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## Gundy v. United States: How Justice Gorsuch's Dissent and Changing Judicial Philosophy in Federal Courts May Lead to a Revived Nondelegation Doctrine and Diminish the Purpose of the Administrative Procedure Act

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## COMMENT

### ***GUNDY V. UNITED STATES:* HOW JUSTICE GORSUCH’S DISSENT AND CHANGING JUDICIAL PHILOSOPHY IN FEDERAL COURTS MAY LEAD TO A REVIVED NONDELEGATION DOCTRINE AND DIMINISH THE PURPOSE OF THE ADMINISTRATIVE PROCEDURE ACT**

**ZACHARY PFRANG OLVERA\***

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## I. INTRODUCTION

In a reoccurring fashion,<sup>1</sup> the nondelegation doctrine was left in constitutional exile yet again as a fractured Supreme Court ruled against a nondelegation challenge in *Gundy v. United States*.<sup>2</sup> The nondelegation doctrine is a constitutional principle that prohibits Congress from conferring its legislative power to another branch of government.<sup>3</sup> Any elementary school student can tell you that the legislature “makes the law,” the executive “enforces the law,” and the judiciary “interprets the law.”<sup>4</sup> Nevertheless, in modern times, Congress has delegated much of its authority to write rules and regulations, with the effect of law, to administrative agencies within the Executive Branch.<sup>5</sup> The Court has only used the

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1. For a discussion on the Supreme Court’s ruling against challenges to an unconstitutional delegation of power, see *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001); *Loving v. United States*, 517 U.S. 748 (1996); *Touby v. United States*, 500 U.S. 160 (1991); *Mistretta v. United States*, 488 U.S. 361 (1989) (holding there was no unconstitutional delegation of legislative power).

2. *Gundy v. United States*, 139 S. Ct. 2116 (2019).

3. *Id.* at 2121.

4. Brief of *Amicus Curiae* Institute for Justice in Support of Reversal at 1, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17–6086), 2018 WL 2684384 [hereinafter Brief for the Institute for Justice].

5. See Aditya Bamzai, Comment, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164 (2019) [hereinafter Bamzai, *Delegation and Interpretive Discretion*] (discussing the Congressional authority delegated to administrative agencies).

nondelegation doctrine twice, both in 1935, to strike down an act of Congress as an unconstitutional delegation of legislative authority<sup>6</sup>—leading to an eighty-five-year hiatus for the doctrine. Its absence has left many to declare the doctrine as dead-letter law.<sup>7</sup> Though the nondelegation doctrine remains in exile, perhaps the *Gundy* concurrence and dissent has at least cracked open the door and invited future nondelegation challenges.<sup>8</sup> The issue certainly drew strong support calling for a revival of the doctrine,<sup>9</sup> likely bolstered by support when the decision came down. *Gundy* has caused many to wonder what the future may hold for the nondelegation doctrine.<sup>10</sup> There is no doubt this case will help shape the future of administrative law in the United States.

Part I of this paper identifies the constitutional basis for the nondelegation doctrine. It discusses constitutional rationales and influences, which helped the founders shape America's constitutional order. The history of the nondelegation doctrine is traced from its origin to the intelligible principle's current standard while evaluating its treatment by the

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6. See *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (holding the provision at issue was an unconstitutional delegation of legislative power and thus violated the nondelegation doctrine); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935) (striking down the provision at issue because it went beyond the “limits of delegation”).

7. See Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1038 (2007) [hereinafter Alexander & Prakash, *Delegation Really Running Riot*]; Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 780 (2016); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2364 (2001); Alexander Volokh, *The New Private Regulation Skepticism Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 974 (2014) (all declaring the nondelegation doctrine is essentially nonexistent).

8. John Yoo & James C. Phillips, *With Kavanaugh, the Court Should Tame the Administrative State*, NAT'L REV. (Oct. 25, 2018, 6:30 AM), <https://www.nationalreview.com/2018/10/supreme-court-brett-kavanaugh-administrative-state/> [https://perma.cc/T46A-PGF9] (discussing how the Court's decision in *Gundy* is likely to generate many nondelegation cases as parties challenge delegations that seem similarly broad or broader than the challenged provision in *Gundy*); Evan Zoldan, *Gundy v. United States: A Peek Into the Future of Government Regulation*, HILL (June 21, 2019, 12:24 PM), <https://thehill.com/opinion/judiciary/449687-gundy-v-united-states-a-peek-into-the-future-of-government-regulation> [https://perma.cc/BXW9-GS4K].

9. Brief *Amicus Curiae* of the American Civil Liberties Union in Support of Petitioner at 5–9, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17–6086), 2018 WL 2684381; Brief of William D. Araiza et. al. as *Amici Curiae* in Support of Petitioner at 4, *Gundy*, 139 S. Ct. 2116 (No. 17–6086), 2018 WL 2733950; Brief for the Cato Institute and Cause of Action Institute as *Amici Curiae* in Support of Petitioner at 2–5, *Gundy*, 139 S. Ct. 2116 (No. 17–6086), 2018 WL 2412171; Brief Institute for Justice, *supra* note 4, at 27–29, *Gundy*, 139 S. Ct. 2116 (No. 17–6086), 2018 WL 2684384; Brief for the Pacific Legal Foundation as *Amici Curiae* Supporting Petitioner at 20–22, *Gundy*, 139 S. Ct. 2116 (No. 17–6086), 2018 WL 2684377 [hereinafter Brief for the Pacific Legal Foundation].

10. See *Gundy*, 139 S. Ct. at 2116 (upholding the provision of the Sex Offender Registration and Notification Act (SORNA or the Act) because it did not violate the nondelegation doctrine).

courts. Part II discusses the recent case of *Gundy v. United States* and the impassioned dissent by Justice Gorsuch, which may help shape the future of administrative law. The appointment of federal judges by President Trump has changed the federal judicial landscape, thereby increasing the possibility of a revived nondelegation doctrine. Part III seeks to identify the tension, if any, between the nondelegation doctrine and rulemaking procedures placed on federal agencies in part by the Administrative Procedure Act (APA). Lastly, Part IV will identify how a revived nondelegation doctrine may diminish the importance of the APA.

Before taking an in-depth look into the *Gundy* opinion and possible post-*Gundy* effects by the federal judiciary, it is vital to first understand the nondelegation doctrine's historical roots and foundation.

#### A. *Constitutional Principles and the Nondelegation Doctrine*

“The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of government.”<sup>11</sup> Article I of the Constitution established that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States . . . .”<sup>12</sup> Articles II and III share similar clauses vesting executive power in a President of the United States<sup>13</sup> and judicial power in one Supreme Court and inferior courts.<sup>14</sup> The United States is a government of enumerated powers, and each branch of government can only exercise the powers granted to it;<sup>15</sup> “[t]hus the Constitution recognizes distinct grants of governmental power that can be categorized as either legislative, executive, or judicial . . . .”<sup>16</sup> Though there is no explicit provision in the Constitution enumerating a commitment to the separation of powers, such a commitment is evident through constitutional structure, text, and provisions.<sup>17</sup>

A government modeled on the separation of powers is not an American invention, as it has long served as a defense against tyranny before America's

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11. *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

12. U.S. CONST. art. I, § 1.

13. *Id.* art. II, § 1, cl. 1.

14. *Id.* art. III, § 1.

15. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

16. Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 388 (2017) [hereinafter Whittington & Iuliano, *Myth of the Nondelegation Doctrine*].

17. *See id.* at 388–89 (suggesting Articles I, II, and III of the Constitution implicitly acknowledge the separation of powers principle).

founding.<sup>18</sup> John Locke, who strongly influenced the framers of the Constitution, once declared:

*The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. . . . And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, [nobody] else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them.*<sup>19</sup>

This notion is embodied in the Constitution as the governed chose to vest Congress with the authority to make all legislative decisions.<sup>20</sup>

The framers constructed a government of separate powers because they recognized the culmination of executive, legislative, and judicial powers in the same hands is the “very definition of tyranny.”<sup>21</sup> This government structure was insisted upon to ensure the people’s liberty would not be unduly restricted as separation of powers is viewed as an essential element of a free government.<sup>22</sup> The co-equal branches of government are to serve as a check on each other.<sup>23</sup> The Constitution’s design seeks to hold the government accountable to the People and secure the blessings of liberty.<sup>24</sup>

Nondelegation is a principal ratified by “We the People” in an effort “to form a more perfect Union.”<sup>25</sup> It serves as the very foundation of government from which the United States grew and prospered. When separate powers begin to co-mingle, protections breakdown and liberty is threatened.<sup>26</sup> The controversial issue is not whether the nondelegation

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18. *Loving v. United States*, 517 U.S. 748, 756 (1996); see generally Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003) [hereinafter Alexander & Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*] (discussing how the nondelegation doctrine dates back three centuries).

19. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 74–75 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690) (emphasis added).

20. U.S. CONST. art. I, § 1.

21. THE FEDERALIST NO. 47, at 308 (James Madison) (The Project Gutenberg ed., 2013).

22. THE FEDERALIST NO. 48, at 316–18 (James Madison) (The Project Gutenberg ed., 2013).

23. THE FEDERALIST NO. 51, at 333–34 (James Madison) (The Project Gutenberg ed., 2013).

24. THE FEDERALIST NO. 47, *supra* note 21, at 308.

25. U.S. CONST. pmb.

26. See THE FEDERALIST NO. 47, *supra* note 21, at 314 (James Madison) (equating tyranny to “an accumulation of all powers . . . , in the same hands”).

doctrine should exist.<sup>27</sup> It is more than likely most people agree that separation of powers to prevent tyranny and suppression of liberty is a good thing. Rather, the issue is the test the Supreme Court should use to determine whether a delegation is a constitutionally permissible grant of power from the legislative branch.<sup>28</sup>

## II. NONDELEGATION IN THE COURTS

### A. *Pre-Intelligible Principle*

The Court first addressed a nondelegation challenge during the Jefferson administration, but the Court did not elaborate greatly on the issue.<sup>29</sup> A short time later, the Court recognized the first nondelegation principle in *Wayman v. Southard*,<sup>30</sup> from which the doctrine would grow. The *Wayman* Court considered a challenge to a delegation by Congress to the federal judiciary, which granted rulemaking power to the courts for determining judicial procedure.<sup>31</sup> The Court held the statute did not impermissibly grant the judiciary legislative power as Congress provided the controlling general policy that courts should follow when establishing procedural rules.<sup>32</sup> In the opinion, Chief Justice Marshall recognized that “the maker of the law may commit something to the discretion of the other departments” while noting that it is a “delicate and difficult inquiry” to differentiate between permissible and impermissible delegations of power.<sup>33</sup>

Though the Court only provided vague boundaries for permissible delegation, it recognized that the legislature may enact a statute with general provisions, and those acting pursuant to the general provisions may “fill up

27. See *Gundy v. United States*, 139 S. Ct. 2116, 2119 (2019) (explaining the delegation of power provision found in the Constitution).

28. *Id.*

29. The challenge against the Non-Intercourse Act was designed to prevent the U.S. from taking sides between Britain and France. The Act allowed the president to lift the embargo against either country if either recognized the U.S.'s neutral commerce rights. An owner of a cargo ship challenged the Act as an impermissible delegation of legislative power to the executive. The Court did not specifically address the delegation challenge, but the opinion suggests the president was simply a fact-finder. See *Cargo of the Brig. Aurora v. United States*, 11 U.S. (7 Cranch) 382, 382–85 (1813) (declining to address whether the act created potential problems of excessive delegation).

30. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1820).

31. See *id.* at 19 (describing how the Process Act allowed Federal courts to adopt state court procedural rules which the court could make “alterations and additions” to).

32. *Id.* at 20 (rejecting defense counsel's argument that the clause would unconstitutionally confer legislative authority to the courts).

33. *Id.* at 22.

the details.”<sup>34</sup> The Court emphasized that Congress may never delegate power strictly and exclusively within Congress’s Article I enumerated grants of power.<sup>35</sup>

By the end of the 19th century, the Court was more willing to draw a line between permissible and impermissible delegations in *Marshall Field & Co. v. Clark*.<sup>36</sup> In *Field*, the petitioner claimed Congress unconstitutionally delegated power to the president by allowing him to initiate or suspend reciprocal tariffs on certain goods.<sup>37</sup> The *Field* Court was more explicit than the *Wayman* Court in stating the principle of the nondelegation doctrine: “[t]hat [C]ongress cannot delegate legislative power to the president is a principle recognized as vital to the integrity and maintenance of the system of government ordained by the [C]onstitution.”<sup>38</sup> However, the Act did not vest the president with the power of legislation because Congress determined the provisions of the Act and prescribed the duties to be levied, collected, and paid; the president only served as a fact-finder to determine when the Act of Congress should be enforced.<sup>39</sup> While the Court held it permissible to allow Congress to prescribe rules and apply the rules dependent on executive fact-finding, it would be several decades before the modern nondelegation standard took control of nondelegation jurisprudence.

#### B. *Rise of the Intelligible Principle*

As the Progressive Era brought about administrative expansion, the desire for agency expediency saw the Court characterize almost any delegation of power as non-legislative.<sup>40</sup> As the administrative state steadily grew, it was a challenge to the president’s ability to adjust custom duties to

34. *Id.* at 20.

35. *See id.* at 20 (“It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative”).

36. *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

37. The Tariff Act of October 1, 1890 authorized the President to initiate or suspend tariffs on sugar, molasses, coffee, tea, and animal hides after a finding that a foreign nation imposed tariffs on these goods produced in America. *Id.* at 680. The Court recognized that Congress frequently deferred to the President when setting standards for trade and commerce and that such routine deference was entitled to greater weight when determining if it was an impermissible delegation of authority. *Id.* at 682.

38. *Id.* at 692.

39. *See id.* at 692–94 (explaining the Act, in effect, made the president a “mere agent of the law-making department,” as he was only required to “ascertain and declare the event which its expressed will was to take effect”).

40. Whittington & Iuliano, *Myth of the Nondelegation Doctrine*, *supra* note 16, at 399.

import barium dioxide, which produced the modern “intelligible principle test.”<sup>41</sup>

In *Hampton*,<sup>42</sup> a delegation challenge arose after Congress enabled the president to adjust tariffs on imported goods under a flexible tariff provision, which sought to equalize production costs between the United States and foreign countries.<sup>43</sup> The Court upheld the delegation by reasoning that Congress would be unable to properly regulate tariffs without the Tariff Commission and the president.<sup>44</sup> In the opinion, Chief Justice Taft attempted to provide a clear standard by which to judge legislative delegations that became the basis for the doctrine today: “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.”<sup>45</sup>

Chief Justice Taft reiterated that Congress may never transfer legislative power to the president, as that breaches fundamental law, but Congress may seek assistance from another branch so long as the co-ordinate branches do not assume the others’ constitutional duties.<sup>46</sup> The executive did not exercise the power of legislation “because nothing involving the expediency or just operation of such legislation was left to the determination of the [p]resident.”<sup>47</sup> The president acted as a mere agent of the legislature tasked to declare when Congress’s expressed will would take effect.<sup>48</sup> Following *Hampton*, the intelligible principle was put to the test as the United States experienced significant social, economic, and political change brought on by the Great Depression.<sup>49</sup>

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41. The legal test most often used to apply the nondelegation doctrine was first established in the early 20th century. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (“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.”).

42. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).

43. See *id.* at 400–02 (describing how Congress mandated that the United States Tariff Commission investigate the trading conditions on behalf of the president, who would then make the final decision based on the Commission’s finding).

44. *Id.* at 404–05.

45. *Id.* at 409.

46. *Id.* at 406.

47. *Id.* at 409.

48. *Id.* at 410.

49. See Andrew Ziaja, *Hot Oil and Hot Air: The Development of the Nondelegation Doctrine Through the New Deal, a History, 1813–1944*, 35 HASTINGS CONST. L.Q. 921, 942 (2008) [hereinafter Ziaja, *Hot Oil*].

