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## ARTICLE

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### THE MINOR QUESTIONS DOCTRINE

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*Few aspects of administrative law are as controversial as the major questions doctrine—the exception to Chevron deference that bars courts from deferring to an agency’s otherwise reasonable interpretation of an ambiguous statute where doing so has extraordinary policy implications. Proponents of the major questions doctrine believe that the nation’s most significant questions should be decided by Congress, not agencies. The doctrine’s critics, however, counter that there is no sound reason to treat major questions differently from ordinary questions, if such a distinction even exists. The elevation of Justices Neil Gorsuch and Brett Kavanaugh, two major proponents of the major questions doctrine, has reignited the debate. Both the doctrine’s friends and foes expect that the Supreme Court will soon begin more aggressively targeting major questions.*

*This Article, however, argues that focusing on major questions is myopic. Minor questions—those bipartisan, “good government” policies that do not attract much attention but that affect countless individuals in small ways—also matter. Because of Chevron deference, Congress and the Executive Branch often have overlapping authority to tackle such minor questions. Yet if one branch acts, that decision confers positive externalities on the other branch: the non-acting branch benefits from a policy it wants without having to pay for it. When incentives are structured this way, collective-action dynamics sometimes may prevent either branch from acting. The time thus has come to consider what this Article dubs the “minor questions doctrine”—a new approach to deference that targets collective-action dynamics by reducing overlapping policymaking authority over minor policies.*

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## INTRODUCTION

One of the most controversial features of modern administrative law is the major questions doctrine—the rule that courts do not defer to an agency’s otherwise reasonable interpretation of an ambiguous statute if the interpretation “concerns a question of deep economic and political significance that is central to the statutory scheme.”<sup>1</sup> In a series of cases, the Supreme Court has applied the major questions doctrine to prevent agencies from adopting policies with “extraordinary” consequences.<sup>2</sup>

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<sup>1</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (internal quotation marks omitted); see also Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 875 (2020) (describing the major question doctrine); Cass R. Sunstein, Foreword, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1185 (2018) (similar); Josh Blackman, Commentary, *Gridlock*, 130 HARV. L. REV. 241, 261 (2016) (similar).

<sup>2</sup> See, e.g., *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (rejecting an EPA interpretation of the Clean Air Act that would “bring about an enormous and transformative expansion in EPA’s regulatory authority”); *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006) (rejecting a Department of Justice interpretation of the Controlled Substances Act that would have

As one might expect, the major questions doctrine is not popular in all circles.<sup>3</sup> Critics argue that there is no reason why major questions merit closer scrutiny,<sup>4</sup> if, indeed, there is a reliable way to tell the difference between major questions and regular ones.<sup>5</sup> Critics also worry that this doctrine's emergence is part of a broader attack on the administrative state.<sup>6</sup> In light of the recent elevations of Justices Gorsuch and Kavanaugh, two major supporters of the major questions doctrine,<sup>7</sup> both the doctrine's supporters and critics believe that the Supreme Court will soon begin targeting major questions more vigorously.<sup>8</sup>

Yet in this back and forth, something important has been overlooked: *Chevron's* application to *minor* questions also merits attention. Minor questions—i.e., relatively uncontroversial, often bipartisan policies that help

decided an issue of “earnest and profound debate across the country”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (rejecting an FDA interpretation of the Food, Drug, & Cosmetic Act that would grant FDA “jurisdiction to regulate an industry constituting a significant portion of the American economy”); *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994) (rejecting an FCC interpretation that would allow the agency to eliminate a “crucial provision of the statute for 40% of a major sector of the industry”); *see also King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (refusing to defer to how an agency resolved a major question).

<sup>3</sup> *See, e.g.*, Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 26-27 (2017) (criticizing the major questions doctrine as part of a larger attack on *Chevron*); Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2192 (2016) (arguing that the major questions doctrine “conflicts with [the Supreme Court’s] own understanding of *Chevron* doctrine”). *But see* Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent “Major Questions” Doctrine*, 49 CONN. L. REV. 355, 359-60 (2016) (arguing that the doctrine is “worth preserving,” despite objections).

<sup>4</sup> *See, e.g.*, Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1959 (2017) (rejecting the “presumption that Congress speaks clearly when it delegates big questions”); Kevin O. Leske, Essay, *Major Questions About the “Major Questions” Doctrine*, 5 MICH. J. ENV’T & ADMIN. L. 479, 480 (2016) (arguing the major questions doctrine is inconsistent with the separation of powers premises underlying *Chevron* deference (discussing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984))).

<sup>5</sup> *See, e.g.*, Note, *supra* note 3, at 2200 (suggesting that there may be no “difference between ‘major’ and ‘minor’ questions”); *cf.* *Thomas v. Reeves*, 961 F.3d 800, 825 (5th Cir. 2020) (Willett, J., concurring) (explaining that “[r]easonable judicial minds can, and do, differ” about what is major or minor, which risks “‘I know it when I see it’ application” (citing Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 45 (2010))).

<sup>6</sup> *See, e.g.*, Metzger, *supra* note 3, at 27-28, 88-89 (identifying a “growing judicial resistance to administrative governance and judicial concern over the constitutional legitimacy of the administrative state”); *cf.* Nicholas Bagley & Julian Davis Mortenson, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 278-79 (2021) (discussing rise of “critics of the administrative state”).

<sup>7</sup> *See, e.g.*, Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. 1323, 1382 (2019) (explaining Gorsuch’s skepticism of the administrative state more broadly); Mila Sohoni, *King’s Domain*, 93 NOTRE DAME L. REV. 1419, 1433-37 (2018) [hereinafter Sohoni, *King’s Domain*] (explaining Kavanaugh’s “robust” approach to major questions).

<sup>8</sup> *See, e.g.*, Joshua S. Sellers, *“Major Questions” Moderation*, 87 GEO. WASH. L. REV. 930, 934 (2019) (“Justice Kavanaugh’s appointment to the High Court is yet another reason for interrogating the major questions doctrine.”); Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1076 (2019) (arguing that Gorsuch’s distrust of administrative law manifests itself in his approach to the major questions doctrine).

the public but that are not especially salient—are ubiquitous. They include “good government” measures like making information more accessible, updating obsolete rules, or closing loopholes.<sup>9</sup> The public is often better off when the government addresses such minor questions. Yet contrary to the conventional view that *Chevron* deference inherently results in a more active federal government,<sup>10</sup> there is reason to fear that sometimes minor questions are not addressed *because* of deference.

This counterintuitive claim is explained by collective-action dynamics. When two branches of government share the same policymaking space, a shared temptation to freeride may systemically push both toward inactivity. Policymaking for even relatively uncontroversial issues can be costly. Even if a policy is beneficial overall, moreover, the costs to bring it about are not evenly distributed; the branch that acts will bear most of the costs but will only receive a portion of the benefits, creating positive externalities for the non-acting branch. Hence, where overlapping policymaking power exists, we sometimes should expect both Congress and the White House<sup>11</sup> to prefer the other to act. And because both Congress and the White House often have that same incentive, it is possible that the equilibrium outcome is that no one acts.<sup>12</sup> Professor Daniel Hemel has examined this collective-action dynamic in the context of tax law. As he has explained, it appears that even when the White House has the power to increase tax revenue via regulation pursuant

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<sup>9</sup> See, e.g., Susan Jensen, *An Informal Legislative History of the Reauthorization of the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1410, 1411 (2015) (explaining why the nonpartisan Administrative Conference of the United States, which addresses lower-profile issues of administration, enjoys “bipartisan support across the political spectrum”).

<sup>10</sup> This view cuts across ideological lines. Compare, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155–56 (10th Cir. 2016) (arguing that deference “add[s] prodigious new powers to an already titanic administrative state”) (Gorsuch, J., concurring), with Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1635 n.96 (2019) (explaining that one “pragmatic advantage” of *Chevron* is that it “allows agencies to act relatively freely” when “address[ing] new problems”).

<sup>11</sup> The “White House” here is used as a stand-in for an entity exercising executive power. Whether the President can lawfully direct how agencies use delegated authority is a disputed issue. The Supreme Court, however, has suggested that the Constitution demands such presidential control of agency policymaking or “the buck would stop somewhere else.” *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 514 (2010)). In any event, the White House appears to have increasingly taken control over agency policymaking in recent decades. See note 126, *infra*. No doubt, the White House does not actually direct all policy. Although the fact that not all agency action is meaningfully directed by the President undoubtedly complicates the analysis, it does not defeat it. See pp. 1227–29, *infra*.

<sup>12</sup> See generally John Nash, *Non-Cooperative Games*, 54 ANNALS OF MATHEMATICS 286, 286 (1951) (describing mixed strategies and coordination conflicts); Daniel J. Hemel, *The President’s Power to Tax*, 102 CORNELL L. REV. 633, 639–40, 707–08 (2017) (using mixed strategies to explain patterns of taxation). To be sure, as explained below, overlapping authority sometimes results in more action, especially for popular policies. See pp. 1205–06, *infra*. That too can be a collective-action problem, but at least it does not prevent the emergence of beneficial policies. Overlapping authority also, of course, sometimes enables action that would not otherwise occur. See p. 1211, *infra*.

to policies that the President *openly* favors, sometimes nothing happens precisely because Congress could also implement that policy.<sup>13</sup>

This collective-action observation is relevant here because *Chevron* deference, by design, gives the White House greater power to fashion policy.<sup>14</sup> After all, at bottom, *Chevron* is a form of policymaking discretion that is grounded in a theory of implied delegation from Congress to the agency.<sup>15</sup> Because of deference, agencies have a freer hand to make policy. The expanded policymaking discretion that *Chevron* provides agencies in turn creates a larger overlapping policymaking space between Congress and the White House (i.e., the universe of policies that either branch can create), amplifying the risk of stagnation caused by collective-action dynamics.

Notably, the risk of stagnation may be particularly pronounced for at least two categories of policies. First, stagnation is presumably more likely for policies with diffuse benefits and concentrated costs. Most models of government action already predict that policymakers are less likely to act if the benefits are shared broadly and the costs fall on a narrow group.<sup>16</sup> That dynamic may be exacerbated, however, when policymaking power is shared and freeriding becomes possible. Because minor questions often fit that diffuse-benefits-concentrated-costs mold (which is a reason why they tend to be less salient), the collective-action problem caused by deference may disproportionately affect them.<sup>17</sup> Second, stagnation is also presumably more

<sup>13</sup> See, e.g., Hemel, *supra* note 12, at 644 (explaining that “some revenue-raising measures that could be implemented via regulation or via legislation may not be implemented at all” because both the White House and Congress can act).

<sup>14</sup> See, e.g., *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (explaining that interpretative discretion gives “the Chief Executive” authority “to make [more] policy choices” based on “the incumbent administration’s views of wise policy”).

<sup>15</sup> See, e.g., *id.* at 844 (“Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.”); Jonathan R. Siegel, Essay, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 960 (2018) (“[J]udicial deference to agency ‘interpretation’ of law is simply one way of recognizing a delegation of law-making authority to an agency.” That is, an ambiguous agency statute is simply another way of doing something that Congress does all the time—namely, authorize an agency to make a policy choice.” (footnote omitted) (quoting Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 26 (1983))).

<sup>16</sup> See, e.g., John O. McGinnis & Michael B. Rappaport, Essay, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 509 (1995) (“One of the fundamental problems of democratic politics is that concentrated interest groups have more influence . . . than diffuse groups, even if the diffuse groups represent a numerical majority.”); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 287 (1988) (explaining that we should expect “concentrated benefits and, especially, concentrated costs to stimulate more interest group formation” and that “distributed costs or benefits will presumably not tend to produce as much organizational activity”) (applying MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION 1* (1st ed. 1965)); James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 366-72 (James Q. Wilson ed., 1980).

<sup>17</sup> This is especially true because minor questions do not break down along partisan lines, which means that one path out of the collective-action problem—government gridlock—is less available.

likely for technical issues that require relatively more resources to address.<sup>18</sup> When policymaking authority is shared and the costs of making policy are high, freeriding should become relatively more attractive. This characteristic also disproportionately applies to minor questions because technical issues are often inherently less salient. Minor questions thus should be unusually susceptible to a collective-action problem. Yet because minor questions are, well, minor, no one to date has recognized the danger.

Compounding that danger, moreover, is the fact that collective-action dynamics may disproportionately have long-term effects for minor questions. By definition, major questions prompt widespread debate and political action, which may moot the need for judicial review. For instance, the Court had no need to consider whether to apply the major questions doctrine to the FCC's "net neutrality" regulations—which then-Judge Kavanaugh urged should be treated as a major question<sup>19</sup>—because intervening events mooted the issue, namely, the election of a different president.<sup>20</sup> The same is true for the Obama Administration's Clean Power Plan, which the Supreme Court stayed on major questions grounds,<sup>21</sup> but which also was later mooted by a new presidential administration.<sup>22</sup> Even ordinary policies—those that are neither major nor minor, such as (perhaps<sup>23</sup>) the policy in *Chevron* itself about whether the term "stationary source" allows the "bubble concept"<sup>24</sup>—often are addressed by

*See, e.g.,* Hemel, *supra* note 12, at 644 (explaining why political gridlock can defeat collective-action problems); *see also* pp. 1215, 1225, *supra* (explaining this point).

<sup>18</sup> *Cf., e.g.,* Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1712-13 (2008) (noting that it is difficult to regulate "where the new information is technical or scientific, the payoff to the public from acting on it is relatively modest and diffuse, and [a group] . . . will benefit . . . from regulatory delay").

<sup>19</sup> *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("The FCC's net neutrality rule is a major rule for purposes of the Supreme Court's major rules doctrine.").

<sup>20</sup> *See* Mozilla Corp. v. FCC, 940 F.3d 1, 17-18 (D.C. Cir. 2019), *aff'g* Restoring Internet Freedom, 33 FCC Rcd. 311 (2018), *rev'g* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015).

<sup>21</sup> *See* West Virginia v. EPA, 136 S. Ct. 1000 (2016) (granting stay); Application for Stay, West Virginia v. EPA, 136 S. Ct. 1000 (2016) (No. 15A773) (requesting stay because EPA "must point to 'clear[]' congressional authorization whenever it 'claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy'" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))).

<sup>22</sup> *See* Order Granting Motion, State of West Virginia et al. v. EPA, No. 15-1363 (D.C. Cir. Sept. 17, 2019) (en banc) (dismissing litigation as moot).

<sup>23</sup> As will be apparent in this Article, drawing lines between major, ordinary, and minor questions can be difficult—as the major questions literature already recognizes. That said, the Supreme Court does distinguish between ordinary and major questions, and distinguishing between ordinary and minor ones—although undoubtedly difficult in application—is conceptually useful.

<sup>24</sup> *See, e.g.,* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 839-40 (1984) (explaining the basis of the litigation, *viz.*, whether the term "stationary source" in the Clean Air Act includes individual devices or "all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble'").

*someone* because they are deemed important enough. Yet for minor questions like whether to close small tax loopholes that Congress may never have intended to begin with, eliminate outdated tariffs that no longer achieve their policy objectives, or make technical changes to environmental law, each of which is discussed below, stagnation may be much more long-lasting.

The conventional wisdom that *Chevron* necessarily enables greater government activity is thus incomplete. Sometimes deference leads to more action, but sometimes it might prevent action that would otherwise occur. The time, therefore, may have come for what this Article calls the minor questions doctrine. There are at least three options for such a doctrine. One involves expanding *Chevron* Step Zero<sup>25</sup> in a way similar to the major questions doctrine. Another involves recognizing a new species of *Chevron* waiver<sup>26</sup> that would allow agencies to prospectively renounce deference to certain possible interpretations. And the third involves flipping the *Chevron* presumption so that agencies only receive deference when Congress says so. The common denominator is that each option would eliminate overlapping policymaking space for minor questions. Although there are important counterarguments to a minor questions doctrine, reform may be necessary to counter the risk that deference sometimes thwarts rather than enables policymaking.

## I. UNDERSTANDING *CHEVRON* AND MAJOR QUESTIONS

To appreciate the need for a minor questions doctrine, it is helpful to understand *Chevron* deference and the emergence of the major questions doctrine, which is an exception to the ordinary *Chevron* framework.

### A. *The Basics of Chevron*

The story of *Chevron* has been told many times before.<sup>27</sup> The gist is that the Supreme Court has held that Congress implicitly delegates to federal agencies interpretative discretion over the statutes they administer, within

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<sup>25</sup> See, e.g., Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (defining “Step Zero” as “the initial inquiry into whether the *Chevron* framework applies at all”).

<sup>26</sup> *Chevron* waiver refers to the notion that a court will not defer to agency’s interpretation if the agency’s counsel did not request it in court. See, e.g., Jeremy D. Rozansky, Comment, *Waiving Chevron*, 85 U. CHI. L. REV. 1927, 1927 (2018) (defining *Chevron* waiver as “the idea that an agency’s decision not to seek deference can prevent the application of the *Chevron* framework”). The Supreme Court arguably has recognized *Chevron* waiver, see *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020), but the D.C. Circuit has rejected it, see, for example, *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 23, 28 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020). The species of *Chevron* waiver proposed here is different. Here, an agency could prospectively forswear judicial deference for certain policies.

<sup>27</sup> See, e.g., Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 772 (2017) (acknowledging *Chevron* as “the most frequently cited case in administrative law”).

certain bounds, unless Congress directly speaks to an issue.<sup>28</sup> The Court famously articulated the two-step rule as follows:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>29</sup>

A reviewing court's conclusion about which reading of a statute is the "best" one therefore need not be dispositive; if the statute is sufficiently ambiguous, the court will uphold the agency's reading so long as it is reasonable.<sup>30</sup> For instance, in *Chevron* itself, the Supreme Court upheld the Environmental Protection Agency's preferred plant-wide definition of "stationary source," even though the D.C. Circuit had reasoned that the best reading would treat each individual smokestack as a "stationary source."<sup>31</sup> The Justices did not disagree with the D.C. Circuit's view on its own terms but held that the court asked the wrong question. *Chevron* thus departs from ordinary interpretation by giving the Executive Branch greater policymaking authority when statutes are ambiguous.<sup>32</sup> Put differently, *Chevron* acts as an implicit delegation of discretionary power to make policy through interpretation.

