The Canary in the *West Virginia* Coal Mine: How the Major Questions Doctrine Led to the Demise Of *Chevron*

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For almost four decades, federal courts ruling on issues of administrative law relied on Chevron v. Natural Resource Defense Council (NRDC).[2] The Chevron Doctrine instructed courts to defer to an agency's reasonable interpretation of ambiguous texts.[3] In 2000, the Supreme Court began sporadically applying a new "Major Questions Doctrine" (MQD) that weakened Chevron's primacy.[4] The MQD, while not named until West Virginia v. EPA (2022), would increasingly undermine basic assumptions of Chevron.[5] Two years after West Virginia, in Loper Bright Enterprise v. Raimondo, the Court found Chevron unworkable, contrary to principles of separation of powers, and incongruent with the Administrative Procedure Act.[6] This article traces the twenty-year leadup to West Virginia and Loper Bright, arguing that, while the MQD began as a rarely used tool for statutory interpretation, the Court's growing hostility toward agency powers led it to expand the MQD into a stringent clear

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[2] Kent Barnett & Christopher J. Walker, *Chevron and Stare Decisis*, 31 George Mason Law Rev. (2024).

[3] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

[4] Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 Va. Law Rev. 1040 (2023) (The "major questions doctrine operates as a clear statement rule that directs courts not to discern the plain meaning of a statute using the normal tools of statutory interpretation, but to require explicit and specific congressional authorization for certain agency policies.").

[5] West Virginia v. EPA, 597 U.S. 697 (2022).

[6] This paper does not discuss the Court's decision in *Loper Bright*, but argues that MQD cases led to the Court's holding that "Congress expects courts to handle technical statutory questions." *see* Loper Bright Enterprises v. Raimondo, 603 U.S. __, 24 (2024).

statement rule.[7] *This shift reshaped principles of separation of powers, eliminating any need for Chevron deference.*

I. Roadmap

This article begins with an introduction to *Chevron* deference, highlighting its respect for separation of powers and its support for the administration of laws meant to protect people and the environment. Then, a historical analysis of MQD cases will highlight the Supreme Court's growing opposition to administrative deference. Afterward, a review of the first three cases of the "Major Questions Quartet" will show how the MQD is underpinned by poorly defined constitutional values.[8] Then, a close reading of the atextual decision in *West Virginia v. EPA* will argue that the MQD encourages judges to draw from their personal beliefs to hold agencies to an ambiguous and arbitrarily applied threshold defined by "economic and political magnitude."[9] Finally, this article will show how the MQD cases turned *Chevron*'s version of separation of powers on its head, rendering the decades old precedent unworkable and unconstitutional.

II. *Chevron* as Law

In 1979, the Environmental Protection Agency (EPA) created a "bubble" rule under the Clean Air Act (CAA), allowing factories in areas that met the National Ambient Air Quality Standards (NAAQS) to treat all pollutant-emitting sources within a plant as though they were inside a single

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[7] John F. Manning, *Clear Statement Rules and the Constitution*, 110 Columbia Law Rev. 399, 401 (2010) (a clear statement rule "insist[s] that Congress express itself clearly when it wishes to adopt a policy that presses a favored constitutional value.").

[8] The term "Major Questions Quartet" comes from Mila Sohoni and refers to *Alabama Ass'n of Realtors v. DHHS, NFIB v. OSHA*, *Biden v. Missouri*, and *West Virginia v. EPA*. *see infra* note 29.

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

"bubble."[10] This meant that emissions could be managed collectively, enabling plants to offset increases from some pollutant-emitting devices with reductions from others, as long as overall emissions remained stable. With the change of presidential administrations in 1981, President Reagan's EPA expanded this rule so that it also applied to factories in areas that did not meet air quality standards, known as "nonattainment" areas.[11] By extending the bubble rule to include plants in these more polluted regions, the EPA allowed factories to receive permits for new or modified equipment even if they increased emissions, provided that the net emissions from the entire plant did not increase.[12]

Arguing that the new policy ran contrary to the CAA's goals of protecting "human health and the environment from emissions that pollute ambient, or outdoor, air," the Natural Resources Defense Council (NRDC) filed a petition for review in the U.S. Court of Appeals for the District of Columbia.[13] Writing for a unanimous panel, then-Judge Ginsburg noted that the *raison d'être* of the nonattainment provisions of the CAA is to ensure reductions in air pollution such that "attainment can be achieved… no later than five years from the date the area was designated nonattainment."[14] Since the bubble rule could only guarantee the maintenance of the status quo, the panel ruled that the EPA's promulgation was an inappropriate interpretation of the statute.[15] The Chevron Corporation

[10] Saideman Ellen, *An Overview of the Bubble Concept*, 8 Columbia J. Environ. Law (1982).
[11] 46 Fed. Reg. 16,280, 16,281 (1981).
[12] For more detail on the bubble rule, *see* Jack L Landau, *Economic Dream or Environmental Nightmare? The Legality of the "Bubble Concept" in Air and Water Pollution Control*, 8 Environ. Aff. (1980).
[13] 42 U.S.C. § 7401; Natural Resources Defense Council, v. Gorsuch, 685 F.2d 718 (1982).
[14] Natural Resources Defense Council, v. Gorsuch, *supra* note 13.
[15] *Id.*; 42 U.S.C. § 7502 (a)(2); 42 U.S.C. § 7502 (c)(2).

intervened and petitioned the Supreme Court to grant *certiorari*.[16]

Writing for a unanimous Supreme Court against NRDC, Justice Stevens determined that, because Congress did not articulate a clear meaning of the term "stationary source," and because the EPA's bubble rule was not "arbitrary, capricious, or manifestly contrary to the statute," the Court should defer to the reasoned rulemaking of the EPA.[17] Justice Stevens' opinion established a two-prong test that would become known as the *Chevron* Doctrine. Under this doctrine, when a court reviews an agency's actions, it must determine at *Chevron* Step One whether Congress explicitly addressed the issue in question. If Congress addressed the issue, the court does not defer to the agency and applies the statute as written.[18] If Congress did not directly address the issue, the court proceeds to determine at *Chevron* Step Two whether the agency's interpretation of the statute is "reasonable" and "permissible."[19] If the agency's interpretation meets this standard, the court defers to the agency's interpretation.[20]

Following its publication, this two-pronged test became the hallmark of Administrative Law. Under *Chevron*, federal courts were instructed to recognize that Congress, which generally lacks the expertise to address complex issues with finely detailed policy prescriptions, reasonably delegates rulemaking authority to agencies.[21] This assumption is supported by Congress's role as a generalist body that enacts broad statutes outlining overarching policy goals (e.g.,

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[16] Chevron U.S.A., Inc. v. NRDC, *supra* note 3.
[17] *Id.* at 844.
[18] *Id.* at 842.
[19] *Id.* at 844.
[20] *Id.* at 844; Catherine M Sharkey, *Cutting in on the Chevron Two-Step*, 86 Fordham Law Rev. (2018).
[21] Alli Orr Larsen, *Becoming a Doctrine*, 76 Fla. Law Rev., 27 (2024); Catawba County, N.C. v. E.P.A., 571 F.3d 20 (2009) (explaining that "ambiguity… suggests a congressional intent to leave unanswered questions to an agency's discretion and expertise.").

