Birt 16. september 2022

ÚLFLJÓTUR

VEFRIT

Improving the Major Questions Doctrine in US Constitutional Law*

Lessons from Icelandic Law concerning *West-Virginia v Environmental Protection Agency*

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* Grein þessi hefur verið ritrýnd og staðist þær fræðilegu kröfur sem gerðar eru samkvæmt reglum Vefrits Úlfljóts.

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Abstract

The majority of the US Supreme Court in *West-Virginia v Environmental Protection Agency* explicitly introduced the so-called major questions doctrine, which requires a clear congressional authorization for administrative instruments that regulate major questions. The article argues that the doctrine is too simplistic and crude as it stands. Since legality principles are quite developed in Icelandic law, the article argues that several lessons can be drawn for developing the doctrine in US constitutional law. The article claims that the result would be a more sophisticated and nuanced doctrine.

Ágrip

Meirihluti Hæstaréttar Bandaríkjanna í *West-Virginia gegn Environmental Protection Agency* byggði beinlínis á viðmiði sem kennt er við svokallaða „major questions doctrine“ á ensku. Samkvæmt viðmiðinu þurfa stjórnvaldsfyrirmæli, sem fjalla um mikilvæg álitaefni, að byggjast á skýrri heimild þingsins. Í greininni er rökstutt að viðmiðið í bandarískum rétti sé of einfalt og vanþróað. Þar sem lagaáskilnaðarreglur í íslenskum rétti eru nokkuð þróaðar er því haldið fram að unnt sé að nema nokkrar lexíur af þeim fyrir bandarískan stjórnskipunarrétt. Væri það gert yrði afleiðingin að mati höfunda betra og vandaðra viðmið.

1 The Major Questions Doctrine and *West-Virginia v EPA*

In *West-Virginia v Environmental Protection Agency* (EPA)[1] (cited as *EPA*), the Supreme Court of the United States delivered a split decision in a high-profile environmental case.[2] In essence, the case concerned the question whether EPA had the authority to set up emissions limitation based on generation shifting, the so-called Clean Power Plan rule, but that depended on whether it was 'the best system of emission reduction' in the sense of Section 111 of the Clean Air Act. Prior to the Clean Power Plan rule, EPA had set emissions limits for stationary source pollution reduction, but never by looking to a system for limiting CO_2 emissions from existing coal- and natural-gas-fired power plants with a transition from coal and natural gas to renewables.[3] The majority of the US Supreme Court held that EPA was not authorized by Section 111(d) of the Clean Air Act to introduce the Clean Power Plan rule. Among the issues in the case was how to interpret Section 111(a) of the Act, which defines 'the best system of emission reduction'. While realising the importance of capping CO_2 emissions, the majority doubted that Congress had given EPA the authority to force a nationwide energy source transition.[4] On this point, the minority took a different view; broad authority had been given to EPA to find the best system of emission reduction,[5] and generation shifting fitted the ordinary meaning of 'system of emission reduction'.[6]

The divergent outcomes depended on different approaches taken by the majority and the minority. The majority explicitly introduced the 'major questions doctrine'.[7] While the majority

[1] Supreme Court of the United States, West Virginia et al. v. Environmental Protection Agency et al, June 30, 2022. We are aware of the political dimensions associated with the US Supreme Court in general, and this case in particular. However, the analysis in the article here is legal but not political.
[2] The case has gained much attention and criticism, see, e.g., comments made 7 July 2022 by Rachael Lyle, "A Reckless Decision. How a Politicized American Supreme Court Derails Federal Agency Action on Climate Change", available on https://verfassungsblog.de/a-reckless-decision/?fbclid=IwAR0ApbGJsj988lI_Pt6RRqHj7wfn4PX2Ys1sFg2-KjYYrBGroZj8SyAvXgA (28 July 2022); for the Carbon Tracker 12 July 2022 comments by Daniel Cronin, "The Impact of West Virginia v. EPA" available on https://carbontracker.org/the-impact-of-west-virginia-v-epa/ (28 July 2022), and coverage by Grist (June 30, 2022), "The Supreme Court's EPA decision could have been much, much worse. The decision will limit – but not prevent – the EPA's regulation of greenhouse gas emissions", available on https://grist.org/regulation/supreme-court-epa-west-virginia-emissions/ (28 July 2022).
[3] *EPA*, syllabus, 1–2.
[4] Ibid, 31.
[5] Ibid, dissent, 7.
[6] Ibid, 8.
[7] Ibid, majority, 16–31.

