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Wait a Minute, Could John Roberts Block All of This?

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Existing statutes give presidents a wide range of discretion to make policy choices and advance a progressive agenda through the existing regulatory state. There is, however, a big catch: the Roberts Court. The most recent term sent strong signals that the Supreme Court is preparing to take power from the executive branch and arrogate it to itself.

After the constitutional crisis created by judicial attacks on the New Deal during FDR's first term, the Supreme Court established doctrines that gave wide deference to the ability of the federal government to regulate the economy and to authorize executive agencies to implement broad policy objectives under statutory authority granted by Congress. And despite successfully rolling back liberal victories in other areas, the Burger and Rehnquist Courts mostly left these doctrines in place. But conservatives on the federal bench are showing signs of becoming bolder. Some of these involve attacks on legislative power based on the Commerce Clause, which nearly got the Affordable Care Act struck down. But there are increasing signals that the Roberts Court is about to revive long-discredited doctrines, or invent new ones, to attack the federal regulatory state as well.

Nondelegation Doctrine

What may prove one of the most important cases of the Supreme Court's most recent term seems innocuous on its face. In a 5-3 decision in *Gundy v. United States*, the Court upheld a provision of the Sex Offender Registration and Notification Act, authorizing the attorney general "to prescribe rules" concerning offenders who would have to register as a sex offender although they had not previously been required to. Under existing law, this was an easy case. As Justice Kagan wrote for a plurality of the Court, "as compared to the delegations we have upheld in the past," the SORNA provision is "distinctly small-bore" and "falls well within constitutional bounds." So far, so good.

But the other opinions in the case are ominous. Justice Neil Gorsuch's dissent was joined by Chief Justice Roberts and Justice Thomas, and almost certainly would have been joined by Justice Brett Kavanaugh had he been on the Court when the case was heard. Most disturbingly, Justice Samuel Alito filed a concurrence that did not join any part of Kagan's opinion. Alito conceded that the provision of SORNA was constitutional under existing rules and it would be "freakish" to single it out, but "[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort." Kavan-augh's confirmation almost certainly gives Alito the majority he seeks.

The "nondelegation" doctrine is based on the premise that Congress acts unconstitutionally when it delegates its legislative authority to the executive branch by authorizing it to make policy choices. The doctrine was invoked in two 1935 decisions—*Panama Refining v. Ryan* and *Schechter Poultry v. U.S.*—to hold the National Industrial Recovery Act unconstitutional. However, the Court quickly (and correctly) abandoned the doctrine as an unworkable dead end. As Alito observed in his concurrence, even as the administrative and regulatory state has proliferated, the Court has not struck down an act of Congress under the doctrine in the subsequent 84 years.

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What's particularly disturbing about *Gundy* is that (unlike with the NIRA) there is nothing remotely unusual or novel about the delegation involved. Congress made a clear policy choice and simply left it to the executive branch to use its expertise to determine how it would be best implemented. Whole branches of administrative law are authorized by delegations less specific about policy than the one at issue in that case; practically the entire Dodd-Frank Act was left to executive branch agencies to decide the technicalities of financial regulation. As Kagan put it in her opinion, "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional."

Nondelegation doctrine can sound superficially attractive—having elected officials make clearer choices sounds like a good thing. But as the political scientist George Lovell observed in an article defending the abandonment of the doctrine, the idea that the judiciary can *force* Congress to make clearer choices is naïve and ahistorical. Before the development of the modern regulatory state, Congress still routinely passed legislation that was accidentally or purposely vague, or simply refused to address major policy areas, allowing judges or state and local officials who are more easily captured by powerful interests to fill in the gaps.

Of course, the problem is that this is the future many conservatives want. And because if the provision of SORNA is unconstitutional most of the U.S. Code is logically unconstitutional, conservative judges will have a plausible argument against any regulatory action made by a Warren or Sanders administration that offends them.

The End of *Auer* and *Chevron* Deference?

Two important lines of doctrine hold that the courts should generally be deferential to executive branch agencies. *Chevron v. Natural Resources Defense Council* (1984) held that if an agency rule did not contradict the relevant statutory text, courts should defer to agencies as long as their actions are "permissible" under the statute. And *Auer v. Robbins* (1997) held that courts should defer to agency interpretations of their own rules unless the reading was "plainly erroneous." Unlike many of the doctrines in the crosshairs of the Roberts Court, *Chevron* and *Auer* deference were not solely the creations of liberal judges. Indeed, both opinions were unanimous, and the latter was written by very conservative Justice Antonin Scalia.

But the political context has changed. A generation of conservatives liked agency deference because of the battles that the Nixon and Reagan administrations had with more liberal judiciaries. Today, younger conservatives are more skeptical of deference to executive branch agencies, a skepticism intensified by the second term of the Obama administration. The Court has already begun to take a more aggressive posture.

When Roberts wrote the majority opinion in *King v. Burwell*, correctly rejecting an argument that would have made the Affordable Care Act's tax credits to purchase insurance on state health insurance markets unconstitutional based on a hyper-literal reading of an isolated clause of the statute, he could have simply deferred to the interpretation of the law given by the IRS under *Chevron*. But Roberts refused to apply *Chevron*. Instead, he argued that, because the case concerned a matter of great "economic and political significance," Congress could not have wanted to delegate the policy choice to an executive agency, and so it was up to the Court to definitively interpret the statute. This exception to *Chevron* doctrine is far from unique—the Court's four most conservative justices have repeatedly argued that the doctrine should be severely limited or overruled, and with Kavanaugh on the Court this is very likely to happen.

