
THE ROBERTS COURT'S STRUCTURAL INCREMENTALISM

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Too often, Supreme Court opinions raise more questions than they answer. Those of us who painstakingly parse the Justices' writings for insights often lament the explanations not offered. It would be so helpful if the Court's opinions were more like law review articles, exhaustively articulating all the alternative lines of reasoning, surveying the counterarguments, justifying the superiority of the analytical path chosen, and perhaps throwing in a literature review as a bonus (thus giving bragging rights to the law professors whose work was cited). Sometimes we get those opinions, and then we criticize the shortfalls of their reasoning as well, and we complain about how longwinded the Justices have become.¹

Professor Mila Sohoni is thorough and insightful in analyzing the limitations of and omissions from the reasoning in her titular "Quartet" of 2021–2022 Supreme Court decisions that advance the major questions doctrine as a limitation on the actions federal government agencies may take to resolve contemporary problems: *Alabama Ass'n of Realtors v. Department of Health & Human Services*,² *National Federation of Independent Businesses v. Department of Labor*,³ *Biden v. Missouri*,⁴ and *West Virginia v. EPA*.⁵ Sohoni carefully traces the precedents from which the major questions doctrine emerged and its arguable evolution from *Chevron* deference exception to independent canon of statutory construction.⁶ She notes potential tensions with textualism and with other Court precedents presented by the new major questions canon.⁷

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¹ A robust scholarly literature debates the length, content, and claimed failings of contemporary Supreme Court opinions. For just a few examples, see Luke Burton, *Less Is More: One Law Clerk's Case Against Lengthy Judicial Opinions*, 21 J. APP. PRAC. & PROCESS 105 (2021); Erwin Chemerinsky, Speech, *A Failure to Communicate*, 2012 BYU L. REV. 1705; Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995); and Daniel A. Farber, *Missing the "Play of Intelligence"*, 36 WM. & MARY L. REV. 147 (1994).

² 141 S. Ct. 2485 (2021).

³ 142 S. Ct. 661 (2022).

⁴ 142 S. Ct. 647 (2022).

⁵ 142 S. Ct. 2587 (2022).

⁶ Mila Sohoni, *The Supreme Court, 2021 Term — Comment: The Major Questions Quartet*, 136 HARV. L. REV. 262, 267–90 (2022); see also Kristin E. Hickman & R. David Hahn, *Categorizing Chevron*, 81 OHIO ST. L.J. 611, 615–17 (2020) (discussing why these sorts of distinctions might matter in the context of *Chevron* deference).

⁷ Sohoni, *supra* note 6, at 276–90.

She contends that the Court neglected to provide an adequate theoretical justification for a major questions canon, whether as a variation on the canon of constitutional avoidance or as a clear statement rule undergirded by principles associated with the nondelegation doctrine and Article I, section 1 of the U.S. Constitution.⁸ Opinions from the Court acknowledging and addressing all of these concerns might have been helpful, perhaps, although one doubts that critics would be satisfied.

Yet Supreme Court opinions are not law review articles. Even Justices who share certain priors and premises, and who readily agree about the outcome of a case, may still disagree over the details and directions of the supportive reasoning. Substantial disagreements may yield concurring opinions, but the Justices often are willing to let lesser quibbles over dicta slide rather than write separately.⁹ Analytical omissions and ambiguous rhetoric in judicial opinions may represent strategic choices to make the compromises necessary to cobble together a majority.¹⁰

My goal with this Response is not to defend the Quartet as exemplars of judicial opinion writing. I am more sympathetic to the Roberts Court in this regard than many legal scholars, but I have my own quibbles with the Quartet and likely would have written the opinions differently, too. At a minimum, Sohoni is correct that the Court missed an opportunity to provide clearer guidance to lower court judges regarding the major questions doctrine. The Court's failure to address at least some of Sohoni's questions and concerns likely will lead to some amount of confusion and inconsistency among future lower court decisions.

Instead, this Response draws from Sohoni's rather grudging acknowledgment of an argument with which she disagrees, that the Quartet reflects "merely responsible judicial minimalism . . . to cultivate the major questions doctrine on a rule-by-rule, statutory basis, gradually building out boundary lines that agencies must not cross, and to thereby allow the guardrails of nondelegation to accrete incrementally, in common law fashion."¹¹ In this manner, the Quartet and its reliance on the major questions doctrine align with a broader trend of Roberts Court decisions regarding separation of powers and administrative agencies: carefully narrow, calibrated to tweak the day-to-day of administrative governance incrementally, with plenty of carve outs and caveats, and with a preference for subconstitutional approaches, notwithstanding

⁸ *Id.* at 297–315.

⁹ See, e.g., Ruth Bader Ginsburg, Lecture, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010) ("[A] Justice, contemplating publication of a separate writing, should always ask herself: Is this dissent or concurrence really necessary?"); cf. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1412–15 (1995) (discussing reasons why judges write concurring or dissenting opinions).

¹⁰ Cf. Wald, *supra* note 9, at 1377–80 (describing how judges accommodate one another by negotiating opinion language).

¹¹ Sohoni, *supra* note 6, at 314.

lofty flights of rhetoric about the Framers, liberty, and other constitutional values.¹² Part of the Roberts Court's incrementalism in separation of powers cases comes from its choice of remedies, such as its use of severability as a remedy for constitutional flaws in agency design decisions.¹³ But the Roberts Court's doctrinal shifts in this area also are substantially more limited than they could be and seem designed more to accommodate rather than undermine the continued functioning of the administrative state — albeit with some new limitations. It's a path designed to please almost no one, or at least not many of those who debate these issues most vocally. Regardless, for lower court judges seeking guidance for future cases, and perhaps inclined to apply the major questions doctrine aggressively, the overall message should be clear: Proceed With Caution!

I. STRUCTURAL FORMALISM MEETS STARE DECISIS

Let us stipulate at the outset that, in addition to being more inclined toward originalist and textualist methods of interpretation, the Roberts Court also is more structurally formalist and more skeptical of agency action than any of its predecessors since at least the New Deal era.¹⁴ In 1978, renowned administrative law scholar Kenneth Culp Davis described formal separation of powers, rule of law, and nondelegation principles as “barriers to the development of the administrative process” and the modern administrative state (and judicial review thereof) as “focused primarily on particular substantive programs, not on broad and general conceptions about the nature and function of government or of law.”¹⁵ Irrespective of whether Davis accurately characterized the Supreme Court's mid-twentieth century jurisprudence or merely read his own preferences into it, the Roberts Court by contrast takes seriously formalist conceptions of separation of powers, rule of law, and nondelegation principles. “Who decides?”¹⁶ matters at least as much as, if not more than, the substantive policies being pursued through agency action.

¹² See Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 36 (2017) (recognizing in Roberts Court jurisprudence “the sharp disconnect that often exists between the constitutional concerns invoked and the legal result reached”).

¹³ See, e.g., *infra* section II.C, pp. 92–94.

¹⁴ See, e.g., Michael P. Allen, *The Roberts Court and How to Say What the Law Is*, 40 STETSON L. REV. 671, 694 (2011) (noting “a strong tendency toward formalistic reasoning in the Court's decisions, rejecting a more flexible, functionalist approach to constitutional interpretation” among Roberts Court decisional trends); Kent Barnett, *Standing for (and Up to) Separation of Powers*, 91 IND. L.J. 665, 674–76 (2016) (describing “[f]ormalism's ascendancy,” *id.* at 676, and “triumph[] over functionalism,” *id.* at 675); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 3 (2020) (observing the Roberts Court as “marked by a formalist and originalist approach to the separation of powers [and] a deep distrust of bureaucracy”).

