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Reincarnating the 'Major Questions' Exception to Chevron Deference as a Doctrine of Non-Interference (Or Why Massachusetts v. EPA Got It Wrong)

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Abstract

In a pair of cases declaring a “major questions” exception to Chevron deference, the Supreme Court held that executive agencies may not implement major policy changes without explicit authorization from Congress. But in Massachusetts v. EPA, the Court unceremoniously killed its “major questions” rule, requiring the EPA to implement one such major policy change. Because the scholarly literature to date has failed to discern a worthy justification for the “major questions” rule, the academy might be tempted to celebrate the rule’s death. This Article, however, argues that the rule ought to be mourned and, indeed, reincarnated. It offers a “non-interference” justification for the “major questions” exception, arguing that the rule should apply whenever an agency enters debate in a regulatory regime to which Congress is actively considering legislative changes. The purpose of the rule, then, is to prevent agencies from altering the regulatory backdrop against which Congress is negotiating, and the purpose of judicial enforcement of a “major questions” rule is to restore the pre-interference regulatory reality so that congressional negotiations can pick up where they left off. This understanding of the rule explains and justifies the two “major questions” cases, but it cannot explain or justify Massachusetts v. EPA. The Article therefore argues that the “major questions” holding in Massachusetts v. EPA is wrong and should be rejected.

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ABSTRACT

In a pair of cases declaring a "major questions" exception to *Chevron* deference, the Supreme Court held that executive agencies may not implement major policy changes without explicit authorization from Congress. But in *Massachusetts v. EPA*, the Court unceremoniously killed its "major questions" rule, requiring the EPA to implement one such major policy change. Because the scholarly literature to date has failed to discern a worthy justification for the "major questions" rule, the academy might be tempted to celebrate the rule's death. This Article, however, argues that the rule ought to be mourned and, indeed, reincarnated. It offers a "non-interference" justification for the "major questions" exception, arguing that the rule should apply whenever an agency enters debate in a regulatory regime to which Congress is actively considering legislative changes. The purpose of the rule, then, is to prevent agencies from altering the regulatory backdrop against which Congress is negotiating, and the purpose of judicial enforcement of a "major questions" rule is to restore the pre-interference regulatory reality so that congressional negotiations can pick up where they left off. This understanding of the rule explains and justifies the two "major questions" cases, but it cannot explain or justify *Massachusetts v. EPA*. The Article therefore argues that the "major questions" holding in *Massachusetts v. EPA* is wrong and should be rejected.

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Reincarnating the "Major Questions" Exception to *Chevron* Deference as a Doctrine of Non-Interference (Or Why *Massachusetts v. EPA* Got it Wrong)

INTRODUCTION

In *Massachusetts v. EPA*[1] (the Supreme Court's recent foray into the global warming debate), the Court dealt a fatal blow to a fledgling, though controversial, doctrine: the "major questions" exception to *Chevron*[2] deference.[3]

Admittedly, the Court's decision in *Massachusetts* is consistent with a simplistic view of the "major questions" rule. As it had done in the seminal "major questions" case, *FDA v. Brown & Williamson*,[4] the Court in *Massachusetts* identified the central issue as a major one and refused deference to the agency's handling of that issue. The Court thus seemed to hold, as it had in *Brown & Williamson*, that the *Chevron* framework was inapplicable in *Massachusetts* because the question at issue was a major one. On that very basic level, the *Massachusetts* case is a datum in favor of the *Brown & Williamson* rule.

But, of course, that view is far too simplistic. The substantive logic in *Massachusetts* is, in the end, fundamentally incompatible with any substantive justification for a "major questions" exception.[5] Whereas the denial of deference in *Brown & Williamson* seemed to rest on a view that administrative agencies may not implement "major" policy changes,[6] the denial of deference in *Massachusetts* ultimately obligated one such agency to implement—or at least seriously to consider implementing—one such major change.[7]

The puzzle, therefore, is which case got it wrong. When an executive agency has an opportunity to address a major political issue and to implement a major policy reform, should it abstain, as *Brown & Williamson* suggests it should, or should it act, as *Massachusetts* suggests it must?[8]

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[1] 127 S.Ct. 1438 (April 2, 2007).

[2] *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (creating a two-step inquiry for determining whether an agency's interpretation of its governing statute is entitled to deference). Under *Chevron* deference, the Court asks only two questions before accepting an agency's interpretation of its governing statute: whether the statute is silent or ambiguous on the question at issue (Step One) and, if so, whether the agency's interpretation of that statutory ambiguity is reasonable (Step Two).

[3] *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 231–47 (2006) (identifying, explicating, and naming the "major questions" exception but concluding that it should not be enforced).

[4] 529 U.S. 120 (2000).

[5] Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise* (unpublished manuscript on file with author) (arguing that the problem with EPA's decision not to regulate was, at least arguably, that the decision was based on crass political calculations rather than expert scientific judgments).

[6] *See* Sunstein, *supra* note 3.

[7] *See* Freeman & Vermeule, *supra* note 5, at 18–19 (noting that *Massachusetts* and *Brown & Williamson* are incompatible in this sense).

[8] The question is slightly more complicated than I make it out to be here. The "major questions" exception comes into play only if Congress has not clearly bestowed authority in the agency. The rule, in its simplest form, is one of many "clear statement" rules, holding not that agencies are

Of course, there needn't be—and, I will argue, shouldn't be—a uniform answer to that question for every administrative agency or for every major issue. The appropriateness of executive intervention in a major policy battle might—and, I will argue, should—depend on relevant legal and political circumstances. That is, the *Brown & Williamson* rule needn't and shouldn't be a blanket exception for all executive treatments of major questions.

There is, however, no coherent story about the legal and political circumstances underlying *Massachusetts* and *Brown & Williamson* that would reconcile the two holdings. There is no reason that executive intervention should have been *inappropriate* in the context of *Brown & Williamson* but *necessary* in the context of *Massachusetts*.

The initial puzzle, thus, remains: which case got it wrong? But the puzzle has another layer, too. If *Brown & Williamson* got it wrong, then what were the legal and political circumstances that made agency intervention appropriate, or even *necessary*, in both cases? Or if *Massachusetts* got it wrong, then what were the legal and political circumstances that made agency intervention unnecessary, and even *inappropriate*, in both cases? Put another way: Which one of the cases was right to deviate from *Chevron*?

As should be obvious from the title, this Article argues that *Massachusetts* got it wrong—and that *Brown & Williamson* had it right.

The thrust of the argument, however, is not that the major questions exception, as it has been understood, is a good rule or that *Massachusetts*, as it has been understood, is a bad case. The argument is instead that certain circumstances operating in the background of *Brown & Williamson*—circumstances that the Court and the academy have largely ignored—justified the Court's substantive intuition in that case that the agency's action was inappropriate. Because the same circumstances were operating in the background of *Massachusetts*, the Court ought to have reached the same substantive conclusion there, too: that executive action was inappropriate in the context of global warming.

The Article also argues that, whenever this particular background story is repeated, (1) the executive ought to be restrained, (2) the judiciary is the right institution to restrain it, and (3) a *Chevron* exception is an appropriate tool for accomplishing that restraint. The argument, therefore, is that the "major questions" exception should be reincarnated, yes, but also reconceptualized, with an emphasis on this background story rather than on the "majorness" of the relevant policy question.

So what is the background story? What justifies the *Chevron* deviation in *Brown & Williamson*?

In short, it is a story of simultaneous efforts in the executive and in Congress to effect changes in a single regulatory domain. In the background of both *Brown & Williamson* and *Massachusetts*—and in the background of a predecessor "major questions" case, *MCI v. AT&T*[9]—Congress was actively negotiating

absolutely forbidden to make major decisions but rather that agencies may make such decisions only if Congress has clearly given them the authority to do so. This nuance, however, does not impact any of the analysis that follows, and I therefore set it aside for simplicity's sake.

[9] *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994).

amendments to the relevant regulatory regimes at the same time that the agencies considered and passed their regulations. And in the background of *MCI* and *Brown & Williamson*, the agencies' enactments perceptibly disrupted Congress's efforts.

The Court thus played a useful role in *MCI* and *Brown & Williamson* by vacating the agencies' enactments. It restored a regulatory status quo ante, allowing congressional negotiations to pick up where they had left off. In other words, the agencies had shifted the targets around which Congress was negotiating, and the Court simply shifted them back.[10]

The Court's role in *MCI* and *Brown & Williamson*, thus, was nothing more than that of referee, overseeing a complex game of political bargaining and preventing costly intermeddling between political institutions.

This refereeing role is not an unusual one for the Court. Indeed, the *Brown & Williamson* rule, if understood as a doctrine of non-interference, was just one of many doctrines that the Court uses to prevent intermeddling among governmental institutions, such as preemption doctrines (preventing the states from interfering with federal policy) and abstention doctrines (preventing the federal judiciary from interfering with state judicial or federal executive proceedings).

This refereeing role is also a necessary one for the Court. Our constitutional design permits jurisdictional overlap, permitting both cooperative and competitive divisions of labor between the political branches. Although the resulting inter-branch competition can create efficiencies, it can also give rise to wasteful duplication and officious intermeddling. And when that harmful kind of competition occurs, the non-political branch—the judiciary—should step in to moderate the game.

So *Massachusetts* got it wrong because, rather than *preventing* this kind of meddlesome competition and costly target-shifting, the Court *demanded* it, encouraging EPA to implement status-quo-altering substantive regulations even while Congress was negotiating overlapping reforms.

This Article proceeds as follows. Part I describes the birth of the "major questions" exception in *MCI* and *Brown & Williamson* and the death of the exception in *Massachusetts*. Part II identifies the three forms of the "major questions" rule that the Court and the literature have proposed to date and rejects all three, concluding that the rule ought not to be reincarnated if it cannot also be reformed. Part III proposes the non-interference form of the *Chevron* exception, demonstrating its foundations in the history of the "major questions" cases and demonstrating its similarities to other non-interference rules. Part IV offers *Massachusetts* as a disanalogy to demonstrate the value and, indeed, the necessity of the non-interference rule. Part V proposes a doctrinal form for the reincarnated rule: a test for future application of the non-interference doctrine. Part VI concludes.

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I. THE "MAJOR QUESTIONS" EXCEPTION: A COMPLETE LIFE STORY

Under the original *Chevron* doctrine, the Court asked only two questions before deferring: whether the regulatory statute was silent or ambiguous on the question at issue (Step One) and, if so, whether the agency's interpretation of that statutory ambiguity was reasonable (Step Two). But as Thomas Merrill, Cass Sunstein, and others have noted, the Court has added a third, threshold step—a "Step Zero"—to the *Chevron* framework, asking whether an agency's decision is of a kind that deserves any deference at all.[11]

In two of those Step Zero cases, the Court gave birth to a discrete *Chevron* exception for agency interpretations that effect "major" changes, a rule that Sunstein termed the "major questions" exception to *Chevron* deference.[12] In both of those cases, *MCI v. AT&T*[13] and *FDA v. Brown & Williamson*,[14] the Court denied deference to agencies' reasonable interpretations of statutory ambiguity, seeming to hold that the agencies deserved no deference because they had addressed issues of major "economic and political significance."[15]

But in *Massachusetts v. EPA*,[16] the Court unceremoniously killed this fledgling rule, issuing a decision that *required* an agency to address the—concededly major—question of global warming.

This Part describes and analyzes each of the three opinions, highlighting the substantive incompatibility between *MCI* and *Brown & Williamson* on the one hand and *Massachusetts* on the other.

A. *MCI*: Whether "Major Modification" is a Contradiction in Terms

In 1994, the Court held that the Communications Act of 1934 ("Act") did not give the FCC authority to exempt designated "nondominant" carriers from the Act's tariff-filing requirement.[17] Section 203 of the Act required communications common carriers to file rates with the FCC and to charge only the filed rates,[18] a requirement originally intended to police AT&T's natural monopoly in telephone services.

Thanks to technological developments beginning in the 1950s, AT&T's monopoly began to dissolve as competition in long-distance services became feasible.[19] New competitors then argued that rising market forces sufficed to disci-

[11] The term "Step Zero" is the creation of Thomas Merrill and Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L. J. 833, 836 (2001), later adopted and schematized by Sunstein, *supra* note 3 (identifying two "Step Zero" inquiries that the Court has adopted).
[12] Sunstein, *supra* note 3, at 236.
[13] 512 U.S. 218 (1994).
[14] 529 U.S. 120 (2000).
[15] *Brown & Williamson*, 529 U.S. at 160; *see also id.* at 133 ("In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency. Cf. *MCI*[.]").
[16] 127 S.Ct. 1438 (April 2, 2007).
[17] *MCI*, 512 U.S. at 231–32.
[18] *See* Communications Act of 1934, 48 Stat. 1064, codified at 47 U.S.C. § 203 (1988 & Supp. IV).
[19] *Id.*

pline their long-distance rates, rendering unnecessary the § 203 tariff-filing requirement. Agreeing that the requirement was more burdensome than beneficial, the FCC enacted a series of rules exempting the new ("nondominant") carriers from § 203 strictures.[20]

As the only "dominant" carrier remaining under the new regulations,[21] AT&T petitioned the D.C. Circuit Court of Appeals for review of the FCC orders. Among other things, AT&T argued that the FCC lacked authority under the Communications Act to eliminate the tariff-filing requirement for any carriers. The D.C. Circuit agreed, and (eventually[22]) the Supreme Court affirmed.

The FCC had claimed regulatory authority under § 203(b)(2) of the Act,[23] which permitted the agency to "modify any requirement made by or under the authority of" § 203. The debate in the Supreme Court was whether elimination of the tariff-filing requirement for nondominant carriers constituted a mere "modification" of that requirement. The Court determined that it did not, reasoning that detariffing was too "major"[24] and "fundamental"[25] of a change to constitute a modification since "'modify' . . . has a connotation of increment or limitation."[26]

To support the claim that permissive detariffing constituted a "radical or fundamental change" to the Communications Act, the Court considered, first, "the importance of the [tariff-filing requirement] to the [Communications Act as a] whole" and, second, "the extent to which [a permissive detariffing policy] deviates from the filing requirement[.]"[27] On the first point, the Court concluded that the relevant requirement was "the heart of the common-carrier section of the Communications Act" and that the elimination of that requirement for some carriers would be "tragic" for the regulatory regime.[28] On the second point, the Court determined that the permissive detariffing policy, which constituted "an elimination of the crucial provision of the statute for 40% of a major sector of the indus-

[20] The FCC originally eliminated the tariff-filing requirement altogether for nondominant carriers. When AT&T first challenged the mandatory detariffing rule, however, the FCC responded by making the filing requirement permissive. The question before the Supreme Court, therefore, was whether the FCC could make tariff filing *optional* for new competitors. *See* note 22, *infra*.

