REGULATORY REFORM

Responding to the New Major Questions Doctrine

Congress should adopt a fast-track legislative process to make the value judgments that courts leave to it when they apply the major questions doctrine.

BY CHRISTOPHER J. WALKER

In its October 2021 term, the U.S. Supreme Court embraced a new and more sweeping version of the major questions doctrine for interpreting congressional delegations of regulatory authority to federal agencies. Invoking this doctrine, the Court stayed the Occupational Safety and Health Administration's attempt to impose a COVID-19 test-or-vaccine mandate on large employers and vacated the stay of an injunction on the Centers for Disease Control and Prevention's COVID-19 nationwide eviction moratorium. In both cases, the Court interpreted the agencies' authorizing statute to not allow such regulation of matters of great economic and political significance. But it provided little to no guidance about how this rule of statutory interpretation would apply in subsequent cases.

At the end of the term, in *West Virginia v. U.S. Environmental Protection Agency*, 142 S. Ct. 2587 (2022), the Court articulated the major questions doctrine in greater detail. In interpreting the Clean Air Act to not allow the EPA to implement the Obama-era Clean Power Plan, Chief Justice John Roberts, writing for the Court, announced a presumption

> that Congress intends to make major policy decisions itself, not leave those decisions to agencies. Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there.

When it comes to agencies claiming authority to regulate such major policy questions, he continued, "something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims."

The amount of scholarly attention the major questions doctrine has received in the last year has been staggering. Over at the *Yale Journal on Regulation*'s "Notice and Comment" blog, Justice Department attorney Beau Baumann lists more than three dozen full-length law review articles written on the subject since *West Virginia v. EPA*, and I see at least a dozen more articles that can be added to the list. And then there are hundreds of blog posts, opinion pieces, podcast episodes, and legal briefs. Most of the scholarly attention has been critical, including questioning whether the doctrine is consistent with textualism, whether it has any historical or even normative foundation, and how it could lead to the deconstruction of the administrative state.

One overarching theme is that the doctrine is a deregulatory judicial power grab from both the executive and legislative branches. It limits the president's ability to pursue a major policy agenda through regulation. And in the current era of political polarization, Congress is unlikely to have the capacity to pass legislation to provide the judicially required clear authorization for agencies to regulate major questions. Especially considering the various "vetogates" imposed by Senate and House rules, it is fair to conclude that the new major questions doctrine will be difficult for Congress to override via legislation. Thus, its predominant, asymmetric effect will be deregulatory, as opposed to getting Congress to make the major value judgments in federal lawmaking.

But that does not have to be the case. Congress has tools at its disposal to respond to the major questions doctrine. I focus here on one: Congress can enact legislation similar to the 1996 Congressional Review Act that would enable it to quickly address agency rules that have been invalidated on major questions doc-

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trine grounds. This process would bypass the Senate filibuster and similar congressional slow-down mechanisms. The successful passage of a CRA-like joint resolution would amend the agency's governing statute to expressly authorize the regulatory power that the agency had claimed in the judicially invalidated rule. This would enable Congress to decide the major policy question itself—helping to restore Congress's legislative role in the modern administrative state—and would counteract the major questions doctrine's asymmetric deregulatory effects.

FROM THE NONDELEGATION DOCTRINE TO THE MAJOR QUESTIONS DOCTRINE

Before turning to how Congress can respond to the major questions doctrine, it is important to appreciate how the major questions doctrine differs from the nondelegation doctrine—and, in particular, how the major questions doctrine preserves more flexibility for Congress to respond than a reinvigorated nondelegation doctrine would.

Over the last decade or so, there has been a growing call, mainly among conservatives and libertarians, for the Supreme Court to reinvigorate the nondelegation doctrine. This doctrine, as Harvard professor Cass Sunstein has quipped, had "only one good year." That year was nearly nine decades ago, in 1935, when the Court invoked the doctrine to strike down as unconstitutional two congressional delegations of lawmaking authority to the president. In so doing, the Court underscored that Congress is vested with "all legislative powers" under Article I of the U.S. Constitution, and it cannot delegate that power to anyone else. To be sure, it can delegate law implementation or execution authority to the executive branch, and the line between legislation and law execution is not easy to draw. The Court has said that such delegations are constitutionally permissible so long as Congress includes an "intelligible principle" to guide the agency's discretion. (See "From *Chevron* to 'Consent of the Governed,'" Winter 2018–2019.)

Since 1935, the Supreme Court has not applied the nondelegation doctrine to invalidate any congressional delegations to the executive branch. Writing for the Court in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), Justice Antonin Scalia observed that the Court had previously upheld sweeping delegations for federal agencies to regulate markets to "be generally fair and equitable" and to regulate "in the public interest." Quoting from his dissent in *Mistretta v. United States*, 488 U.S. 361 (1989), Scalia reiterated that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."