claimed that the doctrine had implicitly been relied on in previous cases,[8] the minority disagreed.[9] According to the doctrine, administrative agencies require a 'clear congressional authorization' for enacting regulations (or as the concurrent opinion also says: 'to make decisions') concerning issues which count as major questions.[10] A policy issue constitutes a major question if it is of 'economic and political significance'.[11] Consequently, administrative instruments of economic and political significance require a clear statutory basis. The threshold is higher than in normal circumstances. While the majority does not explicitly lay down the rationale of the doctrine as such in this case, presumably it is that the democratically elected legislature should take a stance on certain significant policy issues. The minority, however, maintained that administrative regulations require a statutory basis and the statutory provisions in question should be interpreted by applying 'normal statutory interpretation'.[12] In other words, there is no clear-statement rule even if a regulation is of economic and political significance.

In relation to the 'major questions doctrine' the majority's method is, roughly speaking, in two parts. First, the majority considers the importance of the policy issue to decide whether it amounts to a 'major question'.[13] In so doing, the majority addresses, among other things, whether the policy issue is of 'economic and political significance'.[14] Second, after the majority has found it to be a major question, then it determines whether a 'clear congressional authorization' has been granted.[15] The majority found that Section 111 was not clear. In assessing the clarity of the statutory provision, the majority said that the word 'system' is 'an empty vessel' when shorn of all context, and it is unclear what kind of 'system of emission reduction' is referred to in Section 111.[16] Since the Section is not clear, it cannot be a satisfactory statutory basis for the regulation.[17] The minority, on the other hand, found the Section to be a sufficient legal basis.[18] Whether a clear-

[8] Ibid, 16–20. For reliance on the doctrine in previous cases, its relationship with the *Chevron* deference rule and possibly the more robust non-delegation doctrine, see further David Freeman Engstrom and John E. Priddy, "West Virginia v. EPA and the Future of the Administrative State" (July 6, 2022) available on https://law.stanford.edu/2022/07/06/west-virginia-v-epa-and-the-future-of-the-administrative-state/?fbclid=IwAR2YH1VatAg4d0m4F5igqop7gHcg5Mu7mq3MkfYFMOdn4n6b9mxdBjRMpL0 (28 July 2022).
[9] *EPA*, dissent, 13–28.
[10] Ibid, majority 19–20 et passim.
[11] Ibid, 17 et passim.
[12] Ibid, dissent, 13.
[13] Ibid, majority, 16–20.
[14] Ibid, 20–31.
[15] Ibid.
[16] Ibid, 28.
[17] Ibid.
[18] Ibid, dissent, 19–33.

statement rule exists, and how it is assessed, is of the utmost constitutional importance and consequence.

In what follows, we will assume (for the sake of argument) that the major questions doctrine in US constitutional law is here to stay, at least for the foreseeable future. We will take the Court's statement of the doctrine in *EPA* as our starting point. We will not venture into the literature in the US concerning the doctrine or even attempt to interpret it in the light of the precedents the majority cites in its opinion. Instead, we will argue that the doctrine should, at the very least, be developed into a more sophisticated and nuanced test than the one laid down in *EPA*. As the major questions doctrine now stands, it is too simplistic and crude. We will argue that much can be learned from the way how similar issues are approached in Icelandic law. Thus, we will focus on the Icelandic approach and claim that something in that spirit would be an improvement on the major questions doctrine in US constitutional law as laid down by the majority in *EPA*. We are not claiming that the Icelandic approach should be transplanted wholesale into the US legal system. However, we maintain that by adopting some general features of the Icelandic approach, some of the problems we identify with the major questions doctrine can be addressed. Due to space constraints, we cannot fully argue here why these features are superior, even in the US context, or why it is a plausible interpretation of the US Constitution in our view.

