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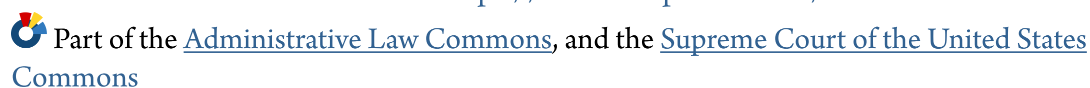

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KING'S DOMAIN

*Mila Sohoni**

In King v. Burwell*, the Supreme Court called the tax-credit provision of the Affordable Care Act ambiguous—but then invoked the major questions exception to* Chevron *deference and proceeded to resolve the provision's meaning for itself. Litigants and commentators quickly recognized that* King *had the potential to destabilize* Chevron*. If* King *exempts from* Chevron *deference anything that is "major," then* Chevron*'s significance will necessarily be diminished, as agencies will only enjoy deference on their answers to questions of "minor" import; the major questions exception may swallow* Chevron*'s rule.*

This Essay, prepared for a symposium held by the Notre Dame Law Review*, traces* King*'s domain and shows how it leaves untouched much of* Chevron*'s domain.* King *was correctly decided in the particular context in which it arose—the context in which an agency was interpreting an ambiguous statute to authorize broad-scale spending by the federal government. De novo review in this domain finds support in cases both old and new; it accords with constitutional values; and it need not spill over to other types of administrative law disputes. Courts can thus comfortably give* King *its due force within the domain it addressed. By the same token, however, courts should refrain from applying* King *beyond that domain, to block judicial deference to regulatory agency action that does not involve the generation of large amounts of federal spending.* King *and* Chevron *currently seem at war, but they can exist in détente. The federal courts should preserve this détente as Congress deliberates on the questions of fundamental regulatory reform currently pending before it.*

Introduction

The Supreme Court's decision in *King v. Burwell*[1] was "breathtakingly important."[2] The plaintiffs in that suit argued that the IRS incorrectly interpreted the Affordable Care Act to authorize the payment of refundable tax credits on a health insurance exchange established by the federal govern-

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* Mila Sohoni, Professor of Law, University of San Diego School of Law. For helpful comments and conversations on this Essay or its earlier incarnations, many thanks to Sam Bagenstos, Nick Bagley, Chris Egleson, Andy Grewal, Kristin Hickman, Gillian Metzger, Zach Price, Richard Re, Miriam Seifter, and Asher Steinberg. I am also grateful to the symposium organizers and student editors of the *Notre Dame Law Review*, and to the other symposium participants.

1 135 S. Ct. 2480 (2015).

2 John F. Manning, Essay, *Without the Pretense of Legislative Intent*, 130 Harv. L. Rev. 2397, 2397 (2017).

ment, although the statute made those credits available only on an exchange "established by the State."[3] The Supreme Court rejected this challenge.

The practical consequence of the Court's decision for health care reform was obvious: *King* let the IRS pay tax credits on the federal health insurance exchange, and so sustained a central part of the ACA's insurance market reforms by allowing individuals to purchase federally subsidized health insurance plans. *King* thus preserved the substantive result achieved by the agency action at issue in that case. But the *method* the Court used to reach this result was unexpected. Instead of deferring to the agency, the Court—by invoking the "major questions" exception to *Chevron* deference[4]—proceeded to resolve the statute's meaning for itself.

King is a uniquely important major questions case. Earlier decisions applying the major questions exception held that Congress had resolved the major question in a way that foreclosed the agency's reading of the statute.[5] The other major questions cases are therefore "just" pure statutory interpretation cases in that they held that the statute did not authorize the result the agency sought. In *King*, however, the statute did *not* foreclose the agency's reading of the statute; indeed, the *King* Court ultimately concluded that the statute "compel[led]" the result the agency wanted to reach.[6] *King* limited Congress's power to delegate *to the agency* the authority to read the statute a particular way, while reserving *to the Court* the power to read the statute in exactly the same way. Because of this Step Zero holding,[7] *King*—and only

3 *King*, 135 S. Ct. at 2488.

4 *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 231–47 (2006).

5 *See* Kent Barnett & Christopher J. Walker, Response, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 150 (2017); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 787–96 (2017); Sunstein, *supra* note 4, at 243 (arguing that *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994), and *FDA v. Brown & Williamson*, 529 U.S. 120 (2000), are Step One cases). Commentators have disagreed on whether *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), is a Step One or a Step Two case. *Compare* Coenen & Davis, *supra*, at 790 (describing *UARG*), *and* Barnett & Walker, *supra*, at 150, *with* Asher Steinberg, *Another Addition to the* Chevron *Anticanon: Judge Kavanaugh on the "Major Rules" Doctrine*, THE NARROWEST GROUNDS (May 7, 2017, 8:44 PM) http://narrowestgrounds.blogspot.com/2017/05/another-addition-to-chevron-anticanon.html. For my purposes in this Essay, the important point is that *UARG* is not a Step Zero case.

6 *King*, 135 S. Ct. at 2492–93 ("Here, the statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid.").

7 For a novel reconceptualization of *King*'s location in the *Chevron* analysis, see Cary Coglianese, *Foreword:* Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1374 (2017) (arguing that *King* is not a Step Zero case); *see id.* at 1357 n.104 ("The [*King*] Court concluded that the statute was ambiguous at Step 1 but that it could not reach Step 2 because of an Interstitial Step."); *id.* at 1361 (locating the major questions inquiry at "Step 1.2" of the decision tree).

King[8]—is a case that is not just about proper statutory interpretation, but also about nondelegation itself.

King's use of the major questions exception has provoked a great deal of commentary, much of it negative.[9] A growing body of scholarship has criticized the major questions exception on a variety of scores—for its uncertain contours,[10] its susceptibility to judicial manipulation,[11] and its capacity to corrode the powers of agencies.[12] Because the major questions exception is flawed, and because *King* appeared to broaden and entrench the major questions exception, it seems to follow that *King* committed a dangerous blunder—or so contend many of *King*'s critics.

To some extent, these worries have been ratified. Litigants have leveraged *King*'s major questions holding in "a number of high-profile challenges to federal regulations."[13] And each case that relies upon *King*'s major questions exception threatens to gradually chip away at *Chevron*'s domain.[14] If *King* exempts from *Chevron* anything that is "major," then *Chevron*'s significance will necessarily shrink, as agencies will only enjoy deference on their answers to questions of "minor" import. *Chevron* and *King* are locked in a (Step) zero-sum game.

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8 In *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013), the Court declined to recognize an exception at Step Zero for jurisdictional questions, notwithstanding how "big" and "important" such questions might be. *See* Coenen & Davis, *supra* note 5, at 791. In *Gonzales v. Oregon*, 546 U.S. 243 (2006), the Court seemed to use the major questions exception at Step Zero, but it treated it as just one of a multitude of considerations that barred the conclusion that Congress had delegated interpretive authority to the agency. *See* Barnett & Walker, *supra* note 5, at 150 n.14; Coenen & Davis, *supra* note 5, at 794 n.80. *King* thus stands as the sole case in which the major questions exception alone drove a Step Zero determination not to defer to the agency.

9 Barnett & Walker, *supra* note 5, at 153 ("Scholars have not treated the Court's application of the major questions doctrine to step zero in *King v. Burwell* kindly . . . .").

