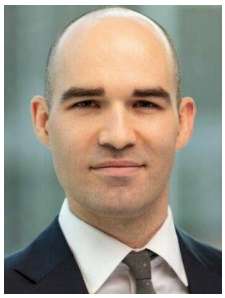
Is There A New 'Moderate Questions' Doctrine?

By **Jason Neal** (July 3, 2023)



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The "major questions" doctrine that the U.S. Supreme Court announced last year in West Virginia v. U.S. Environmental Protection Agency[1] was a watershed moment in administrative law.

The doctrine requires "clear congressional authorization" for agency action in "certain extraordinary cases" — general statutory authorization will not do, even if it can reasonably be read to support the agency.[2]

The U.S. Court of Appeals for the D.C. Circuit's June 20 decision in Heating, Air-Conditioning & Refrigeration Distributors International v. EPA, however, signals that, even in less "major" cases, courts may also begin to approach agency reliance on general statutory authorization with similar skepticism.

This new "moderate questions" doctrine, as I'll refer to it, could rival the impact of the major questions doctrine, as it could apply in a much larger set of cases.

The Major Questions Doctrine

To understand the D.C. Circuit's decision, we must begin with West Virginia v. EPA. In many ways, the D.C. Circuit's application of this moderate questions doctrine follows a similar pattern as the Supreme Court's decision, just on a smaller scale.

The core issue in that case, as framed by the court, was whether a requirement to shift electricity generation from coal burning to other sources can qualify as the "'best system of emission reduction' within the meaning of Section 111" of the Clean Air Act.[3] Writing for the majority, Chief Justice John Roberts concluded that it could not.

The court conceded that the statute could fairly be read to support the EPA's position: "As a matter of 'definitional possibilities,' … generation shifting can be described as a 'system' … capable of reducing emissions."[4]

But it refused to interpret the statute that way, because the policy decision to transition away from coal was one of "such magnitude and consequence" that Congress should make it, or else assign it to an agency through a clear delegation.[5] It grounded that decision in "both separation of powers principles and a practical understanding of legislative intent."[6]

The court dubbed this requirement of a clear statement by Congress the major questions doctrine — a term already in use among some lower courts and scholars. And it traced the doctrine back to several cases in which the court had hesitated before concluding that Congress meant to confer agencies authority over matters of great "economic and political significance."[7]

The court quoted from the 2001 Supreme Court case Whitman v. American Trucking Associations, for example, that "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'"[8]

The major questions doctrine thus effectively requires a court to answer two questions:

First, does the authority asserted by the agency involve a major question? That is, does it involve a "highly consequential power," or an extraordinary case, or one of such "economic and political significance" to warrant special scrutiny?[9] Courts, agencies and practitioners will likely disagree on where exactly to draw the line, quoting these and other formulations from the court's decision.

Second, if there is a major question, can the agency identify "clear congressional authorization" for the power it asserts?[10] There, too, future controversies will surely develop precedent on what suffices to satisfy this clear-statement rule.

In West Virginia, the court majority answered those questions "yes" and "no," respectively.

The ability to "force a nationwide transition away from the use of coal"[11] presented a major question, and the authority in Section 111(d) of the Clean Air Act to set emissions caps at the level reflecting the "applications of the best system of emission reduction … adequately demonstrated" was insufficient to demonstrate that Congress wanted the EPA to answer it.[12]

Justice Elena Kagan's dissent, joined by Justices Sonia Sotomayor and Stephen Breyer, warrants discussion, too. She emphasized the impact the court's decision would have on the EPA's ability to address climate change. She argued that "generation shifting fits comfortably within the conventional meaning of a 'system of emission reduction.'"[13]

And she vigorously contested the majority's reading of previous precedents as constituting a special category of major cases justifying a clear-statement rule, as opposed to representing applications of normal statutory interpretation principles.

The Budding "Moderate Questions" Doctrine

The major questions doctrine is a potent tool for challenging agency assertions of authority, but it is a limited one. The principal limitation, of course, is that the doctrine applies only where the agency action at issue qualifies as a major question. If there is no major question, are broad, general statutory grants of authority enough to support agency action?

Not necessarily — especially in the wake of the D.C. Circuit's recent decision in Heating, Air-Conditioning & Refrigeration Distributors International v. EPA.[14] There, a 2-1 majority relied on similar considerations to those in West Virginia to reject an EPA assertion of authority based on broad statutory language, even though the court disavowed any reliance on the major questions doctrine.

The EPA authority at issue involved regulation of hydrofluorocarbons, or HFCs. The court agreed with the EPA that provisions of the American Innovation and Manufacturing Act, or the AIM Act, permit the EPA to phase out HFCs, including when blended with other chemicals.[15] The court thus rejected industry challenges to EPA rules phasing out HFCs through a cap-and-trade program.[16]

The court took issue with two related EPA rules, however, requiring the use of refillable cylinders to transport HFCs, with QR codes to make the cylinders trackable.

