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Justice Neil Gorsuch's (left) concurring opinion "suggests a future where, in exercising regulatory power, federal agencies will have to navigate between the Scylla of the major questions doctrine and the Charybdis of the nondelegation doctrine." At right is Justice Brett Kavanaugh. (Doug Mills | Pool | Getty Images)

In a recent commentary, I contrasted the pragmatic consequentialism of retiring Supreme Court Justice Stephen Breyer – and, more generally, the other two members of the court's liberal bloc (Justices Sonia Sotomayor and Elena Kagan) – with the structural formalism of the court's six-justice conservative supermajority. I also suggested that this framework may provide a more useful way to understand many of the court's recent and upcoming blockbuster decisions than the partisan angle that court watchers so frequently use.

It would be difficult to find a better example of a case featuring these competing judicial approaches than the court's recent decision in *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration* (OSHA), which stayed the Biden administration's emergency regulation requiring much of the nation's workforce either to be vaccinated against COVID-19 or to mask and undergo weekly testing. On the surface, the case appears to be merely a disagreement over the scope of a federal statute. But in truth, it lays bare fundamentally different understandings of constitutional limits on federal regulatory power and the role the Supreme Court should play in enforcing these limits. Indeed, the case – and in particular the concurring opinion of Justice Neil Gorsuch, which was joined by Justices Clarence Thomas and Samuel Alito – might well serve as a roadmap for how the conservative majority could dismantle broad areas of federal regulatory power in coming years.

Here's the background. In 1970, Congress enacted the Occupational, Safety and Health Act, which created OSHA. The act tasks OSHA with ensuring occupational safety by enforcing occupational safety and health standards promulgated by the secretary of labor. It also requires OSHA to issue "emergency temporary standards" upon determining "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from danger."

Deeming COVID-19 to be such a hazard and emergency temporary action to be necessary, OSHA issued a standard that obligated employers with at least 100 employees to require that employees either be vaccinated or wear masks and test on a weekly basis. The temporary standard contained several exceptions, such as for employees who work from home, alone, or outdoors. It also contained exceptions for religious objections or medical necessity, and it allowed an employer to exempt itself from coverage if it could show that its "conditions, practices, means, methods, operations, or processes" make its workplace equivalently "safe and healthful." It was to last for six months.

Multiple lawsuits challenging the standard and seeking a stay of its implementation were filed and consolidated in the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit denied the application for a stay, dissolved a stay entered by another court, and allowed the standard to take effect. But the challengers convinced the Supreme Court to intervene and to grant a stay by a 6-3 vote.

The majority opinion, which was unsigned, held that OSHA had likely acted beyond its statutory authority because the standard was of "vast economic and political significance" and was not "plainly" authorized by the act. The standard, said the majority, was a broad public

health measure and not a *workplace* safety standard. The risk of contracting COVID-19, while present in the workplace, also arises at home, in schools, and at sporting events and other places where people gather. "That kind of risk," the majority explained, "is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life – simply because most Americans have jobs and face those same risks while on the clock – would significantly expand OSHA's regulatory authority without clear congressional authorization."

The dissent, cosigned by Justices Breyer, Sotomayor, and Kagan, asserted that the majority had acted outside of its competence and without legal basis to stymy the federal government's ability to counter the unparalleled threat that COVID-19 poses to the nation's workers. (Cosigning an opinion is rare and is commonly understood to communicate that the authors' views on the issue are particularly strongly held.) In the dissent's view, OSHA acted more than reasonably in concluding that COVID-19, which by mid-January had killed more than 725,000 Americans and put millions more in the hospital, was both a "new hazard" and a "physically harmful agent" which posed a "grave danger" against which it was "necessary to protect" the nation's employees.

The dissent was particularly critical of the majority's conclusion that the standard was not a "*workplace* safety standard" because COVID-19 also spreads beyond the walls of the workplace. According to the dissent, nothing in the text of the act suggests an intention to disable OSHA from regulating those occupational dangers that also may be found outside of the workplace. It is false logic and contrary to the text and purpose of the law that Congress enacted to hold that something cannot be a workplace safety standard if it is also a broader public-health measure.

Perhaps recognizing the relative flimsiness of the reasoning in the unsigned majority opinion, Justice Gorsuch wrote a concurring opinion (joined by Justices Thomas and Alito) that supported the majority's holding with more explicit structural, constitutional arguments. It is these arguments – if they were to be embraced in future cases by at least two other members of the court's conservative majority – that could lead to a significant rollback of federal regulatory authority.

Justice Gorsuch began his concurring opinion by stating that "[t]he central question we face today is: Who decides?" He then sought to answer the question by observing that the Constitution sets up two default rules when it comes to lawmaking of the sort embodied in the standard. First, our separation of powers between the federal government and the states (known as our federalism) sets up a presumption that state and local authorities are to regulate public health, subject to federal displacement only when the federal government acts within an enumerated constitutional power. Second, our horizontal separation of federal powers sets up a second presumption that Congress must speak clearly if it wishes to assign to an executive agency such as OSHA the power to make rules of "vast economic and political significance." He dubbed this latter principle, adopted by some of the court's conservative members in recent administrative law decisions, the "major questions doctrine."

In Justice Gorsuch's view, the standard failed the test set up by the major questions doctrine. As he put it: "[OSHA] claims the power to force 84 million Americans to receive a vaccine or undergo regular testing. By any measure, that is a claim of power to resolve a question of vast national significance. Yet Congress has nowhere clearly assigned so much power to OSHA." Moreover, Justice Gorsuch argued, if one were to read the statutory language OSHA relied upon as clearly conferring the power to issue the standard, we'd have another constitutional problem: that of Congress delegating its legislative powers to unelected executive branch officials in violation of the "nondelegation doctrine." Under our constitutional system, Justice Gorsuch said, only Congress may exercise lawmaking power.

(By the way, before concluding that the court's conservative majority would have been OK with Congress itself imposing a national vaccinate-or-mask-and-test mandate, recall the court's 2012 decision in *National Federation of Independent Business v. Sebelius*. In that case, a 5-4 conservative court majority held that the Affordable Care Act's "individual mandate," which required most Americans either to purchase health insurance or pay a penalty, exceeded Congress's authority to regulate interstate commerce because it regulated "inaction" rather than commercial "activity." How would congressional enactment of a vaccinate-or-mask-and-test mandate be any different?)

Do you see the implications for federal regulatory power if a court majority were to adopt Justice Gorsuch's approach? Imagine, for example, that, in response to the climate crisis, the federal Environmental Protection Agency (EPA) were to invoke its authority under the federal Clean Air Act to issue regulations significantly curtailing CO2 emissions. Would not the conservative court majority characterize such regulations as having "vast economic and political significance?" If so, the major questions doctrine would suggest that the EPA had exceeded its statutory authority. And if not – if, in other words, the court were to agree with the EPA that the Clean Air Act did indeed authorize the regulations – then we would have a problem under the nondelegation doctrine: that of Congress unconstitutionally delegating its legislative power to an executive agency.

Justice Gorsuch's concurring opinion, joined by Justices Thomas and Alito, suggests a future where, in exercising regulatory power, federal agencies will have to navigate between the Scylla of the major questions doctrine and the Charybdis of the nondelegation doctrine. It remains to be seen how many federal regulations will survive that treacherous journey.

Before concluding, I should note that the three dissenters – Justices Breyer, Sotomayor, and Kagan – did not leave Justice Gorsuch's "Who decides?" question unanswered. Here is what they said: "Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID-19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes."

This is the language of pragmatic consequentialism. It is not the sort of language we should expect to see in a Supreme Court majority opinion anytime soon.

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