord West Virginia*, 142 S. Ct. at 2626 (Kagan, J., dissenting).

428. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, AR6 SYNTHESIS REPORT: CLIMATE CHANGE 2023 (2023).

429. Evaluations of the country's prospects for finding a workable path forward vary in their balance of optimism and pessimism. *Compare* Laurie Ristino, *Surviving Climate Change in America: Toward a Rural Resilience Framework*, 41 W. NEW ENG. L. REV. 521, 542 (2019) ("Adopting a Rural Resilience Framework could provide the federal government with the necessary paradigm to begin building a sustainable policy for food and farming in Anthropocene America."), *with* Daniel J. Fiorino, *Climate Change and Right-Wing Populism in the United States*, 31 ENV'T POL. 801, 801 (2022) (identifying the Republican Party, especially "under Trump," as a "right-wing populist part[y]" whose hostility to climate mitigation "is reflected in skepticism or rejection of climate science, opposition to multilateral institutions and agreements, aggressive domestic exploitation of fossil fuels, and depiction of climate advocates and experts as 'elites' set on undermining the will of 'the people' ").

the trajectory of evolution across geological history,[430] yet disables itself from responding in ways that might be both helpful and lawful.[431] So much for the traditional and hitherto undisputed proposition that the Constitution is not a suicide pact.[432]

The major questions doctrine signals the immediate deprecation and eventual overruling of *Chevron*.[433] Though "*Chevron*'s constitutional demise would have seemed nearly impossible a few years ago, . . . now the signs are everywhere."[434] A newly emboldened and unapologetically conservative judiciary has far eclipsed the incremental, proceduralist criticisms lodged by ideologically diverse members of the broader scholarly community.[435] At a bare minimum, "a contingent of the Court is dissatisfied with how much law-declaration power the Court has ceded to agencies."[436]

Worse still, the contemporary Court has weaponized Antonin Scalia's contempt for science into an affirmative presumption against empirical evidence and technical expertise. A widened variant of Justice Scalia's major mousetrap may yet swallow the very notion of a government guided by "the Progress of Science and useful Arts."[437]

For instance, the uniquely politicized jurisprudence of the Second Amendment expresses extreme disdain for the scientific method and evidence-based decisionmaking. The Court not only declines to "make difficult empirical judgments" about "the costs and benefits of firearms restrictions,"[438] but also dismisses "the relevance of statistics" about "mass shootings," "the use of guns to commit suicide" and "in domestic

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430. *See, e.g.*, Unurjargal Nyambuu & Willi Semmler, *Trends in the Extraction of Non-Renewable Resources: The Case of Fossil Energy*, 37 ECON. MODELLING 271, 272 (2014) ("In recent years, the United States was the world's largest consumer of natural gas."); Yunfeng Shang et al., *The Impact of Climate Policy Uncertainty on Renewable and Non-Renewable Energy Demand in the United States*, 197 RENEWABLE ENERGY 654 (2022).

431. *See* Carl Folke et al., *Our Future in the Anthropocene Biosphere*, 50 AMBIO 834 (2021); Nicholas A. Robinson, *Fundamental Principles of Law for the Anthropocene?*, 44 ENV'T POL'Y & L. 13 (2014); Thomas Sterner et al., *Policy Design for the Anthropocene*, 2 NATURE SUSTAINABILITY 14 (2019).

432. *Contra* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963); Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

433. *See, e.g.*, Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1868-69 (2015).

434. Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 732 (2020).

435. *See, e.g.*, Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549 (2009); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397 (2007).

436. Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 94 (2015).

