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([Cross-posted](#) at Resources for The Future's blog)



The confirmation of Amy Coney Barrett to fill the seat left by the late Justice Ruth Bader Ginsburg has catapulted the Supreme Court back onto the front pages of newspapers around the country. Though press attention has focused on abortion, same sex marriage, healthcare policy, and the outcome of the presidential election, the shift in the Court's composition could also have profound implications for environmental regulation. Even without the addition of a Justice Barrett, five members of the Court [have already expressed serious skepticism about expansive executive power](#), at least when exercised to regulate environmental pollution. With a sixth member likely to embrace a similar viewpoint, the odds are even greater that the Court could dramatically limit executive agency power.

If the presidency changes hands in November, the federal government is likely to turn its attention toward reducing domestic emissions of greenhouse gases that cause climate change. New climate change policies could come from Congress, especially if Democrats gain a majority of seats in the US Senate, and new regulations could be implemented using existing executive power, under statutes like the Clean Air Act. Either approach faces potential legal pitfalls, though it is hard to predict exactly what those pitfalls might entail. The US Supreme Court could use two legal doctrines—the nondelegation and major questions doctrines, either together or separately—to overturn climate legislation or regulations issued to cut carbon pollution. The exact parameters of those doctrines are unclear because the Court has used them only infrequently; the nondelegation doctrine has not been used to strike down a statute or regulation in 85 years. Nevertheless, several

justices have discussed the doctrines recently, suggesting they may impose greater oversight over the regulatory authority of administrative agencies and limit Congress's ability to delegate authority to those agencies in the first place.

### **Supreme Court Specters**

In July of this year, Resources for the Future and the UCLA School of Law's Emmett Institute on Climate Change and the Environment convened a group of leading legal and policy experts to discuss the constitutional concerns that could pose challenges to federal climate policy. The group discussed the Court's development of the nondelegation and major questions doctrines, both of which the Court could use to place limits on regulatory agency authority. The Court may resurrect the long-dormant nondelegation doctrine to limit Congress's ability to delegate its legislative powers to another branch of government. Using this doctrine, the Court could limit the degree of policy discretion Congress can grant to an agency, such as the Environmental Protection Agency (EPA), to carry out Congress's stated goals. The Court could also use the major questions doctrine—a more recently developed tool of statutory construction deployed to scrutinize an agency's authority to regulate—either in tandem with the nondelegation doctrine or on its own. The major questions doctrine assumes that Congress would not grant an agency authority to regulate on an issue that is not explicitly mentioned in the governing statute, particularly when that area involves important and socially significant policy issues with large economic implications. The major questions doctrine was used, for example, to prohibit the Food and Drug Administration from regulating tobacco in [FDA v. Brown & Williamson](#). Neither of these doctrines is particularly well-developed or articulated; nevertheless, they loom as potential obstacles to ambitious climate regulation.

The basic concern that animates proponents of a resuscitated nondelegation doctrine is that regulatory agencies that implement federal laws should not, in doing so, "legislate." Five members of the current Supreme Court—Chief Justice Roberts as well as Justices Alito, Gorsuch, Kavanaugh, and Thomas—have indicated that they may be willing to revive the nondelegation doctrine, though exactly how they would do so is unclear. The general idea, though, is that the more discretion a statute vests in an executive agency, particularly over decisions that sound like policy judgments, the more vulnerable the statute may be to legal attack. Congress can mitigate this concern by reducing the amount of decisionmaking it leaves to the agency implementing the law (e.g. the EPA or another agency).

Several justices have also embraced using the major questions doctrine to [limit EPA's ability to regulate greenhouse gas emissions](#) under the Clean Air Act, which does not explicitly mention greenhouse gases. As explained earlier, the major questions doctrine prohibits an

agency from regulating on issues of broad social and economic importance without express congressional direction and delegation. Although the Court in [Massachusetts v. EPA](#) rejected an argument that the doctrine prevents EPA from regulating greenhouse gases under the Clean Air Act and found that the legislation covers greenhouse gases as “air pollutants,” the vote was 5-4 with Justices Roberts, Alito, and Thomas dissenting and Justices Kavanaugh and Gorsuch not yet on the Court. In a subsequent case, [Utility Air Regulatory Group v. EPA](#), conservative members of the Court upheld EPA’s greenhouse gas emissions regulations for new sources already regulated under the Clean Air Act but held that the agency could not extend those regulations to sources not already subject to regulation. The justices limited EPA’s regulatory reach using the major questions doctrine because Congress has not directly spoken to the issue of greenhouse gas regulation.