### C. *Intelligible Principle in Action*

For years after *Hampton*, the intelligible principle never defeated an act of Congress—until 1935, that is.<sup>50</sup> During the New Deal, Congress enacted the National Industrial Recovery Act of 1933 (NIRA), a broad-reaching statute that empowered the executive to create new administrative agencies to regulate significant portions of the U.S. economy to rebuild it.<sup>51</sup>

Acting under the authority of Section 9(c) of NIRA, President Roosevelt issued executive orders prohibiting interstate trade of petroleum oil extracted in excess of state quotas<sup>52</sup> and authorized the Secretary of the Interior to exercise all powers vested in the presidency to enforce the first order.<sup>53</sup> In *Panama Refining Co. v. Ryan*,<sup>54</sup> the Supreme Court was tasked with determining whether the authority Congress intended the President to exercise under NIRA, concerning, permitting, or prohibiting flows of oil, violated the nondelegation doctrine.<sup>55</sup> The Court first examined Section 9(c), the provision in question. The section authorized the President to stop the flow of oil in interstate or foreign commerce when the amount of oil exceeded the amount permitted by any state or state agency.<sup>56</sup> The Court stated:

Section 9(c) [did] not state whether or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. . . . It [did] not require any finding by the President as a condition of his action. . . . So far as this section is concerned, it [gave] the President an

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*and Hot Air*] (discussing how the National Industrial Recovery Act of 1933 (NIRA) delegated immense regulatory power to the president).

50. See Martin Edwards, *Who's Exercising What Power: Toward a Judicially-Manageable Nondelegation Doctrine*, 69 ADMIN. L. REV. 61, 69–70 (2016) (describing how the Court ruled Section 9(c) of NIRA violated the nondelegation doctrine for lack of intelligible principle).

51. *Id.* at 69; Ziaja, *Hot Oil and Hot Air*, *supra* note 49, at 942.

52. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 405–06 (1935).

53. See *id.* at 407 (explaining the punishment for violating the prohibition on the interstate transport of oil drawn in excess of state quotas was a fine up to \$500, up to six months in prison, or both).

54. *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

55. See *id.* at 414–15 (“[W]e look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President’s action; whether the Congress has required any finding by the President in the exercise of the authority to enact prohibition.”).

56. *Id.* at 406.

unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.<sup>57</sup>

The Court found that the President acted according to his own judgment in deciding whether to permit or prohibit the flow of oil, rather than per guidance promulgated by Congress.<sup>58</sup> The problem with Section 9(c) was that Congress neglected to include conditions or guideposts under which the President could control the distribution of petroleum.<sup>59</sup> Though finding this section violated the nondelegation doctrine, the Court reiterated that the Constitution grants Congress the flexibility needed to lay policies and establish standards.<sup>60</sup>

Several months later, NIRA faced a second loss after the Court struck down another provision of the statute in *A.L.A. Schechter Poultry Corp. v. United States*.<sup>61</sup> Section 3 of NIRA allowed trade and industrial associations to develop codes of fair competition, and with the President's approval, the code would become binding law.<sup>62</sup> When the code was presented to the President for his approval, he did not have to accept or reject it in toto. Instead, the President could impose conditions, provide exemptions, and create exceptions to provisions of the code that he deemed necessary—all of which created binding law.<sup>63</sup>

Acting under section 3, President Roosevelt issued an executive order creating the "Live Poultry Code" (the Code), which regulated the chain of sale from raising to slaughtering chickens.<sup>64</sup> A person's failure to comply with the Code was punishable by fines.<sup>65</sup> In *Schechter*, the Court was tasked

57. *Id.* at 415.

58. *Id.* at 418–19.

59. *See id.* at 415 (describing Section 9(c) as "brief and unambiguous" as it declared no policy regarding the transportation of excess petroleum, and "it [gave] the President unlimited authority to determine the policy and to lay down the prohibition").

60. *Id.* at 421.

61. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

62. *Id.* at 522–23 (stating a code would be approved "if the President [found] (1) that such associations or groups 'impose no inequitable restrictions on admission to membership therein and are truly representative,' and (2) that such codes are not designed 'to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy' of title I of the act." (citation omitted)).

63. *Id.* at 523.

64. *Id.* at 523–24.

65. *See id.* (noting the Code only covered a section of the Northeast including New York, New Jersey, and Connecticut). The Code regulated various aspects of the poultry industry including employee rights, minimum wage, and minimum work age. *Id.* at 521–22. Violation of the Code was a misdemeanor punishable by a fine up to \$500 for each offense. *Id.* at 523.

with determining whether the President's authority in establishing the Code was an unconstitutional delegation of legislative power.<sup>66</sup> In analyzing the question, the Court evaluated the limits that Section 3 placed on the exercise of presidential power.<sup>67</sup> The Court found that Section 3 of NIRA supplied "no standards for any trade, industry or activity."<sup>68</sup> Section 3 allowed the President unfettered authority to undertake the legislative act of approving and proscribing code that regulated trade and industry in the country.<sup>69</sup> As such, the Court held the President's code-making authority was an unconstitutional act that created "delegation running riot."<sup>70</sup>

The Court has not invoked the nondelegation doctrine since *Schechter*. Subsequently, the intelligible principle that Congress must provide is satisfied so long as it "delineates the general policy" for an agency to apply.<sup>71</sup> The intelligible principle standard is seemingly very broad as the Court afforded Congress flexibility to delegate power to administrative agencies to implement statutes that were characterized as "fair and equitable,"<sup>72</sup> "just and reasonable,"<sup>73</sup> or "in the public interest."<sup>74</sup> All of which are comprehensive general policy directives that can be construed in a number of ways.

Like the *Wayman* Court, the modern Court strongly recognizes that nondelegation is fundamental to the constitutional system, but it remains difficult to apply.<sup>75</sup> The Court hesitates and does not readily invoke the

66. The *Schechters* were indicted and convicted on eighteen counts under the Live Poultry Code. *Id.* at 519. It was on appeal that they challenged the act as an unconstitutional delegation of legislative power. *Id.* at 527–28.

67. *Id.* at 535, 538.

68. *Id.* at 541.

69. *Id.* at 541–42.

70. *Id.* at 553 (Cardozo, J., concurring).

71. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

72. *See Yakus v. United States*, 321 U.S. 414, 419–20 (1944) (allowing Congress to delegate authority under the Emergency Price Control Act to regulate commodity prices and control inflation during wartime).

73. *See Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 600 (1944) (allowing Congress to delegate authority to the Federal Power Commission to set rates for natural gas).

74. *See Nat'l Broad. Co. v. United States*, 319 U.S. 190, 224 (1943) (allowing Congress to delegate authority to the Federal Communications Commission to establish regulations for radio stations engaged in chain broadcasting).

75. *See Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (stating the nondelegation doctrine is not "readily enforceable by the courts"); *see also* Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in Clinton v. City of New York: More Than "A Dime's Worth of Difference"*, 49 CATH. U. L. REV. 337, 415–16 (2000) [hereinafter Huefner, *A Dime's Difference*] (discussing the Supreme Court's avoidance of using the nondelegation doctrine); Peter H. Schuck,

nondelegation doctrine as it has “never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”<sup>76</sup> As the Court’s centuries-old struggle to draw the line between permissible and impermissible delegation continues, it should come as no surprise that the success rate of nondelegation challenges in federal courts is virtually nonexistent.

#### D. *Success Rate of Nondelegation Challenges*

Though the Supreme Court has not employed the intelligible principle test of nondelegation to hold an act of Congress unconstitutional for several decades, leaving many to declare the doctrine as dead and gone, some argue the doctrine is alive and well—particularly in state courts.<sup>77</sup> State courts are by far the most popular venue for nondelegation challenges as they heard 85% of all the nondelegation challenges in the post-New Deal era.<sup>78</sup> When aggregated together, state and federal court nondelegation challenges succeed 15% of the time between 1940 and 2015.<sup>79</sup> This rate is comparable to the 17% success rate of nondelegation challenges from 1789 to 1939, the pre-intelligible principle era.<sup>80</sup> Such similar rates do not comport with the notion that the doctrine is dead. However, when examining the success rate for nondelegation challenges in federal courts over time, the contrast is striking.<sup>81</sup>

Between 1940 and 2015, only 3% of the 156 nondelegation challenges in federal courts were initially successful in invalidating federal action as an

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*Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 791 (1999) (stating the Court’s “line-drawing problem[]” has caused the Court not to implement a “robust nondelegation doctrine”).

