4-2011

Chevron's Regrets: The Persistent Vitality of the Nondelegation Doctrine

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CHEVRON'S REGRETS: THE PERSISTENT VITALITY OF THE NONDELEGATION DOCTRINE

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Since the Chevron *decision in 1984, courts have extended to administrative agencies a high level of deference when those agencies reasonably interpret ambiguous statutes, reasoning that agencies have more technical expertise and public accountability than courts. However, when the agency's interpretation implicates a significant policy choice, courts do not always defer. At times, they rely on principles of nondelegation to rule against the agency interpretation and require that choices be made by Congress instead.*

Chevron *makes no explicit exception for significant policy choices, but in cases like* MCI v. AT&T *and* FDA v. Brown & Williamson*, the Supreme Court has manipulated the application of the* Chevron *test to find statutory clarity and preclude deference to agencies for exactly this reason. Led by litigants who highlighted the separation of powers implications of the agency's interpretations, the Court has suggested both that the principles of nondelegation remain a constitutional constraint and that alluding to them, even without resort to some canon of interpretation, is a viable litigation strategy.*

This Note exposes and defends the persistent, if unspoken, role played by the principles of nondelegation in the jurisprudence of the administrative state in an era of Chevron *deference. It draws a strategic and doctrinal framework from which to challenge agencies' statutory interpretations and presents a live circuit split involving the authority of the Food and Drug Administration to criminalize certain failures to maintain research records that is a ripe opportunity for applying that framework.*

INTRODUCTION

The American people, and even some judges and senators, seem to have truly lost faith in Congress's ability to legislate effectively.[1] At

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[1] *See* Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 270 (2010) (describing Congress as "government of buck-passing"); Evan Bayh, Op-Ed., *Why I'm Leaving the Senate*, N.Y. TIMES, Feb. 21, 2010, at WK9, *available at* http://www.nytimes.com/2010/02/21/opinion/21bayh.html?hp ("[T]he institutional inertia gripping Congress is no laughing matter."). A February 2010

the same time, because they are removed from immediate democratic accountability, there is a pervasive distrust of the vast array of regulatory agencies that could fill some of the legislative void.[2] Even while recognizing Congress's limitations, we may fairly criticize Congress for passing off politically sensitive or complicated policy questions to these administrative actors. It is almost as if we must choose between the ineffectiveness of a legitimate, legislative source of law and the potential illegitimacy of an effective, but unelected, bureaucracy.

The courts, too, tangle with the degree to which the Constitution permits Congress to transfer its responsibilities to administrative agencies and the degree to which agencies may take on such authority. On one hand, the longstanding nondelegation doctrine requires congressional primacy in the making of policy judgments. However, beginning in the 1980s with the seminal *Chevron U.S.A., Inc. v. Natural Resources Defense Council* decision, courts have deferred to agencies' reasonable interpretations of ambiguity in their statutory authority.[3] Because the *Chevron* doctrine permits agencies to make fairly significant judgments in the course of these gap-filling interpretations, its adoption is often seen as having confirmed, or even precipitated, the end of the nondelegation doctrine.[4] This understanding of *Chevron*'s role, the current status of the nondelegation doctrine, and, most of all, the interaction between them, is incorrect. While *Chevron* may be described as a revolutionary decision,[5] subsequent applications have made clear that courts are uncomfortable with the extent of deference that *Chevron* could logically require. Not only have courts

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poll found that eighty-six percent of respondents said that the U.S. system of government "is broken." *CNN Poll: Majority Think Government is Broken*, CNN POLITICS (Feb. 21, 2010, 8:45 AM), http://politicalticker.blogs.cnn.com/2010/02/21/cnn-poll-majority-think-government-is-broken/.

[2] *See, e.g.*, Joseph P. Tomain & Sidney A. Shapiro, *Analyzing Government Regulation*, 49 ADMIN. L. REV. 377, 378 (1997) ("In addition to its ubiquity, government regulation . . . is notably unpopular."); Press Release, John Boehner, House Republican Leader, Republican Chart Outlines House Democrats' Government Takeover of Health Care (July 15, 2009), *available at* http://speaker.gov/News/DocumentSingle.aspx?DocumentID=137304 ("Families shouldn't have to answer to shadowy Washington bureaucrats . . . .").

[3] 467 U.S. 837 (1984).

[4] *See, e.g.*, Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 834 (1991) (describing *Chevron* as having "drive[n] the last nail in the sporadically reopened casket of the nondelegation doctrine"). For further discussion of nondelegation, see Part I.B, *infra*. For discussion of *Chevron*, see Part I.A, *infra*.

[5] Indeed, "*Chevron* is one of the most important decisions in the history of administrative law. It has been cited and applied in more cases than any other Supreme Court decision in history." Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 307 n.41 (2004) (quoting 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2 (4th ed. 2002)). However, *Chevron* was not intended to be so revolutionary. *See infra* note 27 and accompanying text.

explicitly limited the scope of *Chevron* deference, they have accepted litigants' invitations to identify agency exercises of interpretive power that entail significant policy judgments and to subtly limit that power by withholding *Chevron* deference in such cases.

This limitation on *Chevron* in turn reflects a persistent attention to, though not an explicit acknowledgement of, the core principle of the nondelegation doctrine: the appropriate allocation of policymaking power to the elected, legislative branch. While the Supreme Court has relied explicitly on the nondelegation doctrine only twice in its history,[6] some Justices and appellate courts have continued to show a strong sensitivity to the doctrine. Moreover, as I show in this Note, the Court has issued at least two major opinions that nominally deny *Chevron* deference but are more deeply grounded in nondelegation principles: *MCI Telecommunications Corp. v. AT&T Co.*[7] and *FDA v. Brown & Williamson Tobacco Corp*.[8] Specifically, even though the agencies' interpretations in these cases embodied reasonable, if broad, readings of their statutory powers, the litigants' abilities to effectively highlight—through nondelegation principles—the fact that the agencies had exercised those powers so as to make policy choices that ought to have been made by Congress persuaded the Court to evade *Chevron*'s demand for deference.

This thesis joins other attempts to clarify seemingly anomalous applications of *Chevron* and to better predict the doctrine's Russian roulette–like application.[9] Some have argued that these decisions are best explained by competing theories of interpretation[10] or ideologies;[11] others have maintained that they have more to do with taking the temperature of the current Congress and respecting its actual policy preferences.[12] Another scholar, John Manning, has contended

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[6] *See infra* Part I.B (discussing history of nondelegation doctrine).

[7] 512 U.S. 218 (1994).

[8] 529 U.S. 120 (2000).

[9] For the Russian roulette metaphor, see Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1091 (1997).

[10] Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 51 (2006) (suggesting that "hypertextualist" judges tend to employ their interpretive preferences).

[11] FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 174–75 (2009) (illustrating some ideological effects in Supreme Court's application of *Chevron*).

[12] Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 765 (2007) (arguing that Court will vacate rules when agency "*know*[*s*] that Congress opposes its substance") (emphasis added). Note that, unlike Bressman, I do not argue that the Court is trying to ascertain what the current Congress *would* enact. Rather, I argue that the Court starts from a more normative position, asking whether the *type* of judgment is one best left to Congress. This distinction explains, for example, *MCI v. AT&T*, a case with which Bressman does not engage. *See id.* at 764 n.22 (noting Bressman's acknowledgement that she does not explain *MCI*); *infra* Part II.B.2 (exploring *MCI*).

that one such decision—which I address here as well—resulted from the Court's desire to avoid a nondelegation problem in the statute.[13]

None, however, have linked their explanation to the larger questions of the Court's discomfort with the shape that *Chevron* deference has taken, the role of litigants in molding the Court's approach, the strategies that litigants might adopt in light of the Court's practice, and the likely resolution of future cases. Further, few have carefully considered that it may be appropriate for the Court to address its discomfort with *Chevron* and to employ the nondelegation doctrine silently and subtly. Along with expanding on and more fully justifying Manning's nondelegation-based analysis with additional case examples, support from litigants' briefs, and a deeper defense of the relevance of the doctrine itself, the goal of this Note is to draw attention to these more general gaps in the scholarship and to offer both doctrinal context and some potential answers.

The structure of my analysis follows from this set of aims. Part I sets the stage by briefly discussing the rise of the *Chevron* doctrine and the signs that the Court may be interested in backtracking from it, and then by exploring the history of the nondelegation doctrine and its continued viability. In Part II, I develop and defend a model of nondelegation enforcement under the guise of *Chevron* and then apply that model to two major agency reversals: *MCI v. AT&T* and *FDA v. Brown & Williamson*. Through a detailed reframing of the reasoning employed by the Court and discussion of the arguments advanced by the litigants in these cases, I illustrate that the litigants were able to motivate the Court to rule, at least in part, in accordance with the principle of nondelegation.

Finally, in Part III, I briefly explore the complicated normative implications of the Court's practice of enforcing nondelegation *sub silentio* in light of serious questions of congressional inertia and administrative legitimacy. Departing from scholars like Manning who call for a more explicit reliance on nondelegation,[14] I caution that such a shift is both unnecessary, because legislators and litigants have been able to respond to these cases, and potentially harmful to values like judicial independence and legislative and administrative efficacy.

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[13] *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223 (interpreting *Brown & Williamson* as application of constitutional avoidance canon); *see also* Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 611–12 (2009) (discussing generally notion of nondelegation avoidance as canon of interpretation).

[14] Manning, *supra* note 13, at 228 (arguing that nondelegation operating as canon of interpretation "undermines, rather than furthers, the constitutional aims" of nondelegation). For my response, see *infra* Part III.A.

Indeed, there may be principled reasons to engage in subtle enforcement of nondelegation principles through *Chevron* review.

I close by presenting and tackling an open question of statutory interpretation that brings these threads together. Because the ultimate resolution of this and similar issues may turn on how litigants and the Court assess the interaction of *Chevron* deference with the principles of nondelegation, this Note provides a strategic and doctrinal framework for briefing and deciding future cases while continuing the appropriately subtle enforcement of nondelegation principles.

I
THE HISTORIES OF *CHEVRON* AND NONDELEGATION

A. The Rise and Regrets of the Chevron *Regime*

In 1984, the Court supplanted a relatively stringent test for deference to agency interpretations of statutes,[15] through which the judicial branch exercised a fairly active role,[16] with a far more permissive regime known as *Chevron* deference. Under the rule of *Chevron*, courts are directed to defer to agency interpretations of ambiguous law as long as they are objectively reasonable.[17]

To determine whether deference is merited under *Chevron*, a court looks for delegated authority to fill implementation gaps in legislation and proceeds formally in two steps.[18] First, the reviewing court is to determine "whether Congress has *directly spoken* to the precise question at issue."[19] If it has, the agency must obey the congressional command, as it is the judgment of the most direct source of democratic policymaking. If Congress has not given an explicit directive, however, the question for the court in *Chevron*'s second step is whether the agency's statutory interpretation is "based on a permis-

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[15] Under this regime, known as *Skidmore* deference, courts deferred to agency interpretations of statutes only to the extent to which they were subjectively persuasive. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The weight of [an agency interpretation] in a particular case will depend upon . . . all those factors which give it power to persuade . . . ."); *see also* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 n.95 (1985) (offering list of factors).

