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Short-Circuiting the New Major Questions Doctrine

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Short-Circuiting the New Major Questions Doctrine

*Kent Barnett**

*Christopher J. Walker***

In Minor Courts, Major Questions, Michael Coenen and Seth Davis advance perhaps the most provocative proposal to date to address the new major questions doctrine articulated in King v. Burwell. They argue that the Supreme Court alone should identify “major questions” that deprive agencies of interpretive primacy, prohibiting the doctrine’s use in the lower courts. Although we agree that the Court provided little guidance about the doctrine’s scope in King v. Burwell, we are unpersuaded that the solution to this lack of guidance is to limit its doctrinal development to one court that hears fewer than eighty cases per year. On the contrary, our recent empirical study of every published circuit court decision that implicates Chevron deference over an eleven-year period suggests that the circuit courts have much value to add to the doctrine’s development and that they are unlikely to engage in the sort of widespread mischief that seems to motivate the Coenen and Davis proposal. Especially for a doctrine in its infancy that goes to the heart of Chevron’s theoretical foundations, short-circuiting the development of the new major questions doctrine in the lower courts only exacerbates its problems.

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INTRODUCTION

In *King v. Burwell*, Chief Justice Roberts, writing for the Court, crafted a new major questions doctrine that narrowed the scope of *Chevron* deference. Under the canonical *Chevron* doctrine, courts defer to agencies' reasonable interpretations of ambiguous statutory provisions that they administer.¹ Courts do so because Congress has expressly or implicitly delegated interpretive primacy to agencies, not courts, under these circumstances.² In *King v. Burwell*, the Court held that the agency correctly interpreted an ambiguous statutory provision of the Affordable Care Act concerning subsidies for certain health-insurance exchanges.³ Nevertheless, the Court reviewed the interpretation de novo, refusing to apply *Chevron's* framework. That was because, the Court concluded, *Chevron* does not apply to questions of “deep ‘economic and political significance,’ ”⁴ especially when the agency—here the IRS—had “no expertise in crafting health insurance policy of this sort.”⁵

In just two years since the Court decided *King v. Burwell*, scholars have spilt much ink debating the scope and propriety of this new major questions doctrine. One of us, for instance, has questioned whether *King v. Burwell* is just about major questions or, instead, part of the Chief Justice's larger agenda to narrow *Chevron* to be a more context-specific inquiry.⁶ The scholarly debate, as detailed in Part I.B, has been particularly vexing because the Court in *King v. Burwell* provided little guidance on how to apply this new major questions doctrine in subsequent cases.

In *Minor Courts, Major Questions*, Professors Michael Coenen and Seth Davis add to the debate by advancing perhaps the most provocative proposal to date. To limit the doctrinal disruption, they propose that the Supreme Court *alone* should identify “major questions”

1. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 842–43 (1984).

2. See *id.* at 843.

3. See *King v. Burwell*, 135 S. Ct. 2480, 2487, 2491, 2494 (2015).

4. *Id.* (quoting *Utility Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

5. *Id.* (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006)).

6. Christopher J. Walker, *Toward a Context-Specific Chevron Deference*, 81 MO. L. REV. 1095, 1098–1105 (2017).

that deprive agencies of interpretive primacy.⁷ Prohibiting the lower courts from applying the major questions doctrine, they argue, would limit decisional and error costs inherent in lower-court decision-making without undermining the doctrine's putative benefits.⁸ They concede that some benefits of "percolation" within the lower courts (that is, development of the doctrine as lower courts decide whether and how to apply it in various kinds of cases) would be lost. But they contend that de novo review can be useful to the Supreme Court even if the Court applies *Chevron's* framework and that lower-court judges can signal views to the Court through dicta or separate opinions.⁹

In this Response, we approach their proposal from the perspective of having recently spent three years reviewing every published circuit court decision that cites *Chevron*—over two thousand opinions—from 2003 through 2013.¹⁰ We agree that *Chevron's* domain is inchoate and that the Supreme Court did not provide clear guidance to lower courts on how to apply the new major questions doctrine. But these key failings do not convince us to abandon traditional doctrinal development. Instead, they convince us that the federal judiciary has a lot more work to do in explicating the new major questions doctrine and its place under *Chevron's* delegation theory. The Supreme Court's dereliction of its duty on numerous *Chevron*-related questions is no reason for the lower courts to do the same.

I. THE NEW MAJOR QUESTIONS DOCTRINE AND ITS CRITICS

Before turning to our substantive response to the Coenen and Davis proposal in Part II, we first document the origins of the new major questions doctrine in *King v. Burwell* (Part I.A) and then situate the Coenen and Davis proposal within the larger scholarly debate on the new major questions doctrine (Part I.B).