*Chevron*'s seemingly straightforward rule has proven to be complicated. For instance, although the Supreme Court usually says that *Chevron* has two steps (is the statute ambiguous, and if so, is the agency's interpretation reasonable?<sup>33</sup>), the Court also sometimes suggests it really only has a single

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28 See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 511-12; see also Peter L. Strauss, Essay, "Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight," 112 COLUM. L. REV. 1143, 1145 (2012) (characterizing *Chevron* deference as "space" within which an administrative agency has been "delegated or allocated authority").

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

30 *Id.* at 844.

31 *Id.* at 840-42, 866.

32 See, e.g., Sunstein, *supra* note 25, at 190 ("*Chevron* might well be seen . . . as the administrative state's very own *McCulloch v. Maryland*, permitting agencies to do as they wish so long as there is a reasonable connection between their choices and congressional instructions."); Philip Hamburger, Response, *Chevron On Stilts: A Response To Jonathan Siegel*, 72 VAND. L. REV. EN BANC 77, 78 (2018) ("*Chevron* requires judges to abandon their duty of independent judgment.").

33 *Chevron*, 467 U.S. at 843.



step (is the agency's interpretation reasonable?<sup>34</sup>). Yet other times, the Court acts like there are more than two steps, for instance by asking whether the type of agency decision is one that Congress implicitly wants to trigger deference ("Step Zero"<sup>35</sup>), the agency followed the proper procedures ("Step 0.5"<sup>36</sup>), the agency acknowledged the ambiguity ("Step One-and-a-Half"<sup>37</sup>), or the agency's reading was reasonable yet also for some reason arbitrary and capricious (which may be "Step Three" or "Step Four," depending on your count<sup>38</sup>). Even beyond confusion about *Chevron's* steps, it also turns out that the very concept of ambiguity is ambiguous.<sup>39</sup> And whether an agency's reading is "reasonable" can also be the subject of reasonable debate.<sup>40</sup>

*Chevron* deference is also controversial—and has been for a long time.<sup>41</sup> No statute *explicitly* authorizes deference<sup>42</sup> and the Administrative Procedure

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<sup>34</sup> See *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009) (invoking the reasonableness inquiry at the "outset"); see also Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA L. REV. 597, 597 (2009) (arguing for a one-step version of *Chevron*).

<sup>35</sup> See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001) (describing "step zero"); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (articulating the step).

<sup>36</sup> See Michael Pollack & Daniel Hemel, *Chevron Step 0.5*, YALE J. ON REG. NOTICE & COMMENT (June 24, 2016), <https://www.yalejreg.com/nc/chevron-step-0-5-by-michael-pollack-and-daniel-hemel> [<https://perma.cc/9U4T-JPBT>] ("[W]e suggest that *Encino* is indeed a different move—a move we'll call '*Chevron* step 0.5.' If *Chevron* step zero asks whether Congress intended for the agency to fill gaps in the relevant statute, *Chevron* step 0.5 asks whether the agency has followed the proper procedure in filling the gap." (discussing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016))).

<sup>37</sup> See Hemel & Nielson, *supra* note 27, at 757 (explaining the doctrine); see also *Negusie v. Holder*, 555 U.S. 511, 521-23 (2009) (applying a version of the doctrine).

<sup>38</sup> 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, 832 (2010) ("[I]t has been argued that the reviewing court should also apply the arbitrary, capricious standard to the . . . interpretation, adding a third or fourth step, depending on when or how you are counting.").

<sup>39</sup> See, e.g., Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) ("Unfortunately, there is often no good or predictable way for judges to determine whether statutory text contains 'enough' ambiguity . . . That's because there is no right answer.").

<sup>40</sup> See Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441 (2018) (explaining different courts' approaches to *Chevron* Step Two reasonableness analysis).

<sup>41</sup> See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) ("*Chevron* is a siren's song, seductive but treacherous.").

<sup>42</sup> See, e.g., Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1313-15 (2015) (explaining that the Administrative Procedure Act (5 U.S.C. § 706) seems to grant "reviewing courts [the ability to] decide matters of law de novo, without any deference to the administrators' views").

Act's text,<sup>43</sup> especially combined with the history of judicial review,<sup>44</sup> may cut against it. Going further, Justice Thomas has suggested that *Chevron* may be unconstitutional,<sup>45</sup> a view seemingly also embraced by Justice Gorsuch.<sup>46</sup> *Chevron*'s defenders, however, question whether such criticisms can be reconciled with the Supreme Court's hands-off approach to delegation<sup>47</sup> and argue, pragmatically, that *Chevron* enables more efficient administration of national standards.<sup>48</sup> Defenders of deference also invoke political accountability—a point made in *Chevron* itself.<sup>49</sup> Finally, when a statute is ambiguous, the argument goes, *someone* must make policy, and it makes more sense for that “someone” to be an expert agency.<sup>50</sup>

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<sup>43</sup> See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) (arguing that *Chevron* conflicts with the APA's command that the “reviewing court [should] . . . interpret . . . statutory provisions” (quoting 5 U.S.C. § 706)); cf. Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1300-01 (2012) (“The Court made no mention of the APA in *Chevron* itself, and so far the statute has only played a minor role in subsequent decisions.”). But see Sunstein, *supra* note 10, at 1656-57 (defending *Chevron* as a plausible interpretation of the APA); 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.32 (Wolters Kluwer, 6th ed. 2019) (similar).

<sup>44</sup> See, e.g., Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017) (challenging whether *Chevron* is consistent with historical practice). But see Sunstein, *supra* note 10, at 1648-50 (pushing back).

<sup>45</sup> See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (“*Chevron* . . . precludes judges from exercising that judgment, forcing them to abandon what they believe is ‘the best reading of an ambiguous statute’ in favor of an agency’s construction. It thus wrests from Courts the ultimate interpretative authority to ‘say what the law is,’ and hands it over to the Executive.” (quoting *Nat’l Cable & Tel. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). But see Siegel, *supra* note 15, at 941 (resisting this argument).

<sup>46</sup> See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring) (suggesting that *Chevron* violates Article III of the Constitution); *id.* at 1149 (“[T]he fact is *Chevron* and [its progeny] permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”).

<sup>47</sup> See, e.g., Metzger, *supra* note 3, at 41 (“Article III may in fact militate in favor of deference to expert elucidation of statutory standards if the questions at issue require specialized expertise or experience that the federal courts lack.”).

<sup>48</sup> See, e.g., Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1112 (1987) (arguing that different interpretations among different courts could make it difficult to administer laws uniformly).

<sup>49</sup> See, e.g., *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (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 . . .”).

<sup>50</sup> See, e.g., Metzger, *supra* note 3, at 94 (disputing the view that “[i]f Congress chooses to delegate regulatory authority to agencies, part of the price of delegation may be that the court, not the agency, must hold the power to say what the statute means” (quoting Farina, *supra* note 41, at 498)); cf. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) (“[T]he judgments about the way the real world works that have gone into the [agency’s] policy are precisely the kind that agencies are better equipped to make than are courts. This practical agency expertise is one of the principal justifications behind *Chevron* deference.”).

Implicit in many of these defenses of deference is the premise that *Chevron*, like other species of delegation, is good because it allows the Executive Branch to make policy, which frees up Congress to act on other matters or allows the federal government to address issues when Congress is deadlocked.<sup>51</sup> Yet the notion that *Chevron* allows the Executive Branch to make policy is controversial in part precisely because many believe that too much policy is made.<sup>52</sup> Chief Justice Roberts, for instance, has called *Chevron* “a powerful weapon in an agency’s regulatory arsenal.”<sup>53</sup> Notably, in recent years, an increasingly skeptical view of deference has been embraced by many federal judges who oppose the enhanced interpretative discretion that *Chevron* provides agencies.<sup>54</sup>

Following the confirmations of Justices Neil Gorsuch and Brett Kavanaugh, many expect the Supreme Court to further limit *Chevron*’s domain.<sup>55</sup> In fact,

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<sup>51</sup> Cf. John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 192 (2007) (explaining the theory that delegation “permit[s] [Congress] to accomplish more in the public interest”).

<sup>52</sup> See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring) (criticizing *Chevron* for enabling lawmaking “without the inconvenience of having to engage the legislative processes the Constitution prescribes,” i.e., another “form of Lawmaking Made Easy, one that permits all too easy intrusions on the liberty of the people” (citing Manning, *supra* note 51, at 202)); Charles J. Cooper, *The Flaws of Chevron Deference*, 21 TEX. REV. L. & POL. 307, 308 (2017) (“Today the administrative state is essentially a sovereign unto itself, a one-branch government whose regulatory grasp extends into virtually every human activity.”); Hamburger, *supra* note 32, at 82-83 (“*Chevron* is a . . . judicial effort to expand the administrative state.”); Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U. J.L. & LIBERTY 491, 505 (2008) (“[D]eference . . . ignores the danger that good bureaucrats will be more intent on expanding their power than behaving like disinterested experts . . .”). Unsurprisingly, the view that *Chevron* is the reason for a larger federal government is not universally held. See, e.g., Terence J. McCarrick, Jr., *In Defense of a Little Judiciary: A Textual and Constitutional Foundation for Chevron*, 55 SAN DIEGO L. REV. 55, 85 (2018) (“So, what—if not *Chevron*—accounts for the continued expansion of the administrative state? Conscious political choice.”).

<sup>53</sup> *City of Arlington v. FCC*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting); see also Heinzerling, *supra* note 4, at 1958 (noting “the Chief Justice’s evident desire to trim the power of administrative agencies”).

<sup>54</sup> See, e.g., Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 324 (2017) (criticizing administrative agencies’ sense of entitlement and “sloppy work” that result from *Chevron* deference); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment) (“[T]he problems [created by *Chevron* deference] are serious and ought to be fixed.”); Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103 (2018) (documenting examples of judges criticizing *Chevron*); see also Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302 (2018) (using a survey to show that most of the participating federal circuit judges “are not fans of *Chevron*, with the significant exception of the judges we interviewed from the D.C. Circuit”).

<sup>55</sup> E.g., Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931, 934-35 (2021); Metzger, *supra* note 3, at 17. Although she has said less about the subject than Justices Gorsuch and Kavanaugh, some commentators speculate that Justice Amy Coney Barrett’s confirmation may lead to revision of *Chevron*. See, e.g., Kristin E. Hickman & Aaron L. Nielson, *Foreword: The Future of Chevron Deference*, 70 DUKE L.J. 931, 1116 (2021) (noting speculation).

the Court has already begun to do so. In *Epic System Corp. v. Lewis*, Justice Gorsuch, writing for the Court, held that *Chevron* does not apply when the Department of Justice disagrees with an independent agency about how to read a statute.<sup>56</sup> The Court has also arguably disparaged *Chevron* itself.<sup>57</sup> And in *Kisor v. Wilkie*, a majority of the Court upheld a weakened form of *Auer* deference (which applies when an agency interprets a *regulation* rather than a *statute*).<sup>58</sup> Although Chief Justice Roberts joined parts of the *Kisor* opinion, he declined to similarly defend *Chevron* on stare decisis grounds.<sup>59</sup>

### B. The Major Questions Doctrine

Driven by nondelegation concerns<sup>60</sup> and its associated fear of government “overreach,”<sup>61</sup> the Supreme Court over the last few decades has developed an exception to *Chevron* known as the major questions doctrine. Under the doctrine, a court—in “extraordinary cases”—will set aside the ordinary *Chevron* framework altogether on the theory that absent an “express[.]” statement from Congress, judges should not assume that Congress would have delegated “a question of deep ‘economic and political significance’” to an agency.<sup>62</sup> In this way, the major questions doctrine resembles the rule of

<sup>56</sup> See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (“[D]eferring to the Executive on grounds of political accountability . . . becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable.”); cf. Hickman & Nielson, *Future of Chevron Deference*, *supra* note 55, at 1115-16 (explaining that lawyers may be reluctant to cite *Chevron*).

<sup>57</sup> See, e.g., *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (“But whether *Chevron* should remain is a question we may leave for another day.”); see also *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (“[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.”).

<sup>58</sup> See *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (upholding, but modifying, *Auer v. Robbins*, 519 U.S. 452 (1997)).

<sup>59</sup> See *id.* at 2425 (Roberts, C.J., concurring in part and in the judgment) (“Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. I do not regard the Court’s decision today to touch upon the latter question.” (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984))).

<sup>60</sup> See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (“Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.”); Loshin & Nielson, *supra* note 5, at 23 (“The Court is alarmed by excessive delegation but is wary about directly enforcing the nondelegation doctrine—so it looks for more judicially manageable proxies.”).

<sup>61</sup> See, e.g., Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 785 (2017) (explaining that the Court’s “hesitance to apply *Chevron* in its pure, unvarnished form” is driven in part by fear of “executive overreach”).

<sup>62</sup> *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (citations omitted); see also Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 445 (2016) (analyzing the doctrine).

interpretation that courts should address nondelegation concerns by reading statutes narrowly.<sup>63</sup>

That said, it has taken time to place where the major questions doctrine fits in administrative law. In arguably the first case<sup>64</sup> in the line, *MCI v. AT&T*, Justice Scalia framed the inquiry at *Chevron*'s first step,<sup>65</sup> on the theory that an ambiguity for *Chevron* purposes cannot exist where the agency's interpretation would work "a fundamental revision of the statute" that violates "the heart" of scheme.<sup>66</sup> The Court then continued to apply a step one formulation in *FDA v. Brown & Williamson*,<sup>67</sup> despite the presence of ambiguity.<sup>68</sup> Reviewing *MCI* and *Brown & Williamson*, Scalia later suggested the principle: "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."<sup>69</sup> That formulation has since been used by justices across the ideological spectrum in a number of cases.<sup>70</sup> Recognizing that the Court's approach to ambiguity in these cases, with its emphasis on the significance of the policy question, differed from how ambiguity is treated in other cases, Cass Sunstein argued that the major questions doctrine is best understood as falling within step zero.<sup>71</sup> And in *King v. Burwell*, Chief Justice Roberts appears to have agreed, concluding that certain questions—such as whether subsidies are available on federal health-

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<sup>63</sup> See, e.g., *Gundy*, 139 S. Ct. at 2141 ("We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names.") (Gorsuch, J., dissenting); *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").

<sup>64</sup> Then-Judge Breyer noted the idea earlier. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (suggesting that Congress is "more likely to have focused upon, and answered, major questions").

<sup>65</sup> 512 U.S. 218, 229 (1994) ("Since an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear, the Commission's permissive detariffing policy can be justified only if it makes a less than radical or fundamental change in the Act's tariff-filing requirement." (internal citation omitted)).

<sup>66</sup> *Id.* at 231.

<sup>67</sup> 529 U.S. 120, 125-26 (2000).

<sup>68</sup> See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 226 (arguing that the statute was ambiguous in *Brown & Williamson*); cf. *Glob. Tel\*Link v. FCC*, 866 F.3d 397, 418-19 (D.C. Cir. 2017) (Silberman, J., concurring) (faulting Justice Scalia for "never conced[ing] that the word 'modify' was ambiguous [in *MCI*], which it was").

<sup>69</sup> *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 468 (2001) (citing *MCI*, 512 U.S. at 231; *Brown & Williamson*, 529 U.S. at 159-60).

<sup>70</sup> See *Loshin & Nielson*, *supra* note 5, at 47 (explaining that the entire Court has embraced the doctrine); see also *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (defending the doctrine in a decision authored by Chief Justice Roberts, and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan).

<sup>71</sup> Sunstein, *supra* note 25, at 236.

care exchanges—are too significant for the *Chevron* framework.<sup>72</sup> *King* is noteworthy because the Court upheld the agency’s interpretation about the availability of tax credits on federal rather than state exchanges, but it did so without deference. Other cases in the major-questions line both deny deference *and* further reject the lawfulness of the agency’s interpretation.

The major questions doctrine is also controversial. Its critics contend that there is no principled way to determine whether a question is “major” or not. After all, can a court reliably tell whether a policy “is truly an elephant—and not just a rather plump mouse,” or whether the ambiguity “is sufficiently unimportant to be a mousehole—and not just a rather cramped circus tent”?<sup>73</sup> Moreover, if *Chevron* is premised on the notion that a politically-accountable agency is better positioned than a politically-isolated court to resolve ambiguities in statutes, then why should that analysis change depending on the importance of the issue?<sup>74</sup> Indeed, might principles of political accountability cut in *favor* of agency resolution of major issues, as presidents run for office on just such questions?<sup>75</sup> And for those who believe for “pragmatic”<sup>76</sup> reasons that robust administrative power is essential for the “effective” functioning of modern government,<sup>77</sup> the whole idea of the major questions doctrine can be maddening. Some scholars have thus urged the Supreme Court to inter the doctrine outright,<sup>78</sup> or at least read it very narrowly.<sup>79</sup>

Nonetheless, the Supreme Court has not backed away from it. Indeed, then-Judge Brett Kavanaugh, while on the D.C. Circuit, urged greater use of

<sup>72</sup> See 135 S. Ct. at 2488-89 (holding that “the two-step framework announced in *Chevron*” does not apply “[i]n extraordinary cases” (internal quotation marks omitted)).

<sup>73</sup> Loshin & Nielson, *supra* note 5, at 45.

<sup>74</sup> See, e.g., Heinzerling, *supra* note 4, at 1959 (rejecting doctrine on this ground).

