

A CONGRESSIONAL REVIEW ACT FOR THE MAJOR QUESTIONS DOCTRINE

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Last Term, the Supreme Court recognized a new major questions doctrine, which requires Congress to provide clear statutory authorization for an agency to regulate on a question of great economic or political significance. This new substantive canon of statutory interpretation will be invoked in court challenges to federal agency actions across the country, and it will no doubt spark considerable scholarly attention. This Essay does not wade into those doctrinal or theoretical debates. Instead, it suggests one way Congress could respond: by enacting a Congressional Review Act for the major questions doctrine. In other words, Congress could establish a fast-track legislative process that bypasses the Senate filibuster and similar slow-down mechanisms whenever a federal court invalidates an agency rule on major questions doctrine grounds. The successful passage of such a joint resolution would amend the agency's governing statute to authorize expressly the regulatory power the agency had claimed in the invalidated rule. In so doing, Congress would more easily have the opportunity to decide the major policy question itself—tempering the new doctrine's asymmetric deregulatory effects and allowing Congress to reassert its primary role in making the major value judgments in federal lawmaking.

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INTRODUCTION

In a series of Supreme Court decisions this past Term, culminating in *West Virginia v. EPA*,¹ a majority of the Court embraced a new version of the major questions doctrine for interpreting congressional delegations of regulatory authority to federal agencies.² Writing for the majority in *West Virginia v. EPA*, Chief Justice Roberts perhaps best captures this new substantive canon of statutory interpretation:

We presume 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. To convince us otherwise, 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.³

The impact of this new major questions doctrine on the field of administrative law will be profound. To borrow a line from the dissent in another administrative law decision, “[i]t is indeed a wonderful new world that the Court creates, one full of promise for administrative-law professors in need of tenure articles and, of course, for litigators.”⁴ Application of the doctrine will no doubt be

1. 142 S. Ct. 2587 (2022).

2. *Id.* at 2615–17 (finding that the Obama Administration EPA’s Clean Power Plan exceeded the agency’s statutory authority); *see also* Nat’l Fed’n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665–66 (2022) (granting a stay of OSHA’s COVID-19 test-or-vaccine mandate for large employers); Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485, 2489–90 (2021) (vacating the stay of an injunction against the CDC’s COVID-19 nationwide eviction moratorium).

3. *West Virginia*, 142 S. Ct. at 2609 (paragraph break deleted; internal quotation marks and citations omitted).

4. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1019 (2005) (Scalia, J., dissenting).

urged in challenges to regulatory actions in federal courts across the nation. And the lower federal courts will have to flesh out the doctrine's contours, especially given that the majority opinion in *West Virginia v. EPA* did little to establish an administrable framework. Indeed, Justice Gorsuch's separate concurrence may well be the more important opinion for the new doctrine, as it provides a roadmap for further development.⁵

Scholarly questions abound. For example, textualists, especially those of us who struggle to situate substantive canons and clear-statement rules in the interpretive toolkit, may find it difficult to square the new major questions doctrine with ordinary statutory interpretation.⁶ When it comes to current debates on the constitutional future of the administrative state, this series of cases seems to suggest that the Roberts Court—or at least the ideological middle of the Court, including Chief Justice Roberts—may be embracing what Professor Jeff Pojanowski has dubbed “neoclassical administrative law.”⁷ In particular, the Court may be retreating, at least for now, from recent calls to revive the nondelegation doctrine as a constitutional constraint on regulation,⁸ instead opting

5. See *West Virginia*, 142 S. Ct. at 2616–26 (Gorsuch, J., concurring).

6. See, e.g., Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 480–513 (2021) (critiquing the major questions doctrine on textualist grounds). Jonathan Adler has suggested one potential textualist path forward. See Jonathan H. Adler, *West Virginia v. EPA: Some Answers about Major Questions*, 2022 CATO SUP. CT. REV. 37, 39 (“[T]he burden should be on the agency to demonstrate that the power it wishes to exercise has been delegated to it. And when confronted with broad, unprecedented, and unusual assertions of agency power, some degree of judicial skepticism would be warranted.”). It would be fascinating, moreover, to see how purposivists or even intentionalists react to this doctrine. See, e.g., Tim Mullins, *Administrative Fidelity—Between Deference and Doubt*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 18, 2022), <https://www.yalejreg.com/nc/administrative-fidelity/> [<https://perma.cc/UCZ9-Q8KQ>].

7. Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 857 (2020).

8. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (arguing that the Court should “not wait” to reconsider the nondelegation doctrine).

to cabin administrative action via non-deferential statutory interpretation.⁹

Here, however, I do not wade into these doctrinal and theoretical debates. Instead, my goal is more modest and practical, focusing on how Congress can respond. I suggest that Congress could enact a Congressional Review Act (CRA) for the major questions doctrine. This fast-track legislative process would bypass the Senate filibuster and similar congressional slow-down mechanisms whenever a federal court invalidates an agency rule on major questions doctrine grounds. The successful passage of a CRA-like joint resolution would amend the agency's governing statute to authorize expressly the regulatory power that the agency had claimed in the judicially invalidated rule. This proposal would encourage Congress to decide the major policy question itself—helping to restore Congress's legislative role in the modern administrative state—and would counteract the new major questions doctrine's asymmetric deregulatory effects.

I. THE MAJOR QUESTIONS DOCTRINE'S POTENTIAL DEREGULATORY EFFECTS

As Professor Jonathan Adler and I have explored elsewhere, there is an often-overlooked temporal problem with congressional delegation, especially when it comes to federal agencies leveraging old statutes to address new problems.¹⁰ Textually broad statutory delegations to federal agencies can become a source of authority for agencies to take action at a later time. This later action could be wholly unanticipated by the enacting Congress and may not

9. See Pojanowski, *supra* note 7, at 900, 884 (arguing that the “neoclassical approach . . . turns down the constitutional temperature” and “rejects deference to agency interpretations of substantive law”).

10. Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931 (2020); cf. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 7 (2014) (“We argue that agencies are better suited than courts to do that updating work and that the case for deferring to agencies in that task is stronger than ever with Congress largely absent from the policymaking process.”).

receive support in the current Congress. One way to address this temporal problem of delegation, we argue, is for Congress to revive the practice of regular reauthorization of statutes that govern federal regulatory action. To do so may require Congress to adopt reauthorization incentives, such as sun-setting provisions, in some statutory contexts.¹¹

Some version of the major questions doctrine could be another way to address the temporal problems with congressional delegation.¹² If it is apparent from the statutory text, structure, and context that the enacting Congress would not have anticipated the agency's use of regulatory authority to address a new or different major policy problem, the reviewing court could invoke the major questions doctrine to cabin the agency's regulatory authority. For the agency to be able to regulate in this area, Congress would have to enact legislation to declare more expressly that it has delegated power to the agency to address the major policy question at issue. The doctrine thus forces Congress to make the value judgment when it comes to federal agencies attempting to use old statutes to address new or otherwise unanticipated issues of great economic or political significance.

In *The New Major Questions Doctrine*, Professors Dan Deacon and Leah Litman underscore an important criticism of this vision for administrative governance.¹³ The new major questions doctrine seems to operate in only one direction: deregulatory. The reviewing court asks Congress for a clearer statement of delegation on the major question. Yet the "vetogates" in Congress,¹⁴ especially in our

11. See Adler & Walker, *supra* note 10, at 1974–82.

12. For the purposes of this Essay, I bracket for another day my concerns with the new major questions doctrine as a matter of interpretive theory and legal doctrine.

13. Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4165724>. For a defense of the doctrine, see Louis Capozzi, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. (forthcoming 2023), <https://ssrn.com/abstract=4234683>.

14. See, e.g., William N. Eskridge, Jr., *Vetogates and American Public Law*, 31 J. L. ECON. & ORG. 756 (2015).

current era of political polarization, make it near impossible to respond. These deregulatory effects are exacerbated by a clear-statement rule imposed retroactively on statutes enacted prior to the announcement of the new doctrine. That enacting Congress may not have anticipated the need to provide more than broad statutory text to authorize the agency to regulate on a major policy question based on new facts or changed circumstances.

For some supporters of a reinvigorated nondelegation doctrine, this is a feature—not a bug—of the new major questions doctrine. In their view, regulation should be the exception for federal lawmaking, not the rule. For others concerned with congressional over-delegation, however, our normative end is not necessarily deregulation, but rather entrusting Congress—not federal agencies (or courts)—to 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.