A. Tracing the Doctrine's Origins

As Coenen and Davis chronicle, the major questions doctrine has become a doctrine for all *Chevron*-related occasions. The Court initially applied the doctrine at *Chevron's* first of two steps. By considering whether Congress would have intended to give agencies authority over

7. See Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777 (2017).

8. See *id.* at 800, 812–20.

9. See *id.* at 821–22.

10. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017), <https://ssrn.com/abstract=2808848>.

questions of “economic and political significance,” the doctrine was a tool for interpreting whether the statutory provision at issue was ambiguous.¹¹ More recently, the Court used the doctrine at *Chevron*’s second step to assess whether an agency’s interpretation of an ambiguous provision was reasonable.¹² As Coenen and Davis note, the major questions doctrine, once a tool within the *Chevron* framework, expanded its dominion in *King v. Burwell*.¹³

Other than one precursor,¹⁴ *King v. Burwell* was the first decision to apply the major questions doctrine to the initial question of whether *Chevron*’s two-step framework should apply at all—an inquiry referred to as “step zero.”¹⁵ This step asks whether Congress delegated the authority to interpret a potentially ambiguous statute with the force of law and, if so, whether the agency used its force-of-law authority.¹⁶ Specifically, the Court held that Congress would not have implicitly delegated to the IRS the question of whether those who purchased health insurance on federally run exchanges could receive tax credits. The Court stated that whether “the tax credits . . . , involving billions of dollars in spending each year and affecting the price of health insurance for millions of people[,] . . . are available is . . . a question of deep ‘economic and political significance.’”¹⁷ Because of this significance and the IRS’s lack of “expertise in crafting health insurance policy of this sort,” the Court concluded that Congress would only have delegated authority to decide the question to the IRS expressly.¹⁸ The Court then proceeded to answer the question created by ambiguous statutory provisions de novo and ultimately agreed with the IRS.¹⁹

The notion that the major questions doctrine applied at step zero in *King v. Burwell* developed in the parties’ briefing and crystalized late during oral argument.

11. See Coenen & Davis, *supra* note 7, at 787–89 (discussing *FDA v. Brown & Williamson Corp.*, 529 U.S. 120 (2000), *Whitman v. Am. Trucking Ass’n*, 531 U.S. 437 (2001), and *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

12. See *id.* at 790 (discussing *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014)).

13. See *id.* at 791–96.

14. In *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006), the Court invoked the major questions doctrine when deciding that Congress had not delegated interpretive authority to the Attorney General and thus was a step zero case. But, as Coenen and Davis note, the Court refused to defer to the executive interpretation for many reasons. See Coenen & Davis, *supra* note 7, at 794 n.80. As we have written elsewhere, *Gonzales* also concerned the executive’s fundamental change to a longstanding regulatory scheme. *King v. Burwell* considered a new interpretation for a newly identified problem. See Barnett & Walker, *supra* note 10.

15. See Barnett & Walker, *supra* note 10.

16. See *United States v. Mead*, 533 U.S. 218, 226–27 (2001).

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

18. *Id.*

19. See *id.* at 2489–96.

The petitioners' opening brief suggested the argument but did not squarely present it as a step zero issue. Using some language that sounded in step zero terms, the petitioners argued that Congress would not have "intended to delegate" the question of the availability of tax credits to the IRS because of its economic and political significance.²⁰ But they relied on decisions that applied the major questions doctrine at *Chevron* steps one and two, not the earlier decision that applied the doctrine at step zero.²¹ Moreover, their argument ended in terms that suggested *Chevron* step one by asserting that no ambiguity existed for agency discretion because the statute " 'directly spok[e] to the precise question' at issue."²²

In its responding brief, the federal government quickly dispatched the notion that *Chevron* did not apply to major questions by citing the Court's recent opinion in *City of Arlington v. FCC*.²³ In holding that *Chevron*'s framework applies to agencies' statutory interpretations concerning their own regulatory jurisdiction, the *City of Arlington* Court stated that *Chevron* applies to "big, important" matters and "humdrum, run-of-the-mill stuff."²⁴ Moreover, the government noted that the petitioners cited decisions that applied the major questions doctrine to *Chevron* step one, not step zero.²⁵

The petitioners' reply brief, although continuing to cite a step two major questions decision,²⁶ spoke more concretely in step zero terms, saying that the Court should "not defer on the fiction that Congress left it to the IRS."²⁷ Moreover, it briefly referred to two considerations that concern whether Congress has delegated interpretive primacy to agencies: the IRS's lack of expertise over the matter at issue and the IRS's lack of sole authority to administer portions of the statute.²⁸ That said, the petitioners' argument became incoherent in one respect. They asserted that the "Court should . . . discern, based on *its* best reading of the ACA, what *Congress* meant

20. Brief for Petitioners at 52, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14–114) (capitalized letters omitted).

21. *See id.* (citing *FDA v. Brown & Williamson Corp.*, 529 U.S. 120, 160 (2000), and *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)). The brief did not refer to *Gonzales v. Oregon*, 546 U.S. 243 (2006).

