As-Applied Nondelegation

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The nondelegation doctrine is powerful—so powerful that the Supreme Court is afraid to use it. The doctrine holds that Congress cannot delegate its legislative power to agencies. If the Court were to enforce the doctrine, entire statutory provisions—and perhaps entire statutory schemes—would be at risk of invalidation.

Yet there is no need for such a powerful, facial doctrine. Nondelegation can be refashioned to be as-applied. An as-applied nondelegation doctrine would work by treating statutory ambiguities, just as Chevron *does, as implicit delegations—each of which can be independently assessed for a nondelegation violation. This approach would explain the so-called "major questions" exception to* Chevron*, but without any of the existing doctrine's flaws.*

The implications of an as-applied nondelegation doctrine are numerous and highly attractive. It would replace the major questions doctrine, which the literature has rightly rejected, with a rigorous and coherent theory. It would better serve nondelegation interests by dramatically reducing any adverse consequences from finding a violation of the nondelegation doctrine. Finally, an as-applied nondelegation doctrine could be determinative in a handful of upcoming and important cases.

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Introduction

Modern litigants have primarily two ways to challenge administrative regulations on structural grounds. A governing statute could be so broad or vague as to constitute an unconstitutional delegation of legislative power. The Supreme Court, however, has only invoked the nondelegation doctrine to strike down two statutory provisions in all its history, and both in 1935.[1] Although lower federal courts have occasionally continued to strike down statutory provisions on nondelegation grounds, such attempts are rebuffed by the Court.[2] More commonly, litigants must assume the statute is valid, however broad and vague it may be. The question then becomes one of *Chevron* deference: assuming the statute does not expressly speak to the issue at hand, is this regulation a plausible—even if not the best—reading of the ambiguous statute?[3]

These doctrines have engendered a puzzle. So much is at stake by finding a statute in violation of the nondelegation doctrine that the Court simply does not enforce it; and it is often said it is impossible to administer

1. Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

2. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328 (discussing Whitman v. American Trucking, 531 U.S. 457 (2001)).

3. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); *infra* Part I.B.

the line between permissible and impermissible delegations. Yet at times—in the so-called "major questions" cases[4]—the Court appears to make *Chevron* do the work of nondelegation by finding that statutes clearly and unambiguously preclude certain agency actions that implicate nondelegation concerns, even though the statutes are probably ambiguous and the agency actions probably reasonable. In these cases, the Court not only has to misinterpret statutes to reach its preferred result, but it does not even have to explain why it's doing so—it does not have to explain why there's a nondelegation problem.

The nondelegation doctrine could be refashioned to avoid this problem and to become workable—it could be fashioned into an as-applied doctrine. The doctrine would not challenge statutory language that in most applications creates no nondelegation concerns, but rather would treat particular *ambiguities* created by that statutory language just as *Chevron* does—as implicit delegations of authority—and then assess those implicit delegations for nondelegation violations. For example, the Food, Drug, and Cosmetic Act's definitions of "drug" and "drug device" may create no nondelegation problem because in most applications it will be perfectly clear what drugs the Food and Drug Administration is permitted to regulate. But if an ambiguity were subsequently discovered that seemed implicitly to delegate to the agency the authority to decide whether, to what ends, and how tobacco shall be regulated,[5] then an as-applied doctrine would ask whether *that* implicit delegation—and not the statutory language as a whole—violates the nondelegation doctrine.

Generalizing from this example, one can imagine, under the modern doctrine's intelligible principle standard,[6] broad statutory provisions that survive facial nondelegation challenges and in almost all of their applications give agencies reasonably clear guidance, but under which later-discovered ambiguities give the agency *insufficient* guidance for its regulations.[7] Under a theory of nondelegation maintaining that Congress cannot delegate to agencies authority to create primary rules of private conduct,[8] a broad grant of authority might encompass completely valid implicit delegations—for example, to create rules for official conduct—but also invalid ones authorizing the creation of primary rules of private conduct. An as-applied

4. *See infra* Part I.C.

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

6. *See* Part I.A.

7. *See infra* text accompanying notes 148–159.

8. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. Railroads, 135 S. Ct. 1225, 1242 (2015) (Thomas, J., concurring in the judgment):

> The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power. By corollary, the discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct.

nondelegation doctrine would treat each specific delegation of authority to the agency to resolve the particular question at hand as if that authority were explicitly delegated to the agency in a statute. If Congress would violate the nondelegation doctrine by explicitly delegating such power, then Congress cannot delegate that same power implicitly through broad statutory language.

This approach is consistent with prevailing theories of judicial review and may even be more justified by them than the existing doctrine. For example, if *Chevron*'s core assumption is that statutory ambiguities in broad statutes are implicit delegations of authority to agencies to resolve those ambiguities,[9] then there is no reason why these implicit delegations cannot be assessed for nondelegation violations. The approach is also consistent with the Court's existing preference for as-applied challenges generally,[10] and is invited by Richard Fallon's exceptionally clear account of that preference. As Fallon has argued, even if "rights" are rights against "rules," which must be challenged facially,[11] as-applied challenges are merely challenges to *subrules*; a statute is but a series of subrules, some of which might be valid and others invalid; and the invalid ones can usually be separated from the valid ones.[12] To draw the parallel, broad statutory language delegating authority to an agency can be considered a series of narrower subdelegations (or subrules) delegating authority to decide particular statutory ambiguities. Some of these subdelegations may be valid, others not; but the invalid ones usually can be separated from the valid ones.

This Article makes the case for an as-applied nondelegation doctrine as follows. Part I explains the prevailing doctrine: it shows how all accounts of the nondelegation doctrine are theories of facial unconstitutionality and briefly describes *Chevron* deference. It then examines two so-called major questions cases—*FDA v. Brown & Williamson Tobacco Corp.*[13] and *MCI Telecommunications Corp. v. AT&T Co.*[14]—to illustrate how the Court has used the *Chevron* doctrine to do the work of nondelegation, but that this approach cannot work under the modern doctrinal framework. Part II makes the case for an as-applied nondelegation doctrine, which better explains the major questions cases and which is invited by prevailing theories of judicial review, such as the *Chevron* doctrine and Richard Fallon's account of as-applied challenges generally.

Part III applies it to a handful of new and old cases. It first adopts *a* theory of impermissible delegation so that it can proceed with the analysis;

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9. *See infra* Part I.B., Part III.A.

10. *See infra* notes 115–19 and accompanying text.

11. *See* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 157 (1998); *infra* Part III.B.

12. Richard H. Fallon, Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1327–41 (2000); *infra* Part III.B.

13. 529 U.S. 120 (2000).

14. 512 U.S. 218 (1994).

but it is important to be clear that an as-applied nondelegation doctrine does not depend on any *particular* theory of what constitutes an impermissible delegation of legislative power, so long as one has *a* theory of what does. Indeed, one of the virtues of an as-applied doctrine would be to minimize the consequences of finding a violation of the nondelegation doctrine, thereby allowing courts to begin developing a theory of nondelegation on a case-by-case basis.[15] This Part then examines *Massachusetts v. EPA*[16] and *Chevron*[17] itself to assess how those cases could be analyzed under an as-applied nondelegation doctrine. It concludes with an examination of the FCC net neutrality litigation in the D.C. Circuit,[18] and demonstrates how an as-applied nondelegation doctrine provides the most theoretically satisfying framework for resolving the case. Part IV concludes.

I. Delegation and Deference

This Part briefly describes the modern nondelegation doctrine and the *Chevron* deference framework for analyzing particular regulations. It describes how the Court applied this framework to two of the so-called major questions cases, *Brown & Williamson* and *MCI*, and concludes along with the existing literature that this framework cannot account for the result in these cases. That is because the Court has sought to use the *Chevron* framework to do the work of nondelegation, but *Chevron* is ill-equipped for the task. An as-applied nondelegation doctrine, on the other hand, would make sense of these cases, would be normatively superior, and could have wide applicability to similar problems.

A. Nondelegation in the Courts

The standard account of the modern nondelegation doctrine begins with *J.W. Hampton, Jr. & Co. v. United States*.[19] In that case, the Court confronted the President's power (delegated from Congress) to set tariff rates.[20] Article I, section 8 of the Constitution grants Congress, not the President, the power to lay and collect taxes and duties.[21] The "flexible tariff provision" of the Tariff Act of September 21, 1922, authorized the President to amend the tariff schedule established by Congress if the President determined there were differences in the "costs of production" for particular articles in the U.S. compared to the costs of production for those articles in the principal

15. And if there is no coherent theory available, then an as-applied nondelegation doctrine would help us discover that, too.

16. 549 U.S. 497 (2007).

17. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

18. U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *petition for cert. filed*, No. 17-504 (U.S. Sept. 28, 2017).

19. 276 U.S. 394 (1928).

20. *Id.* at 404.

21. U.S. CONST. art. I, § 8.

competing foreign country.[22] The provision authorized the President to amend the tariff to equalize such differences, if the rate established by Congress did not already do so.[23]

The Court in that case established the "intelligible principle" test: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[24] The Court upheld the flexible tariff provision of the 1922 Act. On its face, this principle has nothing to do with the kind of power being exercised or the impact of exercising the delegated authority. It is entirely a question of discretion: are there sufficient standards in the statute to guide the executive officer in the exercise of her discretion? Further, this standard appears to require a facial approach to nondelegation—either there is sufficient guidance in the statute, or there is not. This was the standard used to strike down the only two statutory provisions ever to be invalidated on nondelegation grounds.[25]

The Court's modern cases confirm this approach. In *Whitman v. American Trucking Ass'ns*,[26] the nondelegation question concerned Congress's delegation of authority to the EPA under the Clean Air Act to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documents of

22. *J.W. Hampton*, 276 U.S. at 400–01 (quoting Tariff Act of 1922, ch. 356, tit. 3, § 315(a), 42 Stat. 858, 941–42 (repealed 1930)).

23. *Id.* at 401.

24. *Id.* at 409.

25. In *Panama Refining Co. v. Ryan*, the Court struck down section 9(c) of the National Industrial Recovery Act, which "authorized" the President to prohibit the interstate transportation of petroleum and petroleum products "in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation." 293 U.S. 388, 406 (1935) (quoting ch. 90, § 9(c), 48 Stat. 195, 200 (1933)). The Court held that this section provided almost no guidance for the President's discretion:

> Section 9(c) does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in section 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.

Id. at 415. In *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down the section of the National Industrial Recovery Act authorizing the President to issue "codes of fair competition" for different industries. 295 U.S. 495, 521–22 & n.4 (1935) (quoting ch. 90, § 3, 48 Stat. 195, 196–97 (1933)). The Court reasoned: "Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. . . . In view of the scope of that broad declaration . . . , the discretion of the President in approving or prescribing codes . . . is virtually unfettered." *Id.* at 541–42.

26. 531 U.S. 457 (2001).

§ 108] and allowing an adequate margin of safety, are requisite to protect the public health."[27] Writing for a unanimous Court, Justice Scalia held:

> The scope of discretion [this provision] allows is in fact well within the outer limits of our nondelegation precedents. In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition."[28]

Nondelegation's guiding principle is therefore discretion, and a statute either confers the requisite intelligible principle or it does not.[29] The doctrine is exceedingly difficult to administer, which partly explains why the Court has only invoked the doctrine twice in its history.[30] As the Court explained in *American Trucking*, "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.'"[31] Thus, "[i]t is often said that the nondelegation doctrine is dead."[32]

B. Chevron *Deference*

If a statute passes muster under the nondelegation doctrine (as most do), the next step is to assess the validity of the regulation promulgated under that statute. The analysis is governed by *Chevron*'s two-part deference framework: If Congress speaks clearly on a particular question, any agency regulation or interpretation to the contrary is invalid. If, however, the statute

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27. *Id.* at 472 (alterations in original) (quoting 42 U.S.C. § 7409(b)(1)).

28. *Id.* at 474 (citing *Pan Ref.*, 293 U.S. 388; *Schechter Poultry*, 295 U.S. 495).

