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Major Questions Doctrine

THE ISSUE IN BRIEF

- From Supreme Court Justices to the Speaker of the House, those on both the right and the left express concern over the ever-expanding authority of the administrative state.
- In particular, administrative agencies today exercise significant legislative authority crafting rules with the force of law. This is because Congress often writes in broad brush and leaves it to federal agencies to fill in the details.
- More troubling still, the Supreme Court has largely abdicated its role to ensure that the legislative powers are exercised primarily by Congress. Instead, if a statute is silent on an issue, the Supreme Court typically *assumes* that Congress intended for an agency to make the call, and thus defers to the agency's determination of the issue.
- However, in a case largely seen as a loss for conservatives, *King v. Burwell*, the Supreme Court articulated an important exception to agency deference: when significant questions are involved the Court will presume that Congress did *not* intend to delegate to the agency.
- This new development has the potential to put lawmaking back in congressional hands. It will be for Congress to decide important questions or explicitly delegate authority to an agency.

EXECUTIVE SUMMARY

The administrative state has never been more powerful. It regulates more and more of our daily conduct. Yet unless and until we see a dramatic reduction in the size of the federal government, it is difficult to envision a world without the Fourth Branch. As a result, the most pressing administrative law question is not really whether the administrative state is unconstitutional, but where do we go from here? How do We the People and the other branches of government act as effective checks on overgrown federal agencies?

For those in favor of limited federal government, and of putting lawmaking back in congressional hands, there is a silver lining to *King v. Burwell*, the case in which a divided Supreme Court upheld the Affordable Care Act. Remarkably, in determining that insurance purchased on *either* a Federal or State Exchange qualified for tax subsidies, the Supreme Court did not rely on the IRS' interpretation of the ACA. Instead, the Court resurrected a defunct statutory interpretation doctrine—the "major questions" doctrine—and concluded that the question was *too important* to be delegated to an agency.

This was an astounding break with administrative law. It reverses entirely the usual rules of statutory interpretation. Instead of presuming that Congress intended to delegate any issue upon which a statute is silent, the Court found that, had Congress wished to delegate such an important question to the IRS, it would have done so expressly. This reversal of presumptions puts the primary responsibility for drafting law on important issues back in congressional hands--and is a very good first step in returning the administrative state to a more limited legislative role.

MORE INFORMATION

The Major Questions Doctrine: A Move towards a More Limited Administrative State

Introduction

It is hard to forget a case like *King v. Burwell*. It involved a legal challenge to Obamacare which would have gutted the statute and returned healthcare policy to the domain of the states. And unlike most administrative law cases, the issue seemed straightforward: When Congress authorized tax subsidies for eligible individuals who purchased insurance on an "Exchange established by a State," did it mean what it said? Yet a sharply divided Supreme Court upheld the Affordable Care Act (ACA) finding that the phrase "established by a State" included exchanges established by the federal government.

Even so, for those in favor of limited federal government, there is a little-recognized silver lining to *King v. Burwell*. In determining that insurance policies purchased on either federal or state exchanges qualified for tax subsidies, the Supreme Court did not rely on the IRS' interpretation of the ACA. Instead, the Court resurrected a defunct statutory interpretation tool—the major questions doctrine—and concluded that the question was too important to be delegated to an agency. The decision as to who should receive tax subsidies was not one for an agency, but for Congress. This was an astounding break with administrative law. And as this legal brief will explain in detail, it is a very good first step in returning the administrative state to a more limited legislative role.

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Background

From Supreme Court Justices to the Speaker of the House, those on both the right and the left express concern over the ever-expanding authority of the administrative state. Federal agencies now control nearly every aspect of daily life. This would have been unrecognizable to our Founding Fathers. Given that the Progressives (who originally advocated for an administrative state) meant for bureaucrats to displace constitutional governance, it is no surprise that federal agencies today often operate in tension with our founding document.

To take just one example, consider the Framers' view of separation of powers. They purposely placed the legislative, executive, and judicial powers in three different departments. As Paul Ryan reminds us, "The Constitution separates the powers of government to guard against the arbitrary use of power…. So liberty itself is at stake." Indeed, James Madison, one of the principle architects of the Constitution, warned that "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may be justly pronounced the very definition of tyranny." Yet federal agencies today exercise significant legislative, executive, and judicial authority—often all at once.

