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A basic primer on the major questions doctrine

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This update provides a basic primer on the origins and implications of the major questions doctrine, which has been recently invoked in a 6-3 opinion written by Chief Justice Roberts striking down the EPA's Clean Power Plan. In doing so, the Court set the stage for heightened judicial scrutiny of agency action, including outside the environmental context.

Major questions doctrine

In its June 30, 2022 opinion in *West Virginia v. Environmental Protection Agency*, [1] the Supreme Court struck down the EPA's 2015 Clean Power Plan, holding that the agency lacked the authority to adopt the plan based on the major questions doctrine. The Supreme Court had never before invoked the major questions doctrine by name, but the majority opinion cited a line of recent precedents in support of the Court's holding that "in certain extraordinary cases" where there is reason to doubt that Congress authorized a particular agency action, "both separation of powers principles and a practical understanding of legislative intent" require the agency to point to "clear congressional authorization" for its action. This memo provides a basic primer on the origins and implications of the major questions doctrine, which extend far beyond environmental regulation.[2]

West Virginia v. EPA

The EPA adopted the Clean Power Plan under Section 111(d) of the Clean Air Act, which directs the EPA to establish emissions standards for existing sources of air pollutants reflecting "the degree of emission limitation achievable through the application of the best system of emission reduction" (BSER) that the EPA "determines has been adequately demonstrated."[3] The EPA is obligated to establish such standards for existing sources of a particular pollutant once it establishes standards for *new* sources of that pollutant under Section 111(b) of the Clean Air Act, subject to certain limitations.[4] As explained more fully in our companion client update, the BSER as determined in the Clean Power Plan called on states not only to improve the efficiency of coal-fired power plants but also to regulate "beyond the fenceline" of each individual power plant by mandating a shift in electricity generation from coal-fired power plants to lower emitting existing natural gas combined cycle plants, and from fossil fuel-fired power plants to new wind, solar and other renewable sources.

Twenty-seven states (among other parties) challenged the Clean Power Plan's power generation shifting requirements as unauthorized under Section 111(d). The Court agreed. Citing the recent line of cases described below, the Court wrote: "our precedent teaches that there are 'extraordinary cases' . . . in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."

As explained more fully in our companion client update, the Court concluded that such hesitation was merited in this case for several reasons and then held that Section 111(d) did not constitute the sort of "clear congressional

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authorization" necessary for the Court to overcome its skepticism.

The Court acknowledged that power "generation shifting can be described as a 'system' … capable of reducing emissions" but noted that "almost anything could constitute such a 'system.'" The Court held that this "vague statutory grant" was "not close to the sort of clear authorization required by [the Court's] precedents." In the Court's view, "it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme under Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body," which was not found in Section 111(d).

The Court's opinion, written by Chief Justice John Roberts and joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, does not provide guidance for applying the major questions doctrine in future cases—that is, how to determine whether an agency has triggered a major question that requires a clear congressional authorization, and how to determine whether the agency's claimed source of congressional authorization is sufficiently clear. In contrast, Justice Gorsuch's concurring opinion, joined by Justice Alito and discussed more fully below, attempted to provide such guidance for future cases. It is unclear whether Justice Gorsuch's concurring opinion reflects the views of the majority, including the Chief Justice, since only two of the justices excluding the Chief Justice joined it. But it is likely to be used by plaintiffs in future cases to argue that a particular agency action triggers the major questions doctrine similar to how Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*[5] has been used to challenge assertions of power by the President.