II. A POTENTIAL CONGRESSIONAL RESPONSE

For those of us interested in reinvigorating Congress's role in the modern administrative state, there are ways for Congress to fast-track legislative responses to pressing problems. Congress has enacted statutes that bypass the Senate filibuster for various reasons. Budget reconciliation, created by the Congressional Budget Act of 1974,¹⁵ is one prominent example that Congress has used aggressively in recent years.¹⁶ Congress has also enacted various statutes

15. Pub. L. No. 93-344, 88 Stat. 297 (codified at 2 U.S.C. §§ 601–88).

16. *See, e.g.*, Inflation Reduction Act of 2022, Pub. L. No. 117-169 (using budget reconciliation to pass landmark climate change legislation); American Rescue Plan Act of 2021, Pub. L. No. 117-2 (using budget reconciliation to pass a \$1.9 trillion economic

to fast-track authority for the president to negotiate international trade agreements.¹⁷ And under the National Emergencies Act and the War Powers Act, Congress has bypassed the Senate filibuster to terminate presidential declarations of emergency¹⁸ and to authorize or terminate the use of force overseas,¹⁹ respectively.

A. *The Congressional Review Act*

If Congress were interested in responding to the new major questions doctrine, perhaps the most analogous legislative tool is the Congressional Review Act of 1996 (CRA).²⁰ Motivated by concerns that federal agencies may adopt regulations opposed by current legislative majorities, the CRA creates an expedited process for considering joint resolutions to overturn agency regulations.²¹ In effect, the CRA creates a means through which Congress can police an agency's exercise of its delegated authority.²²

stimulus package to address the COVID-19 pandemic); Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (using budget reconciliation to pass expansive tax cuts).

17. See, e.g., Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT'L L. & ECON. 687, 696 (1996).

18. 50 U.S.C. § 1622(b) ("Not later than six months after a national emergency is declared . . . each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated.").

19. 50 U.S.C. § 1545(b) ("Any joint resolution or bill [authorizing forces pursuant to the War Powers Act] shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays."); *id.* § 1546 (substantially similar language for terminating overseas forces).

20. Congressional Review Act of 1996, Pub. L. No. 104-121, 110 Stat. 868 (codified at 5 U.S.C. §§ 801-808 (2012)). See generally MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS (last updated Nov. 12, 2021), <https://fas.org/sgp/crs/misc/R43992.pdf>.

21. 5 U.S.C. § 801(a)(3)(B).

22. See, e.g., Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 192-93 (2018) (providing extensive overview of the CRA and arguing that "the CRA should be helpful in corralling agency excesses, but new legislation could achieve that result more effectively and efficiently"); cf. Squitieri, *supra* note 6, at

Congress can only use the CRA within a relatively short window of time after the promulgation of a major rule.²³ Under the CRA, before any new rule may take effect, the agency must submit a report on the rule to Congress (and the Comptroller General).²⁴ 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 economy²⁵ — it shall not take effect for at least 60 days after its submission to Congress.²⁶ This waiting period provides Congress with an opportunity to review major rules and consider whether to overturn them before the major rules go into effect.

The CRA creates a streamlined process for Congress to overturn a major rule by enacting a “joint resolution of disapproval.”²⁷ If the relevant Senate committee does not act on the disapproval resolution within 20 calendar days from the applicable date, “such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar.”²⁸ The purpose of this mechanism is to streamline the review process by preventing a committee from acting as a bottleneck. Under the CRA, moreover, Senators waive all points of order,²⁹ cannot

491 (arguing that the major questions doctrine is in tension with the CRA because “where the major questions doctrine presumes that Congress wishes to answer major questions itself, the CRA exhibits a congressional presumption that agencies will answer major questions through major rules”).

23. 5 U.S.C. § 802(a) (providing that the window for the introduction of a joint resolution of disapproval begins when Congress receives the agency’s report on the rule “and end[s] 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress)”).

24. *Id.* § 801(a)(1)(A).

25. *Id.* § 804(2).

26. *Id.* § 801(a)(3)(A).

27. *Id.* § 801(a)(3)(B).

28. *Id.* § 802(c).

29. *Id.* § 802(d)(1).

propose amendments or delay motions,³⁰ and are limited to 10 hours for debate.³¹ As a result, only a simple majority of Senators must support a CRA resolution for passage.

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.”³²

B. A CRA Approach to the Major Questions Doctrine

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 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 of time 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

30. *Id.*

31. *Id.* § 802(d)(2).

