FREE STATE FSF FOUNDATION

Perspectives from FSF Scholars
September 26, 2020
Vol. 15, No. 51

Justice Ginsburg's Replacement Won't Decimate the Administrative State

by

Randolph J. May *

Yale Journal on Regulation
September 25, 2020

With Justice Ruth Bader Ginsburg's passing, many pundits claim, rather cavalierly, that her replacement on the Supreme Court – if President Trump's nominee is confirmed – almost certainly will vote in a way that will mean the end of the modern administrative state as we know it. Or at least that it will mean a dramatic decrease in its power. I disagree.

This conjecture regarding the administrative state's threatened demise is premised primarily on the potential elimination or gutting of the nondelegation doctrine and the *Chevron* deference doctrine. I acknowledge that alteration of either or both may result in a curtailment of the authority wielded by the alphabet soup of federal agencies. But any change is likely to be more modest than melodramatic, with the array of agencies continuing to carry out their core missions, including protecting the health and safety of the American people.

And, significantly, any changes in the two doctrines that do occur by virtue of the addition to the Court of Justice Ginsburg's replacement are likely to bring administrative law – and, therefore,

the actions of the administrative state – more in line with foundational separation of powers principles that are at the core of our tripartite system of government.

(I am writing this before President Trump announces his nominee to replace Justice Ginsburg. But for my purposes here, it makes no difference in my assessment whether the nominee is Amy Coney Barrett or some other person in the same mold.)

Before explaining why I predict any changes are unlikely to alter dramatically the existing scope of federal agencies' power, let me briefly explain the basics of the nondelegation and *Chevron* doctrines.

Article I of the Constitution vests "All legislative Powers" in Congress. So, for example, when Congress adopts laws empowering agencies to adopt rules (which are often actually called "legislative rules") regulating various activities of individuals or entities subject to the agencies' jurisdiction, you might suppose, in theory, that such delegations would be unconstitutional.

But, in practice, from the Republic's earliest days, the Supreme Court never adhered to such an absolutist literalist construction of the Constitution with regard to delegations. Rather, it affirmed what, in effect, looked like delegations of legislative authority to executive branch officials, however modest they might be. It did this, for example, in *Field v. Clark* (1892), by reframing the challenged action in a way that characterized it as not "legislative."

But in 1928 in *J. W. Hampton v. United States*, the Court took a somewhat more straightforward approach. Rejecting a nondelegation challenge to the President's administration of a tariff established by Congress, the Court declared: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." Although application of this "intelligible principle" test has not led to an invalidation of a federal law since 1935, it remains the standard today by which nondelegation challenges are assessed. At bottom, the standard would appear to require a determination as to whether Congress has provided sufficient policy direction (think "meat on the legislative bones") to guide agencies when they act under the delegated authority.

Now, to *Chevron* deference. In the landmark *Chevron U.S.A. Inc. v. Natural Resources Defense Council* (1984) decision, the Court established a regime that significantly altered the then-existing understanding of the judiciary's role in reviewing agency statutory interpretations. Confronted with what it considered to be an ambiguous Clean Air Act provision, the Court held that "the question for the court is whether the agency's answer is based on a permissible construction of the statute." In other words, confronted with a statutory ambiguity, it's not the judiciary's role to determine whether the agency's interpretation is the best construction, but only whether it is a reasonable one. Importantly, if so, it is to be accorded "controlling weight," which in most cases is outcome-determinative.

Even from these brief descriptions of the nondelegation and *Chevron* doctrines, it is likely obvious the ways in which they are interrelated and impact fundamental separation of powers principles. To the extent that Congress legislates with more specificity, that is, provides more

definitive "intelligible principles" to direct agency actions, it is less likely there will be ambiguities that cause reviewing courts to invoke *Chevron* deference. And it is less likely there will be claims to invoke the nondelegation doctrine. This would mean that Congress, as a popularly elected branch of government, could be held more accountable, as the Founders envisioned. And it would mean that executive branch officials necessarily would be more closely confined to "executing" the laws rather than "making law."

Moreover, to the extent that Congress legislates with more specificity, reducing occasions for the invocation of *Chevron* deference, the occasions for executive branch agencies to exercise unconstrained discretion will be reduced. Were this to occur, calls for eliminating the nondelegation and *Chevron* doctrines likely would become more muted. But, realistically, the odds of Congress actually acting in ways that would lead to legislators being held more accountable for the laws they adopt is, to employ understatement, not high.