[16] Under *Skidmore*, independent administrative authority was constrained not only by the legislature that drafted the text of the statute, but by the judiciary that determined what the statute required. This form of judicial review thus created a dual check on the power of the executive agency that preserved separation of powers principles.

[17] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

[18] Some scholars dispute the extent to which this division operates in practice. *See, e.g.*, Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 597–98 (2009) (arguing that analysis determines only whether agency's interpretation is permissible interpretation).

[19] *Chevron*, 467 U.S. at 842 (emphasis added).

sible construction of the statute" in question.[20] If the agency's interpretation is reasonable, then the court must defer to it.[21] *Chevron* shifts the presumption of deference in favor of the agency: As long as the statute is ambiguous, and the agency interpretation reasonable, the court is obligated to set aside its own judgment of the best reading of the statute and accept that agency's interpretation as an exercise of its delegated authority.

This shift is grounded in the recognition that, especially in areas requiring complex technical expertise, agencies may be better equipped than the judiciary and Congress to make specific implementation determinations.[22] Moreover, agencies are more politically accountable than the judiciary; they are part of the democratically elected executive branch and subject to congressional oversight and budgetary control.[23] For these two reasons, interpretation and execution by agencies—expert actors tied to elected branches—are seen as superior to action by lay actors, especially unelected lay actors like judges.

Though partially rooted in this notion of accountability, transferring power to agencies through *Chevron* necessarily means decreasing the amount of judicial oversight to which they are subjected. Indeed, judicial determinations under *Chevron* are no longer an issuance of the definitive interpretation of a law, but a simple hunt for clarity, thereby eroding the judicial check on the executive's power.[24] *Chevron* also signals to Congress that ambiguous legislation and expansive delegations of authority to fill in gaps are not constitution-

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[20] *Id.* at 843. Elsewhere in the opinion, the Court uses the term "reasonable" in place of "permissible" to refer to this second-step inquiry. *See id.* at 845 ("[T]he question . . . [is] whether the [agency's] view . . . is a reasonable one."). I will use both terms synonymously.

[21] *See id.* at 844 (holding that such administrative interpretations are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"); *see also* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 292 (1988) ("If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute.").

[22] *See* Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the* Chevron *and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 943 (2006) (noting that *Chevron* deference is justified in part by agencies' "specialized or technical expertise in the subject matter").

[23] *See* Bressman, *supra* note 12, at 762 (discussing superior political accountability of agencies relative to courts); Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 816 (2010) (discussing "the greater democratic accountability of the [executive branch] than that of unelected judges").

[24] *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006) (describing *Chevron* as "counter-*Marbury* for the administrative state").

ally problematic.[25] Rather, the only disincentive against the passage of ambiguous legislation is the extent to which Congress *wants* to make a definitive policy choice. If the legislature does not want to, *Chevron* says that it need not. In fact, *Chevron* is not the only means by which agencies have been freed of oversight. Just a year before its decision in *Chevron*, the Court ruled in *INS v. Chadha* that Congress could not maintain a legislative veto over agency action, thus removing a strong tool of *legislative* oversight that had minimized the chance that an agency would usurp policymaking power.[26] The combined effect of *Chadha* and *Chevron* from a separation of powers perspective is to weaken both legislative and judicial checks on administrative agencies.

These doctrines vest agencies with wide discretion. However, it is possible that the Court never intended *Chevron* to be the revolutionary precedent it has become.[27] The Court has therefore begun "backpedaling in a sporadic effort"[28] to make clear "that less agency action will qualify for *Chevron* deference"[29] by setting up significant roadblocks to an agency's access to it. In *United States v. Mead Corp.*, for example, the Court held that only where circumstances suggest that Congress expected that an agency would "speak with the force of law when it addresses ambiguity in the statute" is *Chevron* deference

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[25] *See supra* note 4 and accompanying text (discussing view of *Chevron* as signaling end of nondelegation doctrine); *infra* notes 42–43 and accompanying text (same).

[26] INS v. Chadha, 462 U.S. 919 (1983). At the time, Justice Powell expressed concern about leaving such sweeping power to agencies. *See id.* at 959–60 (Powell, J., concurring) (noting that Congress reasonably viewed legislative veto as "essential" to controlling administrative agencies).

[27] *Chevron* is often described as a "revolution." *See, e.g.*, William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1085 (2008) (noting use of term); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 834 (2001) (same). However, Justice Stevens, the author of the opinion, did not intend it to be so revolutionary. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 188 (2006) ("Justice Stevens . . . had no broad ambitions for the decision; the Court did not mean to do anything dramatic."). Reflecting a similar reticence, Justice Breyer has suggested that because "[j]udges do not agree about how absolute *Chevron*'s approach is meant to be," *Chevron* is better thought of as a "rule of thumb" that "often makes sense, but not always." STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION 101, 102–03 (2008).

[28] J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to* Chevron*: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 19 (2010). Goering goes on to argue that *Chevron*'s "reign is drawing to a close." *Id.* at 22–23. I do not go that far, but such a prediction is certainly consistent with the observation that the Court is uncomfortable with and seeking to limit *Chevron*'s reach.

[29] Air Brake Sys., Inc. v. Mineta, 357 F.3d 632, 642 (6th Cir. 2004).

merited.[30] Alongside such overt instances of backtracking from *Chevron* that have plainly narrowed its scope, I argue that the Court has further retreated from the original formulation of the test by subtly incorporating principles about the proper locus of legislative power.[31] As the following section explains, these principles are core elements of the nondelegation doctrine.

B. The Rise, Fall, and Persistence of the Nondelegation Doctrine

The nondelegation doctrine commands that the legislature may not delegate legislative power to any other branch of government or to any private, nongovernmental actor. The doctrine stems not from any explicit bar on delegation but rather from structural separation of powers considerations implied by the Vesting Clause of Article I of the Constitution: "*All* legislative Powers herein granted shall be vested in a Congress of the United States . . . ."[32] In its strongest form, the Vesting Clause precludes the exercise of legislative powers by any other actor and the transfer of those powers by Congress to another actor.[33] Understood more functionally, the nondelegation doctrine "limits Congress's ability to make broad, unconditional, and undirected delegations of legislative authority to the executive and administrative agencies."[34] This limitation arose out of a decision at the Founding that the most electorally accountable branch—a branch that

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[30] 533 U.S. 218, 229 (2001). Like the more subtle backtracking that is the primary focus of this Note, "*Mead* goes part way toward restoring an important aspect of the nondelegation doctrine." Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 833 (2002); *see also* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (limiting forms of interpretations meriting deference and excluding those without force of law). *But see* Note, *Justifying the* Chevron *Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2049–53 (2010) (arguing that *Mead* fails to narrow *Chevron*'s scope or to resolve its nondelegation problems).

[31] The Court said, even before *Mead*, that the existence of delegated authority is a "precondition to deference under *Chevron*." Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990). However, the cases that are analyzed in this Note cannot be explained by this "precondition" because, in both, the Court actually engaged in the *Chevron* analysis, implicitly accepting that the legislation in question contained a sufficient delegation of gap-filling authority to do so. In *Adams Fruit*, on the other hand, the "precondition" operated so as to keep the Court from applying *Chevron* in the first instance. *See id.* at 649–50.

[32] U.S. CONST. art. I, § 1 (emphasis added); *see also* Touby v. United States, 500 U.S. 160, 165 (1991) ("From [the Vesting Clause] the Court has derived the nondelegation doctrine . . . ."); Mistretta v. United States, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.").

[33] *See, e.g.*, Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is . . . vested [by the Vesting Clause].").

[34] James B. Speta, *The Shaky Foundation of the Regulated Internet*, 8 J. ON TELECOMM. & HIGH TECH. L. 101, 114 n.76 (2010).

had no role in the enforcement of the law—should make policy.[35] As then-Justice Rehnquist wrote, one of the key salutary effects of the nondelegation doctrine is that it "ensures . . . that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."[36]

The question, of course, is the extent to which that aim should be balanced against the pursuit of efficient, effective, and expert administration. The Supreme Court's nondelegation jurisprudence has properly recognized that it is ultimately a question of degree, and a difficult one at that.[37] The greater the discretion left to the delegate, the greater the latitude to unsettle or change a legislative policy choice and therefore to raise constitutional concerns by exercising legislative power.

The Court has given shape to this inquiry by requiring that Congress "lay down by legislative act an *intelligible principle*."[38] Essentially, the doctrine is said to require that some legislative *choice* has been made. The specificity required of that choice has proven, however, to be quite minimal.[39] Indeed, only twice has the Supreme Court struck down parts of legislation explicitly on nondelegation

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[35] MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et al. eds., Cambridge Univ. Press 1989) ("When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty . . . ."); *see also* Ginsburg & Menashi, *supra* note 1, at 254 ("The nondelegation doctrine was once recognized as a foundational principle of the separation of powers.").

[36] Indus. Union Dep't v. Am. Petroleum Inst. (Benzene Case), 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring); *see also* Ginsburg & Menashi, *supra* note 1, at 272 ("[T]he point of the nondelegation doctrine was to keep the locus of lawmaking power in the Congress . . . .").

[37] *See, e.g.*, United States v. Grimaud, 220 U.S. 506, 517 (1911) (noting "that it is difficult to define the line which separates legislative power to make laws" from executive power to make regulations through administrative authority); *see also* City of Amsterdam v. Helsby, 332 N.E.2d 290, 299 (N.Y. 1975) (Fuchsberg, J., concurring) ("Delegation is, after all, a matter of degree . . . .") (quoting J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 587 (1972) (reviewing KENNETH CULP DAVIS, BEYOND DISCRETIONARY JUSTICE (1971))).

[38] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (emphasis added). In writing the *J.W. Hampton* opinion, Chief Justice Taft intended to recognize the doctrine as a "fixture of American constitutional law." Ginsburg & Menashi, *supra* note 1, at 255.

[39] The history of the doctrine is one of permitting delegations made with incredibly vague standards: The principles of fairness, the public convenience, and reasonableness have all been deemed to provide sufficient guidance. Yakus v. United States, 321 U.S. 414, 423 (1944) (holding standard that directed Administrator to fix prices "fair[ly] and equitab[ly]" provided sufficient guidance for Administrator in fulfilling his statutory duty and for courts in reviewing Administrator's actions); NBC v. United States, 319 U.S. 190, 216, 226 (1943) (holding "public interest, convenience, or necessity" provided sufficient "touchstone"); Field v. Clark, 143 U.S. 649, 693 (1892) (holding presidential determination of reasonableness per statutory command was "simply in execution" of Act of Congress).

grounds,[40] both times at the height of constitutional upheaval and interbranch conflict surrounding the advent of New Deal programs, and both times incurring the wrath of the public and the political branches as a result.[41]

The fact that these are the only two such cases has led most commentators and scholars to conclude that the doctrine is no longer in force.[42] After all, the modern administrative state is characterized by a panoply of agencies with the power to make policy choices, and the advent of *Chevron* deference signals the Court's comfort with, or at least acquiescence to, that development.[43] However, this dismissive attitude toward the separation of powers is incorrect insofar as it too narrowly conceives of the nondelegation doctrine as merely contiguous with the "intelligible principle" test, instead of representing a broader background principle about "the proper allocation of power in the modern administrative state."[44] The latter issue remains quite viable; it is debated throughout the lower federal courts[45] and con-

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[40] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); Garry, *supra* note 22, at 922 (noting that Court has invalidated laws on nondelegation grounds "only twice"). The Court's reasoning in these cases was that Congress had "declare[d] no policy." *Panama Ref. Co.*, 293 U.S. at 415.

