

# The Columbus Dispatch

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Opinion

## Column: Justices have an eye on control of federal agencies

Posted at 4:15 AM

Updated at 11:09 AM

Even those of us with only a passing acquaintance with Shakespeare can quote from Henry VI: “The first thing we do, let’s kill all the lawyers.” For over a generation, conservatives have sought to extend that lament to “bureaucrats” — the public servants dedicated to serving us. Now, the U.S. Supreme Court seems poised to advance that refrain by constraining administrative agencies.

Americans have often expressed distrust of government. Misreading the lessons from Vietnam, Watergate and Iran-Contra, in which politicians lied to accomplish dubious objectives, President Ronald Reagan argued that “government is the problem.” Anti-tax activist Grover Norquist said he wanted to shrink government to the point that it could be “drowned in the bathtub.” And Steve Bannon doubled down with his desire to “deconstruct the administrative state.”

Recently, the Supreme Court decided two cases that advance that deconstructive agenda. The cases involve two technical issues of administrative law — nondelegation and an agency’s interpretation of its own regulations. Both issues have been settled law for decades; yet with a new anti-government majority on the court, both have been called into question.

In the nondelegation case, Justices Samuel Alito and Neil Gorsuch invited the court to revise Supreme Court precedents, some of which are more than 80 years old, that enable agencies — in particular New Deal agencies — to carry out the will of Congress. Congress is responsible for passing legislation, and the Constitution prohibits it from delegating legislative responsibility to either public officials or private groups. However, as the Constitution recognizes, Congress must rely on the executive branch to implement its policies.

The court has acknowledged that Congress can delegate the responsibility to agencies to fill in the details of regulatory legislation as long as legislators establish limitations on an agency's authority. Justices Alito and Gorsuch, however, prefer to read the Constitution as limiting such delegations, even though this would hamstring the government's capacity to protect people and the environment.

The deference case examines whether a court or an agency should interpret an agency's own regulations. For decades, courts have deferred to an agency's interpretation of an ambiguous regulation because the agency, which wrote the regulation, is in the best position to know what it means. If an agency's interpretation is contrary to the law, then courts can overrule it. In this case, however, Gorsuch and Justice Brett Kavanaugh prefer to rein in the work of agencies and substitute judicial control.

Constitutionally, the democratically elected legislature directs agencies to carry out the policies that it passes. Nonelected judges should not substitute their judgment for expert agency decisions. Instead, judges should correct agencies when they violate the law, not when they disagree with an agency's reasonable interpretation.

Assume, for a moment, that the movement to "deconstruct the administrative state" prevails. Who will ensure that airplanes are safe to fly and nuclear power plants safe to operate? Who will ensure our food is safe to eat, our water clean to drink and our air healthy to breathe? Who will inspect workplaces, making certain workers are not subject to dangerous conditions? Who will scrutinize prescription drugs and medical devices? Who will make sure that the Cuyahoga River does not catch fire again? Industry will not police itself and keep us safe. Instead, we, the people, form and rely on our government to accomplish these vital tasks.

On July 4 we celebrated Independence Day, but the American Revolution was not about independence from all forms of government; it was the independence to create our own. The Constitution states that it is the purpose of government to promote the general welfare. Our elected officials define the general welfare for us and direct agency staff, not life-appointed judges, to ensure that the general welfare is protected.

In Henry VI, Shakespeare warned us that if we kill all lawyers, then chaos will ensue. If we kill all bureaucrats, then government stops and with it we lose the benefits of living in a free society.

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