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# Why a "Major Questions" Exception to Chevron Deference Is Inappropriate—and No Substitute for Regulatory Reform

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**Abstract**

*Various proponents of regulatory reform have called for the elimination of the* Chevron *doctrine, which directs reviewing federal courts to defer to federal agency interpretations of ambiguous provisions in laws passed by Congress. The concern is that this doctrine has facilitated regulatory overreach and generated excessive economic costs by shielding agencies' far-fetched and overly intrusive statutory constructions. One possible limitation on* Chevron, *as discussed in the Supreme Court's 2015 decision in* King v. Burwell, *provides that courts should not defer to agency statutory interpretations with respect to "major questions"—matters that are of such importance that a court should not presume that Congress implicitly delegated regulatory authority to an agency to resolve them. Such a "major-questions" exception might appear to be a helpful restraint on agency overreach. Upon closer examination, however, the major-exceptions doctrine is unpredictable in application and at odds with sound legal principles. Moreover, it would not necessarily reduce the burden of overregulation. Overturning* Chevron*—not creating an arbitrary exception to it—is the best way forward. It will not resolve all statutory controversies, but it will reaffirm that interpretation of the law ultimately lies with the courts, as it should within our constitutional structure. Nevertheless, elimination of the* Chevron *doctrine will not in and of itself significantly curb government agency excesses. Regulatory reform encompassing both rules and statutes is key to curbing big government abuses.*

## KEY POINTS

- Various proponents of regulatory reform have called for the elimination of the *Chevron* doctrine, which directs reviewing federal courts to defer to federal agency interpretations of ambiguous provisions in laws passed by Congress.
- Critics argue this doctrine has facilitated regulatory overreach and generated excessive economic costs by shielding agencies' far-fetched and overly intrusive statutory constructions.
- One possible exception to *Chevron*, discussed most recently in the Supreme Court's 2015 decision in *King v. Burwell*, provides that courts should not defer to agency statutory interpretations with respect to major policy questions.
- This proposed "major-questions" exception, however, is inconsistent with sound legal principles and would not effectively curb overregulation.
- Overturning *Chevron*—not creating an arbitrary exception to it—is the best way forward. Regulatory reform encompassing both rules and statutes is key to curbing big government abuses.

## I. Regulatory Overreach and the *Chevron* Doctrine

A major concern raised by proponents of regulatory reform has been the degree of deference federal courts give to agencies'

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interpretations of the statutes they administer.[1] The Trump Administration has taken initial helpful steps to curb excessive regulation and thereby reinvigorate the American economy. These have included, for example, the establishment of regulatory reform task forces[2] and the repeal of 15 rules under the Congressional Review Act,[3] a law which allows a regulation—and certain existing regulations that were not property notified to Congress—to be rejected through a "fast track" bicameral resolution of disapproval, followed by a presidential signature.

Nevertheless, even the most reform-minded new President is limited in his ability to reduce excessive regulatory burdens, given the thousands of regulatory programs he inherits and the legal formalities (and inevitable delays) associated with changing or repealing existing rules and published interpretations of laws.[4] A particular problem is that some of the most intrusive regulatory schemes have been based on outlandish agency interpretations of statutory language. For instance, under the "Waters of the United States" rule, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers have interpreted the Clean Water Act to authorize federal regulation of homebuilding activities on dry land that is miles removed from navigable rivers.[5]

Compounding the dilemma for regulatory reform advocates is the *Chevron* doctrine (named after a 1984 Supreme Court decision),[6] which provides that reviewing courts should defer to an agency's interpretation of ambiguous statutory language, as long as that interpretation is within the bounds of reason.[7] In other words, the *Chevron* doctrine presumes that when Congress leaves "statutory blanks" in a law, it has delegated to administering agencies the power to make policy and fill in those blanks in a "reasonable" fashion.

