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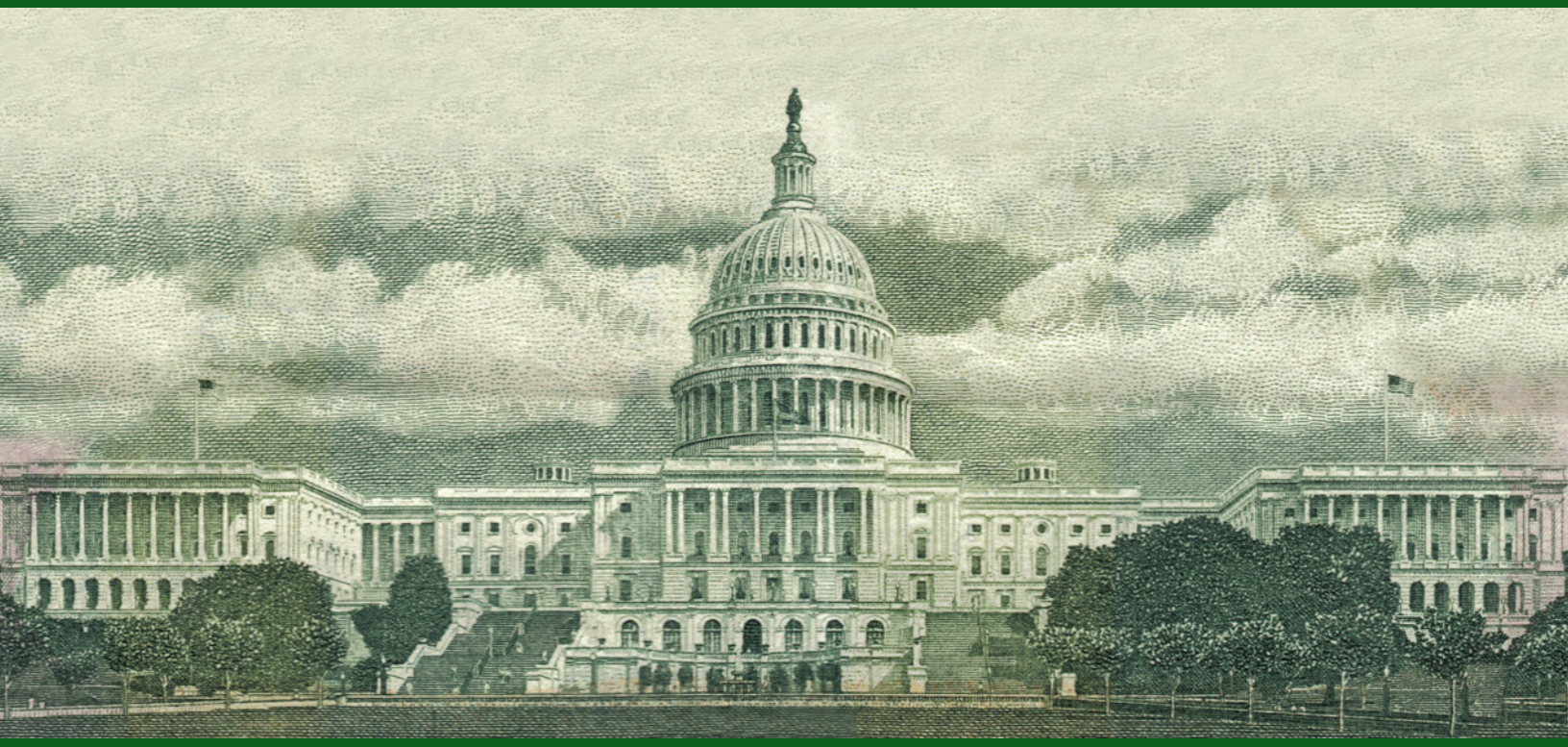

Congress, Not Agencies, Should Answer Major Policy Questions

A legislative blueprint for restoring representative government

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Many of the biggest policy decisions affecting the lives of Americans are made by federal agencies, not Congress. During the Biden administration, this has included rules ranging from the Environmental Protection Agency's (EPA) current effort to limit the availability of gas-powered vehicles to the Centers for Disease Control and Prevention's (CDC) nationwide eviction moratorium that was struck down by the Supreme Court.

Congress did not tell the EPA to issue rules that would reduce the number of gas-powered cars or the CDC to impose a nationwide eviction moratorium. Instead, the agencies made these policy decisions themselves, going well beyond the bounds of the law. They used ambiguities and any discretion afforded them to promulgate rules that Congress never contemplated or authorized. Agencies are doing end-runs around Congress as well as the protections that exist in the legislative process that ensure laws have proper buy-in, consider the interests of all Americans, and reflect the will of the people.

This paper explains why Congress needs to help restore representative government and provides a detailed plan to make that happen. In brief, this plan would establish specific statutory limits on the types of rules that agencies can promulgate. Similar[1] to the major questions doctrine as fleshed out by the US Supreme Court in *West Virginia v. EPA*,[2] this plan would require a clear statement of authority[3] for agencies when they assert power for rules that common sense[4] tells us Congress never would have authorized.[5] The proposed plan is narrowly focused on these types of rules, which generally, but not always, require a rule to be "major" in some fashion.[6]

Legislators should be able to pass laws without having to worry about agencies going beyond what was envisioned by lawmakers. Answers to major policy questions need to come from Congress, not federal agencies. More important, Americans should feel confident that they are voting for elected officials who are making the laws.