32. *Id.* § 801(b)(2).

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 re-issue the rule "as is" without, where applicable, the need to restart the notice-and-comment process.³³ On further judicial review, such 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-decisionmaking grounds as arbitrary and capricious under the Administrative Procedure Act.³⁴ 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.

Admittedly, triggering a CRA-like process through judicial action raises issues not present in the original CRA context. Under the CRA, the clock for congressional action starts when the agency sends the proposed rule to Congress. Judicial review complicates things. A lower federal court invalidating an agency rule on major

33. If the rule had been set aside only as to the parties before the court, the joint resolution would eliminate any major questions doctrine challenges to that part of the existing rule, including in any pending or future litigation. For the purposes of this Essay, I do not wade into the debate on what it means under the APA for a court to "set aside agency action," 5 U.S.C. § 706(2), and, in particular, whether such relief can vacate an agency rule universally or just as to the parties before the court. Compare Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 439 n.121 (2017) (arguing that "whatever one's view of how much the APA codified or changed existing practice, it never speaks with the clarity required to displace the longstanding practice of plaintiff-protective injunctions"), with Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1129 (2020) (arguing that "the APA should be understood to authorize universal vacatur").

34. See *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019) ("We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.").

questions grounds is not the end of the judicial process. There is always a possibility that an appellate court or the Supreme Court reverses the lower court decision, and even more so in the context of a lower court invalidating an agency rule on major questions doctrine grounds. Allowing the first judicial decision to trigger the CRA-like process would no doubt incentivize litigants to engage in strategic forum-shopping in the lower courts.

On the other hand, waiting for the mandate to issue, or for the Supreme Court to weigh in, would arguably prolong the process too long, especially for major rules that may be signature regulatory policies of a new presidential administration. After all, just like in the original CRA context, successful passage of a joint resolution would require support from a simple majority of both houses of Congress and from the President. Such support is most likely to happen when there is unified government, perhaps shortly after a presidential election when the President's party is more likely to also control Congress.³⁵ Not allowing for legislative fast-track review of an agency rule invalidated on major questions doctrine grounds until later in the litigation process increases the likelihood that the Congress (and the President) in office when the rule issued are no longer in power. Such delay thus could frustrate the political branches' ability to implement an electoral mandate. As such, that approach, too, would lead to forum-shopping incentives.

Recognizing these concerns, I tentatively suggest that the trigger should be the first federal court decision to invoke the major questions doctrine. In many circumstances, waiting for the Supreme Court to consider the case would be ideal, but the delay and strategic litigation incentives such approach introduces are just too great. The hope is that the prospect of further judicial review may be a potent political consideration that counsels Congress to stay its

35. See Adler & Walker, *supra* note 10, at 1952 ("Because the CRA resolutions are subject to presidential veto, Congress' only real opportunity to use the CRA is to rescind 'midnight regulations' adopted at the end of a presidential administration.").

hand until the Supreme Court weighs in. That said, one could imagine a narrower statutory scheme, in which the CRA-like process is triggered only by a Supreme Court decision that invalidates a regulation on major questions doctrine grounds. In all events, the CRA window would then close shortly (perhaps 30 or 60 legislative days) after the formal judicial mandate issues.³⁶

III. INTER-BRANCH DYNAMICS

This short Essay does not try to respond to all potential concerns and complications about how to implement a CRA for the major questions doctrine. The goal here is to introduce the idea and hopefully spur congressional and scholarly attention. This Part, however, anticipates some of the concerns about how the dynamics of the proposal would play out in each branch of the federal government.

A. Article III Evasion

One concern is that federal courts might style their opinions to evade this fast-track legislative process. This strategic behavior could manifest in three ways. First, federal courts could fail to invoke the major questions doctrine by name in order to avoid triggering the CRA process. Second, federal courts could strategically find the statute unambiguous or “clear enough”³⁷ (even when there are multiple plausible interpretations), thus foreclosing the agency rule. Third, federal courts could strike down the statutory delegation as unconstitutional on nondelegation doctrine grounds.