437. U.S. CONST. art. I, § 8, cl. 8.

438. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 24-25 (2022) (quoting McDonald v. City of Chicago, 561 U.S. 742, 790-91 (2010)).

disputes," and "children and adolescents killed by guns."[439] Abortion's role as a funhouse mirror in constitutional jurisprudence has already shifted to the Second Amendment.[440]

The major questions doctrine refracts those deceptive reflections even further, projecting judicial ignorance beneath a veneer of arrogant pugnacity to all fronts in a culture war where one set of combatants regards science and enlightenment with disdain, even spite. The fall of the United States might begin with Neil Gorsuch's favorite refrain: "Of course we are not scientists, but . . . ."[441]

The claim that the American conservative movement has rejected science is at once huge and hugely insulting.[442] "[C]onservative hostility toward science is rooted in conservative hostility toward government regulation of the marketplace, which has morphed in recent decades into conservative hostility to government, tout court."[443] In one study of attitudes toward science among different political cohorts from 1974 to 2010, "[c]onservatives began the period with the highest trust in science, relative to liberals and moderates, and ended the period with the lowest."[444] In modern America's weaponized polity, conservatives essentially denounce science.[445]

Properly calibrated judicial review of administrative decisionmaking requires no hostility toward technical expertise, let alone an ideologically motivated war on science. Judges are expected to "acquire the learning pertinent to complex technical questions in such fields as economics, science, technology and psychology."[446] Far from feeling

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439. *Id.* at 72 (Alito, J., concurring).

440. *See* Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1176 (2014) ("[I]n abortion jurisprudence . . . normal doctrine does not apply. Whether it be substantive due process, equal protection, or . . . the First Amendment[,] the rules are different when the claim involves abortion."); *cf.* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009) (assigning the same "four major shortcomings" in the constitutional reasoning behind both Roe v. Wade, 410 U.S. 113 (1973), and District of Columbia v. Heller, 554 U.S. 570 (2008)). *See generally* Bernard M. Dickens, *Abortion and Distortion of Justice in the Law*, 17 L. MED. & HEALTHCARE 395 (1989).

441. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021) (statement of Gorsuch, J.).

442. *See generally, e.g.*, CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE (2005).

443. Naomi Oreskes & Erik M. Conway, *From Anti-Government to Anti-Science: Why Conservatives Have Turned Against Science*, 151 DAEDALUS 98, 98 (2022).

444. Gordon Gauchat, *Politicization of Science in the Public Sphere: A Study of Public Trust in the United States, 1974 to 2010*, 77 AM. SOCIO. REV. 167, 167 (2012).

445. *See, e.g.*, Riley E. Dunlap, *Clarifying Anti-Reflexivity: Conservative Opposition to Impact Science and Scientific Evidence*, ENV'T RSCH. LETTERS, Feb. 2014; Austin C. Kozlowski, *How Conservatives Lost Confidence in Science: The Role of Ideological Alignment in Political Polarization*, 100 SOC. FORCES 1415 (2022).

446. Ethyl Corp. v. EPA, 541 F.2d 1, 69 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring), *cert. denied*, 426 U.S. 941 (1976). *Contra* Queensboro Farms Prods., Inc. v. Wickard, 137 F.2d 969, 975 (2d Cir. 1943) (describing agriculture as a field "so vast that fully to comprehend it would require an almost universal knowledge ranging from geology, biology,

"overwhelmed . . . by the utter 'scientificity' " of subjects presented for their review, judges "should not automatically succumb" to the "acknowledged expertise" of specialized regulators.[447] "Restraint, yes, abdication, no."[448]

More bluntly, the asymmetrical nature of inquiries into major questions, which dismantle "ambitious regulatory agenda[s]" absent clear congressional authorization but never block an agency's retreat, "mask[s] a judicial agenda hostile to a robust regulatory state."[449] Should the unthinkable come to pass, "[o]verturning *Chevron* would be the most radical decision in modern history about constitutional structure, upsetting hundreds of precedents [and] thousands of statutory provisions" while undermining the Constitution's "established tools of democratic self-governance."[450] The Court would effectively "substitute[] itself for Congress and the Executive Branch in making national policy."[451] This Court's "radical restructuring of American law across a range of fields and disciplines" transfers power from "Congress, the administrative state, the states, and the lower federal courts," all for the exclusive benefit of the Supreme Court itself.[452]

But why should we rely solely on the anxious lamentations of academic commentators, when Supreme Court Justices themselves have escalated "concerns over the exercise of administrative power"[453] into an outright declaration of war on the "titanic administrative state"?[454] Immediately before he joined the high court, Neil Gorsuch declared that "*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square

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chemistry and medicine to the niceties of the legislative, judicial and administrative processes of government").

447. Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427, 434 (D.C. Cir. 1973); *cf.* Jackson v. Pollion, 733 F.3d 786, 787 (7th Cir. 2013) (identifying "a widespread, and increasingly troublesome, discomfort among lawyers and judges confronted by a scientific or other technological issue"); Edward K. Cheng, *Fighting Legal Innumeracy*, 17 GREEN BAG 2D 271, 276 (2014) (urging all "legal actors . . . to demand, without embarrassment, that quantitative researchers not only explain the conclusions of their studies, but also how and why the methods work").

448. *Ethyl*, 541 F.2d at 69 (Leventhal, J., concurring); *cf.* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670 (1981) (plurality opinion) (expressing a willingness to invalidate "marginally" effective and "substantially" obtrusive laws despite state officials' claimed expertise over regulations designed "to promote the public health or safety").

449. Heinzerling, *supra* note 344, at 1938.

450. Green, *supra* note 434, at 654. *See generally* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635 (2023).

451. Biden v. Nebraska, 143 S. Ct. 2355, 2385 (2023) (Kagan, J., dissenting).

452. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. 97, 97 (2022).

453. *Biden*, 143 S. Ct. at 2372. *Contra id.* at 2384 (Kagan, J., dissenting) (describing these concerns as unmoored from straightforward interpretation of statutory text).

454. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

with the Constitution of the framers' design."[455] As a circuit court judge, Neil Gorsuch openly pondered, "what would happen in a world without *Chevron*?"[456]

Although he declined to say at his Supreme Court confirmation hearings whether he would overrule *Chevron*,[457] it is now clear that Justice Gorsuch aspires to bury *Chevron* under "a tombstone no one can miss."[458] His war on *Chevron* now completes a trilogy of projects whose other components are the major questions doctrine and the revival of a meaningful nondelegation doctrine.[459] Whatever respect Justice Gorsuch feigned toward *Chevron* during his confirmation now carries roughly the value of his homage during those hearings to *Roe v. Wade*.

For his part, Clarence Thomas grounds his hostility toward *Chevron* in his belief that "the judicial power" requires "independent," presumably de novo, "judgment in interpreting and expounding upon the laws."[460] Chief Justice Roberts fears "the authority administrative agencies now hold over our economic, social, and political activities,"[461] though he does generously admit that "[i]t would be a bit much to describe" even "the growing power of the administrative state" as "the very definition of tyranny."[462] In one of his final official acts on the Supreme Court, Anthony Kennedy deemed it "necessary and appropriate to reconsider," in some future case directly raising the

455. *Id.* at 1149.

456. *Id.* at 1158.

457. *See Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 39 (2017) (reporting then-Judge Gorsuch's refusal to answer whether *Chevron* should be overruled, paired with his concession that *Skidmore* respect would persist even in the absence of *Chevron*); *Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring) ("Of course, courts could and would consult agency views and apply the agency's interpretation when it accords with the best reading of a statute."). *Compare* Kisor v. Wilkie, 139 S. Ct. 2400, 2426 (2019) (Gorsuch, J., concurring in the judgment) ("[T]he government's early, longstanding, and consistent interpretation of a statute, regulation, or other legal instrument could count as powerful *evidence* of its original public meaning."), *with id.* at 2427-28 (explicitly linking this view with the interpretive approach in *Skidmore*).

458. Buffington v. McDonough, 143 S. Ct. 14, 16 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

459. *See Gutierrez-Brizuela*, 834 F.3d at 1157 n.9 (citing Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 817-22 (2010)).

460. Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in the judgment); *accord* Michigan v. EPA, 576 U.S. 743, 766 (2015) (Kagan, J., dissenting); *see also* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 91 (2015) (Thomas, J., concurring in the judgment) (arguing that the Supreme Court has "overseen and sanctioned the growth of an administrative system" that "finds no comfortable home in our constitutional structure").

