REGULATORY OVERSIGHT

What Is the Major Questions Doctrine? A Discussion With Ohio Solicitor General Ben Flowers
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[STEPHEN PIEPGRASS]

Welcome to another episode of Regulatory Oversight, a podcast that focuses on expert perspective on trends that drive and enforcement activity. The podcast features insights from members of the firms Regulatory Practice Group, including its nationally ranked state attorney's general practice and guest commentary from business leaders, regulatory experts and current and former government officials on a range of topics affecting businesses operating in highly regulated areas. Today we are delighted to feature a conversation between one of our regulatory partners and head of our appellate practice Misha Tseytlin and Ben Flowers, Solicitor General of the great state of Ohio, so without further ado, Misha and Ben, why don't you take it away.

[MISHA TSEYTLIN]

Thank you so much Stephen and thank General Flowers for being with us today.

[BEN FLOWERS]

I'm happy to be here, thank you for having me.

[MISHA TSEYTLIN]

Ben and I go back to when I was Solicitor General of the State of Wisconsin and we've had opportunities to work on multiple cases on the same side, generally, ever since, so I'm always glad to be able to talk to Ben. The topic that we had picked out today is something called the Major Questions Doctrine. I will let Ben, explain the details of it, but just as a high level, this is an administrative doctrine that has been around for a couple of decades that basically says that when an agency wants to make a rule of great political or economic significance, it needs to point to particularly clear statutory text to invoke that kind of authority. Ben do you want to give us a little bit of background on this Doctrine, you know what cases did it come from, what's been the development of this doctrine?

[BEN FLOWERS]

You know I think you can trace it back to cases, one that comes to mind is *Whitman* or *FDA v. Brown and Williamson*, and both of those cases as you said, the court was presented with a circumstance in which a statute could be read in a way that gave an agency a real great deal of power to regulate American life. And if we step back even from those cases and just think about, you know the way our government is structured, we're all taught in school that laws are passed through both houses of congress and then they're signed into law by the president and of course that still happens, but frankly the vast majority of rules that govern our everyday lives, especially our economic lives really don't come from congress and are never signed by the president, they come from administrative agencies. So these agencies can make rules

and those rules can bind us. You think about, for example the rules that govern just about, all the trading of securities that we invest in or that regulate air and water quality, most of those rules, there's some general statute that empowers an agency to take steps, but then the agency actually announces the specific rules that bind us. So over the years there's been some push back on that and of course agencies have a tendency to claim the broadest possible power they can. In those cases I mentioned *Whitman* and *FDA v. Brown and Williamson*, you see the court saying, well wait a minute, when you're departing from the typical, the constitutional envisioned way of making rules, when you're not working for Congress and your not working the President then you're doing it through an agency, it really already is an exception to the process our constitution envisions. And so if we're going to allow that exception, we're going to require Congress to very clearly bless it before we allow an agency to make rules. So in other words, unless Congress has made very, very clear that it wants the agency to be the one making these very major rules that effect our lives, it doesn't have the power to do so and Justice Scalia famously stated "Congress doesn't hide elephants in mouseholes" they don't make really, really big changes by sort of subtle hints and statutes. So they want to allow an agency to do something that's really really important, really really meaningful, will have major effects on the economy and on jobs and on other aspects of our lives, we expect them to speak clearly. So it was announced then, but over time, particularly in the last couple of years as the Biden administration and the Trump administration have responded to the COVID-19 pandemic by sort of invoking long standing statutes in novel ways, the courts have pushed back at times by saying, you know it's one thing to say there's a statute that requires something or another and an agency can fill in the gaps, fill in some details but it's quite another to say they can take a statute that's been around for a very long time and claim an immense power from that to regulate major swaths of the economy. So you saw this in the Alabama Association of Realtor's case where the Trump and Biden administration had had eviction moratoriums and the court said no, the statute that the agency was relying on didn't clearly authorize that and since it didn't clearly authorize that, they would not read the statute to give an agency such immense power over the American economy. And then in a case that I'm a little more familiar with from personal experience, the Osha Vaccine Mandate, once again the rule of governing when Osha could announce an emergency standards for workplace safety had been used to regulate discrete chemicals where there wasn't enough time to go through the full rulemaking process, but in this case they responded, not to a chemical you found in a few work places, or even one that really stemmed from work places but to regulate a risk that was ever present in life, COVID-19 and to read of this long standing statute to provide, to confer such great authority to regulate, not only our businesses but the health of the American people, the court said was the kind of thing that was so important that if it is to be authorized, it had to be authorized by Congress directly. So I went on for a long time there Misha, but I hope I gave a little bit of background.