76. *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting).

77. The authors compiled a database of state and federal nondelegation cases decided in a year divisible by five between 1940 and 2015 to create a representative sample of nondelegation cases post-New Deal. See Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 635–36 (2017) [hereinafter Iuliano & Washington, *The Nondelegation Doctrine: Alive and Well*] (finding the large majority of nondelegation cases during this time frame took place in state courts).

78. *Id.* at 636.

79. *Id.* at 635–36.

80. *Id.* at 636.

81. Compare Whittington & Iuliano, *Myth of the Nondelegation Doctrine*, *supra* note 16, at 426 (noting the invalidation rate of nondelegation challenges in federal courts after 1880), with Iuliano & Whittington, *The Nondelegation Doctrine: Alive and Well*, *supra* note 77, at 636 (noting the invalidation rate of nondelegation challenges in federal courts between 1940 and 2015).

unconstitutional delegation of power.<sup>82</sup> However, four of the five initially successful cases were reversed on appeal—leaving an actual success rate of 0.6%.<sup>83</sup> Meanwhile, the challenges to nondelegation in state courts maintained a comparable invalidation rate of 17% and 16%, respectively, during those time frames.<sup>84</sup>

An important distinction must be noted between federal and state nondelegation doctrine practice. Unlike the U.S. Constitution's inherent nondelegation principle, most state constitutions enumerate a specific nondelegation principle.<sup>85</sup> By enumerating such provisions in their constitutions, states make their commitment to the separation of powers clear<sup>86</sup> and provide a valuable tool for judicial review.<sup>87</sup> Since state constitutions contain nondelegation clauses in much greater detail than the U.S. Constitution, it is no surprise that state courts seldom cite the Constitution when discussing the nondelegation doctrine.<sup>88</sup>

While sharing the same spirit for protecting liberty by preventing tyranny, federal and state nondelegation doctrines are the same in name only, which is why there is a more robust application of the doctrine in state courts. The federal nondelegation doctrine's inherent nature and uncodified case law mandate may provide part of the reason why the doctrine is not active in the federal courts.

As the People's agents in Congress, the Constitution presupposes that congresspeople will exercise the legislative will independently, but the principle of nondelegation has never been understood to create a substantial

82. Iuliano & Whittington, *The Nondelegation Doctrine: Alive and Well*, *supra* note 77, at 636.

83. *Id.*

84. *Id.*

85. See TEX. CONST. art. II, § 1 (“The powers of the Government of the State of Texas shall be divided into three distinct departments . . . and no person, or collection of persons, being of one of these departments, shall exercise any powers properly attached to either of the others . . .”); S.C. CONST. art. I, § 8 (“In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct for each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.”).

86. Aside from creating a clear emphasis that state government is a system of separation of powers, many provisions in state constitutions forbid the passage of law contingent on any outside authority. Whittington & Iuliano, *Myth of the Nondelegation Doctrine*, *supra* note 16, at 416 (citing IND. CONST. art. I, § 25). Similarly, many state constitutions contain provisions explicitly forbidding the legislature to delegate any powers. *Id.* (referencing COLO. CONST. art. V, § 35).

87. Nevertheless, even with strong textual support preventing broad swaths of delegation, state courts are often still willing to defer to the legislature in determining when delegation is practical and necessary. *Id.* at 417.

88. *Id.*

burden for Congress.<sup>89</sup> The federal legislature undoubtedly will come across issues that are impracticable for it to answer without turning to a body of experts to fill up the policy details.<sup>90</sup> Therefore, the issue of permissible congressional delegation turns into a question of degree.<sup>91</sup> In Herman Gundy's mind, Congress went a degree too far when it delegated authority to the U.S. Attorney General in deciding how a legislative act would apply to pre-act offenders.<sup>92</sup>

### III. *GUNDY V. UNITED STATES* AND A FEVERISH DISSENT

#### A. *The Plurality Holding*

In *Gundy*, the Court ruled against Herman Gundy in a 4–1–3 plurality opinion.<sup>93</sup> In 2006, Congress passed the Sex Offender Registration and Notification Act (SORNA or the Act), which established a national, comprehensive sex offender registration system.<sup>94</sup> The Act imposes criminal penalties on convicted sex offenders who knowingly fail to register

89. *Id.*

90. *See* *St. Louis Consol. Coal Co. v. Illinois*, 185 U.S. 203, 211 (1902) (noting there would be no objection to delegating law-making power to experts in the field of mining for specific issues).

91. *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

92. *Gundy v. United States*, 139 S. Ct. 2116, 2122 (2019).

93. Justice Kagan announced the judgment of the Court and delivered the opinion which Justices Ginsburg, Breyer, and Sotomayor joined. Justice Alito concurred only in the judgment. Justice Gorsuch dissented with whom the Chief Justice and Justice Thomas joined. *Id.* at 2116. Many commentators have ridiculed plurality opinions as nothing more than “juridical cripples.” *See generally* Linda Novak, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 760 (1980) (citing John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59 (1968)). But behind the alleged juridical cripple is perhaps the greatest benefit of plurality opinions—judicial freedom and flexibility. *Id.* at 66. Pluralities provide greater judicial freedom because a Justice need not limit his views to obtain majority support; therefore, a Justice is free to engage in a creative analysis to tackle a divisive or undecided issue knowing that his attempt to create innovative views will not be binding on lower courts. *Id.*

Not only do pluralities provide Justices with more freedom, but they also allow greater freedom to the lower courts because they allow the judges the chance to distinguish future cases instead of always following strict precedent. *Id.* at 62. Such freedom among the Justices and judges aid in the sound development of the law by allowing individual positions to be well articulated instead of forcing a compromised agreement. Plurality opinions are often well written, coherent, and thoughtful explanations of the Justice's rationale to clarify the issue and convince others to respect and follow his position. As discussion increases with multiple rationales proposed, the law develops as jurists may coalesce around a specific proposition or train of thought. *See generally id.* (discussing the precedential value of plurality opinions for the Supreme Court).

94. *Gundy*, 139 S. Ct. at 2121 (2019) (referencing Sex Offender Registration and Notification Act, 34 U.S.C. §§ 20901–91).

and who travel in interstate commerce.<sup>95</sup> While Congress detailed registration requirements for sex offenders convicted after the Act's passage, it left the U.S. Attorney General the discretion to "specify the applicability" of the Act's requirements to sex offenders convicted before its passage.<sup>96</sup> The provision states:

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).<sup>97</sup>

Acting under his delegated authority, the then-Attorney General issued a final ruling in 2010 mandating SORNA's registration requirements applied in full to pre-Act offenders.<sup>98</sup> In 2005, Petitioner Gundy pleaded guilty under Maryland law to sexually assaulting a minor; thereafter, Gundy was released from prison in 2012 and moved to New York.<sup>99</sup> Gundy never registered as a sex offender and was subsequently convicted under SORNA for not satisfying the registration requirement.<sup>100</sup>

Gundy challenged his conviction, in part, as an unconstitutional delegation of legislative authority to the Attorney General by allowing him to decide how SORNA's registration requirements would apply to pre-Act offenders.<sup>101</sup> He challenged the provision as granting "unguided" and "unchecked" power to the Attorney General.<sup>102</sup> In determining if the Act provided an intelligible principle, the inquiry began with statutory interpretation to ascertain the statute's meaning to determine if executive discretion is sufficiently guided.<sup>103</sup> Only after the Court determined the meaning of the challenged provision could it decide whether the discretion

95. Sex offenders who fail to register can be imprisoned for up to ten years. *Id.* at 2121 (citing Failure to Register, 18 U.S.C. § 2250(a)).

96. *Id.* at 2122 (quoting Sex Offender Registration and Notification Act, 34 U.S.C. § 20913(d)).

97. *Id.* (quoting Sex Offender Registration and Notification Act, 34 U.S.C. § 20913(d)).

98. The Court refers to sex offenders who were convicted before SORNA's passage as "pre-Act offenders." *Id.* (quoting Sex Offender Registration and Notification Act, 75 Fed. Reg. 81849, 81850 (Dec. 29, 2010)).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 2123 ("[The provision] does not give the Attorney General anything like the 'unguided' and 'unchecked' authority that Gundy says.>").

