NOTES

Major Questions Doctrine: Implications for Separation of Powers and the Clean Power Plan

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INTRODUCTION

Over the last twenty years, the United States Supreme Court, on a handful of occasions, has both expressed its concern with the expansion of the administrative state and actively sought to place checks on what it perceives to be agencies acting outside the scope of their delegated authority. The Court's doctrinal tool in these circumstances is the "major questions" doctrine. The major questions doctrine is an exception to the *Chevron* deference principle whereby the Supreme Court has occasionally refused to defer to an agency's interpretation of a statute under the *Chevron* framework based on concerns that the agency's interpretation of the statute would bring about too great of a transformational change or speaks to issues of too great importance.[1]

The major questions doctrine exception to *Chevron* deference recently re-emerged before an *en banc* panel in the D.C. Circuit Court of Appeals in litigation challenging President Obama's Clean Power Plan.[2] Consequently, the major questions doctrine's reemergence in this case has spawned an outgrowth of critical academic analysis.[3] This Note seeks to join the mix by proposing that the major questions doctrine raises considerable separation of powers issues by both undercutting an essential executive function, particularly in the environmental context, and by contravening congressional intent. Consequently, this Note serves as a repudiation of the major questions doctrine.

I. BACKGROUND

A. *CHEVRON* OVERVIEW

In the 1984 decision *Chevron v. Natural Resources Defense Council*, the Supreme Court delivered a simplified and expedient two-step inquiry for courts to employ in determining whether a court should award deference to a federal agency's statutory interpretation.[4] The Court's inquiry sets forth the following two steps. Step One requires that courts ask whether Congress has spoken directly to the precise question at issue. If Congress has, the inquiry ends and "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[5] But, if the statute is ambiguous or silent with respect to the specific issue, Step Two requires the court to determine whether the agency's interpretation is "based on a permissible construction of the statute," or in other

1. *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 231–34, 236–42 (2006).
2. West Virginia v. EPA, Docket No. 15-01363 (D.C. Cir. filed Oct. 23, 2015).
3. *See, e.g.*, Abbe R. Gluck, *The Supreme Court, 2014 Term—Comment: Imperfect Statutes Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 65, 93–96 (2015).
4. Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 842–43 (1984).
5. *Id.*

words, whether it is reasonable.[6] In essence, *Chevron* instructed courts to defer to agencies' reasonable interpretations in the face of statutory silence or ambiguity.[7]

Members of the Court have long agreed that *Chevron* deference rests on two important premises. First, when Congress delegates a statutory provision to an agency to implement, it does so because it wishes for the agency to be the primary interpreter of that provision.[8] Second, the interpretation of such statutory provisions necessarily includes decision making regarding policy. Congress delegates to agencies on the belief that agencies, as opposed to courts, are best equipped to make such policy decisions because of their comparative institutional advantages, like subject matter expertise and political accountability.[9]

A point of disagreement for the Court over the years has been figuring out *how* to determine whether Congress has delegated interpretive authority over a provision to an agency.[10] The Court generally seems to agree that it is unable to determine whether Congress truly intended to delegate interpretive authority to an agency for any given provision. Therefore, the Court is forced to impute to Congress a fictional intent to delegate interpretive authority to administrative agencies.[11] It is the construction of this legal fiction which is subject to disagreement within the Court and that breathes life into the major questions doctrine. There have been two doctrines of construction employed by the Court, one championed by Justice Scalia, and the other by Justice Breyer.

Justice Scalia championed the prevailing school of thought on how to construct Congress' fictitious intent to delegate. Justice Scalia's camp stands for the simple proposition that statutory ambiguity signals delegation.[12] In *City of Arlington v. FCC*, Justice Scalia asserted that when Congress injects ambiguity into a statute, it intends for the agency, and the agency alone (not the courts), to resolve it.[13]

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6. *Id.*

7. *Id.* For example, a court applying *Chevron* analysis to an EPA rule that interprets the meaning of the term "stationary source" within the Clean Air Act would look to the statute to see whether Congress clearly defined the term. Upon finding that "stationary source" is not clearly defined in the statute, the court would then determine that the term is ambiguous, in which case the court would then be required to defer to EPA's definition of "stationary source" as long as it is reasonable.

8. *Id.* at 843–44; *see also* City of Arlington v. FCC, 133 S.Ct. 1863, 1868 (2013); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 369–70 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–17 (1989).

9. *Chevron*, 467 U.S. at 843–45.

10. John F. Manning, *Inside Congress' Mind*, 115 COLUM. L. REV. 1911, 1929–34 (2015).

11. *See* Breyer, *supra* note 8, at 370; *see also* Scalia, *supra* note 8, at 517.

12. *City of Arlington*, 133 S. Ct. at 1868.