36. See Fed. R. App. Pro. 41 (detailing rules for issuing the mandate).

37. See Christopher J. Walker, *Gorsuch’s “Clear Enough” & Kennedy’s Anti-“Reflexive Deference”: Two Potential Limits on Chevron Deference*, YALE J. ON REGUL.: NOTICE & COMMENT (June 22, 2018) (discussing *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)), <https://www.yalejreg.com/nc/gorsuchs-clear-enough-kennedys-anti-reflexive-deference-two-potential-limits-on-chevron-deference/> [https://perma.cc/6FU6-NL5X].

To address the first concern, 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 “major-ness” of the policy question at issue. It would encompass decisions framed as resting on a threshold clear-statement rule,³⁸ a *Chevron* step-one application of a substantive canon to resolve the statutory ambiguity,³⁹ or a *Chevron* step-two reasonableness check on the agency’s interpretation.⁴⁰

Interpreting the grounds of the judicial decision would be left to the congressional process, with the Parliamentarians playing a critical role. As Professors Jesse Cross and Abbe Gluck have detailed, “The Parliamentarians make procedural recommendations on consequential matters,” such as committee referrals for introduced bills, “germaneness” determinations for proper bill amendments in the House, and “Byrd rule” determinations in the Senate for legislative provisions that qualify for the filibuster-free budget reconciliation process.⁴¹ Here, the Parliamentarian for each chamber would make a recommendation on whether the proposed resolution addresses an agency rule that has been invalidated by a court on major questions doctrine grounds. To be sure, under each chamber’s rules, the presiding officer, subject to override by a chamber majority, would make the final ruling as to whether the joint resolution qualifies for this fast-track process. But as Professors Cross and Gluck explain, “these

38. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

39. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000).

40. See, e.g., *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). See generally *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (commanding courts to defer to an agency’s interpretation of a statute it administers (“step zero”) if the statutory provision at issue is ambiguous (“step one”) and the agency’s interpretation is reasonable (“step two”).

41. Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1585–86 (2020).

[Parliamentarian] recommendations are almost always followed by the presiding officer—and the presiding officer’s ruling, in turn, is almost never appealed or overturned by a chamber majority, especially in the House.”⁴² Basing this decision on internal processes would shield the decision from judicial review; indeed, to avoid confusion, the CRA-like statute should preclude judicial review on this determination.⁴³

As for the latter two concerns, this CRA-like legislative response would provide no remedy. Instead, it would leave judicial decisions of statutory clarity and unconstitutionality (such as an overly broad statutory delegation) to the ordinary legislative process and the court of public opinion. As Professor Adler and I explore elsewhere, Congress has other tools, such as the regular reauthorization process, to revisit outdated statutes that govern federal agencies, to update them to address new problems and changed circumstances, and to provide additional statutory instructions to channel regulatory activity.⁴⁴

On the flipside, this legislative innovation would encourage courts to engage more seriously in ordinary statutory interpretation and to invoke the major questions doctrine more carefully and selectively. It would likely have a similar restraining force on vexatious litigation behavior. These constraints on potential abuse of the major questions doctrine would be welcome byproducts of the legislative reform.

B. Article II Overreach

Another concern is that this proposal may encourage the President and federal agencies to overclaim regulatory authority to take advantage of a filibuster-free legislative process. While federal agencies are no doubt influenced by judicial review and potential

42. *Id.* at 1586.

43. *Cf.* 5 U.S.C. § 805 (providing in the CRA that “[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review”).

44. *See* Adler & Walker, *supra* note 10, at 1972–84.

congressional action, priorities and politics should constrain flagrant executive abuse and overreach.

Consider, for instance, a related proposal. Last year, Professors Jody Freeman and Matthew Stephenson proposed a creative use of the CRA: Federal agencies should promulgate major rules that are the opposite of what the agencies and the President actually want and then get Congress to disapprove of those rules under the CRA.⁴⁵ Professors Freeman and Stephenson argue that this CRA disapproval resolution would effectively amend the agency's governing statute to authorize the opposite of the proposed rule.

For reasons similar to those offered separately by Professors Jonathan Adler and Adam White,⁴⁶ I am skeptical that this is a proper interpretation of the CRA. More importantly for the purposes of this Essay, the Biden Administration has shown no interest in leveraging the CRA in this "good-faith faithless execution"⁴⁷ manner. That is perhaps because of the political costs of such tactics and also, no doubt, because of limited resources and higher policy priorities—both in the White House and on Capitol Hill.