22. *Id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 842 (1984)).

23. Brief for Respondents at 57, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14–114) (citing *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)).

24. *See id.* (quoting *City of Arlington*, 133 S. Ct. at 1868).

25. *See id.*

26. *See Reply Brief for Petitioners* at 22, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14–114) (citing *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

27. *Id.*

28. *See id.* at 23.

when it ‘directly spoke to this precise question.’”²⁹ Yet, if Congress spoke directly to the question, no delegation could occur because neither the agency nor the Court would have interpretive space. To the extent that the Court is merely announcing Congress’s clear command, the Court would be interpreting the statute at *Chevron*’s first step. Once again, the petitioners appeared to trip on their *Chevron* steps.

But the Court, at least on this one issue, caught the petitioners as they stumbled. *Chevron* came up only at the end of oral argument. Justice Kennedy more clearly framed a step zero question that assumed statutory ambiguity, something the petitioners’ brief never clearly did. After noting that we “think about *Chevron*” if a statute is ambiguous, he observed that it would be “a drastic step for us to say that the [IRS] can make [the tax-credit determination] when there are . . . billions of dollars of subsidies involved.”³⁰ After the Solicitor General largely repeated the government’s briefing points,³¹ the Chief Justice asked whether “a subsequent administration could change [the IRS’s current] interpretation.”³² The Solicitor General responded that it would be possible but difficult to do under *Chevron* step two’s reasonableness inquiry.³³ Notably, Justice Kennedy and the Chief Justice were two of the three dissenting Justices in *City of Arlington*, in which they argued that courts must carefully consider whether Congress has delegated particular questions to an agency.³⁴

Thus, the major questions doctrine’s new application to step zero—focusing both on the significance of the question and on agency expertise—slowly crystalized during the litigation process. Based on the new doctrine’s proponents at oral argument, it appears to be a means of focusing judicial attention on the specific statutory matter at hand to determine whether congressional delegation occurred. Even then, the Court’s decision was problematic. As Coenen and Davis discuss, the Court failed to provide guidance on what constituted a “major question,” the force of this one consideration as compared to others, and the interplay of the existence of a major question and agency expertise.³⁵

29. *Id.* at 22 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 842 (1984) (alterations omitted)).

30. Transcript of Oral Argument at 74, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14–114).

31. *See id.* at 75–76.

32. *Id.* at 76.

33. *See id.*

34. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting) (“But before a court may grant such deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue.”).

35. *See Coenen & Davis, supra* note 7, at 793–96.

B. Assessing the Scholarly Reactions to King v. Burwell

Scholars have not treated the Court's application of the major questions doctrine to step zero in *King v. Burwell* kindly, although they have attempted to understand its place in the Court's *Chevron* jurisprudence.

Numerous scholars have noted the vagueness surrounding which questions have “deep economic and political significance.”³⁶ Some, including one of us, have questioned whether the new doctrine was intended to apply only to tax matters.³⁷ Others have wondered whether it was intended to kill *Chevron* altogether³⁸ or serve as a “power canon” for the Court to “seiz[e] power aligned with its basic distrust of an active administrative state.”³⁹ One of us has also noted that the new major questions doctrine appears to be part of the Chief Justice's ongoing efforts to limit *Chevron*'s reach.⁴⁰ And another scholar has suggested that the doctrine should be understood as refocusing the step zero inquiry on the actual likelihood of congressional delegation.⁴¹

Or it may turn out that this new major questions doctrine means none of those things. It may simply be that the Justices in the majority—having agreed on the underlying interpretation—thought that the matter was too insignificant to develop and perhaps expected it to fade into doctrinal obscurity.⁴²

In the face of the uncertainty surrounding the new major questions doctrine, Coenen and Davis call for the lower courts to review agency statutory interpretations without regard to the doctrine at step zero, leaving it exclusively for invocation by the Supreme Court. Because of the significance of the interpretations to which the doctrine would apply, Coenen and Davis argue that the doctrine will be

36. See, e.g., David Gammage, *Foreword—King v. Burwell Symposium: Comments on the Commentaries (and on Some Elephants in the Room)*, 2015 PEPP. L. REV. 1, 5; Kristin E. Hickman, *The (Perhaps) Unintended Consequences of King v. Burwell*, 2015 PEPP. L. REV. 56, 57.

37. See, e.g., Stephanie Hoffer & Chris J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 PEPP. L. REV. 33, 35, 42.

38. See Steve Johnson, *The Rise and Fall of Chevron in Tax: From the Early Days to King and Beyond*, 2015 PEPP. L. REV. 19; see also Catherine Sharkey, *In the Wake of Chevron's Retreat* (unpublished manuscript), http://administrativestate.gmu.edu/wp-content/uploads/sites/29/2016/06/Sharkey_In-the-Wake-of-Chevron_5_20_16.pdf (“*King v. Burwell* and *Michigan v. EPA*—decided within the same momentous week in June 2015—taken together, seem to augur the Supreme Court's retreat from the venerable *Chevron*.”).

39. Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV., at *1 (forthcoming 2017), <https://ssrn.com/abstract=2757770>.

40. See Walker, *supra* note 6, at 1097–98; Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. [Part II.B.3] (forthcoming 2017), <https://ssrn.com/abstract=2826146>; accord Hickman, *supra* note 36, at 58.

41. Jonathan Adler, *Restoring Chevron's Domain*, 81 MO. L. REV. 983, 984–85 (2017).

42. See Hickman, *supra* note 36, at 66.

ineffective in the lower courts because the Supreme Court will likely need to provide its own *de novo* review regardless. And few, if any, interpretations that qualify for the doctrine would not also qualify for certiorari review.⁴³ Leaving *de novo* review to the Supreme Court, they argue, would further the new major questions doctrine's ability to settle legal questions, whereas review in numerous lower courts would not.⁴⁴ The lower courts, they further contend, will encounter significant decision costs in even considering a prolonged step zero analysis and will likely erroneously apply the standard in too many cases.⁴⁵

Although Coenen and Davis concede that their approach will limit the ability of lower courts to develop the contours of the new major questions doctrine and thus aid Supreme Court review, they question the need for further "percolation."⁴⁶ The lower courts' review under *Chevron*, they argue, could be useful to the Supreme Court's *de novo* review of the statutory question. Moreover, lower courts can use dicta or separate opinions to signal their views on matters reserved for Supreme Court review.⁴⁷ In short, the new major questions doctrine, under Coenen and Davis's proposal, would not only apply to exceptional questions but also constitute itself an exceptional doctrine that contravenes the traditional vertical nature of precedent in the American jurisprudential system.

II. VALUABLE COURTS, NECESSARY QUESTIONS

Despite our appreciation for the creativity of Coenen and Davis's proposal and our agreement on many of the new major questions doctrine's failings, we disagree with their proposal for two principal reasons.

First, the new major questions doctrine is an inquiry anchored to *Chevron's* theoretical grounding (Part II.A). As empirical evidence and recent congressional practice suggest, the doctrine is germane to whether Congress delegated interpretive primacy to agencies. Applying *Chevron* when no delegation has occurred separates doctrine from theory.

Second, one should not so easily dismiss the benefits of further percolation in the lower courts (Part II.B). The circuit courts serve as jurisprudential laboratories for developing (or even jettisoning) legal rules and standards. Our empirical study of *Chevron* in the circuit

43. See Coenen & Davis, *supra* note 7, at 800–01.

44. See *id.* at 811.

45. See *id.* at 812–20.

46. See *id.* at 821.

47. See *id.* at 821–23.

courts supports this percolation point, while also suggesting that circuit courts will not grossly misuse the new major questions doctrine as an excuse to abandon *Chevron*'s strictures opportunistically.

A. Severing Chevron from its Theoretical Moorings

The Supreme Court has consistently grounded *Chevron* deference on a delegation theory.⁴⁸ Under this theory, the Court respects Congress's delegation to agencies to resolve ambiguities or fill gaps in statutes that agencies administer. This delegation gives agencies, as opposed to courts, interpretive primacy over the ambiguities or gaps in statutes the agencies administer.⁴⁹ Although the Court has never justified the normative basis for the delegation theory, it has suggested that it resides in notions of agency expertise, deliberative process, and political accountability.⁵⁰ Congress can delegate explicitly or implicitly.⁵¹ The Court understands Congress to do the latter usually by giving the agency the authority to act with the force of law by enacting notice-and-comment rules or conducting formal on-the-record adjudication.⁵² *Chevron*'s step zero is the stage at which courts assess whether congressional delegation has occurred.

The key criticism of the delegation theory is that it is fictional or fraudulent. It is fictional, some argue, because statutory ambiguity is not a sufficient signal of congressional delegation; Congress's preference for formalized agency action does not speak to the delegation of interpretive primacy.⁵³ It is fraudulent, others argue, because courts do not actually care about Congress's intent; they rely, instead, on questionable presumptions without further inquiry.⁵⁴ These criticisms appeared to gain force after the Court's decision in *City of Arlington v. FCC*.⁵⁵ In holding that *Chevron*'s framework applied to an agency's determination of its regulatory jurisdiction, the Court rejected the dissent's position that "a general conferral of rulemaking authority does not validate rules for all the matters the agency is charged with administering."⁵⁶ Moreover, it refused to distinguish between "big, important" matters, such as "jurisdictional ones," and "humdrum, run-

48. See Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 14–15 (2015).

49. See *id.* at 14.

50. See *id.* at 14, 15.

51. See *id.* at 14.

52. See *United States v. Mead*, 533 U.S. 218, 230 (2001).

53. See Barnett, *supra* note 48, at 21.

54. See *id.*

55. 133 S. Ct. 1863, 1874 (2013).