The invocation of *Chevron* by reviewing courts has coincided with the growth of all-encompassing federal regulation.[8] This reality, combined with the principled objection that our Constitution empowers the federal courts, not agencies, to say "what the law is,"[9] has led some commentators to call for the elimination of *Chevron* deference—either by the Supreme Court,[10] or by federal statute.[11] As Heritage Foundation scholar Paul Larkin has explained:

> *Chevron*...has the effect of transferring the final interpretive authority from the courts to the agencies in any case where Congress did not itself answer the precise dispute. The effect of *Chevron* was to transform agencies into common-law courts because only agencies can engage in the blank-filling necessary when Congress has failed to answer a question. Overturning *Chevron* would return that ultimate decision-making to the courts.[12]

In short, elimination of the *Chevron* doctrine would strengthen the constitutional separation of powers by reducing the power of agency bureaucrats to act as judges and reemphasizing the role of the courts in statutory interpretation.

If, however, totally overturning *Chevron* is not practicable in the short term,[13] one possible "second best" alternative would be to make it inapplicable to the most important federal regulatory questions. Such a "major-questions" exception, which has been specifically relied upon in two Supreme Court decisions, might seem at first blush to be a good means for limiting the harm generated by excessive federal agency overreach permitted under *Chevron*.

Careful legal analysis, however, reveals that a major-questions exception would generate uncertainty, lead to arbitrary decision making, intrude on congressional prerogatives, and not necessarily reduce regulatory burdens. Thus, the major-questions exception should be rejected. *Chevron* deference should also be eliminated (either by judicial action or, more likely, through legislation), in order to clarify that courts must carry out their constitutional duty to interpret the law. Overturning *Chevron* would not in itself, however, eliminate the role of agencies in interpreting the statutes they administer nor would it significantly tackle the problem of regulatory expansion. Regulatory reform—and more narrowly tailored statutes—are badly needed to rein in the regulatory state.

## II. A "Major-Questions" Exception to Chevron Would Be Bad Jurisprudence and Bad Public Policy

**A. The "Major-Questions" Exception: Two Big Supreme Court Decisions.** The Supreme Court's attempt to articulate a possible major-questions exception is derived from the majority decisions in two U.S. Supreme Court cases, one in 2000 and one in 2015.

*1. FDA v. Brown & Williamson Tobacco* (2000). In *FDA v. Brown & Williamson Tobacco*,[14] the Court

rejected the U.S. Food and Drug Administration's (FDA's) attempt to regulate tobacco products that were promoted, labeled, and made accessible to children and adolescents. The Court cited a provision of the United States Code stating that the "marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare."[15] Therefore, the Court determined, it could not have been the intent of Congress to enable the FDA to ban the sale of tobacco products to minors and impose other restrictions on advertising and the like designed to further that goal.

The opinion reasoned that the application of *Chevron* deference depends upon the issue at hand:

> Deference under Chevron to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.... In extraordinary cases, however, there may be reason to hesitate before concluding Congress has intended such an implicit delegation.[16]

This was such an "extraordinary case." Due to the unique character of the tobacco industry in the United States and the far-reaching nature of the FDA regulations under scrutiny, the Court concluded that it could not defer to the agency's interpretation.

This articulation of the major-questions doctrine appears to rely primarily on perceived congressional intent, as evidenced by the opinion's extensive review of legislative history. In a single sentence in the last paragraph, the Court mentions that the executive branch may be more likely to be in the public eye and thus be held politically accountable. However, the Court brushes this aside, emphasizing that "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress," the scope of which must not be exceeded.[17]

*2. King v. Burwell* (2015). In *King v. Burwell,*[18] the Supreme Court addressed the question of whether the phrase "[insurance] [e]xchange established by a state" in the Obamacare statute[19] included an exchange established by the federal government. This issue was critically important because the statute made federal tax credits available for the purchase of health insurance policies offered through state exchanges. The Obamacare law also made the federal government responsible for creating and operating exchanges in states that refuse to do so, but did not state that tax credits would be available for insurance purchased through those federal exchanges.