[21] Although the FCC claimed to exempt only those carriers that had nondominant market power, the distinction between dominant and nondominant carriers in the long-distance market "amounted to a distinction between AT&T and everyone else." *MCI*, 512 U.S. at 221.

[22] The D.C. Circuit first vacated the detariffing policy in 1992. *See American Telephone & Telegraph v. FCC*, 978 F.2d 727 (1992). The Supreme Court denied certiorari to the D.C. Circuit. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 509 U.S. 913 (1993). The FCC responded to the D.C. Circuit's opinion by instating a permissive (rather than mandatory) detariffing policy. *See MCI*, 512 U.S. at 223; *In re Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd 8072 (1992). The D.C. Circuit then granted summary reversal of the permissive policy, restating that a detariffing order exceeded the FCC's authority. *See MCI*, 512 U.S. at 223. To this second case, the Supreme Court granted certiorari and affirmed the D.C. Circuit in 1994, two years after the first D.C. Circuit decision and more than a decade after the first FCC order. *Id.*

[23] 47 U.S.C. § 203(b)(2) (1988 & Supp. IV).

[24] *MCI*, 512 U.S. at 227.

[25] *Id.* at 228.

[26] *Id.* at 225.

[27] *Id.* at 229.

[28] *Id.*

try," was "much too extensive [of a change] to be considered a 'modification.'"[29] The Court concluded that the FCC's detariffing regulations were not entitled to *Chevron* deference because the FCC's interpretation of its modification authority went "beyond the meaning that the statute [could] bear."[30]

Majorness thus played a central role in the Court's denial of deference. The Court relied on the significance of detariffing to both the statute's structure and the industry's operations in concluding that the FCC had exceeded its authority to "modify" § 203 requirements. But this focus on the enactment's political and legal significance was unusual for the Court, particularly among holdings that are facially Step One holdings, denying deference based on a statute's plain meaning.

Of course, the case's necessary focus on the word "modify" arguably made the majorness distinction uniquely relevant in *MCI*; the case's only question was the degree of change that the word "modify" could bear. But the Court did not merely decide that elimination of some requirement was too dramatic to constitute a "modification." Instead, the opinion focused on the rate-filing requirement in particular, concluding that tariff filing was "the essential characteristic of a rate-regulated industry" and that elimination of that single requirement was tantamount to total deregulation.[31]

At least one driving force behind the opinion, therefore, appears to be that the rate-filing requirement was too important as a matter of *policy* to be eliminated, not that elimination qua elimination was too dramatic to constitute "modification." *MCI* thus appears to rest in part on a *Chevron* Step Zero determination that telecom deregulation is a "major" policy change that an agency should not be permitted to effect.[32]

Importantly, the Court nowhere implied that the majorness of telecom deregulation was enough in itself to justify judicial, rather than administrative, resolution the debate. Rather, the implication of the Step Zero rule was that the agency should be prevented from implementing any major policy change, including telecom deregulation, and the Court's intrusion was necessary and appropriate only as a means of accomplishing that restraint.

[29] *Id.* at 231.
[30] *Id.* at 229.
[31] *Id.* at 231 (holding that Congress could not have left "the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion").
[32] *See* Sunstein, *supra* note 3, at 236–42. Sunstein notes that *MCI* may be one of a "trilogy" of Step Zero cases denying deferential review to major policy changes. The other two cases in the trilogy, according to Sunstein, are *Brown & Williamson* and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). Sunstein includes *Babbitt* in the trilogy primarily because the opinion cites the first scholarly article to have mentioned a "major questions" rule, an article that Justice Breyer wrote when sitting as a judge on the First Circuit. *See* Stephen Breyer, *Judicial Deference to Executive Agencies*, 38 ADMIN. L. REV. 363, 370 (1986). As Sunstein acknowledges, though, the Court's treatment of the major questions idea in *Babbitt* is limited and "cryptic." For that reason, I will not include *Babbitt* in my analysis.

B. *Brown & Williamson*: Whether Nicotine is a "Drug"

Six years later, the Court gave a much stronger indication that *MCI* had created a Step Zero exception for major questions and that the purpose behind the Step Zero rule was to prevent agencies from implementing major policy changes.

In *FDA v. Brown & Williamson*,[33] the Court held that the Food and Drug Administration (FDA) exceeded its authority when it determined that nicotine qualified as a "drug" under the Food, Drug, and Cosmetics Act (FDCA).[34] Section 321(g)(1)(C) of the FDCA defines "drugs" as "articles (other than food) intended to affect the structure or any function of the body."[35]

Relying on nicotine's effects as a stimulant, tranquilizer, and appetite suppressor, the FDA determined that nicotine fell within § 321(g)(1)(C) and, therefore, that the agency had authority to regulate tobacco products.[36] Having established its jurisdictional authority, the FDA also passed a series of regulations limiting the sale, distribution, and advertisement of cigarettes and smokeless tobacco.[37]

Tobacco manufacturers, retailers, and advertisers challenged the FDA's rulemaking, arguing among other things that the agency lacked jurisdiction to regulate tobacco because nicotine is not properly a "drug" under § 321(g)(1)(C).[38] By a 5-4 vote, the Supreme Court agreed with the tobacco industry, invalidating the FDA regulations on the ground that the agency lacked jurisdictional authority.

The Court reasoned that the FDCA requires prohibition of "dangerous" drugs and that tobacco, according to the FDA's findings, could not be used safely. Pursuant to that logic, the Court claimed that the FDA's designation of nicotine as a "drug" would require an all-out tobacco ban. The Court then concluded that Congress could not have intended for the statutory definition of "drug" to encompass nicotine because Congress could not have intended to authorize the FDA's criminalization of the entire tobacco industry.

Just as it had in *MCI*, the Court couched its disposition as a *Chevron* Step One holding; its primary conclusion was that the FDA's broad interpretation of the term "drug" was not entitled to deference because it "contravene[d] the clear intent of Congress."[39] But in an unusual rhetorical move (especially for the justices in the majority, all of whom belonged to the Court's conservative bloc), the Court justified its Step One conclusion by reference to postenactment legislative history.[40] The Court reasoned that a series of tobacco-specific bills passed be-

[33] 529 U.S. 120 (2000).

[34] 21 U.S.C. § 301 *et seq.* (2000).

[35] 21 U.S.C. § 321(g)(1)(C) (2000).

[36] *See Brown & Williamson*, 529 U.S. at 127. The FDA claimed jurisdiction over cigarettes and tobacco as "combination devices," 21 U.S.C. § 353(g)(1), designed to deliver nicotine to the body. *See Brown & Williamson*, 529 U.S. at 127.

[37] *See id.* at 126.

[38] *See id.* at 129.

[39] *Id.* at 132. Justice Scalia recently emphasized his belief that *Brown & Williamson* was a Step One holding. *See Gonzales v. Oregon*, n.6 (2006) (Scalia, J., dissenting).

[40] *See See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 226 (2000) (noting that the opinion's "heavy reliance on postenactment legislative his-

tween 1965 and 1992 demonstrated Congress's ratification of "the FDA's long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products"[41] and demonstrated Congress's intent to preserve for itself exclusive regulatory authority over tobacco.[42]

The Court's reliance on postenactment legislative history seems puzzling not only because the justices composing the majority ordinarily are disinclined to rely on legislative history but also because the Court as a whole typically disfavors implied repeals.[43] The *Brown & Williamson* opinion focuses for thirty-three of its thirty-five pages on an implied-repeal argument, concluding that later statutes implicitly subtracted tobacco from the FDCA's otherwise-broad definition of "drug."[44] If the Court had relied exclusively on this disfavored reasoning, the *Brown & Williamson* opinion would seem easily impeachable.[45]

The last two pages of the opinion, however, suggest a surprising crutch to support an otherwise weak opinion. Relying exclusively on *MCI*, the Court wrote that it was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency[.]"[46] More broadly, the Court argued that "there may be reason" to deny deference in all "extraordinary cases"[47] that involve "major questions."[48]

The allusive Step Zero exclusion from *MCI* thus became explicit in the final salvo of *Brown & Williamson*. In a last-ditch effort to justify its denial of deference, the Court specifically referenced and adopted a "major questions" exception. And, as in *MCI*, the Court's justification for the Step Zero rule was that agencies should be forbidden to make such major changes.

C. *Massachusetts*: Whether Carbon Dioxide is an "Air Pollutant"

Seven years later, the "major questions" exception died.

In *Massachusetts v. EPA*,[49] the Supreme Court held that the Environ-

tory" was "puzzling" and seemed "out of character," especially given that the justices composing the majority were Chief Justice Rehnquist and Justices O'Connor, Scalia, Thomas, and Kennedy).

[41] *Brown & Williamson*, 529 U.S. at 144.

[42] *Id.* at 149 (arguing that subsequent statutes demonstrated Congress's intention to reserve for itself "exclusive control" over tobacco regulation).

[43] *See Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

[44] *See* Manning, *supra* note 40, at 274–75.

[45] *See id.* at 260 ("The ratification arguments ultimately represent an unconvincing account of legislative intent, one that the Court almost surely would have rejected in the absence of nondelegation concerns."); *id.* at 274–75.

[46] *Brown & Williamson*, 529 U.S. at 160 (emphasis added); *see also id.* at 133 ("In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate *a policy decision of such economic and political magnitude* to an administrative agency. Cf. *MCI*[.]") (emphasis added).

[47] *Id.* at 159.

[48] *Id.* (quotation marks omitted) (citing Breyer, *supra* note 32, at 370 ("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.")).

[49] 127 S.Ct. 1438.

mental Protection Agency (EPA) contravened the Clean Air Act (CAA) when it *refused* to regulate vehicular emissions of greenhouse gases. The Court thus denied *Chevron* deference to an agency's stance on the major question of whether and how to respond to global warming, but it did so in a way that *required*, rather than prohibited, agency intervention in the major policy debate.

The *Chevron* question in *Massachusetts* was whether EPA had statutory authority to regulate greenhouse gas emissions from new cars.[50] Under § 202(a)(1) of the CAA, EPA is required to standardize vehicular emissions of any "air pollutant" that, in the Administrator's judgment, endangers public health or welfare.[51] The CAA defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air."[52]

Relying on these provisions, several private organizations filed a rulemaking petition with EPA, arguing that the agency should use its § 202(a)(1) power to regulate four greenhouse gases: carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. The agency denied the petition, concluding that those substances do not fall within the statutory definition of "air pollutant" and, on that basis, concluding that the agency lacked statutory authority to regulate greenhouse gases.[53]

In a 5-4 decision, the Supreme Court disagreed, refusing deference to EPA's interpretation of its statutory authority on the ground that greenhouse gases unambiguously fall within the statutory definition of "air pollutant." As in *MCI* and *Brown & Williamson*, the majority opinion in *Massachusetts* represented itself as a Step One holding. The Court reasoned that greenhouse gases must necessarily be "air pollutants"—and that EPA must necessarily have authority to regulate them—because all four gases are, unambiguously, "physical or chemical substances that are emitted into the ambient air."[54]

[50] There were two other questions at issue in the case: whether the state of Massachusetts had standing to challenge EPA's decision and whether EPA's refusal to exercise its statutory authority was arbitrary and capricious. The Court's holdings on those two questions are not particularly relevant here, but the Court's analysis in both sections is interesting for the current discussion. To reach its conclusions on both points, the Court ended up emphasizing the majorness of global warming as an economic and political issue. EPA had argued that Massachusetts lacked standing in part because the state could not show that EPA's decision *caused* any of the alleged injury: rising sea levels and loss of coastal lands. Its argument was that the refusal to regulate new car emissions was too small a decision to cause those harms. The Court responded: "[EPA's] argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve *massive problems* in one fell regulatory swoop. They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed." *Massachusetts*, 127 S.Ct. at 1457 (emphasis added) (citations omitted). The Court thus characterized the agency's decision as a first-step response to a massive regulatory problem.
[51] 42 U.S.C. § 7521(a)(1).
[52] 42 U.S.C. § 7602(g).
[53] *Massachusetts*, 127 S.Ct. at 1459.
[54] *See* 42 U.S.C. § 7602(g).

In so holding, however, the majority opinion completely failed to address EPA's Step One argument. The agency never disputed that greenhouse gases are physical or chemical substances, and it never disputed that those gases are emitted into the ambient air. It argued only that greenhouse gases are not "air pollution agents"[55] because the effect that they cause—global warming—is not "air pollution."

EPA's textual argument was that greenhouse gas emissions do not, within the ordinary meaning of the word, "pollute" the air because the gases occur naturally in the atmosphere. The agency also made a structural argument, asserting that global warming must not constitute "air pollution" under the CAA because the tools that the statute provides for responding to air pollution would be largely ineffective in responding to global climate change.[56]

In his dissenting opinion, Justice Scalia argued that EPA's position was at least a reasonable interpretation of statutory silence, which should have received deference under *Chevron*. That is, Justice Scalia argued that the CAA nowhere defines "air pollution" and that EPA presented a reasonable interpretation of that statutory silence in holding that global warming is *not* "air pollution." And, of course, Justice Scalia's dissent assumed that a reasonable interpretation of statutory silence is all that *Chevron* demands.

Although Justice Scalia's opinion presented a serious challenge to the majority's Step One reasoning, the majority did not expand its Step One analysis in response; instead, it stubbornly repeated its own incomplete argument.[57] As a Step One decision, therefore, the case is weak: weak on its own merits and weaker still for its failure to confront and rebut Justice Scalia's critique. There is no statutory grounding for the holding that EPA needed to regulate greenhouse gases.

But, like the opinions in *MCI* and *Brown & Williamson*, the majority opinion in *Massachusetts* did not rest entirely on Step One analysis. The *Massachusetts* opinion also made a Step Zero argument, albeit an argument that is directly opposed to the Step Zero analysis in *Brown & Williamson*.