<sup>75</sup> See Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2606 (2006) (“[E]xpertise 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.”). This argument, of course, assumes that the major questions doctrine is designed to accurately reflect what Congress intends. To the extent the Supreme Court believes that too much delegated power is unconstitutional and that the constitutional test turns at least in part on whether a policy is major, then constitutional avoidance might have more teeth for major policies. This Article does not address constitutional avoidance.

<sup>76</sup> See, e.g., Bradley George Hubbard, Comment, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 U. CHI. L. REV. 447, 455 (2013) (noting the “pragmatic” argument).

<sup>77</sup> See, e.g., Metzger, *supra* note 3, at 92-94.

<sup>78</sup> See, e.g., Heinzerling, *supra* note 4, at 1958 (calling this method of interpretation “nonsensical”); Note, *supra* note 3, at 2212 (“The Court should follow its own guidance and remove the major question excrecence from administrative law.”).

<sup>79</sup> See, e.g., Sohoni, *King’s Domain*, *supra* note 7, at 1439 (arguing that *King* should be read as only holding that “[a]gency action that triggers large-scale government spending on the basis of ambiguous statutory authority falls outside *Chevron*’s domain”); *Massachusetts v. EPA*, 549 U.S. 497, 530-32 (2007) (reading *Brown & Williamson* narrowly).

the major questions doctrine—which he called the “major rules” doctrine.<sup>80</sup> According to Kavanaugh, the FCC’s decision to impose so-called “net neutrality” regulations should be evaluated and found wanting as a major question.<sup>81</sup> This statement hewed closely to recent Supreme Court decisions like *Utility Air Regulatory Group v. EPA*.<sup>82</sup> Perhaps even more importantly, the Court itself stayed the Obama Administration’s Clean Power Plan, which would have significantly affected the nation’s energy sector, on what appear to be major-questions grounds.<sup>83</sup>

In fact, not only has the Court shown no inclination to back away from the major questions doctrine, it has suggested a willingness to expand it. Recall that the major questions doctrine has been understood as an exception to *Chevron*, a *statute-based* presumption that Congress intends agencies to reasonably resolve ambiguities. Yet the Court may be willing to *constitutionalize* the doctrine, meaning that Congress could not even expressly empower courts to defer to agency resolutions of major questions when the relevant statutory authorization is ambiguous. Now-Justice Kavanaugh recently commended Justice Gorsuch’s “thoughtful” call to revisit the intelligible principle standard.<sup>84</sup> Kavanaugh then tipped his hand about what the new standard ought to be. Notably, that standard openly borrows from the major questions doctrine.<sup>85</sup>

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<sup>80</sup> See *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

<sup>81</sup> See *id.* at 422-24.

<sup>82</sup> See *id.* at 420-21 (citing 573 U.S. 302 (2014)) (“It would have been a major step for EPA to regulate the greenhouse gas emissions of so many large and small facilities. But there was no clear statutory authorization for the EPA to do so.”).

<sup>83</sup> See, e.g., Application for Stay, *West Virginia v. EPA*, No. 15A773 (Jan. 26, 2016) (successfully requesting stay on major-questions grounds); Jim Dennison, Note, *A Cost-Benefit Analysis-Based Interpretation of Reciprocity Under Clean Air Act Section 115(C)*, 103 VA. L. REV. 1561, 1587 (2017) (explaining that the litigation “is likely to help clarify the major questions and elephants in mouseholes doctrines”).

<sup>84</sup> *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of certiorari) (seemingly endorsing Justice Gorsuch’s dissenting opinion in *Gundy v. United States*, 139 S. Ct. 2116 (2019)). Justice Gorsuch’s dissent in *Gundy* was joined by Chief Justice Roberts and Justice Thomas while Justice Alito wrote that “[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.” *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring).

<sup>85</sup> As Justice Kavanaugh wrote in *Paul*:

[T]he Court has not adopted a nondelegation principle for major questions. But the Court has applied a closely related statutory interpretation doctrine: In order for an executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce. . . . Justice Gorsuch would not allow that second category—congressional

## II. UNDERSTANDING COLLECTIVE-ACTION DYNAMICS

To understand the possible value of a minor questions doctrine, it is also necessary to understand an important principle of decisionmaking: sometimes less is more. In a group setting, what is rational for each individual may result in suboptimal outcomes for the group. This Part thus first explains how collective-action problems work generally and under what circumstances they are most likely to arise. It then offers solutions recognized in the literature.

### A. *The Logic of Collective-Action Dynamics*

The law is no stranger to collective-action dynamics.<sup>86</sup> The basic idea is that sharing authority can lead to suboptimal outcomes.<sup>87</sup> When groups are involved, what is rational for each individual member may nonetheless result in outcomes that are irrational for everyone.<sup>88</sup>

A classic example of a collective-action problem, and one that will form the basis for much of this Article, is the Snowdrift Game, also sometimes called the Chicken Game.<sup>89</sup> Imagine one car going north and another going south, when they both come across the same snowdrift that has blocked the road. The only way for either car to get through is if someone shovels the snow; there is no way to clear the road, however, that only benefits one of the

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delegations to agencies of authority to decide major policy questions—even if Congress expressly and specifically delegates that authority.

*Paul*, 140 S. Ct. at 342 (emphasis added).

<sup>86</sup> See, e.g., *In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 412 (Del. Ch. 2010) (“A good board . . . does not suffer from the collective action problem of disaggregated stockholders.” (quoting *In re Cox Comm'ns, Inc. S'holders Litig.*, 879 A.2d 604, 619 (Del. Ch. 2005)); *In re Inslaw, Inc.*, 932 F.2d 1467, 1473 (D.C. Cir. 1991) (“The object of the automatic stay provision is essentially to solve a collective action problem—to make sure that creditors do not destroy the bankrupt estate in their scramble for relief.”).

<sup>87</sup> See, e.g., Peter M. Shane, *Response, Cybersecurity: Toward A Meaningful Policy Framework*, 90 TEX. L. REV. 87, 95 (2012) (defining “a classic collective-action problem” as a situation “where everyone doing his or her personal best . . . is not going to produce an optimal result”); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 117 (2010) (“When activities spilled over from one state to another, the Framers recognized that the actions of individually rational states produced irrational results for the nation as a whole—the definition of a collective action problem.”). But see Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217, 226 (2014) (“[T]here is no standard definition of . . . ‘collective action problem’ in the legal literature. I will argue below that the term is often employed with some liberality, and even a touch of promiscuity.”).

<sup>88</sup> See, e.g., MICHAEL TAYLOR, *THE POSSIBILITY OF COOPERATION* 19 (1987) (“[A] collective action problem exists where rational individual action can lead to a strictly Pareto-inferior outcome, that is, an outcome which is strictly less preferred by every individual than at least one other outcome.”).

<sup>89</sup> See Christopher S. Yoo, *Beyond Coase: Emerging Technologies and Property Theory*, 160 U. PA. L. REV. 2189, 2217 (2012) (citing ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, COOPERATION AND WELFARE* 58-62, 128-32 (1986)).



drivers. The worst-case scenario for both drivers is if no one digs, in which case no one moves forward. Thus, one might expect both drivers to pick up a shovel. Yet for each individual, it is best if the other driver does the work. While the worker is out in the cold, the non-worker can enjoy a warm vehicle. When this situation arises, both drivers may opt to stay in the car.<sup>90</sup> In the conceptually similar Chicken Game, two drivers are driving at each other. If a driver swerves out of the way, he loses face and puts himself at some risk of skidding into the ditch—a minor accident. Each driver thus wants the other to play “chicken” and swerve (i.e., act), but if neither driver swerves, a serious accident will result.<sup>91</sup> Yet because each individual driver is better off if the other one changes direction, it is possible that neither driver will swerve, resulting in an accident. Thankfully, the worst-case outcome (either two cars stalled in front of a snowdrift or, even worse, in a fiery collision) does not always happen and when the costs of mutual inaction become dire enough, it is quite unlikely to ever happen.<sup>92</sup> But it *can* happen,<sup>93</sup> and how likely it is to happen depends on the players’ respective strategies.

Freeriding—letting someone else work while you benefit—is a common element of collective-action dynamics. “A rational individual reasons that if others engage in the behavior necessary to achieve the collective good, she can free ride on their efforts and still gain the benefits of their behavior.”<sup>94</sup> This free-rider problem is closely associated with public goods, “that is, non-rival, non-excludable goods,” because “free-riders cannot be excluded from

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<sup>90</sup> See Nicolas Suzor, *Free-Riding, Cooperation, and “Peaceful Revolutions” in Copyright*, 28 HARV. J.L. & TECH. 137, 173 (2014) (“[W]hen you are faced with a snowdrift blocking a road, it is better to shovel it out of the way than to do nothing, better still if everyone shovels, best if someone else shovels while you do nothing, and worst for everyone if nobody picks up a shovel.” (citing D.F. Zheng, H.P. Yin, C.H. Chan & P.M. Hui, *Cooperative Behavior in a Model of Evolutionary Snowdrift Games with N-Person Interactions*, 80 EUROPHYSICS LETTERS 18002, 18002-p1 (2007))).

<sup>91</sup> See *id.* at 173 n.215 (citing Irwin Lipnowski & Shlomo Maital, *Voluntary Provision of a Pure Public Good as the Game of “Chicken,”* 20 J. PUB. ECON. 381, 384 (1983)); see also Yoo, *supra* note 89, at 2217-18 (discussing the “Chicken Game”). If fiery collisions are too outlandish for your taste, a more mundane example about newlyweds may be better. Love is real, but dirty dishes somehow still go unwashed in the sink.

<sup>92</sup> See EDWARD C. ROSENTHAL, *THE COMPLETE IDIOT’S GUIDE TO GAME THEORY* 74 (2011) (“Not surprisingly, as the mutually destructive outcome becomes more severe, the players will play less aggressively.”).

<sup>93</sup> In fact, Thomas Schelling used almost this exact analogy in his classic treatment of nuclear deterrence: the ultimate game of chicken. See THOMAS C. SCHELLING, *ARMS AND INFLUENCE* 116-18 (1966).

<sup>94</sup> Ann E. Carlson, *Recycling Norms*, 89 CALIF. L. REV. 1231, 1243 (2001) (citing ELINOR OSTROM, *GOVERNING THE COMMONS, THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 5-7 (1990)); see also Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1465 (2011) (“Information acquisition may often suffer from a collective action problem, in which each agent is tempted to free ride, shirking her own obligations to invest in costly research . . .”).

obtaining the benefits these goods provide.”<sup>95</sup> If everyone benefits from a good, each person may decide to let someone else produce the good. Confronted with that incentive, however, it is possible that no one will bear the cost: “If an entrepreneur stages a fireworks show, for example, people can watch the show from their windows or backyards. Because the entrepreneur cannot charge a fee for consumption, the fireworks show may go unproduced, even if demand for the show is strong.”<sup>96</sup> To be sure, social norms may lead to cooperation.<sup>97</sup> And it is also possible that a show will be so valuable that someone will pay for it.<sup>98</sup> But *sometimes* no one does anything. And even when someone does act, at the margins, a collective-action dynamic may reduce the amount of activity in suboptimal ways. On the 4th of July, lots of people still shoot fireworks even with a collective-action dynamic. But shows might be better without a collective-action dynamic.

When two individuals can act and both face an incentive to freeride, game theorists have recognized that the rational move for each player may be to adopt a “mixed strategy” of sometimes acting and sometimes not.<sup>99</sup> The ratio of action to inaction for each player depends on how much each values action, combined with an assessment of how much the other side values action.<sup>100</sup> How this works can be described mathematically,<sup>101</sup> but the intuition is that “always acting” or “never acting” does not always make sense given what the other individual may do in response.<sup>102</sup>

Finally, collective-action problems are both a common justification for government intervention and a common explanation for government inaction. For instance, when it comes to public goods like building streetlights (a local problem) or providing an army (a national problem),<sup>103</sup> the

<sup>95</sup> Patrick Croskery, *Institutional Utilitarianism and Intellectual Property*, 68 CHI.-KENT L. REV. 631, 634 (1993).

<sup>96</sup> Tyler Cowen, *Public Goods*, LIBR. OF ECON. & LIBERTY, <http://www.econlib.org/library/Enc/PublicGoods.html> [<https://perma.cc/ND7K-UE7G>]; *see also id.* (“If the free-rider problem cannot be solved, valuable goods and services—ones people otherwise would be willing to pay for—will remain unproduced.”).

<sup>97</sup> *See, e.g.*, Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSPS. 137, 140 (2000) (explaining how social norms can increase cooperation).

<sup>98</sup> *See, e.g.*, ROSENTHAL, *supra* note 92, at 74 (noting that as the costs of inaction increase, action becomes more likely).

<sup>99</sup> *See generally* Nash, *supra* note 12 (explaining mixed strategies).

<sup>100</sup> *See, e.g.*, Hemel, *supra* note 12, at 707-08 (explaining how presidential and congressional actions are a function of the relative share of political benefits and costs borne by each branch).

<sup>101</sup> *See infra* note 155.

<sup>102</sup> *See, e.g.*, DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 37-39 (1994) (explaining mixed strategies and why rational actors may adopt them).

<sup>103</sup> *See, e.g.*, Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 602 n.132 (1998) (“A collective-action problem exists whenever private markets are relied on to provide public goods, such as street lamps and national defense.”).

government may be best positioned to act because individuals may otherwise be tempted to freeride.<sup>104</sup> At the same time, however, collective-action dynamics may also distort the law and lead to inaction. Where the benefits of a policy are diffuse, for example, but the policy's costs are concentrated, it is possible that no one will act to bring the policy about, or that a weaker version of the policy will emerge, because the policy's would-be beneficiaries will hope that someone else does the necessary work while a highly motivated interest group will oppose the policy.<sup>105</sup>

### B. *Collective-Action Dynamics and Theories of Government*

Implicit in the foregoing is the point that how often collective-action problems prevent beneficial behavior depends on how decisions are made and in particular the values decisionmakers place on action and inaction. Those values, in turn, are affected by what motivates decisionmakers. To the extent that decisionmakers are motivated by altruism, it is relatively less likely that collective-action dynamics will prevent beneficial action.<sup>106</sup> In the fireworks example, for instance, if a decisionmaker *enjoys* benefitting others (or just enjoys lighting things on fire), then the fact there is no way to prevent others from sharing in the experience is much less likely to prevent the show. The collective-action dynamic arises because individuals like watching fireworks and would rather watch someone else's than pay for their own. Or in the Chicken Game, if one driver takes pleasure in keeping the other driver safe, he or she may very well get out of the way without really playing the game. By contrast, if a

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<sup>104</sup> See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 14 (1st ed. 1965) ("It would obviously not be feasible, if indeed it were possible, to deny the protection provided by the military services, the police, and the courts to those who did not voluntarily pay their share of the costs of government, and taxation is accordingly necessary."). That said, even for public goods, government action is not always necessary. See, e.g., R.H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357, 363-67 (1974) (describing the historical role of private individuals in building lighthouses, a public good).

<sup>105</sup> This point should not be taken too far; cooperation is not impossible, even for large, diffuse groups. See generally GUNNAR TRUMBULL, *STRENGTH IN NUMBERS: THE POLITICAL POWER OF WEAK INTERESTS* (2012) (describing diffuse consumer groups that have successfully lobbied for legislation). That said, at the margins, presumably it is easier to coordinate in small groups with intense interests than large groups with diffuse interests. See Jonathan Rauch, *Was Mancur Olson Wrong?*, AM. ENTER. INST. (Feb. 15, 2013), <https://www.aei.org/articles/was-mancur-olson-wrong> [<https://perma.cc/P2SN-VPZN>] ("Olson did not say diffuse interests cannot organize, any more than Newton's gravitational theory says you can't walk uphill. He said it is *harder*, other things being equal, for diffuse interests to organize.").

<sup>106</sup> See Lu Gram, Nayreen Daruwalla & David Osrin, *Understanding Participation Dilemmas in Community Mobilisation: Can Collective Action Theory Help?*, 73 J. EPIDEMIOLOGY & COMTY. HEALTH 90, 91 (2019) ("In other situations, the direct benefits are excludable, but sharing still occurs out of altruism.").

decisionmaker is less altruistic, then an inability to avoid freeriding may prevent a fireworks show from happening or result in a fiery crash.

This point can be applied to theories of government behavior. What motivates government officials is a difficult question, especially because the answer no doubt varies. Some officials may have pecuniary or other less-than-noble interests in mind,<sup>107</sup> while others may be more altruistic. Steven Croley has collected and summarized the leading theories.<sup>108</sup> Especially relevant is the debate between those who subscribe to public-interest versus public-choice models of government behavior—models this Article caricatures to more cleanly present the distinction. The premise of the public-interest model is that officials always try to do what is best for the public.<sup>109</sup> A very simplified version of public choice,<sup>110</sup> by contrast, posits that those in power look out for themselves, and are unlikely to do what benefits the public absent some element of personal advantage.<sup>111</sup> Public choice theory, of course, has

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<sup>107</sup> See, e.g., Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2042 & n.247 (2014) (book reviews) (collecting citations about the “revolving-door”); cf. DAVE BARRY, DAVE BARRY HITS BELOW THE BELTWAY 94 (2001) (“When they say ‘serve the nation,’ what they of course *mean* is that they want to be whisked around the nation in a motorcade, and fly on Air Force One, and be catered to by a large fawning entourage . . .”).

<sup>108</sup> See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 5 (1998). For further discussion of theories of what motivates government regulation of the economy, see Richard Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974).

<sup>109</sup> See Croley, *supra* note 108, at 65–66 (describing the public interest theory); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 6 (1990) (“[T]he public interest view emphasizes the importance of ideology and the desire to make good policy, which are seen as motivating legislators to seek to improve society (according to their perhaps controversial notions of what is good).”). Unsurprisingly, what an abstract concept like “the public interest” means in application is debatable. See David Thaw, *Enlightened Regulatory Capture*, 89 WASH. L. REV. 329, 336 (2014) (“Debate over what constitutes the ‘public interest’ enjoys a rich history both in political theory and in political action.”); Scott L. Cummings, *The Pursuit of Legal Rights—and Beyond*, 59 UCLA L. REV. 506, 521 (2012) (characterizing the question as “imponderable”).