The importance of representative government

A common argument goes along the lines of: "if we do not allow agencies to make policy decisions, then nothing will get done because Congress is broken." This mindset, if taken too far, would have the country ruled by unelected bureaucrats and ignores the intentional and critical design of the nation's republican form of government. Laws, and especially sweeping laws with major effects, are not supposed to be easy to pass. This is not a flaw of the system, it is the design of the system. Gridlock is a feature, not a bug.

To be enacted, a bill must pass through a bicameral legislature and get signed into law by the president. Legislators, who are elected and accountable to their own constituents, must negotiate and persuade other legislators who represent different constituencies from across the country to get their legislation passed. Congress is more likely to consider the costs and tradeoffs of its actions than an agency because of the numerous interests it must consider. An agency does

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1 This author has had variations of the ideas outlined in the paper for many years. See e.g. Daren Bakst, *Regulating the Regulators Seven Reforms for Sensible Regulatory Policy in North Carolina,* (Raleigh, NC: John Locke Foundation, February, 2010), https://www.johnlocke.org/wp-content/uploads/2016/06/regulatoryreforms.pdf.

2 *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), https://supreme.justia.com/cases/federal/us/597/20-1530/. For other cases connected to the major questions doctrine, see e.g. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994), https://supreme.justia.com/cases/federal/us/512/218/; Biden v. Nebraska, 600 U.S. 477 (2023), https://supreme.justia.com/cases/federal/us/600/22-506/; FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), https://supreme.justia.com/cases/federal/us/529/120/; *Util. Air Regul. Grp. (UARG) v. EPA*, 573 U.S. 302 (2014), https://supreme.justia.com/cases/federal/us/573/302/; *Nat'l Fed'n of Ind. Business v. OSHA*, 142 S. Ct. 661 (2022) (per curiam), https://supreme.justia.com/cases/federal/us/595/21a244/; *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam), https://www.supremecourt.gov/opinions/20pdf/21a23_ap6c.pdf; *Gonzales v. Oregon*, 546 U.S. 243 (2006), https://supreme.justia.com/cases/federal/us/546/243/; *King v. Burwell*, 576 U.S. 473 (2015), https://supreme.justia.com/cases/federal/us/576/473/; *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001), https://supreme.justia.com/cases/federal/us/531/457/.

3 There is some disagreement over whether the major questions doctrine requires a "clear statement of authority." See e.g. Congressional Research Service, "Clear Statement Rules, Textualism, and the Administrative State", Legal Sidebar, December 4th, 2023, https://crsreports.congress.gov/product/pdf/LSB/LSB11084. The focus of this paper is not on how the Court applies this doctrine. For purposes of this paper, a "clear statement rule" and "clear Congressional authorization" both mean the same thing, which will be detailed later in the paper.

4 "[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), https://supreme.justia.com/cases/federal/us/529/120/#tab-opinion-1960613.

5 They never would have been authorized given the nature, breadth, or significance of the asserted power.

6 There are five categories of rules that are listed as part of this plan. Four of the five address "major" rules in some fashion, be it in terms of importance, cost, or some other factor. The first category dealing with agency expertise would often cover rules that are major, but not always.

not have these concerns and frequently suffers from tunnel vision.[7]

Legislative hurdles help to get wider buy-in, create predictability, and minimize large swings in national policy (a problem that is often seen within agencies when new administrations take over). Without proper buy-in, new policies will exacerbate tensions and divisions within the country. The hurdles protect against tyranny of the majority and the political factionalism that worried the Founding Fathers.

Justice Neil Gorsuch has written:

> *But no less than its rules against retroactive legislation or protecting sovereign immunity, the Constitution's rule vesting federal legislative power in Congress is "vital to the integrity and maintenance of the system of government ordained by the Constitution."*
>
> *It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable "ministers."*
>
> *From time to time, some have questioned that assessment. [Internal citations omitted].*[8]

He provided an example of someone questioning that assessment:

> *For example, Woodrow Wilson famously argued that "popular sovereignty" "embarrasse[d]" the Nation because it made it harder to achieve "executive expertness." In Wilson's eyes, the mass of the people were "selfish, ignorant, timid, stubborn, or foolish." [Internal citations omitted].*[9]

The rest of the passage highlights Woodrow Wilson disparaging a wide range of groups.[10] Wilson's disdain for voters is chilling and hopefully reflects a mindset that is the exception today, not the rule. However, the desire for "executive expertness" is very much alive today and if taken too far, it can come at the expense of voters.

Agencies and administrative experts are not immune to political pressure, self-interest, ideological agendas, corruption, or the influence of advocacy groups and regulated parties. Yet they have immense power and face little in the way of hurdles in the rulemaking process. This is very much like the "regime administered by a ruling class of largely unaccountable 'ministers'" that the framers wisely rejected.

Voters elect members of Congress to represent them and pass laws or to leave existing laws alone. When agencies make policy decisions that Congress never authorized, they are ignoring the will of elected officials and by extension the will of voters. At a minimum, this dilutes the importance of voting and undermines this fundamental right.[11]

Congress should restore representative government

Congress created the federal agencies and authorized them to issue regulations. It therefore has the responsibility to ensure that *its* agencies are not making policy decisions that go beyond what was envisioned by legislators. Legislators should not expect courts to do what Congress should be doing: protecting its lawmaking power.

