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The Metamorphosis Of The Major Questions Doctrine

By **Dan Wolff and Olivia Venus** (July 21, 2025, 1:54 PM EDT)


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In the U.S. Supreme Court's 2001 decision in Whitman v. American Trucking Associations Inc., Justice Antonin Scalia famously observed that Congress "does not … hide elephants in mouseholes."[1]

He was making a classic textualist point about interpreting statutes, not unlike the frequent refrain: Courts are to presume that Congress says what it means and means what it says in a statute.[2] Since then, the line has become a favorite of enthusiasts of the so-called major question doctrine.

At the time of the Whitman decision, the major questions doctrine was in its infancy, not yet even named. But its birth related directly to a doctrine that was in full force: Chevron deference, originating in the Supreme Court's 1984 decision in Chevron USA Inc. v. Natural Resources Defense Council Inc.

Under the now-buried Chevron doctrine, an agency's interpretation of a statute that Congress charged the agency with administering was entitled to courts' deference so long as the statutory provision at issue was genuinely ambiguous and the agency's interpretation was plausible — i.e., not unreasonable.

The judge-made reasoning for that doctrine was that Congress implicitly delegated the gap-filling role of resolving statutory ambiguities to agencies.

Although Chevron the case was a win for industry,[3] Chevron the doctrine soon became a persistent thorn in industry's side as evermore ambitious administrations pushed large-scale and frequently controversial policies into law via rulemaking.

Many saw these new rules not so much as gap-filling procedures to fill in the details of what Congress left out of the statutory text — which was the original point of Chevron, and the reason why Chevron was not, at the time it was decided, thought to be the seismic precedent it ultimately became — but as de facto legislation, in violation of separation-of-powers principles.[4]

Thus, as agencies grew more emboldened by the generous regulatory license Chevron afforded them, the courts created an exception: If the agency's interpretation resulted in an outcome of significant political or economic consequence — i.e., if the interpretation posed a major question or resulted in a major rule — deference was withheld.

The judge-made reasoning for this counter-doctrine was that major outcomes, such as expansive and costly regulatory programs, went beyond mere gap-filling, and that Congress — as the lawmaking body under the U.S. Constitution — should not be presumed to have implicitly delegated expansive authority.

The major questions doctrine thus arose as a judge-made proviso to the judge-made doctrine of deference. Under it, a clear statutory statement is necessary to conclude that Congress intended to delegate to an agency the authority to pervasively regulate large sectors of the economy.[5]

In its 2024 Loper Bright Industries v. Raimondo decision, however, the Supreme Court said that every statute, "no matter how impenetrable," does in fact "have a single, best meaning."[6] And — overturning Chevron — it reiterated the hoary rule from its 1803 decision in Marbury v. Madison that it is for the courts to say what the law means.[7]

With Chevron deference now a bygone doctrine, does it still make sense to talk about major questions as having special import in connection with statutory interpretation? It would seem that one takeaway from Loper Bright is that we should presume Congress does not hide even mice in mouse holes.

And yet, invocations of the major questions doctrine persist. In practice, and as a matter of common sense, even if Loper Bright rendered all questions equal, some questions are more equal than others.[8]

The evolution of the major questions doctrine helps explain why this may be so.

In its 2000 decision in U.S. Food and Drug Administration v. Brown & Williamson Tobacco Corp., the Supreme Court rejected the FDA's reliance on Chevron deference to support the agency's effort to regulate tobacco. In no small part, this was because Congress had consistently refused to grant the FDA that authority expressly.[9]

Over a decade later, citing Brown & Williamson as the exemplar precedent, the court said in its 2014 decision in Utility Air Regulatory Group v. U.S. Environmental Protection Agency that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy' … we typically greet its announcement with a measure of skepticism."[10] There, too, the agency's appeal to Chevron deference was rejected.

In due course, the lower courts picked up on this thread when confronted with agency appeals to deference in cases concerning major rulemakings in particular, giving a name to the major questions doctrine.[11]

The irony is that, like Chevron itself, the major questions doctrine is an atextual rule of interpretation. It was only ever because of Chevron deference that the courts came to fashion the major questions doctrine as an atextual counterweight.

After the advent of the major questions doctrine, however, the administrative law canon took another turn — in large part because of the sheer number of federal judges President Donald Trump appointed in his first term, including three Supreme Court justices.

By the time the COVID-19 pandemic hit, the Supreme Court appeared ready to fully embrace the major questions doctrine as its own, and it did so in a new way: not as a counterweight to the Chevron doctrine, but seemingly as its own, stand-alone canon of statutory construction.

In a series of headline-grabbing decisions issued between 2021 and 2023, the court considered and rejected, on major questions doctrine grounds:

- The Centers for Disease Control and Prevention's attempt to impose an eviction moratorium under its general public health authorities, absent express congressional approval;[12]
- The Occupational Safety and Health Administration's attempt to impose a nationwide COVID-19 vaccine mandate under its general authority to regulate occupational safety and health;[13]
- The EPA's attempt to overhaul electrical power generation under its Clean Air Act authority to regulate emissions of certain air pollutants;[14] and
- Then-President Joe Biden's attempt to cancel billions of dollars of federal student loans.[15]

In each case, implicitly if not expressly, the court invoked the major questions doctrine or its framework to cast aside executive action not expressly authorized by Congress.

Where was Chevron in all these cases? Not to be found. In fact, the Supreme Court had not relied on Chevron to decide a case since 2016. So why, with Chevron deference largely sidelined by the major questions doctrine — certainly in the big cases, at least — did the court see a need in 2024 to revisit the Chevron doctrine?

