

Unless you're deeply immersed in administrative law, you may not have heard of the major questions doctrine. It's a legal theory that conservative judges have used with increasing rigor to block important regulatory initiatives. The doctrine places special obstacles on agency regulations of issues of "major economic and political significance."

In its initial outing, the conservative majority said that FDA couldn't regulate tobacco without a clear congressional mandate. Most recently, it has applied the doctrine in striking down the CDC moratorium on evictions during the pandemic. It now seems poised to do so in a case involving EPA's power to regulate carbon emissions from coal-fired power plants.

Unfortunately, there are a host of major questions about the doctrine's legal scope that the conservative Court has never resolved. Here are just a few of them:

What's the effect of holding something to be a major question? Sometimes, the Court has said that if a statute is ambiguous about a major question, the Court will decide the question for itself rather than deferring to the agency. Sometimes it has said that if a statute is ambiguous about a major question, the statute should not apply at all. And Justice Kavanaugh at least has suggested that it might even be unconstitutional for Congress to give an agency power to decide a major question. Which is it?

When does the economic effect of an issue become "major"? A lot of regulations cost \$100 million per year or more. Presumably the threshold is higher than that, but we don't know how much higher. Even a billion dollars a year is only 0.005% of GDP. We also don't know whether it's the overall amount of cost or whether other forms of significance matter, such as job losses or the extent to which costs are spread evenly among the population. Even a \$1 billion is only about \$3 per person.

When does an issue have "major political significance"? The Court has tended to look at indexes of political significance like editorials, media attention, and political pushback. These forms of evidence give a lot of power to political figure, mass media, and social media influences to decide What is politically controversial also shifts with time. Then there's the issue of how to draw the line between "major" and "minor" political controversies. It's hard to see a clear metric apart from whether the Justices themselves are worked up over an issue.

Why "economic" significance but not other impacts? There are a lot of ways a regulation can impose costs on society. It could wreak havoc on the environment or cause deaths, for instance. Why does the Court only care about monetary impacts?

Why doesn't the doctrine apply to the Court itself? The Court often decides issues of "great economic and political impact," often based on statutes that don't precisely speak to an issue. In an early era, the Court broke up Standard Oil and restructured the US oil industry based on the nebulous language of the antitrust laws. Recently, it held that employment discrimination against LGBTQ individuals is illegal under Title VII. Indeed, you might argue that the question of when to apply the major questions doctrine is itself "an issue of major economic and political significance."

Is the major question doctrine constitutional? The doctrine involves the kind of nebulous standard that the Court finds constitutionally problematic in other settings. In the *Rucho* case, the Court held that the question of when political gerrymandering goes too far can't be decided by the courts because there's no judicially ascertainable standard. How, then, can determinations of when a political controversy is sufficiently "major" possibly be within the authority of courts? In short, doesn't the major questions doctrine involve the Court itself in making decisions that are far more suited to legislators than courts?

It seems almost certain that some conservative judges will try to use the major questions doctrine to block Biden Administration initiatives on climate change. Doing so would be a major error.