After emphasizing the majorness of global warming as a modern economic and political issue[58] (and thereby aligning *Massachusetts* with *MCI* and *Brown & Williamson* in terms of the Step Zero predicate), the *Massachusetts* ma-

[55] *See id.* (defining "air pollutant" as "any air pollution agent" that endangers public health or welfare, "*including* any physical [or] chemical . . . substance or material which is emitted into or otherwise enters the ambient air").
[56] EPA argued that National Ambient Air Quality Standards (NAAQS) require the measurement of regional pollutants close to Earth but that greenhouse gases do not stay close to Earth or confined to regions. As a result, EPA argued that it would be incapable of using the CAA's statutory scheme to respond to global warming, even if it asserted jurisdiction over greenhouse gases. The agency thus argued that Congress must not have intended for the CAA to cover greenhouse gases and global warming. If it had so intended, EPA argued, it would have provided some tool other than the NAAQS. *See Massachusetts*, 127 S.Ct. at 1477 (Scalia, J., dissenting).
[57] *Id.* at 1461 n.26 ("Justice SCALIA does not (and cannot) explain why Congress would define 'air pollutant' so carefully and so broadly, yet confer on EPA the authority to narrow that definition whenever expedient by asserting that a particular substance is not an 'agent.' At any rate, no party to this dispute contests that greenhouse gases both 'ente[r] the ambient air' and tend to warm the atmosphere. They are therefore unquestionably 'agent[s]' of air pollution.").
[58] *Id.* at 1446–49, 1457.

jority argued that EPA should be *required* to confront this "'most pressing environmental challenge of our time.'"[59] The opinion seemed to hold that EPA bore not only a statutory but also a social responsibility to confront the issue of global warming, and the justices in the majority scolded the agency for abdicating that social responsibility.[60]

The majority thus held that EPA *must* express an opinion on the major issue of global warming (or at least give carefully considered reasons for refusing to do so).[61]

This holding is obviously contrary to the Step Zero holdings in *MCI* and *Brown & Williamson*. The first two "major questions" cases denied deference on the ground that the agencies must be restrained from making "major" decisions whereas *Massachusetts* denied deference on the ground that the agency must be forced to make a "major" decision.

D. Conclusion

In all three of the relevant cases, the Supreme Court highlighted the "economic and political significance" of the underlying regulatory questions, and in all three cases, the Court refused deference to the agencies' treatments of those major questions. All three cases, thus, deviate from *Chevron* for reasons that seem to relate to the majorness of the underlying issues.

That is, in all three cases, the justices rejected the agencies' interpretations in favor of their own, without making a compelling case of either statutory clarity (Step One) or executive unreasonableness (Step Two), justifying their interventions instead by reference to economic and political majorness (Step Zero).

But despite the cases' common departure from *Chevron*, they are incoherent when taken together. The Court's substantive justification for denying deference in *Massachusetts* is the opposite of the Court's substantive justification for denying deference in *MCI* and *Brown & Williamson*.

The *Brown & Williamson* version of the "major questions" exception is, therefore, currently dead. Under *Massachusetts*, there is no longer a presumption against executive enactment of major policy changes, and there might, in fact, be a presumption in favor of executive enactment of such changes.

II. A RULE IN SEARCH OF A RATIONALE

The question now is whether we should celebrate or mourn the death of *Brown & Williamson*.

Among today's scholars of administrative law and *Chevron* theory, there might be a strong temptation to celebrate—or at least gladly to accept—the case's demise. In the years since *Brown & Williamson* was decided, most scholars have

[59] *Id.* at 1446 (quoting Pet. for Cert. 22).
[60] *See* Freeman & Vermeule, *supra* note 5 (arguing that the problem with EPA's decision not to regulate was, at least arguably, that the decision was based on crass political calculations rather than expert scientific judgments).
[61] *Massachusetts*, 127 S.Ct. at 1460–61.

concluded that the Court's opinion should be read narrowly or wholly rejected. Indeed, the existing literature has almost unanimously concluded that the *Brown & Williamson* rule lacks a coherent justification.

And I largely agree. There isn't, in the abstract, any reason to prevent agencies from making major decisions.

Of course, there's more going on in *Brown & Williamson* than the majorness of tobacco regulation, as much of the literature has recognized. The scholarship has, therefore, imagined two alternative rationales for *Chevron* exceptionalism in *Brown & Williamson*, both of which center on deeper issues in the case: agency aggrandizement and nondelegation. In other words, some scholars have hypothesized that the Court's underlying concern in *Brown & Williamson* was the agency's expansion of its own jurisdiction (aggrandizement) while other scholars have hypothesized that the Court's underlying concern was the statute's excessive delegation of lawmaking authority (nondelegation).

Despite having imagined and formulated these rationales, however, most scholars are skeptical of them.

The trouble is that no conceptualization of the *Brown & Williamson* rule that has been proffered thus far—bare majorness, nonaggrandizement, or nondelegation—ultimately provides a justification for *Chevron* exceptionalism; all three of the underlying rationales are inconsistent with fundamental assumptions of *Chevron* theory.

To support this conclusion, this Part begins with a brief description of *Chevron* theory, outlining two competing rationales for *Chevron* itself and identifying the basic assumptions and arguments that are common to both. This Part then elaborates the three proffered justifications for a major questions exception and concludes, in agreement with the near-unanimous literature, that those rationales are doctrinally and normatively unsatisfactory; all three would be difficult rules to enforce, and, more importantly, all three fly in the face of the two assumptions underlying *Chevron*.

I therefore conclude that, in the absence of a compelling reformulation of the *Brown & Williamson* rule, we would be right to celebrate its death.

A. *Chevron* Theory

The competing camps of *Chevron* theorists can be divided by reference to their acceptance or rejection of the delegation metaphor. On the delegation account, deference rests on the (admittedly fictive) congressional choice to delegate law-interpreting power to administrative agencies, while on the competing account, deference is justified independently of congressional intent, resting instead on broad separation-of-powers principles that counsel against judicial second-guessing of agency interpretations.

Although there is true disagreement among scholars as to whether the fiction of delegation is useful, the two competing theories ultimately rest on the same intuitions about institutional competence; the reasons for inferring delegation are identical to the reasons for restricting judicial intervention.[62]

1. Congressional intent.

Under the more common view of *Chevron*, deference is mandated by a presumed congressional intent to delegate law interpreting authority to agencies.[63] This "delegation" account holds that when congressional instructions are either vague or absent, judges should assume that Congress delegated resolution of those statutory ambiguities to the executive. In most such cases, of course, Congress did not speak to the question of interpretive authority, either explicitly or implicitly, so the delegation is purely fictional—a judicial presumption.[64]

Those who accept the delegation metaphor justify this presumption by reference to a kind of congressional meta-intention, arguing that a reasonable legislator in the modern administrative state would rather give law interpreting power to agencies than to courts. The source of this meta-intention, then, is the perceived institutional superiority of the executive relative to the judiciary.[65] On this view, courts presume that Congress has delegated interpretive power to agencies because expert agencies are presumptively better than generalist judges at construing statutory ambiguities.[66]

2. Separation of powers.

The alternative view of *Chevron* simply jettisons the fiction of delegation and focuses squarely on the institutional competence justifications for judicial restraint.[67] On this version of *Chevron*, courts defer to executive branch interpreta-

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[62] *See* Sunstein, *supra* note 97, at 17 (noting that the delegation fiction rests on "intensely pragmatic" considerations of institutional choice).

[63] *See* Breyer, *supra* note 32, at 369; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–17. *See also* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 623–27 (1996); Merrill and Hickman, *supra* note 11, at 872–73.

[64] Scalia, *supra* note 63, at 517.

[65] *See* Breyer, *supra* note 32, at 365, 397 (noting that the pre-*Chevron* body of administrative law represented a "skewed [ ] view of institutional competence" and justifying deference on the grounds that it plays to courts' and agencies' relative expertise).

[66] *See generally* Sunstein, *supra* note 3, at 198–205 (summarizing the key arguments in support of the implied-intent reading, put forth by Justices Breyer and Scalia in the 1980s). As Sunstein describes, Justices Breyer and Scalia, though they disagreed as to the appropriate scope of mandatory deference, agreed that the implied-intent reading of *Chevron* was best. But, as Sunstein points out, both based their support of that reading on pragmatic considerations about relative institutional competence.

[67] *See* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. (forthcoming 2006); David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 357–62 (2000); Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988); Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225 (1997); Kenneth W. Starr,

tions because they recognize that agencies are better than judges at making the kinds of technical and political decisions that are involved in the daily administration of regulatory statutes.

Some theorists who advocate this reading of *Chevron* believe that judicial restraint is constitutionally required under a forceful reading of the separation of powers,[68] while others advocate deference on purely pragmatic and consequentialist grounds, arguing that deference will lead to better policy results.[69] For present purposes, the constitutionality or non-constitutionality of this view is irrelevant; the basic idea does not depend on its constitutional foundations. The "separation of powers" account, thus, holds that judges should defer to agency interpretations because they should recognize, independently of any spectral congressional instructions, that agencies will do a better job than courts of interpreting ambiguous statutes.

3. Conclusion: *Chevron*'s two assumptions.

From this rough sketch of *Chevron* theory, we can extract two assumptions that are common to all justifications of deference. First, all *Chevron* theorists make an "institutional choice assumption." *Chevron* assumes that at the time of the doctrine's application, the institutional choice is limited to the court and the agency. In other words, regardless of *Chevron*'s legal origins, a deference doctrine makes sense because, in the ordinary case, judges must choose between the agency's interpretation and their own.[70]

Second and subsequent, all theorists make an "institutional capacity assumption." *Chevron* theory holds that as between the judiciary and the executive, agencies are frequently (or usually, or always) better interpreters of regulatory statutes than judges, thanks to their greater technocratic expertise and democratic accountability. All theorists therefore assume that we should, at least by default, prefer agencies to courts.

B. *Chevron* Theory and "Major Questions": The Problems with Majorness, Nonaggrandizement, and Nondelegation

Any workable justification for a "major questions" exception should operate within the boundaries of *Chevron*'s two universally accepted intuitions. The rationale for any *Chevron* exception must not be that judges are ordinarily better at interpreting regulatory statutes than agencies or that judges may allocate interpretive decision-making to a third body, such as Congress, rather than choosing between the agency's interpretation and their own. Such arguments would counsel

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*Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 309–10 (1986); Sunstein, *supra* note 97, at 7–8.

[68] *See* Hasen, *supra* note 67; Kmiec, *supra* note 67; Pierce, *supra* note 67.

[69] *See* Gersen and Vermeule, *supra* note 67; Sunstein, *supra* note 97.

[70] *See* Sunstein, *supra* note 3, at 232–33 (noting that "[b]y hypothesis," *Chevron* is in play only when "the only question is whether to accept an agency's resolution or instead to rely on the interpretation chosen by a federal court").

in favor of rejecting *Chevron* wholesale; they cannot justify the mere creation of retail exceptions.

Nevertheless, as we shall see, all three of the proffered rationales for the "major questions" exception—majorness, nonaggrandizement, and nondelegation—fight one or both of these fundamental assumptions of *Chevron* theory.

1. Bare majorness.

The most straightforward explanation for the major questions exception, of course, is the superficial view that agencies should be prevented from implementing major policies. Writing during his tenure as a First Circuit judge in 1986, Justice Stephen Breyer advanced this understanding of *Chevron* on the ground that Congress was unlikely to have delegated major questions to the executive.[71] In his words, Justice Breyer's argument was that Congress was "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."[72] Since deference depends on a delegation and since Congress does not usually delegate major questions to the executive, Justice Breyer argued, the Court should not defer when an agency addresses a major question.[73]

But this bare majorness account raises both doctrinal and theoretical difficulties. As a blanket Step Zero exception, the bare majorness rule would be doctrinally problematic because it would be difficult to administer, and it would be theoretically unjustified because it fights both of the fundamental assumptions that underlie *Chevron* deference.

The first (more mundane) problem with the bare majorness view is an administrability problem. Consider *MCI*, the birthplace of the major questions exception: as Sunstein has pointed out,[74] it is difficult to determine what the relevant distinction is between that case and *Chevron* itself if we focus only on the majorness of the political issues. The tariff-filing requirement at issue in *MCI* was not clearly of greater political or economic significance than the bubble policy at issue in *Chevron*.[75] If anything, the bubble policy had greater economic significance than the tariff-filing requirement since the bubble policy affected all industrial manufactories while the tariff-filing requirement affected only long-distance telephone carriers.

[71] Breyer, *supra* note 32, at 370.
[72] *Id*.
[73] In later years, Justice Breyer has indicated that he intended "majorness" to be only one of many factors that judges should consider when determining whether Congress had, in fact, delegated the relevant question to the agency.
[74] Sunstein, *supra* note 3, at 232.
[75] The question in *Chevron* was whether the Environmental Protection Agency could interpret the term "stationary source" as used in the Clean Air Act's emissions restrictions to refer to an entire factory rather than an individual smokestack. This simple reinterpretation had enormous practical consequences.

But even assuming that the policies at issue in *MCI* and *Brown & Williamson* were appreciably more major than the policy at issue in *Chevron*,[76] we still would need a mechanism for categorizing future "major questions" cases.[77] The Court never gave any indication, other than its somewhat vacuous reference to "economic and political significance," of how lower courts should determine whether agency enactments are more like *Brown & Williamson* or *Chevron*.

Furthermore, the line between major and minor policies is easy to distort by reframing the predicate question. If the question in *MCI* had been whether deregulation of the telecommunications industry was a major policy change, then the Court's "yes" answer would have been clearly defensible. But, as the *MCI* dissent pointed out, a narrower framing of the question might have been more accurate: whether a permissive detariffing policy for designated nondominant interexchange long distance carriers constituted a major policy change. So framed, the answer is much less clear.[78]

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

The second and more profound problem with the bare majorness understanding of the *Brown & Williamson* rule is that it offends *Chevron*'s assumptions about institutional choice and institutional capacity.

Justice Breyer's argument, remember, is that judges should review major questions because reasonable legislators would not want to delegate those questions to agencies. But reasonable legislators surely would not want to delegate those questions to judges, either.

Within *Chevron*'s hypothesis that we must choose between the executive's interpretation and the judiciary's, it should be clear that agencies are better-equipped than judges to answer *major* political questions just as they are better-equipped to answer *minor* ones. In fact, the majorness of the policy makes the technocratic expertise and democratic accountability of the decision-maker more relevant, not less. Justice Breyer, however, offers no reason for believing that judges are systematically better than agencies at answering "major" questions. He merely ignores the institutional capacity assumption, making no effort to rebut it.