103. *Id.* (citing *Whitman v. Am. Trucking Ass'ns Inc.*, 531 U.S. 457, 473 (2001)).

allowed was constitutional.<sup>104</sup> The plurality states that a fundamental canon of construction is to read the statute's words in context within the overall statutory scheme.<sup>105</sup> When tasked with a nondelegation challenge, the Court gives "narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."<sup>106</sup> Moreover, the Court often looks beyond the context and towards the statute's history and purpose to further determine the meaning of the language.<sup>107</sup>

The plurality determined section 20913(d) "require[d] the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible."<sup>108</sup> Justice Kagan found the court properly determined the provision's statutory meaning seven years earlier in *Reynolds v. United States*,<sup>109</sup> which "effectively resolved" the issue before the *Gundy* court.<sup>110</sup> The Court's holistic endeavor of statutory interpretation began with SORNA's declaration of purpose to create a comprehensive national sex offender database.<sup>111</sup> According to the plurality, the term "comprehensive,"<sup>112</sup> "could not fit the system SORNA created if the Attorney General could decline, for any reason or no reason at all, to apply SORNA to all pre-Act offenders."<sup>113</sup> Furthermore, the plurality contends that the Act's definition of sex

104. *Id.* at 2129.

105. *Id.* at 2126 (citing Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 666 (2007)).

106. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (citing *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980); *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974)).

107. *Gundy*, 139 S. Ct. at 2126 (2019) (citing *Maracich v. Spears*, 570 U.S. 48, 78 (2013)).

108. *Id.* at 2123 (citing *Reynolds v. United States*, 565 U.S. 432, 442–43 (2012)).

109. *See Reynolds v. United States*, 565 U.S. 432, 442 (2012) (noting SORNA's broad definition of "sex offender" "include[s] any 'individual who *was* convicted of a sex offense.'").

110. *Gundy*, 139 S. Ct. at 2124. In *Reynolds*, the Court determined whether the SORNA registration requirements applied to pre-Act offenders once the law was enacted by Congress or if the requirements did not apply until the Attorney General said they did. *Reynolds*, 565 U.S. at 437. The Court settled on the latter approach and held SORNA did not apply to pre-Act offenders until the Attorney General mandated the requirements apply. *Id.* at 435. In part, the Court reasoned that an instantaneous registration mandate for pre-Act offenders might not have been feasible, as the registration requirements largely diverged from state law. *See id.* at 440–41 (discussing the feasibility of automatically applying SORNA registration requirements to pre-Act offenders). To resolve difficulties, the Court determined Congress assigned to the Department of Justice the responsibility examine the issues and apply the registration requirements accordingly (i.e., as soon as feasible). *Id.* at 441.

111. *Gundy*, 139 S. Ct. at 2124 (noting *Reynolds* presumed it was Congress's intent for "SORNA's registration requirements to apply to pre-Act offenders.>").

112. The Court defined comprehensive to mean "something that is all encompassing or sweeping." *Id.* at 2126–27.

113. *Id.* at 2127.

offender—“an individual who was convicted of a sex offense”—uses past tense language, meaning the Act does not apply just to future offenders.<sup>114</sup> Justice Kagan found such construction of the words were supported by the legislative history as the need to register those convicted of sexual assault was a prime issue for Congress.<sup>115</sup>

Turning to back to Section 20913(d), when read as a whole, the text created a practical problem for Congress to apply the Act to pre-Act offenders because the Act assumed that offenders were in prison when, in fact, pre-Act offenders were not.”<sup>116</sup> Justice Kagan identified this problem as meaning SORNA required the Attorney General to resolve practical problems of registering pre-Act offenders by determining how to apply SORNA as opposed to whether to apply it to pre-Act offenders at all.<sup>117</sup> The contentions resulted in the plurality’s finding the “text, . . . context, purpose, and history, makes clear that the Attorney General’s discretion extends only to considering and addressing feasibility issues.”<sup>118</sup> In addressing the feasibility issues of the Act, the Attorney General is only determining administrative issues, and therefore, the Act is within constitutional bounds of delegation.<sup>119</sup> Yet again, the Court found the federal agency just determined the “how” element of a policy enacted by Congress: “Congress [can still] routinely [delegate] its legislative power, even though the doctrine pretends it does not.”<sup>120</sup> The tradition continues.

*Gundy* marked yet another moment in the Court’s nondelegation history where rationally minded individuals greatly differed as to the preferred outcome of the case. As expected, staunch opposition from other members of the Court met the plurality’s opinion.<sup>121</sup>

#### B. *An Invitation to Litigate?*

The plurality’s ruling securing a judgment against *Gundy* received support from Justice Alito’s concurrence.<sup>122</sup> Nevertheless, Justice Alito noted his discontent with how the Court has allowed agencies to promulgate rules

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114. *Id.*

115. *Id.*

116. *Id.* at 2128.

117. *Id.* at 2128–29.

118. *Id.* at 2123–24.

119. *Id.* at 2129–30.

120. Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 361 (2017).

121. *Gundy*, 139 S. Ct. at 2131.

122. *Id.* (Alito, J., concurring).

“pursuant to extraordinarily [capricious] standards.”<sup>123</sup> Furthermore, Justice Alito signaled his support for the Court’s revisiting and possibly revising their nondelegation approach in the future.<sup>124</sup> Though Justice Alito thought it would be “freakish”<sup>125</sup> to revisit the nondelegation approach with the *Gundy* case, at least three of his colleagues thought the time was right.<sup>126</sup>

### C. *The Gorsuch Dissent*

Justice Gorsuch strongly dissented to the plurality’s holding.<sup>127</sup> He criticized the plurality as having reimagined SORNA’s terms through statutory interpretation to conclude that Congress is not granting the Attorney General too much power.<sup>128</sup> He lambasted the plurality’s settlement on the feasibility standard as a “figment of the government’s (very recent) imagination” because Section 20913(d) says nothing about feasibility nor did the Department of Justice discuss feasibility in its rulemaking.<sup>129</sup> Even if SORNA directed the Attorney General to establish a comprehensive national system, he disagreed with the plurality’s interpretation of the word “comprehensive.”<sup>130</sup> In Justice Gorsuch’s view, SORNA’s wording gives the Attorney General unbridled power to determine the rules for up to a half-million pre-Act offenders in the U.S.<sup>131</sup>

Additionally, Justice Gorsuch notes that various Attorneys General have differing opinions on how SORNA should be applied to pre-Act

123. *Id.* at 2130–31 (Alito, J., concurring).

124. *See id.* at 2131 (Alito, J., concurring) (“If a majority of this Court were willing to reconsider the approach taken for the past 84 years, I would support that effort.”).

125. *Id.*

126. *Id.*

127. *See id.* (Gorsuch, J., dissenting) (“Today, a plurality of an eight-member Court endorses this extraconstitutional arrangement but resolves nothing.”).

128. *See id.* (Gorsuch, J., dissenting) (“[T]he plurality reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing off so much power to the Attorney General.”). Justice Gorsuch also seemingly criticized Congress for passing the problem of how SORNA would affect pre-Act offenders to the Attorney General to avoid “impos[ing] unpopular and costly burdens on States and localities . . .” *Id.* at 2131–32 (Gorsuch, J., dissenting).

129. *Id.* at 2145–46 (Gorsuch, J., dissenting).

130. *See id.* at 2146 (Gorsuch, J., dissenting) (citing 3 Oxford English Dictionary 632 (2d ed. 1989) (discussing how the word “comprehensive” should properly be interpreted in respect to creating a “comprehensive national system”)).