29. The scholarly literature generally agrees that the nondelegation doctrine centers on whether a statute on its face confers too much discretion. *See, e.g.*, John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 241–42 ("[E]nforcements of the nondelegation doctrine necessarily reduces to the question whether a statute confers too much discretion.").

30. *Id.* at 258 ("The administrability problem arises because there is no reliable metric for identifying a constitutionally excessive delegation."); Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 321 (2000) ("Because the relevant questions are ones of degree, the nondelegation doctrine could not be administered in anything like a rule-bound way, and hence the nondelegation doctrine is likely, in practice, to violate its own aspirations to discretion-free law."). *But see* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 395 (2002):

> The charge that no workable standard for judging delegations can be formulated is . . . false. It is true that application of the Constitution's nondelegation principle requires judgment on occasions, but that is an inescapable feature of much of law. Drawing a line between execution and lawmaking is no harder, and indeed is probably considerably easier, than drawing a line between reasonable and unreasonable searches and seizures.

31. 531 U.S. at 474–75 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

32. Sunstein, *supra* note 30, at 315 (citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 132–33 (1980)).

is ambiguous, then the courts give deference to authoritative agency interpretations of the statute the agency administers so long as the interpretation is reasonable.[33] (Determining whether Congress has clearly spoken or the statute is ambiguous is often referred to as "*Chevron* Step One." The analysis of reasonableness under an ambiguous provision is often referred to as "*Chevron* Step Two."[34]) The theory of this approach is that ambiguities in statutes are implicit delegations of authority to the agency to decide the issue in question.[35]

Proponents of the doctrine argue that deference is owed to reasonable agency interpretations even if the courts might otherwise conclude those are not the best interpretations because the agency is assumed to have technical expertise in administering its organic statute that courts lack.[36] And recent scholarship by Kent Barnett and Christopher Walker reveals that deference makes a difference—that in the vast majority of cases in which *Chevron* is invoked in the circuit courts, the regulation is upheld.[37] However, some have argued that *Chevron* deference has no historical basis.[38] Whatever its merits,

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

> 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.

Id. (footnotes omitted); United States v. Mead Corp., 533 U.S. 218, 229 (2001); Cass Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 190–91 (2006).

34. *See, e.g.*, Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 613 (2009).

35. *Chevron*, 467 U.S. at 843–44; *Mead*, 533 U.S. at 229; John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 623 (1996):

> Although *Chevron* recognized the relationship between binding deference and delegation, the decision did not break new ground in that respect. Rather, *Chevron*'s importance lay in its adoption of a *categorical* presumption that silence or ambiguity in an agency-administered statute should be understood as an implicit delegation of authority to the agency.

Id. (footnote omitted); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN L. REV. 593, 608 & n.62 (2008) (citing authorities).

36. Sunstein, *supra* note 33, at 196–97 (describing the agency-expertise rationale).

37. Kent H. Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 30 & fig.1 (2017).

38. *E.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 998–1000 (2017).

Chevron's status is "now[ ]canonical,"[39] and it is not the intent here to support or oppose it.

We now turn to an important set of cases in which the Court has sought to vindicate nondelegation concerns through the *Chevron* framework—the "major questions" cases. This approach does not work because it requires the Court to misinterpret broad statutory language without giving any nondelegation reasoning for doing so.

C. The Major Questions Cases

In *FDA v. Brown & Williamson* and *MCI v. AT&T*, the Court analyzed the agency regulations under the modern framework, holding under *Chevron* Step One that the organic statute prohibited the regulations—in the former case, rulemakings asserting jurisdiction over and regulating tobacco, and in the latter case, rulemakings deregulating an industry subject to an existing regulatory scheme. These cases are inexplicable under *Chevron* Step One: in both cases, the broad statutory language did not clearly prohibit the regulations, and indeed may have supported them. Neither are these cases explicable under *Chevron* Step Two: because the statutory language was likely ambiguous, the agency's regulations should have received deference. But these cases do point to a different intuition altogether: that some implicit delegations of authority in broad statutes to resolve ambiguities may be impermissible for another reason. These implicit delegations may violate nondelegation principles. These cases point to something like an as-applied nondelegation doctrine.

1. Brown & Williamson.—After decades of disclaiming authority to regulate tobacco products, in 1996 the Food and Drug Administration (FDA) asserted jurisdiction over such products and promulgated numerous regulations governing their sale and marketing.[40] The authority by which the agency asserted jurisdiction was the language of the 1938 Food, Drug, and Cosmetic Act (FDCA) defining "drug" as "articles (other than food) intended to affect the structure or any function of the body,"[41] and "device" as "an instrument, apparatus, implement, machine, [or] contrivance . . . intended to affect the structure or any function of the body."[42] The FDA determined that nicotine is a drug and cigarettes are "drug delivery devices" and thus that the FDA had jurisdiction over them.[43] Both the five Justices in the majority as

39. City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013); Sunstein, *supra* note 33, at 188.

40. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125, 128–29 (2000) (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (Aug. 28, 1996)).

41. *Id.* at 126 (quoting 21 U.S.C. § 321(g)(1)(C)).

42. *Id.* (quoting 21 U.S.C. § 321(h)(3)).

43. *Id.* at 127 (citing 61 Fed. Reg. at 44,397, 44,402).

well as the four in dissent agreed that *Chevron* governed the analysis.[44] The majority, however, stopped the analysis at *Chevron* Step One—it concluded that "[i]n this case, . . . Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products."[45] The dissent concluded that nicotine was clearly a drug under the statutory definition and cigarettes clearly drug-delivery devices,[46] and because the agency's finding that cigarette manufacturers objectively "intended" their products to have therapeutic effects on consumers was reasonable, the agency's interpretation was entitled to deference.[47]

Whichever of these readings one finds more persuasive, a strong case can be made that the statute was ambiguous, particularly if both the majority's and dissent's readings were plausible. If that's the case, then *Chevron* Step Two should have determined the outcome. Consider the various pieces of textual and contextual evidence that both sides marshaled in support of their positions. The majority found that:

- The FDCA requires a "reasonable assurance of the safety and effectiveness of the device,"[48] which assurance could not be provided for cigarettes, and thus cigarettes would have to be removed from the market contrary to clear congressional intent in other statutes;[49]
- The FDCA provides that a product is "misbranded" if "it is dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof,"[50] and accordingly tobacco products would all be misbranded and require removal from the market;[51]
- The fundamental purpose of the FDCA is that any regulated product not banned must be safe for its intended use, and tobacco products were not safe for their intended use;[52]
- Several post-FDCA, tobacco-specific pieces of legislation implied that Congress reserved for itself the power to regulate tobacco, or they ratified FDA's decades-long insistence that it

44. *Id.* at 125–26; *id.* at 170–71 (Breyer, J., dissenting).
45. *Id.* at 126 (majority opinion).
46. *Id.* at 162 (Breyer, J., dissenting).
47. *Id.* at 170–71.
48. 21 U.S.C. §§ 360c(a)(1)(A)(i), (B), (C) (2012).
49. *Brown & Williamson*, 529 U.S. at 134–41.
50. 21 U.S.C. § 352(j).
51. *Brown & Williamson*, 529 U.S. at 141.
52. *Id.* at 142.

had no jurisdiction over tobacco without therapeutic claims on the part of manufacturers;[53] and

- Congress considered and rejected several proposals to give FDA authority to regulate tobacco.[54]

The dissent, however, pointed out the following:

- Tobacco literally fell within the statutory definition of "drug," and tobacco products literally fell within the statutory definition of "devices";[55]
- The statute's basic purpose is the protection of public health, which supports the regulation of tobacco;[56]
- The enacting Congress fully intended the Act to reach as broadly as the literal language suggested;[57]
- The subsequent congressional statutes did not intend to resolve the question of FDA's jurisdiction, and indeed the only explicit statement in any of these was that the statute shall *not* be construed to affect the question of FDA's jurisdiction;[58]
- FDA regulates other addiction, sedation, stimulation, and weight-loss products, which are difficult to distinguish from tobacco;[59]
- FDA's determination (necessary to invoke jurisdiction) that cigarette manufacturers "intended" their product to have therapeutic effects was based on the reasonable, objective, ordinary meaning of "intent," both in that manufacturers historically made such claims and in that FDA discovered the manufacturers always knew about its purported therapeutic effects, as did their consumers;[60] and
- FDA did not necessarily need to ban an unsafe device because numerous remedial provisions provided that the Secretary "may," but is not required to, ban unreasonably dangerous devices.[61]

It does not matter for present purposes which of these readings is more persuasive. At a minimum, there is significant evidence on both sides of the

53. *Id.* at 143–47, 156.

54. *Id.* at 147.

55. *Id*. at 162 (Breyer, J., dissenting).

56. *Id.*

57. *Id.* at 164–66.

58. *Id.* at 163, 184 (citing Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, § 422, 111 Stat. 2296, 2380 (codified at 21 U.S.C. § 321 note (2012) (Regulation of Tobacco))).

59. *Id.* at 169.

60. *Id.* at 171–73, 186–88.

61. *Id.* at 176 (citing 21 U.S.C. §§ 360f(a), 360h(a), (b)).

question. This is, in other words, a likely case of ambiguity. Given ambiguity, *Chevron* counsels deferring to the agency's interpretation—and thus FDA's assertion of jurisdiction.[62] Yet something *feels* right about the majority's position—the decision *whether* to regulate tobacco has huge ramifications for the national economy, with major consequences for private actors. Shouldn't Congress be the one to decide such important political issues in our representative system?

Something like that intuition was clearly driving the Court. In the final subsection of its rather lengthy opinion, the majority added that its "inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented."[63] *Chevron* deference is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[64] "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[65] Here, the majority was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[66]

This analysis has led scholars to consider *Brown & Williamson* as a "major questions" case, which might be taken for the proposition that only Congress should decide questions of major political and economic significance.[67] Unsurprisingly, these scholars tend to reject "majorness" as a plausible principle for deciding these cases. Cass Sunstein has written that "the difference between interstitial and major questions is extremely difficult to administer."[68] He questions whether the rulemaking in *Chevron* itself regarding the definition of "stationary source" under the Clean Air Act—an issue to which we return later—was less major or significant than the rulemakings involved in *Brown & Williamson*.[69] Additionally, Sunstein

62. The Court recently explained that there is no difference for *Chevron* purposes between jurisdictional and nonjurisdictional questions. City of Arlington v. FCC, 569 U.S. 290, 296–301 (2013).

63. *Brown & Williamson*, 529 U.S. at 159.

64. *Id.*

65. *Id.* (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.")).

66. *Id.* at 160.

67. Moncrieff, *supra* note 35, at 594, 598, 611–13; Sunstein, *supra* note 33, at 240–42.

68. Sunstein, *supra* note 33, at 243; *see also* Moncrieff, *supra* note 35, at 611.

69. Sunstein, *supra* note 30, at 243, 245–46; *see also* Moncrieff, *supra* note 35, at 611 & n.74 (referring to EPA's "simple reinterpretation" at issue in *Chevron* as having "enormous practical consequences"). For a discussion of *Chevron* itself, see *infra* notes 211–18 and accompanying text.

writes, agency expertise and accountability "are highly relevant to the resolution of major questions."[70]

These scholars therefore conclude that something like a nondelegation concern may have been driving the Court.[71] Sunstein argues that the Court may have been using a kind of clear-statement rule as a "nondelegation canon"—the Court will not read *ambiguity* as conferring discretion on agencies to decide major questions.[72] John Manning argues that *Brown & Williamson* may be seen as an example of the Court's using the canon of constitutional avoidance to narrow statutes to avoid grave constitutional (here, nondelegation) concerns.[73] Abigail Moncrieff agrees that "as a positive matter [the nondelegation principle] might explain the major questions cases."[74]

These scholars all reject this account of the Court's subtle and implicit invocation of the nondelegation doctrine—and rightly so. Manning writes that narrowing a statute despite rather clear textual permissibility of the agency's interpretation "threatens to unsettle the legislative choice implicit in adopting a broadly worded statute" and that "to rewrite the terms of a duly enacted statute cannot be said to serve the interests of [the nondelegation] doctrine."[75] He adds that an "administrability problem arises because there is no reliable metric for identifying a constitutionally excessive delegation," and "there is no better way to identify whether a statute presents a sufficiently serious nondelegation question to trigger the canon of avoidance."[76]

Moncrieff argues that the problem with the nondelegation view "is that it is impossible to apply in practice" because "the line between excessive and appropriate delegations is notoriously difficult to draw."[77] Sunstein argues that the same problems plaguing an assessment of "majorness" affect a nondelegation principle: the nondelegation approach fails because "the distinction between major questions and non-major ones lacks a metric"[78] and because "expertise and accountability are entirely relevant to questions

70. Sunstein, *supra* note 33, at 243.

71. Manning, *supra* note 29, at 236–37, 242–43; Moncrieff, *supra* note 35, at 616–18; Sunstein, *supra* note 30, at 244–45.