10 *See, e.g.*, Cass R. Sunstein, Essay, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2606 (2006) ("To say the least, no simple line separates minor or interstitial from major questions. . . . In any case, expertise and accountability, the linchpins of *Chevron*'s legal fiction, are highly relevant to the resolution of major questions. Contrary to Justice Breyer's suggestion, there is no reason to think that Congress would want courts, rather than agencies, to resolve major questions.").

11 *See generally* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933 (2017).

12 *See, e.g.*, Blake Emerson, *Administrative Answers to "Major Questions": A Progressive Theory of Agency Statutory Interpretation*, 102 MINN. L. REV. (forthcoming 2018); *cf.* Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 PEPP. L. REV. 33, 40 (noting that the application of the major questions doctrine at Step Zero or Step One—as opposed to Step Two—has the benefit of "foreclos[ing] a subsequent presidential administration from reinterpreting the statute via regulation").

13 Christopher J. Walker, *Toward a Context-Specific* Chevron *Deference*, 81 MO. L. REV. 1095, 1102 (2016); *see* Coenen & Davis, *supra* note 5, at 796 ("There is a growing stack of briefs and motions in the lower courts arguing that *King* has changed the interpretive landscape by disallowing *Chevron* deference in cases that otherwise would fall firmly within *Chevron*'s domain.").

14 *See* Coenen & Davis, *supra* note 5, at 799 ("Precisely because *King* broke new ground, it casts uncertainty over the scope of *Chevron*'s domain.").

This Essay reconciles *Chevron* and *King* by tracing the boundaries of what we might think of as "*King*'s domain."[15] *King* arose in a specific and rather unusual context: it was a case in which an agency interpreted ambiguous statutory authority to create federal spending without clear congressional authorization. The *King* Court's choice not to invoke *Chevron* in that context is consistent with caselaw concerning appropriations and spending.[16] *King*'s eschewal of *Chevron* deference at Step Zero should be understood to be confined to this domain rather than as undercutting deference to major regulatory activity that does *not* trigger spending by the federal government. Put another way, *Chevron* and *King* are in détente, rather than in conflict. And, for reasons more fully discussed below, courts should maintain that détente as Congress decides on the proposals for fundamental regulatory reform currently pending before it.

I. *KING*'S ELEPHANT

To understand *King*, it is necessary to review briefly the context in which it arose: in litigation concerning the Affordable Care Act (ACA). The ACA was intended to expand access to affordable health insurance to millions of Americans. To secure that aim, the ACA created a complex and interlocking scheme of subsidies and mandates. "The subsidies took various forms and flowed to different recipients. For insurers, there were cost-sharing reduction payments, risk-adjustment payments, reinsurance payments, and risk-corridor payments. For individuals, there were premium tax credits."[17] By creating these subsidies, Congress "enabled insurers to offer plans at affordable prices," and "enabled consumers to purchase those affordably priced plans."[18]

The difficulty was that the rushed and unusual circumstances of the ACA's passage left several problems in the statutory text.[19] The challengers in *King* focused on one of these problems: the provisions that dealt with refundable tax credits. The ACA authorized the provision of such tax credits

15 *Cf.* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001).

16 I have argued elsewhere that administrative law's ordinary justifications for deferring to agencies do not translate to the domain in which agencies are relying on interpretations of ambiguous statutory authority to trigger large-scale spending by the federal government to secure certain economic rights. *See* Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1701–24 (2017) (arguing that several factors—including the relative unlikelihood of judicial review; the increased possibility of entrenchment; and heightened concerns over the absence of agency expertise, democratic accountability, and transparency—distinguish this form of executive branch policymaking from executive branch regulatory policymaking). My concern here is different: to examine *King*'s relationship to *Chevron* and to set forth how they can be reconciled.

17 *Id.* at 1687.

18 *Id.*

19 *See* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 63 (2015); Manning, *supra* note 2, at 2399 n.12.

for purchases of plans on "an Exchange established by [a] State."[20] The IRS, however, regarded the provision as authorizing it to make tax credits available to purchasers on the federal exchange—Healthcare.gov.[21] If the Agency's determination were rejected and the challengers were to prevail, the consequences would be lethal for the ACA: the insurance markets in over thirty states would collapse because federal money could no longer flow to purchasers of plans in those states.[22]

Ultimately, the government won *King*, with a six-Justice majority holding that the ACA authorized the provision of tax credits on both the federal and state exchanges.[23] For health care reform, the consequences were clear: the ACA's insurance market reforms would survive to fight another day. But for administrative law, the consequences of the Court's opinion were more difficult to parse. The *King* Court rejected the argument that the IRS was entitled to *Chevron* deference, "brushing the case aside like a slightly annoying but unthreatening bug."[24] This startled many observers, particularly because *King* did *not* hold that the ACA was clear or unambiguous, which is the usual reason courts decline to apply *Chevron*.[25] To the contrary, the Court stated that the statutory provision concerning tax credits *was* ambiguous,[26] yet nonetheless declined to defer under *Chevron*. "This is not a case for the IRS," the Court reasoned; "[i]t is instead our task to determine the correct reading of Section 36B."[27]

On the question of *why* the IRS was not entitled to resolve this statutory ambiguity, *King* offered a single, dense paragraph. First, the Court noted, the tax credits are among the ACA's "key reforms."[28] Second, the Court pointed out that the tax credits "involv[e] billions of dollars in spending each year and affect[ ] the price of health insurance for millions of people," making the availability of those tax credits "a question of deep 'economic and

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20 King v. Burwell, 135 S. Ct. 2480, 2487 (2015) (quoting 42 U.S.C. § 18031(f)(3)(A) (2012)).

21 *See id.*

22 *See id.* at 2493–94.

23 *Id.* at 2496.

24 Michael Herz, Essay, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1868 (2015).

25 For a list of other offered rationales that the Court did not use, see Jonathan H. Adler & Michael F. Cannon, King v. Burwell *and the Triumph of Selective Contextualism*, 2014–2015 CATO SUP. CT. REV. 35, 50–51. Although it was evident at oral argument that certain federalism arguments had caught the Justices' eyes, the Court also eschewed reliance on federalism concerns. *Id.* at 51–52. *See generally* Mila Sohoni, Essay, *The Problem with "Coercion Aversion": Novel Questions and the Avoidance Canon*, 32 YALE J. ON REG. ONLINE 1 (2015) (urging the Court not to decide *King* by application of the constitutional avoidance canon to avoid the novel federalism problem asserted to have been created by the challengers' reading of the statute).

26 *King*, 135 S. Ct. at 2491 ("The upshot of all this is that the phrase 'an Exchange established by the State under [42 U.S.C. § 18031]' is properly viewed as ambiguous." (alteration in original)).

27 *Id.* at 2489.

28 *Id.*

political significance.'"[29] Third, the Court stressed that the agency claiming the delegated authority to decide the question was "the *IRS*," an agency that "has no expertise in crafting health insurance policy of this sort."[30] *King*, in short, offered a "grab bag of reasons"[31] for its refusal to defer.