Maybe because other questions also matter. Just ask the Atlantic herring fishermen who, in Loper Bright, sued the National Marine Fisheries Service over rules requiring them to pay for government-mandated fishery management observers on board their fishing vessels.

In overruling Chevron deference, the court in Loper Bright — itself not a major questions case — stated that "Chevron cannot be reconciled with the [Administrative Procedure Act] by presuming that statutory ambiguities are implicit delegations to agencies."[16] Instead, it is the court's job to "use every tool at their disposal to determine the best reading of the statute."[17]

Given that the major questions doctrine originated as a judicial effort to temper the might of Chevron deference, if Chevron deference is no longer a thing, it is fair to ask if the major questions doctrine is still a thing.

In a decision earlier this year in In re: MCP No. 185, involving the Federal Communications Commission, the U.S. Court of Appeals for the Sixth Circuit seemed to suggest the doctrine was no longer necessary: "Given our conclusion that the FCC's reading is inconsistent with the plain language of the Communications Act, we see no need to address whether the major questions doctrine also bars the FCC's action here."[18]

It is probably likely that, as in the Sixth Circuit's case, far more often than not, a straight textualist reading of a statute will yield the same result as application of the major questions doctrine would. In this regard, the major questions doctrine is more rhetorical than substantive.

This understanding of the major questions doctrine is consistent with Justice Amy Coney Barrett's 2023 concurring opinion in Biden v. Nebraska, where she observed that the "major questions doctrine reinforce[d] [the] conclusion" reached by the majority based on "the ordinary tools of statutory interpretation," but it was "not necessary to it."[19]

Indeed, the same could have been said for all of the court's major questions doctrine decisions in the 2021-2023 time period.

And yet, the major questions doctrine may not be only rhetorical. Even in a post-Chevron world, where the courts are charged with finding the best interpretation of a statute, there may be cases where, on straight textualist principles, the government has the better reading of the statute.

But if the result would be a sweeping new regulatory program of substantial heft, the major questions doctrine — atextual though it may be — could be employed in furtherance of a decision that rejects the government's broad reading while sparing the statute from being struck down on nondelegation grounds.

Alternatively, one might view the major questions doctrine as a clear statement rule, as Justice Neil Gorsuch does.[20] This view rejects the idea that the doctrine is atextual, and insists merely that in order for a statute to be interpreted to authorize a major rule, the statute must do so clearly — if it does not, it cannot be the best interpretation.

Under either formulation, the major questions doctrine seems to be doing the same work as the avoidance canon in combination with explanations of separation of powers and constraints on Congress' authority to delegate.[21]

But even if the major questions doctrine is merely shorthand for hoarier canons of construction, being major clearly still matters, even in a post-Chevron world. The government will still prevail in some — perhaps even many — run-of-mill challenges to agency action where its statutory authority is ambiguous. But if what the executive branch is trying to accomplish is novel and has significant economic or political ramifications, the major questions doctrine should stand in its way absent clear statutory authorization.[22]

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[1] Whitman v. Am Trucking Ass'n, 531 U.S. 457, 468 (2001).

[2] See Connecticut Nat. Bank v. Germain,503 U. S. 249, 253-254 (1992).

[3] The result in Chevron, after all, was a success for coal power plants, litigating in support of on a Reagan-era EPA interpretation that environmentalists (and the D.C. Circuit) claimed was too lax toward pollution. NRDC v. Gorsuch , 685 F.2d 718, 726-27 (DC Cir. 1982).

[4] Chevron, 467 U.S. at 843.

[5] West Va. v. EPA, 597 U.S. 697, 699 (2022).

[6] Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 400 (2024).

[7] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[8] Cf. George Orwell, Animal Farm (1945) ("All animals are equal, but some animals are more equal than others.").

[9] FDA v. Brown & Williamson Tobacco, 529 U.S. 120, 159 (2000).

[10] Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014).

[11] See, e.g., U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 402-03 (D.C. Cir. 2017) (Brown, J., dissenting) (articulating a different rule of statutory interpretation for "major questions" than the deference Chevron affords agencies on "interstitial" matters); see also id. at 417 (Kavanaugh, J. dissenting) (explaining the "major rules doctrine").

[12] Alabama Assn. of Realtors v. Dep't of Health & Human Servs., 594 U.S. 758, 761 (2021).

[13] Nat'l Federation of Indep. Business v. Dep't of Labor, 595 U.S. 109 (2022).

[14] West Va. v. EPA, 597 U.S. at 735.

[15] Biden v. Nebraska, 600 U.S. 477, 504 (2023).

[16] Loper Bright, 603 U.S. at 373.

[17] Id.

[18] In re: MCP No. 185, 124 F.4th 993, 1009 (6th Cir. 2025).

[19] Biden v. Nebraska, 600 U.S. at 507 (Barrett, J., Concurring).

[20] West Va. v. EPA, 597 U.S. at 747 (Gorsuch, J., concurring). Contra id. at 779 (Kagan, J., dissenting) ("The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards.").

[21] See FCC v. Consumer's Research, 606 U.S. at ---, 2025 WL 177630 at *23 (U.S. June 27, 2025) (Kavanaugh, J., concurring) (noting that the "major questions canon reflects … background separation of powers understandings…").

[22] Of course, if clear authorization does exist, the government will then need to contend with the non-delegation doctrine. See id., 2025 WL 177630 at *41 (Gorsuch, J., dissenting).