I would expect similar political dynamics to limit executive overreach with the proposal set forth in this Essay. That is not to say that a CRA-like approach for the major questions doctrine will have no impact on bureaucratic behavior. The President and federal agencies may well be more aggressive on the margins in their regulatory efforts, especially when judicial review will likely take

45. Jody Freeman & Matthew C. Stephenson, *The Untapped Potential of the Congressional Review Act*, 59 HARV. J. ON LEGIS. 279, 281–82 (2022).

46. Jonathan H. Adler, *Could Congress Use the Congressional Review Act to Expand Agency Authority?*, VOLOKH CONSPIRACY (Aug. 19, 2021, 5:09 PM), <https://reason.com/volokh/2021/08/19/could-congress-use-the-congressional-review-act-to-expand-agency-authority/> [https://perma.cc/WU24-6Q5V]; Adam White, *The Temptation of "Good-Faith Faithless Execution"*, YALE J. ON REGUL.: NOTICE & COMMENT (Aug. 15, 2021), <https://www.yalejreg.com/nc/the-temptation-of-good-faith-faithless-execution/> [https://perma.cc/SW9C-7ZWT].

47. White, *supra* note 46 (capitalization adapted from title).

place while the President is still in power and the President's party controls Congress. This pro-regulatory shift in behavior may just mitigate the constraining influence the Court's new major questions doctrine no doubt already has had on administrative action.⁴⁸ But the political costs, resource constraints, and uncertainties inherent in the legislative process should confine brazen executive overreach. In all events, the ultimate check is that a majority of both chambers in Congress would have to agree.

C. *Article I Political Feasibility*

The most obvious concern is whether Congress would enact this CRA-like process in the first place. There are substantive reasons why some members of Congress would not, putting aside the political challenges of polarization and congressional gridlock. After all, the new major questions doctrine purports to require Congress to make the major policy judgments in federal lawmaking through the ordinary legislative process. As Justice Gorsuch justifies the doctrine in his concurrence in *West Virginia v. EPA*, "lawmaking under our Constitution can be difficult. But that is nothing particular to our time nor any accident."⁴⁹ He further explains:

The difficulty of the design sought to serve other ends too. By effectively requiring a broad consensus to pass legislation, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time. The need for compromise inherent in this design also sought to protect minorities by ensuring that their votes

48. Cf. Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 *FORDHAM L. REV.* 703, 722–24 (2014) (exploring survey responses from agency rule drafters about how their agencies may be more aggressive in rulemaking when they believe *Chevron* deference—as opposed to *Skidmore* deference or no deference—would apply on judicial review).

49. *West Virginia v. EPA*, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring).

would often decide the fate of proposed legislation—allowing them to wield real power alongside the majority. The difficulty of legislating at the federal level aimed as well to preserve room for lawmaking by governments more local and more accountable than a distant federal authority, and in this way allow States to serve as laboratories for novel social and economic experiments.⁵⁰

Admittedly, this CRA-like fast-track proposal would undercut—to some degree—compromise and consensus building by removing many of the procedures in the Senate that can help advance those goals. Accordingly, it may be difficult to see Republicans (and other members of Congress with an institutionalist or limited-government mindset) providing an avenue for Congress to bypass the filibuster when it comes to rules that address major policy questions. That said, these Senate procedures are not constitutionally required. To the contrary, Congress has already embraced fast-track legislative processes in other contexts, such as for budget reconciliation, the CRA, national emergencies, treaties, and war powers. Here, the fast-track process would not extend to *any* major policy debate or *any* judicial decision constraining agency action—only to 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.

In that sense, this proposal is much narrower than the Supreme Court Review Act⁵¹—a bill a group of Senate Democrats introduced earlier this summer, which is based on a narrower proposal Professor Ganesh Sitaraman suggested in the pages of *The Atlantic*.⁵² That legislation, if enacted, would create a fast-track

50. *Id.* (internal quotation marks and citations omitted).