An Internal Revenue Service (IRS) rule-setting eligibility criteria for health insurance tax credits required the purchase of coverage from an exchange established by either the state or the federal government. The IRS position was challenged by a group of Virginia residents. Chief Justice John Roberts' majority opinion for the Supreme Court reached the same substantive conclusion as the IRS but rejected the application of *Chevron* deference. Rather, the opinion stated that this was one of those "extraordinary cases" in which it would be unreasonable to presume that Congress delegated interpretive authority to an agency instead of resolving the issue itself. The opinion emphasized that the phrase "[e]xchange established by a state" was critical to one of the Obamacare law's "key reforms"; involved "billions of dollars in spending each year"; "affect[ed] the price of health insurance for millions of people"—and was therefore "a question of deep economic and political significance that was central to [the Obamacare] statutory scheme; and had Congress wished to assign that question to an agency, it surely would have done so expressly."[20]

The opinion did not offer any justification for why the judiciary should craft the policy instead. In its final paragraph, the opinion mentioned political accountability, emphasizing that the law must be made by democratically elected officials, and that the Court was merely interpreting the Act in a manner "consistent with what we see as Congress's plan."[21] Dissenting, the late Justice Antonin Scalia, joined by Justices Clarence Thomas and Samuel Alito, dismissed the majority's paean to political accountability as a flawed attempt "to make its judge-empowering approach seem respectful to congressional authority."[22]

**B. *Chevron* Deference Problems and Limitations.** The major-questions exception is seriously flawed.

First, it has introduced additional uncertainty into the application of *Chevron* deference. Since *King v. Burwell* was decided in 2015, eight federal courts

of appeals decisions and four federal district court decisions have cited the "extraordinary case" portion of the opinion specifically, and there have been nearly 450 law review and journal articles written about the case.[23] These decisions and articles have not developed a coherent theory as to the nature and limitations of the major- questions exception. While it appears that the major-questions exception gives courts (or at least the Supreme Court) "more room to maneuver" in deciding whether to apply *Chevron*,[24] the circumstances under which *Chevron* may be ignored are unclear. In short, the exception effectively gives judges a blank check to follow their personal preferences in deciding whether or not to bow to an agency's statutory interpretation. This leads to arbitrary judicial decision making and uncertainty regarding the stability of agency statutory constructions, thereby undermining the rule of law.[25]

In other words, the major-questions exception grants judges a legal hook to interpose their personal policy preferences for those of the political branches. A judge may, for example, choose to invoke the exception by "discerning" a highly important and overriding congressional purpose (one that comports with the judge's personal views) that is at odds with an agency's reading of a statute. As renowned federal appeals court judge and former Deputy Attorney General Laurence Silberman has pointed out, "[S]triking down an agency interpretation by means of a general recourse to the purpose of the statute can all too often conceal judicial allegiance to one side of what was a congressional compromise or dislike for the policy implications of the executive's actions. Either seems illegitimate."[26]

Second, the major-questions exception also undermines the separation of powers and needlessly complicates the congressional lawmaking process. In particular, by enabling judges to decide on an *ad hoc*, uncertain, policy-driven basis whether a court or an agency will determine the interpretation of particular statutory language, the exception could be conceived as an impermissible delegation of congressional power to the judiciary.[27] Furthermore, the uncertainty that the major-questions exception introduces into the *Chevron* doctrine somewhat undermines Congress' ability to draft legislation in the first place. As the late Justice Scalia pointed out, the major benefit of the *Chevron* doctrine is that it creates a "background principle of law."[28] A flexible, unpredictable, inconsistent application of *Chevron* deference does not create a stable principle on which legislators can rely when drafting statutes.

Third, and finally, use of the major-questions exception would not necessarily reduce regulatory overreach. While some judges might invoke the exception to curb regulatory overreach, others might apply it instead to raise regulatory burdens by displacing agency statutory interpretations that generated (in the judges' eyes) "insufficient" regulation.[29] Moreover, mere invocation of the exception would not necessarily lead courts to adopt a different substantive outcome than the one adopted by the agency being scrutinized. Take, for example, the Obamacare insurance exchanges case, *King v. Burwell*, discussed previously. Although the Court did not defer to the IRS' interpretation authorizing tax credits for insurance purchased on "federal" insurance exchanges, it nevertheless upheld the Administration's provision of such tax credits, based on the Court's subjective understanding of what Congress intended when it enacted the broad Obamacare law.