131. *Id.* at 2132 (Gorsuch, J., dissenting) (quoting Sex Offender Registration and Notification Act, 34 U.S.C. § 20913(d), “The Attorney General shall have the authority to . . . prescribe rules for the registration of any [pre-Act offender].”).

offenders.<sup>132</sup> As a result, he charges the fate of pre-Act offenders is constantly in limbo as SORNA's application to pre-Act offenders is subject to change at the pleasure of the current Attorney General.<sup>133</sup> Justice Gorsuch not only took issue with the nondelegation doctrine as applied in *Gundy*, but he also challenged the Court's approach to nondelegation as a whole.<sup>134</sup>

Recognizing the Court "must call foul when constitutional lines are crossed," Justice Gorsuch questioned what an appropriate nondelegation test should look like.<sup>135</sup> Though the government structure is established on the principle of separation of powers, Justice Gorsuch does acknowledge permissible acts of delegation.<sup>136</sup> However, he argues as the administrative state has grown, the "intelligible principle" test became grossly misunderstood and misused.<sup>137</sup>

In his view, the intelligible principle remark in *J.W. Hampton* was just another way to state the traditional rule that Congress may delegate to the executive branch to act as a fact-finder and fill in gaps for a controlling general policy enacted by Congress.<sup>138</sup> Instead of echoing the traditional rule, the phrase was isolated and eventually displaced prior Court rationale.<sup>139</sup> While it has been several decades since the Court has held a statute improperly delegated power without an intelligible principle,

132. *Id.* (Gorsuch, J., dissenting).

133. *See id.* (Gorsuch, J., dissenting) (detailing how different Attorneys General apply SORNA to pre-Act offenders as they come into office).

134. Justice Gorsuch began his argument by discussing the founders' commitment to establish a government where rulemaking authority rested on the consent of the people through their representatives in Congress. Central to the system of government is the separation of powers, which ensures the consent of the people to rulemaking authority is only exercised by those duly elected as their representatives in Congress. *See id.* at 2133–35 (Gorsuch, J., dissenting) (discussing the founders' intent to create a government of separate powers which he argues is not reflected in the Court's modern nondelegation approach).

135. *Id.* at 2135 (Gorsuch, J., dissenting).

136. First, he acknowledges that after Congress makes the policy decision regulating private conduct, it may refer to the executive branch to "fill up the details," so long as Congress's guidance is followed. *Id.* at 2136 (Gorsuch, J., dissenting). Second, after promulgating rules that govern private conduct, Congress may leave the application of the rules to executive fact-finding. *Id.* (Gorsuch, J., dissenting). Finally, executive and judicial branches may be assigned non-legislative responsibilities by Congress when the legislative authority overlaps with similar authority that the Constitution also vests in another branch of government. *Id.* at 2137 (Gorsuch, J., dissenting).

137. *See id.* at 2138–40 (Gorsuch, J., dissenting) ("This mutated version of the 'intelligible principle' remark has no basis in . . . the Constitution, in history, or even in the decision from which it was plucked.").

138. *Id.* at 2139 (Gorsuch, J., dissenting).

139. *Id.* at 2139–40 (Gorsuch, J., dissenting).

Justice Gorsuch highlights the Court's ability to regulate Congress's attempts to delegate power using different doctrines.<sup>140</sup>

Justice Gorsuch states three questions must be asked to determine whether a statute provides a true intelligible principle: "Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments?"<sup>141</sup> While SORNA fails to satisfy an intelligible principle standard in his view, Justice Gorsuch is adamant that applying separation of powers does not determine policy outcomes, but instead provides procedural protections for individual liberties.<sup>142</sup> Even though the *Gundy* Court declined to reevaluate the nondelegation standard, Justice Gorsuch remains hopeful that, in the future, with a full panel, the Court will ensure that Congress may obtain "considerable assistance from the executive branch" while upholding the separation of powers and ensuring individual liberties.<sup>143</sup> While *Gundy* lost his appeal with the plurality and concurring votes, he launched a last attempt to change the outcome with a hearing in front of a full Court.

#### D. *A Plea for Rehearing*

A ruling from the Supreme Court is not necessarily the end of the case as the parties may petition for a rehearing "within 25 days . . . of the judgment or decision."<sup>144</sup> A petition for rehearing should "state the grounds briefly and distinctly" and will only be granted if "a majority of the Court, [agrees] at the instance of" one who votes in the majority or concurrence.<sup>145</sup> Herman Gundy timely filed a petition for rehearing requesting all nine

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140. For example, under the major question's doctrine, the Court has been unwilling to let an agency fill in statutory gaps when the statutory scheme's central issue deals with a question of great political or economic significance. Additionally, Justice Gorsuch notes how it would be easy to reframe a nondelegation challenge as a void-for-vagueness challenge by asserting the act in question does not contain definite and precise standards for determining whether the will of Congress was followed. *Id.* at 2141–42 (Gorsuch, J., dissenting).

141. *Id.* at 2141 (Gorsuch, J., dissenting).

142. *See id.* at 2145 (Gorsuch, J., dissenting) ("[I]t is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation's course on policy questions like those implicated by SORNA.').

143. *Id.* at 2148 (Gorsuch, J., dissenting).

144. SUP. CT. R. 44.1.

145. *Id.*

members of the Court decide his case.<sup>146</sup>

In his petition, Gundy argued that the decision of the Court was essentially a tie of an equally divided eight-member court.<sup>147</sup> He asserts a rehearing is proper when it appears likely that a majority of the Court may be persuaded one way or the other upon rehearing—especially “when a new Justice . . . can break a tie.”<sup>148</sup> Gundy equates the outcome in his case to a tie—four justices in favor of SORNA without reservation and four justices expressing skepticism—which should be broken by a full nine-member court.<sup>149</sup>

However, this is not a well-drawn comparison. While Justice Alito stated he would support the Court’s reconsideration of the nondelegation approach,<sup>150</sup> it is improper to lump Justice Alito’s concurrence in with the dissent to create a “tie.”<sup>151</sup> The dissent finds the provision in SORNA is an unconstitutional delegation of power,<sup>152</sup> while Justice Alito states “it would be freakish to single out” this SORNA provision to reconsider the nondelegation approach.<sup>153</sup> Since Justice Alito favors a reconsideration of the nondelegation approach, but did not think it is was appropriate with the SORNA provision at issue, it is unlikely that he supported a rehearing in the case. Therefore, it comes as no surprise the Court denied Gundy’s petition for rehearing after it was relisted for conference several times<sup>154</sup> and a final judgment of the case was issued.<sup>155</sup>

It is worth noting that perhaps Justice Alito’s concurrence was also a strategic move on his part.<sup>156</sup> Though we will never know, this is likely part

146. After Justice Kennedy’s retirement at the time of oral argument, the Court had a temporary vacancy. Justice Kavanaugh joined the Court four days after it heard oral argument in the case. Petition for Rehearing at 1–2, *Gundy*, 139 S. Ct. 2116 (No. 17–6086), 2019 WL 3202508, at \*1–4.

147. *Id.* at \*3.

148. *Id.* (quoting EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 15.6(a) at 816 (9th ed. 2007)).

149. *Id.* at \*4.

150. *Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring).

151. *See id.* at 2131 (showing *Gundy* was decided by a plurality opinion).

152. *Id.* at 2143 (Gorsuch, J., dissenting).

153. *Id.* at 2131 (Alito, J., concurring).

154. *See* John Elwood, *Relist Watch*, SCOTUS BLOG (Nov. 19, 2019, 2:39 PM), <https://www.scotusblog.com/2019/11/relist-watch-154/> [<https://perma.cc/72JW-KXWM>] (cataloging the dates that Gundy’s petition for rehearing was relisted for conference).

155. *Gundy v. United States*, SCOTUS BLOG, <https://www.scotusblog.com/case-files/cases/gundy-v-united-states/> [<https://perma.cc/9AGJ-Y5KM>].

156. Perhaps Justice Alito chose to concur only in judgment because if he sided with the dissent, a 4–4 tie would have resulted in leaving the lower court’s decision in place and changing nothing. In a 4–4 tie, no opinion of the Court is written, which also means no dissenting opinions. Maybe

of the reason the petition was denied. Moreover, the Court's long-held custom that a new justice—"that is, those who did not participate in the original decision"—should not vote on a petition for rehearing.<sup>157</sup> This is likely in an attempt to prohibit the new justice from influencing a case decided before his or her arrival to the Court. As in prior petitions for a rehearing, this custom was followed, and Justice Kavanaugh took no part in the petitions' consideration.<sup>158</sup> As discussed in a later section, it is interesting to imagine how this case might have been decided had Justice Kavanaugh participated. For the time being, the intelligible principle is the standard by which federal courts determine nondelegation challenges.