[41] It was around this time that the Court and President Roosevelt clashed so strongly that President Roosevelt threatened to "pack" the Court with like-minded Justices by seeking legislation that would have empowered him to appoint up to six additional Justices. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE 3–7, 195–96 (2009) (discussing court-packing plan and public and presidential disapproval of Court).

[42] *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) (dismissing *Panama Refining* and *Schechter Poultry* as "eccentricities"). *But see* HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 21–22 (1962) ("We still live under a Constitution which provides that 'all legislative Powers herein granted shall be vested in a Congress . . .'; even if a statute telling an agency 'Here is the problem: deal with it' be deemed to comply with the letter of that command, it hardly does with the spirit." (quoting U.S. CONST. art. I, § 1)).

[43] *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 44 (1969) ("[T]he court has upheld many delegations without meaningful standards and even many without any standards."); Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 276 (1988) (arguing that any enforcement of nondelegation doctrine would "raise[ ] serious questions about Congress' ability to function").

[44] Manning, *supra* note 13, at 236.

[45] *See infra* Part III.B (discussing circuit split with respect to nondelegation and Food and Drug Administration (FDA) authority); *see also* Mich. Gambling Opposition v. Kempthorne, 525 F.3d 23, 34–40 (D.C. Cir. 2008) (Brown, J., dissenting) (castigating majority for thin nondelegation analysis and arguing that no standard was provided to guide delegate in acquiring land in trust for "whichever Indians he chooses, for whatever reasons"), *cert. denied*, 129 S. Ct. 1002 (2009); South Dakota v. U.S. Dep't of Interior, 69 F.3d 878, 880–85 (8th Cir. 1995) (concluding similarly), *vacated*, 519 U.S. 919 (1996); United States v. Mitchell, 18 F.3d 1355, 1360 n.7 (7th Cir. 1994) (discussing in dicta that Congress could not, consistent with nondelegation doctrine, delegate power to shape fed-

tinues to garner the attention of Supreme Court Justices.[46] Justice Scalia, for example, dissented from an opinion upholding the constitutionality of the United States Sentencing Commission because he could "find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws."[47] Justice Thomas echoed a similar concern in another case.[48]

Moreover, then-Justice Rehnquist invoked the doctrine more explicitly in two early opinions. He famously relied on the nondelegation doctrine in his concurrence in the *Benzene Case*, a 1980 challenge to the Occupational Safety and Health Administration's (OSHA) safety standards for carcinogen exposure.[49] Echoing John Locke's warning that a representative legislature should "make laws, and not . . . legislators,"[50] Justice Rehnquist wrote that he had "no doubt" that the provision at issue violated the nondelegation doctrine by vesting OSHA with unguided power to act as a legislator, and not merely to implement existing law.[51] He exhorted his colleagues "not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority" and argued that the functions served

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eral court jurisdiction); *cf.* Ginsburg & Menashi, *supra* note 1, at 263–64, 264 n.72 (calling for return of "a Court that recognizes . . . the nondelegation principle" and describing doctrine as "too essential a principle of American constitutionalism to disappear entirely"). Especially given Judge Brown's dissent, some have suggested a "non-delegation doctrinal revival." Jonathan Adler, *More Signs of a Non-delegation Doctrinal Revival?*, THE VOLOKH CONSPIRACY (July 9, 2008, 12:51 PM), http://volokh.com/posts/1215622306.shtml. Moreover, in *South Dakota*, Justices Scalia, O'Connor, and Thomas dissented from the Court's holding vacating the judgment and would have heard argument on the nondelegation issue. 519 U.S. at 920–23.

46 In fact, in private practice, Chief Justice Roberts wrote a petition for certiorari based entirely on the nondelegation doctrine. Petition for Writ of Certiorari, Roberts v. United States, 529 U.S. 1108 (2000) (No. 99-1174).

47 Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting). Echoing Judges Wright and Fuchsberg on the question of degree, *supra* note 37, Justice Scalia expressed concern that "the degree of generality . . . is so unacceptably high as to amount to a delegation of legislative powers." *Mistretta*, 488 U.S. at 419 (emphasis omitted).

48 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (indicating Justice Thomas "would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers"). Justice Thomas evoked Justice Scalia's language on the nature of the nondelegation doctrine, writing, "I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" *Id.*

49 *Benzene Case*, 448 U.S. 607 (1980).

50 *Id.* at 672 (Rehnquist, J., concurring) (quoting John Locke, *Second Treatise of Civil Government*, *in* 2 THE TRADITION OF FREEDOM 44 (Milton Mayer ed., 1957)); *see also* Locke, *supra*, at 44 ("[T]he legislative can have no power to transfer their authority of making laws and place it in other hands.").

51 *Benzene Case*, 448 U.S. at 675 (Rehnquist, J., concurring).

by the nondelegation doctrine—electoral accountability, policy guidance, and effective judicial review—remain relevant and necessary.[52] Joined by Chief Justice Burger, he reprised this reasoning in dissent in another case involving OSHA safety standards, chastising Congress for failing to make the "'hard policy choices' properly the task of the legislature."[53]

Although these Justices did not carry the Court in these cases with their explicitly nondelegation-based reasoning, their arguments indicate that influential members of the Court have been and remain attuned to the issues raised by the nondelegation doctrine.[54] If this is the case with questions squarely presenting the issue, it is certainly plausible that the Justices' receptivity would only increase when litigants present nondelegation issues more subtly and offer the Justices a chance to bring others on board without explicitly using the nondelegation doctrine, as may be the case in *Chevron* applications. I turn now to this possibility.

II
NONDELEGATION CONCERNS MOTIVATE CERTAIN *CHEVRON* APPLICATIONS

A. Policing Nondelegation Concerns in the Chevron *Context*

Given a viable nondelegation doctrine and a Court looking to limit the license afforded agencies by *Chevron*, it should not be surprising that the principles behind the nondelegation doctrine also animate the Court's more subtle efforts to narrow *Chevron*.[55] Justice

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[52] *Id.* at 685–86; *see also* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 996 (2007) (observing that nondelegation doctrine promotes "rule of law values" by protecting, among other things, transparency in decisionmaking).

[53] Am. Textile Mfrs. Inst., Inc. v. Donovan (Cotton Dust Case), 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting) (citing *Benzene Case*, 448 U.S. at 671 (Rehnquist, J., concurring)); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 133 (1980) ("That legislators often find it convenient to escape accountability is precisely the reason *for* a nondelegation doctrine."); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 14 (1993) ("Delegation . . . allow[s] our elected lawmakers to hide behind unelected agency officials. . . . [Congress] often delegate[s] precisely in order to avoid the hard choices.").

[54] In addition to the cases discussed in this Note, the Court's decision to strike down the line-item veto in *Clinton v. City of New York*, 524 U.S. 417 (1998), may have been based on nondelegation grounds. *See* Steven G. Calabresi, *Separation of Powers and the Rehnquist Court: The Centrality of* Clinton v. City of New York, 99 NW. U. L. REV. 77, 85 (2004) (characterizing case as "non-delegation doctrine case masquerading as a bicameralism and presentment case" and as using "the exact language of the nondelegation doctrine").

[55] For the cases that follow, only this subtler backtracking from *Chevron* in the form of the infusion of nondelegation principles can explain the Court's analysis. Recall that the

Breyer has alluded to this approach, noting that, when ambiguous statutory terms concern a question of fundamental policymaking—a question "of national importance"—such that a reasonable Congress "is likely to have wanted to decide for itself," judges should not and often do not defer to the interpreting agency.[56]

This is not merely the passing observation of a single Justice. Rather, instances of this form of nondelegation enforcement appear in the course of a *Chevron* inquiry whenever the Court, often at the insistence of litigants, looks to the scope of the agency's interpretation of its own authority and to the interpretation's policy impact.[57] Under this sort of *Chevron* analysis, interpretations that would pass the *Chevron* test—as either textually clear or definitionally reasonable in the face of statutory ambiguity—are instead deemed unreasonable because the agency exercised discretion in such a way as to usurp the place of Congress as primary policymaker and legislator.

Consider the following model: A vague statutory term has a range of textually reasonable meanings, yet only a subset of meanings within that range would not threaten Congress's role as policymaker. Agency interpretations in that narrower subset pass muster under both *Chevron* and the nondelegation doctrine. Interpretations outside that subset but within the larger range, however, pass muster only under *Chevron*. As the two cases that follow illustrate, even using a *Chevron* framework, the Court *still* may invalidate the latter set of interpretations based on nondelegation concerns.

Cass Sunstein has considered, in passing, this sort of connection between nondelegation enforcement and *Chevron* review, suggesting that cases such as *MCI* and *Brown & Williamson* might be understood as representing the notion that "[f]undamental alterations in statutory programs, in the form of contractions or expansions, will not be taken to be within agency authority."[58] However, Sunstein ultimately discards this reading,[59] concluding that those cases are consistent with a

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precondition to *Chevron* deference established in *Mead* and *Adams Fruit* denies agencies access to the *Chevron* test itself, *supra* note 31, while the cases discussed in this Part are explicitly analyzed and decided under *Chevron*.

[56] BREYER, *supra* note 27, at 103.

[57] *See infra* note 64 (discussing use of nondelegation language in AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999)).

[58] Sunstein, *supra* note 27, at 245.

[59] Sunstein points to the "uncertain foundations" of the nondelegation doctrine and the difficulty of creating a metric for its application in *Chevron* cases. *Id.* at 245–46. However, concern for nondelegation principles in Supreme Court and lower court jurisprudence was, and remains, quite present, *see supra* Part I.B, and *Chevron* itself often lacks a clear metric and gives rise to considerable disagreement about how clear Congress must be to preclude deference to the agency, *see supra* notes 9–13 (noting range of approaches). Moreover, though it may be difficult to articulate how much legislative usurpation is too much in

pure application of *Chevron* and do not suggest any backtracking. As the following sections illustrate, though, *MCI* and *Brown & Williamson* are *not* consistent with *Chevron* and do, in fact, evince a real discomfort with it.[60]

Others may object to the notion of blending nondelegation and *Chevron* review, arguing that they "cannot both be right."[61] However, that statement is only true to the extent that *Chevron* is actually a blank check for agencies. If instead, as I argue, the scope of the *Chevron* test has been narrowed and applied with the concerns that animate the nondelegation doctrine in mind, the two can certainly coexist.[62] One may similarly argue that the two cannot apply in a single case because the nondelegation doctrine is implicated when a delegate is given no guidance while *Chevron* is implicated when an agency is given vague guidance. Recall, however, that the nondelegation doctrine is a background principle of power allocation broader than the "intelligible principle" test.[63] Framed in this manner, *Chevron* and the nondelegation doctrine may fit together quite well as judicial tools designed to permit the smooth operation of the regulatory state while ensuring that policymaking power stays in the hands of the legislature, as the Constitution requires.[64]

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general, the Court still may conclude that, in a given case, that line has been reached. *Cf.* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (acknowledging difficulty of defining hard-core pornography for purposes of First Amendment restrictions but declaring, "I know it when I see it"). Finally, Sunstein argues that a nondelegation gatekeeper would "embed an unhealthy status quo bias" insofar as it would prevent agencies from making policy changes. Sunstein, *supra* note 27, at 246. While this may be true, it only means that the Court *should* not be influenced by nondelegation, not that it *is* not.

