The Mechanics of the Major Questions Doctrine

BY JORDAN T. SMITH, ESQ.

Courts have grown increasingly skeptical of agency efforts to refurbish old laws for shiny new purposes – especially in areas of major national significance. When legislative reforms fail, executive agencies often scour dusty statute books for a replacement as if digging through crates for spare car parts. An inventive agency, like a skilled auto mechanic, can finagle an ambiguous act into a repair for legislative apathy. Thanks to judicially created doctrines like *Chevron* deference and its state-law equivalents, a gently used, yet still pliable, statutory provision can serve as executive branch duct tape for neglected or broken legislative overhauls. When this happens, a court is left staring at the Federal Register like a customer doubting the mechanic's invoice, asking if the replacement part was really meant to solve *this* particular problem and wondering if it really costs *this* much.

Time and again, federal agencies have sought new regulatory solutions to significant national problems in ancient statutes that do not provide clear congressional authorization. For example, in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the FDA scrounged up statutes addressing "drugs" and "devices" to assert regulatory authority over the tobacco industry after Congress refused to confer jurisdiction. Similarly, in *Gonzales v. Oregon*, 546 U.S. 243 (2006), the U.S. Attorney General refashioned the Controlled Substance Act's phrase "legitimate medical purpose" with an interpretive rule to bar certain substances from state-authorized assisted suicide. During the COVID-19 pandemic, in *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the CDC improvised a rarely used statute about communicable diseases into a nationwide eviction moratorium after congressional authorization expired. And not long ago, in *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2602 (2022), the EPA repurposed what one of its architects called "an obscure, never-used section" of the Clean Air Act, and the phrase "best system of emission reduction," to impose requirements on the coal industry after Congress failed to enact similar proposals.

In each of these cases (and others), the U.S. Supreme Court rejected the agencies' efforts to squeeze round regulations into square statutes. The court continually held that Congress does not delegate decisions "of such economic and political significance to an agency in so cryptic a fashion"[1] and "Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints."[2]

Instead, the court "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[3] Or, as Justice Anton Scalia once famously quipped, a legislature "does not, one might say, hide elephants in mouseholes."[4] On the contrary, there is a presumption that legislatures reserve major policy decisions for themselves and do not punt them to executive branch agencies, particularly when those decisions exert unprecedented authority over large sectors of the economy and cost millions or billions of dollars.

This line of cases illustrates what is known as the "major questions doctrine." As explained in *West Virginia v. EPA*, the major questions doctrine is an important corollary to the separation of powers doctrine. It "address[es] a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[5] The doctrine demands that administrative agencies be able to point to "clear congressional authorization" when they enact regulations "of vast economic and political significance" or make "decision[s] of such magnitude and consequence."[6] A clear statement is required before the courts will accept that the legislature delegated authority to an agency to adopt a regulation touching on a major question of national significance.

Like good auto mechanics, nearly all agency administrators can locate some "colorable textual basis" for a regulation buried in the scrapheaps of forgotten statutes. This is not enough. The clear legislative authorization needed to satisfy the major questions doctrine must be more "than merely plausible."[7] The Constitution and common sense dictate that extraordinary grants of regulatory power require extraordinary congressional clarity. Significant delegations are not found in "modest words," "vague terms," or "subtle devices" lost in "ancillary provisions" or "backwater" subparts.[8]

While it is most frequently applied in the federal courts, the Nevada Supreme Court has also used major questions doctrine components, if not its name. This outcome should not be surprising because, unlike the U.S. Constitution, the Nevada Constitution contains an express separation of powers clause (Nev. Const. art. III, § 1) and is likely *even more strict* about the separation of powers. In Nevada, branches of government are separate, not socially distanced.

Recently, in *Diamond Natural Resources Protection & Conservation Association v. Diamond Valley Ranch, LLC*, 138 Nev., Adv. Op. 43, 511 P.3d 1003 (2022), a majority of the Nevada Supreme Court concluded that two statutes delegated authority to the state engineer to approve a groundwater management plan that departed from Nevada's historical prior appropriation doctrine. Years earlier, the state engineer unsuccessfully proposed legislation to obtain the same authority. Chief Justice Ron Parraguirre dissented, and his opinion harkened back to the major questions doctrine.