The only way to reconstruct a majorness exception to avoid this perverse perception of institutional capacity is, instead, to fight *Chevron*'s institutional

[76] *See* Sunstein, *supra* note 3, at 232 (arguing that the bare majorness line fails to distinguish the "major questions" cases from *Chevron* because the policy at issue in *Chevron* also had major economic and political consequences).
[77] *See id.*
[78] The same can be said of *Brown & Williamson*. If the question had been whether criminalizing the tobacco industry is a major policy change, then the Court clearly was right that it is. But if the question was whether an incremental increase in advertising and sales restrictions on cigarettes and smokeless tobacco constitutes a major policy change, then the Court's decision seems much more dubious.

choice assumption. One might believe—and maybe Justice Breyer believed—that Congress would be more likely to remain an active player in the institutional game when major questions are at issue. Maybe Justice Breyer was comfortable with a rule that requires judicial second-guessing of "major" administrative enactments because he believed that Congress retained working control over those questions and would answer them itself if the agency were forbidden to do so. If this assumption proved accurate in most "major questions" cases, then a majorness exception might well comport with *Chevron*'s institutional capacity assumption by allowing the legislature, rather than either the judiciary or the executive, to make policy.

But the bare majorness rationale does not, in itself, justify skepticism towards *Chevron*'s institutional choice assumption. Even in cases of "major" significance, Congress might have checked out of the regulatory regime, leaving all further rulemaking to the experts in the executive. A bare majorness exception, therefore, would not necessarily leave policy making to legislators; it might, instead, allow judges to "make policy" by narrowing regulatory statutes and invalidating agency enactments even when Congress is extremely unlikely to correct the judiciary's mistakes.

In the end, then, a majorness exception violates *Chevron*'s theory of institutional capacity, empowering judges relative to agencies in the interpretation of "major" questions. The only way to justify that outcome would be to make a counter-*Chevron* assumption that Congress is a viable institutional option when major questions are at issue.

The bare majorness rule, thus, lacks both practical and theoretical virtue. As a judicial doctrine, the rule would be error-prone because the majorness line is too difficult to administer. And as a *Chevron* exception, the rule lacks normative justification; major questions, just like minor ones, trigger the theoretical underpinnings of the deference doctrine and should therefore trigger the doctrine itself.

So, in short, the *Brown & Williamson* rule should not be reincarnated in a bare majorness form.

2. Agency aggrandizement.

The first of the two alternative justifications for *Chevron* exceptionalism in the "major questions" cases is jurisdictional expansion or "agency aggrandizement."[79] The suggestion is that the intuition underlying the "major questions" exception is an intuition that courts should exercise greater scrutiny when an agency expands its own jurisdictional reach. Self-aggrandizing interpretations, the argu-

[79] *See* Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J. L. & PUB. POL'Y 203, 261 (2004) (defining "major questions" as those that implicate "the issue of the reach of [the agency's] own regulatory authority"); Ernest Gellhorn and Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1015–16 (1999) (casting the distinction between major and minor questions as a distinction between statutory constructions that involve a "detail in a statute whose general application is undisputed" (minor questions) and statutory constructions that involve a "fundamental issue of the limits of administrative jurisdiction" (major questions)); Merrill & Hickman, *supra* note 11, at 844–45 (defining major, or "extraordinary," questions as those in which "issues about the scope of the agency's jurisdiction are concerned").

ment goes, might represent unscrupulous power-grabbing rather than responsible lawmaking, and the judiciary should be wary of those interpretations.[80]

This nonaggrandizement justification for *Chevron* exceptionalism provides at least a plausible explanation for the disposition of *Brown & Williamson*. The Court may have denied deference in that case because the FDA's interpretation of the term "drug" would have given the agency new power over an enormous sector of the American economy.[81] Perhaps, then, the background story that justified the denial of deference in *Brown & Williamson* was a story of presidential power-grabbing.[82]

But this justification for a Step Zero exception, even if descriptively plausible, runs into the same normative-theoretical difficulties as the bare majorness view. It, too, adopts a skewed perception of both institutional capacity and institutional choice.

In its best light, a nonaggrandizement rule rests on a view that agencies engage in a kind of conflict of interest when they adjust their own mandates.[83] As it relates to *Chevron* theory, this argument is superficially convincing inasmuch as it centers on a *Chevron*-style question of institutional capacity. Perhaps we want an independent body, the judiciary, to protect against presidential power-grabs.[84]

But there is little reason to believe that executive agents will systematically abuse their right to adjust the scope of their jurisdiction. Indeed, there is no coherent theory of bureaucratic incentives that would validate such skepticism.[85] Instead, agencies' decisions to aggrandize or to abrogate their power seem to be core *Chevron*-style decisions, both technical and political in nature.

To use the two "major questions" cases as anecdotal examples: When the FDA asserted jurisdiction over tobacco, it based its decision on painstaking analysis of nicotine's addictive properties and on careful consideration of the jurisdictional assertion's political consequences.[86] Similarly, the FCC considered both the technical and political significance of telecommunications deregulation before it adjusted the Communications Act's tariff-filing requirements.[87] There was no reason, in either case, to believe that the agencies revised their jurisdictional reaches because the bureaucrats had personal or institutional preferences for either greater or lesser power.

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[80] *See* Sunstein, *supra* note 3, at 234–36.

[81] *See* Armstrong, *supra* note 80, at 261 (describing *Brown & Williamson* as a nonaggrandizement holding); Merrill & Hickman, *supra* note 11, at 844 (arguing that the majorness language in *Brown & Williamson* is best understood as indicating jurisdictional concerns).

[82] Of course, this explanation does not fit *Massachusetts*, in which the Court encouraged EPA to expand its jurisdiction.

[83] *See Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 387 (Brennan, J., dissenting).

[84] *See id.*

[85] *See* Daryl Levinson, *Empire-Building Government in Constitutional Law*, 18 HARV. L. REV. 915, 932–34 (2005). *But see* Armstrong, *supra* note 79.

[86] *See generally* DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY (2001).

[87] *See generally See* Scott M. Schoenwald, *Regulating Competition in the Interexchange Telecommunications Market: The Dominant/Nondominant Carrier Approach and the Evolution of Forbearance*, 49 FED. COMM. L.J. 367 (1997).

Furthermore, even if executive agents held skewed preferences that would lead them to push systematically for superoptimal or suboptimal power, there are political checks on agencies' decisions to expand or to contract their jurisdiction.[88] It therefore seems unlikely that agencies would be able to adjust their mandates arbitrarily. At the very least, political forces will require agencies to develop compelling technical and political reasons for their decisions, even if those reasons are not the bureaucrats' primary or genuine motivations.

Based on this analysis, a jurisdictional exception to *Chevron* deference seems to violate *Chevron*'s institutional capacity assumption. Because the decision to assert or to deny jurisdiction is one that requires both technical expertise and political judgment, it is exactly the kind of decision that *Chevron* intended to prevent judges from making.[89]

The advocates of a jurisdictional exception, however, do not limit their argument to an alarmist account of agency incentives. They also argue that there is a relevant theoretical distinction between decisions of *how* to regulate, which are non-jurisdictional decisions that should be left to agencies, and decisions of *whether* to regulate, which are jurisdictional decisions that should be left to *Congress*.[90] On this view, the reason for denying deference to jurisdictional decisions is not that they are apolitical, such that judges can handle them, but rather that they are super-political, such that Congress must handle them. On the institutional hierarchy, these advocates argue, jurisdictional decisions must be left to the first-best actor: the legislature.

Leaving aside the questionable assumption that jurisdictional decisions are genuinely and perceptibly different in kind from non-jurisdictional decisions,[91] this argument obviously falls into the same trap that the rehabilitation of majorness fell into; it assumes, without establishing, that Congress is still a viable institutional option. Under *Chevron*'s institutional choice hypothesis, congressional resolution of jurisdictional questions—like congressional resolution of non-jurisdictional questions—is not an option. The only relevant consideration is whether the executive or the judiciary is the better institutional decision-maker. Within this framework, it seems clear that for both categories of questions—both how and whether to regulate—judges are less capable and less attractive decision-makers than executive agencies.

The nonaggrandizement rationale for the *Brown & Williamson* rule, therefore, is equally as unattractive as the bare majorness rationale. Jurisdictional decisions, even self-aggrandizing ones, should get deference. There would, therefore, be little reason to mourn—and no reason to reincarnate—the Step Zero exception in a nonaggrandizement form.

[88] *See* Levinson, *supra* note 85, at 932–34.
[89] For a similar argument, *see* Sunstein, *supra* note 3, at 235.
[90] *See generally* Armstrong, *supra* note 79, at 245–46; Merrill & Hickman, *supra* note 11, at 909–14.
[91] *See Mississippi Power & Light*, 487 U.S. at 381 (Scalia, J., concurring in judgment) (arguing that the distinction between jurisdictional and non-jurisdictional questions is fuzzy at best).

3. Excessive delegations.

A second possible justification for the "major questions" rule is the much-debated nondelegation principle[92]—which is described alternately as a constitutional doctrine,[93] an interpretive canon,[94] and a haunting distraction.[95]

Whatever status the nondelegation principle ought to hold in modern law, it might, as a positive matter, explain the major questions cases. That is, the intuition driving *Brown & Williamson* may be that the FDCA, if understood to authorize the FDA's regulations, would represent an unconstitutionally broad delegation of policymaking authority. This understanding would explain the Court's tortured analysis in the case, which might just be the interpretive acrobatics necessary to avoid striking down the statute on constitutional grounds.[96]

This idea overlaps somewhat with the nonaggrandizement rationale: one problem with jurisdictional expansions is that they attempt to stretch statutory authority beyond the original delegation.[97] But nondelegation is more ambitious than nonaggrandizement. It encompasses agency enactments that neither strengthen the agency's enforcement power nor extend the agency's jurisdictional reach; nondelegation concerns arise whenever the agency claims broad interpretive or policymaking authority, which might be exercised either to narrow or to expand a statutory program.

This nondelegation rationale for a major questions exception is, at first blush, the least offensive to *Chevron*'s core assumptions. Ultimately, though, the nondelegation account's compliance with *Chevron* fundamentals exists only in theoretical space; once applied, nondelegation falls into the same traps as majorness and nonaggrandizement.

On the strongest version of nondelegation, courts deny deference to agency interpretations not because the judges are second-guessing the agency's decision but rather because they are invalidating Congress's decision.[98] The nondelegation doctrine is a constraint on the legislature, not the executive, which requires Congress to provide "intelligible principles" to define the scope of its delegations.[99] Even when courts deny *Chevron* deference to promote nondelegation

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[92] Manning and Sunstein share this view, though both ultimately conclude that the nondelegation understanding is normatively troubling. *See* Manning, *supra* note 40; Sunstein, *supra* note 3.
[93] *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
[94] *See Mistretta v. United States*, 488 U.S. 361, 374 n.7 (1989) (indicating that the Court enforces nondelegation by "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional"); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).
[95] *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) (claiming that the nondelegation doctrine is "undead").
[96] *See* Manning, *supra* note 40, at 260 (suggesting that the weak arguments in *Brown & Williamson* are understandable in light of background nondelegation concerns).
[97] Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580 (2006).
[98] *See* Sunstein, *supra* note 94, at 329 ("[A] very strong version of the nondelegation doctrine would suggest that agencies can . . . do nothing [if Congress has not spoken clearly as to the scope of their authority] because the underlying grant of power is effectively void.").
[99] *See J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928).

values, therefore, the invalidation of the agency's enactment is merely a means to the end of enforcing a constitutional limitation on Congress. This feature of nondelegation distinguishes it from both majorness and nonaggrandizement since both of those rationales focus on agency misbehavior, attempting to keep bureaucrats within legislatively "intended" boundaries.

The relevance of the nondelegation view's focus on legislation rather than on agency enactments is that the rule does not, in the abstract, rely on the faulty assumption of Congress's continuing presence in the regulatory regime. That is, it does not fight *Chevron*'s institutional choice assumption. When applying the nondelegation doctrine in its most ambitious and robust form, judges do not believe that they are "returning" or "reserving" questions to Congress; they do not, in other words, argue that the legislature failed to delegate and thereby retained power over the relevant question. Instead, they emphatically believe that Congress *did* intend to delegate authority but that the delegation itself was unconstitutional. Judges enforcing nondelegation constraints, therefore, are not limiting agency power in favor of congressional power; they are limiting congressional power itself, by purging American law of unconstitutional statutory breadth.

The problem with this view is that it is impossible to apply in practice, whether attempted directly or through statutory interpretation. At the most basic level, the problem with nondelegation is that the line between excessive and appropriate delegations is notoriously difficult to draw.[100] Because no serious person in the modern administrative state believes that Congress must answer every quotidian policy question that arises, there must necessarily be some threshold—some magnitude of importance, or sensitivity, or "majorness" of policy questions—that triggers nondelegation concerns.[101] But no one actually knows where that threshold lies. As a result, courts will make frequent errors, narrowing statutes that are constitutionally unproblematic and upholding interpretations that are constitutionally troublesome.

Of course, this line-drawing problem might not be a *Chevron* problem if the project of distinguishing constitutional from unconstitutional delegations is a legal project, falling within judges' core competency. In other words, if evaluating delegations were a legal project, then assigning nondelegation enforcement to the judiciary would not violate *Chevron*'s institutional capacity assumption.

But the line-drawing project turns out to be far more political than legal. As it turns out, the simple account of the line-drawing problem—the absence of a threshold—is a bit too simple; the nondelegation principle lacks not only a clear threshold but also, more significantly, a genuine theory. On closer inspection, the "intelligible principles" requirement lacks substantive content; there simply are no criteria for determining whether or not a statute provides "intelligible principles."[102] As a result, judgments regarding which delegations to enforce or what limiting principles to impose will, inevitably, be arbitrary from a constitutional

[100] *See generally* Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324–28 (1987).
[101] *See* Stewart, *supra* note 100, at 325; Sunstein, *supra* note 94, at 326 ("[T]he line between a permitted and a prohibited delegation is one of degree, and inevitably so.").
[102] *See* Stewart, *supra* note 100, at 324.

point of view.[103] In the end, those determinations will be based on value judgments and political preferences.[104]

This realist hypothesis is not radical; it is merely a restatement of *Chevron*'s institutional capacity assumption. One of *Chevron*'s most basic insights is that choices as to how and when to implement regulatory statutes, at least when the statutes are of ambiguous scope, are political rather than legal choices.[105] And those political choices should be left to the discretion of a democratically accountable institution. Of course, to the extent that any delegations are constitutionally problematic,[106] agencies will make the same errors as judges; they, too, lack any doctrinal means of deciding the extent to which they may constitutionally exercise a delegated authority. But their arbitrary decisions, at least, will benefit from greater technocratic and democratic legitimacy.

