Rounding out an extraordinary term in June 2022, the Supreme Court delivered a blow to the imperial bureaucracy, which exercises far more direct power over the daily lives of Americans than either Congress or the much feared imperial presidency. In *West Virginia v. Environmental Protection Agency*, the Court limited the Environmental Protection Agency (EPA) to regulating individual power plants rather than attempting wholesale control over the nation’s electrical grid in the name of the environment. Conservatives rightly applauded the Court’s decision.

But while the Court’s conservative majority has taken important strides in arresting the growth of the administrative state, scratching below the surface of Chief Justice John Roberts’s majority opinion indicates that it has yet to reverse it. This year’s Supreme Court term marks only a small battle in the long war to restore accountability and transparency to the exercise of power by the federal bureaucracy.

**The EPA Case**

*West Virginia v. Environmental Protection Agency* raised fundamental questions about the power that federal agencies hold over society. The issue was whether the EPA could read a vague, 50-year-old statutory provision as authorizing it to exercise sweeping new powers over large
sectors of the economy — powers that Congress could hardly have contemplated when it first wrote the law.

The EPA sought to force a fundamental transition in the way the nation’s electricity is produced. It did so pursuant to the Clean Air Act, a federal air-quality statute enacted in 1963 to control and reduce air pollution. Section 111, which was adopted by way of an amendment to the act in 1970, contains a provision directing the EPA to set emissions limits for power plants and other sources of pollution not covered elsewhere in the statute. (The provision is often referred to as a “gap-filler” for that very reason.) Those emissions limits are to be derived from what the EPA demonstrates is the “best system of emission reduction” (BSER) for the given source of pollution. Once the agency determines the BSER, the emissions limits for that source are calculated to reflect the degree of pollution reduction the system can achieve.

In 2015, the EPA determined that the BSER for existing coal and natural-gas plants consisted of an initial shift from higher-emitting coal to lower-emitting natural gas, followed by another shift from coal and natural gas to cleaner, renewable forms of energy — chiefly wind and solar power. To accomplish these shifts, the EPA held that coal and natural-gas plant operators could either reduce their plants’ production of electricity, build or invest in new or existing plants with lower emissions levels, or purchase emissions credits through a cap-and-trade regime. Under this aggressive transition plan, dozens of power plants would be forced to shutter by 2025, and tens of thousands of jobs would be eliminated. By some estimates, the EPA’s plan would raise the price of electricity to consumers by over $200 billion and reduce the nation’s GDP by at least a trillion 2009 dollars by 2040.

None of this is to say that the plan, despite its heavy costs, was bad public policy. Notably, Congress repeatedly attempted to enact plans similar to the one attempted here in 2009 and 2010, when there were sizeable Democratic majorities in both the House and the Senate. Ultimately, however, the bills were rejected. So in 2015, the EPA attempted to take matters into its own hands.

In West Virginia, the Court denied that Congress had delegated such power to the EPA through the gap-filler provision of the Clean Air Act. Invoking a new major-questions doctrine, the Court held that Congress must “speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.” In short, the Court ruled that
the people’s representatives in Congress, not the unelected bureaucrats of the administrative state, should make policy decisions with such significant consequences.

Upon the decision’s release, the Washington Post featured a story with the headline, “Supreme Court’s EPA ruling upends Biden’s environmental agenda.” The Los Angeles Times editorial board opined that the Court “just made it harder to save the planet.” These doomsday scenarios are overwrought: As even the editors of the Times had to admit, “Congress could pass a law clearly giving the EPA the authority” in question. To their dismay, Congress has remained gridlocked over the issue. But as the Court affirmed, Congress’s failure to act does not entitle the EPA to get away with a naked power grab.

THE IMPACT

The major-questions doctrine might have real teeth. The Court used it during its most recent term to set aside the unwarranted extension of the eviction moratorium by the Centers for Disease Control and Prevention, a vaccination mandate imposed on much of the workforce by the Occupational Safety and Health Administration, and finally the EPA’s generation-transition plan. The doctrine is not wholly new, however; the Court invoked it over two decades ago to rein in the Food and Drug Administration, which had claimed that its statutory authority over “drugs” and “devices” gave it the power to regulate or even ban tobacco products. The Court used it again in 2006 to deny that Congress had authorized the attorney general to rescind the licenses of physicians who prescribed controlled drugs for assisted suicides, even in states where such prescriptions were legal.

This line of precedent bodes ill for the Biden administration’s other regulatory initiatives that lack explicit congressional authorization. These include the Securities and Exchange Commission’s proposal that companies disclose their exposure to climate risks, as well as the Department of Education’s recent student-loan forgiveness measure.