461. City of Arlington v. FCC, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting).

462. *Id.* at 315 (citing Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68-69 (2011) (Scalia, J., concurring)).

issue, "the premises that underlie *Chevron* and how courts have implemented that decision."[463] Samuel Alito "can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*."[464]

Other federal actors support the conservative Justices' war on *Chevron*. Lower-ranking judges ritually denounce *Chevron* as a font of "arbitrary power" over "individual liberty"[465] and as the leading instrument converting matters of paramount material and moral importance into "fodder for the diktat of a federal administrative agency."[466] Orrin Hatch and other conservative members of Congress have introduced legislation to override *Chevron*, purportedly equating de novo review of all questions of law related to agency rulemaking with the "restoration" of separation of powers.[467]

The major questions doctrine has turned *Chevron*'s former dominance into decay and decline. As of October 2023, one could credibly say that the Supreme Court had not applied *Chevron* for seven years.[468] The Court last upheld an agency interpretation of law under *Chevron*'s second step in 2016, the year Antonin Scalia died and the Senate successfully held his seat open in anticipation of a Republican takeover of the Presidency.[469] Especially if *Chevron* is treated as an interpretive canon rather than binding precedent and therefore

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463. Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring).

464. *Id.* at 2121 (Alito, J., dissenting).

465. Egan v. Del. River Port Auth., 851 F.3d 263, 280 (3d Cir. 2017) (Jordan, J., concurring in the judgment); *see also* Bernstein & Staszewski, *supra* note 163, at 23 ("The rhetoric of the *Egan* concurrence strikes a populist note, pitting unaccountable, unelected, biased agencies against a victimized people.").

466. *In re* MCP No. 165, 20 F.4th 264, 285 (6th Cir. 2021) (Bush, J., dissenting from the denial of initial hearing en banc), *stayed sub nom.* Nat'l Fed. of Indep. Bus. v. OSHA, 142 S. Ct. 661 (2022); *see also, e.g.*, Voigt v. Coyote Creek Mining Co., 980 F.3d 1191, 1203-04 (8th Cir. 2020) (Stras, J., dissenting); United States v. Havis, 907 F.3d 439, 448-50 (6th Cir. 2019) (Thapar, J., concurring), *rev'd en banc*, 927 F.3d 382 (6th Cir. 2019); Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 729-36 (6th Cir. 2013) (Sutton, J., concurring).

467. *See* Separation of Powers Restoration Act of 2017, H.R. 76, 115th Cong. (2017); Separation of Powers Restoration Act of 2016, S. 2724, 114th Cong. (2016). *See generally* Kristin E. Hickman, *SOPRA? So What?* Chevron *Reform Misses the Target Entirely*, 14 U. ST. THOMAS L.J. 580 (2018).

468. *See* Isaiah McKinney, *The* Chevron *Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves*, YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended [https://perma.cc/PZB9-VCSM].

469. *See* Cuozzo Speed Techs., LLC v. Lee, 579 U.S. 261, 276-83 (2016).

immune from formal overruling,[470] the case may linger indefinitely in the lower federal courts.[471]

In reality, "*Chevron* is not the influential doctrine it once was and has not been for a long time."[472] The dominant impulse behind judicial review of administrative interpretations of law is no longer deference.[473] It is de novo defiance, disguised in the deceptive constitutional aspirations of the major questions doctrine. Even as a lower court judge, Neil Gorsuch extolled "*de novo* judicial review of the law's meaning" for its power to "limit the ability of an agency to alter and amend existing law."[474] Justice Gorsuch now holds that lifetime appointment and one of five votes needed to magically transform his jurisprudential fantasies into legal realities. He is not final because he is infallible. Instead, Neil Gorsuch is infallible only because he is final.[475]

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470. *See* Evan J. Criddle & Glen Staszewski, *Against Methodological* Stare Decisis, 102 GEO. L.J. 1573, 1595 (2014); Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1811 (2010). Recent instances of lower court deference under *Chevron* include *Shanxi Hairui Trade Co. v. United States*, 39 F.4th 1357, 1361-63 (Fed. Cir. 2022); *Huawei Technologies USA, Inc. v. FCC*, 2 F.4th 421, 438-40 (5th Cir. 2021);—and, most critically—*Loper Bright Enterprises, Inc. v. Raimondo*, 45 F4th 359, 369-70 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023).