In sum, the major-questions exception generates uncertainty, undermines the rule of law, and would not be an effective tool for reducing regulatory burdens (indeed, it might even increase them in some instances). The Supreme Court should disavow it when presented with the opportunity.

## III. *Chevron* Reform and Regulatory Reform: What Comes Next?

Although the major-questions exception to *Chevron* should be rejected, the question of how to deal with *Chevron*—and, in particular, its affront to the separation of powers[30]—remains. The simplest and fastest approach is simply to eliminate it by statute (thereby also eliminating the major-questions exception, of course). Various bills introduced in the current Congress would do this by directing courts not to defer to agency interpretations of statutes. For example, the Separation of Powers Restoration Act of 2017, S. 1577, would require federal courts, in reviewing agency decisions, to decide "de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules."[31] "De novo review" is a legal term of art that means a reviewing judge must independently take a fresh look at the meaning of a law, and not defer to what an agency claimed the law meant. Thus, this language would "legislatively overrule" *Chevron*.

Nevertheless, as a practical matter, the elimination of Chevron would not (and could not) preclude courts from examining agency interpretations of statutes as part of their judicial responsibility in construing legal provisions. Heritage Foundation scholar Paul Larkin Jr. explains:

> Overturning *Chevron* by statute might prevent the Supreme Court from delegating responsibility for statutory interpretation to an agency, but no act of Congress could force the Court to completely disregard what an agency says a law means. At a minimum, the Court would likely place an agency's construction of a statute on a par with the interpretation adopted by a learned member of the bar or a scholar in the academy. A persuasive agency position would carry the same weight as an opinion by...highly regarded [legal] expert[s] in...[their] fields...whose opinions are valued and sought throughout the legal community. Of course, each of those experts could be wrong about a particular point...and the courts would have the responsibility to accept or reject their opinions. But it would be irrational to disregard a persuasive argument of theirs just because their views are not final. It would be equally irrational to reject an otherwise persuasive argument just because an agency made it, not a law professor.... A persuasive agency argument is no less persuasive just because the court has the final say.[32]

It follows that eliminating *Chevron* deference is not a fast and easy cure for regulatory bloat, let alone big government in general. In "a world without *Chevron*," overly expansive regulatory interpretations of laws on the books that *inappropriately* expand government authorities (and usurp the proper role of the courts) should be largely curtailed, when subject to court review—at least in theory.[33] But that would only slightly chip away at the tip of the big-government iceberg. Some laws, fairly read, *promote* big government. The many statutes that *by their very language* impose onerous regulatory burdens, under the most reasonable and faithful judicial interpretations, would remain unaffected. And since regulations have grown like Topsy in recent decades,[34] many overly expansive regulatory interpretations might never be subjected to judicial review. Substantive legal reforms, then, are called for, if the regulatory leviathan is to be tamed. Both Congress and the executive branch have roles to play in reforming federal regulation.

**A. The Role of Congress.** As a matter of general principle, Congress should seek to write clear and narrowly focused legislative language to cabin agency discretion and reduce uncertainty in judicial statutory construction. But that general advice ignores the political incentives of Members of Congress to craft sweeping and vague legislative language to cater to interest groups that support them.[35] Thus, while better written, narrower legislation remains a desirable aspirational goal, specific attention should be focused on legislative measures dealing with the regulatory process and regulations' economic impact. In this regard, two regulatory reform bills introduced in the current Congress merit close examination.

First, the Regulatory Accountability Act (Title I of the Regulatory Accountability Act of 2017, which passed the House of Representatives last January), would require federal agencies to base all proposed rules on best evidence and to consider: (1) the legal authority under which a rule may be proposed; (2) the specific nature and significance of the problem the agency may address with a rule; (3) whether existing rules have created or contributed to the problem the agency is attempting to address with a rule—and whether such rules may be amended or rescinded; (4) any reasonable alternatives for a new rule; and (5) the expected costs and benefits associated with proposed alternative rules, including impacts on low-income populations.[36] This bill would also promote the use of public hearings for economically significant rules. Furthermore, it would preclude courts from deferring to an agency's determination of costs and benefits unless it has conformed to the guidance of the White House's regulatory evaluation unit, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). This measure would have a potentially constraining effect on new regulatory endeavors. It limits agencies' ability to concoct expansive regulatory "solutions" to perceived problems, directs rule-makers' attention toward considering less intrusive regulatory alternatives, and points toward the possible rescission of some burdensome existing regulations.