With Justice Neil Gorsuch joining the Court, however, there had been a renewed optimism that the Supreme Court would seek to reinvigorate the nondelegation doctrine. In *Gundy v. United States*, 139 S. Ct. 2116 (2019), the Court in a 5–3 decision declined to invalidate on nondelegation grounds the attorney general's delegated authority to apply certain criminal-law registration requirements to sex offenders convicted before the enactment of the Sex Offender Registration and Notification Act of 2006.

Gorsuch, joined by Roberts and Justice Clarence Thomas, dissented. He outlined a broad vision for a revived nondelegation doctrine, condemning the "intelligible principle misadventure" and calling on the Court to return to first principles to "polic[e] improper legislative delegations." Concurring in the judgment, Justice Samuel Alito cast the deciding vote to uphold the congressional delegation in this case, but indicated he would support the dissent's call to reinvigorate the nondelegation doctrine "if a majority of this Court were willing to reconsider the approach we have taken for the past 84 years."

Although Justice Brett Kavanaugh had already joined the Court by the time the *Gundy* decision was issued, he did not participate in the case. Several months later, however, he expressed his interest in reconsidering the nondelegation doctrine. In his statement regarding the denial of certiorari in *Paul v. United States*, 140 S. Ct. 342 (2019), Kavanaugh invoked Justice William Rehnquist's concurrence in *Industrial Union Department, AFL–CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), in which "Justice Rehnquist opined that major national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch." Kavanaugh suggested that the Court may want to consider "adopt[ing] a nondelegation principle for major questions."

With the new major questions doctrine, the Supreme Court took up Kavanaugh's suggestion of a nondelegation principle for major questions. But instead of a constitutional doctrine prohibiting Congress from delegating major questions to federal agencies, the Court embraced a rule of statutory interpretation—a substantive canon, or what some have called a clear statement rule—that guides courts in interpreting federal statutes that govern federal agencies. In particular, if an agency is seeking to regulate a major policy question, the reviewing court should assess whether Congress has provided clear authorization for the agency to so regulate. If not, the court should interpret the statute to not allow the regulatory action.

Compared to a constitutional doctrine, the upside for Congress of a substantive canon of statutory interpretation is that it preserves more flexibility for Congress to legislate to provide clear congressional authorization. A constitutional doctrine, by contrast, would prohibit Congress from delegating the authority at all. The downside for Congress is that this assumes Congress has the capacity and will to pass legislation to respond to a judicial decision invalidating a regulation on major questions doctrine grounds. The constitutional requirements of bicameralism and presentment make legislating difficult—intentionally so. But the additional House and Senate rules, including the filibuster in the Senate, often make the task of congressional response near impossible.

HOW CONGRESS CAN AND SHOULD RESPOND

Congress cannot change the constitutional requirements for legislating, but it can streamline the vetogates imposed by House and Senate rules. Indeed, it has done so for various compelling reasons over the years. The most prominent example is budget reconciliation under the Congressional Budget Act of 1974, which Congress has used aggressively in recent years to enact landmark legislation without being subject to the Senate filibuster. For instance, the Trump administration used it to pass the Republicans' sweeping tax reform legislation. And the Biden administration used it to enact the Democrats' signature Inflation Reduction Act, which the EPA has proclaimed to be the most significant climate legislation in U.S. history. Congress has also enacted various statutes to fast-track authority for the president to negotiate international trade agreements. And under the National Emergencies Act and the War Powers Act, Congress has bypassed the Senate filibuster to terminate presidential declarations of emergency and to authorize or terminate the use of force overseas, respectively.

Congress could and should adopt a similar fast-track mechanism when it comes to the regulations that federal courts have invalidated on major questions doctrine grounds.

The model for this legislative reform is the CRA. Motivated by concerns that federal agencies may adopt regulations opposed by current legislative majorities, the act creates an expedited process for considering joint resolutions to overturn agency regulations. Congress can only use the CRA within a short window of time after the promulgation of a major rule. Under the act, before any new rule may take effect, the agency must submit a report on the rule to Congress. If the regulation is deemed a "major rule"—defined as any rule the White House's Office of Information and Regulatory Affairs concludes will likely have "an annual effect on the economy of $100 [million] or more" or otherwise have a significant effect on consumer prices or the economy—it shall not take effect for at least 60 days after its submission to Congress. This waiting period provides Congress with an opportunity to review major rules and consider whether to overturn them before they go into effect.

The CRA creates a streamlined process for Congress to overturn a major rule by enacting a "joint resolution of disapproval." Under the act, senators waive all points of order, cannot propose amendments or delay motions, and are limited to 10 hours for debate. As a result, only a simple majority of senators must support a CRA resolution for passage. Moreover, if the relevant Senate committee does not act on the disapproval resolution within 20 calendar days from the applicable date, a petition of at least 30 senators can get the resolution discharged from committee.