¹⁵ 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 2:1, at 59–60 (2d ed. 1978).

¹⁶ Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

The Roberts Court is troubled by judicial doctrines that have contributed to the gradual shift of governmental power away from Congress and the courts in favor of administrative agencies. After decades of Supreme Court decisions generally (although not always¹⁷) favoring structural functionalism and administrative flexibility,¹⁸ no one should be surprised that the pendulum is swinging the other way, with the Roberts Court shifting doctrine regarding the structural Constitution and administrative governance in a more formalist and less pro-agency direction.

It is equally obvious, however, that those among the Justices who are inclined toward structural formalism, originalism, etc., are not uniformly so.¹⁹ The Justices' fealty to stare decisis and to judicial restraint also varies tremendously as regards constitutional questions. In *Gamble v. United States*,²⁰ for example, Justice Alito defended stare decisis in constitutional interpretation as "promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process."²¹ According to Justice Alito, even when constitutional meaning is at issue, "a departure from precedent 'demands special justification.'"²² By contrast, writing separately in the same case, Justice Thomas mostly rejected stare decisis in the constitutional context, explaining at length his view that the Court's job is to interpret and apply the Constitution as written, not other Justices' "erroneous" interpretations of it.²³ In *Ramos v. Louisiana*,²⁴ Justices

¹⁷ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 124–37 (1976) (per curiam) (invalidating the appointment mechanism for Federal Election Commission members using formalist reasoning); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (interpreting the Due Process Clause to impose extensive procedural burdens on agency decisionmaking).

¹⁸ See, e.g., Ronald J. Krotoszynski, Jr., Johnjerica Hodge & Wesley W. Wintermyer, *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 950–51 (describing the Court's twentieth-century separation of powers jurisprudence as sometimes formalist but often functionalist).

¹⁹ See, e.g., Min K. Lee, *Stare Decisis on Thin Ice: Mulling over the Supreme Court After Ramos v. Louisiana*, 45 SETON HALL LEGIS. J. 295, 296 (2021) (noting "sharply conflicting understandings of the principle of stare decisis" among the Justices).

²⁰ 139 S. Ct. 1960 (2019).

²¹ *Id.* at 1969 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

²² *Id.* (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). Of course, Justice Alito controversially found such special justification to overturn *Roe v. Wade*, 410 U.S. 133 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265–78 (2022) (identifying and discussing five factors that he said "weigh strongly in favor of overruling *Roe* and *Casey*," *id.* at 2265); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478–85 (2018) (identifying and discussing five factors weighing against giving *Abood* precedential effect).

²³ *Gamble*, 139 S. Ct. at 1981–89 (Thomas, J., concurring).

²⁴ 140 S. Ct. 1390 (2020).

Gorsuch,²⁵ Sotomayor,²⁶ Kavanaugh,²⁷ Thomas,²⁸ and Alito²⁹ all authored opinions offering different ideas about stare decisis, when it applies, and what it requires.

Whether a particular Supreme Court decision actually follows stare decisis principles and adheres to precedent can be debatable. Holdings are precedential, while dicta is not, and which is which often is not clear.³⁰ The Court may intend explanatory reasoning to guide lower courts in future cases, but not every judicial musing that catches the eye of commenters must be followed to the *n*th degree.³¹ On the other hand, today's offhand summary of existing precedent may become tomorrow's dominant two-part test.³² Interpretive canons and methods are not given precedential effect, but some argue that perhaps they should be.³³

For that matter, if the Court purports to retain a precedent but narrows or recasts it in some way, whether under the guise of interpretation or otherwise, then has the Court really adhered to stare decisis?³⁴ Administrative law is replete with examples of the Court interpreting its precedents in novel ways. In *Kisor v. Wilkie*,³⁵ Justice Kagan preserved the doctrine of *Auer* or *Seminole Rock* deference to agency interpretations of regulations by transforming the simple and highly deferential "controlling weight unless . . . plainly erroneous or inconsistent with the regulation"³⁶ into a much less deferential, five-stage inquiry,

²⁵ The discussion of stare decisis in Justice Gorsuch's opinion for the Court was in part on behalf of five, *see id.* at 1404–07, in part on behalf of four, *see id.* at 1407–08, and in part on behalf of only three Justices, *see id.* at 1402–04.

²⁶ *See id.* at 1408–10 (Sotomayor, J., concurring as to all but Part IV-A) (writing to emphasize three points, all related to the application of stare decisis).

²⁷ *See id.* at 1410–16 (Kavanaugh, J., concurring in part) ("writ[ing] separately to explain my view of how stare decisis applies to this case," *id.* at 1410).

²⁸ *See id.* at 1421 (Thomas, J., concurring in the judgment) (invoking and applying his own approach to stare decisis and constitutional interpretation as previously articulated in *Gamble*).

²⁹ *See id.* at 1425 (Alito, J., dissenting) ("The doctrine of stare decisis gets rough treatment in today's decision.").

³⁰ *See, e.g.,* RANDY J. KOZEL, *SETTLED VERSUS RIGHT* 70–81 (2017) (describing aspects of precedential scope).

³¹ *See id.*

³² *See* *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *see also* Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in *ADMINISTRATIVE LAW STORIES* 398, 420–21 (Peter L. Strauss ed., 2006) (noting Justice Stevens's lack of intent to establish a new two-part test or otherwise change the law in writing the *Chevron* decision).

³³ *See, e.g.,* Randy J. Kozel, *Constitutional Method and the Path of Precedent*, in 33 *IUS GENTIUM: PRECEDENT IN THE UNITED STATES SUPREME COURT* 159, 183–87 (Christopher J. Peters ed., 2013); Chad M. Oldfather, *Methodological Pluralism and Constitutional Interpretation*, 80 *BROOK. L. REV.* 1, 4–5 (2014).

³⁴ *See, e.g.,* Randy J. Kozel, *Rethorizing Precedent*, 70 *DUKE L.J.* 1025, 1026 (2021); Richard M. Re, Essay, *Narrowing Precedent in the Supreme Court*, 114 *COLUM. L. REV.* 1861, 1863–65 (2014).

³⁵ 139 S. Ct. 2400 (2019).

³⁶ *Id.* at 2428 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

claiming precedent for every step along the way.³⁷ Lest one think this kind of precedential retheorizing is unique to the present day, consider the 1935 case of *Humphrey's Executor v. United States*,³⁸ wherein the Court dismissed most of Chief Justice Taft's seventy-one-page defense of an unfettered presidential removal power in *Myers v. United States*³⁹ as "dicta" to uphold statutory restrictions on the President's authority to remove Federal Trade Commissioners from office.⁴⁰ Likewise, in *Morrison v. Olson*⁴¹ in 1988, the Court upheld statutory restrictions on the removal of independent counsels by interpreting away inconvenient reasoning from *Humphrey's Executor* while purporting to respect that precedent.⁴²

The Quartet's approach to the major questions doctrine arguably reflects this sort of recasting of precedent in the name of adhering to it. In *West Virginia v. EPA*, Justice Kagan complained that "[t]he Court has never even used the term 'major questions doctrine' before."⁴³ That objection is not quite accurate. Justices had used the label previously in concurring and dissenting opinions.⁴⁴ In doing so, the Justices merely picked up what legal scholars and others in the legal community for many years had dubbed the strand of *Chevron* and statutory interpretation jurisprudence on which the Court relied.⁴⁵ Further, members of the Court have raised concerns for decades about agencies pushing the

³⁷ *Id.* at 2414–18.