promoting vaccinations or preventing pollution), while agencies are tasked with implementing these goals by drawing from their "experience with how a complex regulatory regime functions and with what is needed to make it effective."[22] In turn, these agencies, through painstaking administrative procedures, utilize their subject-matter competence to fill in the policy gaps left by Congress.[23]

The *Chevron* doctrine required judges who, like Congress, often lack industry-specific expertise of complex issues, to defer to agencies' reasonable construction of a statute.[24] Some opponents of *Chevron* argue that it violates basic separation of powers principles because it could appear that the Executive Branch usurps both the Legislative Branch's lawmaking authority and the Judicial Branch's Article III charge to interpret statutes.[25] Such a reading of *Chevron* is wrong. *Chevron* upholds the Constitution's separation of powers by affirming Congress' policymaking authority, including its broad discretion to delegate rulemaking to administrative agencies within the Executive Branch that are charged with enforcing the law.[26] Meanwhile, the Judiciary

[22] Loper Bright Enterprises v. Raimondo, *supra* note 6 at 10 (Kagan, J., dissenting).

[23] Rybachek v. U.S.E.P.A, 904 F.2d 1276 (1990) (emphasizing the importance of deferring to agency expertise when there are conflicting readings of a statute); Sierra Club, Inc. v. Bostick, 787 F.3d 1043 (2015) (underscoring the importance to defer when the technical expertise of an agency leads it to a conclusion "substantia[lly] bas[ed] in fact.").

[24] Transcript of Oral Argument, Loper Bright Enters. v. Raimondo, 35–37 (2024).

[25] Nathan Alexander Sales & Jonathan H Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 Univ. Ill. Law Rev. (2009); Abigail Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Non-Interference (Or Why Massachusetts v. EPA Got It Wrong)*, 60 Adm. Law Rev. (2008); Randolph J May & Andrew K Magloughlin, *NFIB v. OSHA: A Unified Separation of Powers Doctrine and Chevron's No Show*, 74 S. C. Law Rev. (2022).

[26] Elena Kagan, *Presidential Administration*, 114 Harv. Law Rev. 2376 (2001) (asserting that "Presidential supervision of administration could

remains crucial in this dance of powers by ensuring that agency rulings remain within the confines of the relevant policy set forth by Congress.[27]

Notwithstanding *Chevron*'s warning to the Legislative Branch that statutory ambiguity will be resolved "within the bounds of permissible interpretations" and its importance in maintaining Americans' health and safety, the conservative Justices of the Supreme Court have deemed it unworkable and in need of replacement.[28] To understand how the Supreme Court arrived at this juncture, it is imperative to interrogate how the MQD was the canary in the coal mine, signaling the death of *Chevron*.

III. The Fall of *Chevron*

Some scholars point to the "Major Questions Quartet" as the primary departure from *Chevron* and adoption of the MQD.[29] However, a closer look at the Supreme Court's administrative jurisprudence reveals that the seeds for overturning *Chevron* were sown by the "elephants in mouseholes" rule initiated in *FDA v. Brown and Williamson Tobacco Corp* and crystallized in *Whitman v. American*

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operate to, contrary to much opinion, to trigger, not just react to, agency action[.]"); E. Donald Elliot, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 Villanova Environ. Law J. (2005) (explaining that the Executive, through agencies, is capable of making pertinent and effective policy as on-the-ground facts change.).

[27] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke Law J. 511 (1989) (explaining that when conducting administrative review, courts only need to determine whether "the agency has acted within the scope of its discretion."); Peter M. Shane, *Chevron Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 Fordham Rev (2014) (showing that *Chevron* requires courts to differentiate lawful from unlawful administrative acts that go beyond any plausible intent of Congress.).

[28] Scalia, *supra* note 27 at 517; Loper Bright Enterprises v. Raimondo, *supra* note 6 (Kagan, J., dissenting).

[29] Mila Sohoni, *The Major Questions Quartet*, 136 Harv. Law Rev. (2022).

Trucking Association. This "elephants in mouseholes" rule existed within the *Chevron* framework. It instructed courts to consider on rare occasions—along with the ordinary meaning, context, and structure of the statute—extratextual ideas of separation of powers and nondelegation.[30] The newly anointed ultra-conservative Supreme Court, however, expanded this interpretation, asserting that any regulation approaching a politically motivated threshold of "too big" is an unconstitutional expression of regulatory power.[31] Thus began the end of *Chevron*.

III.A *The Canary's First Warning*

In the 2000 case, *FDA v. Brown*, the Court addressed the Food and Drug Administration (FDA)'s anti-smoking regulations. These rules were promulgated under the Food, Drug, and Cosmetic Act and aimed to curtail the sale, distribution, and advertisement of tobacco products.[32] While acknowledging the serious public health issue of smoking-related illnesses in the United States, the Court denied the FDA the authority to regulate tobacco products. The Court's holding was partly based on the FDA's duty to ensure the safety and efficacy of the products it regulates, prohibiting the sale of those that would "present a potential unreasonable risk of illness or injury."[33] Justice O'Connor reasoned that because tobacco could never be used safely, the FDA would be statutorily mandated to prevent the sale of tobacco entirely.[34]

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[30] Deacon and Litman, *supra* note 4, at 1040.

[31] Chad Squitieri, *Who Determines Majorness?*, 44 Harv. J. Law Public Policy, 495–497 (2021) (discussing how the MQD allows courts to "exercise its own political discretion to determine whether a policy question is major," thus inviting the court into the political arena.); Deacon and Litman, *supra* note 4 at 1050–1052 (describing how the MQD encourages the courts to consider controversy generated by special interest groups to justify invalidating detested policies.).

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

[33] 21 U.S. Code § 360f.

[34] FDA v. Brown & Williamson Tobacco Corp., *supra* note 32 at 142.