So, back to considering how a change in the Court's composition might impact the power of the agencies. Recall, for present purposes, I am assuming that Justice Ginsburg's replacement will give the Court's conservative wing enough votes to decide, in one way or the other, to alter the nondelegation and *Chevron* doctrines.

I suspect that, in a proper case, the Court will substantially curtail *Chevron's* application, if not jettison it completely, and also that it will reinvigorate the nondelegation doctrine. But the end result of these jurisprudential changes most likely will be only a modest alteration in the size and scope of the administrative state's present power.

As for the nondelegation doctrine, the Court could invigorate the "intelligible principle" test by engaging in a more exacting review when it assesses whether a challenged law contains sufficient statutory criteria so that Congress, not the agency, is making the fundamental policy judgments. A more exacting review would engage in a "hard look" to determine whether the agency has been given enough guidance to apply any necessary factual findings to the statutory criteria.

To be sure, this would require the Court to engage in some difficult line-drawing, but so what? As Justice Gorsuch pointed out in his dissent in *Gundy v. United States* (2020), the Court does this in many other areas where constitutional principles are at stake.

Under an invigorated "intelligible principle" test, it is not easy to envision how the Communication Act's delegation of authority to the FCC to engage in all manner of regulatory activity "in the public interest" would survive, even though it long ago passed constitutional muster. Or, to take just one more example, consider the Occupational Safety and Health Act provision at issue in *Industrial Union Department v. American Petroleum Institute* (1980) (the "Benzene case"). The statute merely directed OSHA to set standards for exposure to toxic materials that would protect workers "to the extent feasible."

While an invigorated "intelligible principle" test is unlikely to result in any radical across-the-board reduction in agency regulatory activity, it nevertheless might result in some welcome reductions in instances where agency discretion presently is virtually unconstrained by

intelligible congressional direction. And a revivified nondelegation doctrine has the virtue of returning to the Founders' originalist constitutional scheme premised on separation of powers principles designed to prevent tyranny and promote accountability.

Likewise, while *Chevron* may be overruled in a newly composed Court, it's unlikely that this too would mean a radical alteration in the size or scope of the administrative state. This is because, even absent the "controlling weight" of *Chevron* deference, reviewing courts almost certainly will continue to apply some lesser degree of deference to agency interpretations of their own authority. Prior to *Chevron*, courts often applied so-called *Skidmore* deference, which looked to the persuasiveness of the agency's opinion, including the thoroughness of its investigation, the validity of its reasoning, and the consistency or not of the agency's interpretation over time. In light of the agencies' experience applying their enabling statutes, which frequently involve varying degrees of specialized knowledge and technocratic expertise, it's unrealistic to expect that even an overruling of *Chevron* would mean courts suddenly would cease according some deference to agency decisions, at least those that meet the *Skidmore* or a similar test.

But, again, a switch from a strong form of *Chevron* deference to a weaker one, a la *Skidmore*, should mean that some agency exercises of regulatory authority that now are greenlighted would not be. And this could result in a modest reduction in the amount of overall regulatory activity (although I understand application of *Chevron* deference can result in affirming pro-regulatory decisions too, more often than not it's been applied in ways that validate expansions of agency authority). Moreover, any jurisprudential change in the direction of a less deferential review standard – certainly one that doesn't accord "controlling weight" to an agency's own statutory interpretation – would also be in accord with the Founder's view, expounded by Chief Justice John Marshall in Marbury v. Madison (1803), that it is the province of the judiciary to "say what the law is."

All in all, Justice Ginsburg's replacement may well mean that, over time, there will be alterations in the nondelegation and *Chevron* doctrines in ways that will reduce, probably modestly, the power currently exercised by administrative agencies. Whether or not you think that this would be a positive development for any other reason, perhaps you'll agree that such doctrinal changes would be welcome because they would bring our system of governance closer to the Founder's originalist vision.

* Randolph J. May is President of the Free State Foundation, a free market-oriented think tank. He is a past Chair of the American Bar Association’s Section of Administrative Law and Regulatory Practice, a past Member and current Senior Fellow of the Administrative Conference of the United States, and a Fellow at the National Academy of Public Administration. This piece appeared first in the Yale Journal on Regulation on September 25, 2020.