Joined by Justice Abbi Silver (and in parts by Justice Kristina Pickering), Chief Justice Parraguirre disagreed that the relevant statues allowed the state engineer to approve a groundwater management plan that deviated from the traditional prior appropriation doctrine. The chief justice noted that the relevant statute was "silent on the issue" and "does not speak to the doctrine of prior appropriation, much less authorize the State Engineer to disregard the doctrine." *Id*. at 1012-13. Echoing major questions doctrine cases and citing Nevada precedent, Chief Justice Parraguirre relied on the "presumption that legislatures 'do[ ] not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'" *Id*. at 1014. He also repeated Justice Scalia's observation that legislatures "do[ ] not, one might say, hide elephants in mouseholes."' *Id*. Yet, according to Chief Justice Parraguirre, "the majority's interpretation hides elephants in mouseholes because [the statute] does not expressly permit the State Engineer to approve a GMP that departs from the doctrine of prior appropriation." *Id*. The chief justice recognized that the state engineer's assertion of authority would have vast and significant effects on Nevada's most precious natural resource – water.

"We cannot assume," Chief Justice Parraguirre continued, "that the Legislature intended a *fundamental* and *significant* departure from 155 years of water law without express statutory text supporting this result." *Id*. Although couched in terms of other legal doctrines and concepts, the chief justice's dissent virtually mirrors a major questions doctrine analysis.

The major questions doctrine interacts with statutory and constitutional principles like the Administrative Procedures Act, nondelegation doctrine, and others as Chief Justice Parraguirre's *Diamond Valley Ranch* dissent shows. Setting aside the controversy over *Chevron*'s constitutionality, in a typical regulatory challenge, federal and Nevada courts engage in a two-step process. First, courts consider whether the statute serving as the basis for the regulation is clear. If so, the first step is the last step. Second, if the statute is ambiguous, courts defer to the agency's interpretation of the statute as long as it is a reasonable construction of the statute. *Chevron*'s approach assumes that an ambiguous statute functions as an *implicit* delegation to the agency to flush out the details. But when a statute is ambiguous enough to

CONTINUED ON PAGE 11

CONTINUED FROM PAGE 9

The Mechanics of the Major Questions Doctrine

support almost any regulation, and lacks "intelligible principles" or "suitable standards" to constrain the agency's discretion, the regulation violates the nondelegation doctrine.[9] A regulation must thread the needle. It must not conflict with statutory language at step one and must not be too ambiguous or unconstrained at step two.

However, in cases of vast economic or political significance, the major questions doctrine requires a threshold inquiry before evaluating *Chevron* or the nondelegation doctrine. Some commentators have referred to the major questions doctrine as "*Chevron* Step-Zero,"[10] and it works the same for the nondelegation doctrine. Prior to engaging *Chevron* or the nondelegation doctrine, courts must search for and find clear, obvious, and unequivocal legislative authorization for the regulation. Then, and only then, should courts proceed to examine the boundaries of the delegation. Again, *West Virginia v. EPA* is an example. Under a usual *Chevron* analysis, the court would have parsed the words like "best" and "system" for ambiguity and reasonableness. Instead, because the regulation would have had enormous consequences for the nation, the Supreme Court first asked whether Congress clearly authorized the EPA to regulate such an economically and politically important sector of American industry. The answer to this major question was no.

As federal and state agencies continue to stretch more mileage out of old statutes with low tread, the major questions doctrine will be a useful tool to gauge the constitutionality of agency regulations. Courts and litigants should utilize the major questions doctrine to ensure that our system of separation of powers continues to run smoothly.

ENDNOTES:

1. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160.
2. *Gonzales*, 546 U.S. at 274.
3. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.
4. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001) (Scalia, J.).
5. *West Virginia v. EPA*, 142 S. Ct. at 2609.
6. *Id.* at 2605, 2614-16.
7. *Id.* at 2609.
8. *Id.* at 2609-10, 2613.
9. *Whitman*, 531 U.S. at 472; *Sheriff v. Luqman*, 101 Nev. 149, 153–54, 697 P.2d 107, 110 (1985).
10. *See, e.g.*, Charles H. Koch, Jr. & Richard Murphy, *Chevron Step Zero - Major Questions Limitation*, 4 Admin. L. & Prac. § 11:34.15 (3d ed.).

JORDAN T. SMITH is a partner at Pisanelli Bice, PLLC. His practice focuses on complex commercial, constitutional, and appellate litigation. You can follow him on Twitter @NevadaAppellate.