[MISHA TSEYTLIN]

You did. You know that last big case you talked about, you had a chance to argue it at the US Supreme Court and this was fairly recently, what kind of questions were you or the other advocates asked about this doctrine there and what did the Court ultimately say about the doctrine and were you surprised in what they said?

[BEN FLOWERS]

I wasn't too surprised about what they said because what they said had, was consistent with that Alabama realtors case I mentioned which had been decided the previous summer, where

the court was making clear that this doctrine really did have some teeth and when an agency purported to exercise really immense power in a way that Congress did not clearly authorize, you know when there was room for debate on the issue the Court would not interpret the statute to permit with the agency was doing. So I wasn't surprised about that and in fact it was sort of a central feature of our argument, both in our briefs and actually arguing it at the Court, in terms of oral argument. I believe you're asking about questions I received at argument, one thing….

[MISHA TSEYTLIN]

Yeah

[BEN FLOWERS]

Right, so one came from Justice Gorsuch that was interesting, it was something along the lines of, is the Major Questions Doctrine really just a tool for deciding what a statute means or does it do something a little bit more than that. And my response was, something a little bit more than that. One way to think about the statute, is that it's not just a guide to the best way of understanding the statute in terms of, you know how would a normal English speaker understand it, it could also be understood as a substantive rule that kept agencies from inadvertently stumbling into constitutional problems. So I mentioned at the outset that, you know as we all know, as you learn in 5th grade, the Congress passes a law and the President signs them. Over the years that's become less and less common, you have the agencies making rules, but there's still some limits, it's hard to police the limits, but there's some limits on just how much agencies can do without congressional authorization and the Major Questions Doctrine serves the function of helping the Court have some sort of line that keeps Congress from giving too much of its power away, allowing too much rulemaking by agencies and so I responded that it filled that role as well.

[MISHA TSEYTLIN]

So on the same day that the US Supreme Court ruled in your favor, on the Osha Mandate, it ruled against other parties who had challenged the CMS Vaccine Mandate and had made some of the same or many of the same Major Questions Doctrine arguments, were you surprised that there was a split result and does this tell you us anything about where the Court is heading on the Major Questions Doctrine?

[BEN FLOWERS]

I don't know if surprised is the right word, I mean they were different cases in that the statutes were slightly different, so I'll talk about the other case and then I'll come back to Osha. In the other case, was what's called the CMS Mandate, it was a mandate that applied to entities that took Medicaid and Medicare funds and if you take those funds, you have to agree to certain conditions and there were various statutes that provided what sorts of regulations Medicaid and Medicare could put on entities that took the funds and using those statutes, it said that if you take the funds, you must require your staff to get vaccinated, essentially. I'm simplifying a bit but that was the gist of it. And the Osha context you have a rule governing all workplaces, not just medical facilities, not just entities that take money from the government, but there was all workplaces of at least 100 employees. So it was broader in that way and the statute was both specific to a particular like medicine where you might see a heightened risk and it had different words obviously, it didn't communicate about the agencies power in the

same way, so the Court determined that in the Medicaid case, it was that the clear, that the Major Questions Doctrine didn't apply, but rather that the statute there, it said was sufficiently clear, especially because, and I think this was significant, it was not an agency exercising authority over all Americans or Americans generally, but rather a subset of entities, these Medicaid, Medicare funds and those entities all agree to be bound by whatever regulations the relevant agency promulgated and this just happened to be the vaccine one. So I think what it tells us is Major Questions Doctrine is not going to do all the work by itself, it's always going to depend on what the statute means and sometimes a statute will clearly authorize the relevant agency to exercise an authority that we can, we would all call major, that really would have a significant effect on our lives, so it's not an automatic win, it's simply a tool that courts will use when they determine that there either interpreting the statute to see if there is ambiguity or if there is some ambiguity in resolving it against the agency.