[60] *See infra* Part II.B.2 (analyzing *MCI* as nondelegation-regarding opinion that is inconsistent with *Chevron*); *infra* Part II.B.4 (performing same analysis for *Brown & Williamson*).

[61] Kmiec, *supra* note 43, at 286; *see also* Herz, *supra* note 5, at 360 (describing common claim that *Chevron* made abandonment of nondelegation doctrine possible by embracing delegation); Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2172 (2004) ("[S]trict enforcement of the nondelegation doctrine would seem to cut the legs out from under *Chevron*. . . . [The two are] pointed in opposite directions . . . .").

[62] For a discussion of why the Court is right to import nondelegation principles into *Chevron sub silentio*, see *infra* Part III.A.

[63] *Supra* note 44 and accompanying text. Justice Scalia recognized the distinction between the test and the doctrine in his dissent in *Mistretta* as well, arguing that, in spite of the fact that the "intelligible principle" test was met, the delegation was unconstitutional because it was "incompatibl[e] with our constitutional institutions," meaning in part the lawmaking function the delegate exercised. Mistretta v. United States, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting).

[64] Notably, the Court used the language of the "intelligible principle" test in one *Chevron* application. Lisa Schultz Bressman observed that, in *AT&T v. Iowa Utilities Board*, the Court invoked *Chevron* to invalidate an agency's interpretation as unreasonable because of "the requirement of limiting standards and the prohibition on private law-

One last concern may be precedential: The Court in *Whitman v. American Trucking* explicitly held that the nondelegation doctrine limits only *Congress*, and not agencies.[65] However, this decision at most forecloses frontal nondelegation challenges to agency action.[66] It does not undermine the conclusion that nondelegation principles remain strong or that they exert a *sub silentio* influence on the Court's *Chevron* jurisprudence.

B. Applying the Model

Having developed a lens through which to view *Chevron* cases and to detect and describe the role of nondelegation principles, I now examine two major agency reversals decided under *Chevron*: *MCI v. AT&T* and *FDA v. Brown & Williamson*.[67] I focus on these cases both because they best illustrate the nondelegation influence and because each, especially *Brown & Williamson*, has drawn significant scholarly attention. I grant that there are many *Chevron* applications that may not illustrate the nondelegation influence I explore here, but it is not my intent to prove otherwise. Rather, I discuss these two cases

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making." Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1401 (2000). The Court's holding that the agency's interpretation had failed to "apply *some* limiting standard" and allowed market participants to determine whether a violation of the rules had occurred, uses the very language of *Schechter Poultry*'s and *Panama Refining*'s applications of the nondelegation doctrine. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 388–89 (1999). The Court thus "invalidated the [agency's] rule for failing to supply the very limiting standards that had once been Congress's responsibility. [It] effectively required the agency . . . to carry forward the lessons of the old nondelegation cases." Bressman, *supra*, at 1401.

65 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–73 (2001).

66 It may not even do that. It merely rejected "[t]he idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power." *Id.* at 473. This says nothing about whether an agency may, through its otherwise reasonable interpretation of a statute, transform a valid delegation of power *into an invalid one* and thus activate scrutiny under the nondelegation doctrine.

67 Another potentially illustrative recent case is *Gonzales v. Oregon*, 546 U.S. 243 (2006). There, the Court held that the Attorney General lacked authority under the Controlled Substances Act to prohibit prescription of certain drugs for use in physician-assisted suicide. It reached this conclusion after finding that the relevant statutory language was ambiguous, *id.* at 258, overlooking a supportive dictionary definition, *id.* at 283 (Scalia, J., dissenting), and without ever arguing that the Attorney General's interpretation was unreasonable. Instead, the Court reasoned that other provisions of the Act and its context precluded the extension of *Chevron* deference. A close look at the reasoning, however, reveals nondelegation-based impulses. *See id.* at 262 (arguing that Attorney General's interpretation of vague phrases like "public interest" would entail "unrestrained" power to criminalize and make policy); *id.* at 267–68 (noting that physician-assisted suicide is "subject of an 'earnest and profound debate'" that requires policy judgment best reserved to legislatures (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997))). I focus on *MCI* and *Brown & Williamson* simply because the evidence of the influence of nondelegation principles is even stronger in those cases.

to elucidate the persistence of nondelegation principles and litigants' ability to focus the Court's attention on them, and relatedly, to encourage litigants and scholars to pay further attention to the doctrine in future cases.

1. MCI v. AT&T*: The Court's Reasoning*

MCI v. AT&T dealt with a provision of the Communications Act of 1934 that required common carriers in the telephone industry to file paperwork with the Federal Communications Commission (FCC) listing the rates they charged for different classes of customers.[68] The Act also delegated to the FCC the authority, "in its discretion and for good cause shown, [to] *modify any requirement*" under the rate-filing provision.[69] As the composition and technological nature of the market changed,[70] the FCC adjusted the filing requirement, eventually making it optional for all nondominant carriers so as to encourage competition.[71] At the time, the nondominant carriers were essentially all carriers except AT&T, which had developed a "virtual monopoly" over national telephone service.[72]

AT&T challenged the FCC's authority to promulgate its new rule, focusing on the statutory term "modify." It contended that "modify" connotes only incremental changes and that, by making a much larger change in the requirement, the FCC had issued what amounted to a new policy judgment. Justice Scalia, writing for the Court, agreed with that proposition, holding that the meaning of "modify" was sufficiently clear, based on an array of dictionaries, as to leave the Court without "the slightest doubt"[73] that Congress intended that the agency have the authority to make only minor changes.

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[68] MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994).

[69] *Id.* at 224–25 (quoting 47 U.S.C. § 203(b) (1988)) (emphasis added).

[70] Technology had changed by the 1980s such that the rate-filing requirements had the effect of *inhibiting* entry into the market and securing AT&T's dominance, rather than checking its monopoly power. *See id.* at 237–38 (Stevens, J., dissenting) (summarizing Federal Communication Commission's (FCC) findings that requirement of filing was unnecessarily costly to new entrants and that rate-filing would be counterproductive vis-à-vis facilitating free market in communications).

[71] For a description of the unusually protracted cycle of rulemakings and D.C. Circuit challenges, see *id.* at 220–23.

[72] *Id.* at 220.

[73] *Id.* at 228.

2. MCI v. AT&T: *Backtracking from* Chevron *To Preserve Nondelegation Principles*

Whatever the propriety of the result, glossing over legitimate ambiguity in the statute to find clarity where little existed was a less-than-faithful application of the *Chevron* formula. Instead, Justice Scalia's reasoning betrays a more basic, if unspoken, discomfort with the separation of powers implications of the scope of authority claimed by the agency's interpretation. In fact, the opinion is far more defensible on the latter grounds.

First, the Court relied on a distinction between the dictionary definitions of the supposedly more encompassing "change," and the supposedly less expansive "modify"—a distinction that is not as clear as the Court suggested. For example, among the definitions for "change" offered in one of the dictionaries cited by the Court in its opinion and elsewhere is "to render different, alter, *modify*."[74] Moreover, among the many definitions of "modify" that the Court parsed and approved is "amend,"[75] a word that can permit degrees of change.[76]

Further, Justice Scalia's dismissal of the more expansive definition of "modify" contained in *Webster's Third International Dictionary* on the ground that it codified popular, if formally erroneous, usages,[77] raises not only the question of whether the Court should be evaluating dictionaries,[78] but also the question of why

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[74] 3 OXFORD ENGLISH DICTIONARY 17 (2d ed. 1989) (emphasis added). For approval of this dictionary, see *MCI*, 512 U.S. at 225.

[75] BLACK'S LAW DICTIONARY 1004 (6th ed. 1990), *quoted in MCI*, 512 U.S. at 225; RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1236 (2d ed. 1987), *quoted in MCI*, 512 U.S. at 225.

[76] According to the U.S. Senate, an amendment is "[a] proposal to alter the text of a pending bill or other measure by striking out some of it, by inserting new language, or both." *Amendment*, U.S. SENATE: REFERENCE HOME, http://www.senate.gov/reference/glossary_term/amendment.htm (last visited Feb. 26, 2011). The Oxford English Dictionary similarly embraces a potentially expansive definition of "amend." *See* 1 OXFORD ENGLISH DICTIONARY 394, def. 4 (2d ed. 1989) ("To make professed improvements in . . . ; *formally*, to alter in detail, though *practically* it may be to alter its principle, so as to thwart it."). No limitation with respect to degree or size is contemplated by the Senate's conception of an amendment; in fact, it even "amends" legislation in its entirety. *See Amendment in the Nature of a Substitute*, U.S. SENATE: REFERENCE HOME, http://www.senate.gov/reference/glossary_term/amendment_substitute.htm (last visited Feb. 26, 2011).

[77] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1452 (1981) (defining "modify" as "to make a basic or important change in"), *quoted in MCI*, 512 U.S. at 225–26. For Justice Scalia's criticism of the dictionary's codification of common usages and common errors, see *MCI*, 512 U.S. at 228 n.3.

[78] *See* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 321 (1998) (discussing lack of principle behind Court's dictionary choices and observing that "Justice Scalia's use of dictionaries . . . appears instrumental . . . , invoked only when it produces the desired result"). Indeed, the Court has frequently cited to *Webster's Third* to find support for statutory interpretations. *See, e.g.*,

common usages should be an inappropriate basis for statutory interpretation. After all, legislators may very well indulge in these common usages or make these same common errors when they write statutes.

Finally, the historical context of the statute indicated that the purpose of the rate-filing requirement was to prevent monopolistic behavior and keep consumer costs under control.[79] With this purpose in mind, it would be quite surprising if Congress intended to hamstring the FCC from adapting its regulations, including the rate-filing requirement, so as to best prevent monopolistic behavior as the communications market evolved over time.[80] From both purposive and textual standpoints, then, there was enough room in the statute to permit deference by the Court.

By issuing a decision that failed to acknowledge this legitimate ambiguity and that denied deference in a case at least plausibly meriting it, the Court betrayed its concern that *Chevron* required a result which would endorse a policy judgment made outside the legislative branch. In doing so, the Court was guided by nondelegation principles.

Applying the model developed in Part II.A, the Court actively framed the FCC's interpretation so as to place it in the subset of interpretations that, while textually reasonable, still unsettled a congressional policy choice and effected a change of such magnitude as to effectively wrest policymaking authority from Congress. Indeed, the Court frequently characterized the rate-filing requirement at issue as "the centerpiece"[81] or "the heart"[82] of the Communications Act,

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Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2721–22 (2010) (defining "service"); Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350 (2009) (defining "because of"); Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006) (defining "transmission").

[79] *See, e.g.*, Communications Act of 1934, Pub. L. No. 73-415, § 314, 48 Stat. 1064, 1088 (codified at 47 U.S.C. § 314 (2006)) (banning acquisition of ownership or control of assets of telephone system if "the purpose is and/or the effect thereof may be to substantially lessen competition . . . or unlawfully to create monopoly in any line of commerce"); Communications Act § 1, 48 Stat. at 1064 (codified as amended at 47 U.S.C. § 151 (2006)) (declaring Act's purpose to be "to make available . . . to all the people of the United States a rapid, efficient . . . communication service with adequate facilities at reasonable charges"); *MCI*, 512 U.S. at 237 (Stevens, J., dissenting) (noting that key purpose of Act was to "guard against abusive practices by wire communications monopolies").