Another serious constitutional issue arises when Congress writes broad statutes delegating to administrative agencies the authority to draft law on the most significant political, social, and economic issues of our time. The effect of overregulation is well known—lost wages, decreased competition, fewer jobs, and a depressed economy—but more troubling still is the fact that the majority of those regulations are crafted, not by Congress, but by administrative agencies.

Yet, a puzzle exists: with very few exceptions, judges and academics are at least reluctant devotees of the administrative state. To be sure, some of those judges and scholars favor the big-government facilitated by administrative agencies. For others, a pragmatic rationale is more likely. As the Supreme Court has noted, it would be difficult for government—at least as we now know it—to function without a vast administrative state. Unless and until we see a dramatic reduction in the size of the federal government, the Fourth Branch seems here to stay.

So, the most pressing administrative law question of our time is not really whether the administrative state is unconstitutional (though some exercises of its authority likely are), but where do we go from here? How do We the People and the other branches of government act as effective checks on overgrown federal agencies?

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II. The Major Questions Doctrine

There are a number of arguments litigants make to limit the administrative state, and this brief focuses on a recent judicial innovation that may garner enough votes at the Supreme Court to become the law of the land. The major questions doctrine provides that it is for Congress, not agencies, to make decisions regarding significant economic, political, and social issues. Ironically, the case in which this limiting principle appears most clearly is one which conservatives see as a clear loss: *King v. Burwell*. Yet a silver lining exists. In *King v. Burwell*, the Supreme Court resurrected the doctrine, putting the burden back on Congress to make significant legislative decisions.

This section will explore the particulars of the major questions doctrine, but will first address the Supreme Court’s abdication of its role to police certain separation of powers issues, and in particular the demise of the nondelegation doctrine.

The Nondelegation Doctrine

Article I of the United States Constitution provides that “all legislative powers” shall be vested in Congress. Typically, Article I is understood to grant exclusive legislative powers to the legislative branches. The nondelegation principle thus holds that, since the Constitution vests the power to make law in Congress,

Congress alone may exercise that power. Of course, the line between legislating and enforcement can sometimes be hard to draw, and some policy decisions lie within the executive's authority to administer the law. But the nondelegation doctrine is important precisely because it preserves the core lawmaking function for Congress.

Yet the doctrine has no freight today. Congress often legislates in broad brush, leaving important policy decisions to administrative agencies. And while there may be good reason to allow Congress to delegate *some* of its authority to an expert agency, the Supreme Court has allowed Congress to delegate nearly all of its authority with little guidance from Congress. The Court repeatedly has upheld vague and open-ended statutes as consistent with Article I's vesting of "[a]ll legislative Powers" in Congress. The Court has sanctioned a delegation to the Price Administrator to fix commodity prices at a level that "will be generally fair and equitable," and upheld a grant to the Federal Communications Commission to write regulations that advance the "public interest." All the Court typically requires is that Congress lay out an "intelligible principle." Given this hands-off approach from the federal courts, and Congress' tendency to pass legislation written broadly, it is no surprise that, in the Speaker's view, "[a]gencies routinely exploit vaguely worded language."

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Not only do agencies routinely "exploit" vaguely worded statutes to craft regulations with the force of law, but the Supreme Court also defers to an agency's interpretation of law. That is, when confronted with a regulation, the federal courts do not ask whether the regulation is the most sensible or the best interpretation of a statute, but merely whether the regulation is a permissible interpretation. Further, Chevron deference *assumes* that when a statute is *silent* on a particular issue, Congress intended to delegate the issue to the agency.

In short, under current Supreme Court precedent, there is little check on what Congress may constitutionally delegate. Further, if Congress writes an open-ended statute, the Court will assume that Congress meant for the agency to fill it in and thus defer to the agency's interpretation of the statute. All this leaves much of the business of legislating—making enforceable legal standards—to federal agencies. Thus, when Nancy Pelosi infamously remarked that the House of Representatives would have to pass Obamacare to know what was in in, she was troublingly correct. That statute left many important policy questions—such as what forms of contraception insurance plans would be required to cover, and whether religious liberty exemptions would exist, questions that resulted in the Supreme Court's decision in *Hobby Lobby*—to the Health and Human Services Agency.