Greater abuses: The need for Congressional action is even more pronounced because the problem of agency overreach is only getting worse. During the Biden administration, some of the most far-reaching

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[7] Given the size of the administrative state, agencies have very little accountability even to the president. To the extent that agencies are accountable to the president, they are still not be bound by the numerous Article I hurdles that provide the protections necessary for lawmaking. This is why agencies can get things done easier than Congress. If agencies could promulgate whatever rules they wanted, even with the blessing of the president, this would turn the country from a representative government into what would in effect be more like a technocracy, and to the extent the president is in control, then an autocracy. Justice Gorsuch has written, "Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President. And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice." Gundy v. United States, 139 S. Ct. 2116 (2019) (Gorsuch, J., dissenting), https://supreme.justia.com/cases/federal/us/588/17-6086/.

[8] *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), (Gorsuch, J., concurring), https://supreme.justia.com/cases/federal/us/597/20-1530/.

[9] *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), https://supreme.justia.com/cases/federal/us/597/20-1530/.

[10] The rest of footnote one in Justice Gorsuch's concurrence: "He expressed even greater disdain for particular groups, defending '[t]he white men of the South' for "rid[ding] themselves, by fair means or foul, of the intolerable burden of governments sustained by the votes of ignorant [African-Americans].' He likewise denounced immigrants 'from the south of Italy and men of the meaner sort out of Hungary and Poland,' who possessed 'neither skill nor energy nor any initiative of quick intelligence.' To Wilson, our Republic 'tr[ied] to do too much by vote.' [Internal citations omitted]. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), (Gorsuch, J., concurring), https://supreme.justia.com/cases/federal/us/597/20-1530/.

[11] Ironically, this plan could lead to Congress doing more because legislators will not be able to rely on agencies making decisions that legislators may want to avoid making for themselves.

regulations ever have been published, from an EPA rule that would severely limit the ability of Americans to buy gas-powered vehicles[12] to the Securities and Exchange Commission's rule to address climate risk,[13] an area in which the agency has neither expertise nor mandate.

The administration is pushing such rules despite lessons it should have learned when the courts say no. This includes the Supreme Court striking down the Biden administration's efforts to cancel about $430 billion in student loan principal,[14] the Occupational Safety and Health Administration's vaccine mandate,[15] and the CDC's nationwide eviction moratorium.[16] The Biden administration has not even stopped trying to push student loan forgiveness, recently announcing yet another plan to accomplish this objective.[17] After the Court's rejection of the Clean Power Plan, the Biden administration has come back with a new power plant rule that arguably is even more problematic.[18] These repeated trips to the well bring the rule of law itself into question.

Insufficient efforts to date: Existing legislative efforts to ensure agencies do not usurp Congressional lawmaking power have had little success. The appropriations process, which should serve as a check on agencies, has continuously failed to stop agencies from issuing rules that go beyond what Congress ever would have authorized. Even if it did stop such rules from going forward, it would only do so for the duration of the spending bill. The Congressional Review Act creates a useful process for legislators to disapprove of rules, especially since resolutions of disapproval can avoid a Senate filibuster.[19] The application of this law, though, has had limited success because presidents veto the disapproval of their administration's rules.

Congress can be more expansive than courts: The Supreme Court's decision in *West Virginia v. EPA* is one of the most important developments in helping to restore representative government.[20] In this case that struck down an EPA rule regulating the greenhouse gas emissions of power plants (the "Clean Power Plan"), the Court helped to flesh out the major questions doctrine.[21]

The Court explained that there are "extraordinary cases…in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." In these instances, agencies must have a "'clear Congressional authorization' for the power it claims."[22]

While this is a critical case, the Court will likely only act to protect against the worse abuses, in part to ensure that there are no constitutional violations.[23] The Supreme Court will serve as a last resort to protect against agencies going beyond their statutory

[12] Environmental Protection Agency, "Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles," Final Rule, *Federal Register,* Vol. 89, No. 76 (April 18, 2024), pp. 27842-28215, https://www.govinfo.gov/content/pkg/FR-2024-04-18/pdf/2024-06214.pdf.

[13] Securities and Exchange Commission, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," Final rules, *Federal Register,* Vol. 89, No. 61, (March 28, 2024), pp. 21668-2192, https://www.govinfo.gov/content/pkg/FR-2024-03-28/pdf/2024-05137.pdf.

[14] *Biden v. Nebraska*, 600 U.S. 477 (2023), https://supreme.justia.com/cases/federal/us/600/22-506/.

[15] *Nat'l Fed'n of Ind. Business v. OSHA*, 142 S. Ct. 661 (2022) (per curiam), https://supreme.justia.com/cases/federal/us/595/21a244/.

[16] *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam), https://www.supremecourt.gov/opinions/20pdf/21a23_ap6c.pdf.

[17] Danielle Douglas-Gabriel, "Biden makes another pitch for student loan relief, but challenges loom," *Washington Post*, April 8, 2024, https://www.washingtonpost.com/education/2024/04/08/biden-debt-relief-rule/.

[18] Environmental Protection Agency, "New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule," pre-publication copy, access date 4/25/2024, https://www.epa.gov/system/files/documents/2024-04/eo-12866_111egu_2060-av09_nfrm_20240424_final.pdf. See e.g. Daren Bakst and Marlo Lewis Jr., "EPA rule against power plants – bad for energy reliability and prices, bad for rule of law," Competitive Enterprise Institute (2024), https://cei.org/news_releases/epa-rule-against-power-plants-bad-for-energy-reliability-and-prices-bad-for-rule-of-law/; Marlo Lewis Jr., "EPA's new powerplant rule is the Clean Power Plan on steroids," Competitive Enterprise Institute (2024), https://cei.org/blog/epas-new-powerplant-rule-is-the-clean-power-plan-on-steroids/.