56. See *id.* at 1874.

of-the-mill” matters.⁵⁷ In short, *City of Arlington* sought to create a step zero inquiry that eschewed nuance for clarity.

The new major questions doctrine, as a step zero inquiry, makes more sense once one considers it as a response to these critiques. By evaluating the specific question at issue, the question’s relationship to the regulatory regime, and the agency’s expertise in resolving that matter, the doctrine seeks to divine whether Congress actually delegated interpretive primacy to the agency on a specific question. Whatever its faults and whatever its convergence with the Court’s certiorari process, the new major questions doctrine takes *Chevron*’s underlying delegation theory seriously. It provides an inquiry that moves beyond the “fictional” import of statutory ambiguity and formalized action. And in moving beyond broad, nearly irrebuttable presumptions and asking pointed questions to investigate Congress’s likely intent, the delegation theory loosens its “fraudulent” mantle. Allowing lower courts to ignore or limit this inquiry leaves *Chevron* unmoored from its proper role in judicial review.

That the Court takes the delegation theory seriously does not mean that it correctly identifies congressional preferences. For instance, although some argue that the formality of agency action is distinct from interpretive primacy,⁵⁸ it may be that formality, by providing sufficient salience for congressional oversight, informs congressional delegation of interpretive primacy.⁵⁹ Similar debates could arise over the new major questions doctrine. Congress may well want to leave major questions with an agency because of the agency’s political accountability to the President and Congress. But it may also be that Congress would prefer that the Court resolve major questions because they are outside the agency’s ken or because Congress does not want future administrations to be able to change the answer.⁶⁰

Although our purpose in these limited pages is not to prove the doctrine’s soundness as a device to glean congressional intent, significant survey responses and congressional actions suggest that, contrary to Coenen and Davis’s intuition,⁶¹ the Supreme Court’s new major questions doctrine has some foundation. First, survey responses from congressional drafters indicate that they do *not* believe that Congress intends to delegate major questions to agencies. In Abbe

57. See *id.* at 1868.

58. See David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 218–219.

59. See Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2044 (2011).

60. See *Nat’l Cable & Telecom. Ass’n v. Brand X Internet Servs.*, 545 U.S. 937 (2005).

61. See Coenen & Davis, *supra* note 7, at 802–05.

Gluck and Lisa Bressman's path-breaking study of congressional drafters, only 28% of those drafters surveyed thought Congress implicitly delegates major policy questions to agencies.⁶² Further, only 38% thought Congress implicitly delegates economically significant questions, while only 33% thought Congress implicitly delegates politically significant questions.⁶³ Similarly, agency rule drafters surveyed in a related study were also skeptical that Congress delegates major questions to agencies, albeit to a lesser extent. 56% of those agency drafters responded that Congress implicitly delegates major policy questions to agencies.⁶⁴ But when the survey questions more specifically targeted economically significant and politically significant questions, only 49% and 32% of those drafters responded that Congress intends to delegate those matters to agencies through ambiguity or gaps in a statute.⁶⁵ These survey results, despite their methodological limitations,⁶⁶ provide some evidence that the Court's new major questions doctrine is an accurate (or at least colorable) understanding of congressional delegation preferences and thus a valid inquiry under *Chevron* step zero.⁶⁷

Second, Coenen and Davis largely discard the expertise rationale from *King v. Burwell*,⁶⁸ but agency expertise may be one of the most legitimate indicia of congressional intent to delegate. Congress has only expressly evidenced its preferences as to interpretive primacy in one statute, the Dodd–Frank Wall Street Reform and Consumer Protection Act.⁶⁹ In that statute, Congress expressly gave courts interpretive primacy over certain formalized agency state-law preemption determinations by requiring courts on judicial review to use factors propounded in *Skidmore v. Swift & Co.*⁷⁰ Legislative history indicated that Congress did so because it was concerned that the

62. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1003 (2013).

63. See *id.*

64. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1055 (2015).

65. See *id.*

66. See *id.* at 1013–16.

67. See also Walker, *supra* note 6, at 1005–114 (exploring in greater detail the implications of the findings from these two empirical studies for the Chief Justice's approach to *Chevron* deference).

68. See Coenen & Davis, *supra* note 7, at 795 n.87 (arguing that the expertise rationale was a “makeweight” and not persuasive in the context of delegations to the IRS).

69. 12 U.S.C. § 25b (2012).