2 Lessons from Icelandic Law

We will identify several problems with the major questions doctrine as it is described by the majority in *EPA*. We will make suggestions for how the problems could be addressed in light of the approach taken in Icelandic law for similar issues. The reasons why the Icelandic approach might be of interest for US constitutional law are, *firstly*, that there are requirements of clarity for delegation of law-making power and assessing the statutory basis of administrative instruments. *Secondly*, the Icelandic doctrine is highly developed and, in our view, more sophisticated and nuanced than the major questions doctrine in *EPA*.

2.1 An Evaluative Standard but not a Categorical Rule

The problem with the major questions doctrine is that either an issue counts as a major question or it does not. The doctrine is a categorical rule.

Issues like the one dealt with in *EPA* are regulated by the constitutional principle of legality in Iceland.[19] The legality principle stems from the separation of powers in the Constitution. Some issues need to be decided by the legislature and there are limits to delegating law-making power. According to the legality principle, some administrative acts, including regulations, require a statutory basis. Some acts, though, require a clearer statutory basis than others. We need to decide (a) whether a statutory basis is required, and (b) how clear does the statutory basis need to be for this type of act. The decisions are made according to the *importance test*. According to the test, important or significant administrative acts for the citizen, the public or the society need to have a statutory basis. The more important or significant an act is, the clearer the statutory basis needs to be.[20] The test is an *evaluative standard* or a *scale*.[21] Administrative acts are not treated as either important or not but more-or-less important. Therefore, it is not as simple or crude as the major questions doctrine.

The problem with the major questions doctrine as a categorical rule is that there is a great difference in legal effects depending on which side of the line an issue falls. This can be avoided if the major questions doctrine is developed as an evaluative standard. Had the majority in *EPA* treated the doctrine as an evaluative standard, it would not have sufficed to merely state that the policy issue concerned a major question. Instead, the Court would have needed to decide how major it is in the context of other (possible) policy issues. It would have needed to decide roughly where on the spectrum it lies. That is important because of the next lesson.

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[19] For the legality principle and the importance test, see Hafsteinn Dan Kristjánsson: "Stjórnskipuleg lögmætisregla" (2009), 421–494, og Hafsteinn Dan Kristjánsson: "Brottfall stjórnsýsluviðurlaga" (2019), 460–461. For the legality principle in general, see e.g. Páll Hreinsson: "Lagaáskilnaðarregla atvinnufrelsisákvæðis stjórnarskrárinnar" (2001), 399–421, Páll Hreinsson: "Lagaheimild reglugerða" (2015), 193–294, Páll Hreinsson: "Þegar reglugerð brýtur í bága við lög" (2015), 577–619, Róbert R. Spanó og Hafsteinn Dan Kristjánsson: "Stjórnsýsluréttur" (2017), 96–100. See also chapter 2.1 in *Starfsskilyði stjórnvalda* (2002). As an example of special legality principles in the field of criminal law, that is Article 69 of the Constitution and Article 7 of the European Convention on Human Rights, see e.g. Róbert R. Spanó: *Stjórnarskráin, Mannréttindasáttmáli Evrópu og meginreglur refsiréttar* (2012), 151, Róbert R. Spanó og Hafsteinn Dan Kristjánsson: "Refsiréttur" (2017), 331–338, and Björg Thorarensen: *Stjórnskipunarréttur. Mannréttindi* (2019), 199–215 et passim.

[20] See e.g. *UA 22 April 2015 (8181/2014)*, Hafsteinn Dan Kristjánsson: "Stjórnskipuleg lögmætisregla" (2009), 421–494, and Róbert R. Spanó and Hafsteinn Dan Kristjánsson: "Stjórnsýsluréttur" (2017), 98–99.

[21] The arguments in this article depend on the pros and cons of rules and standards. See in this regard, e.g., Pierre Schlag, "Rules and Standards" (1985), 379–417. 3

2.2 A Relative Standard but not a One-Size-Fits-All Approach

Sometimes rules are thought of as if X, then Y. The former is about the conditions of the rule, but the latter is about its consequences or legal effects. The previous section was about the conditions (major question). This section concerns the consequences (clear legal basis).