If Congress passes the CRA disapproval resolution (and the president signs it into law), the substantive effect of the resolution does not just repeal the agency rule at issue. It also prohibits the agency from promulgating "a new rule that is substantially the same" as the rule at issue "unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." (See "Should We Fear Zombie Regulations?" Summer 2017.)

It is not difficult to see how Congress could employ a CRA-like approach when federal courts invalidate regulations under

the major questions doctrine. Once the regulation is judicially invalidated, Congress could have a window of time during which it could introduce a joint resolution. When it comes to the legislative process, Congress could require the same or similar CRA fast-track procedures. These could include a committee discharge mechanism, a limitation on amendments and delay motions, and a simple majority up–down vote in the Senate after a set period for debate. If the resolution makes it through the House, the Senate, and the president, the substantive effect would be to amend the relevant statute in two limited ways. First, this amended statute would provide clear authorization for the regulatory power the agency had claimed in the invalidated rule. Second, it would authorize additional regulatory power that is "substantially the same" as the authority the reviewing court had precluded on major questions doctrine grounds.

In so doing, the current Congress would provide the "clear statement" required by the major questions doctrine, along with some regulatory flexibility for the agency to modify its approach as needed based on changed circumstances. Importantly, the resolution would not codify the agency's prior rule. Nor would it amend the agency's governing statute in any other way. If the rule had been judicially vacated in a universal manner, the agency could reissue the rule "as is" without, where applicable, the need to restart the notice-and-comment process. On further judicial review, such a rule would be subject to statutory and, of course, constitutional constraints. For instance, an agency's reissued rule can be substantively permissible under the agency's governing statute (as amended by the joint resolution), but still be set aside on reasoned-decision-making grounds as arbitrary and capricious under the Administrative Procedure Act. But the agency also would retain the discretion inherent in the statutory framework, including the option not to reissue the previously invalidated rule at all or to pursue a different regulatory approach through the applicable administrative process.

WHY CONGRESSIONAL DEMOCRATS SHOULD EMBRACE THIS REFORM

This proposal should be an easy sell for Democrats in Congress if they are serious about court reform and the future of the administrative state as a critical mechanism for addressing pressing problems facing the country and world. After all, this proposal makes it easier for Congress to respond to judicial actions with which a congressional majority disagrees and to authorize the president and federal agencies to pursue a more ambitious regulatory agenda.

Indeed, this proposal is similar to the proposed Supreme Court Review Act, a bill a group of Senate Democrats introduced earlier this year that is based on a proposal that Vanderbilt law professor Ganesh Sitaraman suggested in the pages of *The Atlantic.* The legislation, if enacted, would create a fast-track legislative process for Congress to pass substantive legislation to respond to any Supreme Court decision that interprets a federal statute in any way or "interprets or reinterprets the Constitution of the United States in a manner that diminishes an individual right or privilege that is or was previously protected by the Constitution of the United States." Although the proposed legislation purports to prohibit "extraneous matters" from being included in a fast-track-eligible bill responding to a Supreme Court decision, the legislation provides that the responsive bill can amend a statutory provision that is "directly implicated" by a Supreme Court decision, or in the constitutional context allow responsive legislation that is "reasonably relevant" to a Supreme Court decision.

To be sure, the CRA-like approach I propose is much more limited in scope and much less likely to be abused or misused to advance larger legislative projects where the filibuster would normally still require more consensus in the Senate. Like the CRA itself, a joint resolution would not allow for any other substantive amendments; its passage would just amend the agency's governing statute to provide clear authorization for the judicially invalidated rule as well as authorization for any subsequent agency rules that are substantially the same as the invalidated rule. There would be no fast-track opportunity for any other amendments or substantive legislative changes to the agency's governing statute. That would require the ordinary legislative process.

Similarly, this CRA-like process would only be triggered when a federal court invalidates a regulation on major questions doctrine grounds. To cabin strategic judicial behavior, it would be important to frame the CRA-like statute to sweep more broadly than an express citation to—or invocation of—the major questions doctrine. This CRA-like statute should include any judicial decision that rejects—as a matter of statutory interpretation—a textually plausible agency statutory interpretation based on the "majorness" of the policy question at issue. It would encompass decisions framed as resting on a threshold clear-statement rule, a *Chevron* step-one application of a substantive canon to resolve the statutory ambiguity, or a *Chevron* step-two reasonableness check on the agency's interpretation. Similar to the germaneness inquiry for budget reconciliation, the Senate (and House) parliamentarian would be charged to interpret whether a judicial decision qualifies for this CRA-like process.