Notwithstanding all the rope that Supreme Court precedent accords administrative agencies, a revolution of sorts is underway. In recent terms, the Supreme Court has expressed more and more concern over the potential dangers of the administrative state. In particular, one doctrine seems poised to garner enough Supreme Court votes to limit the administrative state. The major questions doctrine, which carves out an exception to *Chevron* deference for significant economic or political issues, has the potential to place primary responsibility for major legislation back in congressional hands.

Major Questions Doctrine

The major questions doctrine provides that, before courts blindly defer to an agency's interpretation of a statute, courts must first ensure that the agency is in fact exercising delegated authority—at least when a significant regulation is at issue. This is an important development because it *reverses* the *Chevron* assumption. Remember that *Chevron* deference—which requires courts to defer to just about any agency interpretation of a vague statute—is premised on the assumption that statutory ambiguity constitutes "an *implicit* delegation from Congress to the agency to fill in the statutory gaps." That is, where Congress is *silent* on a particular issue, the courts will assume that Congress intended for the agency to fill in the gap. This ends up being rather convenient both for legislators—who can leave the difficult questions to an agency and for administrators—who are given broad leeway in interpreting statutes.

In the two most recent terms, however, the Supreme Court has begun to push back upon this assumption. In "extraordinary cases," the Court has said, there may be reason to "hesitate before concluding that Congress has intended such an implicit delegation." Indeed, when significant economic or political regulations are at issue, the Court assumes that Congress did *not* delegate unless Congress has done so expressly in the statute. As the Chief Justice recently put it, an agency "cannot exercise" regulatory or interpretive authority "until it has it."

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The Silver Lining of *King v. Burwell*

King v. Burwell upheld a Department of Treasury regulation interpreting the Affordable Care Act to provide tax subsidies for insurance purchased on either a State or Federal Exchange. The text of the ACA, however, seemed to provide tax subsidies only for insurance purchased on a State Exchange; providing credits to qualifying individuals who purchase insurance "through an Exchange established by the State." The Treasury Department nonetheless interpreted this phrase to include both State and Federally-facilitated Exchanges.

In a 6-3 decision, the Supreme Court agreed with Treasury's interpretation. The Court acknowledged that the challengers' position—that tax credits were only available for insurance purchased on a State Exchange—was the "most natural" reading of the statute. Nevertheless, the Court looked at the context and structure of the statute as a whole and concluded that Congress must have intended for *all* qualifying individuals to receive tax credits, even if they purchased insurance on a Federal Exchange.

Interestingly, the Supreme Court did not take the easy out. The least controversial way to uphold the Treasury regulation would have been to find the (admittedly poorly drafted) Affordable Care Act to be ambiguous. Once the statute was found ambiguous, the Supreme Court could have declared that its hands were tied: Since the ACA was ambiguous, Congress presumably meant for the agency to fill in the details. Thus, the Court was required to defer to the agency's interpretation, even if that interpretation was not the one the Court would have arrived at independently.

The Supreme Court started down this path. After analyzing the statutory text and context, the majority wrote that the phrase "an Exchange established by the State … is properly viewed as ambiguous." The "most natural" reading of the statute limited its reach to State Exchanges, but the Court found it "possible" that the phrase referred to all Exchanges—both State and Federal. The next step under well-established administrative law was clear: The Court would defer to the Treasury Department's interpretation of the provision.

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And yet, the majority did no such thing. In determining that "established by the State" really meant any exchange established by the state *or* the federal government (and thus saving the Affordable Care Act), the majority did not rely on the IRS' interpretation of the ACA at all. Instead, the Court resurrected a defunct statutory interpretation doctrine—the major questions doctrine—and concluded that the exchange question was too important for Congress to have delegated it to an agency. This was a stark departure from administrative law principles.

The Supreme Court dispensed with the need to defer to the agency's interpretation in one short paragraph:

> When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. *In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.*

The Court then articulated why it was permissible to discard *Chevron* deference in the context of health insurance tax subsidies:

> This is one of those [extraordinary] cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS.

