2024

Legitimacy and the Major Questions Doctrine

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Questions about the legitimacy of recent Supreme Court decisions are occupying an increasingly prominent place in public law discourse. Last February, a widely discussed feature in the *New York Times* quoted several well-known law professors' laments that multiple decisions by the newly empowered conservative majority of the Court have departed so far from accepted constitutional law premises that the professors could not figure out how to teach them to their students. Jesse Wegman, *The Crisis in Teaching Constitutional Law*, N.Y. Times, Feb. 26, 2024. On the other hand, various commentators have argued that the Court's current activism is not fundamentally different from its activism in earlier eras, and that a change in direction should not be equated with lawlessness. *E.g.*, Jonathan H. Adler, *The Restrained Roberts Court*, Nat'l. Rev. (NR Plus Mag.), July 31, 2023.

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The Court itself has taken note of the controversy and has dismissed the criticism. In the Court's latest decision on the major questions doctrine (MQD), Chief Justice Roberts's opinion for the majority was unapologetic: "It has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary [but it] is important that the public not be misled. . . . Any such misperception would be harmful to this institution and our country." *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

Up to a point, I agree with the commentators' premise that the charge of illegitimacy should not be deployed too readily. An epithet will lose credibility and potency if invoked indiscriminately. But this does not mean that the label can never be appropriate. With due respect to the Chief Justice, I will explain here why the MQD is itself among the few legal developments that I would describe as giving rise to serious concerns about legitimacy.

First, a bit of background. As most readers of this essay are doubtless aware, the Roberts Court has deployed the MQD during the past few years to invalidate EPA rules on emissions from power plants, health requirements that OSHA imposed during the COVID pandemic, the Biden student loan program, and so forth.

The doctrine is hard to define, and this is part of the problem, as I will discuss. Roughly speaking, however, the doctrine asserts that an administrative agency may not adopt a regulation that would have vast economic and political significance unless the agency has *clear* congressional authorization for the rule—that is, a more secure foundation in legislation than would be required in the case of most regulations.

The bulk of academic commentary on the MQD has been critical, but much of that commentary has focused on issues such as why it has bad consequences, how it should be interpreted, whether it is consistent with textualism or originalism, etc.

This essay has a different focus. It suggests that the doctrine has a serious legitimacy problem, because the Court has made no serious effort to justify the existence of the doctrine, as I will explain. In developing this argument, I will draw on a full-length article of mine that will soon appear in the *California Law Review*. Readers may consult that article for full elaboration and documentation of the points made here.

The Court came closest to trying to justify the doctrine in a Clean Air Act case, *West Virginia v. EPA*, 597 U.S. 697 (2022). Chief Justice Roberts's opinion for the majority devoted several pages to arguing that the Court had already applied the doctrine in a host of past decisions.

The problem with this claim is that, apart from a pair of COVID cases decided earlier in the same term of Court, those decisions didn't actually provide the precedential support that he claimed for them. Some of the cited cases, such as *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), reflected the major questions doctrine as it was originally understood, as an exception to *Chevron* deference—not as it is currently understood, as a clear statement principle. Others, such as *Gonzales v. Oregon*, 546 U.S. 243 (2006), ruled against the government on the particular facts presented, but didn't purport to endorse any interpretive principle that would apply to a broad range of cases. The only pre-2021 case that arguably did endorse a clear statement rule was *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014). But that endorsement, if it did occur, consisted of one ambiguous sentence dropped into the middle of a discussion of a different point, unaccompanied by any reasons to justify such a requirement.

Of course, the Court often does overstate the teachings of its past cases, but the *West Virginia* opinion was exceptional in the extent to which the Court used exaggerated accounts of its case law as a substitute for analysis rather than as a supplement for it.

Chief Justice Roberts also relied heavily on what he said was a presumption that Congress itself would not use ambiguous language to confer on agencies the authority to adopt rules with a major economic and political impact. But a serious objection to that reasoning is that, in the past, the Court

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has found many times that Congress did confer such authority, in statutes that use broad language such as "public interest, convenience, and necessity," or "just and reasonable rates" or "requisite to protect the public health" or "unfair methods of competition." Many of those laws were enacted by Congresses that were a good deal more liberal than the current Court. What seems to be happening is that the Justices in the Supreme Court majority have created the presumption under discussion by projecting their own skepticism about the regulatory state onto the legislative branch.

In short, the Court has not yet presented a more than perfunctory defense of the MQD. However, some of the individual Justices in the majority have deployed more elaborate defenses of the doctrine in their concurring opinions, so I will give further attention to those opinions. I have in mind, specifically, Justice Gorsuch's argument in the employee vaccination case, *NFIB v. OSHA*, 595 U.S. 109 (2022), which rested on the nondelegation doctrine, and Justice Barrett's concurrence in the student loans case, *Biden v. Nebraska*, which sought to justify the MQD as a so-called linguistic canon.