If one accepts that these justiciability problems exist and accepts *Chevron*'s realist story, then the only remaining argument to support a nondelegation restriction is to fight the central allegation of nondelegation skeptics: that judicial constructions will stick. That is, nondelegation enthusiasts might respond to concerns about judicial policymaking by arguing that Congress can and should intervene to supersede judge-made outcomes that it finds politically troublesome. In fact, some advocates of nondelegation make exactly this argument, expressing their hope for lasting congressional involvement in terms of the need to enforce legislative "responsibility" for relevant policy choices.[107]

In making this argument, of course, nondelegation enthusiasts wander into the same trap that catches the majorness and nonaggrandizement enthusiasts; they start to fight *Chevron*'s institutional choice assumption. Unless the nondelegation advocates assume that Congress remains a viable institutional option, their proposed exception to *Chevron* merely elevates judicial policymaking over administrative policymaking, which is to strike at the very heart of *Chevron* theory.[108]

Like the bare majorness and nonaggrandizement accounts of the *Brown & Williamson* rule, the nondelegation account lacks normative validity. Ultimately, the enforcement of a nondelegation principle through *Chevron* exceptionalism will disserve both *Chevron* and nondelegation.

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[103] *Cf.* Sunstein, *supra* note 94 (noting that certain categories of "clear statement" rules, such as the canon against extraterritorial application, constitute clear and easily administered constitutional constraints that can be enforced against Congress through *Chevron* exceptionalism).
[104] *See* Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 792–94 (1999).
[105] *See* Sunstein, *supra* note 97 (rooting *Chevron* in a realist account of judicial decision-making); Sunstein, *supra* note 94, at 329 (calling *Chevron* a "prodelegation" doctrine). For empirical evidence of the political nature of judicial decision-making in *Chevron* decisions, *see* Thomas Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006).
[106] *See* Posner & Vermeule, *supra* note 95 (questioning the constitutional foundation of the nondelegation doctrine).
[107] *See, for example,* David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 731–32 (1999). *See also* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).
[108] *See* Sunstein, *supra* note 94, at 330.

The *Brown & Williamson* rule, thus, cannot be justified by reference to a nondelegation theory, meaning that the rule should be neither mourned nor reincarnated in that form.

4. A brief return to *Chevron* theory: a second theoretical divide.

Based on the preceding discussion, we can identify a second, and more relevant, division among *Chevron* theorists: those who happily embrace and those who begrudgingly tolerate *Chevron*'s institutional choice assumption. Those who embrace the assumption, who hold a deep-seated skepticism towards Congress's interest and ability to engage in ordinary regulation, remain the strongest supporters of deference and the harshest critics of proposed limitations on *Chevron*'s scope.[109] On the other hand, those who worry about the institutional choice assumption, who harbor a quixotic conception of Congress's interest and ability to engage in daily regulation, are something like *Chevron* apologists; they gladly support proposals to constrain *Chevron*'s application.[110]

This debate, though, turns on an empirical question that neither side bothers to answer empirically. And the right answer is likely to be somewhere in the middle: Congress neither never nor always remains actively interested in monitoring established regulatory regimes.

C. Conclusion: A Rule Without a Rationale?

As it has been understood, the "major questions" rule lacks a workable rationale. When a "major" question or a jurisdictional question arises, we should prefer the executive's answer to the judiciary's, and when a statute confers broad authority, we should prefer to have the executive, rather than the judiciary, decide the extent to which that authority should be exercised. Absent some other justification for *Chevron* exceptionalism, therefore, the deference doctrine should apply in full force when an agency implements a major policy, aggrandizes its jurisdictional reach, or exercises a broad delegation.

The *Brown & Williamson* rule, thus, should be neither mourned nor reincarnated in any of the forms that the scholarship has proffered thus far.

III. A NEW RATIONALE: THE NON-INTERFERENCE VIEW

So why do I want to reincarnate this pesky rule? Because there is a workable rationale for *Chevron* exceptionalism in *MCI*, *Brown & Williamson*, and *Massachusetts*.

The best—and right—justification for the *Brown & Williamson* rule is a practical idea orthogonal to majorness: when Congress has, in fact, remained actively interested in a regulatory regime, agencies should be forbidden from enacting regulations that would interfere with ongoing congressional bargaining.

[109] *See* Gersen & Vermeule, *supra* note 67; Manning, *supra* note 40; Sunstein, *supra* note 3; Sunstein, *supra* note 97.
[110] *See* Breyer, *supra* note 32; Merrill & Hickman, *supra* note 11.

In the background of both *MCI* and *Brown & Williamson*, Congress was actively considering changes to the relevant regulatory regimes. And in both cases, the Court prevented the agencies from distorting the regulatory status quo around which Congress was bargaining—or, more accurately, the Court restored a regulatory status quo ante so that congressional negotiations could pick up where they had left off.

The *Brown & Williamson* rule, then, was—and should be reincarnated as—a doctrine of non-interference, designed to prevent institutional intermeddling between the executive and legislative branches. In this sense, the exception is similar to doctrines of preemption, which prevent state governments from interfering in federal regulatory domains, and it is similar to doctrines of abstention, which prevent the courts from interfering in the political branches' or the states' regulatory domains.

This Part describes the foundations of the non-interference understanding in the text of the *MCI* and *Brown & Williamson* opinions and in the background stories of those cases, and then it elaborates the non-interference rule by reference to analogous doctrines that similarly prevent institutional intermeddling and decisional simultaneity. In other words, this Part makes two relatively modest contributions to the Article's thesis, demonstrating that the non-interference rationale is a plausible description of the cases and that a non-interference rationale is an ordinary judicial concern. The argument that the non-interference rule is sufficiently important to be reincarnated is reserved for Part IV.

A. Origins of Non-Interference

A non-interference understanding is not an obvious interpretation of *MCI* and *Brown & Williamson* given that the Court's central concern appeared to be majorness. Institutional intermeddling is, admittedly, orthogonal to majorness. Nevertheless, there is support for the non-interference understanding both in the text of the opinions and in the history of the cases. This Part, first, describes the Court's references to institutional intermeddling and, second, tells the background story of interference that operated behind each case.

1. Non-interference in the majority opinions.

In both *MCI* and *Brown & Williamson*, the majority opinions hinted that prevention of institutional intermeddling partly motivated the Court's dispositions.

In *MCI*, the Court noted that questions of detariffing and deregulation should "'address themselves to Congress, not the courts.'"[111] But the decision to reserve a question to Congress is an unusual one in a *Chevron* opinion; *Chevron* analysis typically assumes that Congress empowers agencies to make policy deci-

[111] *Id.* (quoting a case that predates *Chevron* by more than seven decades, *Armour Packing Co. v. United States*, 209 U.S. 56, 82 (1908)).

sions in order to avoid the cost of doing so itself.[112] Significantly for the non-interference view, the explanation that the Court offered for this unusual argument was that, ongoing at the time the opinion was written, there was "considerable debate in other forums about the wisdom of the filed rate doctrine and, more broadly, about the value of continued regulation of the telecommunications industry."[113] Although not explicit, the Court's argument seems to have been that the agency should allow Congress to address deregulation because the legislature had already entered the debate.[114] In other words, the Court seemingly held that active congressional bargaining and deliberation should be allowed to continue, free of FCC interference.

In *Brown & Williamson*, the non-interference logic was different; the Court did not focus on ongoing debate, either in Congress or elsewhere. Instead, the Court concluded that Congress, because it had already reached a bargain regarding tobacco regulation, had implicitly instructed the agency not to interfere. The upshot of the Court's puzzling analysis of postenactment legislative history was that Congress had "adopted a regulatory approach to the problem of tobacco and health that contemplated no role for the FDA."[115] To support this conclusion, the Court quoted (among many other things) a Senate Report stating that "any further regulation in this sensitive and complex area must be reserved for specific Congressional action,"[116] and a circuit court case holding that FDCA expansion "is the job of Congress," not of the FDA.[117] The Court thus held, quite unusually, that Congress retained regulatory control over tobacco and that its retention of control necessarily precluded concurrent administrative action. This conclusion rests on a kind of dormant non-interference theory: that the agency should be forbidden to intrude in a regulatory domain if it appears that the subject matter belongs exclusively to Congress.

2. Non-interference in the background of each case.

The justices, however, did not directly discuss the most compelling evidence for the non-interference view of *MCI* and *Brown & Williamson*: the story of congressional deliberations proceeding in the background of each case. In both cases, members of Congress were debating the relevant regulatory regimes both

[112] *See* Part IV (noting that one of *Chevron*'s fundamental assumptions is that Congress is no longer actively involved in the regulatory regime).
[113] 512 U.S. at 234 (internal quotations and citations omitted).
[114] Although the Court's language about "considerable debate in other forums" does not refer directly to *congressional* debate, the legislature is the only alternative forum that should matter to *Chevron* analysis. A *Chevron* enthusiast (such as Justice Scalia, the author of the *MCI* majority) surely would be unimpressed by debate in, say, academic institutions or political think-tanks. Furthermore, as I will describe fully in the next section, Congress certainly fit the description of an "other forum" that was debating deregulation at the time the Court decided *MCI*.
[115] *Brown & Williamson*, 529 U.S. at 149 (emphasis added).
[116] *Id.* at 151 (quoting S. Rep. No. 94-251, at 43 (1975) (additional views of Sens. Hartke, Hollings, Ford, Stevens, and Beall)).
[117] *Id.* at 152–53 (quoting *Action on Smoking and Health v. Harris*, 655 F.2d 236, 243 (D.C. Cir. 1980)).

before and during the agencies' deliberations. Furthermore, in both cases, the agencies' decisions to intervene apparently affected congressional negotiations. In the telecommunications case, agency intervention disrupted active congressional debate; deliberation paused after the FCC completed its rulemaking, but negotiations quickly resumed and intensified after the Court vacated the agency's enactments. In the tobacco case, agency intervention disrupted reasoned congressional inertia; deliberation intensified dramatically after the FDA completed its rulemaking, but debate quickly died after the Court vacated the agency's enactments. In both instances, the agency's interference altered the stakes in Congress's game of public choice, potentially wasting time and resources by forcing stakeholders and legislators to adjust their negotiating positions to a new baseline.

(a) Telecommunications deregulation. Congress started considering new legislation in the area of telecommunications regulation in 1976, when AT&T began lobbying to diminish the FCC's power over the industry.[118] The 1976 legislation, however, was not a serious proposal. Rather, it was a rent-seeking bill, derided as the "Bell bill,"[119] which AT&T introduced in an attempt to curb the FCC's earliest procompetitive policies.[120] Although the 1976 bill failed to emerge from committee, it sparked congressional interest in telecommunications reform, and that interest remained strong throughout the ensuing deregulatory process.

The first serious legislation proposing wholesale revision to telecommunications policy was introduced in late 1979,[121] which was the same year that the FCC started considering and writing its First Report on long-distance detariffing.[122] Although neither the Communications Act of 1979[123] nor a later version, the Telecommunications Act of 1980,[124] passed either chamber of Congress, debate on those two bills paved the way for a more modest amendment to communications law and FCC jurisdiction. The Record Carrier Competition Act of 1981 passed shortly thereafter.[125]

Continuing throughout the first half of the 1980s—as the FCC gradually fine-tuned its detariffing policy[126]—Congress debated both the general wisdom of

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[118] *See* MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 183–87 (1985).
[119] *Id.*
[120] *Id.* at 179.
[121] Another non-serious bill was introduced in 1978, *id.*; H.R. 13015, 95th Cong. (1978), which sparked lengthy hearings, *Communications Act of 1978: Hearings on H.R. 13015 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 95th Cong. (1978), but did not make it to a vote in either chamber. DERTHICK & QUIRK, *supra* note 118, at 187.
[122] *See* Competitive Carrier Notice of Inquiry, 77 F.C.C.2d 308 (1979); Competitive Carrier First Report, 85 F.C.C.2d 1, 52 Rad. Reg. 2d (P&F) 215 (1980).
[123] H.R. 3333, 96th Cong. (1979).
[124] H.R. 6121, 96th Cong. (1980).
[125] 95 Stat. 1687 (repealed 1994).
[126] The FCC issued six reports implementing its detariffing policy, finalizing and releasing the last report in January of 1985. *See* Scott M. Schoenwald, *Regulating Competition in the Interexchange Telecommunications Market: The Dominant/Nondominant Carrier Approach and the Evolution of Forbearance*, 49 FED. COMM. L.J. 367, 390–402 (1997); Competitive Carrier Sixth Report, 99 F.C.C.2d 1020, 57 Rad. Reg. 2d (P&F) 1391 (1985).

telecommunications deregulation[127] and the specific benefits of proposed statutory overhauls.[128] Also during that time, Congress held many oversight hearings, specifically considering the FCC's approach to competition policy and proposing changes to the FCC's regulations.[129]

Once the FCC finalized its detariffing policy, however, congressional consideration of telecommunications deregulation paused. Between 1985 (the year the FCC issued its final order) and 1993, Congress did not consider any serious legislation,[130] though it continued to hold hearings on deregulation and FCC oversight.

But in 1993, the year after the D.C. Circuit issued its final opinion vacating the FCC's rules[131] and the same year that the Supreme Court granted certiorari,[132] serious debate began again.[133] That second round of deliberation, then, culminated in Congress's passage of the Telecommunications Act of 1996,[134] which, among other things, embraced the FCC's detariffing policy.[135]

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[127] *See Status of Competition and Deregulation in the Telecommunications Industry: Hearing Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the H. Comm. on Energy and Commerce*, 97th Cong. (1981); *AT&T Proposed Settlement: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 97th Cong. (1982) (considering AT&T divestiture pursuant to a Department of Justice consent decree); *Economic Issues of a Changing Telecommunications Industry: Hearing Before the Subcomm. on Agriculture and Transportation of the J. Comm. on Economic*, 98th Cong. (1983)

[128] *See* Telecommunications Competition and Deregulation Act of 1981, S. 898, 97th Cong. (1981); Telecommunications Act of 1982, H.R. 5158 (1982); Federal Telecommunications Policy Act of 1986, S. 2565, 99th Cong. (1986).