The Court's invocation of the major questions doctrine echoed Justice Kennedy's concern at oral argument that it would be a "drastic step" to assume that Congress intended for an agency to make the ultimate decision when billions of dollars were at stake. *King v. Burwell*, Oral Argument Transcript, Kennedy, J. ("[I]t seems to me a drastic step for us to say that the Department of Internal Revenue and its director can make this call one way or the other when there are, what, billions of dollars of subsidies involved here?").

"Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly."

In *King v. Burwell*, the Court was clear that courts have the primary role in interpreting statutes — at least important ones. The Chief Justice refused to defer to the agencies' interpretation of the ACA because whether subsidies were available was a question "of deep 'economic and political significance.'" Indeed, reversing entirely the Chevron presumption, the Chief Justice wrote that for significant questions, instead of *presuming* that Congress intended to delegate interpretive authority to an agency, the Court would presume that Congress did not intend to delegate interpretive authority, unless Congress had done so expressly. Finally, the *King v. Burwell* Court found such a delegation even more unlikely because the IRS had no expertise in health care policy.

FDA v. Brown & Williamson

The idea that courts should interpret statutes to require specific delegations for significant questions is not entirely new. Several of the Supreme Court's early cases suggested that the Court would scrutinize delegations more closely for significant questions. In *FDA v. Brown & Williamson* in particular, the Court concluded that Congress had not delegated authority over tobacco to the FDA. This conclusion was supported "by the nature of the question presented." In "extraordinary cases," the Court observed, courts should "hesitate" before concluding that Congress intended an implicit delegation.

The Court relied on a 1986 essay by then-Judge Breyer, for the proposition that, when considering agency authority, it is appropriate for the court to "ask whether the legal question is an important one." There is a difference, Judge Breyer had written, between "major questions," on which "Congress is more likely to have focused," and "interstitial matters." With regards to the regulation of tobacco, the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."

The Supreme Court's announcement in *King v. Burwell* that significant social, political, and economic decisions belong to Congress, not federal agencies, puts more responsibility on Congress for major regulations. The legislative branches must either make a decision on a significant issue or expressly delegate to an agency the authority to make such decisions. In effect, then, the administrative law rule announced in *King v. Burwell* is similar to the REINS Act, proposed legislation which would require Congress to subject every major regulation (defined as a regulation with impact of $100 million or more) to an up or down vote.

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Going Forward in a Major Question World

What does the major questions doctrine mean for administrative law going forward? Is it a shot across the bow or something more substantive? And what will it mean, practically, for challenging administrative regulations?

To begin, two factors in particular suggest that the Supreme Court will be more likely to employ the major questions doctrine (and other agency-limiting doctrines) in the near future.

First, we increasingly have an executive branch that is out of control from the top down. From President Obama's immigration power grab—where in the words of the district court, President Obama "created [law] from scratch,"—to the EPA's insistence that it has authority to regulate land in the guise of water, to the EPA "Clean Power Plan" that restructures the entire American energy grid, the administrative state has never been more aggressive in regulating individuals and industries. The Supreme Court is beginning to pay attention. Federal courts have stayed implementation of all three of the administrative actions above, and a number of Justices have expressed dismay over deference to the administrative agencies and the growing power of the administrative state.

Second, we have a Supreme Court that is keen on preserving the role of the Supreme Court *as an institution*. That the Supreme Court is a co-equal branch blessed by the Founders with the judicial power is front and center in how the Supreme Court views its role in various inter-branch (including the Fourth Branch) disputes.

Of course, the Court's key role in exercising its judicial power is that of interpreting the law. As Chief Justice John Marshall memorably put it in *Marbury v. Madison*, "it is emphatically the province and duty of the judicial department to say what the law is." Courts may be reluctant to defer to aggressive agencies precisely because of their duty to "say what the law is." To defer too much would be to violate the separation of powers principle that the judiciary interprets law. Indeed, a number of recent Supreme Court opinions by different Justices question how deference to agencies can be squared with Marshall's injunctive. One opinion by Justice Thomas puts it starkly: deference to agencies "wrests from Courts the ultimate interpretive authority to 'say what the law is.'"