[MISHA TSEYTLIN]

It seems that there are two challenging questions when you're talking about the Major Questions Doctrine. One, what you were discussing is what is efficiently clear enough statute to authorize an agency to decide a major question, but then the other one, and this is a predicate one, is what exactly triggers the Major Questions Doctrine. So, you know, what has the Court said about that and you know how clear is the guidance to lower courts and agencies about when something fits into the traditional box where the agency actually gets a decent amount of deference under Chevron and where on the other hand the agency is really out of luck unless it can point to clear statutory text, clearly authorizing what was being done.

[BEN FLOWERS]

Well we've gotten quite a bit of more guidance in the past year just because there's been more cases decided under this doctrine, the way the court explains it, is that a Major Question is one with major political or economic implications. That's of course vague, they don't set a dollar limit but we do have some examples, we can reason by analogy, I mention the *FDA v. Brown and Williamson* case, there they determine that a statute that would empower the FDA to effectively ban cigarettes would be a major question, why cigarettes are a major economic engine in some areas, they produce quite a bit of money and that's the kind of thing that if you expect, if Congress were to empower an agency to forbid it, you would expect them to do it very clearly. In the eviction moratorium case you had a circumstance where just about all landlords were being made subject to a rule that required them to not evict people who are unable to pay their rent, again that's a major impact on the economy. And when you look at the vaccine mandate, Osha, you have again a rule effecting broad swats of the economy all companies, all employers with over 100 employees, that's a great many people, it's touching on a great many businesses and lives and so for that reason it's a major question. So I think the more of these we start to see and it seems like we're seeing more of them, there's a, you know increase interest in this doctrine, we'll have more examples we can draw analogies to in deciding what is and what is not a major question.

[MISHA TSEYTLIN]

Speaking of that, the US Supreme Court currently has a merits case where this issue was briefed and argued, relating to the regulation of carbon monoxide emissions from power

plants, you know, can you tell us a little about that case and what more information we may be able to glean about the Major Questions Doctrine after the Supreme Court decides it?

[BEN FLOWERS]

Yeah, absolutely, so this was another case from this term that involved, as you said the Major Questions Doctrine, many people might remember the Obama era clean power plants plan, which was a project that I know Misha you were involved in challenging in your former role as Wisconsin's Solicitor General, but the program, had it ever taken effect, would have affected a major overhaul of power production in America. It would have required replacing or overhauling quite a bit of power infrastructure, replacing coal power plants, things of that nature and so there was an argument at the time that that was a major question, that's the kind of thing that the EPA, in that instance, could not do absence something very clearly telling it, it had the power to do so and there was nothing like that in the clean air act. The Trump administration repealed the clean power plant plan rule in part based on its assessment the statute did not give it that authority. This case back up at the Supreme Court is questioning whether in fact it did have the authority. Whether the statute did convey that very broad power to effect major, major changes to the power grid in America as opposed to simply limiting what individual power plants do in terms of their emissions. So the case was argued, West Virginia lead the advocacy for the states. The Solicitor General there, is a very talented Lindsay See did an excellent job and it could be another example where we gain insight into what constitutes a major question, and I will say that if anything's a major question a rule that requires such drastic changes to the American economy, the way we produce power, the way we supply power would sure seem to fall within the category of major questions but we will learn about that and we'll also see if the court determines that notwithstanding the significance of this question, the statute is simply clear enough to permit it. We expect a decision in that by the end of June.