Apart from the consequences for particular regulatory proposals, the Court’s decision could have salutary effects on how Congress and the executive branch operate. Congress continues to fail to address many of the nation’s problems, from climate change to entitlement spending to immigration. Instead of incurring the political costs of tackling these controversial issues, legislators have delegated broad lawmaking
authority to the agencies — allowing them to blame unelected administrators for the unpopular trade-offs demanded by difficult policy choices. Presidents, of course, welcome this delegation of lawmaking power to agencies that, aside from the multi-member boards and commissions of the New Deal, generally remain under their command. Given that voters tend to hold presidents electorally accountable for economic growth, presidents naturally want to gather as much power into the administrative state as possible.

Rather than allowing unilateral executive action to settle controversial issues, the EPA decision could nudge Congress to legislate them. With the major-questions doctrine in place, Congress will find it harder to evade political responsibility by enacting broad, vague grants of discretion to the bureaucracy. Congress may have to revisit and even overhaul statutes that have been on the books for decades, that are not well adapted to current conditions, and that the agencies have “updated” to their own ends. By fortifying the power of Congress, the EPA decision shifts more political responsibility to our elected representatives, and therefore more accountability to the American people. It begins to slow down, if not reverse, the massive transfer of lawmaking power to the administrative state.

Why, then, should conservatives have misgivings about the Court’s opinion?

**THE MAJORITY OPINION**

Unfortunately, the Court’s account of the major-questions doctrine leaves many questions unanswered.

To begin, the majority opinion provides little guidance for lower courts on when the doctrine applies. The opinion states that the doctrine is limited to “extraordinary” cases, but it never explains the reasoning behind these limitations. We cannot tell if an agency rule that causes $100 million or $100 billion in economic costs qualifies as a major question. We also do not know whether the doctrine applies only to new administrative mandates, or if it also applies to those that were promulgated years ago. Perhaps the political disputes over older mandates have become subdued and their economic consequences have been absorbed — in such cases, Congress might be said to have “acquiesced” to the regulations.

Second, the doctrine operates much more as a standard than a fixed rule. The distinction is important in the law. A bright-line rule (such as
“the speed limit is 65 mph”) is usually easier to understand and enforce. It affords certainty and predictability, both to those to whom it applies and to those who must apply it. And it incurs lower decision costs, understood in terms of the effort required to adjudicate whether given conduct violates the rule.

By contrast, a standard (“drive at a reasonable speed”) is more flexible than a rule, and more sensitive to the surrounding circumstances. It leaves more room for discretion and disagreement. It also has lower predictability and higher decision costs, since a decision-maker must expend more resources to determine whether conduct violates the standard. The “undue burden” test created under the Supreme Court’s now repudiated abortion regime was an example of a standard rather than a rule—it prohibited a state from imposing an “undue burden” on a woman’s choice to abort a pre-viable fetus but otherwise gave little indication of what constitutes such a burden. The Fourth Amendment’s requirement that searches either proceed under a warrant or are not “unreasonable” is another example of a standard that takes into account all of the surrounding circumstances but provides little certainty or predictability.

The majority explicitly frames the major-questions doctrine as a standard rather than a rule: It asks whether the defendant agency is “asserting [a] highly consequential power beyond what Congress could reasonably be understood to have granted” (emphasis added). This phrase invites uncertainty and dispute. Lower courts, agencies, and Congress may not know what the Supreme Court expects of them. The Court’s standard may also encourage the justices to indulge their ideological preferences: The conservative justices may more be prone to applying it against, say, environmental regulations, while the liberal justices would be less prone to doing so.

What’s more, judges have incentives to accept outcomes that the political branches find satisfactory. And, as noted above, both Congress and the executive branch may be content to allow agencies to take major but controversial policy choices out of their hands. Given the judicial temptation to accept inter-branch arrangements, coupled with the political branches’ reluctance to take responsibility for difficult decisions, the major-questions doctrine might well prove to be a speed bump, not a traffic light.

Third, the Court seems to characterize the major-questions doctrine as an assortment of clues that should inform the judiciary’s interpretation
of statutes. These clues are to be distilled from selected Supreme Court precedents as well as “a practical understanding of legislative intent.” But the majority does nothing, apart from a single reference to “separation of powers principles,” to illuminate the doctrine’s constitutional foundations or provide a coherent rationale. The doctrine could flow from several sources: rules of construction for vague statutes, a broader agenda to limit the congressional delegation of lawmaking power, or enforcement of the Administrative Procedure Act, which sets general procedural rules for agency actions and regulations. This lack of justification leaves lower courts in the dark on applying the doctrine to novel circumstances.

