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A Critique of the ‘Congressional Dysfunction’ Critique of the Major Questions Doctrine

by

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In an essay, [“A Major Ruling on Major Questions.”](#) published in *The Regulatory Review* in July 2022, I explained why I generally agree with the way the Supreme Court’s [West Virginia v. EPA](#) decision embedded the “major questions” doctrine in our jurisprudence. At bottom, both Chief Justice John Roberts’ majority opinion, which requires a clear congressional statement before an agency may exercise the authority it claims if a major question is involved, and Justice Neil Gorsuch’s concurrence, are grounded in constitutional separation of powers principles, albeit Justice Gorsuch’s opinion elaborates on the separation of powers rationale in a much more all-embracing fashion.

While I find the West Virginia majority and concurring opinions largely persuasive, I acknowledge there are several lines of criticism worth pursuing. For example, there surely will be ongoing debate regarding the feasibility of distinguishing, in a principled way, between “major” and “non-major” questions.

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Here, however, I want to focus on one particular line of criticism that, in my view, is problematic: the suggestion that the West Virginia decision is wrong because Congress, more so now than in the past, is “dysfunctional.” The claim is that, because Congress is increasingly polarized, it no longer can pass legislation—or certainly legislation containing a clear statement authorizing agency action—necessary to advance the public interest. So, the suggestion runs, the major questions doctrine will render it too difficult for Congress to enact laws regarding important matters that can survive judicial review.

Here’s one example of this “dysfunction” line of criticism from a [paper](#) by University of Michigan Law School Professors Daniel Deacon and Leah Litman:

It is a vast understatement to say that passing legislation is difficult. The hypothetical possibility that Congress could amend a statute to authorize a particular agency action will, in most cases, remain just that—a hypothetical, not a reality. And that’s true even if or when an agency action was authorized by a capacious, but general, grant of authority in a statute and even if or when that agency action enjoys majority popular support.

Then based on what they say is the “prevailing political geography” of the United States, Professors Deacon and Litman add this:

[T]he Court’s major question doctrine provides a comparative advantage to the Republican Party’s likely levers of political power relative to those of the Democratic Party The apportionment scheme of the Senate . . . as well as state legislatures’ power to draw gerrymandered districts for federal Congressional seats, make it easier for Republicans to hold majorities in both houses of Congress. As a result, Democrats find it harder to win political power in Congress, and harder to enact their preferred policies through legislation. That is particularly true given the existence of the filibuster, which in effect requires Democrats to win supermajority control of the Senate, an institution that is structurally stacked against the current Democratic Party, in order to advance policy goals that require legislation.

In a somewhat similar, but less politically charged, vein Ronald Levin, Professor of Law at Washington University, argues in a [recent paper](#) that a major difficulty for the major questions doctrine is:

[I]t appears to presuppose a Congress that will supply legislative direction and guidance when necessary. At present, however, that is not the Congress we have. Congressional dysfunction is such a familiar phenomenon in our political life today that many people simply take it for granted, but I will provide some particulars.

He then proceeds to recite the familiar litany of proffered reasons why, in his view, Congress presently is dysfunctional, including more routine use of the filibuster, more gerrymandered districts, less investment in congressional staff resources, and increased political polarization.

Still, Professor Levin acknowledges that he doesn’t “want to exaggerate the breadth of congressional dysfunction,” because “the modern Congress does enact important legislation from time to time.” As examples, he cites recently passed “landmark legislation” such as the American Rescue Act and the Inflation Reduction Act, and one could easily add the Infrastructure Investment and Jobs Act, the Chips and Science Act, and the Respect for Marriage Act. Regardless of whether

one favors all or parts of these newly enacted laws, by anyone’s account, they all are major pieces of legislation.

The point is that whether “congressional dysfunction” exists is largely in the eye of the beholder. This subjectivity makes reliance on its existence a shaky reed upon which to rest criticism of the major questions doctrine. This is especially true given the major pieces of legislation cited above were adopted on a bipartisan basis during the first two years of the Biden Administration—at a time, by the way, in response to Professors Deacon and Litman, when Democrats controlled the presidency and both houses of Congress.

But assume for the sake of argument that at present, compared to times past, we are in the midst of a period of congressional dysfunction. Given a somewhat longer view of American history, with the periodic shifts in political alignments and congressional majorities that have occurred, reliance on present congressional dysfunction to attack a doctrine rooted in separation of powers principles strikes me as wrong.

Reliance on congressional dysfunction, at best, is a temporal justification used to criticize a doctrine rooted in the Constitution. In other words, congressional dysfunction, assuming it now exists, is not a permanent feature of American government. In his West Virginia concurrence, as Professor Levin acknowledges, Justice Gorsuch explained the structural ways the Constitution was designed by the Framers to make lawmaking difficult, including the requirement that new laws pass both the Senate and House of Representatives and be signed into law by the President. And particularly pertinent here, Justice Gorsuch added: “But that is nothing particular to our time” [Emphasis mine.]

In a [forthcoming law review article](#) (with co-author Andrew K. Magloughlin), I explain that, in his concurrence in [NFIB v. OSHA](#), Justice Gorsuch declared that “the major questions doctrine protects against unintentional delegations of authority by Congress that occur when the executive branch engages in strained interpretations of pertinent statutory provisions.” Viewed through this lens, the major questions doctrine, with its clear statement requirement, protects against executive branch aggrandizement of authority at Congress’s expense, surely a concern implicating separation of powers.

I appreciate that Professors Deacon, Litman, and Levin, along with others, offer critiques of the major questions doctrine other than the “congressional dysfunction” one. And I admit there are many aspects of the major questions doctrine worthy of debate, including, perhaps foremost, the feasibility of distinguishing, on a principled basis, between major and non-major questions.

But for the reasons I have explained, relying on what is claimed to be present congressional dysfunction as a justification for criticizing a doctrine grounded in timeless separation of powers principles is dubious.

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