[19] 5 U.S.C. §§801- 808, https://www.law.cornell.edu/uscode/text/5/part-I/chapter-8

[20] *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), https://supreme.justia.com/cases/federal/us/597/20-1530/.

[21] *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), https://supreme.justia.com/cases/federal/us/597/20-1530/.

[22] *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), https://supreme.justia.com/cases/federal/us/597/20-1530/.

[23] From Justice Gorsuch's concurrence in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), https://supreme.justia.com/cases/federal/us/597/20-1530/: "One of the Judiciary's most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us. To help fulfill that duty, courts have developed certain 'clear-statement' rules. These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds. In this way, these clear-statement rules help courts 'act as faithful agents of the Constitution.'…. "The major questions doctrine works in much the same way to protect the Constitution's separation of powers." From the majority opinion in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), https://supreme.justia.com/cases/federal/us/597/20-1530/: "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."

authority. The language in *West Virginia v. EPA*, such as the phrase "extraordinary cases," supports that conclusion. Congress is not similarly constrained. Legislators should craft whatever limits are necessary to ensure that agencies are not ignoring Congress's wishes. The statutory limits should serve as the first line of defense against agency abuses, and then the major questions doctrine would serve as a back-up.

Congress can provide greater clarity: The Supreme Court was influenced by numerous factors in its decision to strike down the Clean Power Plan. It is generally not clear which of these factors are necessary to apply the major questions doctrine. While the Court will provide some greater clarity as it considers more cases, it will take time and likely never provide the level of clarity that can be achieved through legislation.

Congress can be very specific and precise as to the limitations placed on agencies. It can also detail for itself that there are specific categories of rules that by themselves are prohibited, absent a clear statement of authority.[24] This proposed legislative plan would not merely go beyond the major questions doctrine but also help to acknowledge that Congress respects this doctrine. This is especially important since there are current proposed ideas that would seek to weaken or undermine the major questions doctrine.[25]

Amend the APA, restore representative government

There should be nothing controversial about legislation prohibiting agencies from asserting power[26] in rules that common sense tells us Congress never would have authorized in the first place without a clear statutory authorization. This simple point informs the major questions doctrine and helps to inform this legislative plan.[27]

The plan would amend the Administrative Procedure Act of 1946 (APA), which is the underlying law that governs the regulatory process.[28] Instead of trying to address problems with rules on a case-by-case basis, which is like playing whack-a-mole, Congress needs to change the regulatory process – setting rules about rules. This is done most effectively through changing the law that governs the process.[29]

In its nearly 80 years, there have been no meaningful reforms to the APA, and certainly none to stop agencies from usurping the lawmaking power of Congress. On the APA's 75th anniversary, the General Services Administration wrote: "When it was established, U.S. Senator Pat McCarron called the APA "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated' by federal government agencies."[30] It has not achieved that objective. Its biggest failure is allowing representative government to be ignored as agencies fail to respect the voice of the people, including those who are regulated.[31]

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[24] In addition, the Court must be cognizant of when it is appropriate for the judiciary to step in and apply the major questions doctrine. It will likely want to be restrained out of potential overreach by the judiciary itself and due to its own internal debates over the application of this doctrine. Congress is not bound by such concerns. Legislators can codify in statute whatever limitations they want to place on agencies. Of course, Congress is bound by the Constitution. By creating a specific statutory framework, Congress can help establish clarity and predictability for anyone affected by rules, including the agencies themselves. This framework can help inform agencies ahead of time as to what they may or may not do, and this should reduce the need for courts to step in. It will also help courts by giving them clear statutory limitations to apply instead of always having to consider the major questions doctrine.

[25] See e.g. Zvi Mowshowitz, "RTFB: On the New Proposed CAIP AI Bill," Don't Worry About the Vase (substack), April 10, 2024, https://thezvi.substack.com/p/rtfb-on-the-new-proposed-caip-ai, and Center for AI Policy, "Responsible Advanced Artificial Intelligence Act of 2024, Draft bill, page 13, https://assets.caip.org/caip/RAAIA%20%28March%202024%29.pdf. See also, Walker, Christopher J., Responding to the New Major Questions Doctrine (June 23, 2023). Regulation, Vol. 46, No. 2, pp. 26-30, Summer 2023, Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4489830.

[26] This plan is inherently focused on agencies asserting more power, not less power. It has no impact on an agency that is taking a deregulatory action, that is, reducing power it has already asserted.

[27] The Supreme Court said in *West Virginia v. EPA*, "We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), https://supreme.justia.com/cases/federal/us/597/20-1530/. This legislative plan makes the same presumption. Similarly, it also presumes that regardless of whether a policy decision is major, Congress does not want agencies to go beyond what it envisioned and thereby usurp lawmaking power.

[28] Codified at 5 U.S.C. §§551- 559, https://www.law.cornell.edu/uscode/text/5/part-I/chapter-5/subchapter-II.

[29] This plan would be codified within the APA and specifically the rulemaking section of the law (Section 553). 5 U.S.C. § 553, https://www.law.cornell.edu/uscode/text/5/553.

[30] U.S. General Services Administration, "Celebrating the 75th anniversary of the Administrative Procedure Act," GSA Blog, June 11, 2021, https://www.gsa.gov/blog/2021/06/11/celebrating-the-75th-anniversary-of-the-administrative-procedure-act.