13. *Id.* Consequently, *Chevron* "provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *Id.* For, "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *Id.*

But shortly after *Chevron* was decided, then-Judge Breyer championed his own, alternative school of thought for constructing the same legal fiction.[14] While Justice Breyer maintains the view that an implicit delegation of interpretive authority may exist in certain circumstances, he departed from Justice Scalia's camp on the grounds that courts ought not to grant agencies an across-the-board presumption of delegation.[15] Rather, Justice Breyer believed that courts should engage in case-by-case inquiries in constructing Congress' (fictional) intent.[16] Justice Breyer reasoned that a more exhaustive exercise was necessary in order to sort between questions that call for agency expertise, which are suited for deference, and "important" questions, where judicial review is more appropriate.[17] In *Mayburg v. Secretary of Health and Human Services*, Justice Breyer asserted:

> The less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative or substantive expertise, the less likely it is that Congress (would have) 'wished' or 'expected' the courts to remain indifferent to the agency's views. Conversely, the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves.[18]

Based on this line of reasoning, Justice Breyer would likely find that a rule dealing with the remedial administration of a technical statute is a question that calls for agency expertise, whereas a rule that seeks to regulate an entire industry is a question that is sufficiently "important" to warrant judicial review. While Justice Scalia's across-the-board presumption seems to have prevailed since *Chevron*, it is this "major questions" or "interstitial matters" parity that forms the underpinning of the major questions exception.[19]

B. THE MAJOR QUESTIONS DOCTRINE EXCEPTION

The major questions doctrine is an exception to the *Chevron* deference principle, whereby the Supreme Court has, on only a handful of occasions, refused to defer to an agency's statutory interpretation either within or before applying the *Chevron* framework.[20] For some time there has been a common

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14. *See* Mayburg v. Sec. of Health and Human Servs., 740 F.2d 100, 104 (1st Cir. 1984).

15. *See* Breyer, *supra* note 8, at 370.

16. *Id*. Justice Breyer believed that courts would construct Congress' intent by imagining "what a hypothetically 'reasonable' legislator would have wanted (given the statute's objectives)" and "looking to practical facts surrounding the administration of a statutory scheme." *Id*.

17. *Id*. at 370–71.

18. *Mayburg*, 740 F.2d at 106 (quoting Int'l Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979)).

19. *Id*.

20. *See* Sunstein, *supra* note 1, at 231–34, 236–42 (explaining the distinction between major and interstitial

perception that the federal government's administrative apparatus has grown too large. The major questions doctrine has been viewed as a possible solution to this perceived overgrowth. The Court has invoked the exception in two circumstances. The first circumstance is when the Court believes an agency is making a "decision[] of vast 'economic and political significance.'"[21] The second circumstance is when an interpretation would "bring about an enormous and transformative expansion" of an agency's authority under a "long-extant statute" without clear statutory authorization from Congress.[22] The Court has invoked this exception irrespective of whether all other *Chevron* pre-conditions have been met.[23]

1. Genesis: *MCI* and *Brown & Williamson*

The major questions doctrine first came to life in *MCI Telecommunications Corp. v. American Telephone and Telegraph Company*,[24] a 1994 Supreme Court decision.[25] Under section 203(a) of the Communications Act of 1934, communications common carriers are required to file tariffs with the Federal Communications Commission ("FCC").[26] Section 203(b)(2) of the same Act authorizes the FCC to "modify any requirement made by or under . . . this section . . . ."[27] The critical question in *MCI* was whether the FCC could interpret the term "modify" in section 203(b)(2) to expand its own authority by exempting some common carriers from filing tariffs with the agency. The Court engaged in *Chevron* analysis.[28] In finding clear statutory language, the Court held that the FCC was

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questions); *see, e.g.,* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (Court conducted "Step Zero" antecedent inquiry to determine *Chevron* applicability).

21. Sunstein, *supra* note 1, at 231–34, 236–42.

22. The Court has invoked the major questions exception in the following cases, which this paper analyzes at length in the next section. The cases are organized chronologically. MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231–32 (1994) (applying the major questions exception and finding it "highly unlikely" that Congress would entrust an "essential characteristic" of the statutory scheme to agency discretion); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2444 (2014) (applying the major questions exception and rejecting EPA's interpretation because it "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization") (citing *Brown & Williamson*, 529 U.S. at 160); King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (applying the major questions exception when the question at issue was "of deep 'economic and political significance'" (quoting *Utility Air Regulatory Group*, 134 S. Ct. at 2444)).

23. *See*, *e.g.*, *Brown & Williamson*, 529 U.S. at 159–61 (2000) (citing Breyer, *supra* note 8, at 370) ("Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."); *see also Mayburg*, 740 F.2d at 106 (expressing the same reasoning).

24. *MCI*, 512 U.S. at 219.

25. *Id*. at 220.

26. 47 U.S.C. § 203.

27. *Id*.

28. *MCI*, 512 U.S. at 231–32. (The Court undertook the *Chevron* analysis to find that Congress' intent was clear that the Act represents "a scheme of rate regulation in long distance common-carrier communications" and not "a scheme of rate regulation where effective competition does not exist.") *Id*.

foreclosed from making its expansive interpretation of "modify," causing the FCC's interpretation to fail under *Chevron* Step One.[29] The Court reasoned that "the Commission's permissive de-tariffing policy [could] be justified only if it [made] a less radical or fundamental change in the Act's tariff-filing requirement"[30] and that the FCC's regulation was tantamount to "a fundamental revision of the statute."[31] Evidently, the Court was not comfortable with the agency's expansive re-scoping of its own regulatory authority based on the language of the statute. By consequence of this decision, the Court created the major questions doctrine. Since then it has greatly expanded upon the principle.