#### E. *A Divided Court*

The Court agreed on one thing in *Gundy*—Article I of the Constitution prohibits the delegation of legislative power to administrative agencies. Nevertheless, the deep division between the Justices comes from where and how to draw the line of what is “legislative power.”<sup>159</sup> Such a division from the Court will have lingering effects.

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Justice Alito purposefully chose to concur so that Justice Gorsuch could write his dissent calling for a reconsideration of the nondelegation approach. After all, it is Justice Gorsuch's dissent that advocated for reinvigorating the nondelegation debate. Along with Justice Alito's welcoming future challenges to the doctrine, none of this would have occurred had Justice Alito voted with the dissent.

157. Brian De Vito, Comment, *When U.S. Supreme Court Decisions Are Not Final: An Examination of the Rehearing Rule and the Court's Application of it in Kennedy v. Louisiana*, SETON HALL L. 17 (2010), [https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1035&context=student\\_scholarship](https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1035&context=student_scholarship) [<https://perma.cc/HN8V-4BU9>] [hereinafter De Vito, *Examination of the Rehearing Rule*] (citing EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 816–17 (9th ed. 2007)).

158. *Gundy*, 139 S. Ct. at 2130.

159. While the Justices have failed to coalesce on when or how to draw a nondelegation line, many others have articulated their approach to the nondelegation issue. Professor Schoenbrod says the critical question to determine permissible delegations is whether the statute sets out rules or goals. To him, the statute must set out rules of conduct and not just a set of goals for the executive to work towards. Congress cannot merely announce ambition for the executive to seek; the Constitution demands to specify how and to what extent the executive should realize the ambition. To him, a “rules statute” is enough to determine permissible delegations, therefore qualifying as valid legislation. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 372–73 (2002) (citing David Schoenbrod, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 181–89 (1993)). Professor Redish proposed a “political commitment” approach to nondelegation issues. Since lawmakers are the People's agents in Congress, he proposes that statutes must contain a meaningful political commitment level. Statutes that do not make such a commitment should be considered as a simple mandate to the Executive Branch to create policy. A court can determine whether a statute announces a political commitment by ascertaining if the statute is more likely to inform voters about their representative's position based on whether she voted for or against the act. *Id.* at 374–75 (citing Martin H. Redish, THE CONSTITUTION AS POLITICAL STRUCTURE

In precedential fashion, the case turned on a narrow construction of the statutory scheme at issue to seemingly avoid an unconstitutional delegation issue. While *stare decisis* mandates the narrow construction of the statutory scheme, such an approach is not without strong criticism.<sup>160</sup> Though the Court has never second-guessed Congress regarding the degree of policy judgment left to agencies, the narrow construction given to statutory schemes heightens the level of deference to the point of always ascertaining an intelligible principle even when a challenged provision, like Section 20913(d), contains zero boundary language.

Justices Kagan and Gorsuch share “a fundamental disagreement . . . on how to operationalize nondelegation as a matter of constitutional doctrine.”<sup>161</sup> The plurality seeks to maintain the status quo of the deferential intelligible principle while the dissent favors a set of more formalized rules for future dealing with administrative law to create a more robust distinction between fact-finding and determining elements of policy within executive agencies.

Though Justice Gorsuch articulated a powerful dissent in *Gundy*, what difference does it make? Dissenters are the “losers,” so why do many consider his dissent to be so important?

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136–37 (1995)); Martin H. Redish & Elizabeth J. Cisar, *If Angels Were to Govern: The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 453–56 (1991); see also Brief for the Pacific Legal Foundation, *supra* note 9, at 19–22 (advocating the Court adopt void for vagueness standards in its application and evaluation of the nondelegation doctrine).

160. Narrow construction of a statutory scheme may be worthy of strong condemnation on multiple fronts. First, by “narrow[ly] [construing] a statute by rewriting it” using legislative history and purpose, the Court “threatens to unsettle the legislative choice implicit in adopting a broadly worded statute.” Bamzai, *Delegation and Interpretive Discretion*, *supra* note 5, at 175 (quoting John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228 (2000)). There is a fine line between statutory interpretation and statutory rewriting. While a court must engage in interpretation to fully ascertain the meaning of a statute, a court can just as easily impute the background of the statute to conform with its predetermined “interpretation.” Second, some criticize constitutional avoidance as creating tension with the *Chevron* doctrine. *Chevron* “reasoned that Congress [might] enact open-ended statutes” because the federal agencies tasked with enforcing the statutes possess greater expertise in for interpreting and administering the statute. *Chevron*’s approach shows the Court’s support for deference to administrative agencies when the agencies are implementing a broad statute. Yet, when evaluating constraints on delegations of power in broad statutes, the Court engages in a narrow construction of statute for nondelegation purposes. *Id.* at 176 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984)). Such an approach with the nondelegation doctrine contradicts the approach mandated by the *Chevron* doctrine because an agency seeks deference by asking for a broad interpretation of a statute yet nondelegation mandates a narrow construction.

161. *Id.* at 167.

F. *What Purpose Do Dissents Provide?*

Historically, judicial dissents serve as a protest by the losing side as they spar with the majority or plurality's rationale.<sup>162</sup> Perhaps dissents serve a greater function than just a paper protest. For example, the careful crafting of a dissent creates an intellectual exchange that often enhances the quality of court opinions.<sup>163</sup> Opinions of the Court are not always as coherent and complete as they appear, and dissents serve as a spotlight on the shaky or unclear reasoning of the Court as Justices seek to create the ideal precedential rationale for lower courts.<sup>164</sup>

An essential role dissents play is to “push[] the reasoning of future cases” closer to the rationale of the dissenter's view.<sup>165</sup> A dissenter can accomplish this by questioning elements of the majority's or plurality's rationale and advocating a sounder approach to the issue.<sup>166</sup> The law is shaped by new understandings that a dissent contributes to as the dissenter seeks to clarify differing rationales to create a clearer result.<sup>167</sup> As dissents question the Court's opinion, the exchange of ideas often clarifies and helps develop the law.

When it comes to plurality opinions, dissents are often considered by lower court judges while attempting to determine which rationale should carry precedential effect.<sup>168</sup> This is where Justice Gorsuch's dissent is likely to have the most impact. The intelligible principle remains the standard that courts use to evaluate nondelegation challenges; however, the dissent is likely to cause others to question whether the current intelligible principle is the best approach.

Justice Gorsuch criticized the intelligible principle as too weak while favoring delegation that allows another branch to fill up a statute's details.<sup>169</sup> Though differing on the degree of deference afforded to statutory delegation, the plurality and dissent converge on the same fundamental analysis as both assess the boundaries to cabin executive

162. Randall T. Shepard, *Notable Dissents in State Constitutional Cases: What Can Dissents Teach Us?*, 68 ALB. L. REV. 337, 339 (2005).

163. *Id.* at 338.

164. *Id.* at 340.

165. *Id.* at 342–43.

166. *Id.* at 343.

167. *Id.* at 347–48.

168. See Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 808–18 (2017) (discussing three different ways lower court judges can determine the precedential force of a plurality opinion).

169. *Gundy v. United States*, 139 S. Ct. 2116, 2143 (2019) (Gorsuch, J., dissenting).

discretion.<sup>170</sup> It is Justice Gorsuch's advocacy for more robust delegation requirements that is likely to shape the future of administrative law as courts encounter more nondelegation cases, perhaps due in part to Justice Alito's calling for such challenges.<sup>171</sup>

In calling out the plurality's constitutional fouts, Justice Gorsuch's dissent sparked a conversation on how nondelegation should look in the future. Either Congress or the courts can narrow the scope of delegated power. Naturally, a lower court may find a delegation issue if the judge shares a similar view with Justice Gorsuch. The number of judges with similar views in the federal judiciary is likely growing thanks to the current presidential administration.

As President Trump continues to appoint new federal judges, the federal judiciary may soon contain a majority of judges who, like Justice Gorsuch, favor strong separation of powers and a more robust nondelegation doctrine. As a result, perhaps a future approach to nondelegation will look a lot more formalized, as Justice Gorsuch promotes.

