

In *West Virginia v. EPA*, the Supreme Court used the “major question doctrine” to overturn Obama’s signature climate change regulation. Once an issue reaches a certain level of significance, the Court says, Congress generally would want to make its own decision rather than allowing an agency like EPA to decide.

Scholars have criticized the opinion for its lack of clarity about what makes an issue “major.” I decided to check out the court of appeals opinions after *West Virginia* to see if this criticism is valid. The short answer is yes.

I found six cases that actually decided the issue. (There were about an equal number of cases where the issue was raised but wasn’t clearly decided.) The cases are split 3 to 3, with some courts applying the major question to regulations that were so minor I’d never heard of them.

No, not a major question.

An executive order requiring federal contractors’ employees to get COVID vaccinations. *Mayes v. Biden*, 67 F.4th 921 (9th Cir. 2023), vacated as moot, 70 F. 4th 1167 (9th Cir.. 2023).

Labeling and reuse requirements for cylinders with HFCs, the super-powerful greenhouse gases. *Heating, Air Conditioning and Refrigeration Distributors Int’l*, 71 F.3d 59 (D.C. Cir. 2023).

Rule requiring fishing ships to pay for an observer to check for violations of fishing limits. *Lopez Bright Enterprises v. Raimondo*, 45 F.4th 359 (2022) (Supreme Court granted cert. but not on this issue).

Yes , a major question.

An executive order requiring federal contractors’ employees to get COVID vaccination. *Louisiana v. Biden*, 55 F. 4th 1017 (5th Cir. 2022). (Yes, the same issue that the 9th Circuit decided the other way.)

Issuance of license to private party to operate a temporary, away-from-reactor, storage facility for nuclear waste. *Texas v. NRC*, 2023 WL 5498874 (5th Cir. 2023).

Applying Clean Water Act to shrimp trawlers’ dumping of bycatch back in the

ocean. *NC Coastal Fisheries Reform Group v. Capt. Gason, LLC*, 76 F. 4th 291 (4th Cir. 2023).

The Court described major questions issues as arising in rare, extraordinary cases of immense economic and political significance. Judging by these opinions, litigants are arguing for courts to apply the doctrine in cases involving relatively routine regulatory issues, and some courts seem to be obliging. Some clarification from the Supreme Court would be more than welcome.