[31] Senator McCarron apparently envisioned a regulatory state much different than what we have today. There are far more than hundreds of thousands of Americans whose affairs are controlled or regulated. Granted, this quote was from 1946. However, the U.S. population was about 141 million people then, which still reflects a view of a much smaller regulatory state than we have today.

Focused reform: This proposed reform does not require that there be a clear statement of authority for every rule or even a significant number of rules. It is not that far-reaching. Instead, it is focused on rules where it is unlikely that Congress authorized an agency to have the asserted power. This helps to address the most egregious abuses without touching most rules. The plan would apply to more rules than the major questions doctrine while still only going after the clearest examples of agencies exceeding their statutory authority.

On the surface, it may seem reasonable that there should always be a clear statement of authority. However, drafting a statute is difficult. Congress is not going to be able to think of every possibility when it develops legislative text, and ambiguity is commonplace. Agencies arguably need to have some discretion and be able to fill in the gaps to implement laws. If a clear statement requirement existed for most rules,[32] this could potentially have an unintended consequence of leading Congress to try and draft laws that expressly allow agencies to do whatever they want. It would also play into the argument that making it too difficult for agencies to implement laws is itself a way to ignore the will of Congress.

Ambiguity though is what allows agencies to take advantage of statutory text to expand its power. This plan tries to address this abuse by going after the most egregious expansions of power and requiring clear statements of authority in those situations. However, more reforms are certainly needed to address abuses beyond the specific focus of this legislative plan.

Categories of rules: Legislation based on this plan would include categories[33] of rules that are prohibited absent clear congressional authorization.[34] There is a two-step process. The first question is whether an agency's asserted power for a rule fits into one of the categories of rules. If yes, then the next question is whether there is a clear statement of authority for the asserted power. It is important to stress an important aspect of this plan: *each category by itself would trigger a clear statement requirement.*

The categories establishing the limits on agencies are specific and direct enough so that Congress would take responsibility for addressing agency abuses and not pass the buck off to the courts through vague and broad language. However, agencies and courts would still be required to interpret the limits. This is not ideal because agencies (and even courts) will look to find ways around any prohibitions. Therefore, a critical feature of this plan is the use of an easy-to-apply reasonableness standard that makes it difficult for agencies or courts to claim that a rule does not fall into a category limiting agency power.[35] Specifically, unless there is a clear statement of authority, a rule would be prohibited if there is *any reasonable basis* to conclude that it meets *any* of the following requirements:

1) The agency is asserting power for a rule that is outside its regulatory expertise or its statutory mission, or another agency is the regulatory expert.

A major argument for agencies being delegated power in the first place is based on their alleged expertise. As the argument goes, Congress does not have expertise on certain matters and therefore it needs agencies with expertise to address these matters. If an agency issuing a rule does not have the demonstrated expertise or the rule is outside the mission established by Congress, then it is highly unlikely that Congress authorized the agency to issue the rule. The same is true if another agency is the expert on the issue. This category is especially important now as the Biden administration pushes a "whole-of-government" approach seeking to have agencies address issues,

[32] The more rules that are covered, the higher the risk of this unintended consequence.

[33] Most of the categories are informed by Supreme Court decisions.

[34] There are certain patterns that emerge on investigation regarding unauthorized powers agencies assert in rules. These patterns help to establish the categories of rules that Congress should address in amending the APA. This legislative plan, informed in part by the Supreme Court, is intended to develop a list of these categories so that there are specific limits on agencies. In many instances, these categories by themselves are well beyond what Congress ever would have authorized; prohibiting rules within these categories would be appropriate. However, this legislative plan in no way seeks to supersede existing statutes. Therefore, there is a clear statement of authority provision, which acts as an exception to what arguably should have been blanket prohibitions.

[35] This plan is intended to ensure that agencies are in no way afforded deference. Even if the deference in *Chevron v. Natural Resources Defense Council* were to remain in place, the reasonableness standard would address this problem. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), https://supreme.justia.com/cases/federal/us/467/837/. There would also not be a Chevron deference problem because this legislative plan amends the APA. Under Chevron, agencies are given deference for statutes that they administer, not the APA. Legal Information Institute, "Chevron Deference," Cornell Law School (2022), https://www.law.cornell.edu/wex/chevron_deference.

from promoting unions[36] to advancing arts and culture[37] to combatting the climate crisis,[38] which are beyond their expertise.[39]

2) The agency is asserting power for a rule that would reshape or change the nature of one or more industries or a broader portion of the American economy. This includes banning or severely limiting the supply of a type of good or service or shutting down a type of business.

If Congress wanted an agency to reshape an individual industry,[40] such as banning a type[41] of good, it would say so clearly.[42] Regulating something does not mean eliminating it.[43] These actions are a direct assault on freedom for both businesses and consumers. Yet agencies have aggressively been turning their regulatory power into a means to change the marketplace itself.