Ultimately, the Court’s failure to root the major-questions doctrine in any firm constitutional grounding means that it is merely a delaying tactic in the struggle against the real cancer eating away at the separation of powers. To see why, we need only look to the doctrine’s corollary—the “clear statement” rule—which requires Congress to provide an explicit, unambiguous statement before an agency can exercise a delegated power. The majority states that the Court presumes Congress intends to make major policy decisions and that the “basic and consequential tradeoffs” the EPA had sought to make were ones that “Congress would likely” have made itself (emphasis added). But the Court concludes that a decision “of such magnitude and consequence [as the nationwide transition away from coal as a source of electricity] rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body” (emphasis added).

Thus, the clear-statement requirement does little to prevent Congress from transferring vast lawmaking power to the agencies if it is bent on doing so. In theory, lawmakers could enact legislation stating, “we delegate all policy decisions concerning the environment—and we really mean all—to the EPA.” On the majority’s view, that delegation would be valid. The major-questions doctrine would not apply, and even if it did, Congress could not have spoken more clearly of its intent to delegate lawmaking authority to the agency in question.

This sort of delegation is not permitted by the Constitution as originally understood. The Constitution requires Congress to make all major legislative policy decisions itself. As Article I declares, “[a]ll legislative powers herein granted” are vested in the Congress, and the Congress alone. Of course, the Constitution can (and as a practical matter, must)
provide some discretion to the executive to implement the laws that Congress passes. As early as the 1790s, Congress vigorously debated whether and how far it could delegate its powers to, say, designate post roads, to the executive branch. But could Congress, as an original matter, delegate policymaking power to the executive on the scale that the EPA claimed it could? Of course not: Making policy of that kind is what Congress was designed for.

The framers deliberately established a Spartan federal government to handle questions of truly national importance — national security, foreign policy, trade, and interstate commerce. Congress would serve as the core of the federal apparatus by making the laws, the president would execute them, and the judiciary would resolve disputes arising under them. This basic system held for the first century of the republic; when Abraham Lincoln first called his cabinet together, it was only slightly larger than the four-member team assembled under George Washington. But progressives, led by the philosophy of Woodrow Wilson and propelled by the energy of Theodore Roosevelt, criticized the Constitution as too slow and too political for the modern age. Instead, they sought to transfer broad lawmaking power to experts for faster, more comprehensive control over a complex economy and society.

We still live in Wilson’s republic today. Modern government subsists on broad congressional grants of lawmaking power to expert agencies, which remain largely independent of electoral accountability. The major-questions doctrine may slow the transfer of legislative authority without any broader rooting in the Constitution, but it will not put a stop to it.

Justice Neil Gorsuch’s concurring opinion raises many of these concerns. In Article I of the Constitution, Gorsuch reminds us, “the People” vested “[a]ll” federal “legislative powers” in Congress. Chief Justice John Marshall (who himself played a significant role in ratifying the Constitution) interpreted Article I’s Vesting Clause to mean that although Congress might delegate authority to the executive branch “to act under such general provisions to fill up the details,” any “important subjects...must be entirely regulated by the legislature itself.” While drawing a line between “important subjects” and “details” is not always straightforward, there can be no question regarding which side of the line the EPA’s plan falls on. Every justice, together with the Biden administration, the EPA, and the plaintiff states acknowledged the
overriding “importance” of a policy mandating a nationwide transition from carbon fuels to renewable energy. The EPA attempted to fill the breach only because Congress had failed to act. To say this is to admit that the EPA was exercising policymaking power that rightfully belongs to Congress. If the Constitution still means what it was originally understood to mean, Congress had no authority to transfer such power to the EPA.

Gorsuch, along with Justice Samuel Alito, was keenly aware of this difficulty, but they chose not to press it home. They likely thought that half a loaf is better than none, and that the larger issue—which calls into question the constitutionality of much of the administrative state—was best postponed for another day.

**THE GORSUCH DOCTRINE**

Justice Gorsuch’s concurrence in *West Virginia* does a better job than the majority opinion at guiding the lower courts and developing a coherent constitutional theory of congressional delegation. It is thus worth examining in greater depth.

Gorsuch is the Court’s leading revolutionary on administrative law. In the 2019 case *Gundy v. United States*, he denounced the rise of the administrative state since the New Deal. His dissenting opinion set forth a strong defense of the original meaning of the separation of powers, explained the purpose of vesting federal lawmaking power exclusively in Congress, and delineated the traditional limits on legislative authority to delegate such power to the executive.

In *West Virginia*, however, Gorsuch lowered his sights. He was primarily concerned with three issues: 1) the constitutional basis for the major-questions doctrine and the associated clear-statement rule, 2) the circumstances that trigger the doctrine, and 3) the “clear congressional statement” needed to authorize agency action.