70. *Id.* § 25b(b)(5)(A); see also *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* calls for judicial review in which an agency's views are not controlling on courts, as under *Chevron*, but nonetheless may have the power to persuade. See *id.* at 140. In other words, courts retain interpretive primacy under *Skidmore* review.

agency, subject to regulatory capture, had not used its expertise for more than a decade when preempting state law.⁷¹ Congress, however, included a savings clause to permit *Chevron* review of other agency decisions.⁷² In other words, the only time that Congress has directly spoken to a matter of interpretive primacy, it focused on the agency's possession and use of expertise as the key factor. Indeed, it is no surprise that 93% of congressional respondents in the Gluck and Bressman study indicated that Congress intends to fill ambiguities relating to the agency's area of expertise, second only to ambiguities relating to the details of implementation (99%).⁷³

Coenen and Davis argue that, even if Congress intended to give interpretive primacy to courts, it does not follow that Congress wanted to give primacy to all courts, as opposed to only the Supreme Court.⁷⁴ If that were so, Coenen and Davis would face an almost vertical climb. Mere silence would go much further than suggesting legislative delegation of discretion to the executive branch in the course of executing law, as in the case with *Chevron*. It would suggest, instead, upsetting traditional, uniform default notions of precedent's vertical application. That implicit suggestion seems even less likely because Congress has used express provisions to alter judicial review. As Coenen and Davis note, Congress knows how to rely on only Supreme Court interpretations when it wants to.⁷⁵ In the Antiterrorism and Effective Death Penalty Act of 1996, Congress expressly permitted habeas petitioners to rely upon only "clearly established law, as determined by the Supreme Court" to question state-court judgments.⁷⁶ By doing so, the provision altered the default rule that permitted federal courts, uniformly, to rule on the matters de novo.⁷⁷

All of this is *not* to say that the new major questions doctrine is free from definitional problems as to what exactly constitutes a major

71. See Barnett, *supra* note 48, at 39–40.

72. 12 U.S.C. § 25b(b)(5)(B).

73. Gluck & Bressman, *supra* note 62, at 1004–05 & fig.11. The results are similar for agency rule drafters: 92% of agency rule drafters surveyed indicated that Congress intends to fill ambiguities relating to the agency's area of expertise, second only to ambiguities relating to the details of implementation (99%). Walker, *supra* note 6, at 1053 fig.10. Moreover, 79% of rule drafters indicated that the agency's expertise is a relevant factor that affects whether *Chevron* deference applies to a statutory ambiguity—second only to the two *Mead* factors of congressional authorization of agency rulemaking or formal adjudication (84%) and the agency's use of such lawmaking authority (80%). See *id.* at 1063–65 & tbl. 1.

74. See Coenen & Davis, *supra* note 7, at 805.

75. See *id.* at 824.

76. 28 U.S.C. § 2254(d)(1).

77. See Adam Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After Williams v. Taylor*, 2001 WIS. L. REV. 1493, 1496.

question. But this same indeterminacy has also bedeviled other legal standards, including the step zero inquiry into whether an agency has acted with the “force of law.”⁷⁸ Lower courts have confronted indeterminacy and shaped the standard by using an incremental case-by-case approach.⁷⁹ Indeed, it is precisely these determinacy issues that further percolation in the lower courts can help address.

B. Reevaluating the Benefits and Costs of Percolation

As numerous scholars, including Coenen and Davis, recognize,⁸⁰ lower-court percolation can be valuable.⁸¹ Percolation permits courts to consider and refine legal rules in response to new factual scenarios and decisions from other courts.⁸² By witnessing the consequences of a legal principle’s application in various scenarios, all courts obtain more information to assess the principle’s propriety and scope.⁸³ This decentralized decision-making process also encourages dialogue between the courts and the political branches.⁸⁴ Despite the “madness” of allowing numerous courts to reach inconsistent and opposing views and the inefficiency that it entails, lower-court percolation “has a method. If the circuits all agree, their precedents resolve the question;

78. Barnett, *supra* note 48, at 56–57.

79. *See id.*; *see also* Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005) (describing disparate application of *Mead*’s command in the circuit courts).

80. *See* Coenen & Davis, *supra* note 7, at 821 (citing Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 481–501 (2012)). As Gewirtzman argues:

[a]mong other things, a robust percolation process allows the Court to use its limited monitoring resources more efficiently, minimizes the Court’s expenditures of political capital, incentivizes lower court judges to take their job more seriously, and lets the Court measure support for a potential ruling among lower court judges, who are ultimately charged with applying the rule and whose allegiance is necessary for the Court to enforce its will.

Gewirtzman, *supra*, at 484.

81. The lack of empirical data renders it difficult to know to what extent lower court opinions influence other lower courts or the Supreme Court. *See* Gewirtzman, *supra* note 80, at 494; *see also* Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 437–40 (2013) (noting judicial and academic skepticism over percolation’s benefits).

82. *See* Gewirtzman, *supra* note 80, at 485–86.

83. *See* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 65–66 (1998).