The EPA has been especially aggressive in this abuse. For example, the agency's final vehicle tailpipe rule would, by the agency's own estimation, lead to internal combustion engine vehicles constituting less than 30 percent of new light-duty vehicle sales sold by 2032.[44] It would be unreasonable to think Congress wanted the EPA to start killing off gas-powered vehicles without making this abundantly clear.[45]

Similarly, during the Obama administration, the Department of Justice and a host of financial regulators got together to form Operation Choke Point, which used non-statutory guidance on potential "reputational risk" to banks to try to stop bankers from associating with a variety of industries from payday lending to firearms dealers. If Choke Point had been allowed to succeed, those regulators would have effectively killed off those industries without a word from Congress on the subject.[46]

This category covers rules that directly or *indirectly* reshape or change the nature[47] of an individual industry or a broader portion of the economy. The "indirectly" language is necessary because agencies, like the EPA, are already trying to assert that their intent for some rules is not to lead to any specific outcomes but to set standards that regulated parties can figure out how to meet themselves. This is despite them setting standards that they know can only lead to specific outcomes, such as closing down coal-fired power plants or manufacturing more electric

[36] Joseph R. Biden Jr., "Memorandum on Advancing Worker Empowerment Rights, and High Labor Standards Globally," The White House, November 16, 2023, https://www.whitehouse.gov/briefing-room/presidential-actions/2023/11/16/memorandum-on-advancing-worker-empowerment-rights-and-high-labor-standards-globally/ and U.S. Chamber of Commerce, "The Biden Administration's 'Whole of Government' Approach to Promoting Labor Unions," https://www.uschamber.com/assets/documents/U.S.-Chamber-White-Paper-Whole-of-Government-Approach-to-Promoting-Labor-Unions.pdf.

[37] National Endowment for the Arts, "NEA and White House Domestic Policy Council Host Convening on Whole-of-Government Approach to Arts and Culture," press release, October 20, 2023, https://www.arts.gov/news/press-releases/2023/nea-and-white-house-domestic-policy-council-host-convening-whole-government-approach-arts-and and Joseph R. Biden Jr., E.O.14084, "Executive Order on Promoting the Arts, the Humanities, and Museum and Library Services," *Federal Register,* Vol. 87, No. 192, October 5, 2022, https://www.whitehouse.gov/briefing-room/presidential-actions/2022/09/30/executive-order-on-promoting-the-arts-the-humanities-and-museum-and-library-services/.

[38] Joseph R. Biden Jr., E.O. 14008, "Executive Order on Tackling the Climate Crisis at Home and Abroad," *Federal Register,* Vol. 86, No. 19, February 1, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/.

[39] Dave Yost, "Biden Tempts Judicial Fate With 'Whole of Government' Plans," *Wall Street Journal,* January 3, 2024, https://www.wsj.com/articles/biden-tempts-judicial-fate-with-whole-of-government-plans-2a1ad927.

[40] An industry would include subsectors, consistent with how the Bureau of Labor Statistics lists industry groups and subsectors. U.S. Bureau of Labor Statistics, "Industries at a Glance: Alphabetical Index," https://www.bls.gov/iag/tgs/iag_index_alpha.htm. The term "individual industry" comes from the definition of a major rule under the Congressional Review Act.

[41] A "type" of a good, service, or business would also include subcategories based on features that distinguish it from other goods, services, or businesses within its type/category and such distinctions are meaningful to consumers or difficult to change for producers. As an example, a type of good would not just cover stoves in general, it would also include the more specific category of gas stoves. A type of business would include natural gas-fired plants and not just power plants.

[42] This category would not affect agencies that have the power to issue product recalls, preapprove products, or otherwise ban products, so long as the agency has a clear statement of authority. If it does not have a clear statement of authority, then it should not be taking such actions in the first place.

[43] Environmental Protection Agency, "Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles," Final Rule, *Federal Register,* Vol. 89, No. 76 (April 18, 2024), pp. 27842-28215, https://www.govinfo.gov/content/pkg/FR-2024-04-18/pdf/2024-06214.pdf.

[44] Environmental Protection Agency, "Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles," Final Rule, *Federal Register,* Vol. 89, No. 76 (April 18, 2024), pp. 27842-28215, https://www.govinfo.gov/content/pkg/FR-2024-04-18/pdf/2024-06214.pdf.

[45] In footnote 3, the majority addresses efforts to use regulation to change the nature of a business. "The dissent suggests that EPA could bring about the same result by, for example, simply requiring coal plants to become natural gas plants, and that this would fit within the prior regulatory approach of efficiency-improving, at-the-source measures. Of course, EPA has never ordered anything remotely like that, and we doubt it could. Section 111(d) empowers EPA to guide States in "establish[ing] standards of performance" for "existing source[s]," §7411(d)(1), not to direct existing sources to effectively cease to exist." *West Virginia v. EPA,* 142 S. Ct. 2587 (2022), https://supreme.justia.com/cases/federal/us/597/20-1530/.

[46] See Iain Murray, "Operation Choke Point: What it is and why it matters," Competitive Enterprise Institute (2014), https://cei.org/studies/operation-choke-point/.

[47] Reshaping or changing the nature of an individual industry or a broader portion of the economy could occur in other situations such as a rule's effect on the workforce, competition, or structure of an industry.

vehicles.[48] Regardless, even if they were being honest about intent, it makes no difference because the effect is ultimately what matters.

3) The agency is asserting power in a rule that has resulted in or is likely to result in annual costs of $300 million or more or a total cost of $3 billion or more.

This category is intended to provide a somewhat objective means to identify rules that have a very significant economic effect.[49] The language is modeled in part on the CRA's definition of a "major rule":

> *The term "major rule" means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—*
>
> *(A) an annual effect on the economy of $100,000,000 or more…*[50]

Unlike the CRA that states the Office of Information and Regulatory Affairs must determine if the annual effect requirement has been met, this legislative plan would not limit who can make this determination. A court would have to consider economic findings whatever the source, with the qualification being that the threshold could only be met if there is a reasonable basis to draw this conclusion. The legislative plan would also focus on costs, and not the potentially broader[51] "economic effect." This cost focus could lead to fewer rules covered under this category.