[80] Not only does the text of the Act suggest that its purpose was to counter monopolistic market practices, the New Deal context in which the Act was written was one in which antimonopolization was a particularly compelling purpose. The New Deal agencies all were given broad powers to achieve similar ends, and "[i]t is revealing . . . that [Justice Scalia] never explains how he concludes that the New Deal Congress that so broadly empowered all the agencies it created, not just the FCC, intended here only a narrow grant of authority." Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 496.

[81] *MCI*, 512 U.S. at 220.

[82] *Id.* at 229.

instead of crediting the broader principle of antimonopolization. While this interpretation of the Act is disputable,[83] it reflects the Court's attention to the question of whether the FCC's rule was simply a technical tweaking or a more substantial policy shift—the introduction of a "whole new regime"[84]—based on the agency's own judgment of good policy in a novel market context.[85] By narrowly conceiving of the policy choice expressed by the Act, the Court was able to hold that the agency had excessively and impermissibly relied on its own judgment in adjusting the rate-filing requirement, rather than find that the agency had acted in pursuit of an antimonopolization goal set by Congress.

The attorneys for AT&T consciously presented the FCC's action in those very terms in their brief to the Court, focusing their attention on the legislative choice embodied in the Act to illustrate that the FCC had made an independent policy change. Instead of citing *Chevron*,[86] AT&T cited the *Benzene Case* and specifically Justice Rehnquist's nondelegation concurrence for the propositions that the FCC's claim of authority was too "sweeping" to be upheld and that the Court would have to accept an incredibly low level of congressional guidance as valid if it sustained the FCC's position.[87] AT&T described the statute's purpose as simply maintaining "equal and reasonable rates" and repeatedly portrayed the rate-filing requirement as the "fundamental means" of achieving that purpose,[88] devoting an entire section of the brief to case law designed to prove just that.[89] AT&T also warned the Court that the FCC's interpretation would grant it license to "eliminate the key tool" for rate enforcement and thus to "revolutionize the very structure of the Act."[90]

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[83] *See id.* at 244 (Stevens, J., dissenting) (dismissing talismanic characterization of filing requirement and noting that it is "unsatisfactory substitute[ ] for a reasoned explanation" of statute's purposes).

[84] *Id.* at 234.

[85] While the majority felt that the FCC had not simply made an adjustment that preserved a fundamental congressional policy choice, the dissenters argued that the FCC had done exactly that and explicitly framed the issue along those lines. *See id.* at 245 (Stevens, J., dissenting) ("The FCC . . . [acted] in service of the goals Congress set forth in the Act."). In this way, both sides were attuned to the nondelegation principles at play.

[86] AT&T did discuss whether the text of the Communications Act, specifically the term "modify," could bear the meaning that the FCC had given it, but it did not cite *Chevron* in this discussion. Brief for Respondent AT&T at 17–19, *MCI*, 512 U.S. 218 (Nos. 93-356, 93-521).

[87] *Id.* at 22 n.29; *see also supra* notes 49–52 and accompanying text (discussing *Benzene Case*).

[88] Brief for Respondent AT&T, *supra* note 86, at 12. AT&T emphasized five times that the rate-filing requirement was the "fundamental" part of the Act. *Id.* at 12, 29, 30, 32, 40.

[89] *Id.* at 29–41.

[90] *Id.* at 22.

These efforts to direct the Court's attention to the scope and character of the agency's interpretation shaped the Court's application of *Chevron* by offering an analysis consistent with, for example, the nondelegation basis of Justice Scalia's dissent in *Mistretta v. United States* five years earlier.[91] In that opinion, Justice Scalia reasoned that the agency in question made decisions that were "far from technical, but [were] heavily laden (or ought to be) with value judgments and policy assessments."[92] While this may be true, such an inquiry should not matter for *Chevron* purposes as long as the statute was ambiguous with respect to which policies would be permissible. This impulse to ensure that "bigger" policy determinations are made by the legislative branch itself, in contrast to "smaller" gap-filling actions more suited to an administrative agency, is exactly the language of nondelegation.

That the Court was concerned in *MCI* not only by "the largeness of the change being effected, but also [the fact] that accepting [the agency's interpretation would] entail accepting that an agency can be empowered to change its mandate"[93] is illustrated by contrast to a similarly expansive interpretation that the Court nonetheless upheld under *Chevron*: *Babbitt v. Sweet Home*.[94] In *Sweet Home*, the Court granted *Chevron* deference to the Fish and Wildlife Service's (FWS) expansive interpretation of the Endangered Species Act's (ESA) prohibition on "tak[ing]" endangered species as including habitat modification that kills those species.[95] A more limited interpretation, both of the statute and of the undefined term in question, was certainly available—that "tak[ing]" included only actively killing, capturing, and maiming.[96] But unlike the *MCI* Court, the *Sweet Home* Court did not choose the narrow construction.

A key distinction between the two cases may explain the different outcomes: the Court's and litigants' framing of the policy choices expressed both by the statutes and the agency's interpretations affected the degree to which the nondelegation doctrine was implicated.[97] In *Sweet Home*, the Court described the FWS's rather extreme interpretation of statutory language as furthering Congress's

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91 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

92 *Id.* at 414 (1989) (Scalia, J., dissenting); *see supra* note 47 and accompanying text (discussing Justice Scalia's *Mistretta* opinion).

93 Strauss, *supra* note 80, at 495.

94 Babbitt v. Sweet Home Chapter of Cmtys., 515 U.S. 687 (1995).

95 *Id.* at 703.

96 Indeed, the dissent adopted just such a view. *Id.* at 717–18 (Scalia, J., dissenting).

97 Granted, one explanation for the differing outcomes may merely be a shifting judicial coalition. In the interest of finding coherence in the law, however, I set aside such an explanation.

overarching policy goal of protecting endangered species.[98] As a result, this became a more straightforward *Chevron* case for the Court; the statute left the specific practices to be enjoined, and the degree to which they would be so prohibited, to the agency's expertise as a matter of implementation and of determining and weighing relevant costs and benefits.[99]

A significant reason for the Court's willingness to defer to the agency in *Sweet Home* was likely the fact that, because the issue was not argued, the Court did not perceive any nondelegation problem. Unlike AT&T, the litigants challenging the agency failed to construct a contrary story about the statute and the policy judgments that it contained. Instead, they conceded its broad purpose and focused their arguments entirely on *Chevron* and statutory interpretation.[100] By failing to raise the kind of nondelegation-based arguments advanced by AT&T in *MCI*,[101] the challengers in *Sweet Home* missed an opportunity to influence the Court's *Chevron* application by injecting nondelegation principles into their arguments and ultimately lost their case.[102]

The contrary results in these cases thus illustrate both the vitality of nondelegation principles and the power of litigants to influence the Court's *Chevron* analysis by raising them. The Court in *Sweet Home* took a broad view of the policy judgment embodied in the ESA and consequently saw the agency as merely serving its congressionally determined purpose. The Court in *MCI*, in contrast, adopted AT&T's narrower view of the policy judgment in the Communications Act and, parroting AT&T's brief, portrayed the FCC as having made independent, substantive policy choices constituting a "fundamental revision" of the statute.[103] In other words, litigants led the *MCI* Court to see an agency interpretation that presented a usurpation of legisla-

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[98] *See Sweet Home*, 515 U.S. at 698 ("[T]he broad purpose of the ESA supports the [EPA's] decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid."); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978) (describing ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation" meant "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" (quoting 16 U.S.C. § 1531(b) (1976)).

[99] *See supra* Part I.A (discussing purposes of *Chevron*).

[100] Brief for Respondents at 7–8, 8–35, *Sweet Home*, 515 U.S. 687 (No. 94-859) (conceding that "Petitioners are correct that Congress was concerned with the need to preserve vital habitat for endangered species" and engaging in statutory interpretation analysis).

[101] There is not a single reference to the *Benzene Case* and only a single, unrelated reference to *MCI* in the entire brief. *Id.*

[102] *Sweet Home*, 515 U.S. at 708.

[103] MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994); *see supra* note 88 (noting AT&T's use of word "fundamental").

tive power. Correctly recognizing the problems of voicing nondelegation principles outright,[104] AT&T and the Court used the guise of *Chevron* but argued and ruled with nondelegation principles in mind. Only a Court profoundly uncomfortable with the consequences of a strict *Chevron* application would have adopted that kind of reasoning.[105]

3. FDA v. Brown & Williamson*: The Court's Reasoning*

FDA v. Brown & Williamson dealt with the Food and Drug Administration's (FDA) authority to regulate tobacco products.[106] Since 1938, the FDA has had the authority under the Food, Drug, and Cosmetic Act (FDCA) to regulate "drugs" and "devices."[107] The Act as then in force defined "drugs" in relevant part as "articles (other than food) intended to affect the structure or any function of the body"[108] and a "device" as "an instrument . . . or other similar or related article . . . which is . . . intended to affect the structure or any function of the body."[109] After decades of explicitly disavowing the authority to regulate tobacco under the FDCA, the FDA issued a rule in 1996 in which it determined that nicotine was a "drug," that cigarettes and smokeless tobacco were delivery "devices" thereof, and that it had the power to regulate them.[110] It therefore issued regulations with respect to the labeling, advertising, and sale of cigarettes and tobacco[111] but declined to ban them altogether.[112]

Brown & Williamson and other major tobacco manufacturers challenged the new rule on the grounds that the FDA had exceeded its statutory authority. As with AT&T's similar allegation in *MCI*, the Court claimed to examine this contention under *Chevron*, asking first if Congress spoke directly to the precise issue and, if not, whether the

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104 *See infra* Part III.A (defending *sub silentio* nondelegation enforcement).

105 This is "not [a] faithful application[ ] of *Chevron*, [but it is] nonetheless understandable as a form of nondelegation review"—a policing of the proper scope of legislative authority. Bressman, *supra* note 64, at 1412.

106 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000).

107 Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended 21 U.S.C. §§ 321–360 (2006)).

108 21 U.S.C. § 321(g)(1)(C) (1994).

109 *Id.* § 321(h)(3).

110 *Brown & Williamson*, 529 U.S. at 127 (quoting Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44396, 44397, 44402 (Aug. 28, 1996)).

111 The regulations required, among other things, that sellers verify the age of all purchasers under twenty-seven, that smokeless tobacco not be sold to individuals under eighteen, and that cigarettes be sold in quantities greater than twenty. They also prohibited vending machines (except in adult-only locations) and free samples and set advertising restrictions. *Id.* at 128–29 (summarizing regulations).

112 *See id.* at 139 (noting FDA's reason for not banning cigarettes altogether).

FDA's interpretation was a reasonable one.[113] In her opinion for a closely divided Court, Justice O'Connor held that Congress *had* spoken directly to the issue, and that it had precluded the FDA from exercising jurisdiction over tobacco products.