The Court then reapplied the major questions exception six years later in *FDA v. Brown & Williamson Tobacco Corp*.[32] In *Brown & Williamson*, the FDA attempted to expand the meaning of "restricted devices" under the Federal Food, Drug, and Cosmetic Act ("FDCA") to encompass tobacco products.[33] Quoting *Chevron*, the Court echoed its longstanding recognition that deference was warranted where "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."[34] Essentially, the Court said that agencies, and not courts, are best equipped to assess and make policy choices, the principle for which *Chevron* stands. Nonetheless, the Court reasoned that by looking at the "nature of the question presented," *Chevron* deference should not be applied in "extraordinary cases."[35] Extraordinary cases are those in which an agency purports to interpret a statutory provision of "economic and political magnitude."[36] While the Court noted that *Chevron* is premised on the principle that Congress implicitly delegates interpretive authority to agencies to "fill in the statutory gaps,"[37] in "extraordinary cases" the Court will not presume that Congress intended such a delegation.[38] Because the FDA was attempting to regulate the vast tobacco industry through the expansion of the term "restricted devices," *Brown & Williamson* represented an extraordinary case, and the Court concluded under *Chevron* Step One that Congress had "directly spoken to the

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29. *Id*. at 228 (The Court found "not the slightest doubt" regarding Congress' intended meaning of the Act.).

30. *Id*. at 229.

31. *Id*. at 231–32.

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

33. *Brown & Williamson*, 529 U.S. at 129, 146; *see also* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,400, 44,403–07 (Aug. 28, 1996) (discussion of FDA's purported legal authority for the rule).

34. 529 U.S. at 132 (quoting *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 866 (1984)). Scalia also stated that deference was appropriate due to the "agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated." *Id*. (citing Rust v. Sullivan, 500 U.S. 173, 187 (1991)).

35. *Id*. at 159.

36. *Id*. at 133.

37. *Id*. at 159.

38. *Id*. (citing Breyer, *supra* note 8, at 370).

issue and precluded the FDA from regulating tobacco products."[39] Thus, the Court again applied the major questions exception and did not presume that Congress had delegated to FDA the authority to regulate the entire tobacco industry through the FDCA.

2. Death: *Massachusetts v. EPA* and *City of Arlington*

Seven years after *Brown & Williamson*, the Court acknowledged the major questions doctrine once more in *Massachusetts v. EPA*.[40] However, this time the Court executed an about face. In *Massachusetts v. EPA*, the EPA, under the George W. Bush Administration, had denied a rulemaking petition to regulate greenhouse gases from new motor vehicles on the basis that greenhouse gases were not "air pollutants" within the meaning of the Clean Air Act ("CAA").[41] Invoking *Brown & Williamson* as a basis for denying the rulemaking petition, the EPA argued that using a broadly worded statute to regulate greenhouse gases would have "greater economic and political implications than FDA's attempt to regulate tobacco,"[42] thereby constituting an extraordinary case. Nevertheless, the Court held that the CAA *did* authorize the EPA to regulate greenhouse gases from new motor vehicles and that the agency's "reliance on *Brown & Williamson* . . . [was] misplaced."[43] Given EPA's authority to protect human health and the environment, the Court reminded EPA of its statutory obligation under the CAA to regulate carbon dioxide upon the finding that it is an "air pollutant" that may "endanger public health and welfare."[44] By opting *not* to apply the major questions exception in this case, and by failing to provide a clear rationale for doing so, the Court injected tremendous confusion about when the exception would be applied, and if the exception even survived this case.

Then, in 2013, the Court issued a ruling in *City of Arlington v. FCC*, which seemed to be the final nail in the major questions doctrine's coffin.[45] In that case, the Court put to rest the idea that there are "two distinct classes of agency interpretations."[46] Justice Scalia, writing for the five-justice majority—including Justices Thomas, Ginsburg, Sotomayor, and Kagan—said there was not a distinct class of "big, important ones" that define the agency's "jurisdiction'" nor a class of "humdrum, run-of-the-mill stuff" that "simply [applies the] jurisdiction the agency plainly has."[47] Justice Scalia went on to describe the distinction as a mere

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39. *Id*. at 160–61.
40. Massachusetts v. EPA, 549 U.S. 497 (2007).
41. *Id*. at 513.
42. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).
43. *Massachusetts*, 549 U.S. at 530.
44. 42 U.S.C. § 7521(a)(1).
45. City of Arlington v. FCC, 133 S.Ct. 1863 (2013).
46. *Id.* at 1868.
47. *Id*.

"mirage."[48] Justice Breyer concurred in the judgment taking specific aim at Justice Scalia's dismissal of the distinction between interstitial matters and major questions. While the Court in this case opted not to address the major questions doctrine directly, Justice Scalia's opinion further supported the Court's prior decision in *Massachusetts v. EPA*, that the size of a rule's impact does not bear on an agency's authority to regulate.

3. Resurrection: *Utility Air Regulatory Group* and *Burwell*

The very next year, the Court resurrected the major questions doctrine in *Utility Air Regulatory Group v. EPA*. To fix a problem arising with the dramatic increase in the number of stationary sources subject to the CAA's licensing requirements, EPA amended some of the licensing program's explicit requirements so that the program only covered certain kinds of stationary sources.[49] The Court reasoned that EPA's interpretation of the Act was unreasonable under *Chevron* Step Two because "it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[50] Moreover, the Court cited *Brown & Williamson* and stated that "[t]he power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text."[51] Despite rulings in *Massachusetts v. EPA* and *City of Arlington*, which dispelled of the distinction between major questions and those that are non-transformative and of insufficient economic and political significance, the Court in *Utility Air Regulatory Group* drove a stake back between the two classes of questions.