Origins

In invoking the major questions doctrine "label," the Court cited "an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." The key Supreme Court precedents include *FDA v. Brown & Williamson Tobacco Corp.*,[6] *Gonzales v. Oregon*,[7] *Utility Air Regulatory Group v. EPA*,[8] *Alabama Association of Realtors v. Department of Health and Human Services*,[9] and *National Federation of Independent Business v. OSHA.*[10]

- In *Brown & Williamson*, the Court held that the FDA's statutory authority to regulate "drugs" and "devices" did not authorize the agency to regulate tobacco products. In rejecting the FDA's interpretation of the statute, the Court held that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[11] The Court explained that "[d]eference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps… . In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[12]
- In *Gonzales*, the Court held that the Attorney General lacked the authority to issue an interpretive rule declaring that dispensing or prescribing controlled substances for the purpose of assisted suicide was unlawful under the Controlled Substances Act, meaning that the licenses of physicians who did so would be subject to suspension or rescission, even in states where assisted suicide was legal. The Court explained: "The idea that Congress gave [the Attorney General] such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable… . The importance of the issue of physician-assisted suicide, which has been the subject of an 'earnest and profound debate' across the country, … makes the oblique form of the claimed delegation all the more suspect."[13]
- In *Utility Air*, the Court held that the EPA lacked the authority to apply certain permitting requirements under the Clean Air Act to stationary sources of greenhouse gases. The Court explained that the EPA's interpretation was "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' . . . we typically greet its

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announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[14]

- In *Alabama Association of Realtors*, the Court vacated a stay on a lower court judgment that the CDC lacked authority to adopt a nationwide eviction moratorium under the Public Health Service Act during the COVID-19 pandemic. The Court explained that "the sheer scope of the CDC's claimed authority . . . would counsel against the Government's interpretation," which it said "would give the CDC a breathtaking amount of authority."[15] The Court stated that the expectation for Congress "to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance'" applied to the case, since "[a]t least 80% of the country, including between 6 and 17 million tenants at risk of eviction, falls within the moratorium."[16]
- In *NFIB v. OSHA*, the Court granted a stay of OSHA's COVID-19 vaccine mandate for businesses with more than 100 employees, holding that the challenging parties were likely to succeed on the merits of their claim that OSHA lacked authority to impose the mandate. The Court stated that the mandate was clearly the exercise of a power of "vast economic and political significance," as a "significant encroachment into the lives—and health—of" 84 million Americans.[17] The Court held that "[p]ermitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization."[18]

The Court in *West Virginia v. EPA* characterized the agency interpretation in each of these precedent cases as having had a "colorable textual basis," but stated that "given the various circumstances, 'common sense as to the manner in which Congress [would have been] likely to delegate' such power to the agency at issue … made it very unlikely that Congress had actually done so."

Justice Gorsuch's concurrence

Justice Gorsuch wrote a concurring opinion, joined by Justice Alito, to "offer some additional observations" on the major questions doctrine.

Gorsuch characterized the major questions doctrine as a clear statement rule developed to ensure judicial adherence to the constitutional principle of separation of powers, similar to the clear statement rules on retroactive liability and waivers of sovereign immunity. Gorsuch then identified the following triggers, based on the Court's precedents, for determining that "an agency action involves a major question for which clear congressional authorization is required:

- First, if the agency is claiming power to resolve a matter of "great 'political significance'" or if the agency is seeking to end an "earnest and profound debate across the country." Instructive for these questions are whether Congress has considered and rejected taking similar action to that of the agency's proposed action through legislation in the past.
- Second, if the agency seeks to regulate "a significant portion of the American economy" or "require 'billions of dollars in spending' by private persons or entities."
- Third, if the agency seeks to intrude in an area that is the particular province of state law.

Gorsuch wrote that "this list of triggers may not be exclusive" but "each of the signs the Court has found significant in the past is present" in *West Virginia v. EPA*, making it "a relatively easy case for the doctrine's application."

Gorsuch then identified the following factors for determining whether a congressional authorization is sufficiently clear:

- First, courts must look to the text of the statutory provisions "with a view to their place in the overall statutory scheme." Oblique or elliptical language will not supply a clear statement, nor will gap-filler provisions.
- Second, courts may examine the age and focus of the statute in relation to the problem being addressed, since "an

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agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority."

- Third, courts may examine the agency's previous interpretation of the relevant statutory language. Where an agency asserts a new power after long interpreting a statute more narrowly, that warrants skepticism.
- Fourth, courts should inquire as to whether there is a mismatch between an agency's challenged action and its congressionally-assigned mission and expertise.

