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'West Virginia' and 'Chevron': The Supreme Court Cuts Back on Agency Deference

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The U.S. Supreme Court's decision in *Chevron v. NRDC* (1984) is a longstanding source of controversy. Some proponents of the doctrine argue that it facilitates our Constitution's separation of powers. This deference doctrine puts administrative agencies, under the control of our democratically elected president, ahead of unelected judges when interpreting ambiguous statutes to implement policy. Others, including Supreme Court Justice Elena Kagan, endorse broad agency delegation because "members of Congress often don't know enough—and know they don't know enough—to regulate sensibly on an issue."

In *West Virginia v. EPA*, a case decided on the last day of its 2021-22 term, the Supreme Court issued its most significant administrative law decision in years. Although only passingly mentioned, *West Virginia* effectively modifies *Chevron's* well-known two-step analytical framework.

West Virginia instructs courts to more closely scrutinize agency interpretations at step one. In furtherance of *Chevron*'s original separation of powers principles, federal courts should "presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" Thus, an agency needs "something more than a merely plausible textual basis for the agency action." There must be a "clear congressional authorization."

In *West Virginia*, the Supreme Court now formally endorses the "major questions doctrine" label for the "identifiable body of law that has developed over a series of significant cases."

In the wake of *Chevron*, administrative agencies began using *Chevron* deference as more than a tiebreaker allowing agencies to win close calls for reasonably administering their missions. Instead, agencies began reverse-engineering novel regulatory programs in reliance on *Chevron*, and in anticipation of the deference that courts would grant when interpreting purportedly "ambiguous" language. This led many federal agencies to promulgate ever more expansive rules and regulations stretching well beyond what the enacting Congress envisioned for these statutes.

Yet in "major" case after major case, the Supreme Court steadily rejected agency regulations that clearly stretched agency authority into novel areas.

In 2000, the Supreme Court rejected the FDA's sudden assertion of power to regulate tobacco products under the Food Drug & Cosmetics Act. In 2006, the court rejected the attorney general's claim that he could rescind the license of any physician who prescribed a controlled substance for assisted suicide—even in a state where such action was legal. In 2016, the Supreme Court blocked an earlier EPA attempt to construe the Clean Air Act to suddenly now grant "it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements." And earlier this year, the Supreme Court vacated the Centers for Disease Control and Prevention's efforts to impose an eviction moratorium by regulation, and Occupational Safety and Health Administration's efforts to impose by regulation a nationwide vaccine mandate.

While *West Virginia* follows from and cited this growing line of cases, *West Virginia* is a Supreme Court majority's first express application of this "doctrine." Chief Justice John Roberts' opinion—furthered in a concurrence by Justice Neil Gorsuch—also reveals the primary factors the courts can be expected to apply when using this doctrine to review an agency regulation. The factors that may require an agency's interpretation to be not just "plausible," but "clear," include:

- When an agency relies on "vague terms" or "modest words" in the text of a statute to claim a significant expansion of regulatory power.
- When there is language in the context of other parts of a statute where Congress more clearly granted an agency similar powers elsewhere.
- When an agency's assertion of authority conflicts with the established practice of agency implementation.
- When congress considered enacting legislation to provide the agency authority to undertake a similar program but failed to do so.
- When an agency lacks expertise specific to the broader scope of issues it moves to regulate.
- When an agency's interpretation lacks a clear statutory or technical constraint on the new power claimed by the agency.
- When an agency or agency head has conceded publicly that the new program moves beyond its traditional authority.

The Supreme Court's major question doctrine is a warning to federal administrative agencies. It is certain to be raised by litigants who will challenge novel new rules and programs already proposed by the Biden Administration.

Shortly after taking office, President Joe Biden ordered federal agencies to implement a "government-wide approach" to address greenhouse gas emissions and climate change. Nearly every agency of the federal government has announced some initiative or program—some minor, but some major—in response to the president's call.

Two agency proposals likely to be impacted by the major questions doctrine come from the Securities and Exchange Commission and Federal Energy Regulatory Commission. In March, the SEC proposed a novel new disclosure program relating to "climate-related financial risk." Well before the SEC released its proposal, there were questions about whether SEC's statutory authority allowed the agency to promulgate such disclosure requirements. Given the expansive scope of the program that the SEC ultimately proposed in March, *West Virginia* is certain to play a role in the litigation to come over SEC's regulations (if finalized as proposed).

In addition, FERC proposed to modify its procedures for the Certification of New Interstate Natural Gas Facilities in February 2022. Throughout its history, FERC has been an economic regulator. Its primary mission is "encouraging the orderly development of plentiful supplies of … natural gas at reasonable prices."

In February, however, FERC announced an expansive new policy. When approving new infrastructure, FERC said it would consider whether greenhouse gas emissions would increase as a result of the transport and ultimate use of natural gas for its congressionally intended purpose: combustion for energy. Two of FERC's five commissioners objected to this expansion of FERC's authority. One specifically invoked the major questions doctrine when

dissenting from the policy statement. After intense political objections in Congress, FERC withdrew the statement and opened a further comment period. Nevertheless, the controversy and concern about FERC's policy continues.

The Clean Power Plan is also unlikely to be the last time that the major questions doctrine is invoked against EPA. Nevertheless, it is important to keep in perspective that this is the "major questions" doctrine. Litigants against federal regulations will surely argue this doctrine broadly in the coming years. If, however, federal agencies heed the Supreme Court's warning, and hue closely to their clear statutory authority, the number of cases where the major questions doctrine is actually applied may be small. The Supreme Court's *West Virginia* decision may thereby result in less uncertainty for the public and regulated entities alike. The decision may also help steer policymaking on issues of major economic or political significance back to the halls of congress and away from the creative fancies of lawyers and administrators.

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