Clearly, the most important element of the "grab bag" was the Court's invocation of *Brown & Williamson*'s language on questions of "deep 'economic and political significance.'"[32] The *Brown & Williamson* case is now the canonical cite for the "major questions exception" to *Chevron*—the idea that Congress does not delegate authority to answer questions of major economic and political significance implicitly, but instead does so explicitly. As the Court elsewhere phrased it, Congress does not "hide elephants in mouseholes."[33]

This "elephants in mouseholes" element of *King* has caused some consternation. Several perceive in this opinion the spreading symptoms of an incipient across-the-board pushback against the very foundation of *Chevron* deference[34]—perhaps an effort by Chief Justice Roberts to establish as controlling doctrine the principles that underpinned his dissenting opinion in *City of Arlington*.[35] Commentators have worried that *King* augurs that the Court will deprive agencies of authority to resolve precisely the kinds of major questions that agencies are best equipped to resolve[36]—say, the regulation of genetically modified foods, cholesterol-lowering drugs, air pollution, or workplace safety.[37] Indeed, Michael Coenen and Seth Davis contend that the major questions exception as enunciated in *King* is so potentially disruptive to administrative law doctrine that the exception should be applied *only* by the Supreme Court, not by other federal courts lower in the judicial hierarchy.[38]

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29 *Id.*

30 *Id.*

31 Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2206 (2016).

32 *King*, 135 S. Ct. at 2488–89 ("[*Chevron*] is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000))).

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

34 *See* Steve R. Johnson, *The Rise and Fall of* Chevron *in Tax: From the Early Days to* King *and Beyond*, 2015 PEPP. L. REV. 19; Leandra Lederman & Joseph C. Dugan, Essay, King v. Burwell*: What Does It Portend for* Chevron*'s Domain?*, 2015 PEPP. L. REV. 72.

35 *See* Walker, *supra* note 13.

36 Coenen & Davis, *supra* note 5, at 796 ("Unless Congress clearly states its preference for agency resolution, [King] will be understood to have ousted agencies from their Chevron role of resolving statutory ambiguity whenever that ambiguity presents a 'major' question.").

37 Sunstein, *supra* note 4, at 232–33.

38 *See* Coenen & Davis, *supra* note 5, at 830; *cf.* Barnett & Walker, *supra* note 5, at 159–62 (responding to Coenen and Davis by stressing the value of permitting lower courts to "percolat[e]" the major questions exception).

All this anxiety has been augmented considerably by the *King* opinion's opacity on *why* the major questions exception applied in that case—and hence its potential for acting as ammunition in future challenges to consequential agency action. As Lisa Heinzerling has pointed out, there is no "general presumption that Congress speaks clearly when it delegates big questions to agencies; many prior cases expose the factual inaccuracy of such a presumption."[39] *King* seemed to "carv[e] out a category of cases as to which it simply will not tolerate ambiguity,"[40] but it is difficult to decipher what exactly falls into that critical "category of cases." Does the category have any rule-like boundaries capable of generalization in future cases?[41] Or, alternatively, was the *King* Court simply applying "an infinitely flexible doctrinal escape-hatch [from] *Chevron*,"[42] an elastic loophole that threatens to become "tautological" because—as Abigail Moncrieff has argued—"pretty much anything Congress legislates could satisfy a standard of 'economic and political significance' "?[43]

I think that *King* does have meaningful boundaries.[44] Not all "elephants in mouseholes" are alike. Some "elephants"—in fact, most of them—involve regulation of private parties' conduct; much rarer are "elephants" that trigger spending by the government. *King*'s elephant was of this latter type. In *King*, the authority claimed by the Agency was the authority to answer a question in a way that would dictate billions of dollars of future spending by the

39 Heinzerling, *supra* note 11, at 1959; *see also* Sunstein, *supra* note 4, at 232 (noting that "*Chevron* itself" was a case that "hardly involved an interstitial question").

40 Heinzerling, *supra* note 11, at 1959.

41 *See id.* at 1956 ("[*King*'s] interpretive principle . . . can be stated as follows: when an agency charged with administering an ambiguous statutory provision answers a question of great economic and political significance, the question is central to the underlying statutory regime, and the Court believes the agency is not an expert in the matter, the Court may 'hesitate' to apply the *Chevron* framework at all in determining statutory meaning."); *id.* ("Note the complexity of this interpretive principle, with its five different features: ambiguity in the statute, economic and political significance, centrality to the statutory regime, the interpreting agency's status as an expert in the field, and complete withdrawal of the *Chevron* framework."); *see also* Kristin E. Hickman, *The (Perhaps) Unintended Consequence of* King v. Burwell, 2015 PEPP. L. REV. 56, 64 ("Combined with *Brown & Williamson Tobacco* itself, one can envision *King* as launching a new extraordinary cases exception from *Chevron*'s scope that considers whether the question at issue (1) is central or interstitial to the statutory scheme, (2) is economically and politically significant, and (3) implicates the agency's core expertise.").

42 Abigail R. Moncrieff, King, Chevron, *and the Age of Textualism*, 95 B.U. L. REV. ANNEX 1, 4 (2015).

43 *Id.* at 7.

44 To my knowledge, the reading of *King* urged here has not been advanced elsewhere in the burgeoning literature on the case. In addition to sources already cited in preceding footnotes, other notable contributions include Kevin O. Leske, Essay, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479 (2016); Richard Primus, Essay, *The Cost of the Text*, 102 CORNELL L. REV. 1649, 1655–56 & n.20 (2017); Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355 (2016).

federal government.[45] *King*'s elephant created not an obligation to the federal government, or to another private party, but a financial obligation running *from* the federal government.[46] *King*'s elephant might thus be thought of as a "white elephant"—as fable has it, a type of elephant that entails especially great expense to maintain.

In this respect, *King* differs sharply from other major questions cases, which involved claims of agency regulatory authority, but *not* claims of agency authority over federal spending. Let us pause to review this herd of elephants and check them against *King*'s. *Brown & Williamson* concerned agency power to regulate tobacco products—the imposition of labeling obligations and marketing rules—but no financial consequences for the government budget.[47] *MCI Telecommunications Corp. v. AT&T* involved agency power to authorize companies not to file their tariffs—a rule that adjusted telecommunications companies' obligations, but that would not have generated any federal spending.[48] *Whitman* involved agency power to consider costs in setting air quality standards—i.e., the scope of agency power to impose regulatory burdens on polluters—but that elephant, too, involved obligations *to* the government and not spending *by* the government.[49] *Gonzales v. Oregon* concerned the Attorney General's authority to interpret the Controlled Substances Act to prohibit doctors from using regulated drugs to enable physician-assisted suicide;[50] the case implicated regulation of physician conduct, but not spending by the federal government. In short, none of these cases involved the particular type of elephant at issue in *King*—a regulation that would trigger a large amount of federal spending; there is not a white elephant in the lot.

The one partial outlier from this set is *Utility Air Regulatory Group v. EPA*,[51] which rejected the EPA's interpretation of its authority under the Clean Air Act to regulate greenhouse gas emissions from stationary sources. Tellingly, the *UARG* Court stated that "[t]he fact that EPA's greenhouse-gas-inclusive interpretation . . . would place plainly excessive demands on limited governmental resources is *alone* a good reason for rejecting it."[52] That the EPA's reading of the Clean Air Act entailed such "resource-intensive" and "significant" "procedural burdens on the permitting authority and [the]

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45 King v. Burwell, 135 S. Ct. 2480, 2489 (2015).