<sup>110</sup> This is a simplified version—no doubt too simplified. As others have noted, the “homo-economicus” view of human nature does not realistically portray how humans behave. See, e.g., D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029, 1040 (2011) (reviewing MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009)). A more accurate portrayal of public choice would posit that the public good is only one of many things that regulators care about. Surely everyone who goes to work for government does so because they desire to see the public good promoted. Personal interests, however, play a greater role in the overall balance of interests in public choice. See *id.* (explaining the need for, and difficulties of, a broader conception of “self-interest”). For purposes of this Article’s analysis, however, there is value in a caricature—it more sharply illustrates the point.

<sup>111</sup> See Croley, *supra* note 108, at 34–35 (describing the basics of public choice theory); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 27 (1965) (“Self-interest, broadly conceived, is recognized to be a strong motivating force in all human activity; and human action, if not bounded by ethical or

its share of critics, especially when taken to extremes.<sup>112</sup> Even so, that doesn't mean the theory isn't valuable<sup>113</sup> or that there are not examples of what looks like public choice in action.<sup>114</sup>

To the extent that government decisionmakers (e.g., members of Congress or Executive Branch regulators) are motivated by the public interest, we should expect less inaction when beneficial policies for the public are on the table; by contrast, to the extent decisionmakers are motivated by public choice, we should expect more inaction.

In reality, of course, the truth is presumably somewhere in the middle, especially when (i) the entire universe of decisionmakers is considered and (ii) the time-horizon is extended beyond a particular decision. The pool of decisionmakers presumably includes individuals at different points on a (simplified) public-interest-versus-public-choice spectrum and even public-interest-minded individuals may make decisions that themselves are not in the public interest on the theory that ensuring reelection will enable more decisions in the public interest.<sup>115</sup> Likewise, even those who want to do good may fail in their attempt because they lack interest in a particular issue that would be beneficial if acted on; unfortunately, because we have finite

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moral restraints, is assumed more naturally to be directed toward the furtherance of individual or private interest.”); cf. Jeremy Kidd, *Fintech: Antidote to Rent-Seeking?*, 93 CHI.-KENT L. REV. 165, 172 (2018) (“A counter-intuitive result of legislative and regulatory processes is that those who bear the costs of regulation often lobby for its implementation . . . because they know that new entrants into the market will not be able to afford the additional costs.”); Jeremy Kidd, *Quacks or Bootleggers: Who’s Really Regulating Hedge Funds?*, 75 WASH. & LEE L. REV. 367, 441-42 (2018) (making the same observation in the context of Dodd-Frank’s hedge fund regulations).

<sup>112</sup> See, e.g., Tom Ginsburg, *Ways of Criticizing Public Choice: The Uses of Empiricism and Theory in Legal Scholarship*, 2002 U. ILL. L. REV. 1139, 1147-48 (arguing that public choice theory is overly pessimistic).

<sup>113</sup> Tom Ginsburg made the following observation about the theory:

Even if people are not self-interested, we may want to . . . assume that they are for purposes of institutional design. As long as some large proportion of human behavior involves self-interest—and even social constructivists would likely acknowledge that this is the case—it makes sense to take self-interest into account as we design institutions. Public choice-like insights have been utilized in this pragmatic manner for two hundred years.

*Id.* at 1154.; see also DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 4 (1991) (“[E]ven if [the most extreme positions] do not fully capture the realities of government, they may still represent some important tendencies.”).

<sup>114</sup> See, e.g., Gordon Tullock & Jimmie Hillman, *Public Choice and Agriculture: An American Example*, in 3 *ISSUES IN CONTEMPORARY ECONOMICS* 98, 104-09 (Partha Dasgupta ed., 1991) (offering examples of potential public-choice decisions).

<sup>115</sup> See, e.g., Frank H. Hill, *Democracy and Progress*, 6 *UNIVERSAL REV.* 1, 10 (Harry Quilter ed., 1890) (“To get elected is the first duty of a politician; to get re-elected is his second duty. What good can he do if he loses his seat?”). More generally, “there are many instances when the pursuit of narrow self-interest by groups may arguably benefit the more diffuse public.” Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 *HARV. L. REV.* 1285, 1303 n.67 (2003).

resources (including time), no one can address everything. We all have priorities. Accordingly, unless one believes that *all* policymakers *only* pursue what an objective observer would call the public interest, whatever one's opinion of what generally motivates decisionmakers, we should worry about collective-action dynamics.

### C. How to Address Collective-Action Dynamics

Finally, and of particular importance here, it is possible to mitigate collective-action problems. An answer to the Chicken Game, for instance, is a credible commitment mechanism.<sup>116</sup> If the drivers *know* that one cannot turn (for example, because she has openly removed the steering wheel), the payoff structure changes.<sup>117</sup> Then, the rational response is for the driver who can still steer to change direction.<sup>118</sup> Similarly, it may make sense for the government to intervene to prevent a collective-action problem—for instance, by itself providing a public good such as national defense.<sup>119</sup> In other words, if the collective-action problem arises because two can act, a solution to the problem is to take away that power from one of them. Other possible solutions include increasing cooperation—by encouraging beneficial norms to that effect<sup>120</sup> or by increasing punishment for lack of cooperation (itself a form of “encouragement”<sup>121</sup>). “Repeat-player” dynamics may also play a role (e.g., by encouraging cooperation for fear of punishment in the next iteration of the game), especially where the same parties are involved and know they are in an iterative game.<sup>122</sup>

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<sup>116</sup> See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 22-28 (1960) (explaining commitment mechanisms in game theory).

<sup>117</sup> See, e.g., Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1449-50 (2009) (“These limits can often be conceptualized as legally imposed precommitment devices, similar to one party (*A*) tearing out her own steering wheel during a game of roadway Chicken with another party (*B*). If *B* indeed faces a Chicken Game payoff structure, he will see *A*'s precommitment and swerve . . .” (footnote omitted)).

<sup>118</sup> See LISA L. MARTIN, *DEMOCRATIC COMMITMENTS* 64 (2000) (explaining commitment mechanisms, including openly tossing aside a steering wheel).

<sup>119</sup> See Cowen, *supra* note 96 (discussing national defense as a public good).

<sup>120</sup> See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 918 (1996) (“Good social norms solve collective action problems by encouraging people to do useful things that they would not do without the relevant norms.”).

<sup>121</sup> See Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453, 461 (2006) (“One solution, most associated with organized crime, is to kill the snitch.”).

<sup>122</sup> Cf. Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1132 n.86 (2005) (noting how “features” of “the legislative process, such as logrolling, a norm of collegiality, [and] the presence of repeat players” may act to “mitigate[] collective action problems”). That said, repeat-player dynamics are not a cure-all. See, e.g., Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573, 598 (2015) (“[A]n industry structure conducive to collective action, combined with the strategic use of positional and informational advantages that intermediaries derive as repeat players in a particular market, may operate to entrench an inefficient institutional arrangement.”); David

### III. *CHEVRON* AND COLLECTIVE-ACTION DYNAMICS

The conventional wisdom—shared by both those who are wary of “an already titanic administrative state”<sup>123</sup> and those who believe agencies need authority to address “modern problems”<sup>124</sup>—is that delegation, of which *Chevron* deference is a species, by its very nature results in more federal activity.<sup>125</sup> After all, the theory goes, absent *Chevron*, where an ambiguous statute is best read as foreclosing some policy, only Congress can create that policy. Because of *Chevron*, however, an agency can also sometimes create the policy in that situation.<sup>126</sup> So, on the theory that two is more than one, we should expect that more policy will be created (or at least more activity will occur, including deregulation). Both sides of the ideological debate about *Chevron* share the premise. They just disagree about whether increased activity should be applauded.

Yet that shared premise may be false, or at least incomplete. To be sure, the premise may be true for major questions; indeed, one reason the White House uses regulatory power for high-profile policy issues is because Congress refuses to enact new legislation.<sup>127</sup> This means that if the Supreme Court continues to

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Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 482 (1999) (explaining why it can “more difficult to control opportunism than the ‘repeat player’ story might lead one to believe,” including the lack of good information about what has happened and why).

<sup>123</sup> Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>124</sup> Cf. David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 292-93 (2013) (explaining that “open-ended, broad delegations of regulatory authority” enable “the administrative state [to] be responsive to modern problems”).

<sup>125</sup> See, e.g., Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1911 (2017) (“[T]he *Chevron* doctrine encourages agency aggressiveness on a large scale. Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes.”).

<sup>126</sup> The President, the White House, and federal agencies do not always overlap in terms of agenda. See Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 686 (2016) (“[A]dministrative law has failed to take the complexity and variety of presidential control into account.”); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1761 (2013) (“Presidents delegate regulatory review to a number of agents . . . who themselves disagree and conflict over what the President desires.”). Nevertheless, it is no secret that the Presidency, acting through White House personnel, has increasingly assumed greater control of the agencies and their regulatory actions. See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272-81 (2001) (describing this trend). Some argue that Article II of the Constitution requires such control—a question beyond the scope of this Article. See, e.g., Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541, 2559 (2011) (emphasizing Article II’s vestiture of executive power in a singular president). For purposes here, the President, the White House, and federal agencies will be conflated for ease of exposition. The central insight that a collective-action dynamic may arise, however, applies even if agencies are separated from the White House. See *infra* Section V.C.

<sup>127</sup> See, e.g., Blackman, *supra* note 1, at 293-94 (discussing President Obama’s use of deferred actions when Congress decided to not enact an immigration reform bill); Kagan, *supra* note 126, at 2248 (“Whether the subject was health care, welfare reform, tobacco, or guns, a self-conscious and central

enforce the major questions doctrine, presidents will have less ability to create major policies through regulation. So if the Court backs away from the doctrine, presidents will have a freer hand to create major policies. The shared premise may also be true for policies that are neither major nor minor but are regularly addressed by policymakers (even if not on the front page).

The shared premise is not necessarily true, however, for minor questions. Minor questions—that is, low-profile, often bipartisan issues that the political branches want resolved the same way but are not high priorities for either branch—are particularly at risk of policy stagnation. As Mancur Olson observed, because of the collective-action dynamics that a shared ability to act creates, “[i]t is not in fact true that the idea that groups will act in their self-interest follows logically from the premise of rational and self-interested behavior.”<sup>128</sup> Because these characteristics tend to reduce political saliency, moreover, the risk of inaction should be especially pronounced where a policy’s benefits are diffuse and its costs concentrated or where a policy is technical. For such low-salience, “good government”-type issues, which are everywhere in modern society, Congress and the White House both face incentives to freeride. This unexplored collective-action insight explains why a minor questions doctrine may be worthwhile.

#### A. *An Intuitive Explanation*

When both political branches share the same policymaking space, each branch has an incentive to freeride off the efforts of the other. The result for each branch may be mixed strategies—i.e., acting only a certain percentage of the time.<sup>129</sup> When each branch uses a mixed strategy, sometimes both will act, sometimes only one will act, and sometimes neither will act. That collective-action insight may apply to administrative law, where shared policymaking spaces are common. For certain popular policies, both Congress and the White House *want* to act and would do so regardless of what the other does; when that happens, there may be wasted resources (itself a collective-action problem), but at least there is no danger of inaction. For other policies, however, Congress and the White House both want the same thing, but each would prefer the other to bear the costs. In theory, this incentive structure might lead to both sides using mixed strategies, and so sometimes mutual inaction.<sup>130</sup>

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object of the [Clinton] White House was to devise, direct, and/or finally announce administrative actions . . . to showcase and advance presidential policies [against the backdrop of a hostile Congress].”)

<sup>128</sup> OLSON, *supra* note 104, at 1-2 (emphasis omitted).

<sup>129</sup> BAIRD ET AL., *supra* note 102, at 36-37.

<sup>130</sup> See, e.g., Hemel, *supra* note 12, at 707-08 (discussing a possible example of the President and Congress adopting mixed strategies for raising additional revenues).



By definition, deference allows the White House to act where it would otherwise be forced to stand aside, thus expanding the White House's menu of options. At the same time, because agencies (generally) cannot act without congressional authorization,<sup>131</sup> and because one Congress cannot bind a future Congress,<sup>132</sup> Congress also can access that same menu, plus any other policy within its constitutional powers. Thus, every policy that the White House can create via *Chevron* can also be created by Congress through legislation. Deference accordingly creates overlapping policy spaces between Congress and the White House where such overlap would not otherwise exist. This may lead to at least two types of collective-action problems. First, sometimes both Congress and the White House may act, resulting in wasted resources. And second, sometimes neither Congress nor the White House may act, resulting in policy stagnation.

First, overlapping policymaking power sometimes may mean wasted resources. Some policies are good for the public *and* popular; everyone wants credit for those policies. Congress thus may rush to enact legislation, and the White House may similarly use its rulemaking powers, augmented by *Chevron*, to create redundant policy.<sup>133</sup> To be sure, this overlapping authority

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<sup>131</sup> See *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”). The exception to this “no power to act” rule, of course, is when the President is acting pursuant to his or her Article II powers. The extent of the White House’s power to control what agencies do with delegated authority from Congress is disputed, especially when it comes to policymaking authority that only exists because Congress created agencies to exercise it. Recently, the Supreme Court suggested that with limited exceptions, the President has the constitutional power to control whatever policymaking discretion federal agencies enjoy. See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (explaining that “[t]he entire ‘executive Power’ belongs to the President alone,” and that although “lesser executive officers [may] ‘assist the supreme Magistrate in discharging the duties of his trust,’” “[t]hese lesser officers must remain accountable to the President, whose authority they wield” (quoting 30 THE WRITINGS OF GEORGE WASHINGTON 334 (John C. Fitzpatrick ed., 1939))); *id.* at 2204 (explaining that it is important that agencies fall “in line with the President’s preferred policies”). That broad view of presidential power, however, is contested. See, e.g., *id.* at 2227 (Kagan, J., dissenting) (“The President, as to the construction of his own branch of government, can only try to work his will through the legislative process.”). For purposes of this Article, it is enough to observe that the White House can and often does exert a great deal of pressure on agencies to pursue the president’s policy goals. See, e.g., Kagan, *supra* note 126, at 2248 (demonstrating that in recent decades “the regulatory activity of the executive branch agencies” has become “more and more an extension of the President’s own policy and political agenda”).

<sup>132</sup> See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (“[O]ne legislature may not bind the legislative authority of its successors.” (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*90 (1765))). *But see* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1693 (2002) (offering some counterexamples).

<sup>133</sup> There are examples of overlapping efforts. Agencies, for instance, parrot statutory language, even though they receive no special deference for doing so. See, e.g., Hanah Metchis Volokh, *The Anti-Parroting Canon*, 6 N.Y.U. J.L. & LIBERTY 290, 290 (2011) (noting how agencies sometimes promulgate rules that parrot statutory language). One explanation may be that the policy is popular. Promulgating redundant language allows agencies to “hold [themselves] out as the source of a

may have have offsetting benefits.<sup>134</sup> And no doubt, there are policies that are viewed differently by Congress and the White House such that only one branch wants to act.<sup>135</sup> But for policies that are perceived as beneficial and popular by both branches, we should expect overlapping policymaking authority to produce at least *some* waste.

Second, and the special focus of this Article, overlapping policymaking power also sometimes may lead to no one doing anything. In deciding whether to enact legislation, there are policies for which Congress's decision whether to move forward is a close one—the universe of costs is almost as large as the universe of benefits, with both “costs” and “benefits” being comprised of a combination of general *welfare* concerns mixed with *political* concerns.<sup>136</sup> And within that universe of policies, sometimes the overall benefits come disproportionately from the welfare side of the ledger, while the overall costs are disproportionately political. When a welfare-enhancing policy is politically popular, Congress is eager to act. But when a welfare-enhancing policy is politically costly, Congress presumably would like to see someone else step up, at least at the margins.<sup>137</sup> Likewise, even if a policy is politically beneficial, it can still be very costly to enact—it takes resources to address some issues and opportunity costs are real. This is especially true for technical issues, which tend to require more policymaking resources to understand and address.<sup>138</sup> Where such costs become great enough, the

popular new law, just as legislators may enact redundant laws to play to interest groups.” F. Andrew Hessick, *Doctrinal Redundancies*, 67 ALA. L. REV. 635, 669 n.175 (2016) (citing Michael Doran, *Legislative Organization and Administrative Redundancy*, 91 B.U. L. REV. 1815, 1844 (2011)).

<sup>134</sup> See, e.g., Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1138 (2012) (“[R]edundancy has certain benefits, like providing a form of insurance against a single agency’s failure.”); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 848 (2015) (similar).

<sup>135</sup> As reflected in the major questions doctrine, however, there may be questions of legitimacy when the White House creates such policies. See *supra* notes 80–85 and accompanying text.

<sup>136</sup> Further complicating the analysis, these welfare and political costs and benefits overlap. Members of Congress are themselves part of the public, so they benefit when the public benefits, and they suffer when the public suffers. Likewise, political survival for a member of Congress may potentially be a means and not an end; if so, a decision driven by political survival could also, at bottom, be driven by public-interest motivations. For ease of exposition, however, this overlap will be set aside.

<sup>137</sup> Cf., e.g., OSTROM, *supra* note 94 (explaining the “powerful” argument that “[w]henever one person cannot be excluded from the benefits that others provide . . . [t]he temptation to free-ride . . . may dominate the decision process”).