72. Sunstein, *supra* note 30, at 244–45; *see also* Sunstein, *supra* note 30, at 330–37 (describing various other clear-statement requirements motivated by nondelegation concerns).

73. Manning, *supra* note 29, at 242 ("Despite the Court's apparent refusal to enforce the nondelegation doctrine directly, cases such as *Brown & Williamson* illustrate the Court's modern strategy of using the canon of avoidance to promote nondelegation interests.").

74. Moncrieff, *supra* note 35, at 617.

75. Manning, *supra* note 29, at 228; *see also id.* at 247–57 (arguing that employing the nondelegation doctrine as an avoidance canon undermines legislative supremacy and contradicts the Court's turn toward textualism).

76. Manning, *supra* note 29, at 258.

77. Moncrieff, *supra* note 35, at 618.

78. Sunstein, *supra* note 33, at 245.

about contraction or expansion of statutory provisions."[79] Moncrieff concludes: "the existing literature has almost unanimously concluded that the *Brown & Williamson* rule lacks a coherent justification."[80]

There are, indeed, serious problems with using a "major questions" principle to give effect to the nondelegation doctrine. Put most simply, if the Court was trying in *Brown & Williamson* to enforce nondelegation on the margins or as a canon of avoidance, then to do so it had both to assume a likely nondelegation problem *without actually deciding* whether the nondelegation doctrine was in fact violated and to *misconstrue a validly enacted congressional statute* in order to accommodate this vague (and unproven) intuition.

2. MCI v. AT&T.—Another "major questions" case is *MCI Telecommunications Corp. v. AT&T Co.*[81] We need not belabor the analysis to show that the same doctrinal problem obtains in this case. Section 203(a) of the Communications Act of 1934, the so-called tariff-filing provision, requires that "[e]very common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges . . . ."[82] Section 203(b)(2) then provides that the Commission "may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions . . . ."[83]

At issue in *MCI* was a series of rules promulgated under the authority of section 203(b)(2) exempting all nondominant carriers—that is, everyone but AT&T—from the tariff-filing requirement of section 203(a).[84] The majority held that the requirement to file rates was the "centerpiece of the Act's regulatory scheme"[85] and that the FCC could not alter this centerpiece under its authority to "modify" requirements. The Court held that the word "modify," similar to other words with the root *mod* like "moderate," "modest," or "modicum," "has a connotation of increment or limitation," that is, to change "moderately or in minor fashion."[86] Because the FCC's

79. *Id.* at 246.

80. Moncrieff, *supra* note 35, at 607.

81. 512 U.S. 218 (1994).

82. *Id.* at 224 (quoting 47 U.S.C. § 203(a)).

83. *Id.* (quoting 47 U.S.C. § 203(b)(2)).

84. *Id.* at 221–23 (citing Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 F.C.C.2d 1 (1980); Second Report and Order, 91 F.C.C.2d 59 (1982); Fourth Report and Order, 95 F.C.C.2d 554 (1983); Fifth Report and Order, 98 F.C.C.2d 1191 (1984)).

85. *Id.* at 220.

86. *Id.* at 225.

regulation went "beyond the meaning that the statute can bear," it was not entitled to *Chevron* deference.[87] Thus, on the surface, this was a *Chevron* Step One case. As with *Brown & Williamson*, the Court noted that "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."[88]

The dissent complicates this simple picture. First, it noted that the purpose of the Act was to give the FCC "unusually broad discretion to meet new and unanticipated problems in order to fulfill its sweeping mandate 'to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges.'"[89] In light of this purpose "to constrain monopoly power, the Commission's decision to exempt nondominant carriers is a rational and 'measured' adjustment to novel circumstances . . . ."[90] More still, the word "modify" includes the meaning "to limit or reduce in extent or degree," and the "permissive detariffing policy fits comfortably within this common understanding of the term."[91]

At minimum, it appears again that the statute is not so clear as the majority would have us believe. It appears sufficiently ambiguous to trigger *Chevron* deference, making it a difficult Step One decision. The majority seems to have sought to vindicate nondelegation values through the *Chevron* framework but could not do so in a rigorous and coherent way. The intuition in both this case and *Brown & Williamson* seems proper, but the Court did not have the proper doctrinal tool for assessing these cases.

II. The Case for As-Applied Nondelegation

An as-applied nondelegation doctrine would satisfactorily resolve these cases by permitting the Court properly to accept the existence of statutory ambiguity and to give proper nondelegation reasons for its holdings. So long as the majority were willing to conclude that Congress could not *explicitly* grant the FCC discretion regarding both whether and how a major portion of an industry shall be regulated, then an as-applied nondelegation challenge would work to prevent an agency regulation from capitalizing on statutory ambiguity—on an *implicit* delegation—to obtain the same result. Similarly, if Congress cannot *explicitly* delegate to the FDA the authority to decide

87. *Id.* at 229.

88. *Id.* at 231.

89. *Id.* at 235 (Stevens, J., dissenting) (quoting 47 U.S.C. § 151).

90. *Id.* at 241; *see also id.* at 225 (majority opinion) (tracing the root *mod* to the Latin for "measure").

91. *Id.* at 242 (Stevens, J., dissenting).

whether, to what ends, and how tobacco shall be regulated, then Congress cannot make that same delegation *implicitly* through statutory ambiguities.

An as-applied nondelegation doctrine would not challenge the key statutory language at issue in these cases on its face. After all, in almost all applications, the agencies had reasonably clear guidance on what the terms "modify" or "drug" required. It simply turned out that down the line a latent ambiguity was discovered. This ambiguity could have been created by the unique factual circumstances of the issue at hand, competing statutory provisions that cast doubt on the meaning of the statutes' central provisions, or some combination of the two. Either way, the statutory language does not violate the nondelegation doctrine, but the *implicit* delegation created by a particular ambiguity perhaps does. An as-applied nondelegation doctrine would resolve these cases by assessing whether such an implicit delegation would be unlawful if made *explicitly* by Congress in clear statutory language. If such a delegation would be impermissible, then Congress cannot make that same delegation implicitly through statutory ambiguities.

This Part assesses an as-applied nondelegation doctrine under prevailing theories of judicial review. It claims that such a doctrine would be more theoretically satisfying and conceptually attractive under several existing theories. First, the very theory of *Chevron* is rooted in the notion that Congress implicitly delegates authority to agencies in statutory ambiguities. It thus makes conceptual sense to conceive broad statutory language as a series of narrower, implicit delegations to the agency, each of which must be assessed for a nondelegation violation. This Part will consider two statutes—one hypothetical and one real—that, under different understandings of impermissible delegation, would contain within statutory ambiguities both valid and invalid implicit delegations.

Second, as-applied challenges are generally favored in the law, and there appears to be no clear doctrinal reason prohibiting such challenges in the context of nondelegation. Indeed, Richard Fallon's account of as-applied and facial challenges[92]—where as-applied challenges are merely facial challenges to subrules, and a statute is a series of subrules each of which may be separable from the others—maps neatly onto the concept of treating a broad statute as a series of subdelegations.

Third, an as-applied doctrine makes sense from the perspective of the Constitution's text. Perhaps Congress does not violate the nondelegation doctrine when it enacts any particular broad statute—but the President must still ensure that the executive branch only executes the law and does not exercise legislative power. In other words, just as an agency regulation can still violate *other* constitutional provisions (such as the First, Fifth, or Fourteenth Amendments) even though it passes muster under *Chevron* and

92. Fallon, *supra* note 12.

its organic statute is otherwise valid, that regulation *might also* violate the Vesting Clause of Article II. This Part concludes with a discussion of the various constitutional—and litigation—values served by an as-applied doctrine.

A. Chevron *and Implicit Delegations*

As-applied nondelegation makes sense under *Chevron* itself. Indeed, its core justification invites an as-applied nondelegation doctrine. One of the foundational justifications for *Chevron* is that statutory ambiguities in broad statutes are assumed to be implicit, but intentional, delegations of power to agencies to resolve any existing ambiguities.[93] As the Court said in *Brown & Williamson*: *Chevron* deference is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[94] If that is the theory, then there is no difference between Congress's passing a broad statute with numerous ambiguities for an agency to resolve, or a series of narrower statutes each explicitly delegating to the agency authority to resolve those particular questions.

All this theory requires is that one have *some* definition of or standard for determining an impermissible delegation of legislative power. So long as one has *a* theory of what constitutes an unconstitutional delegation of power, one could always conceive of a statutory provision most of whose applications create no nondelegation concern at all because the guidance to the agency is perfectly clear. But it could be that ambiguities exist, and that some of these create unconstitutional implicit delegations of authority. The FDCA's definition of "drug" and "device" may be just such a statutory provision, and section 203(b)(2) of the Communications Act may be as well. Consider now two further examples.

1. Establishing Post Roads.—The Constitution grants Congress the power to establish post roads. This power is given explicitly and specifically: "The Congress shall have Power . . . To establish Post Offices and Post Roads[.]"[95] A committee of the Second Congress introduced a bill for the establishment of the Post Office and post roads that specified in great detail where the post roads would be.[96] Mr. Sedgwick introduced an amendment to

93. *See* sources cited *supra* note 35.

94. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

95. U.S. CONST. art. I, § 8, cl. 7.

96. The statute enacted in its very first section:

> That from and after the first day of June next, the following roads be established as post roads, namely: From Wisscassett in the district of Maine, to Savannah in Georgia, by the following route, to wit: Portland, Portsmouth, Newburyport, Ipswich, Salem, Boston, Worcester, Springfield, Hartford, Middletown, New Haven, Stratford, Fairfield, Norwalk, Stamford, New York, Newark, Elizabethtown, Woodbridge, Brunswick, Princeton, Trenton, Bristol, Philadelphia, Chester, Wilmington, Elkton,

strike the enumerated routes and replace them with the provision "by such route as the President of the United States shall, from time to time, cause to be established."[97]

Thus commenced one of Congress's first nondelegation debates in our Constitution's history. The upshot is that Mr. Sedgwick's amendment was rejected, with several prominent members expressing the view that it would be an impermissible delegation of legislative power.[98] Madison, for his part, argued that "there did not appear to be any necessity for alienating the powers of the House; and that if this should take place, it would be a violation of the Constitution."[99] Although the view that the amendment was unconstitutional was not unanimous,[100] it was nearly so. Congress's deliberation appears to

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> Charlestown, Havre de Grace, Hartford, Baltimore, Bladensburg, Georgetown, Alexandria, Colchester, Dumfries, Fredericksburg, Bowling Green, Hanover Court House, Richmond, Petersburg, Halifax, Tarborough, Smithfield, Fayetteville, Newbridge over Drowning creek, Cheraw Court House, Camden, Statesburg, Columbia, Cambridge and Augusta; and from thence to Savannah, and from Augusta by Washington in Wilkes county to Greenborough and from thence . . . .

Act of Feb. 20, 1792, ch. 7, § 1, 1 Stat. 232 (1792).

97. 3 ANNALS OF CONG. 229 (1791).