[129] *See Monopolization and Competition in the Telecommunications Industry: Hearing Before the S. Comm. on the Judiciary*, 97th Cong. (1981) (considering a provision of the Telecommunications Competition and Deregulation Act of 1981 that would have legislatively designated AT&T as a "dominant carrier" under FCC regulations); *FCC Authorization Legislation: Oversight: Hearing on H.R. 2755 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the H. Comm. on Energy and Commerce*, 98th Cong. (1983); Universal Telephone Service Preservation Act of 1983, S. 1660, 98th Cong. (1983) (proposing to amend the FCC regulations in order to ensure continued universal access to basic telephone services); *Impact of Recent FCC Decisions on Telephone Services: Hearing on H.R. 4102 Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the H. Comm. on Energy and Commerce*, 98th Cong. (1983); *Federal Communications Commission Oversight: Hearing Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the H. Comm. on Energy and Commerce*, 98th Cong. (1984); *Reauthorization and Oversight of the FCC: Hearing Before the Subcomm. on Communications of the S. Comm. on Commerce, Science, and Transportation*, 99th Cong. (1985).

[130] The Federal Telecommunications Policy Act of 1986, S. 2565, 99th Cong. (1986), was the last bill introduced until the Telecommunications Policy Act of 1990, 101st Cong. (1990). Neither bill was serious enough to emerge from the initial committee process.

[131] *See American Telephone & Telegraph Co. v. F.C.C.*, 978 F.2d 727 (1992).

[132] *MCI Telecommunications Corp. v. AT&T Co.*, 510 U.S. 989 (1993).

[133] The Telecommunications Policy Act of 1990 was not a significant proposal. Serious bargaining began again with the introduction of the Telecommunications Infrastructure Act of 1993, S. 1086, 103rd Cong. (1993). *See* JAMES SHAW, TELECOMMUNICATIONS DEREGULATION 27 (1998) (claiming that "Congress seriously debated a restructuring of the Communications Act of 1934 beginning in 1993").

[134] 47 U.S.C. § 151 et seq. (2000).

[135] *See* Schoenwald, *supra* note 126, at 449–52.

Admittedly, this chronology is a small part of a much bigger picture. The 1985 pause in congressional deliberation is, undoubtedly, also attributable to the passage of the final consent decree that broke up the Bells, which occurred at about the same time. And Congress certainly had a lot more than long distance regulation in mind when it debated and passed the Telecommunications Act of 1996, which encompasses much more than long distance rates. The point here, however, is only that congressional consideration of long distance regulation—in both floor activity and committee activity—tracks FCC action on the same regulatory issues. Even though long distance regulation was a small part of a big story, Congress was actively interested in long distance regulation throughout the time that the FCC acted, and Congress's ability and motivation to legislate apparently faltered after the FCC finalized its rules.

In sum, the story of telecommunications deregulation is a story of simultaneous negotiations in Congress and the executive. The FCC's success at reforming long distance regulation before Congress passed any significant legislation seemingly caused congressional deliberations to stop for a period of time. Congress then restarted its negotiations in earnest as soon as the judiciary struck down the agency's enactments, and the legislature was able to pass significant reforms just three years after resuming deliberation.

(b) Tobacco regulation. Congress's consideration and passage of tobacco regulations has a long history, as the Supreme Court acknowledged in *Brown & Williamson*.[136] In the three decades preceding the FDA's announcement in 1994 that it would consider asserting jurisdiction over tobacco, Congress had enacted six pieces of tobacco-specific legislation.[137] The precise question of FDA jurisdiction over tobacco has an equally long congressional history, having been considered periodically since 1964.[138]

But the most interesting feature of the institutional story behind *Brown & Williamson* is the rash of congressional activity that began just *after* the FDA launched its official rulemaking process. As noted, Congress had averaged one tobacco bill every five years in the three decades preceding the FDA's announcement. In the short time between the beginning of FDA deliberations and the ruling of the Supreme Court, Congress averaged one tobacco bill *per year*, passing five tobacco-specific provisions in five years. By the time the Supreme Court vacated the agency's rulemaking, Congress had enacted limited versions of most of the FDA's major initiatives, including programs to reduce teen smoking, prohibitions

[136] 529 U.S. at 137–39.

[137] *See Brown & Williamson*, 529 U.S. at 137–38 (listing six pieces of tobacco-related legislation that Congress passed between 1965 and 1992).

[138] *See Cigarette Labeling and Advertising: Hearings Before the H. Comm. on Interstate and Foreign Commerce*, 88th Cong. (1964); *Public Health Cigarette Amendments of 1971: Hearings Before Consumer Subcomm. of the S. Comm. on Commerce, Science, and Transportation*, 92d Cong. (1972); *Cigarettes: Advertising, Testing, and Liability: Hearings Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the H. Comm. on Energy and Commerce*, 100th Cong. (1988); *Health Consequences of Smoking: Nicotine Addiction: Hearings Before the Subcomm. on Health and the Environment of the H. Comm. on Energy and Commerce*, 100th Cong. (1988).

on vending machine sales, and higher excise taxes on all tobacco products and cigarette papers.[139]

The most significant congressional debate, however, did not occur during the agency's deliberative process; it began after the agency published its jurisdictional statement and regulations. The agency finalized its rulemaking in August of 1996, at the close of the 104th Congress. In the next Congress, just one year after the FDA published its enactments[140] and six months after the trial court upheld those regulations,[141] Senator John McCain introduced the first of an eventual six comprehensive tobacco bills that would be considered in the 105th Congress.[142] These comprehensive bills were legislative versions of the "global tobacco settlement," which had been proposed in litigation to end forty-one state attorney generals' lawsuits against the tobacco industry.[143] And the 105th Congress did not limit itself to comprehensive legislation; members also introduced more than fifty other bills that would have made incremental changes to tobacco regulation.[144]

On June 17, 1998, the comprehensive reform proposal died in a filibuster, and serious congressional debate came to an abrupt halt. Interestingly, though perhaps coincidentally, the filibuster occurred exactly one week and one day after oral arguments in the Fourth Circuit[145]; by that time, it had become fairly clear that the Court of Appeals would declare the FDA's regulations unlawful.[146] After the Supreme Court affirmed the Fourth Circuit's decision, a few members of Congress once again attempted to give the FDA jurisdiction,[147] but debate never

[139] The FDA launched its official investigation with a letter to the Coalition on Smoking or Health, which it sent on March 25, 1994. KESSLER, *supra* note 86, at 87–88. Immediately following the agency's announcement, Congress passed a bill that increased funding for public school programs designed to curb youth smoking, a key target of the FDA's proposed regulations. *See* Improving America's Schools Act of 1994, Pub. L. 103–382, 108 Stat. 3518 (1994). Just one year later, Congress banned the sale of cigarettes in vending machines in or around federal buildings, a limited version of another FDA proposal. *See* Prohibition of Cigarette Sales to Minors in Federal Buildings and Lands Act, Pub. L. 104–52 § 636, 109 Stat. 468 (1995). In the next three years, Congress also increased excise taxes on tobacco and cigarette papers, Balanced Budget Act of 1997, Pub. L. 105–33, 111 Stat. 251 (1997), passed a second law funding school programs that target youth smoking, Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. 105–277, 112 Stat. 2681 (1999), and passed two laws facilitating document requests in the mass tort suits pending against the tobacco industry, Tobacco Production and Marketing Disclosure, Pub. L. 106–47, 113 Stat. 228 (1999); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, Pub. L. 106–78, 113 Stat. 228 (1999).

[140] The FDA published its jurisdictional statement and regulations on August 28, 1996.

[141] *See Coyne Beahm, Inc. v. U.S. Food & Drug Admin.*, 966 F.Supp. 1374 (April 25, 1997).

[142] *See* Universal Tobacco Settlement Act, S. 1415, 105th Cong. (1997) (introduced Nov. 7, 1997). *See generally* C. Stephen Redhead & Joy Austin-Lane, *Tobacco Litigation in the 105th Congress: Side-by-Side Comparison of S. 1415, S. 1530, S. 1638, S. 1889, H.R. 3474, and H.R. 3868*, CRS Report to Congress (Aug. 19, 1998).

[143] Redhead & Austin-Lane, *supra* note 142, at 1.

[144] *See id.* at 7–12.

[145] *See Brown & Williamson Tobacco Corp. v. Food & Drug Admin.*, 153 F.3d 155 (1998) (argued June 9, 1998).

[146] *See* KESSLER, *supra* note 142, at 363–66 (describing the oral arguments).

[147] *See* Adam Clymer, *Legislators Planning Response to Justices' Ruling on F.D.A.*, N.Y. TIMES, March 24, 2000, at A19.

again reached the level of seriousness that it reached in the two years following the FDA's rulemaking.

Like the story of telecommunications deregulation, the story of tobacco regulation is one of simultaneous activity in Congress and the executive. During the FDA's deliberations, Congress confronted many of the agency's core concerns and enacted limited versions of the agency's basic proposals. But the FDA's successful assertion of jurisdiction sparked a congressional panic, which ended only after the Fourth Circuit vacated the agency's enactments. The interference story, then, is one of executive intermeddling with Congress's devotion to incrementalism.[148]

(c) Conclusion. In both *MCI* and *Brown & Williamson*, Congress was, demonstrably, an active player in the relevant regulatory regimes. Although the interference stories are markedly different in the two cases, they both involve simultaneous deliberation throughout the early parts of the agencies' investigations, and they both involve manifest changes in Congress's bargaining after the agencies finalized their rulemaking processes. And in both cases, Congress returned to its deliberative status quo ante after the courts intervened. A non-interference intuition, then, would explain the Court's holdings in both cases.

Furthermore, we can imagine discrete harms that might have flowed from the agencies' interference in both cases and can therefore imagine concrete benefits that would result from the Court's fix.

Taking the telecom case, imagine a pro-regulatory member of Congress who has developed a good relationship with AT&T on this issue and is therefore willing to oppose deregulatory overhauls by, for example, introducing amendments when deregulatory statutes reach the floor. Once the FCC passed its deregulatory rules, that same member of Congress would need to figure out whether she would be willing to stick to her substantive position by supporting bills and amendments that would reverse the FCC regulations. Importantly, the answer might go either way, depending on political realities that are difficult to assess. We could easily imagine that overturning an FCC rulemaking would be politically riskier than proposing amendments to limit or even to kill deregulatory overhauls,

[148] The non-interference conclusion here is a bit rough in the following sense: The Court could not possibly restore the substantive status quo ante without altering the jurisdictional status quo ante. That is, in order to invalidate the FDA's regulations, the Court had to hold that the FDA lacked jurisdiction under the FDCA to regulate tobacco. The Court thus created certainty, where no certainty had existed before, as to the meaning of the FDCA and as to the authority of the FDA. The Court did not and could not restore the status quo ante in a pure form. This complication could significantly undermine the Article's thesis if it turned out that Congress was more concerned with FDA jurisdiction than with substantive tobacco regulation, in which case the Court was the final arbiter in the tobacco debate. That is, by this account, the Court did not simply erase a meddlesome change and return regulatory control to Congress; it took control of the central issue and resolved it. This account, however, does not seem entirely persuasive given the history of tobacco regulation. All of Congress's enactments prior to the FDA's intervention were substantive, not jurisdictional. Although Congress debated FDA jurisdiction on a number of occasions—and debated it rigorously after the FDA asserted jurisdiction—the congressional commitment that the FDA interfered with was a substantive one, not a jurisdictional one. The relevant congressional commitment was the commitment to incrementalism, and the relevant congressional enactments were direct, substantive regulations.

but we could just as easily imagine that undoing the work of an adversary in the White House would be politically rewarding. The Congresswoman would therefore need to invest in polling data or other new information to determine what impact, if any, the FCC's action should have on her voting preferences, and she would lose at least some of the value of her prior investments in similar information. As an additional cost to the process, AT&T would also need to invest in new information to figure out how valuable a reversal of the FCC ruling would be and how much it would cost to convince members of Congress to pass such a reversal.

This point might be even easier to see in the tobacco case. Imagine that the voters in a congressional district are generally opposed to the lobbying influence of tobacco companies but are also generally opposed to FDA regulation. The Congressman who represents that district might have invested in relationships with anti-tobacco advocates during the many years that Congress was devoted to an incremental approach, but once the FDA acted, he might have needed to support legislation that would strip the FDA's jurisdiction, thereby harming the relationships he had developed over the prior decades.

The agencies' interference, thus, might have imposed real informational and reputational costs on members of Congress who had already invested in the regulatory domain. By altering the status quo—by changing the substantive regulatory reality against which stakeholders and voters had formed their preferences—the agencies diminished the value of those prior investments and forced the legislators' and lobbyists' to make new investments in their new reality.

The question now remaining is whether this story of institutional intermeddling justifies a *Chevron* Step Zero exception—whether such an exception would be beneficial from legal and theoretical perspectives.

B. Analogous Doctrines

From a legal perspective, the concept of non-interference is neither new nor unusual. In fact, the non-interference rationale for the *Brown & Williamson* rule is an instantiation of a concern that arises regularly in both federalism and separation of powers jurisprudence—namely, the prevention of intermeddling and simultaneity among institutions exercising overlapping authority. This same goal of non-interference motivates, for example, preemption and abstention doctrines.

The first example of an analogous rule is the doctrine of "obstacle" preemption, which invalidates any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[149] Unlike other versions of preemption, obstacle preemption requires neither explicit nor implicit federal instructions against state interference. Rather, the doctrine vacates any state action that intermeddles with the accomplishment of federal goals. Obstacle preemption, then, rests not on the supremacy of federal laws but rather on a general supremacy of congressional policy.[150] As a result, the instruction that the Court gives to states under obstacle preemption is the same as the instruction

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149 *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

150 *See generally* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000) (arguing that obstacle preemption has no grounding in the Supremacy Clause).

that it gave to the agencies in *MCI* and *Brown & Williamson*: "Step aside. Your action is interfering with congressional policymaking."

The second analogy is to federalism-inspired abstention doctrines, most famously *Pullman* abstention,[151] which limit federal courts' interference with state policymaking and with state court proceedings. Collectively, these doctrines rest on the same two policy concerns that motivate Step Zero non-interference: prevention of officious intermeddling and avoidance of wasteful duplication.

Very roughly, federal courts will abstain from exercising their jurisdiction in two scenarios[152]: (1) when they are asked to consider undecided questions of state law[153] and (2) when they are asked to interfere directly (as by injunction) with ongoing state court proceedings.[154] Abstention is justified in the first scenario by respect for the states' primacy in interpreting their own laws and in the second by respect for the state courts' concurrent and coequal jurisdiction over certain cases. The logic, then, is that federal courts should not intermeddle with a state's superior ability and equal right to decide questions of state law.

A converse abstention doctrine allows federal courts to enjoin state court proceedings (effectively forcing the state court to abstain) when state jurisdiction is likely to result in harmful duplication of pending federal proceedings.[155] This exception to the anti-injunction rule avoids the waste of trying the same case in two forums, particularly when state court proceedings seem likely to interfere with the federal court's exercise of jurisdiction.