³⁸ 295 U.S. 602 (1935).

³⁹ 272 U.S. 52 (1926).

⁴⁰ *Humphrey's Ex'r*, 295 U.S. at 626–27.

⁴¹ 487 U.S. 654 (1988).

⁴² *Id.* at 687–93.

⁴³ *West Virginia v. EPA*, 142 S. Ct. 2587, 2634 (2022) (Kagan, J., dissenting).

⁴⁴ *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 667–68 (2022) (Gorsuch, J., concurring); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1925 (2020) (Thomas, J., concurring in the judgment in part and dissenting in part); *Gundy v. United States*, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting) (discussing the "major questions doctrine" as "nominally a canon of statutory construction" that the Court applies "in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency").

⁴⁵ *See, e.g.*, Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 65 & n.275 (2010); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593, 594–95 (2008); *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 991–93 (2013) (documenting empirically awareness of the major questions doctrine among congressional legislation drafters); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 243–44 (2006) (describing "the concern that on major questions, interest-group power and agency self-dealing might produce a real risk, one that is sufficient to call for a reduced degree of judicial deference").

interpretive limits of ambiguous statutory delegations to pursue aggressive policy agendas, whether labeled as “jurisdictional” questions,⁴⁶ as “elephants in mouseholes,”⁴⁷ or otherwise.⁴⁸ In *King v. Burwell*,⁴⁹ Justice Kagan herself joined the Court’s majority in rejecting the availability of *Chevron* deference and claiming for itself de novo review of an Internal Revenue Service interpretation of the Affordable Care Act based in no small part on the interpretation’s “economic and political significance,”⁵⁰ although the Court in that case sided with the agency.⁵¹

Justice Kagan’s broader point in *West Virginia v. EPA*, advanced as well by Sohoni, is closer to correct — that the version of the major questions doctrine advanced in the Quartet seemed meaningfully different from those precedents.⁵² How much so, and whether the shift falls outside the normal parameters of doctrinal evolution and stare decisis as described above, is where at least some of the scholarly debate over the major questions doctrine will lie.

II. PATHS PROPOSED, PATHS NOT TAKEN

Beyond legal theory, what does it mean in practical terms for the Roberts Court to be more formalist, more originalist, and more skeptical of administrative agencies than its predecessors? If they truly wanted to pursue dramatic change and wreak havoc upon the administrative state, the Justices have no shortage of options. Legal scholars have been

⁴⁶ See, e.g., *Miss. Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354, 386–87 (1988) (Brennan, J., dissenting) (“Agencies do not ‘administer’ statutes confining the scope of their jurisdiction, and such statutes are not ‘entrusted’ to agencies.”). In *City of Arlington v. FCC*, 569 U.S. 290 (2013), the Supreme Court rejected an exception from *Chevron* deference for jurisdictional questions. *Id.* at 297. Chief Justice Roberts dissented, asserting de novo review for whether “Congress has conferred on the agency interpretive authority over the question at issue.” *Id.* at 312 (Roberts, C.J., dissenting).

⁴⁷ See, e.g., *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 528 (2014) (Scalia, J., dissenting) (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (same).

⁴⁸ See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (rejecting an agency’s interpretation of a statute because “we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion”); see also Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (suggesting a court is less likely to defer to an agency interpretation of a statute if “the legal question is an important one [because] 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”).

⁴⁹ 135 S. Ct. 2480 (2015).

⁵⁰ *Id.* at 2489 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

⁵¹ *Id.* at 2496; see also Kristin E. Hickman, *The (Perhaps) Unintended Consequences of King v. Burwell*, 2015 PEPP. L. REV. 56, 58 (arguing that Chief Justice Roberts’s opinion for the Supreme Court in *King v. Burwell* should be seen as an effort “to accomplish, through alternative framing, a broader curtailment of *Chevron*’s scope that he advocated unsuccessfully” in *City of Arlington*).

⁵² *West Virginia v. EPA*, 142 S. Ct. 2587, 2633–34 (2022) (Kagan, J., dissenting); Sohoni, *supra* note 6, at 271–72.

proposing doctrinal alternatives to overhaul the administrative law status quo for a long time. The Court could reinvigorate the nondelegation doctrine by replacing the intelligible principle standard with a sweeping and categorical prohibition against all agency regulations carrying the force of law or all regulations issued pursuant to statutory grants of general rulemaking authority.⁵³ The Court could repudiate *Chevron* deference outright, calling into question the validity of thousands of agency statutory interpretations upheld by courts over the past four decades.⁵⁴ Upon finding a constitutional deficiency in an agency's structure, the Court could effectively nullify the agency's existence, or at least its capacity to act in legally consequential ways, until Congress passes new legislation reconstituting the agency to satisfy constitutional constraints.⁵⁵ The Roberts Court has done none of these things, and not for lack of opportunity.

A. *The Nondelegation Doctrine Is Still (Mostly) Dead*

The nondelegation doctrine holds that Article I, section 1 of the Constitution vests in Congress the legislative powers "herein granted" and that Congress may not delegate those legislative powers to the executive branch (or anyone else).⁵⁶ For decades now, the nondelegation doctrine has been moribund.⁵⁷ Since at least the 1970s, legal scholars and others have called for replacing the intelligible principle standard

⁵³ See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 2-3, 377-78 (2014); see also *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 70-71 (2015) (Thomas, J., concurring in the judgment) (arguing that the Constitution does not allow the Executive to "formulate generally applicable rules of private conduct," *id.* at 70, and citing Hamburger's book as support); Kristin E. Hickman, Foreword, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1125-30 (2021) (discussing this and other categorical alternatives to the intelligible principle standard).

⁵⁴ See, e.g., Petition for a Writ of Certiorari at i, *Buffington v. McDonough*, No. 21-972, 2022 WL 72897 (Jan. 3, 2022) (asking the Court to grant certiorari to overrule *Chevron*); Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782 (2010); Cass R. Sunstein, *Zombie Chevron: A Celebration*, 82 OHIO ST. L.J. 565, 568-75 (2021).

⁵⁵ Judge Karen LeCraft Henderson proposed this outcome for the Consumer Financial Protection Bureau. See *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 160 (D.C. Cir. 2018) (Henderson, J., dissenting).

⁵⁶ See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (describing the doctrine); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2098-99 (2004) (same).

⁵⁷ See, e.g., DAVIS, *supra* note 15, § 3.2, at 150 (describing nondelegation as a failed legal doctrine); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 12, at 34 (1976) (contending that the nondelegation doctrine "can not be taken literally").

and reinvigorating the nondelegation doctrine.⁵⁸ Notwithstanding several opportunities since then,⁵⁹ the Court has not invalidated a statute on nondelegation grounds since 1935.⁶⁰

Before resolving the Quartet, a majority of the Justices now on the Court had signaled interest in revitalizing the nondelegation doctrine. In *Gundy v. United States*,⁶¹ Justice Gorsuch outlined a proposed alternative to the intelligible principle standard and was joined by Chief Justice Roberts and Justice Thomas.⁶² Justice Alito concurred in *Gundy*'s outcome but called for reconsidering the intelligible principle standard on another occasion.⁶³ In *Paul v. United States*,⁶⁴ Justice Kavanaugh — who did not participate in *Gundy* — authored a statement in which he expressed a similar desire to rethink the intelligible principle standard and spoke favorably of Justice Gorsuch's alternative approach.⁶⁵ Justice Kavanaugh stopped short of endorsing Justice Gorsuch's *Gundy* opinion outright, however. Instead, he spoke of “major policy question[s]” and cited some of the precedents from which the Quartet's version of the major questions doctrine derives.⁶⁶

At no time in its post–New Deal history has the Supreme Court seemed more likely to bring the nondelegation doctrine back to life than heading into the 2021 Term. As the lone case among the Quartet in which the Court actually granted certiorari and heard oral argument, *West Virginia v. EPA* was the most anticipated vehicle for revitalizing the nondelegation doctrine by replacing the intelligible principle standard with a more robust limitation on congressional delegations of policy-making authority to agencies.⁶⁷ Pursuing that route, as the Justices

⁵⁸ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131–34 (1980); MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 136 (1995); J. Skelly Wright, *Beyond Discretionary Justice*, 81 *YALE L.J.* 575, 582–83 (1972) (book review); see also Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 *COLUM. L. REV.* 1119, 1127 (1977) (acknowledging suggestions that courts revive the nondelegation doctrine).