However, she found that Congress explicitly forbade a tobacco ban, thus failing the Agency's claim at Step One of *Chevron*.[35]

Justice O'Connor emphasized that Congress had devised a distinct regulatory scheme concerning the sale of tobacco products, "focus[ing] on labeling and advertising," rather than restrictions.[36] Importantly for the Justice, this scheme did not mention the FDA, but delegated enforcement responsibility to the Federal Trade Commission and Federal Communications Commission.[37] Justice O'Connor figured that by providing precise regulatory instructions to specific agencies not including the FDA, Congress intended to preclude the agency from regulating tobacco.[38]

FDA v. Brown illustrates a growing reluctance by the Court to infer implicit delegations of power in cases involving "decisions of such economic and political magnitude" that could otherwise be reasonably justified by a plain reading of statutory text.[39] Justice O'Connor argued that in such cases, courts should be skeptical as to whether Congress delegated broad authority through ambiguous text. While it might be good policy to approach major agency rulings that Congress has not explicitly addressed with a degree of caution, such a legal analysis lacks a clear constitutional or legislative basis. Indeed, Justice O'Connor suggested that her decision was guided by a degree of "common sense," which is hardly the rigorous legal standard required for interpreting complex statutory or constitutional questions.[40] This "common sense" approach further undermines *Chevron*'s view that Congress

[35] *Id.* at 148;156.
[36] *Id.* at 155–156.
[37] *Id.* at 149.
[38] *Id.* at 130. It is important to note that the majority did not claim that the plain text of the statute precluded FDA, rather their reasoning rested in a purposivist reading of extratextual sources.
[39] *Id.* at 160.
[40] *Id.* at 133; Manning, *supra* note 7 at 410.

regularly makes implicit, and often major, delegations of authority through statutory silence.[41]

If one were to compare Justice O'Connor's "common sense" understanding of congressional intent with actual statutory directives, one would find that the Congressional Review Act (CRA) authorizes Congress to nullify agency rulemakings of which it disapproves.[42] Indeed, the CRA explicitly details legislative procedures for reviewing "major" rules.[43] Given this, the absence of congressional disapproval for a rule issued under ambiguous statutory language could reasonably signal legislative approval—or at least acquiescence—that courts should respect.

One year after *FDA v. Brown*, the Supreme Court continued to limit agency rulemaking by building on its burgeoning clear statement rule in *American Trucking*. That case considered the constitutionality of the EPA's authority under §109(b)(1) of the Clean Air Act (CAA) to set National Ambient Air Quality Standards (NAAQS) without considering the financial impacts of implementing such standards.[44] Textually, §109(b)(1) gives EPA the authority to set NAAQS, "the attainment and maintenance of which… are requisite to protect the public health."[45] Justice Scalia determined that the omission of economic considerations in §109(b)(1), and the inclusion of it in many other sections of the CAA, unambiguously foreclosed the EPA's ability to consider any factors beyond public health.[46] Justice Scalia determined that, unless Congress explicitly stated otherwise, it is implausible that Congress would demand, or even allow, the EPA to consider costs that could "cancel[] the conclusions drawn from direct health effects."[47] Such a reading of the statute would

[41] Chevron U.S.A., Inc. v. NRDC, *supra* note 3 at 843–844.
[42] 5 U.S.C. § 801.
[43] *Id.* at (A)(ii).
[44] Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001).
[45] 42 U.S.C. § 7409 (b)(1).
[46] Whitman v. American Trucking Associations, Inc., *supra* note 44 at 467.
[47] *Id.* at 469.

fundamentally alter the operating framework of the CAA. If Congress meant to require the consideration of costs, it knows how to write the words "cost-benefit analysis."[48] As Justice Scalia concisely put it, "Congress… does not, one might say, hide elephants in mouseholes."[49]

To understand *American Trucking*'s relationship to the MQD, it must be read as a limitation of administrative powers. Although the EPA was not asserting that it could consider economic factors, the Court concluded that the agency could not do so even if it wanted. Had Congress intended the EPA to have such authority, it would have explicitly said so as it did elsewhere in the CAA. In other words, the EPA's authority to set NAAQS is not so broad that it can read the CAA in a way that would fundamentally alter the regulatory framework established by Congress. When harmonizing this principle with *FDA v. Brown*, it can be argued that, when administrative agencies issue rulings of significant political and economic magnitude to which Congress did not speak, those rulings inherently disrupt the intended regulatory framework. Simply put, any "major" agency rulemaking that can be read, textually or otherwise, as contradicting congressional intent would fail at *Chevron* Step One.

American Trucking and *FDA v. Brown* operate within *Chevron* Step One analysis.[50] These rulings required courts to consider the breadth of the rulemaking in light of the agency's charge from Congress.[51] If the agency's rulemaking is broader than Congress intended or spoke to, then it fails at Step One. Importantly, neither of the above cases address what would happen if the text of the statute is ambiguous and an agency

[48] Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 232 (2009) (Stevens, J., dissenting); American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 510 (1981) (stating that "when Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.").

[49] Whitman v. American Trucking Associations, Inc., *supra* note 44 at 468.

[50] Deacon and Litman, *supra* note 4 at 1021.

[51] FDA v. Brown & Williamson Tobacco Corp., *supra* note 32 at 159.

rulemaking is not explicitly foreclosed by a direct congressional charge. Nor do these cases discuss what would happen if Congress intentionally wrote ambiguously to allow the agency to determine the best course of action within the prescribed regulatory framework and its stated goals. As demonstrated below, the Court answers by shuffling the MQD between *Chevron* Step One, Step Two, and a new Step Zero, as well as by expanding the indicia for its application.[52] This inconsistent application allowed the Court to scrutinize not just *what*, but *how* federal agencies regulate.

III.B *The Canary's Coughing Fit*

Moving on to a set of cases that further lay the foundation for overturning *Chevron*, Judicial antipathy towards agency powers becomes more pronounced as the Supreme Court narrows the Administrative State's regulatory authority. These cases show how the Court inconsistently invoked the MQD to circumvent otherwise precedent-bound agency deference.[53] These cases demonstrate how the MQD increasingly became a "get-out-of-deference" free card, destabilizing the traditional *Chevron* framework and eventually necessitating its elimination.[54]

In *Gonzales v. Oregon*, the Supreme Court ruled against a U.S. Attorney General's 2001 Interpretive Rule.[55] This rule claimed that under the Controlled Substances Act, the Attorney General (AG) could revoke the licenses of medical professionals who prescribed or dispensed controlled substances for physician-assisted suicide, even in states where such practices were legal.[56] The Court determined that while the AG had the authority to add, remove, or reschedule

[52] Squitieri, *supra* note 31 at 475.
[53] Cass R Sunstein, *Chevron Step Zero*, Public Law Leg. Theory Work. Pap. (2005).
[54] West Virginia v. EPA, *supra* note 5 at 28. (Kagan, J., dissenting).
[55] Gonzales v. Oregon, 546 U.S. 243 (2006).
[56] *Id.* at 249–250.

substances and ensure compliance, he did not have the authority to unilaterally decide the legality of medical practices.[57]

Part of the analysis supporting this conclusion derived from Congress' delegation of medical policy decisions to the Secretary of the Department of Health and Human Services (DHHS), rather than the AG.[58] The Court suggested that if the AG's proposition were accepted, he would have the authority to decide "whether a physician who administers any controversial treatment could be" punished.[59] This would make the AG, rather than the Secretary of DHHS, the ultimate arbiter of permitted medical practices — a delegation too "broad and unusual" to be made through the implicit language of the Controlled Substances Act.[60] Finally, the Court noted in *dicta* that the controversial nature of physician-assisted suicide made the AG's claim all the more suspect.[61]

Gonzales exhibits two new factors materializing within the MQD's framework. First, the mismatch between an agency's actions and the powers delegated to it by Congress; and second, the controversial nature of a regulation.

