A Battle Over Major Questions Is Brewing in the High Court

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IN February, the major questions doctrine took center stage when the Supreme Court heard argument in the biggest environmental case on its docket this term, *West Virginia v. EPA*. The justices will eventually decide whether to uphold the Trump administration's Affordable Clean Energy rule.

The doctrine was most famously set out at the beginning of the century, in a case about a cigarette advertising regulation aimed at protecting kids. In *FDA v. Brown & Williamson Tobacco Corp*., the Court held that the Food and Drug Administration did not have authority for that regulation, because the issue was so significant that the agency needed to point to clear statutory language —and could not. Two features of the FDA's cigarette regulation caused the Court to invoke the doctrine. First, FDA's reading of the statute was "extremely strained." And second, the decision to regulate tobacco was of great "economic and political significance" at least in part because of tobacco's place as one of the "greatest basic industries of the United States."

And attacks on rules are often attacks on agency deference in rulemaking

Now, with a new conservative majority firmly in place in the Supreme Court, parties arguing against agency regulation are repeatedly invoking this doctrine in seeking a stay or other limiting action.

Before the current term began, the Court heard a case about whether the Centers for Disease Control could put a temporary stop to evictions for renters who lived in areas of the country with significant Covid transmission and could show financial need. In a shadow docket decision in the case labeled *Alabama Association of Realtors v. HHS,* the Court vacated the regulation on the grounds that CDC had attempted to exert a "breathtaking amount of authority" without a legislative mandate.

In another shadow docket case, the Court heard a challenge to the Occupational Safety and Health Administration's vaccine mandate for large private employers. Before the issue got to the High Court, the Fifth Circuit not only pronounced the mandate a major question but it also threw shade on the agency—calling it "a workplace safety administration in the deep recesses of the federal bureaucracy." The Supreme Court followed that with a decision that stayed the mandate. The Court's reasoning was that the mandate was a "significant encroachment into the lives—and health—of a vast number of employees" and that the agency only had authority "to set workplace safety standards, not broad public health measures."

Something similar came up in *American Hospital Association v. Becerra,* which was argued in November. The petition in that case claims that a reimbursement rate issue is a major question and invokes a hallowed case that empowers agency action when statutes are unclear: "*Chevron* deference is not a license for administrative agencies to invoke vague terms or ancillary provisions to alter the fundamental structure of a regulatory scheme."

The *West Virginia* case will test the reach of the major questions doctrine. The state argues that EPA's Trump-era repeal of the Clean Power Plan was correct because the agency has no business regulating utility emissions in the manner envisioned by the Obama EPA. But there is no question that the agency has long regulated power plants and emissions, so EPA was not straying outside of its usual arena—as could be argued OSHA did with the vaccine mandate, CDC with eviction relief, or the FDA with cigarette advertising limits. Petitioners in *West Virginia* have forcefully made the argument nonetheless. After describing the statutory provision at issue as "ancillary," the state argues that the lower court's interpretation was consequential enough to become a major question. Petitioners noted the high cost of implementing the Clean Power Plan—but cited data from 2014 which is now obsolete, even according to the Trump administration's calculations. Finally, the state pointed out that Congress has debated climate change legislation on numerous occasions without passing a bill through both chambers.

America's Power, a trade association formed by coal companies, attacked *Chevron* itself in its brief supporting the petition, arguing that ambiguity in a statute raises serious separation-of-powers concerns and that an agency should not have the ability to define the scope of its own authority. According to America's Power, the major questions doctrine resolves some of these concerns, in cases where an agency has asserted "major" or "transformative" authority.

Power companies on the other side of the case filed a brief arguing that petitioners had stretched the major questions doctrine into something that allows the Court to engage in "abstract speculation" about what EPA can do; they argued that the Court should instead only consider "an agency's actual exercise of power."

We will soon see whether this Court truly has a limitless appetite to engage in the kind of political decisionmaking that those companies are warning against.