471. *See* Glen Staszewski, *Major Questions and the Ecosystems of Regulatory Jurisprudence*, MICH. ST. L. REV.: MSLR F. (Apr. 7, 2023), https://www.michiganstatelawreview.org/vol-20222023/2023/5/31/major-questions-ecosystems-of-regulatory-jurisprudence [https://perma.cc/VY98-29NE].

472. Nathan Richardson, *Deference Is Dead (Long Live* Chevron*)*, 73 RUTGERS U. L. REV. 441, 441 (2021).

473. S*ee, e.g.*, Connor Schratz, Note, Michigan v. EPA *and the Erosion of* Chevron *Deference*, 68 ME. L. REV. 381 (2016); *cf.* HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2180 (2021) (declining to consider *Chevron* because the government had not sought deference under that case); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018) (withholding *Chevron* deference where "the Executive seems of two minds" with respect to its "policy choices"). Whether a court should accord *Chevron* deference when it has not been requested is a surprisingly unsettled question. There is a circuit split over the ability of a reviewing court to apply *Chevron* where the government has waived its claim to deference. *Compare* Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 920 F.3d 1, 21-23 (D.C. Cir. 2019) (permitting deference even where the government has waived its *Chevron* argument), *cert. denied*, 140 S. Ct. 789 (2020), *with* Cargill v. Garland, 57 F.4th 447, 465-66 (5th Cir. 2023) (refusing to consider *Chevron* where the government has waived deference). Justice Gorsuch has exploited this issue as part of his ongoing war on *Chevron*. *See Guedes*, 140 S. Ct. at 790 (statement of Gorsuch, J., regarding the denial of certiorari); *cf.* BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 909 (2019) (Gorsuch, J., dissenting) (stating, with respect to an argument where the private party refrained from invoking *Chevron* and the Court did not use that framework: "Though I may disagree with the result the Court reaches, my colleagues rightly afford the parties before us an independent judicial interpretation of the law"). *See generally* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1121-24 (2008).

474. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

475. *Cf.* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

CONCLUSION: HOPE SPRINGS ETERNAL; LAW DOES NOT

Similarity in form and overlap in habitat, as Charles Darwin observed in *The Origin of Species*, are among the harshest drivers of natural selection and ultimate extinction.[476] In David Tilman's ecological model, intense population pressure after cataclysmic habitat destruction falls hardest on formerly dominant species.[477] New ecological research, based on (of all things) the functional extinction of the steam locomotive, suggests that extinction and replacement through competitive exclusion "may only occur when niche overlap between an incumbent and its competitors is near absolute and where the incumbent is incapable of transitioning to a new adaptive zone."[478] *Mead* long ago constrained *Chevron*. The nearly simultaneous emergence of the major questions and nondelegation doctrines now attack *Chevron*'s underpinnings.

Chevron has long guided the judicial approach to congressional delegations of regulatory authority. The major questions doctrine and its overt constitutional counterpart, the nondelegation doctrine, now contest the jurisprudential space that *Chevron* has occupied for nearly four decades. The swift rise of the major questions doctrine alongside the comparably rapid implosion of *Chevron* suggests that extinction debt has already been incurred. The precipitous decline in *Chevron*'s doctrinal currency presages its extermination. In the language of the Endangered Species Act, *Chevron* is threatened if not already endangered or critically endangered. The contemporary Court's conservative supermajority has assuredly and purposefully chosen to jeopardize *Chevron*'s continued existence.[479]

Indeed, as of October Term 2023, the high court has granted certiorari for the specific purpose of asking "[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[480] A certiorari petition hewing more closely to the judicial

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476. *See* DARWIN, *supra* note 245.

477. *See* Tilman et al., *supra* note 35.

478. Luke C. Strotz & Bruce S. Lieberman, *The End of the Line: Competitive Exclusion and the Extinction of Historical Entities*, ROYAL SOC'Y OPEN SCI., Feb. 2023, at 1; *see also id.* at 9.

