

In September, Take Back the Court issued a study entitled, “The Roberts Court Would Likely Strike Down Climate Change Legislation.” In my view, that’s too alarmist. But the current conservative majority definitely will be an obstacle to aggressive use of government regulation. That could hold true well into the 2030s, depending on who leaves the Court and who’s in the White House at the time. The authors of that study were highlighting a very real concern, even if they may have been a little over-dramatic.

It’s clear that the present majority is no friend of the administrative state. As early as 2013, Chief Justice Roberts warned that “the danger posed by the growing power of the administrative state cannot be dismissed.” His views especially matter because he’s now the swing voter on the Court. The *Chevron* case which requires courts to defer to agency interpretation of ambiguous statutes, is under heavy conservative fire and may well be overruled — notwithstanding the fact that it’s been cited thousands of times by the federal courts. Until Obama took office, conservatives loved the *Chevron* doctrine because it increases presidential power.

Just last year, four of the conservative Justices indicated a desire to strike down statutes which they think give too much discretion to administration agencies. That would overrule 84 years of Supreme Court rulings. In fact, except for two cases in 1937, the Supreme Court has never actually struck down a law on this basis. Justice Kavanaugh, who didn’t vote in that case, has more recently indicated allegiance with the other four conservatives on this issue, though his ideas differ somewhat in how they would be implemented. This conservative initiative would pose a threat to some existing environmental statutes. It’s hard to evaluate the extent of the threat, though I have a hard time imagining that Chief Justice Roberts will run amuck with the idea, even though in theory the conservatives could strike down big chunks of environmental law including much of the Clean Air Act.

It would require very careful drafting of future climate change legislation to avoid this kind of constitutional challenge. Even if the law survives constitutional challenge, any ambiguities in a future law could well be resolved by the Court in favor of the fossil fuel industry. One advantage of a carbon tax might be that the law could potentially be specific enough to leave little discretion in implementation.

Though you can never rule anything out, I’m less worried about two of the other issues raised in the study from Take Back the Court. One worry is that the Court might rule that climate legislation is a taking of property without just compensation. The Court has never held a general business regulation unconstitutional on the ground that it had the side effect of making some property interests less valuable. All of the modern takings cases involve regulations directly aimed at the use of land. I suppose it’s conceivable that the Court

might find a national ban on fracking on private land to be a taking of mineral rights in gas and oil. It's probably better to regulate or tax emissions, even if it has the side effect of limiting fracking. In any event, Chief Justice Roberts wrote an opinion in the *Murr* case a few years ago that indicated he wasn't inclined to make major changes in takings law.

The other question is whether the Court would strike down climate legislation for exceeding congressional power to regulate interstate commerce. Again, I'm doubtful. First, a carbon tax wouldn't be subject to that objection at all. It's possible that the current Court might have a problem if the law directly regulated conduct by private individuals like using their own fireplace or idling their cars too long. But it's hard to imagine that Congress would want to pass such a law in the first place. Unless the Court is ready to strike down basically every bit of legislation in the past century, it would be hard for them to find grounds to view regulation of emissions from industry unconstitutional.

Three caveats are in order. The first is that you can't be completely sure of what judges will do. This is shown by the willingness of four Justices to strike down the Affordable Care Act on grounds that would have been considered frivolous a year or two earlier. Not to mention *Bush v. Gore*. The second caveat relates to the composition of the Court. I'm addressing the current Roberts Court. If one or two of the current liberal Justices were replaced by activist conservative, all bets would be off. That's not impossible, depending on how the 2020 election comes out, how well the health of the older Justices holds up, etc. The third caveat is about timing. If the Court maintains a strong conservative majority for a long enough time, it could start building a body of precedents that would cripple all government regulation. That's not a negligible possibility. So there are real grounds for worry, including the possibility of a future crisis if the Court gets too far away from an equally strong and long-lived democratic majority

In terms of strategy, regulators may want to pursue two approaches. The first is to use a swarm of smaller regulations. Smaller regulations are less likely to attract the Court's attention. And if one or two are struck down, the others remain effective. The second strategy is to craft regulations with Chief Justice Roberts and Justice Kavanaugh in mind. For instance, Kavanaugh is a huge fan of cost-benefit analysis, so regulators should be sure to have rigorous economic support whenever possible. Finally, Kavanaugh and Gorsuch seem reluctant to strike down state laws on federalism grounds, so there may be greater opportunities for regulation at the state level.

There are substantial concerns about the long-run threat of an activist conservative Court. The bottom line for me is that the Supreme Court will be a barrier to aggressive regulation in years to come, but probably not an insuperable one. The conservative bent of the Court

will make regulation harder, but no one ever said saving the planet was going to be easy.