The *Gonzalez* Court argued that the AG could not regulate medical *uses* of controlled substances, since his authority was limited to regulating *abuses* of controlled substances.[62] On its face, this premise does not seem to disregard *Chevron*'s reverence for an agency's particular expertise. Indeed, *Gonzales* recognized that *Chevron* is predicated on the assumption that agencies typically make decisions within their delegated domain by relying on experts in the relevant field.[63] When an agency attempts to regulate an area in which it traditionally lacks subject-matter expertise, it

[57] *Id.* at 262.
[58] *Id.* at 274.
[59] *Id.* at 268.
[60] *Id.* at 267–268.
[61] *Id.* at 267.
[62] *Id.* at 270.
[63] *Id.* at 267.

becomes quite doubtful that Congress would delegate that authority through ambiguous text.[64] However, subsequent rulings applied this principle too expansively. While *Gonzales* showed respect for DHHS's expertise in medical care policy, recent cases — particularly *Alabama Ass'n of Realtors v. CDC* and *NFIB v. OSHA* — exemplify how the "agency mismatch" principle has become a tool to denigrate the expertise of agencies attempting to address multifaceted issues like climate change and COVID-19.[65]

The Court's recognition of an "earnest and profound debate" over physician-assisted suicide in the country was insufficient on its own to find the AG's actions unconstitutional.[66] Rather, the presence of moral controversy provided reason to doubt that Congress had, through such vague language, authorized the AG to unilaterally prohibit physician-assisted suicide.[67] As explained in Part IV.C, these words, while not binding, foreshadow how some Justices have come to undermine *Chevron* deference and the Administrative State by pointing to the presence of controversy, whether it be large or small, real or imagined.[68]

In *Utility Air Regulatory Group v. EPA*, the Court considered the legality of the EPA's decision to include greenhouse gasses under certain permitting provisions of the CAA, particularly the "Prevention of Significant Deterioration" (PSD).[69] The PSD provisions require "major emitting facilities"

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[64] *Id.* at 268.
[65] Thomas O McGarity, *The Major Questions Wrecking Ball*, 41 Va. Environ. Law Rev. 1, 49–50 (2023).
[66] Gonzales v. Oregon, *supra* note 55 at 249.
[67] Brianne J Gorod, Brian R Frazelle & J Alex Rowell, *Major Questions: An Extraordinary Doctrine for Extraordinary Cases*, 58 Wake For. Law Rev. 599, 619.
[68] Deacon and Litman, *supra* note 4 at 1063.
[69] Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014). The other provision at the heart of the case, Title V, shares many of the same definitions and effects as the PSD provisions, so for clarity's sake, only the PSD provisions will be discussed.

in "areas designated attainment or unclassifiable" to comply with emissions limitations and best practices.[70] The CAA defines "major emitting facilities" as stationary sources with the potential to emit 250 tons per year (tpy) of any air pollutant.[71] Recognizing that greenhouse gasses are emitted at much higher rates than other pollutants, the EPA chose to enforce its interpretation only against facilities that emit at least 100,000 tpy of CO2e.[72]

The Court held that, even if the EPA did not change the numerical definition of "major emitting facilities," the CAA would still preclude the EPA from including greenhouse gasses in the PSD provision. Echoing its reasoning in *Brown*, the Court ruled that the EPA is statutorily required to apply the 250 tpy threshold when establishing rules under the PSD provisions. The EPA conceded that this threshold would be inappropriate for greenhouse gasses, as it would mandate the regulation of millions of smaller sources. As in *Brown*, such an outcome, though plausibly supported by the statute's plain text, would be incompatible with the regulatory framework established by Congress.

The Court reinforced this conclusion by requiring "clear congressional authorization" for agencies claiming "enormous and transformative" expansions of regulatory power.[73] This requirement reflects the "elephants in mouseholes" rule articulated in *American Trucking*. The Court reasoned that the EPA's attempt to include greenhouse gasses in the PSD framework, which traditionally regulated only a few major polluters, would fundamentally alter the statute's scope. While the EPA enjoys authority to regulate greenhouse gasses

[70] *Id.* at 308.
[71] 42 U.S.C. § 7479(1).
[72] Utility Air Regulatory Group v. EPA, *supra* note 69 at 309–310. CO2e, or carbon dioxide equivalent, is a standard unit used to compare the emissions of different GHGs to CO2 based on their global warming potential.
[73] *Id.* at 324.

under the CAA, that authority was deemed insufficiently broad to justify such an extensive expansion of the PSD provisions.[74]

The *Utility Air* framework extends the basic rationale of *FDA v. Brown* and *American Trucking*. Its holding being that, without clear congressional authorization, agency rulings of political and economic significance disrupt the intended regulatory scheme. The primary issue begins when the Court states that it "expect[s] Congress to speak clearly if it wishes to assign agency decisions of vast economic and political significance."[75] Synthesizing this principle with *American Trucking*, it follows that agencies cannot "discover" an unheralded power to regulate conferred through the "ancillary provisions" of statutes; they must find this power in explicit text.[76] Here, *Utility Air* establishes a new *Chevron* carve-out whereby "ambiguous language cannot be invoked to allow an agency to exercise its authority in a sufficiently transformative way."[77] There are three major issues with this seemingly innocuous transformation: (1) how significant a rulemaking must be to require a clear statement from Congress; (2) who determines when this threshold has been reached; and (3) what constitutional compulsion supports the Court's clear statement rule for "major regulations."

As the next section will show, the Court answers this line of inquiry by arrogating to itself the power to "selectively

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[74] Massachusetts v EPA, 549 U.S. 497 (2007) (granting EPA authority to regulate GHGs.); Cass R Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Adm. Law Rev. 475, 491 (2021) (arguing that the rationale in *Utility Air* "could easily have been used to justify the opposite result in *Massachusetts v. EPA*". That argument is beyond the scope of this paper, but it is at least worth pointing out that the *Massachusetts* Court gave EPA the authority to regulate GHGs, but the *Utility Air* Court stripped it of substantial enforcement power as it relates to certain provisions of the CAA.).

[75] Utility Air Regulatory Group v. EPA, *supra* note 69 at 321.

[76] *Id.*; Whitman v. American Trucking Associations, Inc., *supra* note 44 at 458.

[77] Cass R. Sunstein, *Chevron as Law*, 107 Georget. Law Rev. 1613, 1677 (2019).

demand that explicit legislative language be used to delegate the authority to answer those questions that courts determine to be major."[78] The Court's synthesis of the above cases leads it to maximalist conclusions that encourage arbitrary judicial policymaking excused by an ambiguously-defined threshold of "political and economic significance."

III.C *The Canary's Last Gasps*

If the old MQD existed within the *Chevron* framework, the "Major Questions Quartet" exemplifies how the new MQD, enunciated in *Utility Air*, comes to function as a half-baked federalism canon and nondelegation doctrine that undermines basic assumptions of *Chevron*.[79] The Quartet's judicial power-grab further turns the Court into a political actor, whereby questions of "political and economic significance" are not decided by legal reasoning but by a jurist's policy preferences and world view.[80] This power of "void for majorness" amounts to a political veto in which a jurist, for their own political and economic reasons, may determine that a policy is "too grand" to stand on ambiguous language.[81] By applying this doctrine arbitrarily to administrative agencies, the Court disrupts forty years of precedent that informed legislative processes and agency rulemaking, causing a sea-change in Administrative Law and ultimately the demise of *Chevron*.