98. *Id.* In particular, Rep. Livermore observed:

> the Legislative body being empowered by the Constitution "to establish post offices and post roads," it is as clearly their duty to designate the roads as to establish the offices; and he did not think they could with propriety delegate that power, which they were themselves appointed to exercise.

Id. Rep. Hartley stated,

> The Constitution seems to have intended that we should exercise all the powers respecting the establishing post roads we are capable of . . . . We represent the people, we are constitutionally vested with the power of determining upon the establishment of post roads; and, as I understand at present, ought not to delegate the power to any other person.

Id. at 231. Rep. Page further added,

> If the motion before the committee succeeds, I shall make one which will save a deal of time and money, by making a short session of it; for if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation; and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction. . . . I look upon the motion as unconstitutional, and if it were not so, as having a mischievous tendency . . . .

Id. at 233–34; Rep. Vining summarized,

> The Constitution has certainly given us the power of establishing posts and roads, and it is not even implied that it should be transferred to the President; his powers are well defined; we create offices, and he fills them with such persons as he approves of, with the advice of the Senate.

Id. at 235; *see also id.* at 233 (statement of Rep. White, as summarized, making "several objections on the expediency and constitutionality of the measure"). Regarding another Congressman's statements, the recorder wrote: "Mr. Gerry took a general view of most of the arguments in favor of the motion; replied to each . . . ." *Id.* at 236 (statement of Rep. Gerry, as summarized). Apparently, the recorder was getting tired. Regardless, we can surmise from this comment that Mr. Gerry likely agreed that the provision was unconstitutional.

99. *Id.* at 239 (statement of Rep. Madison, as summarized).

100. *Id.* at 232–33 (statement of Rep. Bourne, as summarized); *id.* at 235–36 (statement of Rep. Barnwell, as summarized); *id.* at 236 (statement of Rep. Benson, as summarized).

have liquidated the question whether the power to establish post roads can be delegated.[101] Such authoritative interpretations of the Constitution need not come from the courts, and early Congresses routinely took it upon themselves to interpret the scope of constitutional provisions.[102]

Suppose Congress subsequently enacted a statute providing that "the Postmaster General shall promulgate rules and regulations as he deems necessary and expedient for the purpose of efficiently delivering the mail." The statute gave further guidance to the Postmaster in exercising his discretion: "In promulgating a rule or regulation under this provision, the Postmaster General is to consider the cost of the rule to the public, the impact on delivery speed and efficiency, and the cost of the rule to the U.S. Postal Service." There is little doubt that the statute itself would survive a modern nondelegation challenge.[103]

Pursuant to this statutory authority, the Postmaster General subsequently promulgates a regulation establishing post roads, arguing that establishing the particular roads in question would improve the efficiency of

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101. *See* THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961) ("All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."). For arguments that the concept of liquidation may coexist with an originalist interpretation of the Constitution, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 553–56, 578–84 (2003); William Baude, Constitutional Liquidation (unpublished manuscript) (on file with author).

102. DAVID P. CURRIE, 1 THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD ix–x (1997).

103. Consider the Court's description in *American Trucking* of the prior delegations it has upheld:

> In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition." We have, on the other hand, upheld the validity of § 11(b)(2) of the Public Utility Holding Company Act of 1935, which gave the Securities and Exchange Commission authority to modify the structure of holding company systems so as to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders." We have approved the wartime conferral of agency power to fix the prices of commodities at a level that "'will be generally fair and equitable and will effectuate the [in some respects conflicting] purposes of th[e] Act.'" And we have found an "intelligible principle" in various statutes authorizing regulation in the "public interest." 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."

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (alterations in original) (citations omitted) (first quoting Public Utility Act of 1935, ch. 687, § 11(b)(2), 49 Stat. 803, 821 (repealed 2005); then quoting Emergency Price Control Act of 1942, ch. 26, § 2(a), 56 Stat. 23, 24 (repealed 1956); and then quoting Mistretta v. United States, 488 U.S. 361, 416 (Scalia, J., dissenting)). If these examples are any guide, then the statute delegating authority to the Postmaster General to make rules and regulations on the basis of cost, delivery speed, and efficiency surely meets the nondelegation standard with flying colors. The statute includes even more detailed guidance than necessary to find an intelligible principle.

the delivery of the mail and would be cost effective. How would such a regulation be analyzed under modern doctrine? Under *Chevron* Step One, the statute certainly does not clearly prohibit the Postmaster General's action. If anything, the regulation pretty clearly follows from a natural reading of the statute's text, and thus under *Chevron* Step Two the regulation is reasonable and thus permissible. But Congress could not, if it had done so explicitly, have delegated the power to the Postmaster General to establish post roads (assuming the decision of the Second Congress on the constitutional question fixed the construction of the relevant clause). Thus, although our hypothetical statute would have been permissible in most of its applications, its implicit delegation to the Postmaster General to decide whether and where to establish post roads would have been an impermissible delegation of power.

Put another way, the statute can be considered as a series of narrower delegations: "The Postmaster General may decide with whom to contract for the delivery of the mail"; "The Postmaster General may decide whether mail shall be delivered on weekends"; "The Postmaster General may decide whether to carry abolitionist literature"; "The Postmaster General may decide whether to establish post roads"; and so on. Most of these would be perfectly permissible delegations of power. But not all necessarily would be.

2. Proceedings in Suits at Common Law.—Another example is supplied by the statute at issue in *Wayman v. Southard*,[104] the Court's first major nondelegation case.[105] The 1792 Process Act established that the practices prevailing in each respective state supreme court as of 1789, respecting "the forms of writs and executions" and the "modes of process . . . in suits at common law," would govern in federal court proceedings in those states.[106] The statute included a proviso: subject to the rules and regulations prescribed

104. 23 U.S. (10 Wheat.) 1 (1825).

105. An earlier case, *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813), in which the Court upheld Congress's conditioning of the existence of an embargo on a presidential finding of non-neutrality among foreign states, *id.* at 388, is also taken as a nondelegation case. It is not particularly controversial, however, and the Court did not give any sustained treatment to a nondelegation principle.

106. The statute enacted

> [t]hat the forms of writs, executions, and other process, except their style and the forms and modes of proceeding in suits in those of common law shall be the same as are now used in the said courts respectively in pursuance of the act, entitled, 'An act to regulate processes in the courts of the United States,' . . . except so far as may have been provided for by the act to establish the judicial courts of the United States . . . .

Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276; *see also Wayman*, 23 U.S. at 31. The statute referred to was the 1789 Act providing that "the forms of writs and executions, except their style, and modes of process . . . in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used in the supreme courts of the same." Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93; *see also Wayman*, 23 U.S. at 26–27.

by the federal courts.[107] The nondelegation question in *Wayman* (which did not even have to be decided[108]) was whether this proviso was an unconstitutional delegation of legislative power.

The facts can be simplified thus: The plaintiff sought an execution of judgment against the defendant in hard currency.[109] The defendant sought the application of a 1792 Kentucky law providing that a plaintiff must accept state paper currency in satisfaction of a judgment.[110] The Court agreed with the plaintiff that the 1792 Kentucky law did not govern in a federal court suit at common law because the federal acts provided that only those state practices established as of 1789 applied.[111] Thus, the defendant would have to pay in hard currency. Not to be deterred, the defendant pressed a nondelegation argument: the 1792 Process Act for the governing of process and suits at common law would be an unconstitutional delegation of legislative power in light of its proviso, if that proviso were interpreted to extend to matters outside of courtroom proceedings and to the manner of executions; thus Congress could not have intended for it to reach outside the courtroom to the manner in which a judgment was executed.[112]

The Court rejected this argument, holding that the law did reach to matters outside of courtroom procedures to all "proceedings at common law," including execution of judgments.[113] Chief Justice Marshall proceeded to address the nondelegation argument. The defendant had pressed that if the Process Act permitted courts to regulate proceedings outside of court, such as the nature and form of an execution, that would be an exercise of legislative power because it would determine the manner in which someone was deprived of property.[114] Indeed, a regulation requiring the acceptance of

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107. Act of May 8, 1792 § 2 (defining the proviso: ". . . subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same . . . ."); *see also Wayman*, 23 U.S. at 31.

108. *See Wayman*, 23 U.S. at 48–49:

> But the question respecting the right of the courts to alter the modes of proceeding in suits at common law, established in the Process Act, does not arise in this case. That is not the point on which the judges at the circuit were divided and which they have adjourned to this Court. The question really adjourned is whether the laws of Kentucky respecting executions, passed subsequent to the Process Act, are applicable to executions which issue on judgments rendered by the federal courts.

109. *Id.* at 2.

110. *Id.*

111. *Id.* at 32, 41.

112. *Id.* at 13–16, 42.

113. *Id.* at 44.

114. According to the reporter, defendant's counsel had argued:

> All the legislative power is vested exclusively in Congress. Supposing Congress to have power, under the clause, for making all laws necessary and proper, to make laws for executing the judicial power of the Union, it cannot delegate such power to the judiciary. The rules by which the citizen shall be deprived of his liberty or property, to

state bank notes affected not only how one would be divested of property, but also of how much property.

Marshall explained that Congress cannot delegate power that is "exclusively legislative."[115] He then assessed whether the power delegated by the proviso was an impermissible delegation, i.e., whether it fell within the class of powers that was "exclusively legislative." He began as follows:

> *Now, suppose the power to alter these modes of proceeding, which the act conveys in general terms, was specifically given*. The execution orders the officer to make the sum mentioned in the writ out of the goods and chattels of the debtor. This is completely a legislative provision, which leaves the officer to exercise his discretion respecting the notice. That the legislature may transfer this discretion to the Courts, and enable them to make rules for its regulation, will not, we presume, be questioned. So, with respect to the provision for leaving the property taken by the officer in the hands of the debtor, till the day of sale. . . . The power given to the Court to vary the mode of proceeding *in this particular*, is a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution.[116]

Here we see some hints of the possibility of an as-applied nondelegation doctrine. Marshall *supposes* the power to issue *particular* regulations was explicitly given. In other words, he breaks down the broad (and ambiguous) provision into a series of particular, explicit delegations of power. He then proceeds on a hypothetical-regulation-by-hypothetical-regulation analysis of the constitutionality of the delegation. In the above passage, he presumed two specific regulations: The first was the delegation of authority to the officer to make good on the sum owed by taking the property of the debtor. This, Marshall argued, was a straightforward implementation of the legislative will. The second was the delegation of authority to the officer to decide where to keep the confiscated property before it is sold. This, too, Marshall argued was a straightforward execution of the law. But then Marshall proceeded to

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> enforce a judicial sentence, ought to be prescribed and known; and the power to prescribe such rules belongs exclusively to the legislative department.

Id. at 13.

115. "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." *Id.* at 42–43. Marshall continued:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

Id. at 43. Here, Marshall echoed Madison's discussion in the Post Office debate regarding the difficulty of distinguishing among the powers and also Madison's more extended treatment in The Federalist. *See* 3 ANNALS OF CONG. 228–29 (statement of Rep. Madison, as summarized); THE FEDERALIST NO. 37, at 226–29 (James Madison) (Clinton Rossiter ed., 1961).

116. *Wayman*, 23 U.S. at 44–45 (emphasis added).

offer a third, more difficult example: "To vary the terms on which a sale is to be made, and declare whether it shall be on credit, or for ready money, is certainly a more important exercise of the power of regulating the conduct of the officer, but is one of the same principle."[117]

For purposes of his argument, Marshall thus treats the "general" grant of power as though it were a series of specifically granted powers, and recognizes that not all of those grants necessarily must be treated equally. If the rule regulates the terms of a sale (for example, if it is to be for credit), that is a "more important exercise of the power of regulating the conduct of the officer." And perhaps that is so because, unlike the first two provisions, it has the effect of determining how much property a private party will lose.