Second, the Regulations from the Executive in Need of Scrutiny Act of 2017 (REINS Act), which passed the House of Representatives on January 3,

2017,[37] would require that Congress vote on "major" rules (those that have an annual economic cost of over $100 million or certain other significant adverse economic effects) before the rules go into effect. If a joint resolution approving a major rule were not passed within 70 legislative or calendar days of its submission to Congress (subject to certain narrow exceptions), the rule would not be enacted. Furthermore, before *any* new rule (not just a major rule) took effect, the promulgating agency would have to amend or repeal other rules to offset any annual costs of the new rule to the U.S. economy. The REINS Act thus could have a major effect in limiting the output of new rules and in "reining in" overall federal regulatory costs.

Finally, Congress has the authority to curb certain inappropriate rules under existing law. It can and should disapprove overly burdensome new regulations through the enactment of joint resolutions under the Congressional Review Act (CRA).[38] The CRA has two added deregulatory benefits: (1) it bars an agency from adopting a regulation that is substantially similar to the one overturned, absent a new act of Congress; and (2) it allows Congress to reach back and review agency regulations that were never properly submitted to Congress under the CRA. In its first few months, the Trump Administration has cooperated closely with the current Congress in identifying problematic regulations ripe for disapproval under the Act, leading to the rejection of 15 rules at the latest count.[39]

**B. The Role of the Executive Branch.** The executive branch can and should take its own initiatives to spur regulatory reform.

During his first few months in office, President Donald Trump issued various executive orders to implement his campaign promise to improve the nation's economy by rescinding needless administrative regulations.[40] Particularly noteworthy are the Administration's executive orders that require agencies to: (1) identify existing regulations for elimination to offset the regulatory costs of new rules, and (2) operate agency-specific task forces charged with identifying inappropriate existing rules that are ripe for repeal, replacement, or modification.[41]

Reinvigorated economic review of proposed rules by the White House regulatory review watchdog, OIRA, is also crucial. Heritage Foundation Senior Research Fellow Diane Katz recently recommended that OIRA regulatory review be stiffened (i.e., made applicable to guidance documents, not just formal rules) and extended to independent federal agencies to render it a more effective tool for reining in the regulatory state.[42]

Finally, establishment of a White House–led task force charged with examining and proposing fundamental reforms to major statute-based regulatory regimes that distort competition—aided perhaps by PhD economists from the Justice Department and the Federal Trade Commission who are competition experts—could prove quite beneficial in the longer term.[43] Reducing the drag on the economy from overly regulatory federal statutory schemes (and, where appropriate, pruning them back and eliminating them) is vital to the long-term health of the economy. However, this will require major statutory surgery, not tinkering at the edges.

## IV. Conclusion

The *Chevron* doctrine that directs courts to defer broadly to "reasonable" agency interpretations of the laws they administer has been seen as a factor in encouraging agency overregulation. Applying an exception to *Chevron* deference that enables courts to ignore agency interpretations on major questions of policy is not, however, a good means to rein in regulatory excess. The major-questions exception promotes arbitrariness and uncertainty, undermines the rule of law, and would not necessarily reduce the burden of regulations. The Supreme Court should therefore disavow this exception. The *Chevron* doctrine should be eliminated as well, in order to clarify that it is the courts that are empowered to "say what the law is" under our constitutional system. But the demise of *Chevron* would at best have only a very limited effect in curbing governmental bloat. Regulatory reform that encompasses both rules and statutes is necessary if the big government leviathan is to be brought to heel.