Another problem with the major questions doctrine is that it seems to require the same level of strictness for all major questions. The same level of clarity is required for all cases. The test seems to be one-size-fits-all. However, there are reasons to require a clearer legal basis when the question is more major and vice versa. Both the conditions and the consequences are a scale.

The importance test in Icelandic law is a *relative standard*. The requirements of clarity are different depending on how important the administrative act is. Very important acts require a very clear statutory basis and vice versa. Requirements of clarity are treated as a more-or-less kind of thing.[22] The requirements are adapted to the circumstances.

Had the major questions doctrine been developed as a relative standard concerning its legal effects, the majority in *EPA* could not have been as quick to assess 'clear congressional authorization' as if there were just one level of strictness. Rather, the Court would have needed to identify the appropriate level of strictness for this type of case.

2.3 Fleshing Out the Test

It is unclear when a question counts as major according to the doctrine as described by the majority. Consequently, the Court has a lot of discretion. The majority in *EPA* gives a rough idea about what constitutes a major question, and the concurrent opinion discusses triggers, but the test needs to be fleshed out. By doing that the test can be applied in a consistent and foreseeable manner.

There is no space here to adequately describe the multiple considerations that have been mapped in Icelandic law. But a 'taste' is in order. Two considerations are significant when assessing whether an administrative act is important. *Firstly*, the controlling consideration is how and to what extent does the act affect the interests of the citizen, the public or society and what are the act's consequences for those interests. Sub-considerations are relevant for assessing this:

[22] See e.g. *UA 22 April 2015 (8181/2014)*, Hafsteinn Dan Kristjánsson: "Stjórnskipuleg lögmætisregla" (2009), 421–494, and Róbert R. Spanó and Hafsteinn Dan Kristjánsson: "Stjórnsýsluréttur" (2017), 98–99.

(1) How burdensome is the administrative act? Does it involve punishment, taxes, restrictions on freedoms or retroactive consequences? Or is it beneficial, for example, grants permits or benefits?
(2) Does the act affect the (daily) life of the citizen or the public in a decisive or pervasive manner? A decision that a prisoner shall be put into isolation has a very pervasive effects on his daily life.
(3) Does the act concern foundational issues concerning the existence and organization of an administrative agency?
(4) Is it important to ensure equality in the field?
(5) Does the act have great significance for society, for example, issues about the environment and natural resources?

Secondly, the need for clear rules in the field must be assessed. For example, in some areas of tax law there are numerous cases that need to be decided in a consistent and foreseeable manner. This consideration coupled with the burden of taxes leads to the outcome that acts imposing taxes are very important and require a very clear statutory basis.[23]

Once the considerations have been mapped, including how they are balanced, an evaluative test becomes clearer and easier to apply. Consequently, the Court's discretion is limited. To be sure, it does not mean that competent lawyers cannot disagree. But it does mean that a vague standard becomes clearer.

While the majority in *EPA* identified some important implications of the policy (economic and social consequences), it did not discuss other plausible relevant considerations, such as the importance of environmental protection. That would have been appropriate in our view.

2.4 Balancing Countervailing Considerations

As the majority lays down the major questions doctrine in *EPA*, the relevant considerations are one-sided. The Court does not assess relevant countervailing considerations.

The considerations identified above for the importance test in Iceland can lead to the outcome that an act is "more" or "less" important. However, they are incomplete. They need to be balanced against considerations that recommend more discretion to the executive branch and allow for less clear statutory basis. Chief among them is the *effectiveness consideration*, that is the need to uphold an effective government that can efficiently pursue various public goals. The requirement of clear

[23] See, e.g. Hafstein Dan Kristjánsson: "Stjórnskipuleg lögmætisregla" (2009), 446-462. For an example about administrative agencies, see *H 1998, 4552*, for equality, see *UA 31 December 2007 (4735/2006)*, and for efficiency, see *H 8 March 2007 (345/2006).*

statutory provision cannot be so great that it is impossible or impractical to pursue other worthwhile goals. Among other countervailing considerations, or considerations that are sub-considerations of effectiveness, discussed by legal scholars are: the need for detailed technical rules; rules that require expertise in the field; the need to be able to respond quickly to changes; rules are only meant to apply for a short time at once; the need to adapt to changing circumstances and local situations; the need to meet unforeseen circumstances; the need to regulate temporary or experimental projects, and the fact that some matters are hard to capture in a fixed rule and require and evaluative standard.[24]

Let us say that an administrative act limits the citizen's commercial freedom (it is burdensome). That suggests it is a (very) important act. However, there might be an effectiveness consideration that pulls in another direction. When these two considerations are balanced, the outcome is a lower level of strictness than it would be if the effectiveness consideration were not pulling in another direction.