It is unclear what the relationship of the nondelegation doctrine and the major questions doctrine would be if employed; similarly, it is unclear how far the justices would go in striking down regulations or legislation under either.

Moreover, drawing the line between implementing a statute and legislating is, of course, a difficult question. Since the Court has only hinted at reviving the nondelegation doctrine rather than actually deciding a case on that basis, and has used the major questions doctrine sparingly, it is unclear exactly how that line would be drawn. Some justices might be uncomfortable with current statutory delegations; for example, EPA is responsible for determining which pollutants will be regulated under the Clean Air Act. Is determining which pollutants should be regulated “legislative,” and therefore an unconstitutional delegation of power to EPA, or merely the implementation of legislation?

Other justices might craft the nondelegation doctrine more narrowly, in conjunction with the major questions doctrine, to limit agency power over areas where Congress has failed to clearly delegate; for example, because the Clean Air Act doesn’t mention greenhouse gases, some justices have already suggested that any effort by EPA to regulate greenhouse gases might be struck down as an impermissible delegation of legislative power on a major question. This is so despite *Massachusetts v. EPA*’s rejection of a major questions challenge surrounding the same question. At this point, we simply do not have enough guidance from the justices who have indicated their interest in reviving the nondelegation doctrine to know exactly what its contours would be.

### **What Can Policymakers Do?**

Now that the Court seems more likely to employ the nondelegation and major questions doctrines, Congress is left to determine how much it should legislate or delegate to an

expert agency to regulate, and agencies like EPA will likely face uncertainty about the extent of their authority. Federal courts could invoke either or both doctrines when considering the power of regulatory agencies to implement future climate laws and regulations, so it is important for policymakers to try to anticipate their implications.

At the same time, a fundamental attribute of climate change policy is uncertainty about science, technology, and economics. Delegating a goal to an expert agency for it to develop, implement, and adapt policies may be the most effective way to address this challenge. It is impossible for Congress to specify every policy detail within a law, and this expectation is particularly unrealistic for environmental laws that require scientific expertise, technological judgment, and risk assessment, all of which change over time based on new developments and understanding. Proponents of the nondelegation and major questions doctrines have not clearly identified the appropriate degree of agency discretion for these matters.

Nevertheless, although our workshop experts did not always agree on how to craft legislation that includes delegations to expert agencies in the shadow of a skeptical Supreme Court, we have taken from our discussion several takeaways for climate policymakers and regulators as they consider whether and how to take into account potential nondelegation and major questions challenges:

1. **Delegate authority to agencies in ways that are similar to existing statutory authority that has already been upheld.** For example, in [Whitman v. American Trucking](#), the Court rejected a nondelegation challenge to the process by which EPA sets National Ambient Air Quality Standards under the Clean Air Act. Although the current conservative members of the Court were not part of the *Whitman* decision, it was a unanimous decision authored by Justice Antonin Scalia. The National Ambient Air Quality Standards could be an effective model for future legislative programs regulating climate change emissions and impacts given *Whitman*.
2. **Do not sacrifice ambition on climate change in order to defend against hypothetical judicial outcomes, especially given the ways in which background circumstances can change.** To avert the worst consequences of climate change, we will need to see dramatic action to transform our systems of energy and transportation. Several commentators at the RFF-UCLA event stressed that Congress and EPA should not let the specter of a potentially bad judicial outcome keep them from regulating aggressively and effectively. To begin with, there is no reason to believe that nondelegation concerns are likely to be greater if a policy is ambitious

rather than modest. Additionally, any federal policy adopted in the next year or two likely would not reach the high Court for several years. By 2024 or 2025, many things could change, including the composition of the Court. The effects of climate change may be even more apparent to the public and to the justices themselves, and therefore the public and members of the Court may better understand the urgent need for ambitious policy solutions. Although there are steps Congress and EPA can take to reduce the likelihood of a bad judicial outcome, the threat of judicial invalidation several years in the future should not keep Congress or the executive branch from acting boldly to prevent the worst effects of a warming planet. Finally, a policy can be ambitious without running afoul of the nondelegation doctrine—the NAAQS process is a good example.