⁵⁹ See, e.g., *Gundy*, 139 S. Ct. at 2121; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 462 (2001); *Mistretta v. United States*, 488 U.S. 361, 371 (1989); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion).

⁶⁰ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935); *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 433 (1935).

⁶¹ 139 S. Ct. 2116 (2019).

⁶² *Id.* at 2135–37 (Gorsuch, J., dissenting).

⁶³ *Id.* at 2131 (Alito, J., concurring in the judgment).

⁶⁴ 140 S. Ct. 342 (2019) (mem.).

⁶⁵ *Id.* at 342 (Kavanaugh, J., respecting the denial of certiorari).

⁶⁶ *Id.* (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); and *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994)).

⁶⁷ See, e.g., Nathan Richardson, *The Supreme Court's New Threat to Climate Policy*, RES. (Nov. 5, 2021), <https://www.resources.org/common-resources/the-supreme-courts-new-threat-to-climate-policy> [<https://perma.cc/gLJW-8S2W>]; LINDA TSANG & KATE R. BOWERS, CONG. RSCH. SERV., *LSB10666, CONGRESS'S DELEGATION OF “MAJOR QUESTIONS”: THE SUPREME COURT'S REVIEW OF EPA'S AUTHORITY TO REGULATE GREENHOUSE GAS EMISSIONS MAY HAVE*

seemed poised to do, would be a substantial doctrinal shift for the Court.⁶⁸ It would overturn a longstanding and consistently applied legal standard and raise questions about the constitutional validity of many statutes previously upheld by the Court based on intelligible principles, including the Clean Air Act⁶⁹ and the Occupational Safety and Health Act⁷⁰ — although it is worth noting that Justice Gorsuch in *Gundy* took care to say that “[a]t least some” (and perhaps many) of those precedents might survive his proposed alternative as well.⁷¹

But the Court did not overturn the intelligible principle standard in *West Virginia v. EPA*. In fact, the Court did not approach any of the Quartet as a matter of constitutional interpretation at all, embracing instead the major questions doctrine as a subconstitutional canon of statutory interpretation.

Perhaps as a result, the vocal enthusiasm of some of the Justices for replacing the intelligible principle standard seems to be on hold. Even Justice Gorsuch, arguably the most vocal proponent of replacing the intelligible principle standard,⁷² did not suggest the nondelegation doctrine as an alternative basis for the Court’s holding in *West Virginia v. EPA*. Instead, in his concurrence, Justice Gorsuch merely claimed nondelegation and separation of powers principles as the conceptual bases for major questions as a substantive canon of statutory interpretation.⁷³ He then dedicated most of his concurrence to providing a nonexclusive list of circumstances in which the Court might apply that major questions canon and “several telling clues” for “what qualifies as a clear congressional statement authorizing an agency’s action,”⁷⁴ only some of which were suggested by the majority opinion.⁷⁵ As restrained (for him) as Justice Gorsuch was in this regard, only Justice Alito joined him in pushing even so robust a vision for a major questions canon as a limitation on congressional delegations of policymaking discretion to agencies.⁷⁶

BROAD IMPACTS 4 (2021); see also Brief of Amicus Curiae Americans for Prosperity in Support of Petitioners at 23–26, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (Nos. 20-1530, 20-1531, 20-1778 & 20-1780), 2021 WL 6118360, at *23–26 (arguing for overturning the intelligible principle standard).

⁶⁸ See Hickman, *supra* note 53, at 1136.

⁶⁹ See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 486 (2001).

⁷⁰ See *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 611–12, 646 (1980) (plurality opinion).

⁷¹ *Gundy v. United States*, 139 S. Ct. 2116, 2140 (2019) (Gorsuch, J., dissenting).

⁷² See *id.* at 2135–36.

⁷³ See *West Virginia v. EPA*, 142 S. Ct. 2587, 2617–18 (2022) (Gorsuch, J., concurring).

⁷⁴ *Id.* at 2622.

⁷⁵ *Id.* at 2620–26; see also *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 668–70 (2022) (Gorsuch, J., concurring) (describing the major questions doctrine in nondelegation doctrine and separation of powers terms).

⁷⁶ *West Virginia v. EPA*, 142 S. Ct. at 2616 (Gorsuch, J., concurring). By comparison, as noted, Justice Gorsuch’s call in *Gundy* to replace the intelligible principle standard outright was joined by both Chief Justice Roberts and Justice Thomas, and supported in principle by Justice Kavanaugh as well as Justice Alito. See *supra* notes 61–66 and accompanying text.

Beyond leaving undisturbed almost a century of precedent applying the intelligible principle standard, the Quartet's reliance on the major questions doctrine is distinct from reinvigorating the nondelegation doctrine in one very important respect. Declaring that a statutory delegation violates the nondelegation doctrine, and thus the Constitution, would preclude Congress from ever relying upon agency officials to resolve the associated policy matters absent a constitutional amendment. By comparison, with the Quartet and the major questions doctrine, the Court held that Congress, as a matter of statutory interpretation, *did not* give agencies the necessary authority to adopt the regulations at issue, not that Congress, as a matter of constitutional interpretation, *could not* give agencies that authority.

This distinction is important. To be sure, congressional action on controversial policy questions is always challenging, and the Court has not provided Congress with magic words or otherwise offered extensive guidance regarding just how much more statutory detail it expects Congress to provide to avoid the major questions doctrine. Nevertheless, persuading Congress to amend a statute remains an easier proposition than navigating the constitutional amendment process. And amending a statute to delegate more clearly to an agency the requisite rulemaking power to address a particular contemporary problem, perhaps with some amount of guidance regarding the tools Congress would like the agency to use or approaches that Congress would like the agency to follow, is much easier than amending the same statute with the specificity that would be necessary if the Court required Congress to resolve all of "the policy decisions" itself and leave only "the details" to agencies (as would be the case if the Court replaced the intelligible principle standard as Justice Gorsuch proposed in *Gundy*).⁷⁷

Irrespective of the *doctrinal* effect of replacing the intelligible principle standard, I have argued elsewhere that the *practical* impact of such a move on administrative governance likely would be less dramatic than some expect for two reasons: (1) the sheer number and varying types of delegations contained in the U.S. Code, and (2) the incremental, case-by-case, provision-by-provision, statute-by-statute alternatives that Justice Gorsuch and others on the Court seemed to favor over more sweeping and categorical approaches suggested by some scholars.⁷⁸ Any standard that evaluates delegations individually, one at a time, would simply be too limited in its reach to curtail either congressional delegations or agency policymaking very much. Just as most agency actions never see the inside of a courtroom,⁷⁹ the same would be true of most

⁷⁷ *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

⁷⁸ See Hickman, *supra* note 53, at 1125–30 (surveying more categorical alternatives).