Then, in *King v. Burwell*, a 2015 case, the Court was presented with the question of whether the Internal Revenue Service ("IRS") regulation interpreting a provision of the Patient Protection and Affordable Care Act ("ACA") was reasonable under *Chevron* Step Two.[52] The ACA authorizes tax credits for certain health insurance plans "enrolled in through an Exchange established by the State under [section] 1311 of the [ACA]."[53] Supported by contextual signals, the IRS issued a regulation, which interpreted § 36B in such a manner as to allow tax credits for plans purchased on either state- or federally-created exchanges.[54]

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48. *Id*.

49. Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2436–38 (2014).

50. *Id.* at 2444. EPA conceded that its own interpretation would transform the CAA into a statute that would be "unrecognizable to the Congress that designed it" validated the Court in its decision. *Id*. at 2438.

51. *Id*. at 2444.

52. King v. Burwell, 135 S. Ct. 2480, 2488 (2015).

53. 26 U.S.C. § 36B(2)(A) (2016); *id*. § 36B(c)(2)(A)(i).

54. *Burwell*, 135 S. Ct. at 2487; Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (codified as amended at 26 C.F.R. pts. 1 & 602).

While the lower courts undertook *Chevron* analysis to determine whether the IRS's interpretation of the ACA was reasonable, the Court, citing *Brown & Williamson*, reasoned that this case was "extraordinary"[55] and possessed "a question of deep 'economic and political significance.'"[56] The Court reasoned that the "tax credits [were] among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people."[57] Therefore, the Court concluded, the agency's interpretation should not be analyzed through the traditional *Chevron* framework.[58] Rather, the Court interpreted the relevant provision of the ACA itself.[59] It reached the same conclusion as the IRS—that the provision was ambiguous and that the purpose of § 36B is to allow tax credits for plans purchased on either state- or federally-created exchanges. However, the Court reached this conclusion without affording any deference to the agency.[60] Treating the question's economic and political significance as an antecedent inquiry, the Court reasoned that *Chevron* should not apply because the ACA is a statute that deals with healthcare and health policy and the IRS is a tax agency that has "no expertise in crafting health insurance policy of this sort."[61] Additionally, the Court gave no credence to the fact that the IRS's interpretation was taken deliberately from the Department of Health and Human Services, an agency that does possess healthcare policy expertise.[62]

The issue of whether the major questions exception has become an accepted legal doctrine or merely represents "episodes of vaguely equitable intervention" where the Court detects agency waywardness[63] is an important one. The exception's continued existence creates profound consequences that affect the intentionally designed allocation of constitutional powers enumerated in the Constitution and impacts the way the American administrative apparatus operates.

C. *WEST VIRGINIA V. EPA*

The D.C. Circuit now faces the decision of whether to apply the major questions doctrine exception to *Chevron* deference in *West Virginia v. EPA*. In response to what it deems to be "the Nation's most important and urgent environmental challenge"—global climate change—the EPA issued the Clean Power Plan ("the CPP" or "the Plan" or "the Rule"), which sought to "secure

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55. *Id.* at 2488–89 (quoting FDA.v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).
56. *Id.* at 2489 (quoting Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2444 (2014)).
57. *Id*.
58. *Id*. at 2483.
59. *Id*. 2489.
60. *Id*. at 2492–96.
61. *Id*. at 2489.
62. *See* Health Insurance Premium Tax Credit, 77 Fed. Reg. at 30,378 (May 23, 2012) (to be codified at 26 C.F.R. pts. 1 & 602); 26 C.F.R. § 1.36B–1(k) (2016).
63. Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2192 (2016).

critically important reductions in carbon dioxide ("CO_2") emissions from the largest emitters in the United States—fossil fuel-fired power plants."[64] The CPP was promulgated pursuant to Section 111(d) of the CAA, which EPA believed provided it with well-established authority "to abate threats to public health and welfare by limiting the amount of air pollution that power plants pump into the atmosphere."[65] However, the CPP has been challenged by nearly two dozen states, electric utilities, coal mining companies, and the U.S. Chamber of Commerce.[66] After hearing oral arguments in September 2016, an *en banc* D.C. Circuit has taken the case under review.[67] Although the D.C. Circuit has issued an order to hold the case in abeyance pending the Trump Administration's review of the Rule, the important separation of powers issues raised by the potential application of the major questions doctrine remains an important issue worthy of analysis.[68]

The EPA believed that its interpretation of CAA section 111(d) should receive *Chevron* deference because it merely sought to interpret a provision of the CAA which Congress had entrusted it to administer.[69] The joint petitioners did not agree. They argued that EPA's interpretation should not get deference under a *Chevron* analysis because it lacked a clear statement from Congress that would permit such a "transformative rule[]."[70] Petitioners further contested that EPA's aggressive transformation of the power sector through decarbonization of electric generation in favor of clean energy constituted a decision of "vast 'economic and political significance.'"[71] And finally, they argued that the Plan "works an 'enormous and transformative expansion' of EPA's legal authority."[72]

The D.C. Circuit is now faced with the decision to either take a step towards further solidifying the exception in legal doctrine or affirming the exception as a mere discretionary device for courts to use as a check on agencies as required. As argued below, it is imperative that the court undertakes normal *Chevron* analysis.