Departing from Justice Scalia's textual methodology in *MCI*, Justice O'Connor reached this conclusion by exploring the broader context in which federal tobacco regulations operate. She argued that *subsequent* to the passage of the FDCA, Congress passed a series of tobacco-related acts mandating health warnings, advertising blackouts, and other requirements, thus "ratif[ying]" the FDA's declination of power and "preclud[ing] any role for the FDA."[114] Moreover, according to the Court's reasoning, if the FDA found that tobacco was unsafe, it must ban the drug altogether in order to maintain fidelity to the FDCA, which required that any product regulated by the FDA be safe for use. The new regulation was therefore underinclusive, but since Congress foreclosed the removal of tobacco from the market, the FDA could not issue a properly inclusive rule either.

Tellingly, Justice O'Connor closed her opinion by noting that "the nature of the question presented" influences the *Chevron* inquiry and that in "extraordinary cases" the Court may "hesitate before concluding that Congress has intended" a delegation of authority.[115] Noting that "[t]his is hardly an ordinary case"[116] and citing *MCI* as "instructive" on this point, she wrote that Congress was unlikely to make a delegation of such "economic and political significance."[117] For this reason, and because of the subsequent legislation surrounding tobacco regulation, the Court held that the FDA's interpretation of the FDCA failed *Chevron* at the first step.[118]

4. FDA v. Brown & Williamson*: Backtracking from* Chevron *To Preserve Nondelegation Principles*

Perhaps even more than *MCI*, this case is a striking departure from standard *Chevron* applications. Taken at its word, *Chevron* would require the Court to determine whether "drug" was an ambiguous term and, if it was, to decide whether the FDA's inclusion of nicotine was a reasonable construction of that term.[119] Of course, the

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[113] *Id.* at 132.

[114] *Id.* at 144. One such key piece of legislation was the Federal Cigarette Labeling and Advertising Act (FCLAA), 15 U.S.C. §§ 1331–1340 (2006).

[115] *Brown & Williamson*, 529 U.S. at 159.

[116] *Id.*

[117] *Id.* at 160.

[118] *Id.* at 160–61.

[119] *See supra* Part I.A (discussing *Chevron*).

Court could not deny that the literal meaning of the statute sustained the FDA's position.[120] Further, to say otherwise, the Court would have had to grapple with the fact that the FDA's position was entirely consistent with the broad purpose of the FDCA: the protection of public health. In fact, the Court had earlier held that this was the statute's purpose and, to boot, that the FDCA was to be given a "liberal construction" consistent with that "overriding purpose."[121] Given the threat that the FDA concluded cigarettes pose to public health,[122] their regulation by the FDA would seem to serve those purposes.[123] For these reasons, the Court could not just adopt a narrow view of the policy judgment contained in the statute as it had done in *MCI*.

More than creating sufficient ambiguity to reach *Chevron*'s reasonableness step, as I argue would have been appropriate in *MCI*,[124] this evidence may even support the argument that the statute unambiguously favored the FDA's position.[125] As with *MCI*, however, I do not intend to decisively prove that. Rather, I mean to demonstrate that the type of analysis in which the Court engaged was not that of a typical *Chevron* inquiry. By disregarding *Chevron*'s "threshold question" of text[126] and instead relying on subsequent legislation, itself "a hazardous basis"[127] for interpreting statutes, the Court engaged in an

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120 *Brown & Williamson*, 529 U.S. at 162 (Breyer, J., dissenting). In fact, the Court reached its conclusion "without ever interpreting the FDCA's operative language." Manning, *supra* note 13, at 225. If it had, it would have had to address the fact that nicotine and tobacco fit squarely within the statutory text. Indeed, the FDA explicitly found as much in an exercise of the very agency-specific expertise that provided one of the foundations for the *Chevron* doctrine. *See Brown & Williamson*, 529 U.S. at 127–28 (describing FDA's medical and scientific findings).

121 United States v. Bacto-Unidisk, 394 U.S. 784, 798 (1969).

122 *See Brown & Williamson*, 529 U.S. at 191 (Breyer, J., dissenting) (discussing FDA statistics on nicotine addiction).

123 The majority also argued that the FDA, if it acted at all, would have to ban cigarettes entirely and in contravention of specific congressional legislation. However, as the dissenters pointed out, the specific language in the FDCA regarding the banning of devices uses the discretionary term "may" instead of the mandatory term "must" when describing the FDA's response to a device's risk of injury. *Id.* at 175 (Breyer, J., dissenting). More centrally, "the statute plainly allows the FDA to consider the relative, overall 'safety' of a device in light of its regulatory alternatives," and when the FDA exercised its expertise to conclude that a ban was a more dangerous alternative than some other regulation, it fulfilled its statutory obligation to protect the public health. *Id.* at 175–76 (Breyer, J., dissenting).

124 *See supra* Part II.B.2.

125 At least, "[b]ecause either interpretation is reasonable, under *Chevron* the FDA's reading is entitled to deference." Molot, *supra* note 10, at 68.

126 Manning, *supra* note 13, at 234; *see also id.* (noting that Court's reasoning was not based on text of FDCA).

127 United States v. Price, 361 U.S. 304, 313 (1960).

"approach that differed [so] markedly" from usual applications of *Chevron*[128] that one must ask what ultimately drove the decision.

It is possible, of course, to see this as a purely political opinion.[129] There is a far more principled explanation, though: Using the model developed in Part II.A and applied above with respect to *MCI*, it is apparent that the Court was motivated by the litigants to consider that the FDA's exercise of its statutory authority threatened Congress's primacy as policymaker and legislator—a core principle of the nondelegation doctrine. Lacking any textual analysis, the Court's reasoning is ultimately based on the force of subsequent legislation and on Justice O'Connor's assertion that this was an "extraordinary case[ ]" warranting departure from *Chevron*.[130] Both are analytic points much better suited to the nondelegation doctrine than to *Chevron*.

As for the subsequent legislation argument, the Court has repeatedly, and correctly, dismissed subsequent legislation as a tool of statutory interpretation, reasoning that the meaning of decades-old statutes cannot be inferred from legislation passed by an entirely different Congress unless the later law explicitly amends the prior law.[131] Notably, the Court in this case never contended that the subsequent legislation shed any light on what "drug" means in the FDCA. Instead, it argued that the subsequent legislation was relevant because it shed light on current congressional policy judgments with respect to tobacco regulation.[132]

While it may be true that subsequent legislation conveys present congressional judgment, attention to this judgment is more relevant to a nondelegation-sensitive analysis than it is to a *Chevron* analysis, simply because *Chevron* does not ask for the opinion of the current

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128 Garry, *supra* note 22, at 950.

129 *Cf. supra* note 97 (rejecting political explanation of *Sweet Home* in interest of finding coherence).

130 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

131 *See* Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote."); United States v. Sw. Cable Co., 392 U.S. 157, 170 (1968) (holding that subsequent legislative history is of "very little, if any, significance" (quoting Rainwater v. United States, 356 U.S. 590, 593 (1958))); CROSS, *supra* note 11, at 67 ("Even strong advocates of the general use of legislative history often reject judicial reliance on post-enactment legislative history unless it is in the context of legislative action to amend or renew the earlier legislation."); *see also* Manning, *supra* note 13, at 263 ("The post-FDCA legislation did not reenact, amend, or in any way address the FDCA's jurisdictional language. . . . For good reason . . . the Court generally refuses to treat a subsequent Congress's interpretation of a statute as meaningful evidence of an earlier Congress's intent.").

132 As the dissenters argued, though, even that subsequent legislative history was "critically ambivalent" with respect to the relevant congressional policy judgment. *Brown & Williamson*, 529 U.S. at 182 (Breyer, J., dissenting).

Congress. However, like the *Brown & Williamson* opinion, a decision sensitive to nondelegation principles would credit as persuasive, and perhaps dispositive, the fact that the agency's choice would be irreconcilable with the current legislative landscape.[133] Further, such an analysis would protect legislative primacy by rebuking the agency for exercising statutory authority that transgresses the boundary between gap-filling and policymaking, as was the case in *MCI*. In *Brown & Williamson*, the Court did exactly that: Because it decided that "the decisions Congress had *not* made regarding tobacco control strategies superseded and precluded FDA regulation,"[134] the majority's reasoning relied less on statutory interpretation than on the preservation of congressional policymaking supremacy. Framed as striking down an agency rule "because of the failure of Congress to have reached a decision on that particular topic,"[135] *Brown & Williamson* is analogous to *Panama Refining* and *Schechter Poultry*, as the Court decided each on the reasoning that "Congress must make the big decisions"[136] and that the agency had done so instead. This kind of logic is essentially that of the nondelegation doctrine.

Justice O'Connor's "extraordinary cases" language directly exposes that this logic was at play in the majority's decision in *Brown & Williamson*. By relying on the significance of the specific choice in question, the Court made a normative judgment about what kinds of decisions Congress, rather than a given agency, *ought* to make, instead of a descriptive judgment of what kinds of decisions Congress actually *allowed* the agency to make through its organic statute.[137] It thereby imposed the logic of the nondelegation doctrine and treated this case differently from others presenting textual ambiguities.

The litigants themselves likely planted the seeds of this concern. The briefs filed by the tobacco companies, like that filed by AT&T in *MCI* and unlike that filed by the challengers in *Sweet Home*, successfully framed the case from a nondelegation posture and relied heavily on separation of powers principles instead of on *Chevron*. R.J.

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133 *See* EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 103 (2008) (framing Court's core complaint as being that agency "was deviating from the most recent official indications of enactable political preferences").

134 James T. O'Reilly, Chevron *Goes Up in Smoke: Did the Supreme Court Reward Gridlock Tactics in the Cigarette Decision?*, 30 ENVTL. L. REP. 10574, 10575 (2000).

135 *Id.* at 10576.

136 Herz, *supra* note 5, at 360 (attributing that constitutional and normative sentiment to Justices Thomas and Scalia, based on their *American Trucking* opinions).

137 *See supra* text accompanying note 56 (discussing Justice Breyer's similar approach); *see also* Herz, *supra* note 5, at 360 (describing one reading of *Brown & Williamson* asserting that case "rest[s] on a normative rather than descriptive basis, reflecting an insistence that Congress must, rather than will, make the major policy decisions").

Reynolds, one of the tobacco company respondents, opened its brief with the claim, "This case is about who has the power to make national policy" with respect to tobacco.[138] It went on to describe the FDA as engaging in "policy-making of a kind suitable only for Congress" and as "usurp[ing] the role of Congress as the initiator of major change . . . or in the wholesale reorientation" of tobacco policy.[139] It even drew an analogy to *MCI* and the Court's similar judgment in that case.[140]

Finally, R.J. Reynolds devoted a section of its brief to a series of nondelegation citations, including *Benzene* and *J.W. Hampton*, gesturing towards the model of agency violation developed in Part II.A and arguing that, if the text of the FDCA could bear so standardless an interpretation as to allow tobacco regulation, the statute would run afoul of the nondelegation doctrine.[141] The nondelegation analysis was not merely a series of passing references, but rather a thread that tied the brief together and put the issue on the Court's radar. Indeed, the Fourth Circuit accepted this framing of the case below, describing the case as "[a]t its core . . . about who has the power to make this type of major policy decision."[142]

At the same time, the tobacco companies' briefs in *Brown & Williamson* barely reference *Chevron* at all. The brief for respondents Philip Morris & Lorillard never uses the word,[143] and the brief for Brown & Williamson first references the case in the penultimate paragraph of the argument section, and then to argue only that it did not apply because the scope of the FDA's action was too large to merit

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138 Brief for Respondent R.J. Reynolds Tobacco Co. at 1, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (No. 98-1152).