<sup>138</sup> Congress, of course, could increase its policymaking capacity by hiring more staff or by borrowing technical expertise from agencies. See, e.g., Jarrod Shobe, *Agencies As Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 498 (2017) (explaining that Congress uses agencies to help draft statutes because “[a]gencies have more staff and greater subject-matter expertise”). There may be limits, however, to Congress’ ability to hire more staff. See, e.g., Ruth Bloch Rubin, *Lessons from the History of Reform*, in CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM 255, 266 (Timothy M. LaPira, Lee Drutman & Kevin R. Kosar eds., 2020) (noting political obstacles

political benefits of acting may be canceled out such that Congress again presumably would also like someone else to take the lead. Delegated authority, express and implicit (via *Chevron*), may allow that “someone else” dynamic to emerge. Congress, acting rationally from its perspective, may prefer the White House to create the policy.

Yet the White House may not be eager to accept that role.<sup>139</sup> Even if it agrees that the policy is welfare-enhancing, the White House surely recognizes the asymmetrical costs.<sup>140</sup> Granted, if Congress could not act, the White House might be willing to go it alone.<sup>141</sup> But Congress *can* act. And if it does, the White House benefits because the policy becomes law on Congress’s tab. Thus, the White House may also be tempted to freeride, especially if it believes Congress is shirking.<sup>142</sup> This shared incentive to freeride is critical because, again, when playing the Chicken Game, sometimes no one turns.<sup>143</sup> Deference thus may have two effects—the intended effect (more unilateral White House action for some policies) and the unintended one (less overall federal action for other policies).

Think of it this way. Imagine you’re a member of Congress. There are certain policies that are high priorities for you. You are going to do whatever you can to get those done no matter what anyone else does. Let’s call those policies 1, 2, and 3. But you only have so much time in the day. There are other policies that are more marginal but that you want and would push if you had time. Let’s call those policies 18, 19, and 20. And then there are a spread of 14 other policies in between. When policies 18 to 20 can be done by

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to increased staffing); Thomas Molnar Fisher, *Republican Constitutional Skepticism and Congressional Reform*, 69 IND. L.J. 1215, 1246 (1993) (explaining the arguments that “staff expansion undermines Congress’ ability to deliberate” and decreases “accountability”). Members of Congress, moreover, may not always trust agency experts. See Shobe, *supra*, at 476 n.83, 508. In any event, regardless of capacity, it also takes initiative to get the policymaking ball rolling in the first place, and both sides may be reluctant to take that initial step because of their hope that the other will.

<sup>139</sup> See Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1194 (1973) (“[O]ne of the consequences of broad delegation will be the indisposition of the agency to decide controversial questions.”).

<sup>140</sup> See, e.g., Hemel, *supra* note 12, at 643 (“All else equal, the President would prefer to share the political costs of raising revenue with Congress, while Congress would prefer that the President bear all the political costs of raising revenue himself.”).

<sup>141</sup> See *id.* at 644 (predicting more unilateral action by the White House when Congress is divided because the White House knows that Congress is less able to bring about policy).

<sup>142</sup> Cf. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 604 (1996) (explaining how a “desire not to be suckered” may influence behavior (quoting Peter H. Huang & Ho-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J.L. ECON. & ORG. 390, 403 (1994))).

<sup>143</sup> See, e.g., David Scott Louk & David Gamage, *Preventing Government Shutdowns: Designing Default Rules for Budgets*, 86 U. COLO. L. REV. 181, 206 (2015) (likening budget negotiations to Chicken Games where shutdowns sometimes happen); Hemel, *supra* note 12, at 644 (“Absent the possibility of such credible commitments, . . . some revenue-raising measures that could be implemented via regulation or via legislation may not be implemented at all.”).

someone else, you are less inclined to do them yourself. That “someone else,” however, may have a similar approach. If that “someone else” views the same policies as marginal that you do, both of you and the “someone else” may stand aside in hopes that the other person acts. Instead, both you and the “someone else” may spend time replicating each other’s work on policies 1, 2, and 3. The result would be a net loss to society.

Importantly, what types of policies may be most susceptible to mutual inaction? In other words, what policies exist for which, from a policymaker’s perspective, the total benefits outweigh the total costs, but with the benefits disproportionately coming from general welfare considerations, and the costs disproportionately coming from political considerations or high opportunity costs? Obvious answers include (i) policies for which the welfare benefits are diffuse but the political costs are concentrated and (ii) policies that are technical and so require more of the actor’s resources to address.<sup>144</sup> The former category should be especially vulnerable to collect-action dynamics because it is easier for concentrated groups to mobilize, thus putting political pressure on policymakers.<sup>145</sup> Classic examples include industry-specific subsidies or tax breaks; there is little benefit to any individual voter, but these policies can be the difference between survival and extinction for businesses in the industries.<sup>146</sup> And as for the latter category, it is easy to imagine technical issues that would require many resources to solve and so, all else being equal, are more likely to go unaddressed.<sup>147</sup>

The result is that in a world with deference, we should not be surprised to see cases—*at the margins*—where Congress and the White House do not act, even though either branch would act if policymaking power was not shared.<sup>148</sup> Importantly, although major questions or intermediate questions can also sometimes be subject to such collective-action dynamics because they

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<sup>144</sup> Cf. Susannah Camic Tahk, *Making Impossible Tax Reform Possible*, 81 FORDHAM L. REV. 2683, 2696 (2013) (“Interest group theory from political science . . . [contends] that how a law distributes its costs and benefits determines how easy that law is to pass and to sustain.”).

<sup>145</sup> See *id.* at 2697 (“[S]ome small, easily organized group will benefit and thus has a powerful incentive to organize and lobby; the costs of the benefit are distributed at a low per capita rate over a large number of people, and hence they have little incentive to organize in opposition—if, indeed, they even hear of the policy.” (quoting Wilson, *supra* note 16, at 369)).

<sup>146</sup> *Id.* at 2686; see also Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 31 (1999) (“Modest benefits to a well-organized interest group can readily outweigh larger costs to a diffuse and poorly organized interest group in the political calculus.”).

<sup>147</sup> Cf., e.g., Siddharth Khanijou, *Patent Inequity?: Rethinking the Application of Strict Liability to Patent Law in the Nanotechnology Era*, 12 J. TECH. L. & POL’Y 179, 191-92 (2007) (explaining how “research and development” is subject to “collective action problems” unless the benefits are “internalized”); Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 702 (2003) (noting that what is “expensive to produce” can lead to “a real freerider problem”).

<sup>148</sup> See Hemel, *supra* note 12, at 711 (“A zero-deference regime would effectively eliminate the President’s regulatory option, increasing the probability that Congress would act.”).

too can be characterized by diffuse benefits and concentrated costs or unusual technical complexity, policies with those particular characteristics should more regularly satisfy this Article's definition of a minor question.

### B. *A Mathematical Explanation*

The foregoing intuitive analysis also finds support in game theory. Game theory teaches that because of mixed strategies,<sup>149</sup> sometimes the consequence of shared policymaking spaces is that nothing happens.

This point is best illustrated by a number of variations of the Snowdrift Game.<sup>150</sup> Recall, in this game there are two drivers who run into a snowdrift from opposite sides. Each would benefit from a clear road. Sometimes the costs and benefits of clearing the road are such that both will happily clear the snow, especially if shoveling snow is fun. Other times both will get out of the car, resulting in redundancy. Other times still, no one will shovel. Consider the following version of the game. Imagine that shoveling is easy and fast (essentially, all the work is done by getting out of the car) and it is rewarding too (because, say, it is good exercise). If so, the payoff matrix (i.e.,

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<sup>149</sup> Some may object to the use of mixed strategies. After all, when it comes to politics, no one is randomly pulling cards from a hat that say "act" or "don't act," and mixed strategies may require some "random device to decide upon an action." ARIEL RUBINSTEIN, *ECONOMICS AND LANGUAGE: FIVE ESSAYS* 77-78 (2001); see also Tonja Jacobi & Jonah Kind, *Criminal Innovation and the Warrant Requirement: Reconsidering the Rights-Police Efficiency Trade-Off*, 56 WM. & MARY L. REV. 759, 800 n.195 (2015) ("Some scholars have argued that Nash equilibria are not in fact accurate predictions of human behavior."). It can also be difficult to model a relationship that may result in multiple, even infinite, iterations of the game. See generally Bengt Carlsson & Stefan Johansson, *An Iterated Hawk-and-Dove Game*, in *AGENTS AND MULTI-AGENT SYSTEMS* 179 (Wayne Wobcke, Maurice Pagnucco & Chengqi Zhang eds., 1997). Game theorists have offered defenses of mixed strategies. See, e.g., RUBINSTEIN, *supra*, at 79 ("[T]he uncertainties behind the mixed strategy equilibrium [can be] viewed as an expression of the lack of certainty on the part of the other players rather than an intentional plan of the individual player."); Robert J. Aumann, *What Is Game Theory Trying to Accomplish?*, in *FRONTIERS OF ECONOMICS* 5, 19 (Kenneth J. Arrow & Seppo Honkapohja eds., 1985) (noting that "mixed strategy [can] model[] the ignorance of the outside observer and of the other players"). This Article does not address these broad issues. Suffice it to say, despite difficulties, economists have long recognized that mixed-strategy analysis has value. See, e.g., Press Release, The Nobel Prize, Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1994 (Oct. 11, 1994), <https://www.nobelprize.org/prizes/economic-sciences/1994/summary> [<https://perma.cc/5JJB-73CX>] ("Nash equilibrium has become a standard tool in almost all areas of economic theory.").

<sup>150</sup> The portrayal here is stylized. In reality, a lot of behavior occurs before a mixed-strategy-randomizing-like approach applies. Individuals speak with each other and monitor what the other one is doing. Only after a lot of back and forth do the parties decide to "act" versus "non-act." My model necessarily assumes all of that as background. The central point is that at least some cases, at the margins, it is useful to model parties with overlapping policymaking authority acting in a way that reflects mixed-strategy analysis. Put differently, "all models are wrong, but some are useful." GEORGE E.P. BOX & NORMAN R. DRAPER, *EMPIRICAL MODEL-BUILDING AND RESPONSE SURFACES* 424 (1987).

how happy a player in the game is about a particular outcome).<sup>151</sup> could look something like this:

Table 1: The Snowdrift Game: Inaction Impossible

		Driver Two	
		Shovel	Don't Shovel
Driver One	Shovel	(2, 2)	(5, 0)
	Don't Shovel	(0, 5)	(-5, -5)

Here, it is impossible to end up in a situation where no one shovels. Both players *want* to shovel. If, for some reason, one player does not shovel, that wouldn't change anything for the other player. Both sides thus have what is called a "dominant" strategy.<sup>152</sup> When it comes to policymaking, this version of the Snowdrift game may be akin to a situation where the policy is welfare enhancing, popular, *and* not overly technical. For such policies, both Congress and the White House will try to bring them about no matter what the other does. Although mutual action has deadweight losses too, it does not lead to a welfare-enhancing policy being thwarted.<sup>153</sup>

Now, however, consider a different version of the game. Here, it is very cold, and whatever reward that comes from helping others is more than offset by the joy of a warm car. Yet sitting in a car too long means illness or even death. With this scenario in place, imagine these payoffs:

<sup>151</sup> See, e.g., Tracey E. George & Chris Guthrie, Essay, *Induced Litigation*, 98 NW. U. L. REV. 545, 549 n.13 (2004) ("[T]he concept of 'utility' [i]s a means of assigning an objective score to the relative level of satisfaction that a person gets from consuming a good or undertaking an activity." (citing ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 73 (5th ed. 2001))).

<sup>152</sup> See, e.g., BAIRD ET AL., *supra* note 102, at 11 (describing the role of each player's dominant strategy in game theory). The dominant strategy arises because driver one considers the scenario where driver two shovels. In that case, driver one maximizes her utility by shoveling ( $2 > 0$ ). Driver one then considers the scenario where driver two does not shovel; in that case, driver one maximizes her utility by shoveling ( $5 > -5$ ). No matter which choice driver two makes, driver one will be better off shoveling. The same analysis will be conducted by driver two, with the same result, so both parties will shovel. Note, there is no need for symmetry. This Article uses symmetrical values for simplicity's sake. But the same outcome would emerge if, say, one of the 5s was replaced with an 8, and one of the -5s was replaced with a -1. All that matters is certain values in the matrix are larger than other values.

<sup>153</sup> To be clear, though: At the margins, there may be policies that are on net beneficial *only if* just one branch incurs the expense of bringing them about.

Table 2: The Snowdrift Game: Inaction Very Unlikely

		Driver Two	
		Shovel	Don't Shovel
Driver One	Shovel	(1, 1)	(0, 2)
	Don't Shovel	(2, 0)	(-50, -50)

There is no dominant strategy here. If Driver One shovels, Driver Two is better off staying in the car. If Driver Two shovels, Driver One is better off staying in the car. Yet if they both stay in the car, both will suffer.<sup>154</sup> What happens? It is impossible to say. But both sides may opt to use a mixed strategy. With a certain probability, each Driver could decide to shovel, and, inversely, also decide not to shovel. This probability, moreover, can be derived mathematically.<sup>155</sup> It turns out that Driver One and Driver Two should each shovel about 98% of the time and not shovel 2% of the time. The probability that neither shovels therefore would be less than 1%.<sup>156</sup> This is reassuring. There may be some redundancy, but at least someone will almost certainly do the work. As to policymaking, this may be a situation where the policy is welfare enhancing but either unpopular or unusually technical, but where mutual inaction is deemed catastrophic.

<sup>154</sup> There are thus two “pure strategy” Nash equilibria; if Driver One shovels, Driver Two always stays in the car; if Driver Two shovels, Driver One always stays in the car. See BAIRD ET AL., *supra* note 102, at 35. Again, symmetrical numbers are not essential for this analysis. Notably, some might fight the hypothetical and ask why the two drivers don't just get out of their cars and make a deal. At the margins, transaction costs could keep that from happening. In the Snowdrift Game, the wall of snow, the bitter cold, etc., could be transaction costs, as could the inability to guarantee that the other driver will actually get out of the car and shovel when it is his turn. The analogous costs may be far higher in government, where politics, personal grudges, and the inability to know what the courts will do all can be transaction costs. See generally Jeremy Kidd, *Kindergarten Coase*, 17 GREEN BAG 2D 141 (2014).

<sup>155</sup> Player One's optimal strategy is determined by choosing the value for  $P_1$  (given Player Two's optimal strategy ( $P_2$ )) that maximizes Player One's expected payout, that is, Player One chooses  $P_1$  to maximize the following payout:  $P_2 [P_1(1) + (1-P_1)(2)] + (1-P_2) [P_1(0) + (1-P_1)(-50)]$ .

Player Two solves an identical equation. With a bit of algebra (and a little bit of calculus), we see that  $P_1=P_2=50/51$  or about 98%. See also BAIRD ET AL., *supra* note 102, at 35-38 & 277 n.16 (describing the math algebraically).

<sup>156</sup> The probability that *both* would shovel can be calculated by multiplying the probability that Driver One would shovel (for simplicity's sake, say, 98%) by the probability that Driver Two would shovel (also, say, 98%). That would be approximately 96%. The probability that *neither* would shovel would be calculated by multiplying the probability that Driver One would not shovel (say, 2%) by the probability that Driver Two would not shovel (again, say, 2%); that is .04%.

Things change, however, when the payoff structures changes. Consider the following version of the game:

Table 3: The Snowdrift Game: Inaction Fairly Unlikely

		Driver Two	
		Shovel	Don't Shovel
Driver One	Shovel	(1, 1)	(0, 2)
	Don't Shovel	(2, 0)	(-1, -1)

Now, using the same formula, the mixed strategy for Driver One and Driver Two would be to each shovel half the time. This means that for any particular snowstorm, we should expect both to shovel 25% of the time and neither to shovel 25% of the time and that one of the two will shovel half of the time. Returning to policymaking, this situation could be one where the policy is welfare enhancing but politically costly or the issue is very technical, and mutual inaction is pretty bad but hardly a catastrophe.

Finally, if we change the payoff structure one more time, mutual inaction can become likely:

Table 4: The Snowdrift Game: Inaction Likely

		Driver Two	
		Shovel	Don't Shovel
Driver One	Shovel	(1, 1)	(0, 10)
	Don't Shovel	(10, 0)	(-1, -1)

Here, the optimal strategy for both Driver One and Driver Two is to shovel 10% of the time and not shovel 90% of the time. Hence, we should expect that no one shovels; indeed, that should happen about 80% of the time. In this scenario, even though the worst outcome for everyone is mutual inaction, perversely, that outcome is also what we should expect. Analogizing to policymaking, this version may be a situation where the policy is, on net, socially beneficial but the political or opportunity costs of bringing it about



are very high and letting nothing happen is not a huge deal. Under these conditions, freeriding may be quite attractive. To be clear, both branches would benefit from action because a good policy would become law. Accordingly, if only one could act, that branch would do so. But because both can act, and the costs of mutual inaction are considered minor, we should expect that often nothing happens.

The upshot is straightforward. For policies for which neither branch has a dominant strategy to act, and especially for which neither considers inaction catastrophic, mutual inaction sometimes should occur.<sup>157</sup> Not by accident, those conditions often match the test offered in this Article for a minor question.<sup>158</sup> If an issue is particularly important to either or both branches, then there is a good chance that at least one has a dominant strategy to act. Likewise, even if no branch has a dominant strategy to act, but if both consider inaction catastrophic, suggesting that the policy is not a minor question, the odds of mutual inaction should be small. But if an issue is not deemed especially important, then sometimes neither branch may act, even though both agree that the policy is welfare-enhancing and either branch would if the other one couldn't.

### *C. Real World Applications*

This collective-action dynamic may play out in the real world. To be sure, it is difficult for an academic observer to confidently identify things that did not happen but would have happened if some variable had been different. It is also difficult to understand political decisionmaking, where the reason offered for an action may not be the real one.<sup>159</sup> The fog surrounding policymaking is especially heavy here, moreover, because the sorts of policies where inaction results may not command a great deal of attention. And there are many reasons that a policy proposal might not become law, even if the policy is popular.<sup>160</sup> Despite these limitations, however, this Section identifies substantive areas of law that may be most susceptible to a “minor questions” collective-action problem.