Gorsuch concluded that "[a]sking these questions again yields a clear answer in" *West Virginia v. EPA*—that the EPA lacked the requisite clear congressional authorization.

Justice Kagan's dissent

Justice Kagan wrote a dissent, joined by Justices Breyer and Sotomayor, that raised several critiques of the majority opinion. Kagan disputed the characterization of Section 111(d) as an ancillary "backwater," and instead described the provision as a critical backstop. Kagan likewise disputed the characterization of Section 111(d) as overly vague, writing that "Congress used an obviously broad word"—i.e., system—"to give EPA lots of latitude in deciding how to set emissions limits," and that power generation shifting is clearly a system.

Kagan then disputed the Court's characterization of the precedents cited as support for the major questions doctrine, writing that "the relevant decisions do normal statutory interpretation." In those cases, according to Kagan, the Court struck down agency actions under ordinary methods of statutory interpretation because "the assertion of delegated power was a misfit for both the agency and the statutory scheme"—put differently, the "agency had strayed out of its lane, to an area where it had neither expertise nor experience." There was no such mismatch with respect to the EPA's Clean Power Plan, in Kagan's view. Kagan criticized the Court for being "textualist only when being so suits it" and called the major questions doctrine a "get-out-of-text-free card[]."

Broader implications

While *Chevron* remains good law and some of the precedents relied upon involve *Chevron* analysis, the majority and concurring opinions did not mention the *Chevron* two-step analysis, let alone clarify how the major questions doctrine should be applied in the context of that analysis.[19] Regardless of whether the major questions doctrine is viewed as a new step zero or a component of step one,[20] the doctrine is likely to result in fewer agency actions reaching step two and receiving *Chevron* deference.

The major questions doctrine could be used to challenge a variety of ambitious agency actions, such as the SEC's proposed climate risk disclosure rule.[21] The impact of the major questions doctrine on the administrative state will, of course, depend on how broadly the doctrine is applied in the future. Courts may limit the application of the doctrine to cases that involve statutory provisions that can be characterized as ancillary backwaters, or where an agency has clearly strayed from its traditional area of expertise. But if courts apply the factors outlined in Justice Gorsuch's concurrence, then any agency action that addresses a matter of "great political significance" or an "earnest and profound debate," or that regulates "a significant portion of the American economy" or requires "billions of dollars" in private spending, would be subject to challenge under the major questions doctrine.

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[1] West Virginia v. Environmental Protection Agency, 597 U.S. ____ (2022).

[2] A separate Davis Polk client update provides further background on the EPA's Clean Power Plan and the environmental law implications of the decision. See *The Supreme Court uses major questions doctrine to limit EPA's authority to regulate climate change* (July 11, 2022).

[3] 42 U.S.C. § 7411(a)(1), (d).

[4] *Id.* § 7411(d)(1).

[5] 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

[6] 529 U.S. 120 (2000).

[7] 546 U.S. 243 (2006).

[8] 573 U.S. 302 (2014).

[9] 141 S.Ct. 2485, 594 U. S. ____ (2021) (per curiam).

[10] 142 S.Ct. 661, 595 U.S. ____ (2022) (per curiam).

[11] 529 U.S. at 160.

[12] *Id.* at 159.

[13] 546 U.S. at 267.

[14] 573 U.S. 324 (citing *Brown & Williamson*, 529 U.S. at 159-60).

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[15] 141 S.Ct. at 2489.

[16] *Id.*

[17] 142 S.Ct. at 665.

[18] *Id.*

[19] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[20] Professor William Eskridge, who was cited in the Court's opinion, slip. op. at 26, cites Professors Merrill and Hickman for the proposition that what they call the Major Questions Canon is a new step zero. William N. Eskridge, Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution*, at 287 (2016).

[21] For our client update on the SEC's proposal, see *SEC proposes climate disclosure regime* (Mar. 22, 2022).

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