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"Major Question" about the Future of the Administrative State

The Supreme Court relied on the major questions doctrine to reject the Biden administration's student loan forgiveness program.

By Jennifer Fischell

The "major questions doctrine" (MQD) has been in the news again this summer. The basic idea behind that doctrine—as the U.S. Supreme Court articulated it in *West Virginia v. Environmental Protection Agency* last year—is that federal agencies may not answer questions of broad political or economic significance unless they can point to clear congressional authorization for doing so. 142 S. Ct. 2587 (2022). In late June, the Supreme Court relied on that concept again in *Biden v. Nebraska* to reject the Biden administration's student loan forgiveness program. No. 22-506, slip op. (U.S. June 30, 2023). Whether the nation should have a loan forgiveness program with "sweeping and unprecedented impact," the chief justice said, was a question for Congress. *Id.* at 23.

While the MQD seems here to stay, there remains lively debate about its origins, how it fits into traditional legal frameworks, and where it might take the courts—and country—going forward. Earlier this year, that debate was the subject of a webinar entitled " 'Major Question' About the Future of the Administrative State," presented by the American Bar Association's Appellate Practice Committee and Section of Litigation.

The event, moderated by Cheyenne Chambers of the Department of Justice's Civil Rights Division, offered perspectives from two guest panelists, Tom Dupree and Professor Christopher Walker. The panelists offered their insights into the MQD, with comments reflecting perspectives from both academia and practice. Walker teaches and researches topics related to administrative law at the University of Michigan Law School, while Dupree drew on his decades of experience practicing administrative law as a government attorney and on his current role as a partner at Gibson Dunn.

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Where Does the Major Questions Doctrine Come From?

The panelists discussed the origins of the MQD. As the panelists explained, the MQD is sometimes described as deriving from constitutional separation-of-powers principles: Under Article I, Congress exercises the "legislative powers" of government. So, the theory goes, an executive branch agency should not take on bigger legislative issues than Congress has expressly granted. Others have theorized that the MQD is more like a tool of statutory interpretation, designed to assess the extent of a statutory delegation to an agency.

When and how the MQD evolved is also up for debate. As Walker explained, some (like Justice Neil Gorsuch) trace the MQD's origins as far back as the 1800s. More commonly, academics and practitioners source it to a string of cases starting in the 2000s. From then on, the Supreme Court has increasingly rejected agency actions on the theory that the agency exceeded its legislative mandate—whether the cases involved the Food and Drug Administration regulating tobacco, the Centers for Disease Control and Prevention approving an eviction moratorium, or the Occupational Safety and Health Administration mandating certain COVID-19 responses. Those cases culminated in last year's decision in *West Virginia*, when the Court for the first time elevated and crystallized its deregulatory reasoning into a stand-alone "doctrine" that "major" questions must be left to Congress absent clear authorization to the contrary.

The panelists offered a reason for the MQD's recent emergence. Over the last two decades, they explained, it has become more and more difficult for Congress to legislate effectively—but there is just as much political pressure on the president to deliver on promises to the people. As a result, federal agencies have increasingly exerted their power to get things done when Congress falls short. And as they do, they sometimes push the boundaries of their authorizations. The MQD, according to the panel, is a judicial attempt to swing the administrative-law pendulum back toward deregulation.

What Kind of "Doctrine" Is It?

There is disagreement about what kind of "doctrine" the MQD really is. The panelists addressed three different ways to fit the doctrine within existing legal frameworks for statutory analysis, constitutional law, and administrative law.

> **1. A statutory interpretation tool.** One way to think about the MQD is as a "clear statement rule"—a principle that says a statute does not authorize something unless it addresses it expressly. Clear statement rules act as judicial presumptions that

Congress does (or does not) intend a particular result unless Congress rebuts that presumption. For example, there is a general presumption that Congress does not intend to abrogate state sovereign immunity unless it says that it is doing so expressly. The MQD could be seen as imposing a similar requirement on Congress when it comes to "major questions."

Alternatively, the MQD could be seen as echoing another frequent refrain in statutory interpretation: Congress does not "hide elephants in mouseholes." In other words, Congress does not hide massive grants of quasi-legislative authority in obscure or insignificant provisions.

When thinking about the MQD as a statutory interpretation tool, it is important to remember that it is a *context-specific* one—the doctrine is not triggered unless there is a "major" question. That part of the MQD analysis is decidedly not a "statutory" issue and, according to Walker, distinguishes the MQD from other textualist interpretation techniques. Deciding whether a question is major, as conceived by the Supreme Court, requires a detailed assessment of a wide range of factors, including whether Congress tried and failed to pass laws about the major question at issue and the size and scope of a regulation's economic effects.