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# Endnotes

1. The author gratefully acknowledges the outstanding research assistance of former Heritage Foundation intern Clare Myers, University of Virginia Law School Class of 2019, in preparing this memorandum. There have been many academic critiques of Supreme Court jurisprudence that are the linchpin of federal judicial deference to agency statutory interpretations. *See, e.g.*, 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 (2010); Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731 (2014); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 AM. U. ADMIN. L.J. 1 (1996); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Cory R. Liu, *Chevron's Domain and the Rule of Law*, 20 TEX. REV. L. & POL. 391 (2016); Patrick J. Smith, *Chevron's Conflict with the Administrative Procedure Act*, 32 VA. TAX REV. 813, 818 (2013).
2. In February 2017, President Trump issued a Presidential Executive Order requiring federal agencies to "evaluate existing regulations…and make recommendations…regarding their repeal, replacement, or modification, consistent with applicable law" when the regulations were found to be economically harmful, unnecessary, or inconsistent with regulatory reform policies. *See* President Donald J. Trump, Enforcing the Regulatory Reform Agency, Exec. Order No. 13777, Feb. 24, 2017, https://www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda. This order followed on the heels of an earlier Trump Executive Order requiring that federal executive agencies pair "any new incremental costs associated with new regulations" with commensurate cost savings from repealing "at least two existing regulations." *See* President Donald J. Trump, Reducing Regulation and Controlling Costs, Exec. Order No. 13771, Jan. 30, 2017, https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs.
3. *See* Paul J. Larkin, Jr., *The Reach of the Congressional Review Act*, HERITAGE FOUND. LEGAL MEMORANDUM No. 201 (Feb. 8, 2017), http://www.heritage.org/sites/default/files/2017-02/LM-201_1.pdf.
4. The Administrative Procedures Act (APA), which governs most federal rulemaking, makes it difficult to quickly repeal rules:

   > [T]he APA lays out specific requirements for proposing or deleting rules that can prove complex and difficult to satisfy. For example, to repeal a rule through APA, a public comment process would need to be carried out, and the process would need be done deliberately and thoughtfully to prevent the courts from invaliding the rule. Additionally, the administration must provide a strong and legally defensible justification for withdrawing the rule through the APA, and this justification could be vulnerable to legal challenges if [it] is controversial or not sufficiently supported by existing science.

   Julie Ufner and Eryn Hurley, *Trump Administration Has Options—and Challenges—for Repealing Obama Administration Rules*, NATIONAL ASSOCIATION OF COUNTIES (Jan. 17, 2017), http://www.naco.org/blog/trump-administration-has-options—and-challenges—repealing-obama-administration-rules.
5. *See* Paul J. Larkin, Jr., *The "Waters of the United States" Rule and the Void-for-Vagueness Doctrine*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 207 (June 22, 2017), http://www.heritage.org/sites/default/files/2017-06/LM-207_0.pdf.
6. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).
7. A detailed discussion of the *Chevron* Doctrine, which has given rise to extensive commentary and has been invoked by numerous federal courts since 1984, is beyond the scope of this memorandum. For an analysis of the history and application of the doctrine and the likely effects of its being overturned, see Paul J. Larkin, Jr., *The World After* Chevron, HERITAGE FOUND. LEGAL MEMO NO. 186 (Sept. 8, 2016), http://www.heritage.org/courts/report/the-world-after-chevron. More specifically, the Supreme Court in *Chevron* established a two-step test that is highly deferential to agency interpretations of statutes:

   > [I]n *Chevron*, the Court established a two-step test for judicial review of an agency's interpretation of a statute. The first step is to ask whether Congress has answered the particular question in dispute in the statute itself. If so, that answer (absent some constitutional flaw) is dispositive. But if the statute is ambiguous on the issue, the next step for a reviewing court is to ask whether the agency's interpretation is reasonable. If so, that ends the controversy. The court may not disagree with the agency as long as its interpretation is a plausible construction of the act. Why? When a statute is ambiguous, the Court wrote, there is a presumption that Congress implicitly delegated to the agency the authority to fill in the blanks, which is a policymaking function. Unlike courts, agencies may make policy judgments, and if Congress empowered an agency to do so, the courts may not overrule the agency's decision.