139 *Id.* at 9–10; *see also* Brief for Respondents Philip Morris Inc. & Lorillard Tobacco Co. at 48, *Brown & Williamson*, 529 U.S. 120 (No. 98-1152) ("Simply put, FDA has appropriated Congress' constitutional authority to make major national policy.").

140 Brief for Respondent R.J. Reynolds Tobacco Co., *supra* note 138, at 23; *see also* Brief for Respondents Philip Morris Inc. & Lorillard Tobacco Co., *supra* note 139, at 5 (quoting language from *MCI* referenced at note 84, *supra*).

141 Brief for Respondent R.J. Reynolds Tobacco Co., *supra* note 138, at 33–34. R.J. Reynolds discussed these cases to argue that the FDA would lack a standard for regulating tobacco products, posing a nondelegation problem. Later in the brief, R.J. Reynolds also cited the Court's holding that agency deference cannot permit the "unauthorized assumption . . . of major policy decisions properly made by Congress." *Id.* at 48–49 (quoting Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth., 464 U.S. 89, 97 (1983)); *see also* Brief for Respondents Philip Morris Inc. & Lorillard Tobacco Co., *supra* note 139, at 48–49 (arguing that FDA's position would "do violence to established principles of separation of powers") (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 307–08 (1979)).

142 Brown & Williamson v. FDA, 153 F.3d 155, 176 (4th Cir. 1998). The Fourth Circuit also cited to *MCI* for this proposition, making the very connection between the two cases drawn in this Note. *Id.*

143 Brief for Respondents Philip Morris Inc. & Lorillard Tobacco Co., *supra* note 139.

Chevron deference.[144] This presentation, which mirrors the organization of AT&T's brief in *MCI*, further highlighted for the Court the extent to which nondelegation principles predominated.

The picture that emerges from these cases is that the Court was influenced by the litigants' nondelegation pitches and was accordingly troubled by the separation of powers implications of the results that *Chevron* would have yielded. So motivated, the Court "dissemble[d]"[145] and "sacrifice[d] the most likely or natural meaning of a statute in order to advance extrastatutory,"[146] constitutional conclusions offered by the litigants about the proper locus of policymaking power. The next Part argues that the Court's *sub silentio* nondelegation enforcement, though imperfect, is the best available approach.

III
IMPLICATIONS AND EXPECTATIONS

A. Costs and Benefits of Subtle Nondelegation

Given the Court's discomfort with the scope of *Chevron* deference and its apparent willingness to accept arguments against deference that are rooted in nondelegation principles, one might expect the Court to explicitly acknowledge both its own important retooling of administrative law and the vitality of an important doctrine of the separation of powers.[147] Prominent scholars and judges, including John Manning and Judge Douglas Ginsburg, have called for the Court to do so, arguing that it should enforce the nondelegation doctrine directly

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[144] Brief of Respondent Brown & Williamson Tobacco Corp. at 37–38, *Brown & Williamson*, 529 U.S. 120 (No. 98-1152). R.J. Reynolds also argued that *Chevron* should not apply because the question involved multiple statutes, most of which are not administered by the FDA. Brief for Respondent R.J. Reynolds Tobacco Co., *supra* note 138, at 47–48.

[145] Merrill & Hickman, *supra* note 27, at 912. Merrill and Hickman argue that *Brown & Williamson* illustrates that an exception to *Chevron*'s application exists in cases that "involve ambiguities about the scope of an agency's jurisdiction." *Id.* at 845; *see also* Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 CARDOZO L. REV. 989, 1018 (1999) (arguing that, when extending jurisdiction, agencies are "no longer filling gaps but annexing new territory"). However, as *Sweet Home* illustrates, *see supra* notes 94–102 and accompanying text, "[t]he problem with this [jurisdictional exception] claim is that *every* statutory interpretation implicates the scope of agency jurisdiction, by defining what comes within the statutes over which the agency has uncontested jurisdiction." ELHAUGE, *supra* note 133, at 104.

[146] Manning, *supra* note 13, at 256.

[147] *See* Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1327 (2002) ("The Court's attempt to place itself in the position of Congress—and to ask whether Congress likely would have wanted to delegate a particular question to an administering agency—is precisely the sort of practice that characterized the pre-*Chevron* case law and that *Chevron* rejected.").

and forthrightly.[148] The Court has not, however, taken that invitation, and rightly so, because such a shift is unnecessary and would entail potentially dramatic adverse consequences.

Granted, there is something deeply unsatisfying about the Court's lack of forthrightness. As Manning notes, when the Court obscures the basis of its decision, it "makes it less likely that Congress will ever clarify its unconstitutionally vague policies" through formal processes.[149] And when the Court twists statutory language to reach an acceptable result,[150] it arguably sacrifices predictability and legitimacy.[151] Moreover, the *sub silentio* pursuit of nondelegation principles appears to blame the agencies in question for being "bad" interpreters when, in reality, the blame rests with Congress for writing a statute that delegates more policymaking power than the Court is comfortable sanctioning. By holding the agency responsible, the Court may encourage agencies to be overly cautious and wary of testing the boundaries of their delegated authority,[152] while failing to discourage Congress from legislating vaguely.

While these are legitimate judicial process concerns, neither *MCI* nor *Brown & Williamson* produced a confused Congress, an agency unsure of how to proceed, or litigants unsure about what principles to draw from the cases. Indeed, Congress has responded to each case by restoring the agency's authority and thereby expressly making the policy choice that the agency had tried to make, notably in response to significant public pressure in the tobacco context.[153] The fact that the

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[148] *See* Manning, *supra* note 13, at 257 (arguing that, insofar as Court does enforce nondelegation, "it should not employ the avoidance canon to do so," and instead "should displace a duly enacted statute only if it concludes that such statute has effected an unconstitutional delegation"); *supra* note 45 (noting Judge Ginsburg's nondelegation advocacy).

[149] Manning, *supra* note 13, at 260 (emphasis omitted).

[150] *See* Molot, *supra* note 147, at 1325–27 (deriding *Brown & Williamson* for "sacrific[ing] transparency and accessibility," "creat[ing] unnecessary uncertainty," and "mak[ing] judicial review . . . less predictable than it might otherwise be"). Similarly, the *MCI* opinion is written as a strong, unequivocal determination that the Court's interpretation is the *only* possible one. MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 228 (1994) ("We have not the slightest doubt that is the meaning the statute intended.").

[151] *See* Manning, *supra* note 13, at 252 (arguing that doing so "disturb[s] the very choice or compromise that the legislative process has produced").

[152] *See* R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 246 (1992) ("Judicial review has subjected agencies to debilitating delay and uncertainty.").

[153] Congress responded to the Court's opinions in *MCI* and *Brown & Williamson* by amending the Communications Act in 1996 and the FDCA in 2009 to explicitly give the FCC and FDA, respectively, the authority they attempted to exercise in the first instance. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) (amending Communications Act); Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (codified in scattered sections of 21 U.S.C.) (amending FDCA).

Court's opinions obscured the specific reason for the decisions did not prevent these congressional responses. Moreover, the fact that the Court did not explicitly bring nondelegation principles to the surface in *MCI* did not prevent the *Brown & Williamson* litigants from drawing heavily from them, and from the *MCI* opinion itself, in their briefs either.[154] Indeed, while forthrightness is an admirable virtue, the not-so-secret nature of this nondelegation "secret" has meant that its silence has harmed neither policymakers nor litigants.

Even still, is forthrightness a virtue worth pursuing for its own sake? The impracticality of a full-throated nondelegation revival counsels against doing so. As alluded to in Part I.B, the nondelegation doctrine requires a degree of balancing to be at all practicable. The legislative process is exceedingly difficult,[155] and it is all too common in the case of massive regulatory legislation for a series of one-time bargains to be made that would be difficult or impossible to replicate in a new political context, let alone in a Congress with different members.[156] If the Court were forced to strike down even one provision of a statute on nondelegation grounds, the regulatory structure built around it could weaken and be difficult to rebuild.[157] After all, it does not require much imagination to foresee that major legislation like the Communications Act would be far more difficult to pass now than during the New Deal. Faced with such a high bar, Congress might abandon the project or just do the bare minimum, leaving areas of the economy and the environment unregulated, and leaving agencies unable to fill the void.

Relatedly, agencies in a world of strong nondelegation might find themselves without the tools, statutory or political, to do even the jobs properly delegated to them. Indeed, a strong nondelegation doctrine

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154 *See supra* notes 138–44 and accompanying text (discussing nondelegation principles in *Brown & Williamson* brief); *supra* notes 140, 142 and accompanying text (noting *MCI* references).

155 *Cf. supra* note 1 and accompanying text (discussing dissatisfaction with congressional inertia).

156 *See, e.g.*, WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 2–23 (4th ed. 2007) (discussing saga of drafting, negotiation process, and ultimate passage of Civil Rights Act of 1964); *cf.* Elisabeth Goodridge & Sarah Arnquist, *A History of Overhauling Health Care*, NYTIMES.COM, http://www.nytimes.com/interactive/2009/07/19/us/politics/20090717_HEALTH_TIMELINE.html (last visited Feb. 26, 2011) (collecting series of articles on legislative events eventually leading to passage of major healthcare reform in 2010).

157 The Court could certainly sever the statutory provisions, as it did in *Schechter Poultry* and *Panama Refining*. *See supra* note 40 and accompanying text (discussing cases). However, in the case of the FDA, for example, striking the provision defining the word "drug" as insufficiently clear while leaving the rest of the FDCA intact would paralyze the FDA.

could preclude large swaths of agency rulemaking.[158] Agencies fearful of litigation may also simply decline to do more than the statute's minimum requirements, slowing down the pace of regulation and regulatory change.[159] In fact, just as the Court might make agencies overly cautious by directing its disapproval at them instead of at Congress, a full-throated nondelegation doctrine could have the same effect. At the very least, agencies would have to devote more of their limited time and resources to defending themselves in court.

Finally, the nondelegation doctrine has developed a terrible historical reputation.[160] The Court's decisions throughout the twentieth century have made it very difficult to reverse course and frontally enforce the doctrine in the future.[161] When the Court attempted to do so during the New Deal,[162] it was openly threatened with President Roosevelt's notorious court-packing plan and met with public disapproval.[163] The administrative state has become only more entrenched since then,[164] and just ten years ago, in *American Trucking*, the Court seemed to hold that *agency* action cannot be subject to frontal nondelegation challenges.[165] Announcing a strong revival of the nondelegation doctrine now would likely provoke an even more intense backlash.

Indeed, while Manning's call for nondelegation enforcement to be vocal if done at all is attractive in theory, it gives insufficient credit to the impracticability of such an approach. The path the Court charted in *MCI* and *Brown & Williamson*, however, pursues impor-

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158 One may even wonder if the Administrative Procedure Act would be constitutional under a strong nondelegation doctrine, since the Act provides procedures through which agencies may make rules that "prescribe law or policy," which is certainly similar to exercising legislative power. 5 U.S.C. § 551(4) (2006) (defining agency "rule").

159 *Cf.* Burt Neuborne, *"The House Was Quiet and the World Was Calm the Reader Became the Book,"* 57 VAND. L. REV. 2007, 2038 n.100 (2004) (noting problem of "rule book slowdown" when entities slavishly follow text).