First, as to Justice Gorsuch's position: Quite a few commentators have taken it for granted that the MQD seems to be an offshoot or variant of the nondelegation doctrine. However, I see a number of problems with that equation, which may help to explain why the Court as a whole has never endorsed that link.

In the first place, the theory seems to rest on the vigorous nondelegation doctrine that Justice Gorsuch would like to see, rather than the essentially toothless nondelegation doctrine that we actually have. Relative to the latter baseline, the MQD cannot be explained as constitutional avoidance, because the statutes involved in those cases had no constitutional problem that needed avoiding.

Furthermore, even if, for the sake of discussion, we assume that the nondelegation doctrine might be reinvigorated, a serious difficulty with Justice Gorsuch's theory is that it doesn't provide any satisfying basis for distinguishing major questions from non-major questions. If Congress's decision to delegate authority to an administrative agency is constitutionally suspect, logically that problem would seem to exist regardless of whether the resulting regulation would be expensive or not so expensive. Justice Gorsuch tried to justify the distinction by relying on a dictum that Chief Justice John Marshall wrote in a very early case. *Wayman v. Southard*, 23 U.S. 1 (1825). Marshall suggested in passing that some "important subjects" may not be delegated. But he did not rely on the distinction and said nothing to explain what such a category of matters would include. Nor has the Court ever, in two hundred years, elaborated on what matters would fall into such a category. It's quite a stretch to contend that this long-neglected dictum can provide authoritative support for a newly created judicial review doctrine in the twenty-first century.

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For her part, Justice Barrett contended that all statutes should be interpreted in light of their context, which, in her mind, includes what she called "common sense" limits on the breadth of whatever delegation is involved. But a problem with Justice Barrett's theory, in my view, is that "common sense" is very much in the eye of the beholder. In fact, she claimed that all of the Court's holdings in the major questions doctrine cases can be explained on the basis of her theory. Yet, in all of those cases, the Court was deeply divided, so her theory seems to assume that the conservatives on the Court possess common sense, and the liberals don't. You can believe what you want about that proposition, but I seriously doubt that a jurisprudential approach that rests on such a premise can be viable.

So, if none of the rationales put forward by the majority Justices holds water, what's actually going on? I want to suggest what I believe the majority probably thinks it is doing in these cases, although it has not said so. The Court probably thinks of the MQD as a substantive canon, which it has adopted as an exercise of its power to create administrative common law.

Unlike the other theories I have discussed, this explanation does strike me as internally logical and coherent. But it has a significant problem of its own, which I call a problem of legitimacy. It basically amounts to the majority Justices writing their ideological preferences into the fabric of administrative law. That move is very hard to reconcile with the Justices' often-repeated assurance that they sit to enforce neutral principles of law, not to implement their own value preferences.

One final basis for objecting to the major questions doctrine is that its outer boundaries are completely undefined. Supporters of the doctrine might reply that this is a cheap shot, because plenty of other doctrines in administrative law are also ill-defined, like "what does arbitrary and capricious mean?," or "how ambiguous does a statute have to be in order for a rule to survive scrutiny under

Chevron step one?" But I contend that the MQD is unique in at least one sense: not one of the Justices who support the MQD has ever written a single sentence in any opinion to tell us what circumstances would *not* trigger the doctrine. The Court literally acknowledges no limits on its prerogative to decide what is or is not a major question. Indeed, as though to underscore this observation, last December Chief Justice Roberts and Justice Kavanaugh suggested at oral argument in *Harrington v. Purdue Pharma L.P.*, No. 23-124, that the doctrine might circumscribe the statutory authority of a *bankruptcy court*. Apparently, they would not even limit the MQD to administrative agency cases.

Now, this particular objection to the MQD can't last forever. Sooner or later, the Supreme Court will encounter a rule that a lower court has set aside by applying the doctrine but that the Justices themselves may want to uphold. When that day comes, the Court may have to articulate some reason as to why the rule doesn't violate the MQD. But this may turn out to be a difficult task, because the Court has not yet developed a defensible theory as to why the doctrine exists at all.

To conclude, I don't expect the MQD to go away any time soon. But if people come to appreciate the extent to which the Court's creation of this doctrine has been unexplained, and maybe is illegitimate, the Court might feel pressure to apply the doctrine with greater restraint than it has yet shown. And if the Court wants to respond constructively, rather than defensively, to complaints about its legitimacy, the MQD would be a good place to start.