46 *See* Transcript of Oral Argument at 74, *King*, 135 S. Ct. 2480 (No. 14-114); Walker, *supra* note 13, at 1101 ("At oral argument, it was Justice Kennedy who seemed to raise the major questions point" noting that "[I]f it's ambiguous then we think of *Chevron*, . . . [b]ut it seems to me a drastic step for us to say that the Department of Internal Revenue and its director can make this call one way or the other when there are, what, billions of dollars of subsidies involved here? Hundreds of millions?" (alterations in original) (quoting Transcript of Oral Argument, *supra*, at 74)).

47 *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 127 (2000).

48 *See* 512 U.S. 218 (1994).

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

50 *See* 546 U.S. 243, 274 (2006).

51 134 S. Ct. 2427 (2014).

52 *Id.* at 2444 (emphasis added).

EPA" was "good reason" enough to reject that reading.[53] Only then did the *UARG* Court continue on to hold—citing, inter alia, *Brown & Williamson* and *MCI*—that the EPA's "interpretation is *also* unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[54] What is noteworthy here is that the *UARG* Court considered the "plainly excessive demands on limited governmental resources" generated by the agency interpretation as itself constituting *an independent ground* for withholding deference to the EPA's interpretation.[55] Like this underdiscussed aspect of *UARG*, *King* did not accord deference to an agency interpretation that placed "excessive demands on limited governmental resources"—in *King*, federal dollars.[56]

Although *King* did not invoke this body of precedent, *King*'s reasoning also finds support in a distinct line of statutory interpretation cases that address federal spending and Congress's power of the purse.[57] In 1922, Justice Holmes wrote that "[a] liability in any case is not to be imposed upon a government without clear words. . . . [A]nd where, as here, the liability would mount to great sums, only the plainest language could warrant a Court in taking it to be imposed."[58] In 1948, *United States v. Zazove*[59] adhered to that principle in considering whether a statute that authorized life insurance payments to servicemen's beneficiaries should be construed to create a greater financial liability on the government, as the respondent contended, or a lesser one, as specified by a Veterans Administration regulation.[60] The Court reasoned that "the statute is an expression of legislative intent rather than the embodiment of an agreement between Congress and the insured person" and that "[o]nly the intent of Congress, which in this case is the insurer, need be ascertained to fix the meaning of the statutory terms."[61] Because there was nothing in the statute to show that Congress intended for the United States to bear that "huge cost," the beneficiary of the policy lost:

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53 *Id.* at 2443–44.

54 *Id.* at 2444 (emphasis added).

55 *Id.*

56 *Id.*

57 A distinct line of doctrine addresses contexts in which courts order the government to make expenditures for constitutional reasons, such as when the underinclusiveness of a government benefits program violates the Equal Protection Clause. *See* Califano v. Westcott, 443 U.S. 76, 89–90 (1979); Rochester Pure Waters Dist. v. EPA, 960 F.2d 180, 184 (D.C. Cir. 1992).

58 Pine Hill Coal Co. v. United States, 259 U.S. 191, 196 (1922); *see also* United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1947) ("Thus there can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed."); Schellfeffer v. United States, 343 F.2d 936, 942 (Ct. Cl. 1965) (rejecting statutory interpretation that "would impose on the United States a very large financial burden").

59 334 U.S. 602 (1948).

60 *Id.* at 616–17.

61 *Id.* at 611.

> Congress nowhere specified that the United States would bear the huge cost of the enhanced liability that it would necessarily have anticipated had it impressed upon [the statute] the meaning that respondent finds there; and that striking omission is persuasive . . . that no generosity of this magnitude was contemplated.[62]

The government estoppel cases are also relevant here. In *Office of Personnel Management v. Richmond*,[63] the Court rejected the contention that a common-law principle of estoppel could succeed in forcing "a claim for payment of money from the Public Treasury contrary to a statutory appropriation,"[64] reasoning that "not a single case has upheld an estoppel claim against the Government for the payment of money."[65] In other words, even good faith executive branch misinterpretation of statutory authority that engenders reasonable detrimental reliance cannot force government spending.[66]

The D.C. Circuit has also policed the intersection between deference and spending without deferring to interpretations reached by agencies. In *Bell Atlantic Telephone Cos. v. FCC*, the D.C. Circuit declined to defer under *Chevron* to "agency action that creates a broad class of takings claims, compensable in the Court of Claims," because such deference would unacceptably "allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen."[67] In *U.S. Department of Navy v. FLRA*, the D.C. Circuit said that interpretations of appropriations statutes by agencies or by the Comptroller General are not entitled to deference; although the latter's view may be considered "to the extent it is persuasive, 'it is the court that has the last word.'"[68] Most recently, in *Bread for the City v. U.S. Department of Agriculture*, a unanimous panel rejected the challenger's more expensive reading of language in an appropriations law and instead endorsed the more natural—and less expensive—reading endorsed by the Department of Agriculture by relying on the court's own de novo interpretation of the statute.[69]

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62 *Id.* at 616–17.

63 496 U.S. 414 (1990).

64 *Id.* at 424.

65 *Id.* at 427. The *Richmond* Court did preserve the possibility that "some type of 'affirmative misconduct' might give rise to estoppel against the Government." *Id.* at 421.

66 *See id.* at 428.

67 Bell Atl. Tel. Cos. v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

68 U.S. Dep't of Navy v. Fed. Labor Relations Auth., 665 F.3d 1339, 1349 (D.C. Cir. 2012) (quoting Delta Data Sys. Corp. v. Webster, 744 F.2d 197, 202 (D.C. Cir. 1984)); *see also In re* Aiken County, 725 F.3d 255, 259–60 (D.C. Cir. 2013).

69 Bread for the City, Inc. v. U.S. Dep't of Agric., 872 F.3d 622 (D.C. Cir. 2017); *see also Bread for the City, Inc.*, 211 F. Supp. 3d at 335 ("While Congress may be regularly criticized for how it spends the taxpayers' funds, it is certainly not known, thank goodness, for miswriting statutes to obtusely authorize—if not mandate—the expenditure of hundreds of millions of unappropriated funds.").

There is a constitutionally inflected clear statement principle at work in these cases and others like them,[70] and it is a principle that sets *King* cleanly apart from the other major questions cases. While it is certainly true that "no simple line separates minor or interstitial from major questions,"[71] a simple line *does* separate cases where federal spending is triggered from cases where federal spending is not triggered. While it is certainly true that there is no "general presumption that Congress speaks clearly when it delegates big questions to agencies,"[72] there *is* a "general presumption" that when Congress intends to create financial liabilities upon the federal government it will speak clearly. The latter type of implicit delegation is thus different than the type of implicit delegation usually at issue in a *Chevron* case; they are two different breeds of elephant.

Of course, a pure clear statement rule of statutory interpretation concerning federal spending cannot explain *King* and, at first blush, may seem to run counter to *King*. Clear statement rules generally constrain judicial interpretation as well as agency interpretation. And the *King* Court, in the end, found that Congress *had* authorized the spending, even though reaching that conclusion took considerable spadework.[73] The Court was just not willing to reach the identical outcome by according *Chevron* deference to the agency.