The first field is tax law. Daniel Hemel observes that there are many policies that the White House could bring about to increase federal revenue. Yet even though the White House supports these policies—indeed, by means

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<sup>157</sup> See, e.g., Hemel, *supra* note 12, at 708 (“Two-sided inaction may result . . . even in equilibrium.”). As explained above, how Congress and the White House determine the value of policy implicates competing theories of governmental behavior.

<sup>158</sup> See *supra* p. 1204.

<sup>159</sup> See, e.g., Hemel & Nielson, *supra* note 27, at 788-801 (offering possible examples).

<sup>160</sup> See, e.g., Frank H. Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 547 (1983) (“Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.”).

of the “Greenbook,” the White House encourages Congress to enact those policies by legislation—the White House is unwilling to promulgate regulations to do so, even though it could itself unilaterally turn these policies into law.<sup>161</sup> Hemel documents a number of statutes for which an agency would receive deference, and for which the White House openly favored a particular tax policy, yet the White House declined to regulate but instead requested Congress to do so. For instance, taxing officials, when interpreting the phrase “exclusively for conservation purposes” in the tax code, could read the statute to prevent taxpayers from claiming massive deductions for “‘air rights’ easement[s]” above historic homes where “such development [is] already restricted by local authorities.”<sup>162</sup> Nonetheless, the White House has not acted. Hemel details a number of similarly ambiguous tax-related statutes that seem to fit this same pattern.<sup>163</sup>

At first blush, this inaction seems puzzling. If the White House thinks a revenue-raising rule is in the public interest, and if it has authority under *Chevron* to promulgate such a regulation, why not do it? Yet unilateral action by the White House means that it will bear essentially *all* the costs while only receiving *some* of the benefits. That is a recipe for inaction.<sup>164</sup> Moreover, applying this Article’s diffused-versus-concentrated framework (i.e., we should expect collective-action dynamics more often for issues with diffuse benefits but concentrated costs because they impose greater relative political costs on the branch that acts), this is the sort of situation for which inaction is most likely; there is a diffuse benefit (increased revenue for the public) but a concentrated cost (a particular group must pay more). Likewise, if we focus on this Article’s simple-versus-technical framework (i.e., we should expect collective-action dynamics more often for technical issues that require the acting branch to use more resources to address), it is also easy to see why complicated tax issues are not readily addressed. Accordingly, Hemel’s specific, real-world examples support the thesis that deference sometimes may create a collective-action problem for revenue collection.

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<sup>161</sup> See Hemel, *supra* note 12, at 639-40 (“Almost invariably, the Greenbook includes proposals that the President plausibly could carry out on his own—without any congressional action—by directing the Treasury Department to promulgate appropriate regulations.”); see also *id.* (listing examples).

<sup>162</sup> See *id.* at 671-72 (first quoting 26 I.R.C. § 170(h)(1)(C); then quoting U.S. DEP’T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION’S FISCAL YEAR 2014 REVENUE PROPOSALS 162 (2013)).

<sup>163</sup> See Hemel, *supra* note 12, at 658-75.

<sup>164</sup> See *id.* at 703-04 (“[E]ven if the shared political benefits of additional spending are high enough that the President would be willing to bear the political costs of raising revenue on his own, he would still prefer to share those costs with Congress. As a result, the President may include proposals in the Greenbook even though—if the prospect of legislation were off the table—the President would be willing to implement the proposal via executive action.”).

Hemel's logic, however, can be taken further. His article, *The President's Power to Tax*, focuses on one half of the dynamic: why the White House acts or does not act. But his analysis also explains *Congress's Power to Tax*. Hemel notes in passing—but does not dwell on the troubling possibility—that *because* of deference, Congress may also decline to act, resulting in welfare-enhancing policies being shelved even though both Congress and the White House would turn them into law but for the fact that the other also could do so.<sup>165</sup> For instance, Hemel observes that “the rise of the anti-tax Tea Party in recent years may actually have led to more revenue being raised” because Congress was effectively disabled from acting, thus allowing “the President and Congress to avoid the uncooperative result (*don't regulate, don't legislate*).”<sup>166</sup> But the flipside is that when the White House and Congress *do* agree on the policy, “the uncooperative result (*don't regulate, don't legislate*),” may emerge in a world with shared policymaking space. When only the White House can act, there is no collective-action problem because there is no temptation to freeride. By the same token though, when only Congress can act, there is *also* no collective-action problem. It is only when both branches can act that the dynamic emerges. The specific examples Hemel offers of tax policies that the White House lists in the Greenbook but that Congress does not enact are thus situations in which deference's collective-action dynamics may be working its mischief. The fact that Congress declines to enact legislation that the White House favors, even though there is reason to think that Congress also favors it (for instance, say, when the White House and a supermajority of Congress were controlled by the same party<sup>167</sup>), is notable.

Hemel's tax examples, moreover, do not fully capture the “minor questions” problem. There are different types of tax issues.<sup>168</sup> Some “loopholes,” for instance, are actually deliberate choices by policymakers, often with partisan overtones.<sup>169</sup> Others, however, are minor questions that the majority of policymakers irrespective of party affiliation would address in the same way if it

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<sup>165</sup> See Hemel, *supra* note 12, at 644-45 (“[Deference] empowered the executive branch to act unilaterally, but it also may have discouraged Congress from raising revenue via legislation.”).

<sup>166</sup> *Id.* at 710.

<sup>167</sup> Deference in tax policy is complicated by the fact that it was not until 2011 that the Supreme Court explicitly held that *Chevron* applies in the tax context. See *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 53-57 (2011). Before 2011, courts sometimes applied *Chevron*, but on other occasions applied less robust forms of deference. See Hemel, *supra* note 12, at 655 (discussing *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979)). By 2011, the Democrats' supermajority was gone. Because at least some deference existed both before and after 2011, this fact does not defeat the analysis, but it does complicate the math.

<sup>168</sup> See generally Heather M. Field, *A Taxonomy of Tax Loopholes*, 55 HOUS. L. REV. 545 (2018) (explaining the different types of policies that are all labeled “loopholes”).

<sup>169</sup> See Keith R. Fisher, *Nibbling on the Chancellor's Toesies: A “Roguish” Concurrence with Professor Baxter*, 56 LAW & CONTEMP. PROBS. 45, 62-63 (1993) (“[S]ome ‘loopholes’ actually reflect deliberate choices or compromises by Congress.”).

were relatively easy to do so. Hemel's point that divided government may mitigate collective-action problems makes more sense for partisan issues where a divided Congress *de facto* means that if the White House wants the policy, it has to act. But technical issues without partisan implications may be particularly susceptible to stagnation (again at the margins) because there is no obvious reason why divided government would prevent congressional action for a bipartisan issue. In other words, perversely, the less controversial the policy, the stronger the collective-action problem, all else being equal. This is why minor questions (uncontroversial issues with low salience) may be disproportionately affected by deference's collective-action dynamics.

Hemel's tax analysis is quite useful because—thanks to the Greenbook—it contains concrete examples. Because few areas of law have a tool like the Greenbook, it is more difficult to identify specific policies that the Executive Branch favors yet does not act on. But it is possible to identify other subjects where the same dynamics that affect tax law *may* apply.

For instance, international trade is another area marked by diffused benefits, concentrated costs, and technical complexity.<sup>170</sup> Revising tariffs or subsidies, therefore, is another place where deference sometimes may negate the emergence of beneficial policy. To the extent that the statute is ambiguous,<sup>171</sup> both Congress and the White House sometimes can benefit the public by revising tariffs or subsidies. Yet figuring out optimal policy on a product-by-product basis is technical and potentially politically costly; reform will anger a concentrated group (resulting in, say, political advertising against the policymaker).<sup>172</sup> Although the White House often has broad authority over trade issues (in part, the theory goes, because it is less susceptible to factionalism<sup>173</sup>), it is easy to see why the White House at times may be reluctant to use this authority, especially when doing so will affect a concentrated industry. This pattern is consistent with the notion that when an overall welfare-enhancing policy becomes sufficiently costly for the acting

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<sup>170</sup> See John O. McGinnis & Mark L. Movsesian, Commentary, *The World Trade Constitution*, 114 HARV. L. REV. 511, 516 (2000) (noting how protectionist interest groups “ostensibly” seeking to serve public goals may just want to prevent foreign competition). These dynamics have been understood since the time of Adam Smith—who also could not mobilize the public to address them. See Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 931 n.119 (1992) (citing 1 ADAM SMITH, THE WEALTH OF NATIONS 450-69 (R.H. Campbell et al. eds., Clarendon Press 1976) (1776)).

<sup>171</sup> For reasons sounding in “step zero,” *Chevron* does not apply to every trade decision. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001). *Chevron*, however, does apply to some trade decisions. See, e.g., *Ford Motor Co. v. United States*, 809 F.3d 1320, 1324 (Fed. Cir. 2016).

<sup>172</sup> See generally RÉAL P. LAVERGNE, THE POLITICAL ECONOMY OF U.S. TARIFFS: AN EMPIRICAL ANALYSIS 132-35 (1983) (describing the extent to which tariff structure “responds to interest-group pressure as opposed to the ‘public interest’”).

<sup>173</sup> See McGinnis & Movsesian, *supra* note 170, at 539-41.

branch, neither branch wants to take the lead, even if it approves of the policy and would not stand in the way if the other wanted to act.

Similar analysis may apply to providing access to information. Again, the issue can be technical, the benefit is diffuse, and the costs may be concentrated if disclosure is embarrassing to a specific group.<sup>174</sup>

Environmental law may also be worth considering. Many environmental law scholars lament the fact that environmental proposals are hard to turn into law because of concentrated costs and diffuse benefits.<sup>175</sup> They also observe that Congress may be reluctant to address technical issues.<sup>176</sup> Accordingly, environmental law may be another field where the collective-action dynamic created by deference sometimes leads to some inaction.<sup>177</sup> Granted, many environmental policies are not “minor” questions; indeed, they may even be “major” ones. But there are also many smaller, lower-profile questions without partisan overtones.

These categories are not meant to be exhaustive, nor—to be clear—is it certain that these categories are subject to stagnation of the sort discussed in this Article. Indeed, it would be useful for subject-matter experts to study collective-action dynamics in greater detail to help identify specific examples of stagnation (as with the Greenbook in tax). And, to be sure, it may be *good* that some policies are thwarted. This Article is not the place for a discussion of the merits of any particular issue. Instead, the point here is that that even when both Congress and the White House want the same thing, sometimes nothing may get done.

<sup>174</sup> Cf. Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 932 (1990) (“[O]btaining information is more costly for diffuse groups.”).

<sup>175</sup> See, e.g., Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. REV. 1184, 1254 n.401 (2014) (“[I]ndividuals that favor cleaner air, will have difficulty influencing government decisionmaking compared to well-organized, concentrated groups.”); see also *id.* (collecting citations).

<sup>176</sup> See, e.g., Michael P. Vandenbergh, *An Alternative to Ready, Fire, Aim: A New Framework to Link Environmental Targets in Environmental Law*, 85 KY. L.J. 803, 830 (1997) (noting congressional reluctance to address “technical” issues).

<sup>177</sup> Consider, for example, environmental policy in the 1990s. See Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 633-36 (2001) (examining environmental law in the 1990s and noting that Congress did not enact major legislation for a good portion of the decade even when Democrats controlled both the White House and Congress); Paul Rauber, *Bill Clinton: Does He Deserve Your Vote?*, SIERRA MAG., <https://vault.sierraclub.org/sierra/199609/clinton.asp> (last visited May 1, 2021) [<https://perma.cc/D56J-D6AA>] (bemoaning that “a nominally green White House and Democratic majorities in both houses of Congress” failed to enact legislation and, further, that the White House failed to use its regulatory powers to their fullest). To be sure, this Article does not claim that this experience is an example of a collective-action problem, much less an example of the sort of collective-action problem addressed here (indeed, Congress did address some “narrow technical issues,” Revesz, *supra*, at 634)—the political process is too complicated. But it is worth thinking about surprising periods of inaction.

## IV. THE MINOR QUESTIONS DOCTRINE

For reasons explained, minor questions present special concerns that the *Chevron* framework does not address. Congress can fix this problem and the Supreme Court potentially can too.<sup>178</sup> And because the problem is structural, it is doubtful that the problem will solve itself. A minor question doctrine thus could be valuable.

The question, however, is what a minor questions doctrine should entail. There are at least three possibilities. The first version would mimic the major questions doctrine: just as courts do not defer when major questions are implicated, they also would not defer when minor questions are implicated. The second version would take a different tack. Rather than courts themselves directly addressing minor questions, agencies would have discretion to prospectively waive *Chevron*. The third version would reverse the *Chevron* presumption; agencies would only receive deference when Congress expressly delegates the power. Each of these solutions has pluses and minuses, but the key point is that any of them would reduce overlapping policymaking authority for minor questions.

A. *Mirroring the Major Questions Doctrine*

The most obvious path to a minor questions doctrine is to borrow from the major questions doctrine. Just as courts do not defer in cases with major questions, they could also not defer in cases with minor ones. And because Congress would know *ex ante*<sup>179</sup> that courts would not defer when a minor question is involved, Congress would also know that only it could create the policy—thus defeating (or at least mitigating) the collective-action problem.<sup>180</sup>

Unfortunately, revising the *Chevron* framework this way is easier said than done. First, the concern here is governmental *inaction*. It is easy to see how a court would be presented with a major-question case; a party would challenge

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<sup>178</sup> Whether the Supreme Court can address this collective-action problem implicates a question of stare decisis beyond the scope of this Article. Suffice it to say, to the extent that *Chevron* is a species of “common law,” Sohoni, *supra* note 7, at 1437, the Court may have a freer hand to modify *Chevron*—as, indeed, it has done with the major questions doctrine. The minor question doctrine would also address an unintended consequence of the Court’s own making, which may further counsel in favor of judicial reform. The Court’s “precedent on precedent” may also allow some revision of deference doctrines without offending stare decisis. See Hickman & Nielson, *Narrowing Chevron’s Domain*, *supra* note 55, at 992. Here, however, identifying how stare decisis works is orthogonal to this Article’s point. Whether or not the Court can fix *Chevron*, Congress can. (This prompts the question why Congress has not done so already. More on that below. See *infra* Section V.B.)

<sup>179</sup> Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (explaining that would-be litigants often do not need to go court precisely because they know *ex ante* what a court would do).

<sup>180</sup> See Hemel, *supra* note 12, at 710 (explaining how obstacles to congressional action make presidential action more likely by defeating a collective-action problem).

what the agency did, the agency would defend itself by citing *Chevron*, and a court would decide whether deference is appropriate. But how can a court address something that hasn't happened? Typically, a party can only challenge final agency action<sup>181</sup>—not an agency rule that is merely in process of being finished,<sup>182</sup> and certainly not a rule that the agency has not even started. True, parties can sometimes petition for a rulemaking.<sup>183</sup> But judicial review of agency denials of such petitions is “extremely limited” and “highly deferential.”<sup>184</sup>

This version of the minor questions thus would have to address the “where will the cases come from?” issue. It could so in a couple of ways. Congress could reduce agency discretion over petitions for rulemaking, at least when minor questions are in play.<sup>185</sup> This would have to be done carefully because agencies often have good reasons to not grant a petition for rulemaking that have nothing to do with collective-action dynamics.<sup>186</sup> The other approach would be to reduce *Chevron*'s domain organically where minor questions are involved. This could be done by relaxing the *Brand X* doctrine.<sup>187</sup> Either Congress or the Supreme Court could decree that when a minor question is at issue, a judicial interpretation will control despite any later acts by the agency. In this way, courts could sometimes definitively interpret agency-

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<sup>181</sup> 5 U.S.C. § 704; see *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (“[T]he action must mark the ‘consummation’ of the agency’s decisionmaking process . . . it must not be of a merely tentative or interlocutory nature.”).

<sup>182</sup> See, e.g., *In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015) (“[A] proposed rule is just a proposal. In justiciable cases, this Court has authority to review the legality of final agency rules. We do not have authority to review proposed agency rules.”).

<sup>183</sup> 5 U.S.C. § 553(e).

<sup>184</sup> *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (quoting *Nat’l Customs Brokers & Forwarders Assn. of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)).

<sup>185</sup> The judiciary could not do this; the standard for review of denials of petitions for rulemaking is a question of statutory law. See 5 U.S.C. § 706; cf. Erin Morrow Hawley, *The Supreme Court’s Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. 2027, 2027 (2015) (faulting the Court for creating doctrines divorced from the law). That said, as part of arbitrary-and-capricious review, perhaps a court could require an agency to explain itself if a party alleges that a collective-action problem is thwarting policy. Presumably an agency could easily defeat that sort of argument, though, by pointing to resource constraints.

<sup>186</sup> See, e.g., *Massachusetts*, 549 U.S. at 527 (“As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.”).

<sup>187</sup> See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 969 (2005) (holding that under the logic of *Chevron*, an agency can override a court’s prior interpretation of an ambiguous statute); see also Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1055-56 (2007) (explaining how *Brand X* reduces an agency’s ability to make credible commitments not to act). There are arguments against doing this (e.g., doctrinal coherence) that do not sound in collective-action concerns. The point here is simply that this sort of reform could address the “where will the cases come from?” issue. The overall value of this sort of reform is a more complicated question.

administered statutes, which over time would limit the amount of overlapping policymaking space,<sup>188</sup> and so the collective-action problem.

The second problem with this version of the minor questions doctrine goes to administrability. Determining whether a policy has, say, “vast ‘economic and political significance’”<sup>189</sup> is not easy.<sup>190</sup> But surely it is easier than directly targeting minor questions. The number of false positives would be significant—as would be the risk of judicial micromanagement. Perhaps more manageably, this version of the minor questions doctrine thus could identify *categories* of policies that are most susceptible to a collective-action problem. Although such categories would inevitably be under- and overinclusive,<sup>191</sup> a category-by-category approach presumably would be more administrable than an issue-by-issue approach.