As mentioned in Part II, *Chevron* put Congress on notice that ambiguous statutory text will be interpreted by the Executive, whose agencies issue rules "within the bounds of permissible interpretation."[82] Under *Chevron*, the boundaries of

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[78] Squitieri, *supra* note 31 at 495.
[79] Cass R. Sunstein, *supra* note 77 at 1669; Sohoni, *supra* note 29; Alison Gocke, *Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 UC Davis Law Rev. 955 (2024).
[80] Squitieri, *supra* note 31 at 496. (describing that by voiding laws on majorness grounds, courts "act similarly to the President, who for idiosyncratically held political reasons may veto a bill…").
[81] *Id.* at 503–509.
[82] Scalia, *supra* note 27 at 516.

permissible interpretation are not set by the majorness of the resulting policy, but by a plain text reading of the statute.[83] This analysis treats statutory ambiguities as delegating authority to agencies, giving them the flexibility to adjust rules as knowledge evolves and challenges change.[84] The Quartet undermines these assumptions that informed Congress' drafting of complex regulatory schemes, skewing outcomes against regulation and disrupting the legislative compromises that often signal broad delegation.[85]

The first three cases of the Quartet considered whether different administrative agencies had the authority to prevent the spread of COVID-19 through novel regulations.[86] In *Alabama Ass'n of Realtors v. DHHS*, the Court held that the Center for Disease Control and Prevention (CDC) did not have the authority to prevent the spread of COVID-19 by imposing a national eviction moratorium.[87] In *National Federation of Independent Business (NFIB) v. Occupational Safety and Health Administration (OSHA)*, the Court held that because COVID-19 did not pose an exclusively *occupational* risk, OSHA's authority to protect workers from dangerous "agents" or "toxins" could not extend to a vaccine mandate.[88] In *Biden v. Missouri*, the Court agreed with the Government's assertion that the Secretary of DHHS could set health and safety conditions, including a COVID-19 vaccine mandate, for facilities receiving funding from Medicare and Medicaid.[89]

Part of the rationale in the cases in which the Government lost relied on a counter-*Chevron* assumption of the

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[83] *Id*.
[84] *Id.* at 517-518.
[85] Sohoni, *supra* note 29 at 286; Squitieri, *supra* note 31 at 505.
[86] Alabama Ass'n of Realtors v. Dept. of Health and Human Services, 594 U.S. ___ (2021); NFIB v. OSHA, 595 U.S. __ (2022); Biden v. Missouri, 595 U.S. __ (2022).
[87] Alabama Ass'n of Realtors v. Dep't of Health and Human Services, *supra* note 86.
[88] NFIB v. OSHA, *supra* note 86.
[89] Biden v. Missouri, *supra* note 86.

purpose of statutory ambiguity. The Court failed to recognize that Congress cannot foresee future problems and uses ambiguous language to ensure flexibility in agency regulations. Instead, it assumed that provisions in decades-old statutes, never previously applied expansively, could not be so applied without a clear statement from Congress.[90] The Court emphasized that neither the CDC nor OSHA had previously used their emergency rulemaking powers to pause evictions or effectuate a vaccine mandate.[91] By contrast, in *Missouri*, the Court noted that the Secretary claimed broader authority than before because the agency "never had to address an infection of this scale and scope."[92]

Although not cited, the only way to reconcile these disparate rationales is with the agency mismatch concept from *Gonzales*. One could argue that the CDC and OSHA had never established such regulations because doing so would touch on matters beyond their subject-matter expertise. DHHS on the other hand, was reasonably expanding upon previous regulations for healthcare facility operations—something undoubtedly within its purview and expertise. This overly broad application of *Gonzales* prevents agencies from adapting regulations as circumstances evolve. It further loads the dice against agencies trying to address multifaceted crises that touch on, but might not be fully encompassed by, their titular responsibilities.[93]

This raises a fundamental question about why federal courts should require a clear statement from Congress to support an agency's claim to regulate issues that involve, but are not fully encompassed by, the agency's core

[90] Alabama Ass'n of Realtors v. Dept. of Health and Human Services, *supra* note 86; NFIB v. OSHA, *supra* note 86.
[91] *Id*.
[92] Biden v. Missouri, *supra* note 86.
[93] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 26 (new ed. 2018).

responsibilities. The Court answers this by detaching the MQD from *Chevron* and inconsistently attaching it to poorly articulated constitutional values of federalism and nondelegation.

III.C.1 Federalist Values

In the CDC case, the Court found that the agency's actions encroached on typically state-regulated landlord-tenant relationships.[94] Instead of applying the federalism canon—which presumes that federal laws do not override state laws without a clear statement from Congress—the Court treated the disruption of state law as an indicator of political significance.[95] By doing so, the Court linked the federalism canon to the MQD, creating a superficial constitutional basis for requiring a clear statement from Congress. By invoking federalist principles rather than applying an already established clear statement rule, the Court justified its limitation of statutory text by associating one doctrine with another.[96] This judicial sleight of hand allows the Court to demand an unusually high level of statutory clarity, one that undermines Congress's authority to delegate regulatory powers to agencies.[97] Moreover, later cases show that federalism does not appear to be the primary justification for a presumption against major administrative powers; rather, it becomes one of a myriad of poorly articulated constitutional values used to justify the strangling of the Administrative State.[98]

III.C.2 Nondelegation Values

The more often-discussed constitutional value connected to the MQD's clear statement rule is that of

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[94] Alabama Ass'n of Realtors v. Dep't of Health and Human Services, *supra* note 86 at 6.
[95] *Id;* Manning, *supra* note 7 at 434.
[96] Sohoni, *supra* note 29 at 313.
[97] John F. Manning, *The Supreme Court, 2013 Term Foreword: The Means of Constitutional Power*, 128 Harv. Law Rev. (2014).
[98] Sohoni, *supra* note 29 at 283.

nondelegation.[99] The nondelegation doctrine derives from the Legislative Vesting Clause of Article I and "bars Congress from transferring its legislative power to another branch of government."[100] On only two occasions, both in 1935, has the Supreme Court applied this doctrine to invalidate a statute.[101] While its pedigree remains weak, the MQD today camouflages the reemergence of a nondelegation doctrine that provides the Court with a framework to decide not just whether Congress *did* delegate certain powers, but whether Congress *could* do so.[102]

In a fashion similar to the Court's justification via association of constitutional values in the CDC case, Justice Gorsuch justified the application of the MQD in the OSHA case by merely associating the MQD with the seldom-invoked nondelegation doctrine.[103] The Justice explained that the nondelegation doctrine precludes Congress from "hand[ing] off all its legislative powers to unelected agency officials," while the MQD prevents agencies from "exploit[ing] some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment."[104] According to Justice Gorsuch, both doctrines "prevent government by bureaucracy supplanting government by the people."[105] Notably, the main difference between these two theories is which branch of government is inappropriately extending its authority. The nondelegation doctrine polices "improper legislative delegations" from Congress while the

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[99] Sunstein, *supra* note 74; Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 Adm. Law Rev. (2014); Gocke, *supra* note 79.
[100] Gundy v. United States, 588 U.S. 128 (2019).
[101] Cass R Sunstein, *Nondelegation Canons*, 67 Univ. Chic. Law Rev., 322 (2000).
[102] *Id.*; Loshin and Nielson, *supra* note 99 at 57; Gocke, *supra* note 79 at 995–997.
[103] NFIB v. OSHA, *supra* note 86, at 5 (Gorsuch, J., concurring).
[104] *Id.*
[105] *Id.* at 6.

