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The Supreme Court just took a case on the EPA’s authority. Its decision could undo most major federal laws.

As Justice Kagan wrote, the arcane doctrine of ‘nondelegation’ would make most of government unconstitutional

By Pamela Clouser McCann and Charles R. Shipan
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The Supreme Court on Friday [agreed to hear](#) a challenge to the Environmental Protection Agency’s authority to regulate power plant emissions, in a case that [legal scholars](#) say could undermine Congress’s constitutional authority to delegate power to federal agencies. Some argue that such regulation — not just by the EPA, but in President Biden’s [vaccine mandate](#) as well — is [unconstitutional](#) because of a somewhat arcane legal doctrine called the “[nondelegation doctrine](#).” This theory holds that Congress cannot delegate broad policymaking authority to government agencies.

Why does this argument matter? [Our research](#) finds that if the Supreme Court were to invalidate either the EPA’s authority or the vaccine mandate under this doctrine, it might unravel nearly every major law Congress has passed since World War II. Nearly every one of these laws involves delegating authority to U.S. agencies.

Why is congressional delegation a problem?

Let’s look at this more closely. The nondelegation doctrine was an approach the Supreme Court sometimes relied on to strike down laws until the 1930s. According to this constitutional doctrine, Congress can delegate powers to government agencies only if it also gives those agencies clear, specific directions about what actions to take. Because legal commentators regularly say the Supreme Court has not used this doctrine to strike down any policies since the 1930s, they usually describe it as “moribund.”

But did it ever exist? Recent research shows, in fact, that the Supreme Court [did not often use](#) this doctrine before the 1930s — and that the [Founders themselves often delegated](#) authority to executive agencies, indicating they believed delegation was consistent with the Constitution.

Nevertheless, as legal scholar Nicholas Bagley has pointed out, U.S. state and federal courts are [increasingly relying on this doctrine](#) to challenge and strike down laws. What's more, several members of the Supreme Court, led by Justice Neil M. Gorsuch, have [signaled that they're open](#) to striking down laws based on this doctrine. In fact, the court's majority mentioned [concerns about delegation](#) when it struck down the Centers for Disease Control's eviction moratorium.

Their next opportunity to use it might come with the EPA case or when opponents challenge the Biden administration's vaccine mandate after regulations are issued, since in both cases some [opponents](#) are relying explicitly on the doctrine. Or they could use it when, as expected, they hear *Kelley v. Becerra*, the latest challenge to the Affordable Care Act, which is making its way through the courts and close [observers](#) expect to succeed in the U.S. District Court.

So what would a reinvigorated nondelegation doctrine do to the U.S. government? Justice Elena Kagan wrote in her minority opinion in *Gundy v. United States* that if the Court starts striking down congressional delegations of authority, "[then most of Government is unconstitutional.](#)"

We wanted to know whether Kagan and other observers are correct. But first we needed to answer a basic question: How many major laws contain delegation? Some? Half? 75 percent? More?

How we did our research

To find out, we began with a well-known [list of major statutes](#) — 443 of them passed between 1947 and 2016 — that political scientist David Mayhew has compiled. We then used a two-step approach to determine whether each statute delegated any policymaking authority to government agencies. First, we turned to ProQuest's Regulatory Insight database, which provides a regulatory history for all federal enactments since 1936, including all agencies that propose and issue final rules based on each statute. That let us identify all agencies, if any, that drew statutory authority for rules and regulations from each law. From that, we could infer which statutes delegate policymaking authority.

We then complemented this first approach by conducting a full-text search of each law. In part, we searched for terms, phrases or word fragments that could indicate delegation — for example, "department," "secretar" and "administ." We also searched for words or fragments about judicial review of agency

actions. That's because any statute that contains instructions regarding review of agency actions — which is [far more common](#) than generally recognized — only does so if the law first delegates authority to agencies.

When we found any of these terms, we carefully read the surrounding and related sections to see whether the law instructed agencies to create regulations or make policy.

What proportion of major statutes passed since World War II delegate power to government agencies?

What percentage of major laws delegate? The answer is: more than 99 percent of them — so basically all of them. Only four of the 443 laws we examined do not delegate any authority to government agencies — and one of those, the Partial-Birth Abortion Ban Act, delegates policymaking power [to the states](#). Furthermore, most of the laws delegate to several agencies. Nearly half delegate to between two and five agencies, and another third delegate to more than five. And the number of agencies delegated power per law has been growing over time.

In other words, when Congress legislates, it delegates — which brings us back to the nondelegation doctrine. As we explained, challengers are using it to dismantle policies ranging from the vaccine mandate to the eviction moratorium to the ACA. It's starting to appear in judicial actions centered on other policies, too, probably because several Supreme Court justices are open to reinvigorating this doctrine.

The Supreme Court's 2021 docket includes a host of cases about delegation, including [American Hospital Association v. Becerra](#), which challenges the Department of Health and Human Service's authority to set hospital reimbursement rates, and [Federal Bureau of Investigation v. Fazaga](#), which takes on federal power to conduct surveillance. In other words, the high court will have numerous opportunities to examine — and potentially strike down — delegation during this term. And of course, other prominent cases, including the vaccine mandate and *Kelley v. Becerra*, will be winding their way to the court.

If the courts start to lay down precedents for striking down statutes that delegate policymaking authority to agencies, virtually every major federal law since 1947 is on shaky ground. Kagan's concern is right on target.

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