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64. Respondent EPA's Opposition to Motions to Stay Final Rule at 1, West Virginia et al. v. EPA, No. 15-1363 (D.C. Cir. Dec. 3, 2015) [hereinafter EPA Br.].

65. *Id*.

66. *See* Reply Brief of Petitioners on Core Legal Issues, West Virginia, et al. v. EPA, No. 15-1363 (D.C. Cir. Apr. 15, 2016) [hereinafter Pet. Reply Br.].

67. *See* Oral Argument in West Virginia v. EPA, Docket No. 15-1363 (D.C. Cir. Sept. 27, 2016).

68. Order Granting Motion to Hold Cases in Abeyance, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Apr. 28, 2017). *See also* Lisa Heinzerling, *The Supreme Court's Clean-Power Power Grab*, 28 GEO. ENVTL. L. REV. 425, 426 (2016) (discussing the Supreme Court stay of the Clean Power Plan Rule prior to the D.C. Circuit issuing a final decision).

69. EPA Br., *supra* note 63, at 40–41.

70. Pet. Reply Br., *supra* note 65, at 5.

71. *Id*. at 5 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

72. *Id*. at 7 (quoting Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2444 (2014)). Additionally, Professor Laurence Tribe posits that the Plan is not an interstitial rulemaking, but rather, a "historic" "transformation" of the electric utility industry. Intervenor Brief by Peabody Energy, et al., Supporting Petitioners at 17–18, State of West Virginia, et al. v. EPA, No. 15-1363 (D.C. Cir. Feb. 23, 2016).

If not, the court will undermine well-established principles regarding the separation of powers.

II. THE MAJOR QUESTIONS DOCTRINE IMPEDES THE EXECUTIVE'S ABILITY TO CARRY OUT ARTICLE II, SECTION 3, OF THE U.S. CONSTITUTION

The major questions doctrine raises considerable separation of powers concerns by effectively undercutting essential executive functions. The Constitution equips the executive with profound policymaking authority so that it can effectively carry out its executive functions. In the absence of sufficient deference to agencies' expertise in matters of policy, agencies will be given no choice but to temper their policy ambitions or else face debilitating administrative costs. In short, the major questions doctrine impedes the executive in the fulfillment of its constitutional obligations.

First, the major questions exception threatens to impermissibly impede the executive's ability to "take Care that the Laws be faithfully executed"[73] as proscribed by the Constitution. The President's powers under the Vesting Clause[74] and Take Care Clause are intentionally and "unique[ly]" profound.[75] Justice Powell reflected this belief when he stated that the President, who by virtue of his authority "as the chief constitutional officer of the Executive branch," is "entrusted with . . . policy responsibilities of utmost discretion and sensitivity," which "include[s] the enforcement of federal law."[76] Today, that policymaking discretion flows openly to administrative agencies, largely free of judicially proscribed limitations.[77]

The purpose of providing agencies with profound policymaking discretion is to ensure that the executive holds the power necessary to faithfully execute federal laws that Congress enacts. By enacting laws, the legislature creates responsibilities for the executive. The importance of the executive fulfilling these statutorily imposed obligations is reflected by the legal consequences that agencies face for shirking on their obligations under the Administrative Procedure Act ("APA") as well as the Constitution.[78] Therefore, it is imperative that the executive is equipped with the means necessary to administer federal law. It is

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73. U.S. CONST. art. II, § 3.

74. U.S. CONST. art. II, § 1, cl. 1.

75. Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

76. *Id*. at 750.

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

78. 5 U.S.C. § 706(1) (2012) (A court's scope of review under the Administrative Procedure Act ("APA") allows a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed"). *See also* U.S. CONST. art. II, § 3.

vital that the executive be allowed to depend upon the *Chevron* deference doctrine while administering federal law.[79] The Court has consistently favored a deferential approach when dealing with agency interpretations of their respective statutes for good reason—preserving the executive's power as mandated by Article II of the Constitution.

A. THE MAJOR QUESTIONS DOCTRINE WILL IMPEDE AGENCIES' ABILITY TO EFFICIENTLY MAKE POLICY

1. The Major Questions Doctrine Will Require Agencies to Undertake Fragmented Policymaking Approaches

The looming presence of the major questions doctrine, whether it is applied or not, undermines the intended benefits of the *Chevron* deference doctrine. Rather than the *Chevron* deference doctrine functioning to empower federal agencies, which are both politically accountable and experts in policymaking, the major questions doctrine dramatically diminishes that authority by limiting executive discretion. The CPP, for example, fits squarely within the type of agency interpretation that is normally entitled to *Chevron* deference. Congress has entrusted the EPA with the responsibility for administering the CAA.[80] The CAA delegates authority to the EPA to fill statutory gaps in the Act dealing with "the appropriate amount of pollution reduction that should be obtained from long-regulated major pollution sources."[81] And assuming, *arguendo*, that CAA section 111 does not already contain a sufficiently "clear statement"[82] of authorization for EPA's "transformative" rule (as purported by its challengers),[83] section 111(d) is at the least ambiguous. But for the major questions exception, the CPP would otherwise be tailor-made for *Chevron* analysis. But, if the D.C. Circuit applies the

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79. *Chevron*, 467 U.S. at 843. ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.") (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)); *see also* City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013). (The only "question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of the statutory authority.") (emphasis omitted).

80. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 428 (2011) ("It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions.").

81. EPA Br., *supra* note 63, at 43 (arguing that "EPA's authority to regulate the very same pollutant, under the very same provision, from the very same sources" has already been established by the Supreme Court in *American Electric Power*).

82. In *American Electric Power*, the Supreme Court stated that "EPA has authority under 111(d) to determine 'the appropriate amount' of CO_2 regulation and to decide 'how' to limit CO_2 emissions to abate climate change." *American Electric Power*, 564 U.S. at 428. *See also* EPA Br., *supra* note 63, at 44. EPA purports, therefore, that the term "system of emission reduction" flatly encompasses generation-shifting measures. *Id*.

83. EPA contests that it is merely regulating the very largest CO_2 emitters in the country that have long- been regulated by EPA under CAA section 111(d). As such, EPA cannot be claiming any "enormous and transformative expansion of power." EPA Br., *supra* note 63, at 42–43.

major questions doctrine in *West Virginia v. EPA*, *Chevron*'s intended benefits of empowering politically accountable agencies with expertise in policymaking would be vanquished because EPA would not be guaranteed any semblance of deference for its interpretation.

Moreover, applying the major questions doctrine in *West Virginia v. EPA* would have a disorienting effect on EPA and would effectively tie the agency's hands in future rulemakings. The EPA now stands to fulfill its congressional mandate to regulate CO_2 emissions from fossil fuel-fired power plants in one fell swoop through issuance of the CPP. However, an unfavorable ruling on major questions grounds would force EPA to meet that expectation in a different form, one which does not trigger the exception. The logical course of action that EPA would undertake is a fragmented policymaking approach. Such an approach would include segmenting the agency's policy initiatives into a series of smaller, sufficiently non-transformative rules so as to survive major questions challenges in future litigation.

2. A Fragmented Policymaking Approach Weakens the Executive's Ability to Administer Law Through Heightened Administrative Costs

Dissecting a single rule, like the Clean Power Plan, into its component parts would create an insurmountable amount of administrative costs in the form of time and resources, should an agency attempt to promulgate one new rule for each separate part of its original policy initiative. Adding this additional hurdle to the already iterative rulemaking process and the ensuing litigation that accompanies most environmental rules will ensure that the executive will face an uphill battle in fulfilling its responsibility to administer statutes, like the CAA.

As an example of heightened administrative costs, consider the path that the CPP took before it was issued in its final form. Beginning in 2009, EPA determined that greenhouse gas emissions threaten Americans' health and welfare and thus began formulating a plan to limit the amount of CO_2 emissions released into the atmosphere by the nation's largest emitters.[84] The EPA's years-long process included engagement and consultation with states, tribes, stakeholders, and the public, and ultimately amassed an unprecedented 4.3 million public comments.[85] Consider as well the lengthy legal battle that has resulted from the rule's challenge; it has been nearly a decade since EPA has been able to meet this specific national problem with a national solution.[86] Still, the

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84. ENVTL. PROT. AGENCY, EPA FACT SHEET: OVERVIEW OF THE CLEAN POWER PLAN, CUTTING CARBON POLLUTION FROM POWER PLANTS (2016), https://19january2017snapshot.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan_.html.

85. *See* Gabriel Pacyniak, *Making The Most Of Cooperative Federalism: What The Clean Power Plan Has Already Achieved*, 29 GEO. ENVTL. L. REV. 302, 332–34 (2017).

86. *See* EPA Br. *supra* note 63; *see also* Jonathon Adler, *Supreme Court Puts the Brakes on the EPA's Clean Power Plan*, WASH. POST (Feb. 9, 2016) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/0

rule could plausibly face one more challenge in the Supreme Court before it takes legal effect.[87] Thus, the first-ever attempt at instituting national standards to address CO_2 emissions from power plants has been exhaustive and adding yet another hurdle would be unduly burdensome.[88]

Furthermore, the process that the President's Plan has undergone is not uncommon in the environmental context. For instance, in conjunction with the EPA, the U.S. Army Corps of Engineers ("USACE") finally issued its years-in-the-making "Waters of the United States Rule" after more than a decade's worth of requests for rulemaking.[89] In developing the rule, both agencies collectively held over 400 stakeholder meetings and reviewed over one million public comments.[90] It has been nearly a year since both the Sixth and Eleventh Circuits stayed implementation of the rule pending a decision on the rule by the Sixth Circuit.[91]

Similarly, the Bureau of Land Management's ("BLM") final rule to support safe and responsible hydraulic fracturing activities on public and tribal lands[92] took years to complete, only to be struck down in the Federal District Court of Wyoming and subsequently appealed to the Tenth Circuit.[93] As the Waters of the United States Rule and the Fracking Rule both illustrate, environmental rules, irrespective of whether they qualify as extraordinary, are nearly guaranteed to be both time- and resource-intensive endeavors. Thus, promulgating agency rules is already extremely resource-intensive for the executive.

Given the resource intensity of environmental rulemaking, the acceptance of the major questions doctrine as a valid legal doctrine will necessarily require EPA

2/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/?utm_term=.019446026f13.