To be sure, Marshall presumed that this particular delegation, too, would be constitutional.[118] But suppose he was wrong—after all, he said it was a more important power. Suppose, as some scholars have argued,[119] that decisions as to what kinds of property may be used in satisfaction of judgment, what kinds of property must be accepted by a judgment creditor, or what kinds of properties are to be exempted altogether (think of homestead exemptions), are matters for exclusively legislative determination. (This would also follow from Justice Thomas's view of the nondelegation doctrine.[120]) Why does it follow that the entire proviso must be struck down? The most plausible approach is instead one in which the statute is treated as a series of specifically granted powers. The answer to whether any one of these grants is an impermissible delegation of legislative power hardly answers the question whether any of the *other* grants is.

In sum, if the theory of *Chevron* is that statutory ambiguities are implicit delegations of authority to agencies to decide particular questions, then a broad statute can be conceived of as a series of narrow statutes explicitly conferring discretion to decide those questions. All that is required is that one have *a* theory—any theory—of what constitutes an impermissible delegation of legislative power. If, under that theory, those explicit statutes could each

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117. *Id.* at 45.

118. *Id.* at 45–46.

119. *E.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 393 (2014).

120. In *Department of Transportation v. Ass'n of American Railroads*, Thomas commented on Marshall's opinion in *Wayman* as follows:

> First, reflected in his discussion of "blending" permissible with impermissible discretion, is the premise that it is not the *quantity*, but the *quality*, of the discretion that determines whether an authorization is constitutional. Second, reflected in the contrast Chief Justice Marshall draws between the two types of rules, is the premise that the rules "for which the legislature must expressly and directly provide" are those regulating private conduct rather than those regulating the conduct of court officers.

135 S. Ct. 1225, 1249–50 (2015) (Thomas, J., concurring in the judgment). If the statute is construed to permit the officer, however, to decide whether the defendant must pay in hard currency or whether the plaintiff must accept bank notes, that determines private rights, and Thomas would likely view such a regulation as unconstitutional.

be challenged facially on nondelegation grounds, there is no reason in theory or logic why those delegations made implicitly in broadly worded statutes cannot be challenged as-applied. Indeed, as *Wayman v. Southard* shows, an as-applied doctrine can exist in a world without *Chevron* at all because even in such a world there would still be broadly worded delegations of power.[121]

B. Subrules and Subdelegations

An as-applied approach makes sense under *Chevron*'s theory of implicit delegation. It is also consistent with the Court's preference for as-applied challenges in constitutional litigation generally. At least when it comes to congressional legislation that infringes on rights, the Court will rarely strike down a statute as facially unconstitutional.[122] Normally it prefers "as-applied" challenges.[123] As the Court has said, it is an

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121. Thus, the most recent "major questions" case, *King v. Burwell*, 135 S. Ct. 2480 (2015), would also be a good candidate for an as-applied nondelegation challenge. There, the Court had to decide whether an IRS regulation interpreting the Affordable Care Act's term "exchange established by the state" to mean *also* an exchange established by the federal government was valid. The Court did not analyze the case under *Chevron* at all, holding that because this was a question of "deep 'economic and political significance' that is central to th[e] statutory scheme," the Court would decide the question for itself. *Id.* at 2488–89 (citation omitted). An as-applied nondelegation doctrine would still apply, however, because the relevant statutory language—an exchange established by the state—gave the agency reasonably clear guidance in most cases (indeed, in all those in which an exchange was in fact established by a state). But it was only in some cases—those in which the federal government had to establish an exchange—that various statutory provisions created an ambiguity as to whether such exchanges were covered by the tax credits. If a result of that ambiguity is that the agency gets to decide one way or another, that might violate the nondelegation doctrine. Similarly, if the *courts* get to decide such a question, that might also violate nondelegation because the courts would also be exercising legislative power in making such a choice. Indeed, the Court recognized that risk, noting, "Reliance on context and structure in statutory interpretation is a 'subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.'" *Id.* at 2495–96 (quoting Palmer v. Massachusetts, 308 U.S. 79, 83 (1939)).

122. United States v. Salerno, 481 U.S. 739, 745 (1987):

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

Id.; United States v. Raines, 362 U.S. 17, 21 (1960) (collecting cases standing for "the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional"); *see also, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 167 (2007) (rejecting a facial challenge to abortion statute in part because challenges regarding the right to an abortion to protect a woman's health are properly brought as-applied, so that "the nature of the medical risk can be better quantified and balanced than in a facial attack"). Whether the Court has "ever actually applied such a strict standard" is disputed. Washington v. Glucksberg, 521 U.S. 702, 739–40 (1997) (O'Connor, J., concurring).

123. *See, e.g.*, Fallon, *supra* note 12, at 1321 ("Traditional thinking has long held that the normal if not exclusive mode of constitutional adjudication involves an as-applied challenge, in which a party argues that a statute cannot be applied to her because its application would violate her

> incontrovertible proposition that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.[124]

Although the Court has not been clear on the question,[125] challenges to the *scope* of Congress's enumerated powers can also sometimes be as-applied.[126] There is no reason under current doctrine to except nondelegation challenges from these principles.

The Court perhaps rightly perceives that it is exceedingly difficult to determine whether Congress has facially delegated legislative power in a statute. That surely has something to do with the difficulty of discerning just what *is* an impermissible delegation of power. But it might also have something to do with the ramifications of declaring an Act of Congress to be an unlawful delegation of power: the entire regulatory scheme might be invalidated. In *Whitman v. American Trucking*, the very core of the EPA's regulatory mission—to set ambient air standards for pollutants—would have been struck down.

The Court avoids just this situation when it comes to regulations implicating First Amendment rights by assessing challenges as applied. Although statutes implicating the First Amendment *can* be struck down facially on overbreadth challenges,[127] the Court avoids these challenges because "invalidation may result in unnecessary interference with a state

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personal constitutional rights." (footnote omitted)); *id.* at 1324 ("[T]here is no single distinctive category of facial, as opposed to as-applied, litigation. Rather, all challenges to statutes arise when a particular litigant claims that a statute cannot be enforced against her."); *id.* at 1328 ("As-applied challenges are the basic building blocks of constitutional adjudication.").

124. *Raines*, 362 U.S. at 21–22 (citation omitted) (quoting Barrows v. Jackson, 346 U.S. 249, 256 (1953)).

125. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1230–35, 1273–79 (2010); *see also* Fallon, *supra* note 12, at 1323 ("[I]t is tempting to say that the Justices of the Supreme Court are not only divided, but also conflicted or even confused, about when statutes should be subject to facial invalidation.").

126. *See* Gonzalez v. Raich, 545 U.S. 1, 23 (2005) (addressing an as-applied Commerce Clause challenge); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 654 (1999) (Stevens, J., dissenting) (framing the question as whether the Patent Remedy Act's abrogation of state sovereign immunity "may be applied to willful infringement"). In *Raich*, though, the Court seemed to intuit that something was different about Commerce Clause cases, stating that where the class of activities is regulated and that class is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class. 545 U.S. at 23 (quoting Perez v. United States, 402 U.S. 146, 154 (1971)). This is an odd claim, however, because presumably Congress must have had an enumerated power to enact any of the laws violative of the various provisions of the Bill of Rights. *See* cases cited *supra* note 122.

127. *Salerno*, 481 U.S. at 745; Rosenkranz, *supra* note 125, at 1250–52 & n.150 (collecting cases).

regulatory program."[128] This cautionary approach could also explain the Court's reticence in striking down an entire federal regulatory program based only on vague notions of facially excessive delegation. The courts thus ought to proceed with as-applied challenges to specific implementations of federal administrative statutes implicating nondelegation concerns, as they do with as-applied challenges to state or federal regulatory programs implicating the First Amendment.

Indeed, one of the most cogent explanations of the nature of as-applied challenges, propounded by Richard Fallon, invites the use of as-applied nondelegation challenges. Fallon argues that all constitutional challenges are effectively as-applied challenges and that facial challenges are merely outgrowths of as-applied challenges.[129] That is because

> the meaning of statutes is not always obvious, but frequently must be *specified* through case-by-case applications; the process of specification effectively divides a statutory rule into a series of *subrules*; and in most but not all cases, valid subrules can be *separated* from invalid ones, so that the former can be enforced, even if the latter cannot.[130]

Fallon's account is responsive to Matthew Adler's claim that all challenges must be facial because all rights are rights against rules, which must be challenged facially.[131] Fallon accepts that some rights are indeed rights against rules, but even if that is true, as-applied challenges are still suitable. That is because, as explained above, each statute can be considered as a series of subrules, and one can assert a right against a particular subrule and need not assert that right against any of the other subrules.

A crucial component of this account is that often the meaning of a subrule, or even its very existence, does not become clear until specified by the facts of a particular case. This explains the Court's use of narrowing or saving constructions—it can narrow a particular subrule in a statute to avoid future constitutional challenge.[132] In short, Fallon argues, "even insofar as challenges are challenges to rules, it does not follow that all challenges call upon courts to adjudicate the validity of statutory rules in their entirety; some challenges are to subrules . . . ."[133] These challenges to subrules "are, for all functional purposes, as-applied challenges that permit a court to sever a statute and separate valid from invalid subrules or applications."[134]

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128. Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

129. *Id.* at 1324.

130. *Id.* at 1325–26 (emphasis in original) (footnote omitted).

131. *Id.* at 1328–35; Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 157 (1998).

132. Fallon, *supra* note 12, at 1333.

133. *Id.* at 1334.

134. *Id.*

The parallel to as-applied nondelegation is striking. A broad, open-ended statutory provision delegating authority to an agency is a series of subdelegations, or subrules, the precise contours of which only "emerge[] through application"[135] or are "specified only in the process of statutory application."[136] The insight is that a broad statutory delegation of authority is a series of subrules, and these subrules cannot be fully known until the agency takes an action purporting to follow one of these subrules—until it attempts to resolve a particular problem delegated to its discretion by a particular statutory ambiguity. And it follows quite naturally that "some [subdelegations] may validly be applied even if others may not."[137]

This analysis could apply to the statutory provisions at issue in *Brown & Williamson* and *MCI*. For example, the FDCA's definitions of drug and device ordinarily delegate very little discretion to the agency. Usually it is quite clear that a particular drug falls within the statutory definition (a diabetes drug, for example), what finding the agency must make (safety and effectiveness), and what follows from a lack of such finding (prohibition on marketing). By virtue of the unique factual nature of cigarettes or by virtue of other competing statutory provisions, however, the statute appears to create a subdelegation conferring discretion to decide *whether* and to what ends tobacco should be regulated. This subdelegation might violate the nondelegation doctrine even if the other subdelegations of the relevant statutory provisions do not.

To be sure, there is still room for facial challenges. If the reasoning by which a particular subrule is invalidated applies to all of the other subrules, or to a substantial number of subrules, the entire statute or provision can be struck down.[138] In our case, the entire delegation can be struck on its face. A statute or provision can be so broad as to provide (contrary to what is required under modern doctrine) no intelligible principle at all. But in most cases, as history has shown, that will not be the case. Statutory provisions will usually be broad enough to create a series of subdelegations, but not so broad as to violate the nondelegation doctrine in their entirety.

C. Execution Challenges

An agency can follow a statute and still violate other provisions of the Constitution. For example, a regulation can violate an individual right found elsewhere in the Constitution even though the statute does not do so on its face—or at least even where the statute is not challenged.[139] In *Rust v.*

135. *Id.* at 1333.

136. *Id.* at 1334.

137. *Id.*

138. *Id.* at 1336–39.

139. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 184–87, 192–203 (1991) (considering First and Fifth Amendment challenges to a regulation after the regulation was upheld under *Chevron*

Sullivan,[140] the Court considered regulations promulgated under Title X of the Public Health Services Act of 1970[141] clarifying that funds administered under the statute were available only for "preconceptional counseling, education, and general reproductive health care" and not "pregnancy care (including obstetric or prenatal care)."[142] The Court held the regulation to be a permissible interpretation of the statute under *Chevron*.[143] It then proceeded to consider plaintiffs' challenges to the regulations under the First and Fifth Amendment, although no one challenged the validity of the statute.[144] Numerous other cases have considered constitutional challenges to regulations but not to their organic statutes.[145]

If a regulation can violate another provision of the Constitution even though the statute does not on its face violate that provision, then a regulation could independently violate Article II, section 1, which vests the executive power in the President of the United States.[146] That section permits the president to exercise *executive* power, but not legislative power. Modern doctrine thus presumes that agencies are "executing" the law, even if certain of their functions, like rulemaking, appear "quasi legislative."[147] This understanding goes hand-in-hand with the modern nondelegation doctrine: if Congress delegates with sufficiently intelligible principles, then agencies are

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analysis); Clancy v. Office of Foreign Assets Control of U.S. Dep't of Treasury, 559 F.3d 595, 596–98, 599–602, 604–05 (7th Cir. 2009) (considering First and Fifth Amendment challenges to regulations promulgated under the authority of the International Emergency Economic Powers Act); United States v. Johnson, 159 F.3d 892, 895–96 (4th Cir. 1998) (considering a First Amendment challenge to national forest system regulation); Steffan v. Perry, 41 F.3d 677, 684–85 (D.C. Cir. 1994) (considering an equal protection challenge to military regulations); Bradley v. Austin, 841 F.2d 1288, 1296–97 (6th Cir. 1988) (considering due process and equal protection challenges to federal regulations promulgated under the Deficit Reduction Act of 1984).

140. 500 U.S. 173 (1991).

141. *See* 42 U.S.C. § 300(a) (2012) (authorizing federal funds for "family planning methods and services").

142. *Sullivan*, 500 U.S. at 179 (quoting 42 C.F.R. § 59.2 (1989) (amended 2000)).

143. *Id.* at 184–87.

144. *Id.* at 192–203.

145. *See* cases cited *supra* note 139.

146. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

147. INS v. Chadha, 462 U.S. 919, 953 n.16 (1983) ("To be sure, some administrative agency action—rule making, for example—may resemble 'lawmaking.' . . . This Court has referred to agency activity as being 'quasi-legislative' in character. Clearly, however, '[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.'" (alteration in original) (citations omitted)); City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013) ("Agencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the 'executive Power.'"); *see* M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 603 (2001) (explaining that modern legal doctrine requires delegations to be executive in nature; such delegations are "legitimate only if they [do] not represent legislation").

not making law, but are merely executing the law; if Congress delegates with *in*sufficiently intelligible principles, then the agencies' actions pursuant to the statute would be exercises of legislative power.[148]

It might be, then, that a statutory ambiguity creating an implicit delegation of authority lacks a sufficiently intelligible principle *for that particular decision*, and thus if the agency makes the decision it will be exercising legislative rather than executive power. Put another way, if it would have been impermissible for Congress to delegate this particular question explicitly, then an agency would independently violate Article II, section 1—vesting only the executive power in the federal government's administrative apparatus—by seeking to resolve that very question. This violation does not hinge on Congress's violating any of its constitutional obligations when it enacts the statute. Rather, the *Executive* has violated the Constitution by *interpreting* the statute in such a way, plausible under the statutory language, that leads to a violation of the Vesting Clause of Article II.

In a recent article, Nicholas Rosenkranz sought to elucidate the applicability of as-applied and facial challenges based on a careful grammatical analysis of the Constitution's text.[149] His view is that First Amendment challenges must be facial because the First Amendment declares that "Congress shall make no law . . . ,"[150] and therefore only Congress can violate the First Amendment and only at the moment it enacts a statute.[151] Similarly, commerce clause challenges must be facial because their basis is that Congress has exceeded its power under Article I, section 8, which grants Congress power to enact law ("Congress shall have the Power to . . . .")[152]—and thus any violation must be clear on the face of a statute that Congress enacts.[153] On the other hand, challenges to executive actions, for example under the Fourth Amendment, must be as-applied.[154]

Rosenkranz's approach, if correct, would not be fatal to the present analysis. It supports the proposition that Congress might enact a statute that on its face does not appear to delegate any legislative power—and thus a conscientious representative would have no reason to believe she was violating her oath to uphold the Constitution when she voted for the statute[155]—but in some application of that statute the *Executive* might violate

148. *See supra* notes 19–32 and accompanying text.

149. Rosenkranz, *supra* note 125, at 1230–42.

150. U.S. CONST. amend. I.

151. *Id.* at 1268–72.

152. U.S. CONST. art. I, § 8.

153. Rosenkranz, *supra* note 125, at 1275–76.

154. *Id.* at 1239–42.

155. *Cf. id.* at 1235–39 (arguing that challenges based on constitutional prohibitions directed at Congress may only succeed if the statute is invalid on its face, such that individual legislators violated the Constitution by enacting it).

some other provision of the Constitution. In Rosenkranz's terminology, "In these cases, it is the *application* of the statute that violates the Constitution. These challenges should perhaps be called 'as-executed challenges' or, better, simply 'execution challenges,' to gesture more clearly toward the President, whose duty it is to 'take Care that the Laws be faithfully *executed*.'"[156] Put simply, "[j]ust as 'facial challenges' are challenges to actions ('Acts') of Congress, *'as-applied challenges' are challenges to actions of the President*."[157]

This approach could apply to nondelegation challenges. It could be that there are no nondelegation grounds to challenge a statute on its face, i.e., Congress cannot be said to have delegated legislative power in violation of Article I, sections 1 and 7, when it enacted the statute.[158] But if a latent ambiguity creates an implicit delegation that would have been impermissible had it been made explicitly, then an agency promulgating a regulation pursuant to that implicit delegation could violate Article II, section 1, by exercising legislative rather than executive power.[159]

Ultimately, the present approach disagrees with Rosenkranz's framework because if there is a violation of the nondelegation doctrine, it is the *statute* that violates it—just not the statute as a whole. It is the statute, and more specifically one of its particular ambiguities, that creates a violation of the nondelegation doctrine when it implicitly delegates too much power. Yet if one is of the view that there is no nondelegation violation at all because a statute can only violate the nondelegation doctrine facially, then for the reasons just described the court could simply strike down the regulation for violating Article II, Section 1, which supplies an independent reason for invalidation.[160]

D. Implications

An as-applied doctrine would better support underlying constitutional values. If the nondelegation doctrine is justified on the ground that Congress

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156. *Id.* at 1242 (quoting U.S. CONST. art. II, § 3).

157. *Id.* (emphasis added).

158. *See* U.S. CONST. art. I, § 1 (vesting the legislative power in Congress); *Id.* art. I, § 7 (detailing the requirements of bicameralism and presentment).

159. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

160. Thus, this analysis does not require that *Whitman v. American Trucking* be overturned. In that case, the D.C. Circuit had found that EPA's own regulation had interpreted the Clean Air Act in such a way that the statute provided no intelligible principle and thus violated the nondelegation doctrine, but that EPA could avoid this problem by adopting a different regulation with a more restrictive construction of the statute. 531 U.S. 457, 463 (2001). Thus, the court had found that EPA's "interpretation (but not the statute itself) violated the nondelegation doctrine." *Id.* at 472. The Supreme Court disagreed with this approach, holding that "the constitutional question is whether the *statute* has delegated legislative power to the agency." *Id.* Here, it is the statute that violates the nondelegation doctrine—it merely violates the doctrine as-applied.

should make major policy decisions[161] or similarly on the ground that major policy decisions should go through bicameralism and presentment,[162] then an as-applied doctrine serves those interests. By definition, an as-applied doctrine will be easier to apply than a facial one. That makes it more likely that the Court can enforce the nondelegation doctrine at least on the margins—and require Congress to make the truly major policy decisions.

The doctrine would also be more administrable.[163] The intelligible principle standard is exceedingly hard to administer because, as many have noted, "[a]ll legislation necessarily leaves some measure of policy-making discretion to those who implement it."[164] Consider again the statute in *Wayman v. Southard*. Most of the policy-making discretion granted to the courts by the Process Act of 1792 was perfectly acceptable, but *sometimes* that discretion bordered the unacceptable.[165] A court would never conclude in such a situation that the statute itself provided no intelligible principle. An as-applied doctrine would be easier to administer because it tackles each ambiguity—each implicit delegation of authority to decide a question—on its own terms.

Indeed, an as-applied doctrine would afford the courts an opportunity to explore more earnestly exactly what is and is not a permissible delegation of legislative power.[166] The Court has declared that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred,"[167] but it has never significantly elaborated. With a more-narrowly-tailored nondelegation challenge, the Court could explore whether particular kinds of power require more or less guidance from Congress—and why so. Indeed, as explained in subpart II.B, an as-applied doctrine would serve the same values the as-applied framework serves in other areas of law. Primary among these are judicial deference and humility. "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined."[168] An as-applied nondelegation doctrine would permit the courts to be far more delicate than a facial doctrine permits.

The alternative has not worked. Although the modern nondelegation doctrine is not enforced, some scholars have suggested that it can be seen as

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161. Manning, *supra* note 29, at 228.

162. *Id.* at 238–39.

163. Recall that administrability is the key objection to the modern nondelegation doctrine. *See supra* note 30 and accompanying text.

164. Manning, *supra* note 29, at 241.

165. *See supra* text accompanying notes 104–120.

166. It bears repeating that perhaps there is simply no conceivable way to distinguish permissible from impermissible delegations. That may be, but at least the as-applied approach would give courts the opportunity to try to develop workable distinctions.

167. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001).

168. United States v. Raines, 362 U.S. 17, 22 (1960).

a doctrine of constitutional avoidance—and the Court was avoiding the nondelegation issue in *Brown & Williamson* by deciding the case under *Chevron* Step One.[169] But as we have already seen, that requires the Court both to misconstrue the statute and to intuit a nondelegation problem without actually deciding the issue or providing any reasoning.[170] An as-applied doctrine is superior because it actually requires the Court to *decide* the constitutional question and does not require it to misconstrue any statutory language at all.

III. The Framework Applied

An as-applied nondelegation doctrine is plausible, and even attractive, under the Constitution's text and under modern theories of judicial review. Its applicability to *Brown & Williamson* and *MCI* is clear. In the context of *Chevron*, it can serve as a "*Chevron* Step Three": Even if an agency regulation is a plausible interpretation of an ambiguous statute, the courts must still ask whether Congress's implicit delegation to decide that particular question would be an impermissible delegation of legislative power. And because statutory ambiguities and broad delegations exist even in the absence of *Chevron*, the as-applied nondelegation framework would apply even if *Chevron* were abolished or abrogated.

This Part applies the as-applied analysis to three additional past cases—*Massachusetts v. EPA*, *Chevron* itself, and the D.C. Circuit's decision respecting the FCC's 2015 Open Internet Order (the so-called "net neutrality" rules).[171] To deploy the framework, we need a theory of nondelegation. Again, it cannot be emphasized enough that an as-applied nondelegation doctrine does not depend on *what* theory of nondelegation one adopts, so long as one has a theory.[172] Moreover, an as-applied doctrine would afford the courts more opportunities actually to develop a theory of nondelegation over time on a case-by-case basis, without having to fear the consequences of striking down entire statutory schemes. Regardless, it is beyond the scope of this Article to establish a theory for distinguishing permissible from impermissible delegations; but to see how the framework might actually work in specific cases, we need some idea of what might constitute an unlawful delegation of power.

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169. *See supra* notes 162–69 and accompanying text.

170. *See supra* notes 70–75 and accompanying text.

171. The FCC has recently voted to repeal this order, which will likely prevent this case from reaching the Supreme Court. *See* Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html [https://perma.cc/G8FH-5M4T]. It nevertheless remains a good example of when the as-applied framework would be suitable.

172. *See supra* subpart III.D.

A. Defining Delegations

The literature is divided on the very principle of nondelegation: Is too much *discretion* an impermissible delegation? That is the standard view—it is also partly why the nondelegation doctrine is understood to be unenforceable.[173] Or is an impermissible delegation of legislative power one in which the agency is granted *any* amount of discretion to determine *certain things*—such as primary rules of private conduct? That is a typical account of some formalists,[174] may be the line drawn in *Schechter Poultry* (one of the two successful nondelegation challenges),[175] and has been recently advanced by Justice Thomas.[176] Finally, some scholars advance the "important subjects" theory of nondelegation, maintaining somewhat circularly (though not necessarily wrongly) that a subject "important" enough to require congressional action cannot be delegated.[177] This appears to have been Chief Justice Marshall's view.[178]

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173. *See supra* notes 29–32 and accompanying text.

