Major Questions Doctrine May Not Be What Administrative Foes Seek

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Regardless of what happens with the *Chevron* cases in the Supreme Court this term, both undecided at press time, the related Major Questions Doctrine will continue to be a weapon of choice against administrative actions implementing environmental laws. But will those challenges succeed?

The Supreme Court first announced the MQD in 2022 in *West Virginia v. EPA.* The doctrine allows courts to overrule administrative actions if they can describe them as significant for political or economic reasons—hence, addressing "major questions." In order to defeat the challenge, an agency needs to point to clear congressional authority to address that question in the specific way that the agency chose.

This summer, in the consolidated cases of *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*, the Supreme Court will decide whether to overrule *Chevron*, the 1984 decision that created a doctrine in which courts should defer to an agency's expertise if the relevant congressional authorization is ambiguous. But whatever happens with the *Chevron* cases, a court can ignore it anyway by finding a major question is involved.

A court can ignore the decision in the *Chevron* cases if it finds a major question

Natasha Brunstein of New York University Law School recently surveyed cases that cited *West Virginia* between June 2022 and October 2023 for an article in the *Administrative Law Review.* She described cases about guns, visas, hydrofluorocarbons, elections, nuclear storage, student loans, and protections for tipped employees. More recently, the doctrine came up in cases about sentencing, a minimum wage rule, and cryptocurrency.

Brunstein describes interesting trends. For example, courts have been deciding these cases along ideological lines. Brunstein surveyed 21 cases where judges addressed the doctrine in challenges to a Biden-era agency action or executive order. In eight, Democratic-appointed judges upheld the actions. In nine, Republican-appointed judges struck down Biden-era actions under the doctrine. Going against this trend, there were three cases where a Republican-appointed panel or judge upheld the Biden-era action at issue. And one case in the group was decided on other grounds.

Another trend is that the doctrine is not bounded by any criteria. Brunstein's survey shows that courts have looked at a grab-bag of factors. But no court has established that certain factors are always required. And judges have not even been consistent across cases that they personally decided.

The factors include whether the issue has received congressional attention, the relevant statute was old, or that the issue was "highly controversial." Other factors were the expense of the program, the benefits, and the presence or lack of a record regulating in that space. This grab-bag can only have enabled the ideological decisionmaking that has been on display.

The trend may nonetheless be tilting against an indiscriminate application of the MQD based on partisan preference, as more courts reject the challenges to agency actions. In the recent minimum wage rule case *Bradford v. Department of Law,* a majority Republican-appointed panel on the 10th Circuit rejected a MQD challenge. The petitioners argued the doctrine should apply because the rule will cost employers billions of dollars. The court found that Congress had given the agency broad authority to regulate in that area and that there was nothing new about the type of regulation at issue.

The recent sentencing case *United States v. White* was decided by another majority-Republican panel, this time on the 7th Circuit, and that panel also rejected the MQD argument. After explaining that the "contours of the doctrine remain hazy," the court held that the sentencing commission both had discretion in formulating the challenged guidelines and had authority to make the decision, thanks to a statute that authorized it to "establish sentencing policies."

Another court rejected the MQD argument recently in an enforcement case that the Securities and Exchange Commission brought against Coinbase, a crypto-asset trading platform. Coinbase claimed that the doctrine applied because the SEC was seeking to regulate an industry worth $1 trillion. While crypto is new, the court found that "the challenged transactions fall comfortably within the framework that courts have used to identify securities for nearly eighty years."

The irony is that parties in the *Chevron* cases this term, including West Virginia, whose 2022 suit against EPA led to the propounding of the MQD, want the Court to overrule the 1984 precedent because it has caused "widespread confusion and wildly different approaches." They argue that courts should not be left "to their own devices to figure out how to apply it." As this review of the MQD cases shows, those are the exact circumstances that are on display already with the new doctrine.