87. Adler, *supra* note 86. Even if the stay over the CPP is lifted, President Trump has pledged to effectively pull the plug on the Plan. *See* Chelsea Harvey, *Trump has Vowed to Kill the Clean Power Plan. Here's How he Might—and Might Not—Succeed*, WASH. POST (Nov. 11, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/11/11/trump-has-vowed-to-kill-the-clean-power-plan-heres-how-he-might-and-might-not-succeed/?utm_term=.34a29f8fa8a4.

88. *See* EPA FACT SHEET, *supra* note 83.

89. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054-01, (2015); *see also* ENVTL. PROT. AGENCY, EPA FACT SHEET: WHAT THE CLEAN WATER RULE DOES (2016), https://www.epa.gov/cleanwaterrule/what-clean-water-rule-does.

90. EPA FACT SHEET: WHAT THE CLEAN WATER RULE DOES, *supra* note 89.

91. *Clean Water Act's WOTUS Rule: Summary and Updates*, MCGUIREWOODS (Apr. 18, 2016), https://www.mcguirewoods.com/Client-Resources/Alerts/2016/4/Clean-Water-Act-WOTUS-Rule.aspx.

92. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands Rule, 80 Fed. Reg. 16,128-01; 43 C.F.R. § 3160 (2015).

93. Wyoming v. U.S. Dep't of the Interior, 136 F.Supp.3d 1317 (D. Wyo. 2016), appeal docketed, No. 16-8069 (10th Cir. Filed June 29, 2016). The Obama Administration appealed the District Court's ruling to the Tenth Circuit Court of Appeals and had oral arguments slated for late March before the Trump Administration proposed a change in course. On March 15, Department of Justice lawyers filed a brief with the Tenth Circuit informing it that the Department of Interior would formally propose to repeal the rule within 90 days, which was pending review prior to the Trump Administration changing the government's position and filing a motion to no longer seek appeal. Timothy Cama, *Trump to Repeal Obama Fracking Rule*, THE HILL (Mar. 15, 2017), http://thehill.com/policy/energy-environment/324212-trump-to-repeal-obama-fracking-rule.

and other agencies to undertake less ambitious, or in other words "trimmed-down" or "fragmented," policymaking approaches in order to circumvent major questions challenges. Should the D.C. Circuit shoot down the CPP, EPA may opt to re-regulate CO_2 emissions from power plants in other, smaller-scale, ways. For instance, EPA could set individualized emissions performance rates for CO_2 emissions from power plants for each of the nation's three regional grids.[94] Or, EPA may opt to fragment its Plan along the lines of its three Building Blocks, which together make up what EPA has determined to be the nation's best system of emission reduction.[95]

Whichever way EPA chooses to chop up the CPP, costly administrative processes and litigation remain inevitable. But rather than spending years developing only one rule, engaging with stakeholders, considering millions of public comments, and litigating over one comprehensive rule, the government would be forced to bear the brunt of that process several times over with several different, smaller rules. This could result in a backlog of court dockets as litigation challenging administrative rules piles up. The most probable result though is that EPA would be forced to consider which aspects of the CPP it values the most then, based on that decision, promulgate a trimmed down version of the Rule. Although diluting the impact of agency rulemakings may ease concerns about agency waywardness, it would mark an erosion of executive authority in an area that both the legislative branch and the executive branch have long agreed is vital to ensure the faithful execution of federal law.

Thus, an unfavorable ruling in *West Virginia v. EPA* on major questions doctrine grounds would force agencies to undertake fragmented policymaking approaches in the future. In turn, that would create an insurmountable amount of administrative costs in the form of time and resources. Such costs would unduly impede the executive's constitutionally-mandated responsibility of faithfully executing the laws.

B. THE MAJOR QUESTIONS DOCTRINE IMPERMISSIBLY CONTRAVENES CONGRESSIONAL INTENT

Even more concerning than the derogation of the executive's domestic policy-making authority caused by the major questions exception is the judiciary's utter

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94. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015). (Power plants operate through broad, interconnected regional grids that determine the generation and distribution of power. These regional electricity interconnects include the Western interconnection, the Eastern interconnection, and the Electricity Reliability Council of Texas interconnection.).

95. *Id*. (Building Block 1 calls for reducing the carbon intensity of electricity generation by improving the heat rate of existing coal-fired power plants; Building Block 2 calls for substituting increased electricity generation from lower-emitting existing natural gas plants for reduced generation from higher-emitting coal-fired power plants; and Building Block 3 calls for substituting increased electricity generation from new zero-emitting renewable energy sources (like wind and solar) for reduced generation from existing coal-fired power plants.).

disregard for congressional intent. The major questions doctrine exception to *Chevron* deference is deployed for the purpose of more accurately discerning Congress' true intent to delegate. Yet it really makes Congress' intent less discernable than it otherwise would be through use of normal *Chevron* deference.

1. The Major Questions Doctrine Poses the Threat of Directly Violating Congressional Intent

First, the major questions doctrine permits the judiciary to engage in statutory construction with complete disregard for congressional intent. Congressional intent to delegate is a critically important consideration during a court's analysis of an agency's interpretation of a statute because it can help inform the court about the legislature's true purpose and meaning behind the laws it enacts. In *City of Arlington*, Justice Scalia made clear that statutory gaps signal a congressional intent to provide the executive with discretionary policymaking authority.[96] *Chevron* was decided in 1984, and since then, Congress has been legislating against its backdrop and assuming that any gaps, silence, or ambiguities in legislation will be interpreted by the administering agency.[97] Refusing to engage in *Chevron* analysis in major questions cases, and thereby undermining a legal doctrine upon which Congress relies when enacting laws, amounts to an instantaneous betrayal of Congress' intent to have agencies, not courts, resolve statutory ambiguities. The major questions doctrine thus disrupts the decades-long balance of power between the legislative branch in making laws, and the executive branch, through its agencies, in enforcing them and shifts this power to the third branch—the judiciary.