174. *See, e.g.*, HAMBURGER, *supra* note 119, at 84–85 (arguing that executive rulemaking is unconstitutional only if it is legally binding); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1310–17 (2003) (summarizing historical evidence that the Founders understood the legislative power as "the power to make rules for society").

175. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935):

> [W]e look to the statute to see whether Congress has overstepped these limitations—whether Congress in authorizing 'codes of fair competition' has itself established the *standards of legal obligation*, thus performing *its essential legislative function*, or, by the failure to enact such standards, has attempted to transfer that function to others.

(emphasis added); *see also id.* at 541:

> [The statute] supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedures. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims . . . .

176. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1242 (2015) (Thomas, J., concurring in the judgment):

> The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power. By corollary, the discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct.

See also id. at 1249–50 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825)):

> First, reflected in his discussion of 'blending' permissible with impermissible discretion, is the premise that it is not the *quantity*, but the *quality*, of the discretion that determines whether an authorization is constitutional. Second, reflected in the contrast Chief Justice Marshall draws between the two types of rules, is the premise that the rules 'for which the legislature must expressly and directly provide' are those regulating private conduct rather than those regulating the conduct of court officers.

177. *See* Lawson, *supra* note 2, at 372–78 (also citing other scholars whose views can be understood in terms of an "important subjects" theory of delegation).

178. *See Wayman*, 23 U.S. at 43 (Marshall, C.J.):

However, impermissible delegations appear to be a function of both discretion *and* content. The Court has intuited this before: "[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[179] But the Court has never supplied us with an analysis of just how much discretion, and perhaps what *kinds* of discretion, is permitted for what kinds of power.[180] My tentative view is that the more a delegation of power grants discretion, *and* the more that discretion contemplates determining primary rules of private conduct (or some other explicitly legislative task such as establishing post roads), the more likely the delegation is to be unconstitutional.[181] The early history does indeed demonstrate very broad delegations of power[182]—but power to direct official

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> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

179. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001).

180. Interestingly, the Court in the only two successful nondelegation challenges—*Schechter Poultry* and *Panama Refining*—understood that delegation of legislative power must be considered both in terms of discretion and in terms of content. As the Court explained in *Schechter*, the issue in *Panama Refining* was whether the President was given too much discretion to decide *whether* to exercise his authority to prohibit a well-defined act. *Schechter*, 295 U.S. at 530:

> There [in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)] the subject of the statutory prohibition was defined. That subject was the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. The question was with respect to the *range of discretion* given to the President in prohibiting that transportation.

Id. (emphasis added) (citation omitted). In contrast, in *Schechter* itself, "the question [was] more fundamental"—viz., "whether there is any adequate definition of the subject to which the codes are to be addressed." *Id.* at 530–31.

181. Ron Cass makes a similar argument in a recent article. *See* Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 177 (2017):

> [I]dentifying an improper delegation of power requires understanding the power's *nature* rather than its scope. With this in mind, a broad authorization for exercise of a relatively minor power that *is* properly associated with the work of another branch does not fail simply because it is broad. By the same token, a narrow authorization for the exercise of a power of great importance that is *not* properly associated with the work of another branch does not become constitutional simply because it is narrow.

Id.; *see also id.* at 198:

> Other things equal, more open-ended authority over a wider range of decisions ought to count against a finding of constitutionality, but the critical concern remains whether the authority constitutes a commitment of discretion to make general rules for others or to direct activity within the recipient's constitutionally assigned realm.

182. JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 90, 96, 99, 115, 187, 290 (2012) (describing extraordinarily broad grants of discretionary authority to the Executive Branch in early American history).

behavior, not private conduct.[183] That history also has at least a few examples, however, of *limited* delegations to determine rules of private conduct.[184]

There may also be a way to subcategorize the scope of the discretion being conferred. There is probably a difference, for example, between so-called jurisdictional questions and nonjurisdictional questions. The question *whether* something should be regulated appears qualitatively different than a decision over *how* something is to be regulated after Congress has already declared that it should be regulated.[185] Additionally, discretion over *purpose* is surely more legislative than discretion over how to effectuate that purpose—that, indeed, might be the law under *Panama Refining* (the other

183. HAMBURGER, *supra* note 119, at 83–85 & n.a (characterizing Mashaw's examples as granting discretion to provide rules for official conduct); *cf., e.g.*, MASHAW, *supra* note 182, at 193 (describing the grant of authority to a Steamboat Inspection Board to establish "rules and regulations for their own conduct and that of the several boards of inspectors within the districts," i.e., to establish rules governing official conduct (quoting Act of Aug. 30, 1852, ch. 106, § 18, 10 Stat. 61, 70)).

184. For example, one early statute permitted the President almost untrammeled discretion to license trade with Indians. Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137. This was a broad discretion in the sense that the President had wide and almost unbridled discretion, and it also determined private rights and primary rules of conduct. But it was limited in the sense that it was an issue touching on the President's executive power to conduct foreign relations. The early steamboat inspection laws permitted the inspection service to determine maximum passenger limits on steamships. MASHAW, *supra* note 182, at 196. This was a delegation of power to determine private rights—it would determine the number of contracts a steamship owner/captain could enter into with passengers, it limited the rights of prospective passengers, and so on. But the discretion was limited. Congress had decided that steamboats should be regulated for safety and decided that there should be passenger limits, *id.* at 195–96, but left it up to the inspection service to decide what that limit should be. Although we are straying from the early history now, consider also the early power of the Bureau of Animal Industry to quarantine livestock. ALAN L. OLMSTEAD & PAUL W. RHODE, ARRESTING CONTAGION: SCIENCE, POLICY, AND CONFLICTS OVER ANIMAL DISEASE CONTROL 76–82 (2015). That power clearly determined private rights and established rules of conduct. But the discretion was limited in an important sense. Congress decided that contagious livestock diseases were a threat and should be eradicated (a controversial proposition); and Congress decided that quarantines were an appropriate tool to achieve that goal. *Id.* at 76. *Where* to place the quarantine to achieve that goal was left up to the Bureau.

185. This may sound like the distinction between "jurisdictional" and "non-jurisdictional" questions rejected by *City of Arlington v. FCC*, where the Court held that for purposes of *Chevron* deference there is no difference between these two kinds of questions. 569 U.S. 290, 296–301 (2013). That case, however, demonstrates merely that such a distinction does not work under *Chevron*, whose inquiry boils down to whether the agency has acted within its statutory authority—that is, whether it exceeded its jurisdiction or exceeded its authority within its jurisdiction, the question is really the same (whether the agency has exceeded its authority). Thus, Justice Scalia, writing for the majority, explained that even for major and important questions involving jurisdiction—here he cited *Brown & Williamson* and *MCI*—the Court has applied the *Chevron* framework. *Id.* at 303. But this distinction may make a whole lot of sense for as-applied nondelegation because even though the nondelegation inquiry would be the same for jurisdictional and nonjurisdictional delegations—whether Congress impermissibly delegated power—the answer to this question *will* depend on the nature of the implicit delegation. The question of *whether* something can be regulated may be treated just like any other question for the purposes of *Chevron*'s Step One and Step Two analyses, but it may have entirely different implications for a nondelegation analysis.

successful nondelegation challenge).[186] Although these lines can be difficult to draw, that does not mean they do not exist.

This analysis is also consistent with the theory that "important subjects" cannot be delegated. The more a rule affects private conduct or private rights, the more important that subject is for a legislative body; and hence, the less discretion is permitted the executive to make such rules. Critically, however, important subjects might involve the exercise of powers that do not touch upon primary rules of conduct. The post-roads debate in the Second Congress is a prime example. Establishing a post road could mean (as it historically did) the difference between economic prosperity and stagnation for towns; it involved employment and remuneration for local citizens; and it involved controlling the channels of free communication and a free press.[187] It is also a power explicitly given to Congress within the enumeration of Article I, Section 8. The point here is that regulations establishing primary rules of conduct are *more* important a subject than are regulations directing only official behavior; but there are other classes of regulations that for other reasons might be more important, too.

These principles make sense in the context of tobacco regulation. Assume Congress passed a simple, explicit statute granting FDA authority to decide both *whether* tobacco should be regulated, *to what end*—i.e., whether it should consider economic factors or merely health factors—and also *how* it should be regulated. This statute grants broad discretion over whether there should be a regulatory scheme at all and over the purposes for which the regulatory scheme exists, and the objects of the discretion are primary rules of private conduct involving the regulated activity. There would be a very strong case that this is an unlawful delegation of power. Now suppose the statute *instructed* FDA that tobacco should be regulated and that the agency must consider both the economic impact as well as the health impact, and committed only the "how" to the agency's discretion. That is much more likely to pass muster, even if it leaves discretion to determine primary rules of conduct, e.g., that a vendor cannot sell to minors.

As this Article has explained and reiterated, however, it does not matter for present purposes how one defines a delegation of legislative power. The point is that under a given definition, an as-applied framework can have

186. The Court struck down section 9(c) of the National Industrial Recovery Act because it merely *authorized* the President to take action, or not, without specifying whether or why he should or should not do so: "Section 9 (c) does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. . . . The Congress in section 9 (c) thus declares no policy as to the transportation of excess production." Panama Refining Co. v. Ryan, 293 U.S. 388, 415 (1935).

187. *See* LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 77–79 & n.13 (1948) (explaining the importance of post roads to towns).

significant implications for important cases. With these brief musings in mind, let us turn to some examples.

B. Examples

1. Massachusetts v. EPA.—In *Massachusetts v. EPA*, the EPA was presented with a petition requesting that the agency regulate carbon dioxide emissions as air pollutants under section 202(a)(1) of the Clean Air Act, which provides,

> The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.[188]

The Act defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air."[189]

In denying the petition, EPA reasoned that the Clean Air Act was intended "to address *local* air pollutants rather than a substance that 'is fairly consistent in its concentration throughout the *world*'s atmosphere'";[190] that carbon dioxide was not an air *pollutant* merely because it is emitted into the atmosphere;[191] and, *a la Brown & Williamson*,[192] that Congress had enacted a separate statutory scheme to address global warming,[193] that regulations under the Clean Air Act would be inconsistent with other motor vehicle regulations already existing,[194] and that regulations may infringe on the President's foreign policy initiatives.[195] EPA thus concluded not only that carbon dioxide was not an air pollutant within the meaning of the Act, but that even if it were, the agency would decline to regulate it.[196]

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188. Massachusetts v. EPA, 549 U.S. 497, 506 (quoting 42 U.S.C. § 7521(a)(1)).

189. *Id.* (quoting § 7602(g)).

190. *Id.* at 512 (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,927 (Sept. 8, 2003)).

191. *Id.* at 557–58 (Scalia, J., dissenting) (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929 n.3).

192. *See supra* notes 45, 48 and accompanying text.

193. *Massachusetts*, 549 U.S. at 511–12 (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,926).

194. *Id.* at 513 (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929).

195. *Id.* at 513–14 (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,931).

196. *Id.* at 511.

