

In a recent decision, four of the conservative Justices indicated a desire to limit the amount of discretion that Congress can give administrative agencies. If taken literally, some of the language they used would hobble the government by restricting agencies like EPA to “filling in the details” or making purely factual determinations. Some observers have feared that the conservatives were on the verge of dismantling modern administrative law. As I indicated in a [blog post](#) on Thursday, I think this is something of an overreaction.

As it happens, later that same day the Supreme Court gave another signal that it is happy to allow a great deal of administrative discretion. The issue in the Census Case ([Dept. of Commerce v. New York](#)), was whether it was legal for the Commerce Secretary to add a question about citizenship to the census. Although this case provides only one data point in terms of the Court’s directions, it’s notable that the conservative Justices seemed comfortable in giving the Secretary very broad leeway. Whatever their abstract concerns about delegation of authority to agencies may be, those concerns didn’t seem to cause even a moment’s hesitation in this case.

The case was controversial because of the potential political impact of adding a citizenship question to the census. Doing so would dissuade at least some immigrants from answering the census, throwing off the final count. The follow-on effect could well be to warp the apportionment of legislative seats in Congress and state legislators, systematically undercounting the representation of urban areas and Hispanics in particular.

Chief Justice Roberts wrote the majority opinion. Although the majority sent the case back due to evidence that the Secretary’s stated grounds were pretextual, it did hold that those grounds would have been valid if he had honestly held them. In a section of the opinion joined by conservative Justices Thomas, Gorsuch, and Kavanaugh, Roberts held that the Secretary had not abused his discretion even though his decision was based on his own judgment rather than any empirical evidence. In their view, the Secretary was not limited to making factual assessments. Rather, he could also make policy judgments. In responding to Justice Breyer’s dissent, Roberts said: “But the Census Act authorizes the Secretary, not the Bureau, to make policy choices within the range of reasonable options. And the evidence before the Secretary hardly led ineluctably to just one reasonable course of action. It called for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty.” Roberts, Thomas, Gorsuch, and Kavanaugh seemed just fine with that; there’s no hint they thought it was

improper for Congress to give the Secretary that much discretion. Nor did they seem much worried about whether the Secretary had meticulously based the decision on the available empirical evidence. Instead, they seemed quite comfortable with leaving the decision to the administrator's personal judgment and were if anything anxious to defer to that judgment.

In a separate opinion, Justice Alito went even further, arguing that there was no standard at all limiting the Secretary's discretion, and he seemed to have no problem with that free-wheeling delegation of authority. According to Alito, "The provision that directly addresses this question is 13 U. S. C. §141(a), the statute that vests the Secretary with authority to administer the decennial census. This provision gives the Secretary *unfettered discretion* to include on the census questions about basic demographic characteristics like citizenship." [emphasis added] . (Notably, Alito never seemed to define what he means by a basic demographic characteristic. How about pregnancy? Sexual orientation?) Later in the opinion, Alito points to what he considers the absurdity of allowing judicial review if a "statute expressly gave an agency absolute, unrestricted, unfettered, unlimited, and unqualified discretion with respect to a particular decision." He doesn't mention any concern that providing such unrestricted discretion could be unconstitutional.

You might argue that what questions to put on the Census is one of those "details" that administrators are allowed to resolve even under the most restrictive view of the delegation doctrine. Alito in particular makes an effort to portray the citizenship question as routine. But this characterization seems weak in the context of the current dispute over the citizenship question. Including the question could well result in leaving millions of Americans outside of the census count, depriving them and their neighbors of representation in state and national legislatures. And the Secretary's decision did involve, as Roberts put it, "value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty."

You might also try to distinguish the census as merely a bureaucratic collecting of information, much less worrisome than a regulation backed by legal sanctions. But that distinction is an illusion. A federal statute makes it a crime for any person to fail to answer census questions or to answer them incorrectly. Thus, the Secretary's decision to include the question in the Census was exactly equivalent to a regulation requiring every individual to write down their citizenship status on a postcard and send it to the government, under pain of criminal penalty. That scenario would clearly involve a significant agency action. Imagine what

conservatives would think about the importance of the issue if the question had instead been about gun ownership.

I don't want to oversell the census case as the answer to our delegation worries. Doubtless the conservatives viewed the question with a different attitude than they would take toward, let's say, a major environmental regulation. It is rare for issues about the make-up of the census questionnaire to be front page news. Moreover, the citizenship question was not a complete novelty. Historically, a citizenship question had sometimes figured in the census. (Of course, the present moment poses unique issues, given that we have so many immigrants who are under so much of a threat from a President hellbent on limiting immigration. But no doubt that is not a perspective shared by conservatives.) Because of this blasé attitude, their level of comfort with a broad delegation on this issue may not carry over to other administrative actions that seem more fraught to them.

Nevertheless, the ease with which conservatives talked about broad delegation in the census case, including an agency making tough policy choices about "incommensurate values," suggests that they may still feel comfortable with a fairly muscular administrative role. So there's at least some comfort here for those who are worried that the conservative Justices will take a constitutional hatchet to the Executive Branch's regulatory authority.