MQD polices "abuse[s] of delegated authority" by the Executive.[106]

When considering the purported constitutional compulsions supporting Justice Gorsuch's nondelegation argument, it becomes clear that his framework stands on even shakier constitutional grounds than the federalist principles supporting the outcome in the CDC case. Unlike the federalism canon, the Court has been unable to articulate a workable version of the nondelegation doctrine that demarcates when statutory ambiguity meant to be resolved by the Executive becomes a prohibited delegation of legislative power.[107] Justice Gorsuch's theory purports to resolve this dilemma by asserting that *any* statutory ambiguity that results in a "major" policy is either an unconstitutional expression of agency powers (MQD) or an "unconstitutional delegation of legislative authority" (nondelegation).[108]

For the Justice, this means that, unless the matter is wholly mundane or otherwise interstitial, Congress cannot even expressly and specifically delegate decision-making authority to an administrative agency.[109] This theory of both the MQD and nondelegation doctrine turns on the question of when exactly an agency policy is mundane and when it is "major." As will be discussed in Part IV, no consistent answer is readily available, as the Court has issued "ad hoc, discretionary rulings" that "suffer from the appearance" and reality of jurists' basing the outcome of a case on a knee-jerk reaction to personally detested or favored policies.[110]

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[106] May and Magloughlin, *supra* note 25 at 271; Gocke, *supra* note 79 at 994.
[107] Loshin and Nielson, *supra* note 99 at 56.
[108] NFIB v. OSHA, *supra* note 86, at 6 (Gorsuch, J., concurring).
[109] Gocke, *supra* note 79 at 996; Gundy v. United States, *supra* note 100.
[110] Sunstein, *supra* note 101 at 327; Deacon and Litman, *supra* note 4 at 1065–1069 (asserting that worldviews align closely with policy preferences "judges may be more inclined to perceive issues or policies as politically significant if the policies are opposed by the political party that appointed that judge.").

IV. The End of *Chevron*

IV.A The Canary's Death

Up until this point, the MQD merely warned us of *Chevron*'s death. As demonstrated in *West Virginia v. EPA*, the Court did not listen to the warnings. Instead of leaving the MQD behind and deferring to an agency, the Court continued to plunge deep into the unnavigable mines of "majorness" until its new doctrine finally asphyxiated *Chevron*.

In *West Virginia v. EPA,* the Court determined that the EPA's authority under section 111(d) of the CAA was not so capacious as to allow for the Obama-era Clean Power Plan (CPP).[111] The CPP adopted a "generation shifting" approach to greenhouse gas reduction, whereby power plants would need to shift "from higher-emitting to lower-emitting production" of electricity.[112] Rather than attempt to refine the contours of the MQD and explain the constitutional compulsions for the clear statement rule, the Court's opinion and Justice Gorsuch's concurrence present a hodgepodge of ideas justifying the MQD. The opinion and concurrence attempt to justify the Doctrine's application and provide a broad framework for anti-regulatory judges to wage their war against the Administrative State.

This final section is composed of three parts. Part IV.B will critique the Court's atextual justification for applying the MQD in *West Virginia*. Part IV.C will show how the opinion and concurrence instruct lower courts to rule against agency actions that judges personally find to be too political or too

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[111] West Virginia v. EPA, supra note 5; 42 U.S.C. § 7411(d). Not wholly relevant to this article, but still crucial for context, is the issue of standing in the case. The majority and dissent disagreed as to whether any party maintained standing in the case, especially given that an entire presidency and a half had lapsed since the CPP was initially put into place and stayed. Furthermore, the Biden administration claimed that it was not going to reinstate the CPP. Indeed, Justice Kagan characterized the ruling as "an advisory opinion on the proper scope of the new rule EPA is considering."

[112] *Id.* at 705.

costly. Part IV.D will argue that the Court embraced Justice Gorsuch's version of separation of powers from *NFIB v. OSHA*, thus making the MQD impossible to apply so long as *Chevron* breathed.

IV.B *The (A)Textual Justification*

The Court begins its justification for applying the MQD by characterizing Section 111(d) of the CAA as an "ancillary" and seldom employed provision of the statute.[113] This characterization sets the rhetorical foundation for the rest of the Court's opinion.

First, the Court forwards a purposivist argument in textualist's clothing, whereby it establishes an anti-regulatory hierarchy of statutory text in which ambiguous provisions executed through broad regulation are deemed "ancillary" or insufficient to support the agency's ruling. Second, the Court determines that, because the EPA had never interpreted Section 111(d) in such an expansive manner, it is functionally prevented from doing so to address novel issues like climate change.[114] Finally, the Court jettisons textualism and replaces it with a post-hoc anti-regulatory framework that allows the inactions of subsequent Congresses to define the scope of statutes passed by a previous Congress.

As in *American Trucking*, the depiction of certain provisions of statutory text as "ancillary" begs the question of how the Court knows which provisions are unimportant "mouseholes" hiding regulatory elephants.[115] The Court answers by turning its analysis into a fraught search for statutory purpose.[116] Indeed, the Court does not determine the size of the "mousehole" in Section 111(d) by parsing through the language of the provision and situating it within the context of the CAA, but by pointing to the remarks made by one

[113] *Id.* at 703.
[114] Deacon and Litman, *supra* note 4 at 1033.
[115] Loshin and Nielson, *supra* note 99 at 45–46.
[116] *Id.*

architect of the CAA and the EPA's previous rulings pursuant to Section 111(d).[117] This form of statutory construction disregards the normative textualist theory that legislation is often "the result of 'backroom deals' and diverse individual compromises" rather than solely reflecting the views of a few cited legislators.[118]

The Court's framework further ignores Justice Scalia's view that shifting agency interpretations are not indicative of an incorrect interpretation but that agencies change the law in light of new information and "within the limited range of discretion conferred by the governing statute."[119] Both of these textualist presumptions would typically render legislative history and shifting agency interpretations irrelevant to statutory interpretation.[120] Notwithstanding its textualist commitments, the *West Virginia* Court misconstrued ambiguous text as being no more than a legislative afterthought and undeserving of meaningful textual analysis that would likely result in a policy disfavored by the majority.[121]