The EPA had pointed to two provisions of the AIM Act as authorizing those rules:

- A broad grant of authority to "promulgate … such regulations as are necessary to carry out the functions of the [EPA] under [the AIM Act]"; and

- A direction that the agency, to guarantee compliance with the phase-down, "shall ensure that the annual quantity of all regulated substances [HFCs, as relevant here] does not exceed" a certain amount from multiplying two values together.[17]

From the EPA's perspective, the direction to ensure compliance authorized these measures intended to discourage the illicit production and importation of HFCs.

The D.C. Circuit majority disagreed. Because the statute contained other, more specific grants of authority in connection with HFCs and other regulated substances, the majority was unwilling to read the general "shall ensure" language as granting the agency power to "pass other measures" related to the phase-down.[18]

On top of that, the majority said, industry compliance would cost at least $441 million to $2 billion dollars, and it was "unlikely that Congress would have granted the agency authority to pass a rule of that magnitude in a provision that says nothing about complementary measures, refillable cylinders, or QR codes."[19]

That reasoning sounds very similar to that of the Supreme Court in West Virginia. But the majority insisted that it was not applying the major questions doctrine, as these rules are "less important and expensive" than other rules to which the Supreme Court had applied the doctrine.[20]

Nonetheless, the majority grounded its approach in what it called the American Trucking rule, from Whitman v. American Trucking, mentioned above: that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[21] Or, as Justice Antonin Scalia more colloquially put it, Congress does not "hide elephants in mouseholes."[22]

The Supreme Court had quoted Whitman in the course of describing the basis for the major questions doctrine. But the D.C. Circuit relied on it here, too, to hold that broad language directing an agency to ensure compliance with a regulatory scheme was insufficient to authorize particular measures, based in significant part on the court's assessment of a rule's impact on the industry.

That suggests that Whitman is not just a foundation for the major questions doctrine, but also applies to a lesser class of questions, too.

Call it the moderate questions doctrine.

U.S. Circuit Judge Cornelia Pillard's dissent reads much like Justice Kagan's dissent in West Virginia.

She described the importance of the EPA's work to phase down HFCs, as well as the difficulty of ensuring compliance. She agreed with the EPA that, through the two provisions it had cited, "Congress delegated to EPA the authority to promulgate reasonable compliance measures, so long as they are necessary to guaranteeing that the phasedown is met."[23]

Most importantly for present purposes, she argued that EPA's modest regulatory measures requiring reusable, trackable HFC containers "are a far cry from the kinds of sweeping

measures that have triggered extra skepticism" under either the major questions doctrine or Whitman's "no elephants in mouseholes" approach.[24]

The Bottom Line

Don't expect too many courts to start expressly citing a moderate questions doctrine any time soon. Still, the D.C. Circuit's decision suggests that agencies may have less latitude than before to adopt specific rules based on general grants of authority — even when there is no major question.

In the wake of West Virginia v. EPA, advocates in administrative proceedings and court challenges have understandably argued that a wide variety of agency decisions might trigger application of the major questions doctrine. But they need not put all their eggs in one basket.

Even in less extraordinary cases, courts may be open to arguments that significant agency decisions need to be grounded in specific grants of authority rather than more general language.

Whether that is a new moderate questions doctrine or just a more aggressive application of the old "no elephants in mouseholes" intuition, it is another potentially powerful tool.

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[1] West Virginia v. Environmental Protection Agency, 142 S. Ct. 2587 (2022).

[2] Id. at 2609.

[3] Id. at 2607.

[4] Id. at 2614 (citations omitted).

[5] Id. at 2616.

[6] Id. at 2609.

[7] Id. at 2608 (citations omitted).

[8] Id. at 2609 (quoting Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

[9] Id. at 2608-09 (citations omitted).

[10] Id. at 2614 (citation omitted).

[11] Id. at 2616.

[12] Id. at 2614.

[13] Id. at 2630 (Kagan, J., dissenting).

[14] Heating, Air Cond. & Refr. Distribs. Intn'l, et al. v. EPA, --- F.4th ----, 2023 WL 4067167 (D.C. Cir., June 20, 2023).

[15] 42 U.S.C. §7675.

[16] 2023 WL 4067167, at *2-4.

[17] 42 U.S.C. §§7675(e)(2)(B), (k)(1)(A).

[18] 2023 WL 4067167, at *6.

[19] Id.

[20] Id.

[21] Id. (quoting Whitman, 531 U.S. at 468).

[22] Whitman, 531 U.S. at 468.

[23] 2023 WL 4067167, at *9 (Pillard, J., concurring in part and dissenting in part).

[24] Id. at *11.