In November, I wrote a post posing "some major questions about the major questions doctrine." In *West Virginia v. EPA*, Chief Justice Roberts starts supplying some answers to those questions. In particular, he seems to be using a narrower four-factor approach to decide what constitutes a "major question."

As we all know, the *West Virginia* case involved the Obama Administration's signature climate change regulation, the Clean Power Plan. The Court rejected the regulation on the basis of the major questions doctrine. The Court should never have agreed to hear the case, since the Clean Power Plan was already functionally dead. But some good may come out of the case in terms of the way the Court articulated the major questions doctrine.

Here are some of the questions I asked in November, I should note that I did some tinkering with the questions. and added an important new question. By and large, the answers are reassuring.

Q: What's the effect of calling something a major question?

A: The major question doctrine is a clear statement rule.

According to the Court, in a major questions case, "the agency must point to 'clear congressional authorization' for the authority it claims." Thus, if Congress wants to give an agency the power to decide a major question, it has to do so in clear, direct language.

Q: Exactly what makes something a major question?

A: Roberts focuses on four factors in determining whether a regulation involves a major question.

Here are the four factors that Roberts considers:

1. ***Stark departure from past practice and regulatory norms.*** The agency's interpretation of the statute was "not only unprecedented; it also effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of … regulation' into an entirely different kind." Moreover, EPA had relied on an obscure and little-used portion of the statue.
2. ***Breadth of the claimed authority.*** Under EPA's view of the statute,

Roberts says, “Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy.” Congress needs to say so clearly if that’s what it intends.

3. ***Lack of relevant expertise.*** EPA lacked expertise on running the electricity system.
4. ***Congressional consideration and rejection.*** Congress considered and rejected multiple efforts to create a cap-and-trade scheme for carbon.

It may be premature to speak of “the four-prong *West Virginia* test,” but such a test is implicit in Roberts’s analysis. Gorsuch and Alito plainly weren’t satisfied with this approach. As discussed below, they advocated a much more robust version of the major question doctrine. That suggests that they may have seen it as implicitly rejecting their much more aggressive version of the doctrine.

Q: Would it be unconstitutional for Congress to give an agency the power to decide a major question?

A:The Court doesn’t address this question directly, but the major questions doctrine doesn’t seem to be a rule of constitutional law.

The Court says that “A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.” That implies that Congress could delegate this power to EPA if it really wanted to, just as the California legislature gave similar power to the California Air Resources Board in AB 32.

Gorsuch speaks at great length about the nondelegation doctrine, which in his view would forbid Congress to give such broad power to an agency. But the majority opinion only speaks in vague terms about “separation of powers principles” as one of the two considerations behind the doctrine.

The overall impression is that Gorsuch’s effort to put sharp constitutional limits on Congress’s power to delegate to agencies is foundering. We can only hope so.

Q: When does the economic effect of an issue become "major"?

A: If West Virginia v. EPA is any guide, it's not about the dollars. It's a more qualitative assessment of the significance of the regulation.

In his description of the background of the case, Roberts describes the projected cost of the Clean Power Plan. But he doesn't bring up the cost again in his analysis of why the regulation presents a major question. Instead, he emphasizes "on EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy."

Again, there's a contrast with Gorsuch. He goes on at length about the high cost estimates for the Clean Power Plan. (It's clear in retrospect that this was a huge overestimate.) That only makes the absence of such a discussion from the Roberts opinion more glaring.

Q: When does an issue have "major political significance"?

A: "Political significance" seems to have a narrow meaning.

Roberts mentions only one thing that bears on political significance: Congress had repeatedly considered but not passed legislation to create a carbon trading market. Nothing about at all the political rhetoric on both sides regarding the plan.

Q: Why "economic" significance but not kinds of impacts other impacts?

A: The Court never answers this. I suspect that the answer is that other impacts can sometimes count.

For example, if an agency claims the power to control end of life decisions – real death panels rather than the imaginary ones that were supposedly in Obamacare — I think that Roberts would consider that to be a major question. And not just because end-of-life care is

very expensive. It would not be reasonable to assume that Congress gave that power to an agency through indirection or in an obscure provision of a law.

Q: Isn't the major question doctrine awfully vague?

A: I suspect that Roberts and some other conservative Justices had a similar concern about the vagueness of the standard. This may be their effort to fix that.

Roberts seems to be trying hard to domesticate the major questions doctrine so it won't be just a wildcard for judges to play. He steers away from the most problematic and open-ended formulations of the doctrine. Instead, he tries hard to tie it to conventional methods of statutory interpretation.

Q: How will the major questions doctrine be applied in the future?

A: If the Chief Justice's approach sticks, the doctrine hopefully will be applied more sparingly and in a reasonably predictable way.

Maybe I'm being too optimistic, but the failure of Gorsuch and Alito to attract the support of any other Justices may mean that Roberts has really won this fight.

If Roberts and another Justice stick with his approach, that means as a practical matter that it will be controlling. If they don't find a major question, their votes combined with the three liberals will make a majority to reject application of the doctrine in a given case.

Let's hope Roberts's narrower formulation of the major questions doctrine carries the day.