84. *See* Gewirtzman, *supra* note 80, at 488; *see also* Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1600–1620 (2014) (identifying various tools that courts use to engage in a richer dialogue with the political branches).

if they disagree, the Supreme Court gains from the clash of opposing views.”⁸⁵

This percolation is most useful for a legal *standard* (like the new major questions doctrine that speaks in broader, less-defined terms than a legal *rule*) and requires case-by-case application to give it meaning. Moreover, the inter-branch dialogue that percolation encourages is especially useful for a standard such as the new major questions doctrine, or the force-of-law inquiry, that seeks to ascertain legislative intent.

Coenen and Davis, without fully rejecting percolation’s benefits, respond that lower courts can use dicta or separate opinions to provide insights to the Supreme Court when it addresses the doctrine. Although both of these options do provide some percolation, they are not as beneficial as lower courts deciding the issue. Because the discussion would be unnecessary to the holding and perhaps only a matter addressed in one judge’s concurring opinion, the percolation may be limited. Judges may not spend meaningful time thinking about a matter that will not affect the outcome or provide sufficient intra-panel ventilation on an issue that appears in a colleague’s solo opinion. Some judges, too, may have philosophical objections with potentially exceeding their Article III role by discussing matters not necessary for deciding the case.⁸⁶

Coenen and Davis’s fear that the lower courts will purposefully or inadvertently use the new major questions doctrine to escape *Chevron*’s strictures for nonmajor questions does not strike us as a significant concern. We recently completed a study on *Chevron* deference in the circuit courts that attempted, with broad search terms, to consider every published circuit-court decision over an eleven-year period that cited *Chevron* (even if it did not ultimately apply it).⁸⁷ We coded the relevant decisions for nearly forty variables related to the

85. Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV., at *5 (forthcoming 2017), <https://ssrn.com/abstract=2864175> (citing Harold Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U. L. REV. 881, 907 (1975) (noting the “value in percolation among the circuits, with room for a healthful difference that may balance the final result”). To be sure, without percolation, the Supreme Court could address major statutory issues more quickly, and this alacrity may be especially valuable when significant business interests need guidance on how to proceed. See Dorf, *supra* note 83, at 66. But we put those objections aside in this case because even Coenen and Davis’s proposal to permit the lower courts to engage in standard *Chevron* review would not, by itself, lead to immediate Supreme Court resolution of a decision.

86. See, e.g., Ryan S. Killan, *Dicta and the Rule of Law*, 2013 PEPP. L. REV. 1, 9 (“It is now widely accepted that the rule [that dicta is not binding] is of constitutional dimension—by limiting the judiciary’s power to actual cases and controversies, Article III divests judges any power to issue advisory opinions. Dicta is, at bottom, a form of advisory opinion for future cases.”).

87. See Barnett & Walker, *supra* note 10, at 5.

agency statutory interpretation and the court's review (such as the subject matter, the format of an agency's interpretation, the standard of review, and factors that the courts invoked in their review).⁸⁸ Our study, which culled cases that were all decided before *King v. Burwell*, did not specifically consider the circuit courts' use of the major questions doctrine at any of the *Chevron* steps. But it did consider two sensitive matters and the doctrinal and theoretical factors that circuit courts invoke. Our findings suggest that the circuit courts would not meaningfully abandon *Chevron* review even if *King v. Burwell* gave them a colorable ground for doing so.

For the two types of sensitive agency interpretations for which we coded—an agency's interpretation of its own regulatory jurisdiction⁸⁹ and an agency's interpretation that preempted state law⁹⁰—the circuit courts applied *Chevron* at normal rates. For matters concerning regulatory jurisdiction, courts applied *Chevron* to interpretations concerning regulatory jurisdiction almost exactly as often (74.3%) as they applied *Chevron* to all agency statutory interpretations (74.8%).⁹¹ The same was true for matters concerning state-law preemption (76.0%).⁹² The circuit courts' loyalty to *Chevron* is even more striking when one considers that an earlier study found that the Supreme Court applied *Chevron*'s framework to regulatory-jurisdiction questions only about 35% of the time.⁹³ For neither sensitive matter did the circuit courts expand their de novo review, despite having some room to do so.

Second, the circuit courts have not referred significantly to certain factors that could give them more discretion to review agency statutory interpretations de novo. Coenen and Davis note that the circuit courts have coalesced around an analytical regime at *Chevron*'s

88. See *id.* at 6.

89. See *id.* at 70–73. Until the Court held in *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), that *Chevron* applied to an agency's interpretation of its own regulatory jurisdiction, the lower courts were split. See *City of Arlington v. FCC*, 668 F.3d 229, 248 (5th Cir. 2012) (discussing circuit split), *aff'd*, 133 S. Ct. 1863 (2013).