⁷⁹ See, e.g., Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 171 (2019); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 806 (2001).

delegations. As applied in the Quartet, the major questions doctrine similarly anticipates an individualized analysis of statutory text. Thus, whether it functions as an exception from *Chevron* deference or as an independent canon of statutory interpretation, the major questions doctrine has these same practical limitations. Agencies may be less inclined to pursue the very largest and most boundary-pushing regulation projects given the major questions doctrine, but such restraint still leaves agencies with a tremendous range of policymaking discretion.

Finally, as described by the Court in *West Virginia v. EPA* and applied throughout the Quartet, the major questions doctrine is not so standardless as some detractors suggest. Apart from the possibilities described by Justice Gorsuch's concurrence in *West Virginia v. EPA*, Chief Justice Roberts for the Court suggested several guideposts and guardrails for applying the major questions doctrine, including (1) "the 'history and the breadth of the authority that [the agency] has asserted'";⁸⁰ (2) "the 'economic and political significance' of that assertion";⁸¹ and (3) the extent to which the agency is relying on "'modest words,' 'vague terms,' or 'subtle device[s]'" rather than more direct delegations from Congress.⁸² Put more succinctly, one might say based on Chief Justice Roberts's opinion that the major questions doctrine applies to curtail administrative discretion when an agency stretches the boundaries of statutory interpretation to claim new authority to address big problems that, previously, were not obviously within the agency's purview.

To be sure, this description of the major questions doctrine is a mushy standard rather than a bright-line rule, which makes its application more subjective and uncertain than admirers of the administrative state might prefer. The drawbacks of standards are well known, including a lack of certainty *ex ante* and a potential for inconsistency of application.⁸³ Yet, bright-line rules have their own drawbacks, and mushy standards are not new to constitutional law.⁸⁴

⁸⁰ *West Virginia v. EPA*, 142 S. Ct. at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

⁸¹ *Id.* (quoting *Brown & Williamson*, 529 U.S. at 160).

⁸² *Id.* at 2609 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

⁸³ *See, e.g.*, Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400 (1985) (summarizing some of the drawbacks of standards).

⁸⁴ *See id.* at 390–98. For just a few additional examples from the voluminous literature on the use of rules and standards in law, see generally Larry Alexander, *Constitutional Rules, Constitutional Standards, and Constitutional Settlement: Marbury v. Madison and the Case for Judicial Supremacy*, 20 CONST. COMMENT. 369 (2003); Kevin M. Clermont, *Rules, Standards, and Such*, 68 BUFF. L. REV. 751 (2020); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-rules and Meta-standards*, 54 ADMIN L. REV. 807 (2002); and Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

None of this is to suggest that the evolution and application of the major questions doctrine is no big deal. The Quartet undoubtedly will prompt agency officials to restrain their rulemaking impulses on some occasions, especially if they are unsure of their authority to act. Courts can anticipate a new set of challenges to agency actions on major questions grounds. Nevertheless, the subconstitutional major questions doctrine is substantially more restrained and incremental, and arguably more consistent with stare decisis principles, than the constitutional alternatives on offer.

B. *Chevron Still Lives*

Like the nondelegation doctrine's intelligible principle standard, the *Chevron* doctrine has been under attack and, arguably, in decline. Before his passing, Justice Scalia — long one of *Chevron*'s staunchest proponents⁸⁵ — raised doubts regarding *Chevron*'s underpinnings.⁸⁶ Since then, Justice Thomas has questioned whether *Chevron* deference violates constitutional separation of powers principles.⁸⁷ Justice Gorsuch, too, has advocated abandoning *Chevron* deference, characterizing it as “permit[ting] all too easy intrusions on the liberty of the people.”⁸⁸ Justice Kavanaugh also has called *Chevron* “an atextual invention by the courts” and “a judicially orchestrated shift of power from Congress to the Executive Branch” that “encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints.”⁸⁹

The Court also has not applied *Chevron* to defer to an agency interpretation of a statute since 2016,⁹⁰ notwithstanding several opportunities to do so.⁹¹ Some scholars have pointed to the Court's failure to cite *Chevron* in these cases as evidence that the doctrine is in decline, if

⁸⁵ See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (“[I]n the long run *Chevron* will endure and be given its full scope . . . because it more accurately reflects the reality of government, and thus more adequately serves its needs.”).

⁸⁶ *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109–10 (2015) (Scalia, J., concurring in the judgment).

⁸⁷ See, e.g., *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1482 (2020) (Thomas, J., dissenting); *Baldwin v. United States*, 140 S. Ct. 690, 691–92 (2020) (Thomas, J., dissenting from the denial of certiorari).

⁸⁸ *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring); see also *County of Maui*, 140 S. Ct. at 1479 (2020) (joining Justice Thomas's dissent questioning the constitutionality of *Chevron* deference).

⁸⁹ See, e.g., Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (book review).

⁹⁰ See *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016); Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931, 1001–13 (2021) (categorizing all of the cases in which the Court cited *Chevron* through the 2019 Term).

⁹¹ See, e.g., *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1485 (2021) (evaluating agency statutory interpretation without invoking *Chevron*, despite briefing claiming deference); *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) (same); *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 899–900 (2019) (same).

not outright defunct.⁹² As James Kunhardt and Professor Anne Joseph O’Connell have documented, agencies may be adjusting their rule-making practices in response to the uncertainty created by the Court’s silence.⁹³ Sohoni concludes that the Quartet has separated the major questions inquiry from *Chevron* analysis, and thus labels *Chevron* “a derelict.”⁹⁴ Perhaps the Court one day will be explicit that it has rejected *Chevron*.

Or maybe it won’t. Many commentators anticipated that the Court might overturn *Chevron* deference outright in its 2021 Term,⁹⁵ either in *American Hospital Ass’n v. Becerra*⁹⁶ (where briefing expressly addressed whether the Court should overturn *Chevron*⁹⁷ and the issue was discussed at oral argument⁹⁸) or, alternatively, in *Becerra v. Empire Health Foundation*⁹⁹ (where the government also asserted *Chevron* deference¹⁰⁰). That did not happen. Instead, the Court again was merely *silent* regarding *Chevron* as it evaluated agency statutory interpretations by performing its own independent analysis using traditional tools of statutory interpretation as suggested by *Chevron*’s footnote nine.¹⁰¹

⁹² See, e.g., Nathan Richardson, *Deference Is Dead (Long Live Chevron)*, 73 RUTGERS U. L. REV. 441, 485–93 (2021).

⁹³ See, e.g., James Kunhardt & Anne Joseph O’Connell, *Judicial Deference and the Future of Regulation*, BROOKINGS (Aug. 18, 2022), <https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation> [<https://perma.cc/G57Q-Z79F>].

⁹⁴ Sohoni, *supra* note 6, at 281.

⁹⁵ See, e.g., Nicholas Bagley, *Chevron Deference at Stake in Fight over Payments for Hospital Drugs*, SCOTUSBLOG (Nov. 29, 2021, 9:28 AM), <https://www.scotusblog.com/2021/11/chevron-deference-at-stake-in-fight-over-payments-for-hospital-drugs> [<https://perma.cc/TTC7-UZTC>]; David Bernstein, *The Supreme Court Could Foster a New Kind of Civil War*, POLITICO (June 14, 2022, 5:00 PM), <https://www.politico.com/news/magazine/2022/06/14/supreme-court-civil-war-00039543> [<https://perma.cc/K2TW-NVN7>].

