



Delegation of Rulemaking Authority in Light of the “Major Questions Doctrine”

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In [West Virginia v. EPA](#), the Supreme Court addressed a “particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.”² By a 6-3 majority, the Court held that, when a “major question” is involved, the decision on how to regulate rests with Congress and Congress alone. The administrative agency’s regulation is valid only to the extent that it is enacted pursuant to an indisputable delegation of authority from Congress.

This issue brief summarizes *West Virginia v. EPA* and discusses some important considerations in light of the case.

Background

In *West Virginia v. EPA*, the Supreme Court explicitly used the “major questions doctrine” to invalidate an agency rule for the first time—the Obama administration’s Clean Power Plan final rule.³ Before this, the Court had typically considered “major questions” within the doctrine it set forth in *Chevron v. Natural Resources Defense Council*. Under that doctrine, courts generally

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² *W. Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2609 (2022).

³ *West Virginia* cites two recent cases decided, not as merits cases on the Court’s regular calendar, but on an expedited basis through its “shadow docket.” See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., OSHA*, 142 S. Ct. 661 (2022) (per curiam) (citing major questions doctrine and deciding Congress had not clearly authorized OSHA’s requirement that employees of large employers be vaccinated or comply with masking and weekly testing during the pandemic); *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) (per curiam) (citing major questions doctrine and deciding Congress had not clearly authorized the CDC’s eviction moratorium during the pandemic). *But cf. Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam) (upholding CMS regulation requiring workers in Medicaid and Medicare funded health care facilities to be vaccinated).

defer to the agency's construction of a statute that it administers when the statute is ambiguous.⁴ When deciding whether to defer, the Court had reasoned that Congress was unlikely to delegate to an agency the authority to decide a question of deep economic and political significance, *i.e.* a "major question."⁵

In *West Virginia*, with Chief Justice Roberts writing, the Court took this idea a step further. Without citing *Chevron*, the Court held that the major questions doctrine is in fact a clear statement rule, meaning that regulations that involve a "major question" are not valid unless Congress has made it absolutely clear that it has delegated authority to the agency to promulgate the rule: When a major question is involved, the agency "must point to 'clear congressional authorization' for the power it claims."⁶

In *West Virginia*, the Court held that the Clean Air Act did not explicitly authorize the EPA to promulgate the Clean Power Plan rule. Broad statutory language directing the EPA to regulate emissions by identifying the "best system of emission reduction" was not sufficient to authorize the agency to implement regulations designed to more aggressively address climate change.⁷ The Court also faulted the EPA for its lack of special expertise in "balancing the many vital considerations of national policy implicated in how Americans will get their energy."⁸ To support this view, the Court relied in part on the agency's own statements, citing a funding request to Congress in which the EPA stated that carrying out the Clean Power Plan required "technical and policy expertise not traditionally needed in EPA regulatory development."⁹

The remainder of this issue brief answers some common questions regarding the case.

⁴ *Chevron v. NRDC*, 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.... If, however ... 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.")

⁵ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (holding the FDA lacked authority to regulate tobacco). *Cf. King v. Burwell*, 576 U.S. 473, 485-86 (2015) (citing *Brown & Williamson*, refusing to apply *Chevron* two-step framework to ambiguous text in "extraordinary case[]" involving "question of deep 'economic and political significance'" and concluding that the IRS's premium tax credit regulations were authorized by the Affordable Care Act).

⁶ *W. Virginia*, 142 S. Ct. at 2609 (citation omitted).

⁷ *Id.* at 2602-04 (discussing Section 111(d) of the Clean Air Act and assessing the Clean Power Plan rule promulgated at 80 Fed. Reg. 64,530 (2015)).

⁸ *W. Virginia*, 142 S. Ct. at 2612.

⁹ *Id.*

QUESTION: Does Congress have control over what constitutes a “major question”?

ANSWER: No.