479. *Cf.* 16 U.S.C. § 1536.

480. Loper Bright Enters., Inc. v. Raimondo, 143 S. Ct. 2429 (2023), *granting cert. to* 45 F.4th 359 (D.C. Cir. 2022); *see also* Relentless, Inc. v. Department of Commerce, 144 S. Ct. 325 (2023), *granting cert. to* 62 F.4th 621 (1st Cir. 2023).

philosophy of Neil Gorsuch can scarcely be conjured. If *Gundy* holds any hints to his thinking, Justice Gorsuch will press for the outright overruling of *Chevron*. If his colleagues flinch, as they have so far with respect to a complete resurrection of the nondelegation doctrine, he may have to content himself with a new limitation on *Chevron*, based on a tightening of the trigger for deference under that interpretive formula's second step.

"Hope," said the poet, "is the thing with feathers."[481] Amid the reckless demolition of American constitutional law and its day-to-day apparatus, *Chevron* might not flash the plumage of an ivory-billed woodpecker (*Campehilus principalis*).[482] *Chevron* is closer in spirit to the dusky seaside sparrow (*Ammodramus maritimus nigrescens*) than it is to Bachman's warbler (*Vermivora bachmanii*).[483]

In truth, the consummate avian mascot for *Chevron* is the legendary passenger pigeon (*Ectopistes migratorius*).[484] Though its flocks once darkened the sky, the most numerous bird on this continent and perhaps the planet rapidly disappeared as Americans fulfilled their manifest destiny with plow and axe. Dominant in its heyday, then extinct in the twinkling of a naked judicial eye.[485]

481. EMILY DICKINSON, *Hope*, *in* HOPE IS THE THING WITH FEATHERS: THE COMPLETE POEMS OF EMILY DICKINSON 94 (Mabel Loomis Todd & T.W. Higginson eds., Gibbs Smith 2019).

482. *See* Removal of 21 Species From the List of Endangered and Threatened Wildlife, 88 Fed. Reg. 71644, 71645 (Oct. 17, 2023) (recognizing "substantial disagreement among scientists knowledgeable about the species regarding the sufficiency or accuracy of the available data" on the continued survival of the ivory-billed woodpecker and pledging that the Fish and Wildlife Service "will either finalize the delisting of the ivory-billed woodpecker due to extinction or withdraw [its] proposed delisting"). Purported sightings of this iconic bird have long teased biologists and federal regulators. *See* Nat. Res. Def. Council, Inc. v. FAA, 564 F.3d 549, 561-62 (2d Cir. 2009).

483. *See* Modern, Inc. v. Florida, No. 6:03-CV-718-ORL-31KRS, 2008 WL 239148, at *1 (M.D. Fla. Jan. 28, 2008) (describing ultimately unsuccessful efforts to save the dusky seaside sparrow), *aff'd*, 308 F. App'x 330 (11th Cir. 2009); Removal of 23 Extinct Species from the Lists of Endangered and Threatened Wildlife and Plants, 86 Fed. Reg. 54298, 54302-04 (Sept. 30, 2021) (reviewing the natural and legal history of Bachman's warbler). *See generally* Stuart L. Pimm & Robert A. Askins, *Forest Losses Predict Bird Extinctions in Eastern North America*, 92 PROC. NAT'L ACAD. SCIS. 9343 (1995).

484. *See* James Ming Chen, *The Fragile Menagerie: Biodiversity Loss, Climate Change, and the Law*, 93 IND. L.J. 303, 311-12 (2018) (discussing the connection between the nearly simultaneous extinctions of the passenger pigeon and the Carolina parakeet (*Conuropsis carolinensis*) and the Supreme Court's upholding of the Migratory Bird Treaty in Missouri v. Holland, 252 U.S. 416 (1920)). *See generally* A.W. SCHORGER, THE PASSENGER PIGEON: ITS NATURAL HISTORY AND EXTINCTION (The Blackburn Press 2004).

485. *Cf.* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109-10 n.39 (1984) (acknowledging that "rule of reason" economic analysis under the antitrust laws "can sometimes be applied in the twinkling of an eye").