The two justifications, then, that are common to this body of abstention doctrines are the same as the justifications that motivate Step Zero non-interference. In fact, we can state the intuition undergirding the *Brown & Williamson* rule in abstention terms: the Step Zero cases hold that administrative agencies—despite their concurrent authority to make certain policy decisions—should abstain from rulemaking whenever the exercise of their authority would interfere with or harmfully duplicate a standing or pending congressional bargain.

[151] *See Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) (holding that federal courts should decline to exercise jurisdiction if (1) the case raises state-law questions that should be decided by state courts and (2) the decision of the state-law question might allow federal courts to avoid deciding a constitutional question).
[152] *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 12.1–13.4 (4th ed. 2003).
[153] *See, e.g., Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) (applying *Pullman* abstention even in the absence of a significant constitutional question on the grounds that the state's interest in deciding the state-law question was unusually strong); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (holding that federal courts should abstain from reviewing state administrative agencies' orders because such federal review would cause "[d]elay, misunderstanding of local law, and needless federal conflict with the State policy").
[154] *See Younger v. Harris*, 401 U.S. 37 (1971) (holding that federal courts should not enjoin state court proceedings because there is a "longstanding public policy against federal court interference with state court proceedings").
[155] *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970) (interpreting the anti-injunction statute as allowing federal courts to enjoin state court proceedings when necessary "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case").

The final analogy is to the two abstention-like doctrines that operate in administrative law, both of which prevent federal courts from interfering with executive policymaking: exhaustion and primary jurisdiction. These two doctrines rest on the same non-interference rationale as the federalism-inspired abstention doctrines and as Step Zero non-interference.

Exhaustion, which requires federal courts to stay proceedings until the litigants have exhausted all remedial processes available in administrative agencies,[156] "serves to avoid piecemeal interruption of administrative processes, to eliminate unnecessary judicial effort, and to secure the views of agency experts on questions within their competence."[157] In other words, the doctrine prevents federal courts from intermeddling with administrative decision-making and prevents litigation from proceeding simultaneously in judicial and administrative forums.

The second administrative-law abstention doctrine, primary jurisdiction, is a similar rule with a different starting point; it prevents courts from entertaining suits that should be decided in administrative proceedings, even when administrative processes have not yet begun. The logic underlying primary jurisdiction is that courts should correctly "allocate initial decision making responsibility between agencies and courts where . . . [jurisdictional] overlaps exist."[158] Again, the motivation is the same as in the Step Zero non-interference cases: to avoid friction and overlap between two institutions that both have authority to act.

In sum, non-interference is a quotidian concern in both federalism and separation of powers jurisprudence. Although existing non-interference doctrines constrain state legislatures and state and federal courts rather than constraining federal agencies, the extension of the logic to the Step Zero context is not radical. The interaction between agencies and Congress is not different in kind from the interaction between state legislatures and Congress, between courts and agencies, or between federal courts and state courts. All non-interference doctrines concern the appropriate division of labor among governmental institutions, and it is coherent in all contexts of overlapping jurisdiction to limit one institution in favor of another in order to avoid needless friction and duplication. The non-interference understanding of *Brown & Williamson*, therefore, is at least ordinary.

IV. VIRTUES OF A NON-INTERFERENCE RULE

Of course, the ordinariness of a non-interference rule would not be enough to argue in favor of reincarnating *Brown & Williamson*—and, by necessary extension, killing *Massachusetts*. But the non-interference rule is not merely ordinary. It serves important goals in the management of a multi-branch government.

This Part proceeds as follows. First, it briefly revisits *Chevron* theory to demonstrate that the non-interference understanding justifies *Chevron* exceptionalism—that is, that Step Zero non-interference complies with both of the core *Chevron* hypotheses. Second, it presents *Massachusetts* as a disanalogy, explain-

[156] *See generally* RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO, AND PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 5.7.2 (3d ed. 1999).
[157] DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL 179–80 (4th ed. 1999).
[158] PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS § 5.8.

ing the potential harms of the holding in that case and, by extension, explaining the usefulness of the non-interference principle.

A. *Chevron* Theory and Non-Interference

The virtue of the non-interference understanding from a theoretical perspective is that it justifies an exception to deference without fighting either of the core *Chevron* hypotheses. It fully preserves the institutional capacity assumption of judicial inferiority, and it avoids making any counter-*Chevron* institutional choice assumptions about Congress's future involvement.

The most important feature of the non-interference rule from a theoretical perspective is that it is triggered only by case-specific evidence that Congress is interested in the precise question before the court. This feature has two payoffs.

First, the non-interference view does not require judges to evaluate agencies' policy decisions. The trigger is an agency's perceptible interference with a specific congressional bargain, not any particular characteristic (such as majorness or aggrandizingness) of the agency's policy. The non-interference rule, thus, does not assume that courts will be appropriate or capable evaluators of agencies' political decisions; that is, it does not violate the institutional capacity assumption. Instead, the judges' role is the humble role of referee, telling agencies to step aside while Congress plays.

Second, the necessity of congressional involvement eliminates the possibility that judicial policy will stick. This is not to say that the legislature will inevitably alter the reality created by judicial decision; Congress might, as in the tobacco case, fail to pass the legislation it was considering, in which case the judicially-created status quo will remain. But the concern underlying tales of judicial stickiness (and the concern motivating *Chevron*'s institutional choice assumption) is not simply that judge-made policy will last; it is that judge-made policy will remain unchecked, due to the sheer ignorance and inertia of the political branches. The virtue of the non-interference view, then, is that Congress's active interest in the precise question eliminates (or at least significantly mitigates) the concern that judge-made outcomes will go undetected and unconsidered.

In sum, the non-interference understanding of the major questions exception is superior to the proffered alternatives because it does not fight either the institutional choice assumption or the institutional capacity assumption underlying *Chevron* theory. It is an exception to *Chevron* rather than a challenge to *Chevron* because it relies on specific facts in the world that judges are capable of perceiving and that give rise to a discrete need for judicial intervention.

B. *Massachusetts* and Non-Interference

It is, however, still not enough to say that a non-interference rule is consistent with *Chevron*. Unless the rule is independently useful, there would be no reason to enforce a *Chevron* exception at all—no reason to reincarnate *Brown & Williamson*. But the Step Zero non-interference rule *is* useful.

The easiest way to demonstrate this point is to present *Massachusetts* as a disanalogy, to point out the potential harms that could flow from the Court's failure to enforce a non-interference rule in that case. By this account, *Massachusetts* is error; it does not fit the non-interference principle and therefore cannot be justified.

The first step in the argument is to tell the story of non-interference that operated in the background of *Massachusetts* and to demonstrate that the Court could have enforced a non-interference rule in that case. The second step is to acknowledge a worthy instinct that might have underlain the Court's decision in *Massachusetts*: an instinct to promote, or even to require, executive expression of expert opinions.[159] The final step is to explain why the non-interference instinct should have trumped the "expertise-forcing"[160] instinct in *Massachusetts* and why the non-interference rule should trump the expertise-forcing rule in future cases.

1. Non-interference in the background of *Massachusetts*.

The non-interference story in *Massachusetts* has much in common with the one in *Brown & Williamson*. Congress's history of global warming regulation is almost as long—and almost as tortured—as its history of tobacco regulation. And in both cases, the post-enactment legislative histories indicate that Congress may have preferred—and may have been actively working towards—a separate regulatory structure for the precise issues that the agencies confronted.

Congress became actively interested in global warming as an independent issue in the late 1970s, enacting its first global-warming-specific statute in 1978[161] and a second such statute in 1987.[162] Of course, neither of those bills implemented a regulatory scheme. The 1978 National Climate Program Act merely ordered the President to create a coordinated executive program to gather data on climate change and to ponder the diplomatic implications of global warming, and the 1987 Global Climate Protection Act simply ordered EPA to draft a report to Congress on the science and politics of global warming.

In 1990, the issue of climate change burst onto the international stage with the first report of the Intergovernmental Panel on Climate Change,[163] and the treaty model became a realistic supplement to domestic regulation as a means of addressing climate change. In 1992, President Bush signed and the Senate ratified the United Nations Framework Convention on Climate Change (UNFCCC), which was (like the domestic bills that had passed) simply a non-binding declaration that global warming is probably a real problem.

After the ratification of that treaty, congressional interest in global warming faltered. Although the 101st and 102nd Congresses had proposed a combined

[159] *See* Freeman & Vermeule, *supra* note 5.

[160] The term "expertise-forcing" is Freeman and Vermeule's. *See* Freeman & Vermeule, *supra* note 5.

[161] *Massachusetts*, 127 S.Ct. at 1448 (*citing* National Climate Program Act, 92 Stat. 601 (1978)).

[162] Global Climate Protection Act, Pub. L. 100-204, 101 Stat. 1407 (1987) (*cited in Massachusetts*, 127 S.Ct. at 1448).

[163] *Massachusetts*, 127 S.Ct. at 1448.

total of 56 bills related to greenhouse gas emissions, the 103rd and 104th Congresses proposed a combined total of only one such bill.[164]

Then in 1997, the signatories to the UNFCCC wrote the Kyoto Protocol, which was the first attempt at a binding regulatory structure for reducing greenhouse gas emissions and curbing or reversing anthropogenic global warming. Although the Senate unanimously refused to ratify the Kyoto Protocol, Congress's interest in global warming picked up in the wake of the Kyoto debate.[165] In the 105th Congress, members introduced 22 bills related to greenhouse gas emissions.[166]

In the middle of the 105th Congress and then again at the beginning of the 106th Congress, EPA took the position at congressional hearings that it had authority under the CAA to regulate greenhouse gases,[167] but the agency did not then act on that authority.

The rulemaking petition that became the center of *Massachusetts* was presented to EPA in 1999, and at the same time, the legislature's interest in global warming grew perceptibly stronger. After considering only 22 bills in the 105th Congress and an average of only about 15 per Congress in the prior four, the legislature averaged over 50 proposals per Congress from 1999 to 2006, climbing to 64 proposals in the 109th Congress alone.[168] The legislature also held oversight hearings throughout this time, specifically to discuss EPA's authority.[169]

Interestingly, EPA's denial of the rulemaking petition in 2003 did not coincide with any significant change in congressional action; the 107th Congress introduced 51 proposals, and the 108th introduced 57.

Then, the Supreme Court issued its opinion, demanding action from EPA, and at the same moment, Congress went into a fury.[170] So far in the 110th Con-

[164] *See* Natural Gas Vehicle Incentives Act of 1996, H.R. 4288, 104th Cong., 2d Sess. These numbers come from a search of Thomas, the Library of Congress's internet search engine. *See* http://thomas.loc.gov. I searched bills in each Congress from the 101st to the 110th, which are the ones that are searchable through Thomas. Using "greenhouse gas emissions" as the search term brings up 32, 24, 0, and 1 in the 101st, 102nd, 103rd, and 104th Congresses respectively. Using "global warming" produces slightly different results but a similar trend, showing 139, 60, 18, and 2 in the same Congresses. Using "climate change" shows 160, 99, 18, and 34 in the same Congresses. The drop-off is therefore clear regardless of which search terms one uses; the 103rd Congress did very little work on the issue compared to its predecessors.
[165] *See id.* at 1448–1449 (*citing* S. Treaty Doc. No. 102–38, Art. 2, p. 5 (1992) (UNFCCC), and S. Res. 98, 105th Cong., 1st Sess. (July 25, 1997) (as passed) (Senate Resolution expressing the Senate's sense that the U.S. should not enter the Kyoto Protocol).
[166] *Id.* Fourteen of those proposals reached the floor, and one reached the President's desk.
[167] *Massachusetts*, 127 S.Ct. at 1449.
[168] The numbers for the 106th, 107th, 108th, and 109th Congresses are 44, 51, 57, and 64 bills respectively, for an average of 54 proposals per session. Ninety-eight of those bills reached the floor, and nine of them reached the President's desk.
[169] *Is CO2 a Pollutant and Does EPA Have the Power to Regulate It?: Hearing Before H. Comm. On Government Reform*, 106th Cong., 1st Sess. (Oct. 6, 1999). *See*, *e.g.*, *Clean Air Act: Risks from Greenhouse Gases: Hearing Before S. Comm. on Environment and Public Works*, 107th Cong., 2d Sess. (March 13, 2002); *Clean Air Act Oversight Issues: Hearing Before S. Comm. on Environment and Public Works*, 107th Cong., 1st Sess. (2001).
[170] A causal claim is harder to make here than in the tobacco case. The 110th Congress was also the first Congress since 1994 to be controlled by the Democratic Party, which may be a more com-

gress, members have introduced 139 bills that include some provision related to greenhouse gas emissions.[171] Several of those bills would implement the very regulations that the petitioners asked EPA to implement,[172] while others would implement President Bush's preferred market-based and voluntary approaches.[173]

The story of global warming regulation, thus, meets the predicates of Step Zero non-interference. Congress was actively aware of and negotiating in the regulatory domain prior to EPA's involvement and throughout the time that EPA deliberated. That is, negotiations occurred simultaneously in both institutions. Furthermore, the beginning of public deliberation at EPA coincided with increased deliberation in Congress, and the Court's incitement of serious deliberation at EPA has coincided with a dramatic increase of deliberation in Congress.

2. *Massachusetts* and expertise-forcing.

Although there are many commonalities between the *Massachusetts* and *Brown & Williamson* background stories, there is also one important difference. Whereas Congress seemed to view FDA as a competitor in the project of tobacco regulation, it seems to view EPA as a partner in the project of global warming regulation.

Many of the congressional proposals and enactments related to global warming specifically invited executive participation in the debate, ordering scientists in the executive to conduct the research and to provide the information that would be necessary to confront the challenge of global warming. Indeed, in its discussion of post-enactment legislative history, the *Massachusetts* majority pointed out that all of Congress's global-warming-specific enactments were simply efforts "to promote interagency collaboration and research to better understand climate change"[174]; Congress had not, the Court noted, enacted any "binding emissions limitations to combat global warming[.]"[175] This point provided contrast with the tobacco-specific bills that comprised the post-enactment history in *Brown & Williamson*, all of which were direct regulatory efforts and none of which requested FDA participation in identifying the harms of tobacco or the benefits of proposed regulations.

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pelling explanation for the significantly increased activity. There was no such regime-change in the tobacco case.