This bivalent approach—allowing a federal court to find spending, but disallowing an agency from finding spending, based on identical statutory fodder—seems inconsistent in its treatment of courts and agencies, but its underlying logic makes sense. If statutes should not be read to impose "[a] liability . . . [of] great sums" on the federal government absent "clear words,"[74] then it is risky to accord agencies *Chevron* deference in their interpretations of statutes that only arguably or ambiguously create great financial

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70 Obviously, the constitutional principle at stake here is Congress's power of the purse. *See Bell Atl. Tel. Cos.*, 24 F.3d at 1445 ("Where administrative interpretation of a statute creates [an identifiable class of cases in which application of a statute would necessarily constitute a taking], use of a narrowing construction prevents executive encroachment on Congress's exclusive powers to raise revenue and to appropriate funds." (first citing U.S. CONST. art. I, § 8 ("The Congress shall have Power To lay and collect Taxes."); and then citing *id.* art. I, § 9 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."))); California v. Trump, 267 F. Supp. 3d 1119, 1132 (N.D. Cal. 2017) ("Looming over this whole discussion is the fact that the parties are disputing the meaning of an appropriations statute, not just any statute. . . . [T]he role of the Appropriations Clause in enforcing the constitutional separation of powers provides reason for caution in adopting a reading of an appropriations statute broader than the one most obviously provided by the text."); U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 73 (D.D.C. 2015) ("The political tug of war anticipated by the Constitution depends upon Article I, § 9, cl. 7 having some force; otherwise the purse strings would be cut.").

71 Sunstein, *supra* note 10, at 2606.

72 Heinzerling, *supra* note 11, at 1959.

73 *See* King v. Burwell, 135 S. Ct. 2480, 2492–96 (2015).

74 Pine Hill Coal Co. v. United States, 259 U.S. 191, 196 (1922) ("A liability in any case is not to be imposed upon a Government without clear words. . . . [A]nd where, as here,

liabilities for the federal government. An agency exercising discretion to choose between alternative permissible readings of ambiguous statutory text may opt for the reading that authorizes spending because the agency believes that good policy reasons exist to interpret the statute to authorize the spending.[75] When a court looks at the statute de novo, however, it allows the spending only if the court is persuaded that *Congress* decided the payment should be made,[76] because Congress is ultimately the institution that the Constitution entrusts with "absolute" authority over federal spending.[77] In the end, that is what the *King* Court did: after reviewing the ACA's overall text, structure, and purpose, the Court eventually determined that the statute "compel[led]" the conclusion that Congress *did* make tax credits available to purchasers on the federal exchange.[78]

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the liability would mount to great sums, only the plainest language could warrant a Court in taking it to be imposed.").

75 *See, e.g.*, U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 175, 181, 183, 186 (D.D.C. 2016) (rejecting the Secretaries' arguments for spending on cost-sharing reductions, which included, inter alia, arguments that were "contextual," based on "[s]tructure and design," "[u]nintended consequences," "nonsensical and undesirable results," and "contemporary understanding[s]"); *see also* Sunstein, *supra* note 10, at 2598 ("When statutes are ambiguous, a judgment about their meaning rests on no brooding omnipresence in the sky, but on assessments of both policy and principle. . . . So, at least, *Chevron* holds."); *id.* at 2610 ("*Chevron* is best taken as a vindication of the realist claim that resolution of statutory ambiguities often calls for judgments of policy and principle.").

76 I avoid using the locution of "intent" here, because—as Professor Victoria Nourse has pointed out—the "term 'legislative intent' is obscuring . . . . Intent is simply a constitutional heuristic used to remind judges that, in the end, it is not their decision, but Congress's." Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 76, 80–85 (2012) (explaining why "[i]n its best sense, 'legislative intent' is a message for *judges* about *judging*, not an accurate or even necessary description of Congress"). Courts, of course, routinely speak of congressional intent, including in the context of deciding whether federal money can properly be spent. *See, e.g.*, Rochester Pure Waters Dist. v. EPA, 960 F.2d 180, 184–85 (D.C. Cir. 1992) (noting that courts have exercised "equitable powers" to "give[ ] effect to congressional intent by permitting timely claimants to recover from funds that Congress set aside for that purpose," and distinguishing those cases from the situation in which Congress, "with full knowledge" of a pending claim, rescinds an appropriation). *King* was no exception. *See* Manning, *supra* note 2, at 2399–400 ("[*King*] represents a long tradition of the Court's taking a hard, even insoluble question and asserting that it has identified what Congress *intended* to do about that very question.").

77 *See* U.S. Dep't of Navy v. Fed. Labor Relations Auth., 665 F.3d 1339, 1348 (D.C. Cir. 2012) ("Congress's control over federal expenditures is 'absolute.'" (quoting *Rochester Pure Waters Dist.*, 960 F. 2d at 185)).

78 *King*, 135 S. Ct. at 2492–93 ("Here, the statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid."); *see also* Primus, *supra* note 44, at 1656 n.20 ("Given the statute overall, giving legal force to the plain meaning of section 1311 would have been unreasonable. . . . Considered as a whole, the ACA clearly points to the result sought by the government.").

One might take issue, as the *King* dissenters did,[79] with how the *King* Court ultimately read the ACA. More broadly, one might take issue with the idea that courts are able to accurately parse legislative purpose and statutory text, or one might doubt whether courts will carry out that task impartially, instead of just swapping in their own ideological preferences. Alternatively, without doubting judicial capacity or good faith, one may simply think that agencies have greater expertise and democratic accountability than courts for resolving statutory ambiguities,[80] including ambiguities that might trigger large amounts of federal spending.

All of these are reasonable objections that might be levied against the bivalent approach on display in *King*. I will mention only four points of particular relevance in this context. First, Congress legislates in light of existing precedent,[81] and given the long tradition of clear statement cases around spending, it is reasonable to presume that Congress legislates with awareness of the fact that implicit delegations as to spending will be treated differently by the judiciary than other kinds of implicit delegations. Second, in contrast to the mine-run of federal statutes with respect to which it does not express significant interpretive preferences, Congress has stated that appropriations statutes should be construed to authorize spending only when the statute "specifically" so states,[82] which lends support to the idea that agencies should not be able to leverage statutory ambiguities to trigger spending.[83] Third, given that appropriations laws are now the one type of law that Congress can be relied upon to enact, Congress can perhaps more readily correct judicial mistakes concerning the meaning of spending statutes than it can correct judicial mistakes about the meaning of regulatory statutes. Fourth—and this is offered more as a pragmatic point than as one of principle—undoing *King*'s allocation of interpretive authority over statutes that trigger spending will be an uphill battle. Though the *King* dissenters condemned the majority

79 *See King*, 135 S. Ct. at 2506 (Scalia, J., dissenting) ("Rather than rewriting the law under the pretense of interpreting it, the Court should have left it to Congress to decide what to do about the Act's limitation of tax credits to state Exchanges.").

80 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

81 *See* Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2299 n.88 (2006) ("The Court presumes that Congress enacts statutes against the backdrop of established rules of construction.").

82 31 U.S.C. § 1301(d) (2012) ("A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made.").

83 *Cf.* Manning, *supra* note 2, at 2432–33 ("*Congress* can provide a way out of the conceptual stalemate by specifying its own preferences about the way courts should read its handiwork. . . . Congress has the discretion, within a broad range, to specify the means by which it wishes the courts to decipher and carry into execution its commands.").

for misreading the ACA, all *nine* Justices agreed that the Court's standard of review should be de novo, not deferential.

