If you ask Supreme Court experts what keeps them up at night, the answer is likely to be the non-delegation doctrine. If you are among the 99.9% of Americans who've never heard of it, here's an explainer of the doctrine and what the 6-3 Court might do with it.

What's the nondelegation doctrine?

Simply put, the doctrine says that only the legislature can create new rules of law and that Congress cannot transfer this power to the executive branch or the judiciary. That sounds very reasonable. The big problem is that Congress often has to give discretion to the people implementing a law to fill in gaps, apply rules to particular circumstances, and deal with ambiguities. For instance, there are hundreds of toxic chemicals, and it's not realistic to think that Congress could make individual determinations about the risks of each chemical. That's why it gives that authority to experts at EPA. But how do you decide when the amount of discretion becomes so great that Congress has essentially given away the store?

Has the Supreme Court ever used the doctrine to overturn federal laws?

In 232 years, the Supreme Court has used the doctrine twice to strike down federal laws. That's an average rate of once every 116 years. In fact, both cases were decided the same year (1935). The cases involved extreme situations, granting complete discretion to the President in one case and industry representatives in the other. They were part of a series of cases in which the Court tried to stop the New Deal, before giving up in 1935.

What is the current interpretation of the doctrine?

The current legal standard is that a law is valid if it creates an "intelligible principle" for a court or administrator to apply. That means that the statute must contain some standard for determining whether judges or administrators had exceeded their authority. The Supreme Court has never found that a law violated that standard.

Why is the doctrine under attack?

The attack is part of the general conservative argument that the modern administrative state violates the separation of powers. They view this as a threat to liberty. They point to frequent references by the Founding Fathers to the

separation of powers and to arguments by James Madison and others against delegating too much authority. Conservatives view the way that regulation has worked over the past century or so as a betrayal of the original intent that should be corrected. All of this is of course hotly contested, with supporters of regulation also arguing that broad delegation is a practical necessity in the modern world.

Why are the experts so worried?

In 2019, the Supreme Court decided a case involving registration of sex offenders. Four of the conservative Justices used the case to announce a willingness to reconsider the "intelligible principle" test. Three of them, led by Justice Gorsuch, endorsed an approach that would only allow agencies to "fill in the details" or make factual (but not policy) decisions. Depending on how you applied the Gorsuch approach, a lot of federal laws passed in the last century could be called into question. A fifth conservative, Justice Kavanaugh, did not participate in the case but later expressed sympathy with the views of the others. That meant that a majority of the Court would consider overturning the post-World War II precedents and returning to 1935. With the addition of Justice Barrett to the Court, there might well be six votes to do so. Potentially, the result could be to wipe out large areas of federal regulation including securities, labor, and environmental law.

What's likely to happen next?

As the Biden Administration starts to flex its regulatory muscles, it seems inevitable that nondelegation arguments will surface in the courts. It also seems inevitable that the conservative supermajority will find some case in which to reconsider current doctrine. With Barrett's addition to the Court, it seems all the more likely that a majority of the Justices will be willing to replace current doctrine. The open question is whether they will be able to agree on a replacement doctrine. Barrett has not opined on the issue, while Kavanaugh and Alito did not expressly endorse Gorsuch's approach.

Where will all this leave environmental law?

You can't completely rule out the possibility that the Supreme Court will throw out the major environmental statutes. That's a possibility that scares the experts. Although it's frightening that this kind of radical outcome is even a possibility, it seems unlikely to me that the Court will go that far. Even the most ideological Justices are not *completely* oblivious to modern realities. At the very least,

however, a return to the 1935 approach will weaken environmental regulation just at the time when climate changes requires more vigorous government action than ever.