The third atextual justification for the MQD in *West Virginia* relies on Congress's failure to pass comprehensive legislation addressing climate change despite knowing that greenhouse gas emissions pose an existential threat to humanity.[122] This justification is incongruent with textualism, as it cites inactions of subsequent Congresses as limiting the power of broad legislation passed by a previous Congress.[123] This justification also assumes that legislative inaction exclusively provides evidence of congressional disapproval,

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[117] West Virginia v. EPA, *supra* note 5 at 703.
[118] Loshin and Nielson, *supra* note 99 at 52.
[119] Scalia, *supra* note 27 at 518–519.
[120] *Id.*; Conroy v. Aniskoff, 507, U.S. 511, 519 (1993). (Scalia, J., concurring) (writing that "the greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.").
[121] West Virginia v. EPA, *supra* note 5 at 703.
[122] *Id*, at 724.
[123] Deacon and Litman, *supra* note 4 at 1062.

rather than evidence of acquiescence to agency rulemaking or a lack of expertise on exactly how issues should be regulated. As shown below, the atextualist justifications for applying the MQD in this case leads to results that appear to be, or are, arbitrary, inconsistent, politically motivated, and contradictory.

IV.C *The Political Instruction*

To understand how the MQD's application in *West Virginia* promotes arbitrary rulings, one needs to look no further than the list of possible indicia for "majorness" put forth by Justice Gorsuch in his concurrence. The five indicia for majorness that Justice Gorsuch lays out are poorly defined and can be interpreted in an infinite variety of ways.[124] As the Court has noted regarding criminal statutes, poorly defined and limitless rules fail to establish clear standards of enforcement, leading to arbitrary application.[125] While this understanding of arbitrariness pertains to statutory enforcement rather than rulings made pursuant to unclear reasoning, the principle still stands. When one branch of the government, including the Judiciary, establishes vague rules, it leads to inconsistent applications. This is concerning in the world of administrative law because vague rules and standards encourage judges to base decisions on their policy preferences.

First, Justice Gorsuch suggests that policies of "profound political significance" may be implicated in MQD analysis.[126] As shown above, this comes from *FDA v. Brown* and its progeny. Then, Justice Gorsuch seems to expand this theory of majorness, citing *Gonzales* to show that the presence of societal controversy should clue judges into the majorness of an agency's ruling.[127] This idea, in effect, allows controversies

[124] The five indicia of majorness include political controversy, economic significance, federalism, nondelegation, and agency mismatch. Because the last three have already been fleshed out in Part III.C.1-C.2, the discussion here focuses on the first two indicia.
[125] *City of Chicago v. Morales*, 527 U.S. 41, 49-50 (1999).
[126] West Virginia v. EPA, *supra* note 5 at 743.
[127] *Id.*

generated by an increasingly partisan and volatile political landscape to determine when courts stray from normative statutory interpretation.[128] If one party achieves its goals through the Legislature or Executive, the opposing party need not worry, so long as it can generate sufficient controversy. This provides antidemocratic results, as the Executive Branch is barred from using regulation to "end an earnest and profound debate" and legislative inaction is interpreted as opposition to the challenged policy.[129]

Furthermore, the issue of political controversy allows for judicial policy-making. A judge's interpretation of what is sufficiently controversial turns on their political values and worldview, which often closely align with the party that appointed them.[130] This results in an inconsistent adjudication of law, in which an individual judge's political ideology, rather than objective modes of statutory interpretation like textualism, forms the basis for their rulings.[131]

Closely related to the issue of political controversy is that of economic significance. Both the majority opinion and Justice Gorsuch's concurrence take issue with the hefty cost associated with the CPP.[132] For the conservative Justices, the fact that the CPP would result in industries shelling out billions of dollars in fines and compliance costs meant that it was major and required clear congressional authorization.[133] This economic analysis is even more ripe for judicial policymaking when compared to the political controversy analysis. A policy does not need to result in the upending of entire industries to be considered economically significant, although that was a factually incorrect charge made against the EPA. Rather, it

[128] Deacon and Litman, *supra* note 4 at 1051–1052.
[129] *Id.* at 1060; West Virginia v. EPA, *supra* note 5 at 743.
[130] Deacon and Litman, *supra* note 4 at 1065.
[131] *Id.* at 1069.
[132] West Virginia v. EPA, *supra* note 5 at 715, 744.
[133] *Id*.

must be deemed too expensive in the eyes of the presiding jurist.

The economic analysis reeks of judicial policymaking, as it asks whether the economic impact is too significant in relation to the issue in question. This leads to politically motivated, or at least politically informed, weighing of economic factors. Indeed, the conservative Justices' hostility towards the CPP was based on its potential to raise the price of production and home energy, both of which are GOP talking points against the shift from nonrenewable to renewable energy.[134] To be sure, the Justices did not mention the price associated with *inaction*, which in *West Virginia* would likely outweigh the costs of enforcement.[135] No matter which way the analysis is sliced, any determination of majorness that asks for the price tag inevitably results in legislating from the bench, as it requires a jurist to choose between competing values and costs associated with a given policy. This is undeniably a policy determination, and it asks unelected judges to impress their own idiosyncratic economic views upon an electorate that cannot hold them accountable.

Notwithstanding the MQD's opening to judicial policymaking, the conservatives on the Court understand themselves to be issuing legal, rather than policy, decisions. This argument should be taken seriously. To be fair, in almost all cases before the Court, the line between legal and political decisions is hazy. However, the problem of *West Virginia* and the MQD is that the Court reaches legal conclusions—e.g., that Congress did not or could not delegate authority to a given

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[134] West Virginia v. EPA, *supra* note 5 at 714; Lisa Friedman, *A Republican 2024 Climate Strategy: More Drilling, Less Clean Energy*, The New York Times, Aug. 4, 2023; Brian Kennedy Tyson Cary Funk and Alec, *What Americans Think about an Energy Transition from Fossil Fuels to Renewables*, Pew Research Center (Jun. 28, 2023).

[135] Solomon Hsiang et al., *Estimating Economic Damage from Climate Change in the United States*, 356 Science 1362 (2017); Adam B. Smith, *U.S. Billion-Dollar Weather and Climate Disasters, 1980 - Present (NCEI Accession 0209268)*, (2020).

agency—based on policy preferences—e.g., a policy is too expensive, controversial, and the like. The only way to justify such conclusions is by endorsing the anti-*Chevron* view that the Judiciary is the exclusive, rather than ultimate, interpreter of statutes.