In any event, setting normative questions aside, *King*'s significance seems to me apparent. The Court in *King* rejected a key simplifying assumption that animates *Chevron*: it refused to treat an implicit delegation of the power to commit large amounts of federal money as interchangeable with other implicit delegations. Instead, the Court ultimately had to conclude—and did conclude—that Congress authorized the spending on a de novo reading of the statute. In so holding, *King* carved out of *Chevron*'s domain agency interpretations of ambiguous statutory authority that cause large amounts of federal spending.

This, I argue, is *King*'s domain. But—and this is an important "but"—that is its *whole* domain. *King* does not entail that courts should apply the major questions exception at Step Zero to any and all regulatory schemes that leverage implicit delegations to impose major regulatory burdens upon private parties, even if those schemes create billions of dollars in *private* costs. Put another way, to keep *King* within its proper domain, future courts facing challenges to agency action ought to distinguish between (a) implicit delegations to agencies to regulate private conduct and (b) implicit delegations to agencies to commit the federal government to spend large amounts of money. And they ought to regard *King* as controlling only in the latter type of case—cases in which "Step Zero"[84] involves lots of the federal government's "zeroes." *King* need not be read as an across-the-board directive that courts should invoke Step Zero and sidestep *Chevron* deference whenever an administrative determination has "major" effects. Courts should give *King* the force it demands within the domain it addressed but refrain from treating the case as a reason for withholding *Chevron* deference to agency action that falls outside of *King*'s domain.

Understood in these terms, *King* would have limited effects on many administrative law cases that involve *Chevron*. Indeed, it would have limited effects on many administrative law cases involving federal spending. *King* left entirely untouched the cases that circumscribe judicial review in cases where Congress has clearly authorized agencies to spend money. Under *Lincoln v. Vigil*, where a statute makes a lump-sum appropriation to an agency to spend at its discretion, the Court will not interfere with—or even review—the agency's choice; there is no law to apply to such a choice.[85] Under *Citizens to*

84 *See generally* Merrill & Hickman, *supra* note 15, at 873; Sunstein, *supra* note 4.

85 *See* 508 U.S. 182, 192 (1993) ("The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."); *id.* at 193 ("[A]s long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives, § 701(a)(2) gives the courts no leave to intrude. '[T]o [that] extent,' the decision to allocate funds 'is committed to agency discretion by law.'" (alteration in original) (quoting 5 U.S.C. § 701(a))).

Preserve Overton Park, Inc. v. Volpe, when Congress appropriates money to an agency to spend if specified statutory criteria are met, the agency's decision is subject to review only for whether it considered those criteria and applied them in a manner that was not arbitrary and capricious—a form of review that is "searching and careful," but ultimately "narrow."[86] The lesson of *King* is implicated, I argue, only where the agency claims that a statute implicitly delegates to the agency the power to cause large amounts of federal money to be spent.

II. Détente and Deference

The reading of *King* just advanced splits it off from the other major questions cases. The other major questions cases did not involve federal spending, and they were not Step Zero holdings: they held that the relevant statute foreclosed what the agency wanted to accomplish.[87] *King*, in contrast, involved a statute that "compel[led]"[88] the result the agency wanted to reach anyway—the spending of billions of federal tax credits—but the Court at Step Zero refused to let the agency reach that result. If courts lump together *King* with the other major questions cases, and treat them *in pari passu* as Step Zero cases, the consequence will be to skip the other major questions cases forward—to Step Zero—and thereby unnecessarily erode *Chevron*'s domain.

To see this dynamic in action, consider a recent dissenting opinion from Judge Brett Kavanaugh in *United States Telecom Ass'n v. FCC* (*USTA*),[89] in which he described what he referred to as the "major rules doctrine." Judge Kavanaugh correctly noted that *King* "is somewhat different from the prototypical major rules cases because the agency in that particular rule was not seeking to regulate or de-regulate (as opposed to tax or subsidize) some major private activity."[90] Explaining that *King* "concerned the scope of government subsidies under the health care statute," Judge Kavanaugh treated *King* as standing for "the distinct proposition that *Chevron* deference may not apply when an agency interprets a major government benefits or appropriations provision of a statute."[91] But, despite splitting *King* off in this fashion, Judge Kavanaugh nonetheless described *King* as "appl[ying] a form of the

86 401 U.S. 402, 416 (1971) ("To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." (citations omitted)).

87 *See supra* text accompanying notes 5–8, 47–56.

88 *King*, 135 S. Ct. at 2492–93.

89 *See* 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc). For an insightful analysis, see Steinberg, *supra* note 5.

90 *USTA*, 855 F.3d at 421 n.2 (Kavanaugh, J., dissenting from the denial of rehearing en banc); *cf. id.* at 402–03 (Brown, J., dissenting from the denial of rehearing en banc).

91 *USTA*, 855 F.3d at 421 n.2 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

major rules doctrine."[92] He then summarized this (singular) "major rules doctrine" as follows: "If an agency wants to exercise expansive regulatory authority over some major social or economic activity . . . an *ambiguous* grant of statutory authority is not enough. Congress must *clearly* authorize an agency to take such a major regulatory action."[93]

Judge Kavanaugh's opinion illustrates the consequences for *Chevron* of lumping together *King* with the other major questions cases to produce a robust major questions exception that applies at Step Zero. Judge Sri Srinivasan's concurrence in denial of rehearing en banc noted that the statute did not foreclose the possibility that internet service was a telecommunications service; in *Brand X*, the Court had treated the Communications Act as not compelling the conclusion that internet service providers were telecommunications providers.[94] The ambiguity in the statute, Judge Srinivasan stated, was an ambiguity that *Brand X* "definitively" treated as delegated to the agency to resolve—even if the resultant decision "amounts to a major rule."[95] But by interposing the major questions exception at Step Zero, Judge Kavanaugh's opinion denies the possibility of such a delegation, reasoning instead that a finding of statutory ambiguity "cannot be the *source* of the FCC's authority to classify Internet service as a telecommunications service" and that "under the major rules doctrine, *Brand X*'s finding of statutory ambiguity is a *bar* to the FCC's authority to classify Internet service as a telecommunications service."[96] On his view, unless Congress "clearly authorize[s]" an agency to issue a major rule, the major rule is unlawful.[97] From the boundaries set by *Chevron*, Judge Kavanaugh carves a significant exception: "Under our system of separation of powers, an agency may act only pursuant to statutory authority and may not exceed that authority. For major rules, moreover, the agency must have clear congressional authorization."[98]

By thus shifting the burden of proof, Judge Kavanaugh's Step Zero conception of the major questions exception would have sizable consequences

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92 *Id.*

93 *Id.* at 421.

94 *See id.* at 384 (Srinivasan, J., concurring in the denial of rehearing en banc) ("The issue in *Brand X* was whether the Communications Act compelled the FCC to classify cable broadband ISPs as telecommunications providers subject to regulatory treatment as common carriers. The Court answered that question no.").

95 *Id.* at 385 ("If we assume that the FCC's decision to treat broadband ISPs as common carriers amounts to a major rule, the question then is whether the agency clearly has authority under the Act to make that choice. In *Brand X*, the Supreme Court definitively—and authoritatively, for our purposes as an inferior court—answered that question yes.").

96 *Id.* at 425 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

97 *Id.* at 426 ("*Brand X*'s finding of ambiguity by definition means that Congress has not clearly authorized the FCC to issue the net neutrality rule. And that means that the net neutrality rule is unlawful under the major rules doctrine.").