Importantly, however, this approach would not be triggered whenever a federal court interprets a federal statute in a way the current congressional majority dislikes or whenever a federal regulation is invalidated. In that sense, the purpose of this proposal differs markedly from the proposed Supreme Court Review Act, which, as its co-sponsor Sen. Sheldon Whitehouse (D–RI) puts it, is about "check[ing] the activist Court's rogue decisions." A CRA-like approach limited to the major questions doctrine, by contrast, is not a congressional override of a judicial interpretation of a statute. The new major questions doctrine operates in a unique way. The Supreme Court in *West Virginia v. EPA* found that the statute provides "a plausible textual basis for the agency action"; it only invalidated the agency rule because it found no "clear congressional authorization" for the agency to regulate

on the major question. In other words, a CRA-like approach to the major questions doctrine is about Congress accepting the reviewing court's invitation to decide the major policy question more definitively and in a way that the court had already decided was a textually plausible interpretation of the existing statute.

Enacting this CRA-like statute would help address the asymmetric deregulatory effects of the major questions doctrine. It would empower Congress to quickly respond to those judicial decisions, authorizing federal agencies and the president to pursue a more ambitious regulatory agenda. And it would force Republicans in Congress to go on the record as to whether they believe that the federal government should be addressing the most pressing policy problems facing the country today.

WHY CONGRESSIONAL REPUBLICANS SHOULD EMBRACE THIS REFORM

For many conservatives and libertarians, the asymmetric deregulatory nature of the new major questions doctrine is a feature, not a bug. In their view, regulation should be the exception for federal lawmaking, not the rule. Any workaround of the Senate filibuster is likely to be a nonstarter for this group.

But not all Republicans in Congress share this view. For some concerned with congressional over-delegation, the normative end is not necessarily deregulation, but rather having Congress—not federal agencies (or courts)—make the major value and policy judgments when it comes to lawmaking at the federal level. The new major questions doctrine may constrain federal agencies in this area, but it does too little to encourage Congress to play its role in making major policy judgments. And it risks entrenching a potential judicial error concerning congressional intent about an otherwise textually plausible agency statutory interpretation.

Although Republicans often prefer a more consensus-driven, filibuster-constrained legislative process for ordinary legislation, many of them have also embraced fast-track legislative processes when the context compels it, such as with budget reconciliation, the CRA, international trade agreements, presidential declarations of emergency, and the use of force overseas. Here, the fast-track process would not extend to any major policy debate or judicial decision constraining agency action, but rather to only those circumstances in which a federal court has found that the agency statutory interpretation is textually plausible yet Congress has not clearly enough authorized the agency to regulate on the major question. For this type of up–down vote, the consensus and compromise values the Senate filibuster and related procedures can promote seem to be far less valuable than in the context of ordinary substantive legislation.

Thus, unlike the Supreme Court Review Act, there are reasons to believe that some Republicans in Congress should be willing to consider voting for this CRA-like proposal, getting it over the 60-vote threshold in the Senate. It was not too long ago that Sen. Mike Lee (R–UT) and other Senate Republicans founded the Article I Project to restore Congress's role as the "first branch" of government. As Lee explained back in 2017, "Our goal is to develop and advance and hopefully enact an agenda of structural reforms that will strengthen Congress by reclaiming the legislative powers that have been ceded to the executive branch." To be sure, the new major questions doctrine also combats the ceding of legislative power to the executive branch, but it does so at the risk of judicial error in limiting what Congress had authorized the agency to do. A CRA-like process would be a structural reform to strengthen Congress's ability to make that final decision when it comes to major policy questions.

Perhaps most importantly for Republicans, by enacting a CRA for the major questions doctrine, Congress would also be codifying—either implicitly or explicitly—the existence of the major questions doctrine in the first place. Numerous scholars and commentators have proclaimed that the doctrine has no place in our system of government. A bipartisan CRA for the major questions doctrine would legitimate the doctrine as statutory law while mitigating its more extreme effects on federal lawmaking and regulation. Such legislative recognition of this judicial doctrine may have political and policy value for Republicans in Congress.

CONCLUSION

Over the last decade, the debate over congressional delegations of lawmaking authority to federal agencies has centered on the nondelegation doctrine and *Chevron* deference to agency statutory interpretations. But the new major questions doctrine has arrived, and it is here to stay. Its breadth and effect will depend on how it is further developed by litigants and judges in the lower courts. But Congress can and should respond. It should enact CRA-like legislation to respond to the major questions doctrine, allowing for a fast-track, streamlined process for Congress to amend an agency's governing statute to provide clear authorization for an invalidated rule. This legislative innovation would not only mitigate the deregulatory effects of the new major questions doctrine, but it would also allow Congress to re-assert its legislative role in making the major value judgments in federal lawmaking. *R*

READINGS

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