⁹⁶ 142 S. Ct. 1896 (2022).

⁹⁷ See, e.g., Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners at 7, *Am. Hosp. Ass’n* (No. 20-1114), 2021 WL 4135099, at *7 (“[T]his Court should take this opportunity to reconsider *Chevron* deference.”); Brief of Amicus Curiae Americans for Prosperity Foundation In Support of Neither Party at 4, *Am. Hosp. Ass’n* (No. 20-1114), 2021 WL 4173461, at *4 (“The Court should squarely overrule *Chevron* here and now.”); Brief for Amicus Curiae the Chamber of Commerce of the United States of America in Support of Neither Party at 3, *Am. Hosp. Ass’n* (No. 20-1114), 2021 WL 4219174, at *3 (encouraging the Court at least to “take this opportunity to restate, clarify, and reinforce the limitations and requirements on *Chevron* deference”); Brief for the Respondents at 19–20, *Am. Hosp. Ass’n* (No. 20-1114), 2021 WL 4937288, at *19–20 (claiming *Chevron* deference).

⁹⁸ Transcript at Oral Argument at 5, 30–33, *Am. Hosp. Ass’n* (No. 20-1114), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1114_l6h2.pdf [<https://perma.cc/J97H-D96X>].

⁹⁹ 142 S. Ct. 2354 (2022).

¹⁰⁰ Brief for the Petitioner at 23, 26, *Empire Health Found.* (No. 20-1312), 2021 WL 3931359, at *23, *26.

¹⁰¹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (calling the judiciary “the final authority on issues of statutory construction” and instructing courts to “employ[] traditional tools of statutory construction” to ascertain congressional intent).

Ignoring precedent where it might apply can foreshadow the Court's eventually overturning or abandoning that precedent.¹⁰² But silence does not a holding make. By merely remaining silent rather than overruling *Chevron* outright, the Court has preserved the doctrine's availability for future cases.

Chevron has always had a more substantial effect on case outcomes in the lower courts than at the Supreme Court.¹⁰³ The Justices may have cited *Chevron* in 238 cases from 1984 through the 2019 Term,¹⁰⁴ but for all the hype, the Court only applied the *Chevron* standard to evaluate an agency's interpretation of a statute in 107 cases¹⁰⁵ and only deferred to the agency under *Chevron* in 72 of them.¹⁰⁶ As Professor William Eskridge and Lauren Baer documented, from 1984 through the end of the 2005 Term, the Court applied *Chevron* in only 8.3%, and relied purely on its own reasoning without resort to any deferential canon, presumption, or standard in more than 50%, of 1014 cases evaluating agency statutory interpretations.¹⁰⁷ Even when they limited their analysis to cases in which they felt *Chevron* clearly should apply, Eskridge and Baer found that the Court applied *Chevron* in at most 30% of cases.¹⁰⁸ Professors Kent Barnett and Christopher Walker similarly have interpreted these findings to mean that, even before the Court's present silence, its "questionable loyalty to *Chevron* suggests that the doctrine is not meant to discipline Supreme Court decisionmaking. Instead, the doctrine may better serve to control lower courts and

¹⁰² For example, consider the saga of the Supreme Court's *Lemon* test for evaluating Establishment Clause violations, which various Justices criticized and the Court repeatedly ignored for years before finally declaring it "long ago abandoned." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022); see also Amanda Harmon Cooley, *The Persistence of Lemon*, 47 U. DAYTON L. REV. 411, 422–35 (2022) (documenting the history of the *Lemon* test).

¹⁰³ See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 18 (2017) (finding *Chevron* has had greater impact in federal circuit court than Supreme Court decisionmaking).

¹⁰⁴ See Hickman & Nielson, *supra* note 90, at 984.

¹⁰⁵ *Id.* at 986.

¹⁰⁶ *Id.* at 1001–04.

¹⁰⁷ 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, 1094, 1100, 1121 (2008). *But see* Natalie Salmanowitz & Holger Spamann, *Does the Supreme Court Really Not Apply Chevron When It Should?*, 57 INT'L REV. L. & ECON. 81, 82 (2019) (analyzing the cases differently).

¹⁰⁸ Eskridge & Baer, *supra* note 107, at 1124–25.

provide nationwide uniformity.”¹⁰⁹ In this vein, the government continues both to claim and to receive *Chevron* deference in the lower courts.¹¹⁰

Regardless, although Sohoni asserts the contrary,¹¹¹ the Supreme Court’s silence regarding *Chevron* in the Quartet does not necessarily prove that doctrine’s demise nor separate the major questions doctrine from its scope.¹¹² The Court’s *Chevron* jurisprudence anticipates three steps: first, the *Mead* inquiry of whether Congress delegated authority to act with the force of law and the agency acted in the exercise of that authority;¹¹³ second, the *Chevron* step one inquiry of whether the statute’s meaning is clear or ambiguous;¹¹⁴ and third, the *Chevron* step two inquiry of whether the agency’s interpretation of an ambiguous statute is reasonable.¹¹⁵ The Court has never been consistent, however, in ordering those steps. Whereas the Court often has applied *Mead*’s inquiry as a “step zero” that comes first,¹¹⁶ other of the Court’s opinions have approached *Mead* as a “step one-and-a-half” that comes only after deciding that the statute’s meaning is ambiguous.¹¹⁷ Still other Court decisions and academic examinations rearrange or blend the steps in different ways.¹¹⁸ As the Court has observed repeatedly, *Chevron* step one entails the application of “traditional tools of statutory construction”

¹⁰⁹ Barnett & Walker, *supra* note 103, at 18; *see also* City of Arlington v. FCC, 569 U.S. 290, 307 (2013) (describing *Chevron* as having a “stabilizing purpose” by preventing inconsistencies in interpretation among the circuit courts); Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1003 (2005) (Stevens, J., concurring) (suggesting that *Chevron* applies differently in cases concerning prior Supreme Court interpretations of statutes than those concerning prior court of appeals interpretations).

¹¹⁰ *See, e.g.*, Shanxi Hairui Trade Co. v. United States, 39 F.4th 1357, 1360–61 (Fed. Cir. 2022); Oakbrook Land Holdings, LLC v. Comm’r, 28 F.4th 700, 718–19 (6th Cir. 2022); Huawei Techs. USA, Inc. v. FCC, 2 F.4th 421, 436–43 (5th Cir. 2021).

¹¹¹ Sohoni, *supra* note 6, at 281–82.

¹¹² *Cf.* Jonathan H. Adler, West Virginia v. EPA: *Some Answers About Major Questions*, 2021–2022 CATO SUP. CT. REV. 37, 57–62 (2022) (identifying delegation as a shared premise for the major questions doctrine and *Chevron* deference).

¹¹³ United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

¹¹⁴ Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

¹¹⁵ *Id.* at 843; *see also* Kristin E. Hickman, *The Three Phases of Mead*, 83 FORDHAM L. REV. 527, 537–41 (2014) (documenting the steps).

¹¹⁶ *See, e.g.*, United States v. Eurodif S.A., 555 U.S. 305, 316 (2009); Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 242 (2004); *see also, e.g.*, Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 873 (2001) (describing the *Mead* inquiry in “step zero” terms); Sunstein, *supra* note 45, at 191 (same).