The most notable difference is the threshold amount is not $100 million, but $300 million/$3 billion. There is a reasonable argument that the $100 million threshold should suffice. After all, Congress has itself deemed rules meeting this threshold to be "major rules." However, context does matter.

The implication of meeting the $100 million threshold under the CRA is some narrow procedural differences than what exists for non-major rules. Although, it is connected to the important purpose of giving Congress an expedited process to reject a rule.[52] In contrast, under this legislative plan, there are greater consequences. Rules meeting this threshold would be automatically prohibited absent a clear statement of authority.

The purpose of this legislative plan is to cover rules where agencies are asserting an unusual amount of power.[53] This requires the threshold to cover rules whose costs are very high but not at a level limited to "extraordinary cases." The $300 million/$3 billion threshold provides a compelling case that if Congress is genuinely concerned with reasserting its lawmaking power and wants to make major policy decisions, it would not allow agencies to promulgate such costly and rare rules absent a clear statement of authority. Using the American Action Forum's web site "Regulation Rodeo," there was an annual average of only nine final rules that met this threshold over the last five years. In 2023, there were 15 such rules, five in 2022, 10 in 2021, 13 in 2020,[54] and three in 2019.[55]

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[48] Environmental Protection Agency, "New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule," pre-publication copy, access date 4/25/2024, https://www.epa.gov/system/files/documents/2024-04/eo-12866_111egu_2060-av09_nfrm_20240424_final.pdf and Environmental Protection Agency, "Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles," Final Rule, *Federal Register*, Vol. 89, No. 76 (April 18, 2024), pp. 27842-28215, https://www.govinfo.gov/content/pkg/FR-2024-04-18/pdf/2024-06214.pdf.

[49] The asserted power of the rule is not specifically identified under this category, but due to the economic impact of the rule, the asserted power can reasonably be considered to be significant.

[50] 5 U.S.C. § 804, https://www.law.cornell.edu/uscode/text/5/804.

[51] The word "effect" could be interpreted more broadly than costs. For example, when analyzing "annual effect" under Executive Order 12866, the Office of Management and Budget has concluded "annual effect" is broader than costs and includes benefits or transfers. The White House, "Regulatory Impact Analysis: Frequently Asked Questions (FAQs)," February 7, 2011, https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/OMB/circulars/a004/a-4_FAQ.pdf at 1.

[52] Congressional Research Service, "The Congressional Review Act (CRA): Frequently Asked Questions, November 12, 2021, https://crsreports.congress.gov/product/pdf/R/R43992.

[53] This plan focuses on agencies asserting power that has not been authorized. It is not intended to cover deregulatory efforts where an agency is reducing power the agency has already invoked.

[54] There was one rule in 2020 on the Regulation Rodeo site that did not clarify the annual costs, but it appears that the annual costs do not reach $300 million. The total costs did not reach $3 billion, according to the site. The specific rule at issue is Employee Benefits Security Administration, "Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers and Retirees," Adoption of class exemption and interpretation, *Federal Register,* Vol. 85, No. 244, (December 18, 2020), pp. 82798-82866, https://www.federalregister.gov/documents/2020/12/18/2020-27825/prohibited-transaction-exemption-2020-02-improving-investment-advice-for-workers-and-retirees.

[55] These calculations come from data contained in the American Action Forum's Regulation Rodeo. "Regulation Rodeo – A Product of the American Action Forum," American Action Forum, accessed April 1, 2024, regrodeo.com.

There are other concerns too regarding the threshold. If it covers too many rules then that could incentivize Congress to expressly allow agencies to do whatever they want.[56] Also, if the threshold number is too low and easily met, then this category by itself could make some of the other categories of rules in this legislative plan superfluous. As it is, the other categories are not superfluous and it is important to clarify that this $300 million/$3 billion threshold in no way applies to the other categories. A rule that is not clearly authorized could still be prohibited based on the requirements of another category in this plan even if it does not meet this monetary threshold.

4) An agency is asserting power for a rule that intrudes into an area that is the particular domain of state law.

This is a restatement of an existing Court-created clear statement rule governing federalism.[57] The proposed legislative plan would help ensure agencies are not trying to usurp traditional state and local powers, such as zoning and land use.[58] Congress would be making it clear that if there is any reasonable basis to conclude that an agency's asserted power would intrude on traditional state powers, the agency could not promulgate the rule unless there is a clear statement of authority. This would strengthen protections against such intrusions.

5) An agency is asserting power for a rule that resolves an issue that Congress has conspicuously and repeatedly declined to address itself and the issue has been the subject of earnest and profound debate across the country.

This category is the primary way that this legislative plan tries to cover issues of major political or social importance, and not just economic importance. The language again mirrors language from Supreme Court opinions. The "conspicuous and repeatedly" language[59] helps to ensure that there has been genuine debate in Congress showing lawmakers want to resolve the issue for themselves and they do not believe the issue has been resolved to date.[60] Since there is a slight risk that the debate can be "manufactured" and in order to further establish the unsettled nature of an issue and its importance, there would be a second requirement. The issue would also need to be the subject of an "earnest and profound debate across the country."[61] Both requirements taken together provide a strong basis to conclude that an issue is a genuine controversy that Congress has not authorized the agency to address.

Finally, this category helps to ensure that an agency does not do an end-run around Congress in response to it not acting. It also helps to ensure that an administration does not pressure Congress to act by threatening to use unauthorized power to achieve its objectives.

[56] There are constitutional limitations.

[57] See e.g. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), https://supreme.justia.com/cases/federal/us/597/20-1530/.