   *Id*. at 2–3 (internal footnote references omitted).
8. See Philip Hamburger, *The Tyranny of the Administrative State*, ILLINOIS REVEW (June 12, 2017), http://illinoisreview.typepad.com/illinoisreview/2017/06/the-tyranny-of-the-administrative-state.html.
9. As Chief Justice John Marshall wrote in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, under the U.S. Constitution the federal courts have the responsibility "to say what the law is." Excessive judicial deference to bureaucrats' interpretations of the law undermines this core judicial power.
10. *See* Hamburger, note 8 *supra*. Supreme Court Justice Neil Gorsuch also raised major concerns about *Chevron* deference during his tenure as a federal court of appeals judge. *See* Henry Gass, *Gorsuch Hearings: Should Agencies—or Courts—Decide the Law?*, CHRISTIAN SCIENCE MONITOR (Mar. 22, 2017), https://www.csmonitor.com/USA/Justice/2017/0322/Gorsuch-hearings-Should-agencies-or-courts-decide-the-law.
11. A proposed statutory "fix" is discussed in Part III of this memorandum, *infra*.
12. Larkin, *supra* note 7, at 6.

13. A Supreme Court majority may not be prepared to fully overrule *Chevron* deference in the near future. Federal legislation to overturn the doctrine is a more direct approach (proposals to do just this are discussed in part III, *infra*), but its likelihood of enactment by Congress is uncertain.
14. Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
15. 7 U.S.C. §1311 (a). Congress provided the FDA with specific authority to regulate tobacco products in 2009 by enacting the Family Smoking Prevention and Tobacco Control, Pub. L. No. 111–31, 123 Stat. 1776 (2009) (codified at 21 U.S.C. §§ 387a–387u).
16. Brown & Williamson Tobacco, 529 U.S. at 159. In so opining, the Court found support from a law review article by Justice (then Professor) Stephen Breyer. *Id*., citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").
17. Brown & Williamson Tobacco, 529 U.S. at 161.
18. 135 S. Ct. 2480 (2015).
19. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, 124 Stat. 119 (2010).
20. King, 135 S. Ct. at 2488–89 (quoting Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).
21. *Id*. at 2496.
22. *Id*. at 2505.
23. King v. Burwell, 135 S. Ct. 2480 (Westlaw citing references) (2015). The lower court decisions have not sought independently to apply the "major questions" exception in the matters before them.
24. Although the Supreme Court has not decided whether it alone can invoke the exception, there is nothing in any Supreme Court discussion of the exception to suggest that inferior federal courts may not apply it.
25. In the words of one scholarly commentator, "[C]ourts' unfettered discretion to decide whether to follow Chevron's framework results in arbitrary and unpredictable decisions about Chevron's applicability." Liu, *supra* note 1, 20 TEX. REV. L. & POL. at 392.
26. Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 827 (1990).
27. Such a delegation similarly would be in tension with the notion that *Chevron* reflects an understanding that Congress expects the courts to defer to agencies' statutory interpretations. According to Professor Cass Sunstein, the two acknowledged administrative law experts on the Supreme Court, former professors Antonin Scalia and Stephen Breyer, agreed that "courts defer to agency interpretations of law when, and because, Congress has told them to do so." Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 198 (2006).
28. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).
29. In Massachusetts v. EPA, 549 U.S. 497, 528–29 (2007), the Supreme Court, in a 5–4 decision, rejected the Environmental Protection Agency's refusal to regulate greenhouse gases under the Clean Air Act (CAA), holding that "greenhouse gases fit well within the CAA's capacious definition of air pollutant." Rather than invoke the major-exceptions doctrine to *Chevron*, the Court's majority opinion held that the CAA's statutory text "foreclosed" the EPA's interpretation. The Court's majority could very easily, however, have found *Chevron* applicable but applied the major-exceptions doctrine, based on the perceived importance of promoting clean air and curbing global warming, which played a central role in the majority opinion's discussion. Notably, a dissent by Justice Scalia, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, would have accorded *Chevron* deference to the EPA's refusal to regulate.
30. *See* text accompanying notes 9–12, *supra*.
31. S. 1577 was introduced in the Senate on July 18, 2017, and referred to the Senate Judiciary Committee. See https://www.govtrack.us/congress/bills/115/s1577/text. H.R. 76 (also entitled the Separation of Powers Restoration Act of 2017), introduced in the House of Representatives on January 3, 2017, and referred to the House Judiciary Committee, contains nearly identical language. *See* https://www.congress.gov/115/bills/hr76/BILLS-115hr76ih.pdf. A rather more detailed approach, embodied in Title II of H.R. 5, the Regulatory Accountability Act of 2017 (which passed the House of Representatives on January 11, 2017, and was transmitted to the Senate on January 12, 2017) would include the "de novo" review language, but would also specifically instruct courts not to treat a statutory "gap or ambiguity as an implicit delegation to the agency of legislative rule making authority and…not [to] rely on such gap or ambiguity as a justification either for interpreting agency authority expansively or for deferring to the agency's interpretation on the question of law." *See* https://www.congress.gov/bill/115th-congress/house-bill/5/text.
32. Larkin, *supra* note 7, at 6.
33. Even that conclusion only holds to the extent that federal judges avoid the temptation to act as policymakers by automatically adopting the readings of statutes that are most conducive to big government expansion—without regard to the actual language of the text before them. Thus, the appointment of federal judges who will be guided by the text of the law and the U.S. Constitution, not by their personal predilections, is of paramount importance. *See* Robert Alt, *What Is the Proper Role of the Courts?*, HERITAGE FOUND. REPORT (Jan. 12, 2012), http://www.heritage.org/courts/report/what-the-proper-role-the-courts.
34. The Heritage Foundation's annual "Red Tape Rising" reports have highlighted the immense economic burden of regulation. (Total U.S. regulatory costs exceed $2 trillion annually.) *See* James L. Gattuso and Diane Katz, *Red Tape Rising 2016: Obama Regs Top $100 Billion Annually*, HERITAGE FOUND. BACKGROUNDER No. 3127 (May 23, 2016), http://www.heritage.org/government-regulation/report/red-tape-rising-2016-obama-regs-top-100-billion-annually.

