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IN FOCUS

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The Major Questions Doctrine

Congress frequently delegates authority to agencies to regulate particular aspects of society, in general or broad terms. However, in a number of decisions, the Supreme Court has declared that if an agency seeks to decide an issue of major national significance, its action must be supported by *clear* statutory authorization. Courts, commentators, and individual Supreme Court Justices have referred to this doctrine as the **major questions doctrine** (or major rules doctrine), although the Court has never used that term in a majority opinion.

This In Focus provides an overview of the major questions doctrine. It discusses the doctrine's framework, provides examples of its application, explores recent Supreme Court developments, and offers considerations for Congress in crafting legislation against the backdrop of the doctrine.

Overview

Agencies often must interpret statutes that grant them regulatory authority. If challenged, courts may need to review such interpretations to determine if an agency has exceeded its authority, and in doing so, will sometimes defer to an agency's interpretation of an ambiguous statute. Under the major questions doctrine, however, the Supreme Court has rejected agency claims of regulatory authority when (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and (2) Congress has not clearly empowered the agency with authority over the issue. *Util. Air Regul. Grp. (UARG) v. EPA*, 573 U.S. 302, 324 (2014).

In requiring an agency to point to a clear "textual commitment of authority" to regulate issues involving major questions, the Court has explained that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The Court has used the doctrine a number of times to reject agency claims of regulatory authority, including in regard to

- the Federal Communication Commission's waiver of a tariff requirement for certain common carriers under its statutory authority to "modify" such requirement (*MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994)),
- the Food and Drug Administration's regulation of the tobacco industry pursuant to its statutory authority over "drugs" and "devices" (*FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)),
- the Environmental Protection Agency's (EPA's) consideration of costs in regulating air pollutants under its authority to prescribe ambient air quality standards that "are requisite to protect the public health" with "an adequate margin of safety" (*Whitman*, 531 U.S. 457),
- the Attorney General's regulation of assisted suicide drugs under his statutory authority over controlled substances (*Gonzales v. Oregon*, 546 U.S. 243 (2006)),
- EPA's determination that the regulation of greenhouse gas emissions from motor vehicles triggered greenhouse gas permitting requirements for stationary sources (*UARG*, 573 U.S. 302), and
- the Internal Revenue Service's (IRS's) decision that a federal health care exchange is "an exchange established by the State" for purposes of determining eligibility for tax credits (*King v. Burwell*, 576 U.S. 473 (2015)).

On the other hand, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court rejected EPA's argument, which was based on the major questions doctrine, that it did not have legal authority to regulate greenhouse gas emissions from motor vehicles.

These examples indicate the range of questions the Court has defined as "major" under the doctrine. However, the precise scope of the doctrine is unknown. The Court has not clearly explained when, as a general matter, an agency's regulatory action will raise a question so significant that the doctrine applies.

Relationship to the *Chevron* Doctrine

The Court traditionally has treated the major questions doctrine as an exception to the ***Chevron* doctrine**, which the Court established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The *Chevron* doctrine governs judicial review of an agency's interpretation of a statute it administers. If *Chevron* applies, a court will typically engage in a two-step analysis to determine if it must defer to an agency's statutory interpretation. At step one, the court asks whether the statute directly addresses the precise issue before the court. If the statute is ambiguous or silent in that respect, the court must proceed to step two, which instructs the court generally to defer to the agency's reasonable interpretation. However, when an agency's interpretation of an ambiguous statute concerns an issue of vast economic and political significance, the Court has at times invoked the major questions doctrine to deny the agency the deference traditionally accorded under *Chevron*.

The major questions doctrine's precise relationship to the *Chevron* doctrine is unclear. At times, the Court has applied the major questions doctrine at step one of *Chevron*, concluding that Congress did not give the agency authority to regulate the major question at issue. The Court also has invoked the major questions doctrine at step two, determining that the agency's interpretation was unreasonable because Congress did not clearly give it such authority. The Court has even used the doctrine as a reason to reject engaging in the *Chevron* two-step analysis altogether. The Court, therefore, arguably has applied the major questions doctrine in the *Chevron* context in an unclear, ad hoc manner.