90. On preemption matters, the Supreme Court has applied both *Chevron* and *Skidmore* deference, and scholars, including one of us, have called for *Skidmore* to apply. See Barnett & Walker, *supra* note 10, at 16, 72; see also Kent H. Barnett, *Improving Agencies' Preemption Expertise with Chevmore Codification*, 83 FORDHAM L. REV. 587 (2014). The call for *Skidmore*'s application to preemption matters is consistent with findings from surveys of congressional statutory drafters and agency rule drafters in which a majority reported that Congress does not implicitly delegate to agencies authority to preempt state law. See Barnett & Walker, *supra* note 10, at 16.

91. See Barnett & Walker, *supra* note 10, at 71.

92. See *id.* at 72.

93. See *id.* at 70 (citing William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1131 (2008)).

step zero after *Mead* that focuses on the formality of agency action.⁹⁴ Although the *Mead* inquiry continues to present problems,⁹⁵ it does indicate that lower-court percolation of step zero standards can work reasonably well. But what renders it more remarkable is that the lower courts' coalescence around formality was not preordained. The Supreme Court in *Barnhart v. Walton* indicated in dicta, only one year after *Mead*, that formality or its absence could not alone resolve whether the *Chevron* framework would apply.⁹⁶ Instead, the suitability of *Chevron* depended upon numerous factors, including congressional acquiescence,⁹⁷ "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."⁹⁸ The lower courts could have invoked these factors to manipulate *Chevron's* application.

But our findings indicate that they did not do so. We coded whether the circuit courts invoked certain doctrinal or theoretical factors that a similar study of the Supreme Court had considered. Of those coded factors, three (expertise, longevity, and congressional acquiescence) tracked *Barnhart's* considerations. The circuit courts (whether or not applying the *Chevron* framework) invoked expertise and longevity in all cases "more frequently than other contextual factors, but still at relatively low rates of 18.43% and 10.76% and more frequently in the context of *Skidmore* review in which they are doctrinal factors."⁹⁹ The circuit courts referred to congressional acquiescence in only 3.1% of the cases, indicating that the factor has little purchase on the circuit courts.¹⁰⁰ Of course, circuit courts may manipulate judicial review by omitting references to certain review standards or considering other factors (expressly or silently). But it strikes us as telling that they have refrained from invoking factors that could provide them cover in doing so. We do not see why circuit courts would act in a contrary manner with the new major questions doctrine at their disposal.

94. See Coenen & Davis, *supra* note 7, at 813 n.146.

95. See *supra* note 78 and accompanying text.

96. 535 U.S. 212, 222 (2002).

97. See *id.* at 219–20.

98. *Id.*

99. Barnett & Walker, *supra* note 10, at 82.

100. See *id.*

CONCLUSION

In the two years since the Supreme Court introduced the new major questions doctrine in *King v. Burwell*, we have not made much progress in understanding its scope as a limitation on *Chevron's* domain. The doctrine strikes us as having great potential to ground *Chevron* deference in a proper theory of congressional delegation. But much more theoretical and doctrinal work needs to be done. Unlike Coenen and Davis, we believe that lower courts can and should play a vital role in helping to shape this new doctrine. Having just reviewed every published circuit-court decision that implicates *Chevron* deference from 2003 through 2013, we are confident the circuit courts have much value to add, and we are not as worried as Coenen and Davis that the circuit courts will strategically use the new major questions doctrine to overturn agency statutory interpretations.

But if Coenen and Davis's fears of lower court mischief turn out to be well founded, we do not similarly worry that the Supreme Court would fail to intervene to correct course. After all, a mischievous use of the new major questions doctrine would result in a lower court erroneously invalidating an agency interpretation of a statute the agency administers. Such an invalidation generally constitutes a decision on "an important question of federal law that has not been, but should be, settled by [the Supreme] Court," thus meriting certiorari review even in the absence of a circuit split.¹⁰¹

If the Supreme Court's current certiorari process does not provide a sufficient check on such lower-court mischief, we should encourage the Court to take more cases that implicate the new major questions doctrine, either as part of its merits docket via certiorari review or as part of its "shadow docket" via summary reversal.¹⁰² Especially for a doctrine in its infancy, however, short-circuiting the development of the new major questions doctrine in the lower courts would be a serious error. It is critical that the Supreme Court leverage lower courts' expertise to further shape the contours of this important limit on agency lawmaking authority.

101. SUP. CT. R. 10(c) (including as reason for granting certiorari review); see also David C. Frederick, Christopher J. Walker & David M. Burke, *The Insider's Guide to the Supreme Court of the United States*, in APPELLATE PRACTICE COMPENDIUM 7 (Dana Livingston ed., 2012) (noting that where there is a lack of a circuit split the Court will "focus on the national importance of the question(s) presented and the likelihood that the court below reached the wrong conclusion").

102. See William Baude, *The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIB. 1, 43–45 (2015) (noting the trend of summary reversals in state-on-top qualified immunity and state habeas cases, among others).