The *West Virginia* Court makes it clear that Congress cannot dictate what constitutes a major question. The Court has reserved that decision for itself. The fact that the Court reached out to decide *West Virginia*, when (1) the Clean Power Plan rule had never gone into effect, (2) the Rule would not go into effect because the Biden Administration was undergoing a new rulemaking, and (3) the private sector had met metrics of the Clean Power Plan even in the rule’s absence, demonstrates that when a Court is hostile toward a particular administrative initiative, it will not hesitate to label it a “major question.”

By contrast, other recent cases demonstrate that the Court’s majority can simply ignore the major questions framing when it wishes to, apparently deferring to an agency when the policy aligns with its ideology. As the dissent in *West Virginia* points out, in *Little Sisters of the Poor v. Pennsylvania*, a Justice Thomas opinion upheld the Trump administration’s rule expanding exceptions to the Affordable Care Act’s contraceptive coverage mandate. The Court upheld the rule with no discussion of whether the issue was a major question, even noting that “when Congress uses ‘expansive language’ to authorize agency action, courts generally may not ‘impos[e] limits on [the] agency’s discretion.’”¹⁰ Of course, this is exactly what the Court did in *West Virginia*.

QUESTION: How will legislative and executive branches know when the major questions doctrine is in play?

ANSWER: Unclear.

The Court says the major questions doctrine will apply only in “*extraordinary cases*” where 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.”¹¹

¹⁰ *Id.* at 2632-33 (Kagan, J., dissenting) (citing *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020)).

¹¹ *Id.* at 2608 (internal quotations and citation omitted) (emphasis added).

Unfortunately, the Court does not define what constitutes an “extraordinary case” or a “major question.” It lists factors for courts to consider when determining whether the doctrine has been triggered. These include when:

- the administrative agency is enacting a regulatory system that Congress itself conspicuously and repeatedly declined to enact.
- Congress and/or state legislatures are considering or debating the matter.
- the agency relies on a “long-extant statute” for significant expansion of its authority;¹² *e.g.*, in *West Virginia*, the EPA cited a 50-year-old statute it previously used to set performance standards to encourage existing coal-fired power plants to reduce pollution through cleaner plant operation, while the Clean Power Plan rule required such facilities to reduce their production of electricity or subsidize increased generation by natural gas, wind, or solar.
- the regulation represents a change in agency interpretation that constitutes a fundamental revision of the statute.¹³
- the agency is developing rules in an area where expertise has traditionally been needed and the agency has lacked that expertise (this could arise, for example, where the health and human services agency issues rules affecting housing).
- the White House has characterized the agency action as significant, *e.g.*, the *West Virginia* majority noted the White House’s statement that the Clean Power Plan rule would drive “aggressive transformation in the domestic energy industry.”¹⁴

A concurring opinion, written by Justice Gorsuch and joined by Justice Alito, added some additional factors:

- when the issue is a matter of great political significance.
- when the agency is seeking to “regulate a significant portion of the U.S. economy” or “require billions of dollars in spending by private actors.”¹⁵
- when an agency seeks to intrude into an area that is the particular domain of state law.¹⁶

¹² *Id.* at 2610.

¹³ The Court referred to Section 111(d) of the Clean Air Act as “a previously little-used backwater,” and that served as a mark against the ability of that provision to authorize the agency to regulate on the major question at issue. *Id.* at 2613.

¹⁴ *Id.* at 2604; *Id.* at 2610-13.

¹⁵ *Id.* at 2621 (Gorsuch, J., concurring). Justice Gorsuch noted that a range of agency actions can “sometimes check this box,”—actions affecting, for example, health care, tobacco products, the telecommunications industry, and local housing. *Id.*

¹⁶ *Id.* at 2620-22.