IV.D *The Canary Dies*

The first three articles of the Constitution lay out the separation of powers. The Legislature makes the laws, the Executive enforces the laws, and the Judiciary interprets the laws. There are, however, nuances to this basic understanding. Of relevance here is *Chevron*'s view that statutory enforcement requires at least some degree of Executive interpretation of vague statutory language. As discussed in Part III.C.2, Justice Gorsuch understands the MQD to protect against nondelegation issues by forbidding the Executive from citing ambiguous statutory language to fill in major policy gaps. For Justice Gorsuch, any ruling made pursuant to ambiguous statutory language that results in policies affecting more than day-to-day operations would constitute a forbidden exercise of the Executive's enforcement power. While it remains unclear whether all of the conservative Justices are prepared to join Justice Gorsuch in the most extreme application of that anti-regulatory posture, endorsing the Justice's reconceptualization of separation of powers in *NFIB v. OSHA* is the only way for the conservatives on the Court to coherently support the conclusions of *West Virginia* and eventually *Loper Bright*.[136]

[136] This article focuses on Justice Gorsuch's framework of the MQD because it appears to be the dominating conceptualization. However, it remains worth noting that not all conservative Justices agree that the MQD functions as a clear statement rule. Indeed, Justice Barrett understands the MQD to support ordinary principles of communication. As Cass Sunstein writes, for Justice Barrett, "the MQD is relevant to what the best interpretation is, but if Congress is best understood to have said 'actually I meant that sort of [major policy],' or perhaps better, 'I meant the sort of [major policy] that the relevant agency deemed' appropriate, then the fact

As mentioned in Part III.C.2, the MQD renders the *Chevron* doctrine incompatible with principles of separation of powers. It does so by undermining *Chevron*'s basic legal fiction that statutory ambiguities delegate regulatory authority to agencies who define vague terms to determine the scope of their regulatory power. The Court's framework in the MQD cases stipulates that only clear congressional authorization can be understood to grant agencies expansive powers.[137] Taken to its most extreme end, this understanding renders Executive interpretations of ambiguous text antithetical to the entire federal project, and prevents administrative agencies from using their subject-matter expertise to fill in policy gaps left by Congress.

The Court's framework further turns *Chevron*'s version of separation of powers on its head. First, it asserts that Congress cannot divest itself of its legislative powers by telling an agency to adopt what the agency deems to be, for example, the "best," most "economically feasible," or "safest" policy.[138] Instead, Congress must articulate policy prescriptions with an impractical level of specificity so that agencies know exactly what Congress understands to be the "best," most "economically feasible," or "safest" policy. This framework has the deregulatory effect of kicking important issues to a Congress that has often purposefully declined to determine exactly how issues should be regulated.[139]

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that a major question is involved is neither her nor there." *see* Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 Fla. Law Rev. 251 (2024).

[137] West Virginia v. EPA, *supra* note 5 at 722.

[138] Indeed, in *West Virginia*, the CPP was promulgated pursuant to the EPA's interpretation of the ambiguous statutory phrase "best system of emissions reduction."

[139] McGarity, *supra* note 65 at 37 ("it is beyond naïve to suggest that allowing federal courts to strike down consequential agency actions taken under fresh interpretations of old statutes will cause Congress to suddenly spring into action and refresh those statutes or write new statutes to address newly emerging problems.").

While purporting to give the electorate a chance to decide how it is regulated, this anti-*Chevron* version of the balance of powers undemocratically dispossesses the Executive of much of its duty to "take care that the laws be faithfully executed."[140] It does so by limiting the Executive Branch's ability to act on issues where Congress's intent is not explicitly clear but can be reasonably gleaned from the text of the statute. This limitation undermines the Executive's duty to execute laws by restricting its ability to interpret and apply statutory provisions in light of new circumstances, advancing science, and novel policy needs.[141] Perhaps most problematic for *Chevron*'s version of separation of powers is that the Executive cannot resolve statutory ambiguities when they inevitably exist.[142] Rather, as Chief Justice Roberts wrote in *Loper Bright*, it is the exclusive role of the Judiciary to determine the "single, best meaning" of a statute.[143] This means judges, who are not experts in much beyond law, decide what is the one "best," most "economically feasible," or "safest" policy.[144]

This is a maximalist judicial power grab that justifies legislating from the bench by claiming that the Court's legal expertise legitimizes its exclusive authority "over every open issue – no matter how expertise-driven or policy-laden – involving the meaning of regulatory law."[145] By anointing itself as the exclusive, rather than ultimate, interpreter of statutes, the Supreme Court rejects any need for agency deference, rendering *Chevron* unworkable, contrary to the separation of powers, and in need of overturning.

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[140] U.S. Const. art. 2, § 3, cl. 5.
[141] McGarity, *supra* note 65 at 36.
[142] West Virginia v. EPA, *supra* note 5 at 740; Sunstein, *supra* note 102 at 323.
[143] Loper Bright Enterprises v. Raimondo, *supra* note 6 at 22.
[144] *Id.* at 17–18 ("when the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA, is as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits.").
[145] *Id.* at 3 (Kagan, J., dissenting).

V. Conclusion

Over the past twenty years, the Supreme Court has transformed the Major Questions Doctrine from a rarely used tool of statutory interpretation into a rigid clear statement rule, weakly grounded in the Constitution. In doing so, the Court undermined the foundational principles of *Chevron v. NRDC*. Most notably, the MQD cases reveal how the Court disregarded *Chevron*'s vision of the separation of powers and the appropriate disposition of ambiguous statutory text. As these two doctrines sat on increasingly diametrically opposed ends, the Court's desire to constrain administrative powers left overruling *Chevron* as the only logical conclusion.

This outcome was solidified with Justice Gorsuch's reconceptualization of the separation of powers in *OSHA v. NFIB* and the Court's endorsement of that approach in *West Virginia v. EPA*. After *West Virginia*, so little remained of *Chevron* deference that its overruling was essentially a formality. To be sure, the seemingly natural progression of MQD cases to *Chevron*'s demise should not be mistaken as validation of the Court's approach. Rather, it highlights the Roberts Court's troubling approach to precedent. As Justice Kagan and legal commentators have observed, the Court often erodes important precedents by selectively ignoring when they should be applied, then calling the original decision into question.[146] This cycle continues until the Court constructs enough self-justified reasoning to formally overrule the precedent. The MQD cases exemplify this manipulative approach to *stare decisis*, undermining the stability of bedrock legal principles.

The Court has attempted to frame its manipulation of precedent and *stare decisis* as a long overdue defense of its constitutional role, claiming in *Loper Bright Enterprises v. Raimondo* that overruling *Chevron* safeguards distinctly

[146] *Id.*; Richard L. Hasen, *The Chief Justice's Long Game*, The New York Times, June 25, 2023.

"judicial" skills like statutory interpretation. Chief Justice Roberts, in particular, has argued that this is simply the Court "saying what the law is."[147] As this article makes clear, this justification is a smokescreen. The MQD cases — particularly Justice Gorsuch's politics-laden definition of what constitutes a "major question" — reveal the Court's repeated forays into policymaking. By deciding which issues qualify as "major" and dictating their resolution, the Court encroaches on policymaking authority that belongs to the Legislative and Executive Branches.

Now, without the judicial guardrail that was *Chevron*, unelected judges are empowered to impose upon the electorate their subjective views on matters of vast political and economic importance. This invites judicial activism, where administrative policies become increasingly susceptible to arbitrary and politically motivated interference. This new era of statutory interpretation threatens to destabilize critical regulatory efforts, with potentially disastrous consequences for governance, environmental protection, and the public good.

[147] Loper Bright Enterprises v. Raimondo, *supra* note 6 at 7.