For example, Congress intended for CAA section 111 "to protect public health and welfare through cost-effective measures that sources can implement"[98] through use of the "best system of emissions reduction" and section 111(d) authorized the EPA to regulate pollutants not already covered by other programs, and which are already regulated for new sources, to likewise be regulated for existing sources.[99] EPA's CPP Rule calling for "cost-effective generation-shifting" to reduce CO_2 emissions from existing fossil-fuel-fired power plants would seem to fit reasonably within the vague statutory language of section 111(d).[100] But under a major questions doctrine analysis, EPA's interpretation of section 111(d) may be wholly irrelevant to the D.C. Circuit. Even though Congress was likely to have left the decision about which pollutants should be regulated from which sources to be determined by the expert agency entrusted to

96. City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013).
97. Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 866 (1984).
98. EPA Br., *supra* note 63, at 44.
99. 42 U.S.C. § 7411(a)(1).
100. EPA Br., *supra* note 63, at 44.

administer the CAA—as opposed to specifying its own pollutants and sources—the agency's interpretation would be given no weight under the major questions doctrine should the court disregard *Chevron* as petitioners request.

If the court employs the major questions doctrine, then whether or not the D.C. Circuit ultimately lands on the same statutory interpretation as the agency, like the Supreme Court in *Burwell*, the D.C. Circuit's interpretation would be just that—the court's interpretation.[101] The court would deem the expert agency's interpretation to be meaningless, not because Congress foreclosed the agency from making that interpretation, but based arbitrarily on the transformativeness or economic and political significance of the rule. As a result of such a holding, it is likely that a future court would strike down a rule wholly irrespective of whether that particular rule was precisely how Congress wished, or even expressed, for that law to be administered.

2. The Major Questions Doctrine Disincentivizes Legislative Clarity

Second, should the court, through deployment of the major questions doctrine exception to *Chevron* deference, act as a new, robust check on agency waywardness, Congress would have no incentive to place checks on agencies itself, by use of its legislative authority to do so. Where Congress would otherwise undertake legislative action to speak more clearly on a law in order to dispel statutory confusion, Congress may find no purpose in such an extraneous action when the court ties agencies' hands first. Rather than amending the CAA to inject more clarity where it believes EPA took extra liberties, Congress will pass the buck to the courts. Consequently, courts get further from uncovering Congress' true intent than they otherwise would have, had Congress felt some compulsion to restrict agencies. Thus, courts are robbed of the incidental benefit of clearer legislative language, and therefore congressional intent, when courts, as opposed to Congress, take responsibility for keeping agencies in check.

Should the D.C. Circuit deploy the major questions doctrine and shoot down EPA's interpretation of CAA section 111(d), Congress would not be required to undertake any legislative action irrespective of whether it believed EPA exceeded its statutorily delegated authority under the CAA. But in the absence of the major questions exception, the D.C. Circuit could uphold EPA's interpretation under a

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101. The problem with the court interpreting the CAA is that "[f]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" *Chevron*, 467 U.S. at 866 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)); *see also id.* at 865 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

Chevron analysis. At that point, Congress would be faced with a decision. On the one hand, Congress could adopt, through inaction, EPA's interpretation (upheld by the D.C. Circuit) of section 111(d), thereby signaling its intent that the EPA possesses authority to put forth its Plan under section 111(d) of the CAA. Or, Congress could voice its dissatisfaction with EPA's interpretation by amending the CAA to foreclose EPA from exercising the amount of authority it is attempting to exercise, shoot down the rule down through use of the Congressional Review Act ("CRA"),[102] or cut off agency funding. However, passing new legislation clarifying or expanding the EPA's authority under 111(d) would be a monumental legislative undertaking.

Either way, it is only by applying an analysis under *Chevron* that courts ultimately attempt to determine and gain greater insight into Congress' true intent. Ironically, it is the major questions doctrine exception, which assumes a more accurate insight into Congress' intent, that ultimately undermines its own intended purpose. In order to respect Congress' intent to entrust expert agencies with making reasonable interpretations of statutes they administer, courts should continue to analyze agency interpretations through the normal *Chevron* framework. And, should overly ambitious agencies threaten to exceed their statutorily delegated powers, the legislature, which has adequate constitutional tools at its disposal, should demonstrate responsibility for stopping excessive agency actions in their tracks.

CONCLUSION

In conclusion, it is the D.C. Circuit's constitutional responsibility to analyze EPA's Rule under the normal *Chevron* deference doctrine or else risk disrupting principles of separation of powers. Only by killing the major questions doctrine once and for all will the judiciary allow the executive to have the ability to operate as effectively as originally intended and the legislature may again be encouraged to take action to place checks on the administrative state when it senses agency waywardness. Although the abdication of the administrative state seems troubling to some, it should not and cannot be the judiciary's responsibility to keep it in check.

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102. Amanda Shafer Berman, *Regime Change and Regulatory Resilience*, 28 GEO. ENVTL. L. REV. ONLINE 12 (2017).