This last point reflects the close relationship between the major questions doctrine and the federalism canon, another clear statement rule created by the Court that requires Congress to speak clearly when it intends to disrupt the federal/state balance—for example, to incur upon states’ sovereign immunity. The interplay of these doctrines may be a particular concern for health care statutes because of the traditional role of the states in this area.¹⁷

By now, it should be clear that “[a]pplying the major questions doctrine . . . puts Congress in a very difficult position.”¹⁸ As Professor Mila Sohoni puts it, “Some agency regulations are strikes; others are balls—that much is clear. Less clear are the rules of the game and (therefore) whether the umpire has made fair calls.”¹⁹ Justice Kagan’s dissent in *West Virginia* points out that “Congress usually can’t predict the future—can’t anticipate changing circumstances and the way they will affect varied regulatory techniques. Nor can Congress (realistically) keep track of and respond to fast-flowing developments as they occur.”²⁰

Administrative agencies are also challenged. An executive agency cannot exempt its regulations from consideration under the major questions doctrine. But an agency can subject the regulations of a previous administration to the standard, arguing that those regulations are invalid because they involved a major question and were promulgated without proper delegation from Congress. That is, in fact, the argument made by the Trump-appointed EPA against the Clean Power Plan rule.²¹

¹⁷ See Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. __ at 14, n.70 (2023) (DRAFT), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724 (quotations omitted) (discussing *Alabama Realtors*, concerning CDC’s eviction moratorium, and noting “[t]he Court also claimed that the moratorium implicated values of federalism and intruded on states’ authority, since the states primarily regulate the landlord-tenant relationship. The Court explained that [o]ur precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.”).

¹⁸ *Id.* at 56.

¹⁹ Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 268 (2022). See also *id.* at 288 (pointing out that the Court’s “buffet table” of factors “invite[s] courts to perform exactly the kind of all-things-considered, open-ended inquiry that textualism was meant to teach courts to avoid like the plague”).

²⁰ *W. Virginia*, 142 S. Ct. at 2642 (Kagan, J., dissenting).

²¹ See generally Natasha Brunstein & Richard L. Revesz, *The Trump Administration’s Weaponization of the “Major Questions” Doctrine*, THE REGULATORY REVIEW (May 10, 2021), <https://www.theregreview.org/2021/05/10/brunstein-revesz-trump-administrations-weaponization-major-questions-doctrine/> (“In the hands of Trump’s Justice Department, the

QUESTION: What does it take for Congress to authorize an agency to regulate in the area involving a major question?

ANSWER: Exacting specificity.²²

After *West Virginia v. EPA*, Congress will need to establish “clear congressional authorization” for an administrative agency to promulgate regulations that address major questions. A plausible textual basis for the regulation will not be enough. Unfortunately, the Court’s direction on how to draft the authorization is frustratingly vague. The Court mostly describes the sort of drafting that it will greet with “skepticism.”²³ These include:

- statutes that use “modest words,” “vague terms,” or “subtle devices.”²⁴ For example, Clean Air Act language authorizing the agency to establish the “best system of emission reduction” was found to be too vague because “almost anything could constitute such a ‘system’; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents.”²⁵
- statutes that use “oblique or elliptical” language to empower an agency to make a radical or fundamental change to a statutory scheme; as an example, the Court cited its previous holding that the Communications Act’s use of the phrase “modify any requirement” did not authorize the FCC to make changes in the regulatory scheme that would affect 40 percent of the telecommunications industry.²⁶
- “ancillary” provisions of a statute that were designed to function as a gap filler and had rarely been used in the preceding decades.²⁷

The concurrence favorably cites an early Supreme Court opinion that states that if Congress intended to delegate power to an agency, “it would have used language open to no

major questions doctrine became a weapon that could be wielded as a broadside attack on the administrative state.”).

²² See *Massachusetts v. EPA*, 512 U.S. 497, 512 (2007) (“EPA concluded that climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the Agency to address it.”).

²³ *West Virginia*, 142 S. Ct. at 2609 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)). For discussion of how the Court has treated *Utility Air* over time, see *Id.* at 2635 (Kagan, J., dissenting) and Mila Sohoni, *The Major Question Quartet*, 136 HARV. L. REV. 262, 270-74 (2022).

²⁴ *West Virginia*, 142 S. Ct. at 2609 (citation omitted).

²⁵ *Id.* at 2614.

²⁶ *Id.* at 2609 (citing *MCI Telecomm. Corp. v. ATT*, 512 U.S. 218, 229 (1994)).