98 *Id.* (emphasis omitted); *compare id.*, *with* City of Arlington v. FCC, 569 U.S. 290, 297 (2013) ("[T]he question a court faces when confronted with an agency's interpretation of a statute is always, simply, whether the agency has stayed within the bounds of its statutory authority." (emphasis omitted)).

upon deference doctrine. The approach laid out in his opinion would have done more than just invalidate the FCC's net neutrality rule[99]—it would nullify *Chevron* whenever a statute contains an ambiguity and a court regards an agency's regulatory action premised on that ambiguity as "major."[100] On the critical question of what counts as "major" to Judge Kavanaugh, it seems noteworthy that Judge Kavanaugh has acquired a small posse of elephants already.[101] This fact does not seem accidental in light of doubts he has expressed concerning the wisdom of *Chevron*.[102] In a 2016 book review in the *Harvard Law Review*, Judge Kavanaugh identified "two significant questions" about the relationship between *King* and *Chevron*: "First, how major must the questions be for *Chevron* not to apply? Second, if *Chevron* is inappropriate for cases involving major questions, why is it still appropriate for

99 Subsequently, the FCC has acted to undo net neutrality. *See* In the Matter of Restoring Internet Freedom, FCC, WC Docket No. 17-108 (Jan. 4, 2018).

100 Over a decade ago, Cass Sunstein anticipated and criticized Judge Kavanaugh's version of the major questions exception, arguing that reading *MCI* and *Brown & Williamson* to apply at Step Zero rather than Step One would threaten *Chevron* and disregard the "linchpins" of *Chevron* by treating agency expertise and accountability as irrelevant to the resolution of major questions. *See* Sunstein, *supra* note 4, at 243. As noted, I have argued that particular reasons exist to question the ordinary assumptions of agency expertise and accountability when the executive branch interprets ambiguous statutory authority to trigger the spending of money on broad-scale economic entitlements. *See* Sohoni, *supra* note 16. Those reasons apply to a subset of the policymaking within *King*'s domain; they do not extend beyond that domain to the realm of general regulatory policymaking.

101 In his *USTA* dissent, Judge Kavanaugh noted that the D.C. Circuit "has also employed the major rules doctrine," citing two of his own earlier opinions for that court. *USTA*, 855 F.3d at 421 n.3 (Kavanaugh, J., dissenting from the denial of rehearing en banc) (first citing District of Columbia v. Dep't of Labor, 819 F.3d 444 (D.C. Cir. 2016); and then citing Loving v. IRS, 724 F.3d 1013 (D.C. Cir. 2014)). In neither did the D.C. Circuit apply the major questions at Step Zero. *See District of Columbia*, 819 F.3d at 454 ("To use the administrative law vernacular, the Department's interpretation fails *Chevron* step one because it is foreclosed by the statute. In any event, the Department's interpretation would likewise fail *Chevron* step two because it is unreasonable in light of the statute's text, structure, and purpose."); *Loving*, 742 F.3d at 1022 ("Put in *Chevron* parlance, the IRS's interpretation fails at *Chevron* step 1 because it is foreclosed by the statute. In any event, the IRS's interpretation would also fail at *Chevron* step 2 because it is unreasonable in light of the statute's text, history, structure, and con-text."). *Loving* invoked language from *Brown & Williamson* as the fifth of six considerations relevant to the court's Step One holding. *See id.* at 1021. In *District of Columbia*, the invocation of *Brown & Williamson* occurred in dictum that "buttresse[d]" a conclusion reached on two other rationales. *District of Columbia*, 819 F.3d at 446. Neither of these two cases endorsed anything like the Step Zero major rules exception embraced by Judge Kavanaugh's *USTA* opinion.

102 *See* Judge Brett Kavanaugh, U.S. Court of Appeals for the D.C. Circuit, Keynote Address at the Center for the Study of Administrative State: Justice Scalia and Deference (June 2, 2016), https://vimeo.com/169758593?utm_source=email&utm_medium=vimeo-cliptranscode-201504&utm_campaign=28749.

cases involving less major but still important questions?"[103] By incrementally lowering the bar for what constitutes a "major" case—thus answering the first question—Judge Kavanaugh implicitly answers the second question: that *Chevron* is *not* appropriate in any case of any importance.

Indeed, in recent months Judge Kavanaugh flirted again with the major questions exception in a case involving the FCC's authority concerning the languages that broadcasters must use to broadcast emergency alerts.[104] The FCC has not required multilingual emergency broadcasts, and the petitioners argued that the Communications Act's general "statement of purpose" provision required the agency to adopt such a rule.[105] Judge Kavanaugh's opinion first noted that the statute did not *require* the FCC to order multilingual emergency broadcasts.[106] But then—citing *Brown & Williamson*—he went on to state that "[i]f Congress intended to require multi-lingual communications in general, and multi-lingual emergency alerts in particular, we would expect Congress to have spoken far more clearly than it has done in this general statement of policy."[107] He also stated that because no litigant had challenged whether the FCC had the authority to require multilingual emergency alerts by broadcasters, the court would "therefore assume without deciding that the FCC possesses such authority."[108] If the FCC does ever get around to issuing such a rule,[109] this opinion thus leaves the door invitingly open for a broadcaster to claim that because Congress has not "spoken far more clearly" about "requir[ing] . . . multi-lingual emergency alerts in particular," the FCC lacks the authority to address the issue.[110]

It is hard to think of this implication of the opinion while keeping an entirely straight face. But the joke is on *Chevron.* If Congress's failure to speak to "multi-lingual emergency alerts in particular"[111] is the sort of statutory silence that can bring the major questions exception into play—as Judge

103 Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2152 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

104 Multicultural Media, Telecom & Internet Council v. FCC, 873 F.3d 932 (D.C. Cir. 2017).

105 *Id.* at 935.

106 *See id.* at 936.

107 *Id.*

108 *Id.* at 936 n.1.

109 This seems unlikely, not least because Judge Kavanaugh also invited the agency to reject imposing any requirement on broadcasters. *Id.* at 939 ("Given all of the legal and factual circumstances surrounding this issue at the present time, it likely would be reasonable for the FCC to flatly say that the alert originators (the federal, state, and local government entities) are the parties responsible for deciding whether and when to issue emergency alerts in languages in addition to English, and to leave the issue with those government entities.").

110 *Id.* at 936; *cf.* United States Telecom Ass'n v. FCC, 855 F.3d 381, 426 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) ("Under our system of separation of powers, an agency may act only pursuant to statutory authority and may not exceed that authority. For major rules, moreover, the agency must have *clear* congressional authorization.").

111 *Multicultural Media*, 873 F.3d at 936.

Kavanaugh's opinion appears to assume—then what is left of *Chevron*'s domain?