35. *See* Michael M. Uhlmann, *A Note on Administrative Agencies*, in THE HERITAGE GUIDE TO THE CONSTITUTION 277–282 (David F. Forte and Matthew Spalding eds., 2nd ed. 2014).
36. *See* Summary: H.R.5—115th Congress (2017-2018), https://www.congress.gov/bill/115th-congress/house-bill/5.
37. *See* Summary: H.R.26—115th Congress (2017-2018), https://www.congress.gov/bill/115th-congress/house-bill/26.
38. *See* text accompanying note 3, *supra*.
39. By current count, 15 rules have already been rejected pursuant to the Congressional Review Act during the Trump Administration. *See* U.S. General Accounting Office, CONGRESSIONAL REVIEW ACT FAQs (last accessed Aug. 29, 2017), https://www.gao.gov/legal/congressional-review-act/faq.
40. *See* The White House, Executive Orders, whitehouse.gov (collecting Executive Orders) (last accessed Aug. 29, 2017), https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders. One such order, for example, directed the Administrator of the Environmental Protection Agency and the Assistant Secretary of the Army for Civil Works to reconsider the highly intrusive 2015 "Waters of the United States" rule. *See* note 5, *supra*, and accompanying text.
41. *See* note 2, *supra*.
42. *See* Diane Katz, *A Regulatory Reform Agenda for the First 100 Days*, HERITAGE FOUND. ISSUE BRIEF No. 4652 (Feb. 1, 2017), http://www.heritage.org/sites/default/files/2017-02/IB4652.pdf.
43. *See* Alden F. Abbott, *Global Antitrust, International Trade, and Regulatory Reforms: Tools to Promote American Economic Welfare and Economic Freedom*, HERITAGE FOUND. BACKGROUNDER No. 3238 (Aug. 3, 2017), at 7–8, http://www.heritage.org/sites/default/files/2017-08/BG3238.pdf.