The majority rejected these arguments under *Chevron* Step One. It held: "The statutory text forecloses EPA's reading" because "air pollutant" includes "*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air."[197] Thus, "[t]he statute is unambiguous."[198] And if carbon dioxide is an air pollutant, EPA must decide whether it "endanger[s] public health or welfare" and cannot consider other requirements such as the President's foreign policy initiatives.[199] If EPA finds that it does, "the Clean Air Act *requires* the Agency to regulate emissions of the deleterious pollutants from new motor vehicles."[200] The Court concluded that "EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change."[201]

In dissent, however, four Justices found two ambiguities. First, they agreed with the Court that *if* the Administrator makes a "judgment" about an air pollutant, then that judgment can only be based on the statutory criteria. But the dissenters argued that the Administrator may consult *other* reasons in deciding *whether to make a judgment at all*:

> [T]he statute says *nothing at all* about the reasons for which the Administrator may *defer* making a judgment—the permissible reasons for deciding not to grapple with the issue at the present time. Thus, the various "policy" rationales that the Court criticizes are not "divorced from the statutory text," except in the sense that the statutory text is silent, as texts are often silent about permissible reasons for the exercise of agency discretion.[202]

The dissent concluded therefore that "EPA's interpretation of the discretion conferred by the statutory reference to 'its judgment'" is, at minimum, entitled to deference under *Chevron*.[203]

Second, the dissent argued that the definition of "air pollutant" was not unambiguous. Merely because carbon dioxide is a "physical" or "chemical" substance that enters into the ambient air does not mean it is a pollutant—indeed, not every physical or chemical substance that does so is a pollutant.[204] When the statute defines air pollutant as "including" "any" such substance, it is similar to the phrase "any American automobile, including any truck or

197. *Id.* at 528–29 (quoting and adding emphasis to 42 U.S.C. § 7602(g)).
198. *Id.* at 529.
199. *Id.* at 532–39 (quoting § 7521(a)(1)).
200. *Id.* at 533 (emphasis added).
201. *Id.*
202. *Id.* at 552 (Scalia, J., dissenting) (citations omitted).
203. *Id.* at 552–53.
204. *Id.* at 557 & n.2.

minivan"—and such a phrase does *not* mean that *any* truck or minivan is American.[205] Thus, again, the dissent would invoke *Chevron* deference.[206]

How would this case be analyzed under as-applied nondelegation? Of course, just as some Justices resolve cases at Step One where others see ambiguities (requiring a resolution under Step Two), the answer depends on how one reads the statute. Under the majority's reading, the statute *requires* EPA to regulate carbon dioxide emissions upon a particular judgment or determination. So long as that is true, any nondelegation problem would be a facial one. Does the statute give sufficient criteria to guide the discretion of the President to make the determination? It's a question of what the statute does on its face. And as it were, there does not appear to be any nondelegation problem under the majority's reading—Congress decided that carbon dioxide *shall* be regulated, if a certain condition is met; Congress declared the purpose for which it should be regulated; and Congress even declared how it should be regulated—by motor vehicle emissions reductions. Of course, the statute might still leave some discretion: At what level to cap emissions? How is that determination to be made? And so on. If any of *those* questions arose through a statutory ambiguity, there would be less of a nondelegation problem.

If, on the other hand, the dissenters' view is correct, then the statute in this application would raise nondelegation concerns. If the Court first found that the Administrator could *defer* the judgment or finding under the statute that triggers jurisdiction, then presumably he could delay it indefinitely. The statutory silence implicitly delegating this discretion would be tantamount to declaring that EPA shall decide *whether* carbon dioxide should be regulated at all. Now, this is not an entirely naked delegation, because if the agency does decide to regulate carbon dioxide, it has to make a particular finding. Nevertheless, the discretion to delay such a finding indefinitely is essentially discretion over whether to regulate something at all. That raises far more serious nondelegation concerns.

As for the definitional ambiguity, it amounts to an implicit delegation of authority to decide *whether* carbon dioxide should be regulated. This appears no different than the ambiguity over deferring judgment. If, however, that creates a nondelegation problem, then it follows that any time there is ambiguity over whether a particular pollutant is covered, that would raise an identical nondelegation problem. This might seem an undesirable result, but perhaps it is not. Under the statutory definition, there are many pollutants over which there is no dispute at all—that is, *Congress has specified clearly* that something shall be regulated. But in those limited cases where it is not so clear that Congress has specified that something should be regulated, it is not unreasonable to insist that Congress go back and specify. By definition,

205. *Id.* at 557.
206. *Id.* at 558.

the ambiguity means we don't know whether Congress would have wanted the particular particle regulated. Congress has not made the law. Congress should be responsible for going back and doing so.

2. Chevron v. NRDC.—One of the key criticisms of the major questions doctrine as it was developed in *Brown & Williamson* and *MCI* is that it is hardly clear that the rulemakings in the *Chevron* case itself were any less "major" in terms of economic and political significance.[207] Although *Chevron v. NRDC* may be a hard case under a major questions doctrine, it comes out more easily under an as-applied nondelegation framework. *Chevron* involved the decision of the EPA under the Reagan Administration to interpret "stationary source" in the Clean Air Act to refer to an entire plant rather than to any individual emitting source within that plant (this was called the "bubble" policy).[208] The importance of the bubble policy was that it permitted plants to fall below certain regulatory standards with respect to *individual* sources of emissions so long as there were offsetting reductions in emissions in other parts of the plant.[209] Put simply, the Act's statutory definition plausibly could refer either to any individual installation within a plant, or to the plant as a whole. The Act defines stationary source as "any building, structure, facility, or installation" which emits air pollution.[210]

In assessing any potential nondelegation problem with Congress's implicit delegation to decide whether to adopt a bubble policy, a court would consider that Congress passed a thoroughly detailed regulatory scheme—detailing statutory purposes, emissions goals, and remedial procedures.[211] In the words of the Court, "The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue."[212] The amendments required states failing to achieve emissions targets to create state implementation plans by a certain deadline, and specifically required such plans to "require permits for the construction and operation of new or modified major stationary sources . . . ."[213] The only question was whether an entire plant could be considered a stationary source so that each individual emitting component did not need to achieve certain

207. Moncrieff, *supra* note 35, at 611 & n.74; Sunstein, *supra* note 33, at 243, 245–46.

208. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840 (1984) (citing Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 172(b)(6), 91 Stat. 685, 747 (requiring "permits for the construction and operation of new or modified stationary sources"); Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval, 46 Fed. Reg. 50,766 (Oct. 14, 1981) (changing the definition of "source" from one that included "an individual piece of process equipment within the plant" to "an entire plant only")).

209. *Id.* at 853–55.

210. *Id.* at 860 (quoting 42 U.S.C. § 7411(a)(3)).

211. *Id.* at 848–51.

212. *Id.* at 848.

213. *Id.* at 849–50 (quoting Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 172(b)(6), 91 Stat. 685, 747).

targets. Framed thus, Congress established that something *should* be regulated (particular pollutants), established the purposes and goals of such regulation (attainment of lower emissions levels), and even established generally a method of achieving these targets (by the regulation of stationary sources). The only discretion left to the agency was the *how* of the implementation, taking into account all of these directives. In that case, to be sure, the *how* question could have major economic and political significance—and it could even determine the ultimate level of acceptable emissions, a question that affects private rights and private conduct. It certainly *could* be considered legislative. But it probably was not an exercise of "exclusively legislative"[214] power such that Congress could not delegate it.

3. U.S. Telecom Ass'n v. FCC.—The final example involves a recent and controversial issue—the FCC's 2015 Open Internet Order that imposed so-called "net neutrality" rules on Internet access providers. Promulgated under Section 706 of the Telecommunications Act of 1996 and Title II of the Communications Act of 1934, the order prohibited the "blocking, throttling, [or] paid prioritization" of content on the part of the Internet access providers[215]—i.e., providers of Internet access such as Comcast or Verizon could not treat preferentially (or "edge") some content providers over others. In June 2016, the D.C. Circuit upheld the order under *Chevron* as a permissible interpretation on the part of the FCC of the 1934 and 1996 Acts.[216]

It does not take a detailed analysis of the statutes and the order to see that the order—or more precisely the statutory ambiguities pursuant to which it was issued—are ideal candidates for an as-applied nondelegation challenge. The case revolved around whether the FCC could plausibly classify Internet access providers as "offering" a "telecommunications service," as opposed to merely providing an "information service."[217] For the order to be valid, providers had to be classified as telecommunications services so that they could be subject to the common carrier regulations of Title II.[218] The D.C. Circuit held, relying on the Supreme Court's decision in

214. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825); *see supra* note 110.

215. Protecting and Promoting the Open Internet, 30 FCC Recd. 5601 ¶ 14 (Apr. 3, 2015).

216. U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *petition for cert. filed*, No. 17-504 (U.S. Sept. 28, 2017).

217. *Id.* at 701.

218. *Id.* at 691. Under the Telecommunications Act of 1996, the FCC's authority to regulate telecommunications carriers as "common carriers" is limited to "the extent that [the carrier] is engaged in providing telecommunications services." 47 U.S.C. § 153(51) (2012). The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public." *Id.* § 153(53). In contrast, "information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," *id.* § 153(24), and is not subject to common carrier regulation. *U.S. Telecom*, 825 F.3d at 691, 701.

National Cable & Telecommunications Ass'n v. Brand X Internet Services,[219] that this classification depended on the meaning of the term "offering," which was ambiguous, and thus the FCC's classification was entitled to *Chevron* deference.[220]

In short, the D.C. Circuit held, "the Supreme Court expressly recognized that Congress, by leaving a statutory ambiguity, had delegated to the Commission the power to regulate broadband service."[221] That is, Congress, through the statutory ambiguity, delegated to the FCC the power to decide *whether* the Internet access providers should be regulated at all—because under the statutory language, such providers could plausibly be subject to regulations or could plausibly be exempt from them. This is the kind of jurisdictional "whether" question suggesting a possible nondelegation problem.

But more still, this implicit delegation of authority was particularly problematic. As explained elsewhere in the opinion, the Communications Act also grants the FCC authority to "forbear 'from applying any regulation or any provision' of the Communications Act if it determines that the provision is unnecessary to ensure just and reasonable service or protect consumers and determines that forbearance is 'consistent with the public interest.'"[222] Not only, then, did this delegation from Congress give the agency discretion *whether* to regulate the Internet access providers, but it also gave the agency enormously broad discretion *how to do so*—by choosing whether any of the statutory provisions should apply or not. The FCC had nearly free rein to decide whether and how the Internet was to be regulated. This discretion was guided only by very broad, general purposes—such as the "consistent with the public interest," the "just and reasonable" charges or practices, or the "not necessary for the protection of consumers" standards of the 1934 Act for purposes of forbearance.[223] It was also, perhaps, guided by the even broader purposes of the 1996 Act "to promote the continued development of the Internet," "to preserve the vibrant and competitive free market that presently exists for the Internet," and "to encourage the development of" certain technologies.[224]

In short, Congress's implicit (and in the case of forbearance, explicit) delegations of authority—effectively to decide whether, how, and to what end the Internet should be regulated—present a likely nondelegation problem. There is little disagreement that the 1934 and 1996 Acts are

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219. 545 U.S. 967, 989 (2005) ("The term 'offe[r]' as used in the definition of telecommunications service is ambiguous . . . ." (alteration in original) (citation omitted)).

220. *U.S. Telecom*, 825 F.3d at 702–04.

221. *Id.* at 704.

222. *Id.* at 695–96 (quoting 47 U.S.C. § 160(a)).

223. 47 U.S.C. § 160(a).

224. *Id.* § 230(b)(1)–(3).

ambiguous with respect to whether the Internet is covered by their statutory definitions; the FCC's interpretation was thus entitled to *Chevron* deference. And it is beyond question that the relevant statutory provisions in the 1934 and 1996 Acts do not violate the nondelegation doctrine in their entirety. But the Open Internet Order was a clear candidate for an as-applied nondelegation challenge.

IV. Conclusion

An as-applied nondelegation doctrine has much to commend it. Because the doctrine is modest, it would reinvigorate the nondelegation doctrine by permitting courts to assess nondelegation challenges in terms of narrower delegations of authority. Courts no longer need to fear striking down entire statutory schemes or provisions—the central provisions of the Communications Act, the Clean Air Act, the Clean Water Act, the Securities and Exchange Act—merely by entertaining a nondelegation challenge. The doctrine is more intellectually honest and rigorous than the so-called major questions exception to *Chevron*, and it is invited by prevailing theories of judicial review. Finally, it may be determinative in important cases, and indeed has the potential to reshape how administrative law is litigated.