¹¹⁷ *See, e.g.*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (2017); Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 52–58 (2011); Michael P. Healy, *Reconciling Chevron, Mead, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 39–40 (2011) (arguing that *Mead* analysis generally ought to come after *Chevron* step one).

¹¹⁸ *See, e.g.*, Nicholas R. Bednar & Kristin E. Hickman, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1428–41 (2017) (documenting different conceptions of *Mead* and *Chevron* reflected in the jurisprudence and literature); Hickman, *supra* note 115, at 537–47 (documenting different approaches to *Mead* and *Chevron* among the Justices).

to discern congressional intent, much like de novo review.¹¹⁹ Whether under the step one-and-a-half model or otherwise, it has been entirely common for the possibility of deference to come into play only after the Court decides for itself that traditional tools fail to resolve statutory meaning. Under such circumstances, the Court has no need to cite *Chevron* until such time as it decides that traditional tools of statutory interpretation fail to resolve statutory meaning. Throughout *Chevron*'s tenure, the Court's mere silence regarding *Chevron* in one statutory interpretation case has offered little to no hint of the likelihood (or lack thereof) that the Court might apply *Chevron* in a subsequent case. The hostility that some of the Justices have shown toward *Chevron* deference simply gives the Court an additional reason to avoid mentioning *Chevron* if the deference question can be avoided by resolving statutory meaning using traditional tools.

Additionally, to the extent the Quartet casts the major questions doctrine as a substantive canon of statutory interpretation, it falls in the midst of the gray area of how substantive canons square with *Chevron* analysis, including whether they should be taken into account at *Chevron* step one or *Chevron* step two. Legal scholars have debated that question for some time,¹²⁰ while the Supreme Court just has been inconsistent in its treatment. In some cases, the Court has applied the constitutional avoidance canon to bolster findings of statutory clarity and reject the agency's interpretation at *Chevron* step one.¹²¹ On other occasions, however, the Court has postponed or outright rejected consideration of constitutional avoidance until *Chevron* step two, after a finding of statutory ambiguity.¹²² Absent a more explicit statement, little in the Quartet suggests that the major questions doctrine as a substantive canon would fare differently.

The Supreme Court's approach to *Chevron* is and always has been malleable. One must take care not to read too much into what the Court does not say outright. The Court's silences allow it to reserve the availability of *Chevron* deference for future cases. The Court also has preserved for itself whether and how the major questions doctrine as developed in the Quartet might interact with *Chevron*. Thus, irrespective of occasional sweeping rhetoric, the Roberts Court's actual doctrinal pronouncements regarding *Chevron* are more restrained and incremental than dramatic and pivotal.

¹¹⁹ *Chevron*, 467 U.S. at 842–43 & n.9.

¹²⁰ See, e.g., ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 211 (2006); Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 70–84 (2008); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 330 (2000).

¹²¹ See *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–74 (2001); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 230–32 (1994).

¹²² See, e.g., *Dep't of Hous. & Urb. Dev. v. Rucker*, 535 U.S. 125, 134–35 (2002); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574–75 (1988).

C. Agencies Soldier On

Agency design represents yet another area in which the Roberts Court has moved its separation of powers jurisprudence in a more formalist and less pro-agency direction, at least as a matter of doctrinal theory. Congress often prescribes by statute who will appoint the officers of the United States who in turn perform agencies' legally critical rulemaking and adjudication functions; Congress also often imposes statutory limitations on the authority of the President (or other higher-ranking officers) to remove those officers from office.¹²³ Precisely who is an officer of the United States and whether a particular officer is an inferior officer whose appointment Congress can vest in the President alone, the head of a department, or a court of law can be challenging questions given dozens of agencies and myriad government officials exercising varying types and degrees of authority. For most of the twentieth century, the Supreme Court was willing to go along with congressional preferences regarding how to structure an agency's leadership. Such is no longer the case.

Unitary executive theory — the idea that the Constitution's Article II requires "all federal officers exercising executive power [to] be subject to the direct control of the President," including those at independent agencies¹²⁴ — often goes hand in hand with structural formalism,¹²⁵ although some functionalists support the argument as well.¹²⁶ Consistent with unitary executive theory, one hallmark of Roberts Court separation of powers jurisprudence has been its whittling away of statutory limitations on the President's authority to remove federal officers from office. In this way, the Court has substantially reduced Congress's ability to pursue its own preferences for how federal agencies are structured. Yet it has done so while claiming quite explicitly that it is not overturning precedent,¹²⁷ despite calls from some of the Justices to do precisely

¹²³ See U.S. CONST. art. II, § 2, cl. 2 (prescribing mechanisms for appointing "Officers of the United States" and giving Congress latitude with respect to "inferior Officers").

¹²⁴ Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 (1992). Professor Steven Calabresi and Kevin Rhodes go on, however, to describe three separate versions of unitary executive theory. See *id.* at 1166.

¹²⁵ See, e.g., Ronald J. Krotoszynski, Jr., *Cooperative Federalism, The New Formalism, and The Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1607–08 (2012) (linking the two theories); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1733–34 (1996) (same).

¹²⁶ See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–3 (1994) (offering functional rationales for a strong unitary executive).

¹²⁷ See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010).

that.¹²⁸ Instead, the Court generally has pursued an approach of recasting and minimizing its precedents to render them more compatible with the Court's preferred direction. But the Court also has been enormously creative at fixing agencies' constitutional infirmities while leaving the agencies otherwise intact to continue their work.

For example, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,¹²⁹ the Roberts Court declared that two layers of statutory for-cause removal restrictions for members of the Public Company Accounting Oversight Board (PCAOB) violated separation of powers principles.¹³⁰ The Court resolved the constitutional difficulty, however, by simply severing one of the two statutory provisions and remanding the case for reconsideration by a now-constitutional agency.¹³¹ The accounting firm that challenged the PCAOB's structure won its case before the Supreme Court, but its disagreement with the agency persisted for several months until the parties settled with the agency closing its investigation but reserving the authority to pursue future investigations of the accounting firm's "past or future conduct."¹³²

In each of *Seila Law v. Consumer Financial Protection Bureau*¹³³ and *Collins v. Yellen*,¹³⁴ the Roberts Court held that an independent agency headed by a single director — in *Seila Law*, the Consumer Financial Protection Bureau (CFPB); in *Collins*, the Federal Housing Finance Agency — violated separation of powers principles.¹³⁵ Again, however, the Roberts Court resolved the agencies' structural problems with at best minimal interference.¹³⁶ Given the presence of complicating factors in *Collins*, the Court remanded that case for the lower courts to decide what the remedy for the constitutional violation should be.¹³⁷ In *Seila Law*, however, the Court again simply severed a statutory for-cause removal restriction, rendering the CFPB's Director removable at will by the President and the agency no longer independent. The Court in *Seila Law* declined to dismiss outright the matter that gave rise to the case in the first instance, a civil investigative demand issued by the CFPB seeking documents and other information from *Seila Law*.¹³⁸

¹²⁸ See, e.g., *Seila L.*, 140 S. Ct. at 2211–12 (Thomas, J., concurring); *Lucia v. SEC*, 138 S. Ct. 2044, 2056–57 (2018) (Thomas, J., concurring).

¹²⁹ 561 U.S. 477 (2010).

¹³⁰ *Id.* at 492.

¹³¹ *Id.* at 508.

¹³² Michael Cohn, *Beckstead and Watts Settles Inspection Case with PCAOB*, ACCT. TODAY (Feb. 23, 2011, 2:32 PM), <https://www.accountingtoday.com/news/beckstead-and-watts-settles-inspection-case-with-pcaob> [<https://perma.cc/57CD-PHNH>].