So, if we are thinking about challenging an agency regulation, what does the major questions doctrine mean? Here are four ways in which the Court may in the future refuse *Chevron* deference.

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First, the nondelegation doctrine now has real teeth when we are talking about a major social or economic regulation. At the outset, an agency must have the authority to interpret a statute. As the Chief Justice recently wrote, "an agency cannot exercise interpretive authority until it has it." Arguably, most of the questions worth litigating will fall within this "major" category. In the *Hobby Lobby* case, for example, the question whether religious nonprofits should be exempted from the contraceptive mandate would be a significant policy question best left to Congress. Justice Kennedy suggested as much at oral argument when he asked,

> [W]hat kind of constitutional structure do we have if the Congress can give an agency the power to grant or not grant a religious exemption…. recognize delegation of powers rules are somewhat more moribund insofar as their enforcement in this Court. But when we have a First Amendment issue of this consequence, shouldn't we indicate that it's for the Congress, not the agency, to determine that this corporation gets the exemption.

Second, courts may be open to the argument that a delegation from Congress must be sufficiently specific. As the Chief Justice recently highlighted, the *Chevron* case itself involved a "specific provision" and "a legislative delegation to [the agency] on a particular question." The *Chevron* Court did not ask whether Congress had delegated to the EPA the authority to administer the Clean Air Act generally, but whether Congress had "delegat[ed] authority to the agency to *elucidate a specific provision* of the statute by regulation." The Court ended up deferring to the EPA's interpretation of the statute in that case because it concluded that Congress had charged the agency "with responsibility for administering the provision." Thus, as the Chief Justice has argued, "*Chevron's* rule of deference was based on—and limited by—this congressional delegation." Similarly, in *Gonzalez v. Oregon*, the Court explained that, "An agency interpretation warrants such deference only if Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner. Whether Congress has done so must be determined by the court on its own before *Chevron* can apply."

Third, the Supreme Court may find that the principle of constitutional avoidance—the idea that federal courts should interpret statutes narrowly so that they do not get too close to constitutional limits—requires a specific delegation in order for an agency to receive deference. In interpreting statutes, the federal courts presume that Congress did not intend to legislate in an unconstitutional fashion, and to that end will sometimes adopt narrowing, saving interpretations of a statute.

The principle that federal courts will interpret a *statute* narrowly to save it from possible unconstitutionality applies with even more force when an agency *regulation* is under review. When an administrative interpretation invokes "the outer limits of Congress' power," the Court has said, it expects "a clear indication that Congress intended the result." This requirement stems from a two-fold concern: First, the Court's "prudential desire not to needlessly reach constitutional issues." Second, the Court's "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."

As a result, when the Supreme Court is confronted with an agency regulation that pushes a constitutional boundary, it will refuse to defer to the agency's interpretation unless Congress has clearly delegated authority. This means that the Court will adopt a narrow interpretation of a statute—one that is clearly within constitutional boundaries—and not an aggressive view of the statute that creates constitutional questions. And since Congress cannot delegate authority that it does not possess, even a clearly authorized regulation fails if it conflicts with the Constitution.

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Fourth, courts may be open to the argument that an agency must possess some sort of expertise in order to warrant deference. Expertise is not usually a factor for *Chevron* deference, but in *King v. Burwell*, the Court found it "especially unlikely that Congress would have delegated th[e] decision [to authorize subsidies] to the IRS, which has no expertise in crafting health insurance policy of this sort."

CONCLUSION

Time will tell, but the Supreme Court's decision in *King v. Burwell* has the potential to rein in administrative law making. When a significant issue is at stake, the Court will be more careful to ensure that Congress actually intended for an agency to make the call. No longer will the Court blindly assume that silence is an implicit delegation from Congress to an agency to craft rules with the force of law. This new concept in administrative law is important because it puts the burden to write legislation back on Congress. When crafting statutes, it will be for Congress to make the difficult decisions on important issues or to explicitly delegate the decision to an agency. Either way, political accountability increases, and our system of government looks more like the one envisioned by the Founders.