²⁷ *Id.* at 2610.

misconstruction, but clear and direct.”²⁸ The concurrence also refers favorably to the requisites of other clear statement rules: To rebut the presumption against the retroactive application of legislation, Congress must speak in terms “so clear, strong, and imperative, that no other meaning can be annexed to them.”²⁹ And when intending to abrogate states’ sovereign immunity, the Court expects Congress to use “nothing but express words, or an insurmountable implication.”³⁰

Thus, it is difficult to state, with certainty, what language will meet the Court’s delegation test. We *can* give an example of a statute that did not achieve the delegation of authority that the agency claimed: Section 361(a) of the Public Health Service Act. That provision states:

The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.³¹

²⁸ *Id.* at 2619 (Gorsuch, J., concurring) (citing *ICC v. Cincinnati, N.O. & T.P.R. Co.*, 167 U.S. 479, 505 (1897)).

²⁹ *Id.* at 2617.

³⁰ *Id.* at 2617-18. In his concurrence, Justice Gorsuch cites his dissent in *Gundy v. United States*. *Id.* at 2617, 2619, which Chief Justice Roberts and Justice Thomas joined. Justice Kavanaugh took no part in *Gundy*, and Justice Barrett had not yet joined the Court. In the *Gundy* dissent, Justice Gorsuch sought to resurrect the nondelegation doctrine, which would prevent Congress from delegating many issues to an agency, even if it used exceedingly clear language to do so. That the Court’s opinion in *West Virginia* did not take up Justice Gorsuch’s invitation to embrace nondelegation may signal the understanding that, with the major questions doctrine, the conservative majority may achieve the same result on a case-by-case basis. *Cf. Gundy*, 139 S. Ct. 2116, 2141-42 (2019) (Gorsuch, J., dissenting) (noting that the Court will rein in congressional delegation “call[ing] what we’re doing by different names,” such as the “major questions” doctrine, and stating, “Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.”).

³¹ 42 U.S.C. § 264(a).

The *Alabama Association of Realtors* Court held this provision did not authorize the CDC to implement a national eviction moratorium.³² The Court “assert[ed] that the ‘broad authority’ granted to the CDC in the statute’s first sentence was narrowed by the statute’s second sentence, which listed particular measures the CDC could take to control diseases.”³³ An eviction moratorium was too different from the types of measures specifically listed in the statute, despite the presence of a catch-all provision.

In sum, when major questions are in play, the clear statement rule will require delegation language from Congress that is open to no other interpretation—a difficult standard to satisfy.³⁴ The full effect of the rule awaits future court decisions.

Below are observations on how the “major questions doctrine” could affect policy making:

- 1) Because the Court did not set clear standards for when the doctrine applies, we can expect litigants to raise it often, so Congress will be legislating against an uncertain and shifting drafting standard.
- 2) Legislation will need to clearly state congressional intent to delegate authority to decide the issue to the agency. “The authorization needs to jump off the page.”³⁵ Or, as Professor Sohoni puts it, the demand is “not just that Congress speak, but that Congress yell.”³⁶
- 3) Congress will need to state the aims of the statute and the problem(s) the statute intends the agency to solve as specifically as possible.

³² *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021).

³³ Deacon & Litman, *supra* n. 17, at 14.

³⁴ Deacon & Litman, *supra* n. 17, at 25.

³⁵ *Id.* at 24. The delegation cannot be tied solely to a statute’s statement of purpose. “Statements of purpose are ‘in reality as well as in name *not* part of the congressionally legislated ... set of rights and duties,” and “an expansive purpose in the preamble cannot add to the specific dispositions of the operative text.” *Georgia v. President of the United States*, 46 F.4th 1283, 1298 (11th Cir. 2022) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 217, 219 (2012)).

³⁶ Mila Sohoni, *The Major Question Quartet*, 136 HARV. L. REV. 262, 283 (2022).