2. A nondelegation variant. Another way to think about the MQD, the panelists explained, is as a reflection of a reemerging constitutional theory known as the "nondelegation doctrine." That doctrine's basic theory is that Congress may not constitutionally delegate its legislative authority to agencies (or, as applicable, private parties).

The nondelegation doctrine, at least in its strongest form, has long been considered defunct. Day in and day out, federal agencies pass rules and make policies that govern American businesses and lives. But in 2019, starting with *Gundy v. United States*, some justices began expressing interest in revitalizing the doctrine—or at least taking up cases to consider whether they should. 139 S. Ct. 2116 (2019).

The MQD is not quite a nondelegation theory because, at least on its face, it does not *forbid* Congress from ever delegating major questions to agencies—it just says Congress must do so "clearly." In practice, however, it is unclear how much difference that distinction will make. Will there ever be a truly "major" question (as determined by the Supreme Court or lower courts) where Congress speaks clearly enough to authorize agency action? It may turn out that, in practice, the MQD fulfills the same role that the nondelegation doctrine would.

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3. An exception to *Chevron* deference. Finally, as the panelists explained, the MQD is sometimes thought of as an exception to a different long-standing administrative law principle: *Chevron* deference. Under *Chevron v. Natural Resources Council*, courts defer to agencies that have promulgated rules offering reasonable interpretations of otherwise silent or ambiguous federal statutes. 467 U.S. 837 (1984). But in cases where a statute is silent or ambiguous about a "major question," the MQD says the agency does not receive any deference at all; the lack of clarity itself dooms the attempt to regulate.

While the MQD certainly chips away at *Chevron*, it is unclear if *Chevron* will remain on the books at all. As Dupree noted, *Chevron* "ain't what it used to be" and is often treated as if it "shouldn't be spoken about in polite company." In case after case and year after year, the Supreme Court has dodged *Chevron* issues where it could and refused to defer to agencies when it couldn't. The last time the Supreme Court deferred to an agency under *Chevron* was in 2016. And next term, in *Loper Bright Enterprises v. Raimondo*, the Supreme Court will hear a case addressing whether *Chevron* should be overruled outright.

Walker seemed to think that the MQD might actually make it less likely that the Court will overrule *Chevron*. The MQD serves as a sort of safety valve for *Chevron*—permitting courts to refuse to apply *Chevron* when they think there is a "major" question at play. That deregulatory safeguard may ameliorate some justices' concerns about *Chevron* granting too much power to agencies.

Dupree also suggested that the Court has had many opportunities to overrule *Chevron* but still hasn't taken one. "Every year," Dupree joked, everyone thinks that there is a case that will overrule *Chevron*, but then the Court treats *Chevron* like "Charlie Brown and Lucy and the football, and it gets pulled away at the last second." Next term will be the ultimate test, providing the Court a clear chance to overrule—or limit—*Chevron*. Where the Court lands, and whether the Court relies on its MQD jurisprudence in the process, will be worth watching.

What Is Next for Administrative Law?

The panelists noted several other areas worth watching in the coming years as the nation responds to the evolution of the Court's MQD jurisprudence.

The Court's recent decisions leave a lot of uncertainty, for example, about exactly when a question counts as "major," and the lower courts will now have to grapple with drawing the line between normal questions and major ones.

The panelists also discussed the effect of the MQD on agencies and Congress. Congress seems unlikely to redraft old laws or pass new laws clearly granting large swaths of authority to federal agencies. But agencies might work harder to justify their rulemakings in light of the MQD—they could narrow the scope of their rules, add additional support for why their rules are not "major," or further explain why their rules are clearly within the agency's core competencies and authorized by Congress. There have also been proposals for Congress to pass a law that would fast-track consideration of legislation related to regulations that have been vacated by the federal courts under the MQD. Such a law would allow Congress to respond to judicial invalidations of major regulations more quickly by skipping the filibuster process.

State agencies and governments might also respond to the Supreme Court's deregulatory shift. Some state agencies could begin increasing their regulation to fill gaps left by federal agencies. Or state courts and legislatures may follow in the Supreme Court's footsteps and adopt their own state-law versions of the MQD.

Going Forward

In 2022, the emergence of the major questions doctrine as a formal doctrine was itself a "major" development. Next year, we may see yet more changes—with *Chevron*'s vitality in question and many unanswered questions about the state of administrative law. Speculation about what is next abounds, and the reading list for those interested is long and growing. But it is worth keeping an eye on this evolving space: whether federal agencies have the power to regulate is not just a series of abstract legal questions—it affects every corner of public and private American life, including yours.

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