Gorsuch argued that the clear-statement rule presupposes that “Congress means for its laws to operate in congruence with the Constitution rather than test its bounds.” The bounds are those set by the Article I Vesting Clause, which states that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” Following Chief Justice Marshall, Gorsuch interpreted the clause to deny Congress the power to divest itself of the responsibility for making important policy decisions. Congress could have enacted the EPA’s
plan itself or a similar cap-and-trade scheme under the Court’s current Commerce Clause jurisprudence, but it could not have delegated the power to make that policy to an executive agency—at least not without entering constitutionally problematic territory. The EPA carried the burden of demonstrating that Congress granted it the relevant authority, which required a clear and specific statement of Congress’s intent to do so.

What triggers the need for a clear statement before regulation can proceed? Gorsuch distilled three situations from the Court’s case law: first, when the challenged agency rule seeks to resolve a matter of national debate or of great political significance; second, when the agency seeks to regulate “a significant portion of the American economy” or require the private sector to spend billions of dollars; and third, when the agency encroaches on principles of federalism by attempting to govern an area traditionally reserved to the states. Gorsuch had no problem finding all three of these indications of a major question—along with other “suggestive factors”—present in the EPA’s plan.

Gorsuch also described how courts should apply the clear-statement rule. First, he held that they should take into account the structure of the statute and the place of the provision on which the agency relies. An obscure gap-filler provision like the one cited by the EPA would likely not suffice as an explicit grant of sweeping lawmaking authority. Second, courts should consider the age and focus of the statute as a whole. If the agency is addressing a novel problem (like climate change) on the basis of a 50-year-old statute (like the relevant portion of the Clean Air Act), it will likely come up short. Third, the courts should examine the agency’s own interpretation of the statute in the past. If the challenged interpretation marks a significant departure from past practice, it is unlikely that Congress authorized the agency action. Finally, courts should ask whether there is “a mismatch between an agency’s challenged action and its congressionally assigned mission and expertise.” On this ground, the Court struck down the Centers for Disease Control’s claim that it could regulate landlord-tenant relations to protect public health.

Gorsuch’s opinion transforms the majority’s foggy standard into something more like a bright-line rule. His analysis does not limit the major-questions doctrine to statutory grants of authority of older vintage, vague or unclear laws, or regulations that deviate from past agency practices or interpretations; in his telling, any statute, including
the Clean Air Act, will be constitutionally problematic if it purports to grant significant discretion to an agency, while any major agency policy will need to survive constitutional scrutiny. His test gives the lower courts, agencies, and Congress a roadmap in deciding whether a statute empowers an agency to issue a regulation without entering constitutionally dangerous territory. The lower courts are thus likely to turn to it in developing the doctrine.

Gorsuch’s analysis brings the far-reaching implications of the major-questions doctrine into focus. His analysis makes plain that the major-questions doctrine and its clear-statement corollary are merely judicial devices for defusing potential constitutional conflict. But the deeper tension between Article I and congressional delegation looms closer on the horizon. While the majority obscures the conflict between the separation of powers and the broad congressional delegation of authority to the administrative state, Gorsuch’s clear-eyed concurrence prepares for battle.

OVER TO CONGRESS

Critics of the Court’s decision believe in what might be called a “Constitution of Necessity”: If there is a pressing political or economic problem that Congress fails to resolve, the necessity for action falls to the president and the executive agencies. And since Congress drags its heels on so many urgent problems, it is proper for the executive branch to act unilaterally.

The Constitution of Necessity may be fit for a polity of what the French call “the administered,” but it is not well suited for a polity of free citizens. After all, today’s controversies over voting rights and election rules make little sense if the only important question up for grabs is the choice of the president.

As Gorsuch observed in Gundy, our Constitution deliberately provides procedural guarantees that require Congress “to assemble a social consensus before choosing our nation’s course on policy questions.” To that end, Article I is designed to make it difficult for the federal legislature to enact major legislation. It builds in several veto points, including the necessity of bicameral passage and the possibility of a presidential veto, that empower minority factions. Congress has added veto points of its own to this constitutional architecture, including the committee system and the Senate filibuster. This arrangement improves the quality of
congressional deliberation and produces laws that are more the product of “reflection and choice” than passion. It also helps ensure that major legislation reflects an underlying national consensus.

These are not bugs in the system, but features. And for most of the nation’s history, they served us well.

But to many observers, congressional gridlock has reached an unprecedented and alarming state. Deepening political polarization and aggravated partisan competition may be a large part of it; the seemingly endless political campaign may be another. Members of Congress have strong incentives to avoid controversial votes, shirking their responsibilities by buck-passing or inaction. The executive branch is often happy to accrue power at the expense of Congress.

Contrary to the West Virginia dissent and its amen chorus, the Court is not blocking a solution to the problem of carbon emissions and climate change. The problem, rather, lies with a dysfunctional Congress that refuses to legislate on the matter.

We offer no ready solution to these problems. Our point here is simple: The Supreme Court has not usurped the policymaking role of Congress; Congress has abdicated that role itself.