160 *See* Herz, *supra* note 5, at 358 ("[T]he current Justices, like their predecessors, have concluded that a nondelegation doctrine with teeth would be unmanageable and unenforceable in a consistent way.").

161 *See supra* notes 38–41 and accompanying text (discussing flexible, and permissive, "intelligible principle" test).

162 *See* Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); *supra* Part I.B (discussing cases).

163 *See supra* note 41 (discussing disapproval faced by Court); *cf.* Ginsburg & Menashi, *supra* note 1, at 260 (noting that judges' expression of enthusiasm for nondelegation doctrine in nineteenth century was "overmatched by their reluctance to confront the legislature").

164 *See* Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 437 (2003) (discussing expansion of administrative state and "dramatic rise in the scope and intensity of administrative regulation").

165 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–73 (2001). The meaning of the opinion is subject to debate. *See supra* notes 65–66 and accompanying text.

tant nondelegation principles within an accepted yet malleable doctrine that preserves the administrative state, specific regulatory structures, and "good interbranch relations."[166] While far from perfect, the Court's current form of nondelegation enforcement has not damaged the ability of Congress, agencies, or regulated entities to respond to and understand the Court's holdings, and it largely preserves the agency's voice and expertise in an increasingly complicated policy process by giving the agency a chance to try again with a new regulation instead of sending the issue back to Congress by invalidating the statute.

B. Addressing Nondelegation Questions Waiting in the Wings

All of these issues—the vitality of the nondelegation doctrine, the Court's reluctance to follow through on *Chevron*, the power of litigants to capitalize on both in order to shape outcomes in their favor, and the Court's apparent practice to engage with it all *sub silentio*—have implications for open interpretive questions, the resolution of which may well turn on the degree to which litigants and courts frame the demands of nondelegation principles as persuasive or controlling.

To take but one example,[167] another provision of the FDCA criminalizes certain failures, as determined by the Department of Health and Human Services, to maintain records during the trial and testing of new prescription drugs.[168] Because the statute arguably places the entire burden of record keeping on manufacturers alone, and not on individual researchers,[169] three courts of appeals have

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166 Bressman, *supra* note 13, at 617.

167 In addition to the issue discussed here, a similar question may come to the Supreme Court by way of a series of decisions regarding whether an agency may receive *Chevron* deference when it fills a gap created by a prior judicial decision striking down a piece of a statute. The Fourth and Sixth Circuits have held that it may, *see* A.T. Massey Coal Co. v. Barnhart, 472 F.3d 148, 168 (4th Cir. 2006); Sidney Coal Co. v. Soc. Sec. Admin., 427 F.3d 336, 348–49, 351 (6th Cir. 2005); Pittston Co. v. United States, 368 F.3d 385, 403–04 (4th Cir. 2004), *cert. denied*, Brink's Co. v. United States, 544 U.S. 904 (2005), while the Fifth Circuit has held that it may not, *see* Texas v. United States, 497 F.3d 491, 503 (5th Cir. 2007), *cert. denied*, Kickapoo Traditional Tribe v. Texas, 129 S. Ct. 32 (2008). I focus on the FDCA question instead because of the sharpness of the circuit split in the context of a specific statute, which is more akin to the cases discussed in this Note.

168 21 U.S.C. § 331(e) (2006) imposes criminal penalties for, among other things, failures to "establish or maintain" records required under 21 U.S.C. § 355(i). Section 355(i), in turn, requires the keeping of certain records as promulgated "within the discretion of the Secretary [of Health and Human Services]." *Id.* § 355(i)(1). The combined effect is to criminalize failures to keep records as required by the agency.

169 The relevant portion of the statute says that the Secretary may condition the exemption to premarket approval requirements on the submission of reports and records "by the *manufacturer or the sponsor of the investigation* of such drug," *id.* § 355(i)(1) (emphasis added), and not by the researcher. On the other hand, section 355(i) begins by delegating to the Secretary the authority to set "other conditions relating to the protection of the

been presented with the question of whether a regulation that subjects researchers to those same requirements, and therefore to the threat of criminal sanctions, is permissible under the statute. Each court has decided the issue in a different way. One rejected the regulation on the grounds of nondelegation principles, one upheld the regulation as reasonable under *Chevron*, and one upheld the regulation as clearly authorized by the statute.

The Ninth Circuit was the first to examine the question.[170] In reasoning similar to that which was later used by the Supreme Court in *MCI* and *Brown & Williamson*, the court, while seeming to apply a *Chevron*-like standard, actually gave voice to nondelegation principles.[171] Though not citing *Chevron*, likely because it was decided only two months earlier, the court nonetheless appeared to follow its form.[172] After determining that the statute was vague as to the authority to regulate researchers, the court held that it would be unreasonable to read the statute to delegate that authority.[173] Its discomfort with that reading, however, turned not on the statutory language, but primarily on the normative conviction that "legislatures . . . should define criminal activity"[174] and that the guidance given to the agency was insufficient to support a regulation criminalizing conduct "only questionably within its ambit."[175] These are the kind of principles that support the nondelegation doctrine, not *Chevron*.

When the Eighth Circuit took up the same question ten years later, it explicitly applied a *Chevron* framework and held that the statute was ambiguous but that the agency had reasonably interpreted the statute given legislative history suggesting that conditions other than those enumerated in the statute may be imposed.[176] Indeed, only

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public health," *id.*, suggesting that singling out manufacturers may not have been meant to be exclusive of others.

170 United States v. Smith, 740 F.2d 734 (9th Cir. 1984).

171 The court's concern took the form of the rule of lenity, which requires that criminal sanctions be clearly required by statute. *Id.* The more broadly applicable principle that must be drawn from the court's reasoning, though, is certainly one of nondelegation. After all, one of the key purposes of the rule of lenity is to ensure that only the legislature makes the kind of consequential policy judgment that comes with the imposition of criminal sanctions. *Id*. The Eighth Circuit's later discussion of *Smith* explicitly framed the case as a nondelegation doctrine case. United States v. Garfinkel, 29 F.3d 451, 454 (8th Cir. 1994); *see also* Note, *supra* note 30, at 2054–59 (similarly framing rule of lenity as one limiting policymaking discretion).

172 *Smith*, 740 F.2d at 739.

173 *Id.*

174 *Id.* at 738 (quoting United States v. Bass, 404 U.S. 336, 348 (1971)).

175 *Id.*

176 *Garfinkel*, 29 F.3d at 456, 458. The district court had followed and adopted the Ninth Circuit's opinion in *Smith*, including its nondelegation reasoning. *See* United States v. Garfinkel, 822 F. Supp. 1457, 1460–61 (D. Minn. 1993), *rev'd*, 29 F.3d 451 (8th Cir. 1994).

by finding that a sufficient policy judgment had been made by the legislature to satisfy nondelegation principles could the court find enough guidance to support the agency's interpretation under *Chevron*. In this sense, the Eighth Circuit's opinion is similar to the Supreme Court's in *Sweet Home*, and is the direct opposite of those of the Supreme Court in *MCI* and *Brown & Williamson*. Finally, in 2009, the Fifth Circuit managed to avoid the interpretive question entirely, holding that the statute clearly required the agency's regulation and that there was no choice for the agency to make at all.[177]

Examining these holdings under the model developed in Part II.A of this Note, it becomes clear that the core difference between the decisions is, on one hand, whether the court found the agency's interpretation to fall within both the range of definitionally reasonable meanings *and* the range of meanings that would not threaten Congress's policymaking role, or, on the other hand, whether the court instead found the agency's interpretation to usurp the legislative role. The Ninth Circuit, ruling against the FDA, viewed the interpretation as falling in the latter category, while the Eighth Circuit, ruling in favor of the agency, placed it in the former.

However the Court eventually resolves this question, if at all,[178] its answer will likely rest on an assessment of the permissible scope of agency power.[179] Just like the lower courts, and just like its own past practice in *MCI* and *Brown & Williamson*, the Court's decision will depend on whether it sees the FDA's interpretation as entailing a major policy choice that ought to be left to Congress. Because the Court is averse to vocal nondelegation enforcement and justifiably prefers to pursue those ends discreetly, a party challenging the FDA rule would do well to follow the example of the successful litigants in *MCI* and *Brown & Williamson* and show the Court the way to a

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177 *See* United States v. Palazzo, 558 F.3d 400, 405 (5th Cir. 2009) (characterizing issue before it as one of statutory interpretation), *cert. denied*, 130 S. Ct. 196 (2009). The district court in *Palazzo*, in spite of the Eighth Circuit's holding in *Garfinkel*, had followed the Ninth Circuit's opinion in *Smith*, just as the district court had in *Garfinkel* and for the same nondelegation reason. United States v. Palazzo, No. 05-0266, 2007 U.S. Dist. LEXIS 78986, at *21–22 (E.D. La. Oct. 24, 2007) (noting, in nondelegation parlance, that "nothing in [the statute] provides sufficient guidelines"), *rev'd*, 558 F.3d 400 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 196 (2009).

178 The Court denied certiorari from the Fifth Circuit in 2009. Palazzo v. United States, 130 S. Ct. 196 (2009). However, if the question persists or if the split deepens, the Court certainly may grant certiorari in another case.

179 Because of the nature of the Ninth and Eighth Circuits' split, if the Court does hear this particular issue, it will have the opportunity to address what it explicitly left open in *Touby v. United States*, 500 U.S. 160, 166 (1991): whether there is a higher-than-usual bar for congressional specificity, and therefore a narrower scope of agency policy choice, in the criminal context.

favorable decision by subtly framing the issue along nondelegation lines. In the process, the litigant could nudge the Court's view of the FDA's interpretation into the zone of interpretations that are textually reasonable yet entail the exercise of too much policymaking discretion. Indeed, a potential litigant might draw directly on *MCI* and *Brown & Williamson*, as framed in this Note, to support such a nondelegation-based limit on the scope of *Chevron* deference.

Conclusion

Two cases, even as significant as *MCI* and *Brown & Williamson*, certainly do not bear out a pattern of systematic nondelegation enforcement under the guise of *Chevron*. It is true that, in most cases and when deference is actually extended, *Chevron* represents a rule that permits far more delegation of legislative authority than the strictest conception of the nondelegation doctrine could ever bear. *MCI* and *Brown & Williamson* do not suggest that *Chevron* is anything but a powerful tool of deference. They do illustrate, however, that courts have been wary of what *Chevron* should require and that courts will not defer to agency interpretations, even those that are textually sound, if accepting them would sanction the agency's accretion of policymaking power better left to Congress. Moreover, they show that litigants can effectively capitalize on the lasting relevance of nondelegation principles.

While there are certainly reasons for this limitation to operate explicitly, perhaps as an acknowledged exception to *Chevron*'s application, there are strong reasons why the Court should not and need not do so. However this process debate is resolved, though, the doctrinal conclusion remains that, when a court's decision seems to be little more than the incantation of the *Chevron* test followed by a rejection of the deference that a rigorous application of the test would demand, the principle of nondelegation may be operating below the surface. This realization should encourage litigants to continue to exploit the Court's hesitation about *Chevron* and its sensitivity to nondelegation principles, and should caution scholars not to dismiss the validity of constitutional norms regarding the proper allocation of legislative power.