

When it struck down Obama's signature climate regulation in *West Virginia v. EPA*, the Supreme Court formally adopted the major questions doctrine as a way to synthesize prior anti-regulatory rulings. The major questions doctrine (MQD to insiders) has gotten a lot of attention. One thing that's been overlooked, however, is that there are two versions of the doctrine, one in Roberts's majority opinion and one in Gorsuch's concurrence. The contrast is revealing.

Perhaps the most important difference is in the justifications given for the doctrine. Roberts summarizes the reasoning of prior cases by saying that common sense indicates that it was very unlikely that Congress had meant to delegate such broad power in those cases. He added that agencies have only the powers given them by Congress, and the laws empowering agencies are not an "open book to which the agency may add pages and change the plot line."

Roberts ends by saying that "in certain extraordinary cases both separation of powers principles a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there." The stress throughout this section is on power grabs by agencies — which are part of the executive branch. There is not a word about the possibility that Congress will deliberately give agencies too much power.

Indeed, at the end of the opinion, Roberts makes it clear that Congress *could* have given EPA the power to decide whether to fundamentally reshape the country's energy system. Roberts says that EPA had claimed the power to force a transition away from coal and then adds: "A decision of such magnitude and consequence rests with Congress itself, *or with an agency acting pursuant to a clear delegation from that representative body.*" [my italics] Note that he's talking about the decision whether to transition from coal, not about who has to decide the pace and method of the transition (for instance, by requiring emissions trading). In other words, Roberts is saying that if it wanted, Congress could decide whether to eliminate coal or it could write a law telling EPA to decide what to do about coal.

In short, for Roberts, the separation of powers problem seems to be whether an agency has exercised more power than it was given by Congress. There's nothing in the majority opinion that indicates concern about Congress giving too much power to the agency.

In contrast, for Justice Gorsuch, the major questions doctrine is *all about* preventing Congress from "inadvertently crossing constitutional lines" by delegating too much

authority to the executive branch. His dissent begins with several pages about how terrible it is for Congress to give too much power to the executive branch. For him, the stakes are enormous, involving “basic questions about self-government, equality, fair notice, federalism, and the separation of powers.” None of that breathless rhetoric appears in the majority opinion. Gorsuch wants to say that it’s at least constitutionally questionable whether Congress could have delegated “the “major question” whether to eliminate coal to EPA. The majority clearly says that Congress could do so if it wanted.

In short, Gorsuch clearly wants the major questions doctrine to be part of his grand plan of returning government to the good old days before government regulation. He even grounds the doctrine in a decision from the *Lochner* era, in which the Court intervened to save railroad tycoons from effective regulation. That was the same era when the Court struck down minimum wage laws and maximum hours workers. Sadly for him, the Court seems to be taking a different path.