[58] It is unlikely that Congress could affect how the Court applies its federalism clear statement rule or its other clear statement rules. However, it is worth stressing that nothing in this plan is intended to affect how the Court applies its own rules. As stated in the text, the intended effect of including this category is to strengthen protections against federal intrusion into traditional state matters.

[59] *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), https://supreme.justia.com/cases/federal/us/597/20-1530/ citing cases including *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), https://supreme.justia.com/cases/federal/us/529/120/.

[60] While this reflects what a new Congress thinks about an issue, not the Congress that passed the underlying law, this still demonstrates that lawmakers want to address the issue themselves and the issue has not been resolved to date. The "failure" of Congress to enact a bill is not informing the meaning of a statute, it is simply helping to answer whether there is an ongoing debate about the issue. This is similar to a point made by Justice Gorsuch in response to a criticism made by Justice Elena Kagan in *West Virginia v. EPA*. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), (Gorsuch, J., concurring) at footnote 4, https://supreme.justia.com/cases/federal/us/597/20-1530/.

[61] *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), https://supreme.justia.com/cases/federal/us/597/20-1530/ citing *Gonzales v. Oregon*, 546 U.S. 243 (2006), https://supreme.justia.com/cases/federal/us/546/243/.

Clear statement of authority: Even if a rule falls into one of the listed categories, an agency could still issue the rule if there is a "clear statement of authority." For purposes of the plan, a clear statement of authority by Congress would mean that the statute is unequivocal that an agency has authority for a rule.[62] To provide additional clarity, it is helpful to identify when a clear statement *does not* exist.

A clear statement would not exist if a reasonable argument can be made that the agency lacks authority for a rule. Further, a clear statement would not exist if it can reasonably[63] be concluded that:

- There is any ambiguity regarding whether the agency has the claimed authority;[64]
- The authority is based on language that is vague, broad, general, or oblique;[65]
- The claimed authority would be inconsistent with the structure and design of the statute;[66] or
- The authority is based on a statute that expressly addresses the issue in question solely through non-regulatory means.

Conclusion

The proposed legislative plan is very straightforward. It establishes boundaries for agencies in the exercise of their regulatory power. This is critical as agencies consistently try to assert power that Congress never would have authorized, or if it did, it would have only done so in a clear manner. After many decades of the administrative state, it should not be surprising that some patterns of abuse can be identified. This plan goes after these abuses in a direct and clear manner.

The need to address these abuses is not about policy choices. After all, Congress is more than capable of making terrible policy decisions. This issue is about *who* makes the choices. This plan merely requires that agencies stop acting as if they are lawmakers and to stop making decisions that Congress never authorized them to make. The plan would help Congress reassert its lawmaking power. More importantly, it would help restore representative government by ensuring that elected and accountable officials do not stand idly by as agencies usurp their lawmaking power and ignore the voice of the American people.

About the author

Daren Bakst, an attorney, is Director of the Competitive Enterprise Institute's Center for Energy and Environment and a Senior Fellow. Prior to CEI, he was Senior Research Fellow in Environmental Policy and Regulation at the Heritage Foundation, where he played a leading role in the launch of the organization's new energy and environment center. During his decade at Heritage and in previous positions, he wrote extensively about regulatory issues at both the federal and state levels. He has testified numerous times before Congress and has appeared in or been quoted by a wide range of media outlets such as The Wall Street Journal, USA Today, The Washington Times, and CNN.

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[62] For purposes of this proposed plan, the asserted power does not need to be expressly and *specifically* authorized by Congress. For example, legislative text does not have to expressly say that an agency can regulate X. It would suffice if there is a provision, for example, which states that an agency can regulate A, B, and similar matters. If X *clearly* falls within the same category as A and B, then this would suffice. In this example, it is still unequivocal, in large part because X clearly is within the same category as A and B. If there is any doubt of any kind, then it would not be unequivocal. The text in the paper further captures how this plan envisions a clear statement. For a very good discussion on clear statement rules and the confusion surrounding how they apply, see Louis J. Capozzi III, "The Past and Future of the Major Questions Doctrine," *Ohio State Law Journal*, Vol. 84:2, https://moritzlaw.osu.edu/sites/default/files/2023-06/09.Capozzi_v84-2_191-242%202023-06-02%2018_51_09.pdf

[63] The use of "reasonable," as has been frequently used within this paper, helps to lay out a way for agencies and courts to have a clear and somewhat objective way of evaluating the questions before them.

[64] The definition does not stop with whether there is any ambiguity because courts have shown they will find there is no ambiguity in cases where it certainly appears to exist or even when the language is unambiguous but counter to the Court's interpretation. For a prime example, see *Massachusetts v. EPA*, 549 U.S. 497 (2007), https://supreme.justia.com/cases/federal/us/549/497/.

[65] This language is based in part on some of the language used and cited in Justice Gorsuch's concurrence in *West Virginia v. EPA*. The following are examples of when there is not a clear statement:

- "'[O]blique or elliptical language' will not supply a clear statement."
- "cautioning against reliance on 'broad or general language'"
- "Nor may agencies seek to hide 'elephants in mouseholes.'"
- "or rely on 'gap filler' provisions"
- "'broad and unusual authority'…through 'oblique' statutory language."

West Virginia v. EPA, 142 S. Ct. 2587 (2022), (Gorsuch, J., concurring), https://supreme.justia.com/cases/federal/us/597/20-1530/.

[66] *Util. Air Regul. Grp. (UARG) v. EPA*, 573 U.S. 302 (2014), https://supreme.justia.com/cases/federal/us/573/302/.

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