¹³³ 140 S. Ct. 2183 (2020).

¹³⁴ 141 S. Ct. 1761 (2021).

¹³⁵ *Id.* at 1783–84; *Seila L.*, 140 S. Ct. at 2197.

¹³⁶ See Jonathan H. Adler, *Conservative Minimalism and the Consumer Financial Protection Bureau*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), <https://lawreviewblog.uchicago.edu/2020/08/27/seila-adler> [<https://perma.cc/V9WY-E6VZ>] (observing similarly).

¹³⁷ *Collins*, 141 S. Ct. at 1788–89.

¹³⁸ *Seila L.*, 140 S. Ct. at 2221.

Instead, the Court remanded the case, after which the Ninth Circuit decided that the CFPB's demand was properly ratified later by a constitutionally accountable Director.¹³⁹ In other words, although Seila Law won its case before the Supreme Court and the CFPB's structure was altered to make its Director removable at will, the CFPB's performance of its statutory functions — including its investigation of Seila Law — continued unabated.

Finally, *United States v. Arthrex, Inc.*¹⁴⁰ ended with the Roberts Court using severability a little differently to align an agency's structure more closely with unitary executive theory while simultaneously minimizing the impact on the agency's performance of its statutory functions. In *Arthrex*, the Court determined that the Patent Trial and Appeal Board (PTAB) was unconstitutionally structured because administrative patent judges (APJs) made final decisions that no one else in the executive branch, including the Director of the Patent and Trademark Office, could review and overturn.¹⁴¹ The obvious conclusion from the Court's analysis was that the APJs were principal officers who must be appointed by the President with the advice and consent of the Senate. The Court avoided that holding, however, on the ground that it was enough to say that "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us."¹⁴² The Court then severed language in the statute preventing the Director from reviewing and overturning PTAB decisions, thus giving the Director sufficient supervisory authority over APJs to satisfy constitutional requirements by making APJs inferior officers, and otherwise allowing the PTAB to continue its work.¹⁴³

In other work, I have questioned whether the Roberts Court's willingness to use severability to rewrite statutory text is as restrained as might appear at first blush.¹⁴⁴ Nevertheless, one cannot help but notice that, with those small statutory adjustments, the Roberts Court allowed the agencies in question to proceed in the day-to-day administration of their statutory responsibilities with nary a hiccup.

III. WHAT HAPPENS NEXT?

Along with the Roberts Court's other administrative law cases, the Quartet brings some amount of change, but not the radical overhaul that some demand and others decry. Indeed, notwithstanding its trend

¹³⁹ *Consumer Fin. Prot. Bureau v. Seila L. LLC*, 984 F.3d 715, 719–20 (9th Cir. 2020), *amended and superseded on denial of reh'g en banc*, 997 F.3d 837 (9th Cir. 2021).

¹⁴⁰ 141 S. Ct. 1970 (2021).

¹⁴¹ *Id.* at 1980–85.

¹⁴² *Id.* at 1985.

¹⁴³ *Id.* at 1986–87.

¹⁴⁴ Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 NOTRE DAME L. REV. 1475, 1488–93 (2018).

toward greater structural formalism, the Roberts Court seems quite determined not to interfere too much with the overall functionality of the administrative state. Obviously, these decisions are dissatisfying to supporters of administrative governance and advocates of the policies advanced by the invalidated regulatory actions. They are also frustrating to critics of administrative governance who want more sweeping change.

The limitations of and omissions from the Quartet's reasoning bring some amount of uncertainty regarding how to apply the major questions doctrine. Uncertainty leads to inconsistency.¹⁴⁵ Some highly motivated judges will undoubtedly overread the Quartet, just as they will the Roberts Court's other administrative law opinions, and push for more change than the Court has embraced. Other judges likely will underread the Court's opinions and not apply them aggressively enough for the Court.

We also have not seen the last of the Roberts Court in any of these areas. Small changes in the short term are not incompatible with more significant ones later, nor with substantial upheaval over time. Today's incremental moves could become tomorrow's major alterations in the functionality of the administrative state. Of course, if the Court is deliberately pursuing major change on an incremental basis, the passage of time makes the possibility of reaching the end goal (whatever it may be) less likely as political and personnel changes occur.

One suspects the Court lacks the votes for grander doctrinal pronouncements, but we cannot know with certainty whether the Roberts Court's incrementalism regarding separation of powers and agency action arises from genuine disagreement over how far doctrinal change should go or merely how best to get to a particular objective. The Court still could replace the intelligible principle standard,¹⁴⁶ repudiate *Chevron* deference,¹⁴⁷ and invalidate the very existence of some number

¹⁴⁵ For that matter, the Court's opinions in the Quartet arguably are not entirely consistent with one another. See, e.g., Adler, *supra* note 112, at 54 (contending that the Roberts Court's approach to the major questions doctrine in *Alabama Ass'n of Realtors* is different from that in *NFIB v. Department of Labor* and *West Virginia v. EPA*).

¹⁴⁶ But see Alan B. Morrison, *The Supreme Court's Non-delegation Tease*, YALE J. ON REGUL.: NOTICE & COMMENT (July 29, 2020), <https://www.yalejreg.com/nc/the-supreme-courts-non-delegation-tease-by-alan-b-morrison> [<https://perma.cc/XA4T-TH8T>] (documenting two post-*Gundy* cases presenting nondelegation issues in which the Supreme Court denied certiorari).

¹⁴⁷ The Supreme Court denied certiorari in two cases that commenters anticipated might be vehicles for substantially curtailing *Chevron* deference if not overruling it outright in the 2022 Term: *Buffington v. McDonough*, 7 F.4th 1361 (Fed. Cir. 2021), *cert. denied*, No. 21-972, 2022 WL 16726027 (U.S. Nov. 7, 2022); and *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020), *cert. denied sub nom. Aposhian v. Garland*, 91 U.S.L.W. 3061 (U.S. Oct. 3, 2022) (No. 21-159). See Jeff Overley, *Chevron Deference Still Feels Heat After High Court Reprieve*, LAW360 (June 16, 2022, 10:56 PM), <https://www.law360.com/articles/1503671/chevron-deference-still-feels-heat-after-high-court-reprieve> [<https://perma.cc/UBG9-Z989>] (discussing the *Buffington* and *Aposhian* cases).

of government agencies¹⁴⁸ — thus reducing the ability of Congress to rely on agencies to accomplish policy priorities more than the Court has thus far. In the meantime, by shifting doctrine incrementally on a case-by-case basis without doing a more thorough job of explaining and justifying those moves and where they might be headed, the Roberts Court may run the risk of painting itself into a corner that it does not like and from which it has a hard time escaping.

Nevertheless, expecting the Roberts Court simply to maintain the doctrinal status quo despite changing times and Court personnel is ahistorical. With any movement in judicial doctrine, whether great or small, some amount of uncertainty and a whole lot of criticism will be inevitable, no matter how long and how thorough the Court makes its opinions. The real question all along has been how much change, not whether any would occur. At least for now, on administrative law issues, and as regards the day-to-day reality of administrative governance, that change is pretty limited.

¹⁴⁸ See, e.g., *Braidwood Mgmt. Inc. v. Becerra*, No. 20-cv-00283, 2022 WL 4091215, at *8–13 (N.D. Tex. Sept. 7, 2022) (holding that members of the Preventive Services Task Force at the Department of Health and Human Services were unconstitutionally appointed and that their decisions cannot be ratified by the Secretary).