[171] Remember, this number compares to an average of about 30 proposals per Congress in the preceding nine Congresses and a maximum of 64 proposals in any given Congress from 1989 to 2006. Also, the number of proposals in the 110th Congress increases to 182 if one uses "climate change" rather than "greenhouse gas emissions" as the search criterion. Of the 139 bills that include references to "greenhouse gas emissions," 51 have reached the floor of at least one chamber, and two have reached the President's desk.

[172] *See*, *e.g.*, Clean Fuels and Vehicles Act of 2007, S. 1073, 110th Cong., 1st Sess.; Safe Climate Act of 2007, H.R. 1590, 110th Cong., 1st Sess.; National Low-Carbon Fuel Standard Act of 2007, S. 1324, 110th Cong., 1st Sess.

[173] *See*, *e.g.*, Climate Stewardship Act of 2007, H.R. 620, 110th Cong., 1st Sess.; Greenhouse Gas Accountability Act of 2007, H.R. 2651, 110th Cong., 1st Sess.; National Greenhouse Gas Registry Act of 2007, S. 1387, 110th Cong., 1st Sess.

[174] *See Massachusetts*, 127 S.Ct. at 1448, 1460–61 & n.28.

[175] *Id.* at 1460.

The Court thus reasoned that, because Congress's efforts in the realm of global warming were information-gathering efforts rather than direct regulatory efforts, those bills could not be viewed the same way that the tobacco bills were viewed: "as tantamount to a congressional command to refrain from regulating[.]"[176]

This difference might matter a great deal for present purposes if it proves that executive action would have counted as helpful participation in—rather than officious intermeddling with—Congress's project. In holding that EPA had authority to regulate, maybe the Court was simply urging EPA to fulfill this congressionally-assigned informational role.

Indeed, there has been at least one serious suggestion that this "expertise-forcing" account of *Massachusetts* is the best way to read the case. Jody Freeman and Adrian Vermeule argue that *Massachusetts* is best read as an attempt to reprimand the excessive politicization of EPA decision-making and to require expression of a scientific—rather than political—opinion on the issue of global warming.[177]

This view could be synergistic with the non-interference rationale. Like the non-interference view, the expertise-forcing view has much to say about the effect that executive regulation can and should have on a larger regulatory enterprise.[178] That is, executive regulations have the potential to be meddlesome, as the non-interference view assumes, but they also have the potential to be informative, as the expertise-forcing view reveals. By acting first, an agency might, as in the tobacco case, disrupt congressional activity, but it might additionally or alternatively convey useful information to Congress about the nature and the effectiveness of executive scientists' preferred approach. Indeed, taking *Chevron*'s institutional capacity theory, the executive's regulations should reflect both scientific expertise and political sensitivity, meaning that executive decisions should blend the considerations that are most relevant to responsible democratic rulemaking. Perhaps, then, generalist legislators will create better outcomes, from a perspective of democratic representation, if they legislate against a richer backdrop of executive enactments.

Pursuant to this view, the Court's role at Step Zero could be to measure Congress's preference for either executive participation or executive abstention and to require the agency to play the role that Congress prefers. When Congress has repeatedly invited executive participation, as in the global warming case, the Court should require executive regulation, and when Congress has repeatedly discouraged or precluded agency participation, as in the tobacco and telecom cases, the Court should prohibit executive regulation.

By this account, both *Massachusetts* and *Brown & Williamson* got it right.

[176] *Id.*
[177] Freeman & Vermeule, *supra* note 5.
[178] This point is not the primary focus of Freeman and Vermeule's article, however. They view the de-politicization of EPA decision-making as a good in itself, without reference to EPA's ability to inform an ongoing congressional project.

3. Non-interference and expertise-forcing.

The problem with the expertise-forcing account is that executive regulations are not merely informative. When an agency promulgates regulations, it is not just pontificating; it is affecting the real world, changing the status quo. And a midstream change in the status quo, unlike a mere informational update, will significantly raise the cost of legislating, as mentioned in Part III, above, in the stories of diminished investment and necessary reinvestment. Lobbyists and legislators will be forced to reevaluate their positions in light of a new regulatory reality—to discard old investments and to create new ones.

All of this is to say the following: the bottom line justification for the non-interference view is that Congress's deliberative process is, by nature, a long and cumbersome one, which, to function as cheaply as possible, requires a fixed target, not a moving target, around which legislators can negotiate.

Some might object to this argument on the ground that congressional action always trumps administrative action. A non-interference rule might therefore be unnecessary since Congress can always undo administrative "interference" and therefore need not take serious account of midstream regulatory changes. It can instead treat midstream changes as though they were mere executive pontifications.

But such midstream regulatory changes, unlike, say, informative memoranda or policy statements, have real impacts on the interests of legislators and stakeholders. Remember the hypotheticals presented above: a pro-regulatory Congresswoman who needs to decide whether to support a statutory reversal of the already-implemented FCC regulations and an anti-tobacco, but also anti-FDA, Congressman who will necessarily ruin standing relationships with anti-tobacco advocates in order to undo the already-implemented FDA regulations. These are plausible scenarios—and we could imagine many more—that indicate the increased costs associated with a change in the status quo, and the costs that these scenarios indicate would not be incurred if the agencies had merely presented new information to the legislators. Regulatory change, thus, is costly even though Congress can undo it through new legislation, and it is far more costly than simple updates in scientific and political information.

There is also a pure legal argument to support the view that Congress's trumping power should be irrelevant to Step Zero non-interference: that view is fully consistent with the usual operation of non-interference doctrines. The point of a non-interference rule is not to prevent the first actor from setting the rule; it is to prevent simultaneous actors from disrupting each other's processes. In many of the situations that give rise to analogous non-interference rules,[179] the institution that was supposedly "interfered with" clearly had the power to trump the "interfering" institution through later enactments or decisions. Obstacle preemption, for example, restrains state legislatures even though a later-enacted national statute would trump any conflicting state statutes, and *Pullman* abstention prevents federal courts from deciding questions of state law even though later-acting state

[179] *See* Part III.B, *supra*.

courts could trump federal interpretations. Furthermore, in both of those cases, the restrained institution could have provided information to its coequal by acting first. That is, by legislating in a field of "obstacle preemption," the states could provide information to Congress about their individual preferences, and by addressing a question of state law, the federal courts could provide their insight (arguably an expert insight) on a tricky legal question.

In the context of Step Zero non-interference, the point of the non-interference principle is not merely to prevent agencies from beating Congress in a race to regulate. The point is to prevent agencies from moving the target around which Congress is bargaining. The non-interference rule simply recognizes that lawmaking becomes more costly if a regulatory regime changes, independently of congressional action, in the middle of the congressional bargaining process. The nightmare story is not that the agency's decision will prevent Congress from acting; it is that the agency's decision will fundamentally alter legislators' and stakeholders' incentives, requiring the public choice game to start afresh.

None of this is to say that administrative regulations are not informative. Even less is it to say that information is unimportant. But here is the critical point: agencies can present information to Congress without issuing status-quo-altering rules and regulations. There is therefore no need to incur the costs of such regulations in order to gain the benefit of information.

Let's now consider the case of global warming: The allegations of excessive politicization of EPA decision-making are troubling, particularly since they include allegations that the White House has been actively silencing executive scientists.[180] Because scientific information is a necessary component of responsible rulemaking in scientific domains, we *should* be bothered by allegations that political agents are altering and stifling technocratic information about global warming.

It does not follow, however, that the only remedy—or a right remedy—is to require the scientists to implement binding regulations. As the Court unwittingly pointed out in the *Massachusetts* opinion, Congress is perfectly capable of demanding information, through obligatory research and reports, from executive scientists.[181] Furthermore, Congress has tools, such as hearings and concomitant subpoena powers, to oversee the executive's research and reporting procedures.[182] We need not fear, therefore, that enforcement of a non-interference rule will prevent Congress from gathering information about the executive branch's views and preferences, and we should not defy the non-interference principle in order to enforce informational transfers. Return for a second to the telecom and tobacco cases: Congress could have ordered a report from the FCC addressing the continuing necessity of tariff-filing as a means of rate regulation (and the FCC could have provided such a report without a congressional mandate), and Congress could have ordered a report from the FDA addressing addictive properties of nicotine

[180] *See* Freeman & Vermeule, *supra* note 5, at 3–10.

[181] *See* notes 174–176, *supra*, and accompanying text.

[182] *See Allegations of Political Influence with the Work of Government Climate Change Scientists: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong., 1st Sess. (Jan. 30, 2007).

and the need for greater tobacco regulation (and the FDA could have provided such a report without a congressional mandate). It was not necessary in either case for the agencies to implement binding regulations in order to convey their scientific and political judgments to the legislature.

The *Massachusetts* majority was undoubtedly right to conclude that "collaboration and research do not conflict with any thoughtful regulatory effort; they complement it."[183] But it was absolutely wrong to conflate "collaboration and research" with implementation of binding regulations. The executive's regulatory effort, once enacted, will always be costly to an ongoing, parallel regulatory effort in Congress.

The non-interference rationale, therefore, should always trump the expertise-forcing rationale when the question is whether the executive should enact new regulations in a domain that Congress is actively negotiating.

V. A Doctrine of Non-Interference

Perhaps the greatest challenge for a reincarnated non-interference rule would be to develop a standard for distinguishing serious congressional deliberation from strategic congressional posturing. If members of Congress knew that merely debating an issue would preclude executive authority, then they would have a perverse incentive to engage in meaningless debate whenever they wanted to prevent executive action in a particular regulatory regime. The purpose of the non-interference rule is not to give Congress a tool for blocking executive policymaking; it is to prevent the executive from interfering with ongoing and serious congressional policymaking. In developing a test for future enforcement, then, the key is to identify the hallmarks of sincere deliberation and true interference. Four factors are apparent in the three "major questions" cases.

(1) Pre-Interference Activity. In the tobacco, telecom, and global warming cases, Congress had been active in the relevant debates before the executive started its decision-making process. In the telecom case, Congress entertained revisions to the FCC's organic statute three years before the FCC started its detariffing process. In the tobacco case, Congress had passed several tobacco-specific bills before the FDA considered asserting jurisdiction, and it had held hearings in the few years immediately preceding the agency's actions, specifically considering the possibility of granting the agency jurisdiction under the FDCA. In the global warming case, Congress had passed at least five global-warming-specific statutes before the petitioners presented their rulemaking petition to EPA, and it had debated dozens more. The occurrence of debate and the passage of legislation before the agency intervened constitute strong evidence that Congress's interest in the regulatory regimes existed independently of any desire to block executive policymaking.

(2) Post-Announcement Activity. In both the tobacco and the telecom case studies, Congress's committee and floor activities perceptibly increased immediately after the agencies began considering regulation. That is, immediately after

[183] *Massachusetts*, 127 S.Ct. at 1461.

the agencies started their investigations, members of Congress started holding more hearings and introducing more legislation than they had before the agencies' announcements. Such an immediate increase in activity might be evidence that Congress prefers to legislate before the agency has a chance to finish its rulemaking process. In the global warming case, congressional activity increased just before the agency received its rulemaking petition, but it spiked just after the Court issued its decision requiring EPA action.

(3) Post-Enactment Activity. In both the tobacco and telecom cases, there was a perceptible change in Congress's activity immediately following the agency's final rulemaking. In the tobacco case, Congress dramatically increased its deliberations, while in the telecom case, it dramatically decreased its deliberations. A shift in either direction indicates that the agency's action disrupted a preexisting process. Of course, it is too early to tell whether and how EPA regulations, once implemented, will affect congressional deliberations.

(4) Aggressive Oversight. During the debates over telecom deregulation, tobacco regulation, and greenhouse gas regulation, Congress aggressively monitored not only the agencies' specific decision-making processes but also the agencies' general activities. In the tobacco and telecom cases, however, oversight slackened significantly once the agencies completed their rulemaking processes. This trend might be evidence of an attempt to influence or to stall the agencies' rulemakings.

Taken together, these four factors probably suffice to identify cases in which an agency's actions truly disrupt a congressional bargaining process. The test requires some evidence of congressional activity before the agency intervened, and it requires close temporal connections between steps in the agency's decision-making process and changes in Congress's bargaining process. Furthermore, the test incorporates magnitude requirements; increases or decreases in congressional activity must be fairly dramatic to trigger suspicions of interference. These factors should be enough to prevent strategic posturing since the introduction of a bill imposes at least some opportunity cost on the member who introduces it and on the institution as a whole; that same member and then the institution must forego work on different—and potentially more important—issues in order to introduce, for example, a tobacco bill.

Of course, a doctrine of non-interference would not be error-proof. Judges might find connections between executive and legislative activity that are purely coincidental, and they might fail to perceive genuine congressional reactions to executive interference. Nevertheless, the difference between an interfering enactment and a non-interfering enactment, particularly given the four factors outlined above, is more discernible than the difference between a "major" enactment and a "minor" enactment, a "jurisdictional" decision and a "non-jurisdictional" decision, or an "excessive" delegation and a "reasonable" delegation. It is also at least as easy to perceive as the excessive politicization of executive decision-making that might justify the *Massachusetts* rule.

And, ultimately, the non-interference principle is valuable enough to justify even an imperfect judicial doctrine.

VI. CONCLUSION

Although *Chevron* empowers the executive branch to "say what the law is,"[184] it does not bestow exclusive policymaking authority in administrative agencies. Congress, of course, retains the power to legislate, even in those regulatory regimes that it has entrusted partially or fully to the executive. *Chevron*, thus, enshrines a system of overlapping policymaking authority. In any such system, there is substantial risk that competing institutions will interfere with each other's work, and in any such system, there must be some rule for choosing between competing institutions.

In the *Chevron* context, courts should vacate interfering agency interpretations, not because they are unlawful, but simply because they raise overall lawmaking costs by forcing Congress to rethink and reformulate a regulatory strategy in which it has already invested substantial resources. Judicial invalidation of meddlesome administrative actions, thus, is necessary in individual cases to restore a status quo ante so that congressional bargaining can pick up where it left off, and a non-interference rule would be systemically beneficial if it created a disincentive for administrative agencies to enter regulatory domains in which Congress is already acting.

Overall, the non-interference understanding of the "major questions" cases is not just descriptively accurate; it creates a discrete exception to *Chevron* deference that is both theoretically and instrumentally justified. Although the bare majorness, nonaggrandizement, and nondelegation accounts fail to justify the "major questions" exception, the exception should nevertheless be reincarnated—and *Massachusetts* should nevertheless be killed. They rule is necessary as a doctrine of non-interference.

[184] Sunstein, *supra* note 97.