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‘Most of Government Is Unconstitutional’

Did the Supreme Court just suggest that it is prepared to agree with that statement?

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On Thursday, the conservative wing of the Supreme Court called into question the whole project of modern American governance.

In Gundy v. United States, which concerned the constitutionality of a law requiring the registration of sex offenders, four of the more conservative justices endorsed a controversial legal theory according to which Congress lacks the power to delegate broad powers to agencies like the Food and Drug Administration and the Department of Health and Human Services.

For now, the four more-liberal justices have brushed back the challenge, ruling 5 to 3, with Justice Samuel Alito, that Congress can give to the executive branch the authority to implement that specific law. But a close reading of the decisions in the case — and the fact that Justice Brett Kavanaugh was recused — suggests that the liberals may not have the votes to turn back the conservative assault on Congress’s powers.

Federal agencies have been vested with expansive authority since the dawn of the republic, but the administrative state as we know it really took off in the 20th century. The rise of agencies like the Office of Price Administration, the Social Security Administration and the Environmental Protection Agency was essential to the prosecution of two world wars, the creation of the post-New Deal welfare state and the regulation of novel risks such as industrial pollution.

But powerful agencies have long generated anxiety among conservatives. The Constitution, they note, assigns to Congress "all legislative powers herein granted." Very broad delegations of power from Congress to administrative agencies, conservatives argue, amount to an unconstitutional dereliction of Congress's responsibilities.

Back in 1935, the Supreme Court signaled that it was open to this argument. In two cases, the court struck down New Deal laws for vesting too much authority with too little guidance. According to the court, Congress had to offer some "intelligible principle" about how agencies were to exercise the power they were given.

It turned out, however, that the intelligible principle could be pretty minimal. Since 1935, the Supreme Court has approved laws telling agencies to regulate "in the public interest" and to set pollution standards "requisite to protect the public health." Not once in the 84 years since has the Supreme Court invalidated a law because it offends the so-called nondelegation doctrine.

And for good reason. To run a functional, modern government, Congress has no choice but to delegate authority and discretion to federal agencies. Doing so allows Congress to make use of agencies' resources and scientific expertise, to enable a nimble response to emerging problems and to insulate technocratic decisions from raw politics.

It's no exaggeration to say that the Supreme Court's post-1935 consensus — that Congress gets to decide how much power to delegate to an agency, not the courts — serves as the foundation of the American state. That's what makes Thursday's decision so troubling.

Gundy v. United States concerned a 2006 federal law that required convicted sex offenders to register in the states where they lived and worked. But a man named Herman Gundy had been convicted the year before, and applying the statute to people like him posed some practical problems. So Congress tasked the attorney general with "specifying the applicability" of the registration requirement.

Under President George W. Bush and President Barack Obama, attorneys general wrote rules requiring pre-2006 offenders to register. Mr. Gundy was prosecuted for failing to do so.

In his defense, Mr. Gundy argued that it was unconstitutional for Congress to tell the attorney general to decide whether the registration requirement applied to him. Writing for a four-justice plurality, Justice Elena Kagan disagreed.

In response, Justice Neil Gorsuch wrote a lengthy dissent extolling the need to curb Congress's powers to delegate to federal agencies. Surprisingly, two other justices, Chief Justice John Roberts and Justice Clarence Thomas, joined this radical opinion. And while a fourth — Justice Alito — sided with the more liberal justices, he wrote separately to say that "if a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."

Because Justice Kavanaugh was recused from the case, the conservative wing was deprived of a potential fifth vote. But that vote may come: Judging from his record, Justice Kavanaugh is also no friend of agency power.

So the writing may be on the wall for the hands-off doctrine that has enabled the federal government to be a functional government. If that fifth vote comes, the court would generate enormous uncertainty about every aspect of government action. Lawsuits against federal agencies would proliferate, and their targets would include entities that we've come to rely on for cleaner air, effective drugs, safer roads and much else.

Nothing in the Constitution requires that result. The Constitution broadly empowers Congress "to make all Laws which shall be necessary and proper for carrying into Execution" its authorities. Congress does not *surrender* its legislative power by delegating. It *exercises* that power.

That argument, however, may not carry the day. And make no mistake: If the law in Gundy is unconstitutional, then as Justice Kagan wrote, "most of government is unconstitutional." Alarmingly, a majority of justices on the Supreme Court may not have a problem with that.

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Correction: *June 22, 2019*

An earlier version of this Op-Ed misspelled, in one instance, the surname of the man challenging the constitutionality of a law requiring the registration of sex offenders. He is Herman Gundy, not Grundy.

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