### B. *A New Form of Chevron Waiver*

Agencies could also be allowed to waive deference for certain policies. Judges thus would not decide what is a minor question. Instead, agencies themselves would have an off-ramp to escape a collective-action problem where agencies, not courts, conclude that turning off *Chevron* would be worthwhile. Allowing agencies to identify where collective-action problems exist should be much more judicially administrable.

The idea behind this version of the minor questions doctrine comes from the collective-action literature. One solution to the Chicken Game is for a player to openly and irrevocably toss aside its steering wheel.<sup>192</sup> Applied to administrative law, that insight cuts in favor of allowing regulators to “turn off” *Chevron*. If an agency can credibly claim that it lacks authority to create a policy, then the collective-action problem disappears.<sup>193</sup> In other aspects of administrative law, the judiciary acts as a credible commitment mechanism

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<sup>188</sup> See Masur, *supra* note 187, at 1037-41 (explaining how *Brand X* reduces legal stability).

<sup>189</sup> *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)).

<sup>190</sup> See, e.g., *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (“[D]etermining whether a rule constitutes a major rule sometimes has a bit of a ‘know it when you see it’ quality. So there inevitably will be close cases and debates at the margins about whether a rule qualifies as major.”); Loshin & Nielson, *supra* note 5, at 45 (similar).

<sup>191</sup> See, e.g., Aaron L. Nielson, *Optimal Ossification*, 86 GEO. WASH. L. REV. 1209, 1238 (2018) (explaining the difficulty of finding the optimal amount of delay, and whether the inquiry should be done on a rule-by-rule basis or on an agency-by-agency basis).

<sup>192</sup> See *supra* notes 117–118 and accompanying text.

<sup>193</sup> See, e.g., Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291, 1306 (1990) (reviewing ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* (1989)) (“An important form of precommitment is the elimination of subsequent unstable subgames. This in a sense is what Ulysses accomplished by having himself tied to the mast as his ship sailed past the Sirens.”).



against regulatory change, thus expanding an agency's menu of policy options.<sup>194</sup> Here, the judiciary could credibly ensure that an agency's efforts to disavow policymaking authority has teeth such that not even the agency could reverse course. A public and credible disavowal of authority should prevent Congress from being tempted to freeride.<sup>195</sup>

This solution would be controversial. *Chevron* waiver, after all, has critics.<sup>196</sup> But this is a different type of *Chevron* waiver. It rubs some commentators wrong for an agency to tell a court whether to apply a legal test.<sup>197</sup> Critics also fear that if agencies could waive deference during litigation, they may "take a dive" after a presidential change in order to undermine a rule promulgated by a prior administration without going through a new round of the notice-and-comment rulemaking.<sup>198</sup> It is unclear whether the Supreme Court shares this fear of *Chevron* waiver; the Court has arguably embraced *Chevron* waiver during litigation.<sup>199</sup> Regardless, that is not the species of *Chevron* waiver proposed here. Rather than waiving deference *during* litigation, the agency would disavow deference *before* any rule exists at all in order to prompt congressional action. That is not a question of telling a court how to resolve a legal question or spiking a prior administration's rule. Instead, it would be a tool to avert a collective-action problem that potentially would otherwise prevent anything from happening.

To be clear, *Chevron* waiver would only help prevent a collective-action problem in situations where the agency's interpretation is not the best one (in a court's view) but is sufficiently reasonable that it would withstand

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<sup>194</sup> See, e.g., Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 90 (2018) [hereinafter Nielson, *Sticky Regulations*] ("[O]ssification can act as a credible commitment mechanism against change. Because regulated parties know that an agency must survive a procedural gauntlet to change a regulatory scheme, they can have more confidence in that scheme's stability. Under certain circumstances, that stability can encourage more activity of the sort that the agency wishes to encourage." (citing Masur, *supra* note 187, at 1038-45)).

<sup>195</sup> Cf., e.g., Fennell, *supra* note 117, at 1448-50 (explaining that "a rule that limits bargaining options may simultaneously enhance bargaining leverage" and that "limits can often be conceptualized as legally imposed precommitment devices, similar to one party (A) tearing out her own steering wheel during a game of roadway Chicken with another party (B)").

<sup>196</sup> See, e.g., James Durling & E. Garrett West, Essay, *May Chevron Be Waived?*, 71 STAN. L. REV. ONLINE 183, 184 (2019) ("[C]ourts should not allow either private parties or agencies to waive *Chevron*."); Note, *Waiving Chevron Deference*, 132 HARV. L. REV. 1520, 1520 (2019) (similar); Jeremy D. Rozansky, Comment, *Waiving Chevron*, 85 U. CHI. L. REV. 1927, 1928 (2018) (similar).

<sup>197</sup> See, e.g., Durling & West, *supra* note 196, at 188 ("This principle—that parties may not forfeit, waive, or even stipulate to legal propositions—suggests a fundamental problem with *Chevron* waiver.").

<sup>198</sup> See, e.g., *id.* at 184 ("This circumvention . . . allow[s] subsequent administrations to scuttle disfavored policies . . . [of] a prior administration's regulatory actions.").

<sup>199</sup> See *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020) (applying *Skidmore*, rather than *Chevron*, where "[n]either the Solicitor General nor any party has asked [for] what the Court has referred to as *Chevron* deference to EPA's interpretation of the statute").

litigation (i.e., situations for which *Chevron* deference does actual work).<sup>200</sup> Likewise, for this version of the minor questions doctrine to succeed, the agency's public disavowal of deference would have to be (somewhat<sup>201</sup>) irrevocable at least for a period of time—otherwise the collective-action problem would not disappear. And it is true that agencies might waive *Chevron* for non-minor questions. But it is unclear why they would do that. It makes sense for an agency to waive deference when deference makes it harder for the agency to accomplish its goal. It makes much less sense where the agency *wants* power to regulate or would not regulate anyway because it does not want the policy. Presumably, it is only when the agency wants the policy but is stuck in a collective-action dynamic that prospective waiver would make sense. Minor questions fit that bill in a way that other types of questions often do not. And if shirking is a problem, Congress could enact targeted statutes requiring the respective agency to address specific issues.

This version of the minor questions doctrine thus should solve the collective-action problem in cases where it matters without obvious collateral damage. It also should appeal to common sense. Courts speak of “giving” agencies deference<sup>202</sup>; agencies thus arguably should be able to decline the gift when deference would hurt rather than help.<sup>203</sup> The downside of this path, however, is that it would require creating a new mechanism in administrative law (prospective *Chevron* waiver) that is (fairly) *avant-garde* and may be hard to implement.

### C. Reverse the *Chevron* Presumption

The third option would reverse the *Chevron* presumption. Recall that *Chevron* relies on an implicit delegation of authority; although Congress has not said so, courts presume that Congress has implicitly given agencies interpretative primacy for ambiguous language. But it is possible to reverse

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<sup>200</sup> Many cases that mention “*Chevron*” do not involve deference. See Hickman & Nielson, *supra* note 55, at 986.

<sup>201</sup> The more certain the loss of policymaking power is, the more confident Congress will be that the agency really can't act. That said, there could be an emergency exception, perhaps subject to judicial review. As noted, courts can act as a commitment mechanism to make agency claims credible. If an agency must offer an especially compelling reason to break its vow, then the commitment would still be somewhat credible. See, e.g., Nielson, *Sticky Regulations*, *supra* note 194, at 118 (explaining that because of judicial review of various procedural requirements, agencies can credibly commit but still change their mind by “diverting resources away from other priorities”).

<sup>202</sup> See, e.g., *Tex. Off. of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 447 (5th Cir. 1999) (“[U]nder *Chevron* step-two, we usually give the agency deference in its interpretation of ambiguous statutory language . . .”).

<sup>203</sup> Indeed, via Step One-and-a-Half, agencies sometimes already can and do decline the “gift” simply by saying during the rulemaking that the statute unambiguously compels the agency's preferred interpretation. See generally Hemel & Nielson, *supra* note 27 (describing the doctrine).

that presumption; courts could defer only when Congress has expressly delegated that authority.<sup>204</sup>

The advantage of this approach is that courts would not have to decide what is a minor question. Congress, a party to the collective-action problem, is better positioned to identify which policies are affected by collective-action dynamics. For such policies, Congress would not “turn on” deference.<sup>205</sup> But for other policies where Congress believes that deference is sufficiently valuable, Congress would “turn on” deference.

To be sure, reversing the presumption may be close to eliminating *Chevron* itself. The reason why *Chevron* is so significant is because it applies so broadly; if Congress were required to affirmatively enact deference through legislation, there likely would be less deference.<sup>206</sup> That said, if reversing the presumption for all questions (subject to Congress’s power to turn deference back on) is too aggressive, Congress could turn off deference only for minor questions—although, again, that would require identifying what is a minor question. Congress may not be willing to spend time on that undertaking.

#### D. Which Version Is Best?

Each of these options has pluses and minuses. The most intuitive solution would be to borrow from the major questions doctrine. The most targeted would be to create a new form of *Chevron* waiver. And the most foundational would be to reverse the *Chevron* presumption. Yet the minuses are also real. Borrowing from the major questions doctrine is easier said than done; a new form of *Chevron* waiver is unusual and potentially awkward in application; and reversing the *Chevron* presumption would be a big change. The key point, though, is that each option would reduce overlapping policymaking authority over minor questions. This Article thus offers a menu of options. Determining which one makes the most sense, if any, requires considering the overall costs and benefits of reform on other dimensions than those at issue here.

### V. COUNTERARGUMENTS

When two entities want an outcome that is non-rivalrous and nonexcludable and either can bring it about, a collective-action problem may result. As this Article demonstrates, these conditions may characterize the

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<sup>204</sup> This would not solve Justice Thomas’s constitutional concerns. See *supra* note 45 and accompanying text. But it would eliminate any uncertainty about the meaning of statutory law.

<sup>205</sup> Alternatively, Congress could “turn on” deference, but also require the agency to act rather than giving the agency discretion whether to do so.

<sup>206</sup> See, e.g., Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 7 (2015) (explaining how rare it is for Congress to specify whether it wants deference).

relationship between the political branches in today's world, especially for minor questions. Because of deference, accordingly, it is possible that some policies—at the margins—are shelved that otherwise would become law. A minor questions doctrine could address this stagnation. That said, there are important counterarguments to adopting such a doctrine.

#### A. *Do Minor Questions Matter?*

The most important counterargument asks whether this problem is significant enough to justify reform. Flipping through the Code of Federal Regulations, there are many examples of agencies addressing minor questions—including the content of frozen cherry pie.<sup>207</sup> Given that reality, do collective-action dynamics cause stagnation often enough in the real world that the benefits of a new doctrine are greater than its costs?

Candidly, this is a difficult question to answer. Because it is challenging to measure what did not happen, much less explain why it did not happen, it is necessarily also challenging to speak with confidence about whether a minor questions doctrine is cost-justified. True, the real-world examples identified by Hemel suggest that deference sometimes creates a collective-action problem. And that very volume of provisions in the Code of Federal Regulations may also *support* the existence of a collective-action problem, on the theory that it may help explain why agencies and Congress alike often do not eliminate regulations that have become obsolete. But without knowing the respective values that Congress and the White House place on action and inaction, it is impossible to definitively answer how significant the problem is, especially because there are many reasons policymakers do not act even for policies they want (such as resources constraints). So even if the potential collective-action dynamic identified here matters for some policies, the extent of its effect is unclear.

Nonetheless, there is reason to fear that this is a real problem. To begin, the theory here is not elaborate; it is a basic application of widely recognized principles of game theory. There are also at least some real-world examples of what looks like deference-caused inaction.

In fact, there is an argument that minor questions should be a priority. Major questions, by definition, attract the sort of political attention that can moot the need for judicial review.<sup>208</sup> Not so, however, with minor

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<sup>207</sup> See Frozen Cherry Pie; Proposed Revocation of a Standard of Identity and a Standard of Quality, 85 Fed. Reg. 82,395, 82,395 (Dec. 18, 2020) (to be codified at 21 C.F.R. pt. 152) (proposing to “revoke the standard of identity and the standard of quality for frozen cherry pie”).

<sup>208</sup> This is to not say that the major questions doctrine does not serve important interests. See, e.g., Loshin & Nielson, *supra* note 5, at 60 (offering evidence that “the elephants-in-mouseholes doctrine was not created to enable the Court’s pursuit of its own policy preferences”). Thus, just

questions.<sup>209</sup> Put another way, the risk that a collective-action dynamic may stymie policy is not limited to minor questions; it can also happen for other types of questions that are not bipartisan or technical. Some tax policies, for instance, are politically charged.<sup>210</sup> For such issues, however, there is a strong argument that we *should* require congressional involvement.<sup>211</sup> At any rate, when divided government returns (as it regularly does), the collective-action problem for this category of policies should disappear.<sup>212</sup> *But that is not true for minor questions.* Divided government does not solve the problem and it is hard to come up with a normative argument in favor of this type of inaction.

Another counterargument is that even if *Chevron* may thwart policymaking for minor questions, it still may be worthwhile on net. Because of *Chevron*, stagnation may occur for some policies while increased activity may occur for others.<sup>213</sup> Accordingly, to resolve the overall question, we would need a better sense of *Chevron's* total costs and benefits, which we do not know. It does not follow, however, that a minor questions doctrine is not worth pursuing. This Article's central claim is that we should expect stagnation to be most prevalent when the benefits of a policy are diffuse but the costs are concentrated, especially if the policy is technical. Even without *Chevron's* collective-action problem, that is a tough combination. Yet deference may make an already bad situation worse.<sup>214</sup>

#### B. *Why Hasn't Congress Already Acted?*

Of course, all of this raises a separate question: if minor questions are a problem, why hasn't Congress *already* responded? Congress can change

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because a major policy may be revisited later does not mean that a court should not properly apply the law during the interim. When the major questions doctrine should apply, however, is beyond this Article's scope.

<sup>209</sup> For example, if the mutual inaction payoff in the matrix in Table 3 is changed from -1 to -.01, the odds that anyone will act becomes vanishingly small. *See supra* Table 3.

<sup>210</sup> *See, e.g.,* Hemel, *supra* note 12, at 666-67 (noting an issue involving foreign tax credits placed by Democratic presidents in the Greenbook but not Republicans).

<sup>211</sup> *See* Manning, *supra* note 51, at 200 (explaining the value of congressional participation in policymaking).

<sup>212</sup> *See* Hemel, *supra* note 12, at 644 ("Presidents will be more willing to raise revenue unilaterally when Congress is strongly tax-averse, and Congress will be more willing to pass revenue-raising legislation when the President is strongly tax-averse.").

<sup>213</sup> *See supra* Section III.A; *see also* Hemel, *supra* note 12, at 711 ("The static and dynamic effects of deference cut in different directions: deference makes it more likely that any particular Treasury regulation will pass judicial muster but less likely that Congress will act to raise revenues.").

<sup>214</sup> This answer also assumes for the sake of argument that more government action is a good thing. As explained above, that assumption is the subject of debate. *See, p. 1191, supra.* The key point for purposes here is that *even if* more action is good, deference may not always enable more action.

*Chevron*.<sup>215</sup> So if deference creates a significant collective-action problem, why hasn't Congress already fixed it? In other words, doesn't the fact that Congress has not acted or even expressed alarm speak volumes?<sup>216</sup>

This point is also well taken. There are, however, at least four answers. First, it is not all clear that enough members of Congress have recognized the systemic nature of the problem. It is possible to experience a collective-action problem in a single case without recognizing that it applies in other cases, too. If members of Congress do not realize that the same dynamic may arise for many types of policies, it is easy to see why reform would be unattractive; any individual minor question may be too small to justify the efforts associated with reform. Second, Congress may know about this dynamic but has concluded that the current framework is the best option and should be retained. Third, Congress may know about this dynamic but believe, wrongly, that there is no way out of it. And fourth, some in Congress may *like* this collective-action dynamic because it helps sophisticated operators stop legislation.<sup>217</sup> In other words, the very dynamic that give rise to collective action problems for minor questions may also create pressure to keep that system in place.

Which explanation (or explanations) is correct? We do not know. Congress has not spoken one way or the other. Instead, the Supreme Court has changed the status quo by creating *Chevron* without a clear statement from Congress (although, to be sure, some deference existed before *Chevron*.<sup>218</sup>). Because (i) Congress has not addressed the issue but (ii) both theory and some real-world evidence suggest that a collective-action problem sometimes may exist, it is not at all clear that congressional silence should equal consent.

### C. *A More Realistic Understanding of Policymaking?*

Another pushback challenges an assumption in this Article's model, *viz.*, that there are only two players in the game: Congress and the White House. This may be true for high-profile issues (such as those addressed by the major

<sup>215</sup> Because the theory of *Chevron* is implicit delegation, see, for example, *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001), Congress could withdraw that delegation anytime it chose. See Scalia, *supra* note 28, at 517 (describing *Chevron* as "a background rule of law against which Congress can legislate").

<sup>216</sup> See *United States v. Lopez*, 518 F.3d 790, 798 (10th Cir. 2008) (explaining the "logical significance of the dog that didn't bark"); cf. MILAN M. ČIRKOVIĆ, *THE GREAT SILENCE: THE SCIENCE AND PHILOSOPHY OF FERMI'S PARADOX 2* (2018) (explaining the theory that if aliens existed, "they would have been here already").

<sup>217</sup> For what it is worth, this fourth possibility seems improbable. Not only does it require a large dose of cynicism, it is also quite elaborate. Even so, it may still be worth considering, even if the extreme version of public-choice theory does not fit reality. See *supra* note 113 and accompanying text.