Hope springs eternal; life does not. Neither does law, especially amid a polity's self-inflicted wounds. Splashier constitutional controversies rivet public attention in a United States that keeps careening toward self-destruction. The Overton window of American constitutional discourse has kept widening beyond the ongoing quest for conclusive conservative victory in the 5G culture wars.[486] Outlandish threats remain, such as the preposterous suggestion that putatively "independent" state legislatures may arbitrarily substitute their own slates of presidential electors for those chosen by voters.[487]

By those standards, *Chevron* is decidedly unsexy. "Those of us who love nature, and who would like to ensure that nature persists for future generations to love, need to think about saving ordinary places and ordinary things."[488] *Chevron*, that venerable legal workhorse, has plowed the semantic interstices of the regulatory state throughout the ascendancy of modern textualism. Whenever doubt arose, *Chevron* urged judges to defer to agency expertise: "Life tenure good; Ph.D. better."[489] This workhorse has shown few if any obvious signs that its strength has fatally faded. As the Court turns from nominal textualism to major questions doctrine and other clear statement rules, *Chevron*'s sheen has become "less shiny than it had used to be," and its once "great haunches" have shrunk.[490] But workhorses age, and what once had been the "tremendous drumming of hoofs" will eventually "gr[o]w fainter and die[] away."[491]

486. For a description of the Overton window, see John Inazu, *Beyond Unreasonable*, 99 NEB. L. REV. 375, 385 & n.40 (2020). The idea of a shifting Overton window of political acceptability has taken deeper hold in biomedical literature. *See* Daniel J. Morgan, *The Overton Window and a Less Dogmatic Approach to Antibiotics*, 70 CLINICAL INFECTIOUS DISEASES 2439 (2020); Steven Y.C. Tong & Genevieve Walls, *Shortening the Duration of Therapy for* Staphylococcus Aureus *Bacteremia: Opening the Overton Window*, 73 CLINICAL INFECTIOUS DISEASES 873 (2021).

487. *Contra* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 826 (2015). All eyes converged on *Moore v. Harper*, 600 U.S. 1 (2023), where the Court managed to avoid embracing the independent state legislature doctrine. *See generally* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445 (2022).

488. Holly Doremus, *The Special Importance of Ordinary Places*, ENVIRONS, Spring 2000, at 3, 4.

489. GEORGE ORWELL, ANIMAL FARM 142 (Chris Mould illus., Faber & Faber Ltd. 2021) ("Four legs good, two legs better!").

490. *Id.* at 126.

491. *Id.* at 130.

The fate of *Chevron*, like that of any indicator species in ecology, signals trouble ahead.[492] Doctrinal rivals, such as the major questions and nondelegation doctrines, are siphoning off jurisprudential support for *Chevron* and quickly degrading its niche.[493] Biological annihilation and its legal counterpart do not deviate from the task at hand. After decades of high-court dominance and diffusion throughout the lower federal courts, *Chevron* has already suffered desuetude and aggressive deprecation. It now faces outright overruling. Amid the doctrinal wreckage of the contemporary Supreme Court, *Chevron*'s extinction debt must be paid.

492. *See, e.g.*, Vincent Carignan & Marc-André Villard, *Selecting Indicator Species to Monitor Ecological Integrity: A Review*, 78 ENV'T MONITORING & ASSESSMENT 45 (2002); Marc Dufrêne & Pierre Legendre, *Species Assemblages and Indicator Species: The Need for a Flexible Asymmetrical Approach*, 67 ECOLOGICAL MONOGRAPHS 345 (1997); A. Erhardt & J.A. Thomas, Lepidoptera *as Indicators of Change in the Semi-Natural Grasslands of Lowland and Upland Europe*, *in* THE CONSERVATION OF INSECTS AND THEIR HABITATS 213 (N.M. Collins & J.A. Thomas eds., 1991); Jan C. Weaver, *Indicator Species and Scale of Observation*, 9 CONSERVATION BIOLOGY 939 (1995).

493. *See* Strotz & Lieberman, *supra* note 478, at 7-9.