- 4) It will be helpful for legislation to explain why the issue is being delegated to the particular agency, emphasizing how the delegation fits within the overall statutory scheme and the agency's expertise.
- 5) Policy makers may find themselves between a rock and a hard place. A broad catch-all provision may be too general but a statutory provision listing the agency's tasks could be taken to constrain agency authority.³⁷
- 6) The administrative agency may need to use the power Congress has delegated promptly, as soon after the statute's enactment as possible. As a corollary, agencies must be wary of using old statutes to implement regulations introducing broad, new purposes that were not evident at the time of the statute's enactment.³⁸
- 7) Policy makers will need to be aware of the Court's potential use of any executive or legislative branch statements that provide an indication of an issue's significance. In *West Virginia*, the Court cited statements from the Executive Branch to conclude that the regulations were fueled by frustration that Congress had failed to address climate change. The Court noted that the White House had issued a Fact Sheet recognizing that the proposed rule would "drive a[n] ... aggressive transformation in the domestic energy industry," and the EPA's modeling concluded "the rule would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors."³⁹
- 8) Be aware that the major questions doctrine is a potent ideological tool that courts may take to unexpected places. Since *West Virginia v. EPA* was issued in June 2022, four

³⁷ As noted, *Alabama Association of Realtors* held the Public Health Service Act did not authorize the CDC to implement a national eviction moratorium. The Court "assert[ed] that the 'broad authority' granted to the CDC in the statute's first sentence was narrowed by the statute's second sentence, which listed particular measures the CDC could take to control diseases." Deacon & Litman, *supra* n. 17, at 14. An eviction moratorium was too different from the types of measures specifically listed in the statute, despite the presence of a catch-all provision.

³⁸ Legal scholars have expressed concern that the Court's approach to major questions "turns statutory delegations to an agency into 'use it or lose it' grants of power." Deacon & Litman, *supra* n. 17, at 60.

³⁹ *W. Virginia*, 142 S. Ct. at 2604 (quoting White House Fact Sheet, App. in *American Lung Assn. v. EPA*, No. 19-1140 (CADDC), p. 2076 and EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule 3-22, 3-30, 3-33, 6-24, 6-25 (2015)); see also, e.g., *Id.* at 2622 (Gorsuch, J., concurring) (citing White House Fact Sheet as heralding an "aggressive transformation" of the electricity sector through "transition to zero-carbon renewable energy sources").

federal courts of appeals have decided cases that included a major questions doctrine argument. Three of the cases concern the same subject matter—a Presidential Executive Order instructing federal contractors to comply with workplace safety guidance that employees be vaccinated against COVID-19.⁴⁰ Citing the major questions doctrine, split Fifth and Eleventh Circuit panels concluded that the plaintiff states were likely to succeed on the merits of their claim that the Federal Procurement Act did not authorize the President’s action.⁴¹ The dissenting judges argued that reliance on the major questions doctrine was misplaced, first, because the cases were not dealing with delegation to an administrative agency but to the President “who does not suffer from the same lack of political accountability that agencies may,” and, second, because the cases did not involve transformative expansion of regulatory authority but rather the exercise of the federal government’s *proprietary* procurement authority.⁴² In the Sixth Circuit, the panel found likelihood of success without the need to confront whether major questions were involved.⁴³ And in the fourth case, a split panel of the D.C. Circuit Court of Appeals rejected the major questions doctrine argument and upheld a regulation requiring the fishing industry to fund at-sea monitoring. The industry has filed a petition for certiorari with the Supreme Court.⁴⁴ Of note, the panel members in these four appellate court cases ruled along party lines, with all of the Republican appointees voting to bar the delegation and all of the Democratic appointees rejecting major questions doctrine arguments.

⁴⁰ Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50985 (Sept. 14, 2021).

⁴¹ *Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022); *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022).

⁴² *Louisiana*, 55 F.4th at 1036-41 (Graves, J., dissenting); *Georgia*, 46 F.4th at 1308-17 (Anderson, J., concurring/dissenting).

⁴³ *Commonwealth v. Biden*, 57 F.4th 545, 555 n.2 (6th Cir. 2023).

⁴⁴ *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.3d 359 (D.C. Cir. 2022), petition for cert. filed, No. 22-451.