[MISHA TSEYTLIN]

Now along with the rising interest in the Major Questions Doctrine, there's also been a rise in interest in cutting back on Chevron deference, can you tell us a little bit about Chevron deference and how it interacts with the Major Questions Doctrine and how the change in the interpretation of one of those doctrines could impact the change in the other.

[BEN FLOWERS]

The Chevron Doctrine is, many of those terms may know, but I'll summarize just in case, is the idea that when there's an ambiguity in statute, the agency has authority to interpret that ambiguity and courts will defer to any reasonable interpretation. So that empowers the agency, depending on who you ask, to really help define the law, make the law, because if the statute is not crystal clear on its face, they have been given authority to say, well we'll pick reading A over reading B as long as both readings A and B are deemed reasonable. The way the Major Questions Doctrine interacts with that is that in cases where you're dealing with the major question now, it will be harder for the agency to argue, a) that they have the power to do the thing in the first place but regardless, and maybe this is related, that the, an interpretation that would permit them to exercise sort of major authority notwithstanding an ambiguity in the statute would not be a reasonable interpretation of the statute, so if the Major Questions Doctrine guides how we interpret statutes and if you're supposed to evade readings that would read a rather obscure part of a statute to give major power to an agency than a reading that would require giving them such power would be unreasonable and in that

case the agency would not be a deference, meaning the courts would not simply assume that its reading was in fact reasonable and allow it to take effect.

[MISHA TSEYTLIN]

Is it really going to be the case then that a lot of cases are going to be decided either, it's a major question and then the agencies going to almost always lose or it's not a major question and then under Chevron the agency is almost always going to win such that the Major Questions Doctrine will become the fulcrum and the most important battleground in agency cases, or is that overstating things?

[BEN FLOWERS]

I think it might be overstating things slightly because in Major Questions Doctrine I think is part of a larger trend of courts, I think sort of taking more seriously their role in saying what the law is. So whereas in the past I think courts have been quite willing to find ambiguities in statutes, I think today courts will put in a lot more work before they deem a statute ambiguous. And remember the agency doesn't get the deference for reasonable interpretation unless there's first an ambiguity. And I think courts today demand more before they will just declare a statute ambiguous. The fact there is an argument for reading it in one way rather than another isn't usually going to be enough. They're going to want to show that the two arguments are very, at least very close to being just as good as one another. If one is very clearly superior courts will say that that is what the statute means and that therefore there is no ambiguity and so there's no deference to the agency. So I think at the same time you have this Major Questions Doctrine taking form you also have an increase reluctance to deem statutes ambiguous in the first place with or without the Major Questions Doctrine.

[MISHA TSEYTLIN]

For those who are not, you know involved in these big nation changing cases, is this trend towards the judiciary looking at these things much more closing rather it's through a more searching inquiry under Chevron or a Major Questions Doctrine, is this going to have an actual impact in not nation changing type regulations and litigation about those regulations?

[BEN FLOWERS]

I think it will because the, again I think the Major Questions Doctrine is part of an overarching trend of sort of reluctance to read statutes as ambiguous. Courts think that these things do have meaning and they're less willing to give agencies power to effectively make new law by declaring a statute ambiguous and coming up with some arguably reasonable interpretation and many of the things that impact our daily lives do stem from regulations and those regulations are all supposed to be grounded in statute, so that trend of taking the statutory text more seriously and courts saying that it's Congress not the agencies that need to make the rules that govern our lives will have an effect, I think in many aspects of American life, even in cases that don't present the sort of nation changing regulations you're asking about.

[MISHA TSEYTLIN]

Ben thank you so much for joining us today, Stephen do you have any closing words?

[STEPHEN PIEPGRASS]

No, that was wonderful, very insightful and very much enjoyed hearing about your thoughts on the Major Questions Doctrine and I think our listeners will find it very insightful as well. Ben we really appreciate having you on, thoroughly enjoyed this time together and I'm really excited that you and Misha were able to have such a great conversation that our listeners were able to tune into and benefit from.

[BEN FLOWERS]

Great, well thank you for having me, it was a pleasure joining you, happy to do it.