I think it would be unfortunate if more federal judges were to endorse (or acquiesce in)[112] such efforts to expand the outer ambits and nether limits of the major questions exception. The reasons why, to my mind, have to do both with the nature of the judicial function in articulating deference doctrine and with the particular moment in which we today find ourselves—a moment of radical disagreement concerning the administrative state's powers and legitimacy.[113]

Begin with the judicial role in formulating and refining rules of deference. *Chevron* is not a constitutionally mandated rule.[114] Although the regime of *Chevron* deference may be constitutionally motivated[115] and serve important democratic values,[116] the *Chevron* framework is ultimately a species of federal common law.[117] To be sure, it is a species of common law upon which Congress has presumably come to rely.[118] But at bottom, *Chevron* is purely common law in the sense that Congress can override it if it chooses.[119] Indeed, when Congress has wished to displace *Chevron*, it has legislated around it expressly in particular statutes.[120]

Today, Congress is considering various bills that could restrict agencies from promulgating major rules and cut back on or get rid of judicial deference altogether.[121] Other scholars have insightfully described those propos-

112 In *Multicultural Media*, Judge Kavanaugh's oblique invocation of the major questions exception appeared in dictum, but it was dictum by a unanimous panel. The partial concurrence and dissent by Judge Millett did not take issue with this portion of the panel's opinion. *See id.* at 940 (Millett, J., concurring in part and dissenting in part).

113 *See* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2–33 (2017).

114 Goldsmith & Manning, *supra* note 81, at 2299 ("[T]he Court has never suggested that the *Chevron* rule is constitutionally required.").

115 *See id.* (referring to *Chevron* as a "constitutionally inspired" drafting presumption that helps to promote the "background premises of constitutional democracy").

116 *See, e.g.*, Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 275 (2011) (justifying *Chevron* as a self-imposed constraint or resistance norm that makes it more difficult for a court to "dictate[ ] outcomes in policy-laden decisions").

117 Herz, *supra* note 24, at 1877 ("*Chevron*'s command to accept any reasonable agency interpretation is *in practice* a form of self-regulation. The Court made it up and imposed it on itself; it is administrative common law."); Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1300 (2012).

118 *But see* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 785 (2010) ("No one rationally orders their affairs in reliance on *Chevron* deference.").

119 Sunstein, *supra* note 10, at 2589 ("If Congress wanted to repudiate *Chevron*, it could do precisely that."); *see* Mila Sohoni, *A Bureaucracy—If You Can Keep It*, 131 HARV. L. REV. FORUM 13, 24–25 (2017).

120 *See* Kent Barnett, *Codifying* Chevmore, 90 N.Y.U. L. REV. 1, 4 (2015).

121 *See* Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599 (2018); Metzger, *supra* note 113.

als and explored their potential consequences.[122] My aim here is not to evaluate these proposals, but rather to stress a different point—the implications of those ongoing legislative efforts for the judicial role. As Congress weighs its options for transformative administrative law reform and reaches toward a resolution of these questions, it is sensible for federal courts—which, to repeat, are here acting as common-law courts—to maintain stability in the law on judicial deference as Congress deliberates. It is not as though Congress is unaware of the arguments for and against reforming or rejecting *Chevron* deference to administrative agencies,[123] or deaf to the constituencies that would favor or oppose such a possibly momentous step. It is not as though Congress has no responsibility for administrative procedure or no capacity to alter the standards of judicial review of agency action. In cases where the courts could have developed federal common law in a particular direction, but Congress was poised to consider the subject, the federal courts have time and again stayed their hand and awaited action from Congress.[124]

Maintaining the status quo is today equally appropriate.[125] The courts should preserve the détente between *Chevron* and *King* here outlined—a

122 *See* Metzger, *supra* note 111; *see also* Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075 (2016).

123 *See, e.g.*, Beermann, *supra* note 118, at 802.

124 *See, e.g.*, Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 759–60 (1998) ("Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation. In both fields, Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area. . . . In light of these concerns, we decline to revisit our case law and choose to defer to Congress." (citations omitted)); FDIC v. Meyer, 510 U.S. 471, 486 n.11 (1994) (declining to recognize a *Bivens* remedy against federal agencies in part because "Congress has considered several proposals that would have created a *Bivens*-type remedy directly against the Federal Government"); United States v. Standard Oil Co. of Cal., 332 U.S. 301, 316 (1947) (declining to recognize new tort rights of contribution because "exercise of judicial power to establish the new liability . . . would be intruding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action"); *id.* at 315–16 ("When Congress has thought it necessary to take steps to prevent interference with federal funds, property or relations, it has taken positive action to that end. We think it would have done so here, if that had been its desire. This it still may do, if or when it so wishes." (footnote omitted)). If *Chevron* is now governing "statutory precedent" about the APA, the case is even stronger for courts to maintain stability in their practices until Congress acts. *See* Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 271–73 (1979) ("[W]e are mindful that here we deal with an interface of statutory and judge-made law. . . . By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances." (footnote omitted)).

125 I have argued elsewhere that administrative law has at times seemed to evolve in fundamental ways even in the absence of focused deliberation by Congress on whether it *ought* to change in those ways. Contrasting the role played by courts in constitutional law and administrative law, I noted that there is little reason to think that in articulating watershed administrative law doctrines, the courts are channeling or responding to public val-

détente under which the other major questions cases are applied, if relevant, at Step One (or Two), to determine if the agency is acting beyond the bounds of its statutory authority, while *King*, at Step Zero, is kept confined to spending-related cases—as Congress decides whether to jettison or preserve the extant law on judicial deference to administrative agencies. While I am not persuaded that the inferior federal courts can properly refuse to apply the major questions exception as a categorical matter,[126] I do think that all federal courts should handle that exception carefully by keeping *King* within the bailiwick it squarely addressed. The courts can continue their "percolation"[127] of these issues while still remaining mindful of the special aspects that distinguish *King* from the other major questions cases and cordon it within its own domain.

Conclusion

Agency action that triggers large-scale government spending on the basis of ambiguous statutory authority falls outside *Chevron*'s domain; the Supreme Court held no more than that in *King*. But the terse reasoning of *King* has prompted some judges and litigants to regard it as authority for invoking the major questions exception at Step Zero to eschew *Chevron* deference in cases that involve not federal spending, but regulatory policymaking.

This Essay has sought to draw the boundaries of *King*'s domain in a way that both best rationalizes what that opinion said and that also balances and reconciles broader constitutional and democratic values—the value of preserving Congress's power over the purse, as well as the value, shielded by *Chevron*, of giving primacy to expert and democratically accountable agencies, rather than to courts, in the sphere of regulatory policymaking. It has then linked this bounded reading of *King* to the broader principle of judicial restraint. In this era of sharp political contestation surrounding administrative government, the federal courts should refrain from exercising their common-law powers to alter the doctrine of judicial deference as Congress deliberates on the legislative proposals currently pending before it that would address precisely that subject. As for Congress—well, to borrow a phrase from Judge Kavanaugh, perhaps Congress should just "fish or cut bait."[128] But now that's fish, not elephants, and a different kettle of fish at

ues, whereas courts often do appear to respond to and channel public values when articulating evolving constitutional norms. *See* Mila Sohoni, *The Administrative Constitution in Exile*, 57 Wm. & Mary L. Rev. 923, 926, 973 (2016). It follows that when Congress does take up the task of considering fundamental administrative law reform—as happens to currently be the case—the judiciary should stay its hand.

126 Coenen & Davis, *supra* note 5, at 799 ("Rather than attempt to probe majorness on a question-by-question basis, lower courts should conclude that the [major questions exception] *never* applies to the statutory questions that come before them.").

127 *Cf.* Barnett & Walker, *supra* note 5.

128 Multicultural Media, Telecom & Internet Council v. FCC, 873 F.3d 932, 940 (D.C. Cir. 2017).

that; a kettle of fish that most assuredly does not fall within the domain of this Essay—"*King*'s Domain."