While we can in general map the different types of acts, it should be emphasised that the importance test requires a *case-by-case assessment*, and the outcomes are a *more-or-less* need for clarity.

The majority in *EPA* only assessed considerations recommending clear authorization but did not identify and balance countervailing considerations. Had the doctrine been developed in light of the foregoing, the majority would have needed to do that. In this case the relevant considerations are the need for expertise in the field as well as technical rules. The result might have been a lower level of strictness for the requirement of clarity.

2.5 The Legislature Decides the General Approach to Varying Degrees

The majority in *EPA* stated that the word 'system' when shorn of all context is an 'empty vessel'. The argument raises questions about the method used to assess the clarity of the statutory basis.

When dealing with the legal basis of an administrative instrument, two fundamental questions arise. *Firstly*, whether the law itself confers too much law-making power to the administrative agency. If the answer is yes, then the law is faulty, and it cannot be a legal basis for any administrative instrument. *Secondly*, if the law itself does not violate the constitution, then the

[24] Sigurður Líndal, *Um lög og lögfræði: grundvöllur laga – réttarheimildir* (2003), 120–123.

question becomes whether a particular administrative instrument has a legal basis in the law. The first question is about whether the legislature has violated the constitution. The second question is about whether the administrative agency has acted on the basis of law. Even though these are distinct questions, answering the former can set the stage for answering the latter. The reason is that when answering the former question, we need to identify the legal limits of the delegation of law-making power. Those limits matter for whether a particular instrument falls within the scope of the delegation. Nonetheless, it is important not to confuse the two. Let us begin by considering the legal limits according to the first question and then address whether the majority in *EPA* conflates the two questions.

According to Icelandic law, the legislature must lay down the general approach and the executive branch cannot be (entirely) free to decide the rules. The executive branch must *act within the boundary and on the basis of the general approach*. But what does the legislature need to decide? According to the Icelandic approach, the following three matters need to be ascertainable from the statute: (a) the purpose of the measure; (b) the means to achieve the purpose; and (c) the extent or scope of the means.[25] In other words, the legislature lays down the content and scope, but the executive branch fills in the details. These limits are identified by interpreting the statute. Because the importance test is a relative standard, these indicators need to be present to a greater-or-lesser degree depending on the strictness of the requirement.

If the majority had considered the two issues identified above as distinct, then it would have been appropriate to consider what legal limits are present. In our view, Section 111 clearly did not grant EPA an 'open-check' but laid down limitations and guidelines identifiable by interpretation. For example, the 'best system of emission reduction' as has been 'adequately demonstrated' should be interpreted as a *reference standard*, that is a standard that refers to and needs to be filled in light of considerations *outside* of the law, such as moral, social or scientific considerations. An example of a reference standard in this sense is the 'best interests of the child', which can, for example, refer to considerations concerning our best scientific knowledge about child psychology and development.[26] Section 111 seems to us to refer to considerations concerning scientific knowledge in the field about emission reduction. After all, the system must be 'adequately

[25] Páll Hreinsson, "Lagaáskilnaðarregla atvinnufrelsisákvæðis stjórnarskrárinnar" (2001), 417–420.
[26] See e.g. Ármann Snævarr, *Almenn lögfræði*, bls. 354–356, Hafsteinn Dan Kristjánsson, *Að iðka lögfræði* (2015), bls. 178, and Hafsteinn Dan Kristjánsson, ""Eignarétturinn er friðhelgur." Eru upphafsorð 72. gr. stjórnarskrárinnar aðeins stefnuyfirlýsing?" (2013), bls. 44–45.

demonstrated'. What counts as the best system in the sense of the Section depends on scientific knowledge and expertise in the field. Systems that are not supported by adequate scientific knowledge are ruled out. If this interpretation is accepted, then it follows that it was not enough to merely consider *semantics* (what can the words 'best' and 'system' possibly mean linguistically). It was not any possible system linguistically but the system that was based on scientific knowledge and expertise. Accordingly, the word system, in the context it appeared, was not, in our view an 'empty vessel'. Nonetheless, the question remains to be answered whether the reference standard was clear enough in light of the appropriate level of strictness for this case.