3. **Avoid major questions by reducing ambiguity.** At a minimum, if Congress is delegating authority to an administrative agency to regulate greenhouse gases, it should be absolutely clear that its intention is to delegate that authority. The major questions doctrine suggests that Congress needs to speak on an issue of great economic or social significance; in other words, being explicit could insulate a statute from judicial invalidation. Justice Kavanaugh [has suggested](#) that constitutional problems may be more acute when Congress has not clearly articulated that it is delegating authority over a specific policy area, so being clear may be the best strategy Congress can utilize to circumvent some of these concerns.
4. **To hedge against risk, use multiple strategies to reduce greenhouse gases.** If Congress and executive agencies pursue multiple strategies to reduce greenhouse gases, some of those policies are likely to be upheld against legal challenges. One could call this the “don’t put all your eggs in one basket” approach. This is true for agency action as much as it is for congressional action: for example, regulations to control methane leaks from oil and gas operations may be upheld, whereas regulations to control hydrofluorocarbons may not, or vice versa. An ambitious package of policies—including regulations to control greenhouse gases, energy efficiency standards and policies, investments in research and development, tax incentives for renewable energy or carbon capture and storage, and a national renewable portfolio standard—will produce significant greenhouse gas reductions even if one or more pieces of the package are struck down.
5. **Model policy to look like existing regulatory structures, and avoid having a big policy look too different from prior regulations.** Again, to use the NAAQS as an example, the Court has already upheld a structure that delegates authority to EPA to determine, - based on the best available science, which pollutants should be regulated and at what levels. Similarly, expanding and updating current regulatory programs that have already been upheld, like the [Cross-State Air Pollution Rule](#) and the [Mercury](#)

[and Air Toxics Standards](#), may be a less risky regulatory strategy from a legal perspective. EPA could use authority it hasn't previously utilized significantly—such as [Section 111\(d\)](#) and [Section 115](#) of the Clean Air Act to regulate greenhouse gases, but those regulations would be more likely to be upheld if they look like long-utilized tools in EPA's toolbox. The point here is to model policy after already successful strategies, rather than to design something that strays too far from past experience.

6. **Create severable regulatory components, with a backstop, to isolate legal risks.** Given that any new climate policy from Congress will face some risk of judicial invalidation, legislation should make clear that component parts of legislation are severable in order to avoid having an entire legislative approach struck down. In addition, Congress should also consider creating a backstop policy that takes effect in the event of invalidation: for example, legislation could be enacted that triggers a specific outcome such as a carbon price if other parts of the statute are not implemented (or if emissions reduction goals are not achieved). Adding a backstop would protect against losing emissions reductions if part of a piece of legislation were struck down.
7. **Well-designed policy remains important.** As the [Affordable Clean Energy Rule](#) has demonstrated, a regulatory approach to reduce greenhouse gases that is based on the most minimal and [internally inconsistent](#) interpretation of EPA's authority barely reduces emissions, may even be [counterproductive](#), and may itself not withstand legal challenge. Policymakers should carefully consider the legal implications of the nondelegation and major questions doctrines but should continue to value policies that are flexible and cost-effective and also reflect the realities of the sectors of the economy that they seek to regulate.
8. **The openness and inclusiveness of policy debate is critical.** In both the legislative and regulatory policy pathways, it is important to develop a policy process that is transparent and reflects the input of all stakeholders, including bipartisan support where possible. This approach can not only improve the quality of the resulting policy but also make the policy more resilient to legal challenges.
9. **Finally, it is worth stressing that the federal courts' use of the nondelegation and major questions doctrines is unpredictable.** As a result, policymakers should be cognizant of the risk that legislation or regulations could be struck down and take practical and reasonable steps to avoid that risk. At the same time, they should not let concerns about a nondelegation or major questions challenge get in the way of smart and effective policymaking to tackle climate change.