<sup>218</sup> See, e.g., Richard J. Pierce, Jr., *The Combination of Chevron and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91 (2021) (discussing emergence of *Chevron* deference).

questions doctrine or even some “ordinary” *Chevron* questions),<sup>219</sup> but presumably it is much less often true for minor questions. Although the “executive Power” is vested in the President alone,<sup>220</sup> no one argues that the President is personally involved in every decision.<sup>221</sup> Countless decisions involving minor questions are made at the agency level, often by career officials.<sup>222</sup> There are also independent agencies whose decisions are, at least in theory, isolated from presidential control.<sup>223</sup> Against this more accurate backdrop, doesn’t it follow that in the real world, there is no meaningful collective-action problem?

No. This Article uses the White House in its model because it is simpler. But White House participation is not necessary for this Article’s conclusions to hold. The collective-action problem can be between Congress and the White House, but it can also be between Congress and an agency. The key point is not *who* in the Executive Branch creates policy, but rather that *someone* there can do so. That point does not change when we adopt a more realistic view of policymaking.

To be sure, it is no doubt true that, say, a career agency official may assess costs and benefits differently from a political appointee in the White

<sup>219</sup> See, e.g., Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549, 606 (2018) (pointing to white-collar enforcement in the Obama administration and deportation guidance in the Trump administration); Kagan, *supra* note 126, at 2248 (pointing to health care, welfare reform, tobacco, and guns in the Clinton administration).

<sup>220</sup> See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (“Under our Constitution, the ‘executive Power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’” (quoting U.S. CONST. art. II, § 1, cl. 1, § 3)).

<sup>221</sup> See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (“Although the Constitution empowers the President to keep federal officers accountable, administrative agencies enjoy in practice a significant degree of independence. As scholars have noted, ‘no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity.’” (quoting Kagan, *supra* note 126, at 2250)).

<sup>222</sup> See, e.g., *Adoption of Recommendations*, Admin. Conference of U.S., 84 Fed. Reg. 71,348, 71,354-55 (Dec. 27, 2019) (explaining that “SES officials often . . . exercise ‘important policy-making, policy-determining, or other executive functions’” and that “[a]pproximately half of SES positions are reserved for career employees”).

<sup>223</sup> See, e.g., *Seila Law*, 140 S. Ct. at 2203-04 (explaining independent agencies, i.e., those subject to a weaker presidential removal power). How independent many “independent” agencies are in practice is disputed. See, e.g., Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 491 (2008) (questioning the amount of agency independence in a polarized age); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 513 (1985) (“The distinction between executive branch and independent agencies continues to thrive in political rhetoric, but it has virtually no life in the reality of agency practice.”). To the extent that agency independence is more theoretical than real, this objection loses force.

House.<sup>224</sup> If so, this may change how often a collective-action problem occurs, but it would not eliminate the risk altogether, especially for policies without sharp political significance. Moreover, technical issues—which, as this Article explains, also can create a minor-questions collective-action problem—are hard to address. A career official may prefer not to expend the energy on a technical issue that will not advance his or her career, especially when someone else could do it.<sup>225</sup> Or less cynically, a career official may not be especially interested in some issue. At the margins, that person may be more inclined to act if no one else could. But if someone else could, that official may stand aside. Of course, career officials may (or may not<sup>226</sup>) be more public-interest minded than political officials, which would make collective-action dynamics less likely. They may also be more attentive to congressional wishes.<sup>227</sup> But all of this would merely change the *frequency* of the problem, not its *existence*.

At the same time, adding more players to the mix—Congress, the White House, an agency or agencies<sup>228</sup>, and different groups within agencies—may make the collective-action problem even more serious. This Article uses a two-player model because it is simpler. But a model with more decisionmakers could be more susceptible to freeriding. It is a familiar insight in antitrust that the more players involved, the harder it is to prevent self-interested behavior by individuals within the group.<sup>229</sup> Adding more policymakers into the model thus potentially may lead to more freeriding, not less.<sup>230</sup>

Alternatively, what if we take a more realistic view of relative policymaking capacity? In particular, Congress is subject to bicameralism and

<sup>224</sup> See Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28 J.L. & POL. 129, 131 (2013) (“Scholarship has long documented deep divisions within agencies and, more importantly, between political appointees and career staff.”).

<sup>225</sup> See Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265, 1268-69 (2015) (explaining the incentives officials have to maximize their own interests).

<sup>226</sup> See Michael J. Glennon, *National Security and Double Government*, 5 HARV. NAT’L SEC. J. 1, 36-37 (2014) (explaining that “bureaucrats [may] care more for routine than for results” and develop “vast bureaucratic mechanisms” as ends unto themselves (quotations omitted)). Once more, the truth may be somewhere in the middle. This is another empirical question.

<sup>227</sup> See Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1430-31 (2017) (explaining how attentive officials are to congressional requests).

<sup>228</sup> See William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 22 (2003) (“[A] social ill is less likely to be addressed by regulatory action [where there is overlapping policymaking authority than] where a particular institution is viewed by all as having regulatory primacy.”). *But see* Freeman & Rossi, *supra* note 134, at 1151-55 (defending redundancy).

<sup>229</sup> See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 192-93 (5th ed. 2016) (describing the freeriding problem and self-interested behavior in the context of cartels).

<sup>230</sup> See OLSON, *supra* note 104, at 2-3 (explaining that collective-action problems are worse for larger groups).



presentment<sup>231</sup>; agencies are not.<sup>232</sup> Thus, because it is harder for Congress to act, won't the executive branch realize that it should act rather than waiting for Congress? Perhaps, but likely not. In fact, the harder it is for Congress to act, the more inaction we should expect (all else being held constant).<sup>233</sup> Granted, Congress has other means to force action—such as its power over budgets<sup>234</sup> and general oversight functions<sup>235</sup>—and as the costs of new legislation increase for Congress, it may be more willing to use these means. But again, this should just change the frequency of the collective-action dynamic, not its existence. How often inaction occurs (or, put another way, how powerful Congress's other means of spurring regulatory action are) is another empirical question that has not been answered.<sup>236</sup>

#### D. *Are There Better Solutions?*

Even if *Chevron* causes a collective-action problem, are there not better ways to solve it? As noted above, culture—including fairness and cooperation norms<sup>237</sup>—can mitigate collective-action problems. So might not fairness and

<sup>231</sup> U.S. CONST. art. I, § 7, cls. 2-3; see also Manning, *supra* note 51, at 198 (elaborating on these requirements).

<sup>232</sup> Agencies might, however, be subject to an ossified rulemaking process. See, e.g., Nielson, *Sticky Regulations*, *supra* note 194, at 89 (explaining the empirical debate about the extent to which procedural requirements impede agency action).

<sup>233</sup> In terms of the Snowdrift Game, when action becomes relatively less attractive, the incentive to stay in the car increases for one of the players. Both intuitively and mathematically, there is no reason to think that the decreased incentive to act for one player will be entirely offset by a change in the other player's strategy. Holding the payoffs from action constant (as we must), the only implication of moving from a world of symmetrical costs to a world of asymmetrical costs in which one party's costs have increased while the other party's costs have remained constant along all relevant dimensions is a reduced overall likelihood of action.

Notably, the inverse is also true; if it becomes easier for one player to act while everything remains constant for the other player, we should expect less inaction. Applied here, this would mean that if, say, Congress could increase its policymaking capacity in a way that would allow the costs of congressional action to decrease, then we should expect less stagnation. As explained above, however, there may be limits on Congress's ability to increase its policymaking capacity. See *supra* note 138. And needless to say, for such increased capacity to make sense, the benefits of that capacity increase would have to be greater than its costs.

<sup>234</sup> See, e.g., William E. Kovacic & Marc Winerman, Essay, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085, 2104 (2015) (recounting how a threat to reduce funding for DOJ and FTC changed agency behavior).

<sup>235</sup> See, e.g., Christopher M. Davis et al., Cong. Rsch. Serv. RL30240, CONGRESSIONAL OVERSIGHT MANUAL (2020) (discussing how Congress may exercise oversight).

<sup>236</sup> To be sure, if Congress could always prevent the collective-action dynamic discussed in this Article through non-legislative, (arguably) low-cost tools like oversight hearings and budget threats, then those tools themselves could be a viable alternative to a minor questions doctrine. Professor Hemel's real-world tax examples from the Greenbook, however, at least suggests that such tools may not always be sufficient. See pp. 1214–15, *supra*.

<sup>237</sup> This idea that there are fairness norms against which negotiating parties act is supported by the literature surrounding the so-called "ultimatum game," in which two parties negotiate over a

cooperation norms mitigate *Chevron's* collective-action problem? This counterargument is fair but not dispositive. Are there such norms? And if so, are they strong enough to solve the collective-action problem or do they just make it less common?

Alternatively, rather than relying on fairness and cooperation norms, Congress could solve the collective-action problem by taking away an agency's ability to stand down. If an agency must address a problem, there will not be stagnation. Yet there are many good reasons why agencies choose not to act. Agencies regularly stand aside, for example, not because of collective-action dynamics, but instead because they don't want the policy at all and would oppose it even if there was no collective-action problem. In other words, they have a dominant strategy not to act. It is only when the agency doesn't act because of collective-action dynamics, however, that we should be concerned.<sup>238</sup> It is difficult to identify that sort of policy *ex ante* or categorically. Congress, of course, could solve this problem through targeted legislation after a collective-action dynamic emerges—but if Congress is going to do that, why not just create the policy?<sup>239</sup>

Taking a more realistic view of agencies (as explained above), another potential solution could be self-policing by the Executive Branch. If agencies are trying to freeride off of other agencies with overlapping jurisdiction or off of Congress (which by definition has overlapping jurisdiction), perhaps oversight by the Office of Information and Regulatory Affairs (OIRA) within the White House's Office of Management and Budget could spur agency

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surplus. Studies suggest that notions of fairness may lead to a more even distribution. *See, e.g.,* Richard H. Thaler, *Anomalies: The Ultimatum Game*, 2 J. ECON. PERSPS., Autumn 1998, at 195, 197-98 (describing experiments that suggest that generous offers in the ultimatum game are best explained by fairness concerns). That said, the robustness of that "fairness" effect may dissipate in certain situations, such as litigation. *See* Paul Pecorino & Mark Van Boening, *Fairness in an Embedded Ultimatum Game*, 53 J.L. & ECON. 263, 264 (2010) ("Our results suggest that fairness considerations are a good deal less important in stylized legal bargaining than in the simple ultimatum game.").

<sup>238</sup> There are also important Article II issues. It not always clear that Congress *could* force the Executive Branch to act. Questions about the relationship between the Take Care Clause and the Executive Vesting Clause are beyond this Article's scope. For a discussion of when the executive branch may properly decline to enforce the law, see, for example, Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1863-64 (2016); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 674-75 (2014).

<sup>239</sup> Another possible solution would be for Congress to create a mechanism to disable itself when a collective-action problem emerges. The problem with this solution is two-fold. First, if Congress is going to expend that effort, it arguably should just address the policy issue. Second, Congress often cannot bind itself, at least not very well. Partisan divide may act as a commitment mechanism against legislative action for some policies (such as major questions or other political ones), but that effect is less pronounced for minor questions. Notably, the fact that Congress cannot irrevocably "turn off" its legislative power is almost certainly a good thing, even if it means that Congress cannot unilaterally end a collective-action problem. *See* Manning, *supra* note 51, at 200 (explaining how a multicameral system acts as a safeguard against "oppressive legislation").

action. Just as OIRA reviews the most important regulations,<sup>240</sup> perhaps it would also be directed by executive order or statute to target freeriding for minor ones. There is much to be said for this option—at least for issues that do not involve the White House itself (such as Hemel’s tax examples from the Greenbook). Unfortunately, adding more responsibility to its portfolio would stretch OIRA’s resources even further, especially if agencies actively avoid review.<sup>241</sup> OIRA review, although perhaps part of the solution, is thus not a panacea. Similar things can be said about ombudsmen, such as the Taxpayer Advocate Service with the Internal Revenue Service.<sup>242</sup> Such entities may help to identify issues that the agency is not addressing but, as Hemel’s tax examples demonstrate, do not appear to be a silver bullet.

#### E. *What About Delegation Generally?*

Finally, if *Chevron* creates a collective-action problem by empowering two branches to share the same policymaking space, then don’t *all* delegations also do the same? Yet delegated authority is everywhere.<sup>243</sup> So why worry about *Chevron*?

It is true that this Article’s logic suggests that delegation generally<sup>244</sup> also enables collective-action dynamics. Because agencies can regulate, say, in the “public interest,”<sup>245</sup> Congress may do less than it otherwise would, and agencies, in turn, may reciprocate. This effect of delegation no doubt merits extended attention. But it does now follow that we should not also worry about *Chevron*. In fact, there are a couple of reasons to focus on *Chevron* in particular. First, *Chevron* is more manageable. How courts should enforce the

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<sup>240</sup> See Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1850 (2013) (explaining that “OIRA review is limited to ‘significant’ regulatory actions,” which includes rules with “a major economic impact or raise serious policy questions” but excludes rules that are “simple and routine”).

<sup>241</sup> See Nou, *supra* note 126, at 1817 (noting “a decline” in OIRA’s resources which enables agencies to avoid review); Note, *OIRA Avoidance*, 124 HARV. L. REV. 994, 1013 (2011) (noting that “OIRA’s scarce resources” make it difficult to prevent such avoidance).

<sup>242</sup> See Bryan T. Camp, *What Good Is the National Taxpayer Advocate?*, 126 TAX NOTES 1243, 1249 (2010) (explaining how the office works and the complex balance of power between the office and the Internal Revenue Service).

<sup>243</sup> See Metzger, *supra* note 3, at 7 (“[T]he broad delegations of authority to the executive branch that represent the central reality of contemporary national government.”).

<sup>244</sup> See *Whitman v. Am. Trucking Ass’ns., Inc.*, 531 U.S. 457, 474-75 (2001) (“In short, we have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’” (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))). *But see Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (urging the Court to rethink its approach).

<sup>245</sup> See Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 992 (2017) [Nielson, *Beyond Seminole Rock*] (“[S]ome statutes—like those that authorize regulation ‘in the public interest’—do not present meaningful questions of statutory interpretation.”).

nondelegation doctrine is difficult.<sup>246</sup> By contrast, it should be more straightforward to mitigate *Chevron's* collective-action problem. And second, delegation involves an express choice by Congress. Deference, by contrast, is more a creature of the judiciary. It is one thing for Congress to create a collective-action problem for itself. It is something else for courts to spring one on Congress.<sup>247</sup>

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There are no doubt other counterarguments. None of the most obvious ones, however, defeat the need for a minor questions doctrine—at least based on what we know so far. Unfortunately, uncertainty in administrative law is par for the course. We don't know much about many things.<sup>248</sup> This means we must make an educated guess about the key empirical question. Because this Article offers a coherent theory backed by real-world examples, we should be confident that there *isn't* a significant collective-action problem before simply accepting the status quo. At a minimum, targeted empirical study is necessary.

#### CONCLUSION

“[I]t takeschutzpah to write about *Chevron*.”<sup>249</sup> It takes even morechutzpah to say we have overlooked something important for decades. But that is what this Article contends. Under a reasonable set of assumptions, we should expect that *Chevron* sometimes stymies policymaking. Thus, whatever one thinks of the usual back-and-forth about *Chevron*, the story is more complicated. *Because* both branches can act, and *because* both would prefer the other do so, each may shirk.

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<sup>246</sup> See, e.g., *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) (explaining “the inherent difficulty of line-drawing” vis-à-vis delegations).

<sup>247</sup> To be sure, although not the focus this Article, the analysis here has implications for the nondelegation debate. For example, it suggests that Congress should evaluate delegations through the lens of collective-action dynamics. Cf. William K. Kelley, *Avoiding Constitutional Questions as Three-Branch Problem*, 86 CORNELL L. REV. 831, 898 (2001). And if Congress does not want to withdraw delegated power altogether, it can authorize the Executive Branch to forswear statutory authority. See Barron & Rakoff, *supra* note 124, at 339-40.

<sup>248</sup> See, e.g., Nielson, *Beyond Seminole Rock*, *supra* note 245, at 979, 984 (explaining that scholars lack data on key administrative law questions); Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 693 (2015) (explaining the distinction between “informational” and “conceptual” problems in administrative law); cf. Paul R. Verkuil, *The Self-Legitimizing Bureaucracy*, 93 YALE L.J. 780, 780 (1984) (reviewing JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* (1983)) (“It is as if, when asked the question what (or where) is administrative justice, [most lawyers and policymakers] look for that particular lost coin under the proverbial streetlight of judicial process, not because the coin is there, but because that is where the light is.”).

<sup>249</sup> Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1867 (2015).

If this “collective action” account is correct, then no matter one’s priors about the administrative state, deference’s place in it becomes more complicated. And this is especially true for minor questions, which, not by accident, do not receive much attention anyway. Those who embrace *Chevron* because they believe it facilitates good policy must also confront the possibility that it may also do the opposite. *Sometimes* deference allows agencies to act when Congress has overlooked a problem. And *sometimes* it facilitates the emergence of policy that Congress does not want, which is problematic for other reasons.<sup>250</sup> But deference also may *prevent* beneficial policies from becoming law in the first place. In making an overall assessment of *Chevron*, it is incomplete to simply point to the good things it enables; one must also consider the good things it may prevent.

Accordingly, although the high-profile debate about major questions is important, we should not lose sight of the complete picture. Major questions are significant and will continue to be so. Yet counterintuitively, when it comes to deference, “humdrum, run-of-the-mill stuff”<sup>251</sup> may turn out to be no less significant. The *Chevron* debate overlooks this point. That is why the time has come to consider a minor questions doctrine.

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<sup>250</sup> See Peter L. Strauss, *Legislation that Isn’t—Attending to Rulemaking’s “Democracy Deficit,”* 98 CALIF. L. REV. 1351, 1351 (2010) (noting the “legitimacy” problems associated with “permitting unelected officials to create binding legal texts”).

<sup>251</sup> *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013).

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