Did the majority's argument conflate the two questions? If the word 'system' is an 'empty vessel', then presumably the Section is unclear for all cases. The delegation is an open-check. That concerns the first question above rather than the second question. However, if the Section sets sufficient legal limits in general, then the question becomes whether the particular instrument is within them. That concerns the second question and requires a different argument than the linguistic one (semantics) offered by the majority.

2.6 Requirements of Clarity are Interwoven with Statutory Interpretation

The majority in *EPA* seems to *first* identify the meaning or the limits of Section 111 and *then* assess whether they amount to 'clear congressional authorization'. In other words, statutory interpretation and the clear-statement rule are applied in a distinct fashion. The requirement of clarity does not affect the interpretive process. Rather the interpretation – the outcome – is evaluated in light of the standard. The minority claimed, on the other hand, that only normal statutory interpretation is needed and no evaluation in light of a clear-statement rule is required. In our view, the combination of requirements of clarity and statutory interpretation discussed in Icelandic scholarship might be a compromise between the two approaches.

According to the approach taken in Icelandic law, requirements of clarity are interwoven with statutory interpretation.[27] The requirement of clarity affects the weight of individual interpretive considerations. For example, the stricter the requirement, the more weight is given to the inferences drawn from textual interpretation. Furthermore, the requirement of clarity can affect the

[27] Hafsteinn Dan Kristjánsson, "Stjórnskipuleg lögmætisregla" (2009), 421–494, Hafsteinn Dan Kristjánsson: *Að iðka lögfræði. Inngangur að hinni lagalegu aðferð* (2015), 140 et passim, and Róbert R. Spanó, *Túlkun lagaákvæða* (2019), 153–155 et passim.

assessment of an inference, for instance, whether a text supports a particular interpretation in a clear way. Moreover, a requirement of clarity affects how doubt, as to whether an administrative instrument falls within a provision's scope, is dealt with and how much doubt is acceptable. If there is still doubt after all the interpretive considerations have been identified and assessed, a requirement of clarity leads to the conclusion that the statutory provision is not caught. After all, in doubt, it is not clear. A high level of strictness means that little or no doubt is acceptable and vice versa.

Why does it matter that the approaches are different? It matters, *firstly*, because the assessment of whether an administrative instrument has a clear legal basis is different. According to the majority's approach, the outcome of interpretation is assessed to determine whether it is clear enough. However, what counts as 'clear' is unclear. On the Icelandic approach, an administrative instrument has a clear legal basis if it falls within the ambit of the statutory provision after it has been interpretated. A clear legal basis is the outcome of interpretation. What counts as 'clear' is clear. *Secondly*, since a requirement of clarity affects the interpretive process, it can, therefore, affect the outcome of the interpretation. An administrative instrument has a clear legal basis in a statutory provision after it has been interpreted in light of a requirement of clarity set at the level appropriate for this kind of act. Consequently, the outcomes could be different depending on which approach is taken.

Had the requirement of clarity been interwoven with the interpretation in *EPA*, then the majority would have needed to address the weight of individual interpretive considerations, whether they clearly support a particular outcome, whether there was still doubt after all the interpretive considerations had been assessed as well as how much doubt was acceptable in light of the appropriate level of strictness. That might have, but need not have, lead to a different outcome.

3 Concluding Remarks

Assuming the major questions doctrine is here to stay, we suggest it should be improved in light of the approach taken to similar issues in Icelandic law. The improvements are faithful to the underling rationale of the major questions doctrine: the more important an issue is, the clearer stance or authorization the democratic legislature must make. But the improvements make the test, in our view, more sophisticated, balanced and cause less worry about the dramatic implications for the administrative state in a democracy.

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