When the Court refuses to defer to the agency's interpretation of a major question, it ultimately often rejects the agency's position. That is not always the case. While the Court in *King v. Burwell* (listed above) refused to defer to IRS's interpretation under *Chevron*, the Court ultimately upheld the agency's reading of the statute based on its own interpretation.

Recent Developments

In its two most recent major questions doctrine decisions, the Court has appeared to signal that the doctrine is not merely an exception to *Chevron*, but also an independent principle of statutory interpretation focused on ensuring Congress bears the responsibility for confronting questions of major national significance. In *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam), the Court used the major questions doctrine as a basis to block enforcement of the Centers for Disease Control and Prevention's (CDC's) nationwide eviction moratorium. CDC issued the moratorium under its authority "to prevent the introduction, transmission, or spread of communicable diseases" into the country or from one state to another. The Court explained that CDC's action was of major national significance and, therefore, required a clear statutory basis because the agency's action covered 80% or more of the nation; created an estimated economic impact of tens of billions of dollars; and interfered with the landlord-tenant relationship, which the Court explained is "the particular domain of state law."

Further, in *National Federation of Independent Business v. OSHA*, 142 S. Ct. 661 (2022) (per curiam), the Court blocked enforcement of the Occupational Safety and Health Administration's (OSHA's) emergency temporary standard imposing Coronavirus Disease 2019 (COVID-19) vaccination and testing requirements on a large portion of the national workforce pursuant to its authority under the Occupational Safety and Health Act. The Court considered OSHA's action to be of major economic and political significance because, in its estimation, it seriously intruded upon the lives of more than 80 million people.

Although the Court did not discuss *Chevron* deference in either the *OSHA* or *Alabama Association of Realtors* decision, it nonetheless applied the major questions doctrine in both cases, determining that the agencies lacked clear textual authority for their interpretations of the nationally impactful subjects at issue. (In line with its prior major-questions-doctrine decisions, the Court did not use the term "major questions doctrine" or a similar label in its majority opinions in *OSHA* and *Alabama Association of Realtors*, although Justice Gorsuch did refer to the doctrine by name in his concurring opinion in *OSHA*.)

The Court may provide additional guidance on the major questions doctrine this year. In *West Virginia v. EPA*, the Court has been asked to review EPA's authority to regulate greenhouse gas emissions from existing power plants under the Clean Air Act. The court below rejected an argument made under the major questions doctrine that EPA's regulation was not supported by clear congressional authorization. The Court heard oral arguments in *West Virginia* on February 28, 2022. For more information on the case, see CRS Legal Sidebar LSB10666, *Congress's Delegation of "Major Questions": The Supreme Court's Review of EPA's Authority to Regulate Greenhouse Gas Emissions May Have Broad Impacts*, by Linda Tsang and Kate R. Bowers.

Considerations for Congress

Under the Court's formulation of the major questions doctrine, an agency will lack the ability to determine authoritatively a major question if its underlying statutory authority does not clearly permit or require it to do so. Therefore, if Congress wants an agency to decide issues in an area courts likely would consider to be of vast economic and political significance, Congress should clearly specify that intention in the relevant underlying statute, as opposed to relying on vague or imprecise statutory language. This task may be difficult at times, given the lack of clear guidance from the Court on what can be considered a "major" question.

Even when a statutory delegation of authority over a major economic and political question is clear, courts may find that the underlying statute raises other problems. For example, in his concurrence in the *OSHA* case, Justice Gorsuch argued that even had Congress clearly authorized the vaccination mandate at issue in that case, that delegation probably would have violated the **non-delegation doctrine**—the separation-of-powers principle that limits Congress's ability to confer legislative authority on entities—because the statute contained no meaningful restrictions on the agency's regulatory power and, per the agency, conferred near-unlimited discretion on the agency. Two Justices—Justices Thomas and Alito—joined Justice Gorsuch's concurrence.

In his concurrence, Justice Gorsuch opined that the major questions doctrine is a key separation-of-powers principle related to the non-delegation doctrine. Justice Kavanaugh did not join Justice Gorsuch's *OSHA* concurrence, but he has approvingly remarked in the past that adoption of Justice Gorsuch's views on the major questions doctrine and separation of powers would leave agencies only with authority to make "less-major or fill-up-the-details decisions." *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

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