In a ruling issued last June, the Court declined to overrule *Auer* deference outright in an opinion written by Elena Kagan. Every Republican nominee except Roberts joined concurrences by Brett Kavanaugh and/or Neil Gorsuch urging the overruling of the doctrine. However, Kagan's opinion was so focused on emphasizing the limitations on the *Auer* doctrine that the Cato Institute pronounced itself as having effectively won, with *Auer* reduced to a "paper tiger." Kagan acknowledged three exceptions to *Auer* deference: When the authorizing text is unambiguous, when the interpretation in question does not reflect agency expertise, and when the agency's interpretation has changed, *Auer* deference may not apply. Gorsuch's concurrence declared that the doctrine emerged from Kagan's opinion "enfeebled" and "zombified."

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Because of the substantial exceptions to both doctrines, what matters is not so much whether they are formally overruled as the general posture that the Court takes to executive agencies. Roberts in particular has made it a longtime specialty to nominally uphold precedents while slowly hollowing them out. And a majority of the Court seems prepared to take a more aggressive stance toward the executive branch. While Trump is in office, the Court may not move the needle much, but the next Democratic administration is likely to find a Court that's more eager to substitute its own judgments for those of executive agencies. Many more policy questions are likely to be determined to be "major" by the Supreme Court for the purposes of *Chevron* deference, and *Auer* has so many holes as to provide little constraint on future Courts, even if it formally remains in place.

The Elephant in the Mousehole

Another exception that has been carved out of the general deference given to executive agencies is the so-called "elephant in the mousehole" doctrine. The phrase comes from a Scalia opinion in which he asserted that "Congress, we have held, does not alter the fundamental details of a

regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." In such cases, the courts are not required to defer to executive agency opinions, because they lack proper legislative authorization. Both the Supreme Court and various lower courts have invoked the doctrine as a reason to reject rules promulgated by executive agencies.

The legal scholars Jacob Loshin and Aaron Nielson have argued that the "elephant in the mousehole" doctrine is essentially a variant of nondelegation doctrine, and is "not a workable reincarnation" of nondelegation "because it is not amendable to consistent application." Whether courts are dealing with a mouse or elephant is likely to be driven mostly by policy concerns. But precisely because of its plasticity, this doctrine will be another useful tool for conservatives who wish to replace the policy preferences of agency officials with their own.

Concern, but Not Defeatism

With conservative judges preparing for war with the administrative state, at least the next time it's controlled by a president whose policy preferences they will generally oppose, it's tempting to lapse into fatalism. If courts will undo the work done by executive agencies under the next Democratic administration, is it even worth thinking about what the next Democratic administration can accomplish without Congress?

This would be going too far. The courts will be a significant constraint on the next Democratic administration, but that doesn't mean giving up preemptively.

Even during the infamous *Lochner* era, in which the Supreme Court struck down economic regulations with a frequency unseen before or since, most progressive regulations survived. The Court had to come up with various tortured rationalizations to explain why states could regulate the hours of some demonstrably dangerous professions but not others, or why Congress could ban the interstate shipment of lottery tickets but not goods made with child labor. These explanations were never persuasive or coherent, but the key point is that most of the time the reforms enacted by creative legislators survived, even in a very hostile judicial environment. The next Democratic president should still seek to use their authority creatively and boldly.

Another important point, given the judicial environment, is that attention to detail and procedure will matter. The Supreme Court is a political institution, but that isn't to say that the law doesn't matter *at all*. Judicial decision-making is a complex interplay between policy preferences and legal factors. With issues that are a top priority for elite Republicans—such as, say, gutting the Voting Rights Act—the relative strength of the legal arguments basically doesn't matter. But for lower-order issues, it might. The next Democratic administration needs to avoid giving Republican courts an excuse by making procedural or technical mistakes. Being careful won't save every threatened regulatory action, but it might save some.

This is not to say that concern about what the new, more conservative Roberts Court will do is unfounded. There will be a lot of bad decisions, and the next Democratic administration will find some of its good work trashed by the courts. But that's no reason to give up, either. Democrats

need to be thinking now about how to use the administrative and regulatory state the next time they control it.

Candidate Spotlight: How About Packing the Court?

Democratic presidents would have options if the Supreme Court began to nullify administrative actions. The Constitution does not specify how many justices must sit on the Supreme Court; the number shifted over time until the Judiciary Act of 1869 settled on nine. In 1937, Franklin Roosevelt announced a plan to expand the Court to as many as 15 judges, by appointing an "assistant" justice with full voting rights for every member of the Court over the age of 70 years and six months. This was derided as a "court-packing" scheme, and it never got a vote in Congress. However, the Court got the message. Weeks after FDR introduced the plan, Justice Owen Roberts joined New Deal liberals to approve a minimum-wage law in the state of Washington. The reversal seemed timed to preserve the structure of the Court; it became known as "the switch in time that saved nine."

Some law professors have endorsed court-packing as a last resort, both **PETE BUTTIGIEG** and **BETO O'ROURKE** have mused about the idea, and **ELIZABETH WARREN** and **KAMALA HARRIS** refused to rule it out. Others have endorsed 18-year term limits for Supreme Court justices. Of course, either of those options would require legislation, not executive action.