51. S. 4681, 117th Cong. (2022).

52. Ganesh Sitaraman, *How to Rein In an All-Too-Powerful Supreme Court*, THE ATLANTIC (Nov. 16. 2019) (“Congress could pass a Congressional Review Act for the Supreme

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.”⁵³ 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.⁵⁴

As Professor Aaron-Andrew Bruhl observes in his analysis of the legislation, these provisions are “loose” and “unclear around the edges.”⁵⁵ That assessment is charitable. Once there is a filibuster-free legislative process for Congress to legislate on anything related to a Supreme Court statutory or constitutional precedent, the incentives for abuse and misuse would be hard to resist. And, as Professor Bruhl notes, outside of the Senate Parliamentarian’s recommended rulings that historically receive great deference but can be rejected by the presiding officer and overruled by a Senate majority, there is no judicial review or other non-political check on this process; “[t]he punishment for misapplication or manipulation of the procedures comes from other members or the voters.”⁵⁶

By contrast, a CRA-like approach limited to just judicial decisions invoking the major questions doctrine to invalidate an agency rule

Court, which would enable it to overturn Court decisions on legislative matters with greater speed and ease.”), <https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/> [<https://perma.cc/K6L5-HHPA>].

53. S. 4681, § 2.

54. *Id.*

55. Aaron-Andrew P. Bruhl, *The Supreme Court Review Act: Fast-Tracking the Interbranch Dialogue* at *8 (Sept. 27, 2022, draft), <https://ssrn.com/abstract=4227162>.

56. *Id.* at *9.

would be much less susceptible to congressional abuse or misuse. 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 the clear authorization for the judicially invalidated rule, as well as the 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.

The purposes of these two legislative proposals, moreover, differ substantially. The Supreme Court Review Act, as its co-sponsor Senator Sheldon Whitehouse puts it, is about "check[ing] the activist Court's rogue decisions" ⁵⁷ Or, as co-sponsor Senator Catherine Cortez Masto explains, the bill—if enacted—would create a filibuster-free process for Congress to respond "when the Court misinterprets Congressional intent or strips Americans of fundamental rights."⁵⁸ In other words, this legislation is about Congress reviewing and overriding a Supreme Court interpretation of a statute (or the Constitution), pitting the branches against each other.

A CRA-like approach limited to the major questions doctrine, by contrast, should not be viewed as a congressional override of a judicial interpretation of a statute. The new major questions doctrine operates in a unique way. The 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

57. U.S. Senator Sheldon Whitehouse, Press Release, Whitehouse, Cortez Masto Propose Congressional Check on Supreme Court Decisions (July 28, 2022), <https://www.whitehouse.senate.gov/news/release/whitehouse-cortez-masto-propose-congressional-check-on-supreme-court-decisions> [https://perma.cc/EVR5-PNZU].

58. *Id.*

regulate on the major question.⁵⁹ 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 in a way that the court had already decided was at least a textually plausible interpretation of the existing statute. For this type of up-down vote on whether an agency has regulatory authority to address a major policy question, the consensus and compromise values the Senate filibuster and related procedures can promote seem to be far less valuable than in the context of the Supreme Court Review Act (or 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 may be willing to consider voting for this CRA-like proposal to get it over the sixty-vote threshold in the Senate. It was not too long ago that Senator Mike Lee and other Senate Republicans founded the Article I Project to restore Congress's role as the "first branch" of government.⁶⁰ As Senator 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."⁶¹

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. By codifying a CRA for the major questions doctrine, Congress would also be

59. 142 S. Ct. 2587, 2609 (2022) (emphasis added).

60. Michelle Cottle, *Mike Lee's New Crusade*, THE ATLANTIC (Feb. 12, 2016), <https://www.theatlantic.com/politics/archive/2016/02/mike-lee-article-one-project/462564/> [https://perma.cc/8GY5-2BZ2].

61. Rachel del Guidice, *3 Bills Sen. Mike Lee Thinks Could Shift Power 'Back to the People'*, DAILY SIGNAL (May 17, 2017), <https://www.dailysignal.com/2017/05/17/3-bills-sen-mike-lee-thinks-shift-power-back-people/> [https://perma.cc/SG6J-5GJV].

codifying—either implicitly or explicitly—the existence of the major questions doctrine in the first place. Such legislative recognition of this judicial doctrine may have political and policy value for Republicans in Congress.

CONCLUSION

The new major questions doctrine has arrived, and it is here to stay. Its breadth and impact will likely depend on how it is further developed by litigants and judges in the lower courts. But Congress, if it chooses, can respond. As this Essay details, Congress could enact a Congressional Review Act to respond to the major questions doctrine, allowing for a fast-track, streamlined process for Congress to amend the 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 reassert its legislative role in making the major value judgments in federal lawmaking.

