Major Questions, Minimal Consistency: The Erratic Growth of Major Questions Jurisprudence, by Jack Jones

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Since the Supreme Court announced the arrival of the major questions doctrine in *West Virginia v. EPA* in 2022, federal appellate courts have struggled to apply the doctrine's amorphous standards with any consistency both across and within circuits. Perhaps no court better demonstrates this problem than the U.S. Court of Appeals for the Fifth Circuit.

West Virginia indicates that the major questions doctrine may apply in "extraordinary cases" where the "history and the breadth" and the "economic and political significance" of the agency's asserted authority are such that a court should "hesitate" to conclude that Congress authorized the agency's action. This assessment of history and breadth requires that the agency's action be "unheralded" and represent a "transformative expansion of its regulatory authority" for the doctrine to apply. Once the doctrine applies, the agency must point to "clear congressional authorization" for its action.

In the past two years, the Fifth Circuit has developed a remarkably unpredictable approach, in some cases emphasizing the doctrine's limited application in only "extraordinary" cases while in other cases aggressively expanding its reach. In most of these cases, the court analyzed *West Virginia* and other Supreme Court cases under the major questions doctrine without citing previous Fifth Circuit panel decisions on the doctrine's reach or application. By ignoring its own previous panel decisions, the Fifth Circuit has developed at least two distinct strains of jurisprudence, each applying different tests with different factors to determine whether the doctrine applies.

One approach is demonstrated in the initial panel decision and subsequent en banc vacatur in *Alliance for Fair Board Recruitment v. SEC*, which challenged the SEC's approval of Nasdaq's rules requiring its listed companies to disclose information about the diversity of their boards. In the panel decision, the court relied on the *West Virginia* majority decision to present the major questions doctrine as a conjunctive test: For the doctrine to apply, the "history and the breadth of the authority that the agency has asserted, *and* the economic and political significance of that assertion" must *both* provide a "reason to hesitate before concluding that Congress meant to confer such authority" (emphasis added). The panel found that neither factor was satisfied. When the Fifth Circuit, sitting en banc, reversed this decision, it accepted the panel's formulation of the inquiry but concluded the opposite at each point. The agency's actions triggered the major questions doctrine, the court found, because "SEC's proposed exercise of power [was] novel," it stepped "outside of its ordinary regulatory domain . . . intruding into the province of other agencies," and it was both economically and politically significant.

The Fifth Circuit adopted a similar test in a recent case evaluating a Department of Transportation (DOT) rule requiring airlines to disclose certain fees to customers upfront. The court found that DOT's rule was based in DOT's long history issuing similar regulations and claiming the authority to do so and that its rule did not present a "vastly significant economic or political issue[.]" The court also emphasized that the "major questions doctrine is not a talisman to be invoked by concerned litigants whenever they are beholden to new administrative requirements." But the court cited only *West Virginia* and other Supreme Court cases, not major questions cases within the Fifth Circuit.

Meanwhile, the Fifth Circuit developed a completely separate approach in other cases. I've written previously about the Fifth Circuit's August 2023 decision in *Nuclear Regulatory Commission v. Texas*, which ruled that the Nuclear Regulatory Commission (NRC) lacks the authority to issue licenses for the storage of spent nuclear fuel at private storage facilities away from the reactor. In that case, the court concluded, with little explanatory analysis, that nuclear waste disposal is an issue of great "economic and political significance." The court treated this finding alone as sufficient to trigger the major questions doctrine, and it found that the Atomic Energy Act did not authorize the NRC's actions. In its analysis, the court completely ignored the "unheralded" and "transformative" components of *West Virginia*, which was especially problematic because the court did not grapple with the argument that NRC had consistently relied on the Act for nearly fifty years for its authority to issue such licenses.

About a year later, in *Mayfield v. Department of Labor*, the Fifth Circuit built on the approach developed in *NRC v. Texas* in a challenge to the Department of Labor's (DOL's) rule updating the minimum salary necessary to fall within the "White Collar Exemption" to the Fair Labor Standards Act (which exempts employees in an executive capacity from the Act's standards and protections). To assess the plaintiff's major questions argument, the court relied on Justice Gorsuch's concurrence in *West Virginia* rather than the majority opinion, finding "three indicators that each independently trigger the doctrine": (1) when an agency "claims the power to resolve a matter of great political significance" (citing *NRC v. Texas* as an example of this prong); (2) when the agency "seeks to regulate a significant portion of the American economy or require billions of dollars in spending by private persons or entities"; or (3) when an agency "seeks to intrude into an area that is the particular domain of state law." The court worked through each of these three factors and determined that none of them applied, so the major questions doctrine was not triggered. The *Mayfield* approach creates a disjunctive test (where only one factor need be met for the major questions doctrine to apply), composed of factors not in the *West Virginia* majority opinion.

These cases demonstrate at least two distinct approaches to the major questions inquiry: the *Alliance* approach, which applies a two-factor conjunctive test sourced from the *West Virginia* majority opinion, and the *Mayfield* approach, which applies a three-factor disjunctive test sourced from Justice Gorsuch's non-binding *West Virginia* concurrence.

And there is at least one opinion that arguably falls outside either camp. In *Texas v. Trump*, decided a few weeks ago, the Fifth Circuit stated that the "major questions doctrine applies when a question exists as to a statute's linguistic clarity," calling this a "prerequisite" to the doctrine's application and citing the *West Virginia* majority opinion's explanation that courts "need not analyze" whether the doctrine applies when the relevant statute provides "clear congressional authorization." This approach moves the "clear congressional authorization" inquiry to an initial, threshold question, rather than reaching it only once the doctrine has been triggered, as both the *Mayfield* and *Alliance* approaches do.

By relying on different sources within *West Virginia v. EPA* to formulate the test and developing both disjunctive and conjunctive tests, the Fifth Circuit has created a jurisprudence that is highly unpredictable and malleable. These inconsistencies not only complicate agency rulemaking but also offer litigants a wide array of arguments to either invoke or evade the doctrine's application. Without clearer guidance from the Supreme Court, major questions jurisprudence is likely to remain erratic, continuing to fuel uncertainty in administrative law.

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