#### IV. A CHANGING FEDERAL JUDICIARY

The authority vested in President Trump via expressed enumerations in the Constitution can be categorized as: martial,<sup>172</sup> diplomatic,<sup>173</sup> executive,<sup>174</sup> legislative,<sup>175</sup> and judicial.<sup>176</sup> President Trump's ability to shape the federal judiciary will leave his mark on American law long after he is no longer president.<sup>177</sup> The President's appointment power allows him to "legitimately attempt to influence the outcome of cases in ways that agree

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170. Bamzai, *Delegation and Interpretive Discretion*, *supra* note 5, at 168.

171. *Gundy*, 139 S. Ct. at 2143 (Gorsuch, J., dissenting).

172. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 1 (stating the president of the United States is the Commander in Chief of the United States military forces).

173. *See, e.g., id.* art. II, § 3, cl. 4 (stating the president of the United States shall receive ambassadors and public ministers).

174. *See, e.g., id.* art. II, § 1, cl. 1 (stating the president of the United States is vested with executive power).

175. *See, e.g., id.* art. II, § 3, cl. 1 (stating the president of the United States shall report the State of the Union to Congress from time to time).

176. *See, e.g., id.* art. II, § 2, cl. 2 (stating the president of the United States shall have power to appoint judges to the Supreme Court).

177. *See* Stacy Hawkins, *Trump's Dangerous Judicial Legacy*, 67 UCLA L. REV. DISCOURSE 20, 33–34 (2019) ("Trump's judicial legacy is likely to be felt for generation to come and will be difficult to reverse over the next several successive presidential administrations.").

with [his] political views.”<sup>178</sup> While on the campaign trail, before Trump became president, he promised to nominate conservative judges picked in coordination with the Federalist Society.<sup>179</sup> The Federalist Society brands itself as:

[A] group of conservatives and libertarians . . . founded on the principles . . . that the separation of governmental powers is central to [the] Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.<sup>180</sup>

Of course, the President’s nominees must be approved before taking the bench,<sup>181</sup> but with a Republican-controlled Senate that has clearly not been an issue.<sup>182</sup>

President Trump has appointed three jurists to the Supreme Court—Justices Gorsuch, Kavanaugh, and Barrett—all of whom were suggested to the President by the Federalist Society.<sup>183</sup> Having been recommended by the Federalist Society, it is safe to say these Justices strongly support the separation of powers and the Constitution.<sup>184</sup> Justice Gorsuch’s view of the law did not bring much change to the Court as he replaced the late-

178. Quinn W. Crowley, *Sticks, Stones, and So-Called Judges: Why the Era of Trump Necessitates Revisiting Presidential Influence on the Courts*, 94 IND. L.J. SUPP. 13, 16 (2018) [hereinafter Crowley, *Sticks, Stones, and So-Called Judges*] (citing Stephen M. Engle, AMERICAN POLITICIANS CONFRONT THE COURT: OPPOSITION POLITICS AND CHANGING RESPONSES TO JUDICIAL POWER 323 (2011)).

179. Ian Millhiser, *What President Trump Has Done to the Courts, Explained*, VOX (Dec. 19, 2019), <https://www.vox.com/policy-and-politics/2019/12/9/20962980/trump-supreme-court-federal-judges> [<https://perma.cc/F35M-XPCR>]; see also Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 LAW & SOC. INQUIRY 1698, 1704–05 (2018) (discussing the list put together with the help of the Federalist Society and released by then-candidate Trump, which consisted of twenty-one potential Supreme Court nominees to replace the late Justice Scalia). Such action is not unusual though, as presidents do not have personal knowledge of specific nominees and therefore reach out for advisors and external sources for recommendation. Crowley, *Sticks, Stones, and So-Called Judges*, *supra* note 177, at 28 (citing Lee Epstein et al., *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices*, 56 DRAKE L. REV. 609, 611 (2008)).

180. Southworth, *supra* note 179, at 1715.

181. See Carl Tobias, *President Donald Trump and Federal Bench Diversity*, 74 WASH. & LEE L. REV. ONLINE 400, 403 (2018) (discussing the roles the Senate and other departments and organizations play in determining whether the nominee should be allowed to take the bench).

182. *Id.* at 413.

183. Southworth, *supra* note 179, at 1715; Ben Schreckinger, *‘She’s Been Groomed for this Moment’: Amy Barrett’s Supreme Court Preparation Began Early*, POLITICO (Sept. 20, 2020, 10:24 PM), <https://www.politico.com/news/2020/09/20/amy-coney-barrett-supreme-court-419219> [<https://perma.cc/3HPX-R8XH>].

184. Southworth, *supra* note 179, at 1713.

Justice Scalia, an original sponsor and member of the Federalist Society, a man with whom he shared many of the same viewpoints.<sup>185</sup>

President Trump's appointment of Justice Kavanaugh, a hardline conservative, has changed the dynamic of the Court as he replaced Justice Kennedy, a moderate conservative.<sup>186</sup> Moreover, the President's appointment of Justice Barrett, another hardline conservative, to fill the seat left by late-Justice Ruth Bader Ginsburg, a liberal icon<sup>187</sup> and notorious judicial activist,<sup>188</sup> solidified a conservative majority on the Court.<sup>189</sup> These appointments pushed the Court further to the right as these conservative jurists, with life tenure on the Court,<sup>190</sup> are young and will remain on the Court shaping the law long after President Trump leaves office. Though when Gundy's case was argued before the Court, the Court had yet to move further right.<sup>191</sup>

#### A. *A Missing Justice*

It is important to note that Justice Kavanaugh had not yet taken his seat on the Court at the time of the *Gundy* decision and therefore played no role in the case.<sup>192</sup> Before taking his seat on the Court, Justice Kavanaugh's work shows a jurist who takes seriously separation of powers and favors a constrained ability for executive agencies to regulate

185. *Id.*

186. Millhisser, *supra* note 179; see also Hawkins, *Trump's Dangerous Judicial Legacy*, *supra* note 177, at 22 (2019) (stating there was an ideological shift in the Supreme Court with the retirement of Justice Kennedy).

187. Lisa Hirshman, *Book Excerpt: Sisters in Law: How Sandra Day O'Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World*, 40 HARBINGER 69, 70, 72–73 (2015).

188. Keith E. Whittington, *The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 NOTRE DAME L. REV. 2219, 2220 (2014).

189. Seung Min Kim, *Senate Confirms Barrett to Supreme Court, Cementing Its Conservative Majority*, WASH. POST (Oct. 26, 2020, 8:26 PM), [https://www.washingtonpost.com/politics/courts\\_law/senate-court-barrett-trump/2020/10/26/df76c07e-1789-11eb-befb-8864259bd2d8\\_story.html](https://www.washingtonpost.com/politics/courts_law/senate-court-barrett-trump/2020/10/26/df76c07e-1789-11eb-befb-8864259bd2d8_story.html) [<https://perma.cc/TCA7-U5EP>].

190. See U.S. CONST. art III, § 1 (stating that judges on the Supreme Court and inferior courts hold their position “during good behavior”).

191. Erwin Chemerinsky, *Chemerinsky: How the Roberts Court Could Alter the Administrative State*, ABA J., <http://www.abajournal.com/news/article/chemerinsky-the-roberts-court-could-alter-the-administrative-state> [<https://perma.cc/4MBF-24ND>].

192. *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019). President Trump nominated Justice Kavanaugh to the Court to fill the seat by retiring Justice Kennedy, but at the time of *Gundy* the Senate had not yet confirmed Justice Kavanaugh. Southworth, *supra* note 179, at 1705.

broadly.<sup>193</sup> The addition of Justice Kavanaugh to the bench caused commentators to see a new direction for administrative law coming from the Court.<sup>194</sup> Like Justice Gorsuch, Justice Kavanaugh's record shows he typically urges less judicial deference to federal administrative agencies' decisions.<sup>195</sup>

Recently, Justice Kavanaugh concurred in a denial of certiorari in a petition that raised the same statutory interpretation issue the Court addressed in *Gundy*.<sup>196</sup> Certiorari was denied because the *Gundy* Court already answered the question. Nevertheless, Justice Kavanaugh acknowledged: "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."<sup>197</sup> This shows Justice Kavanaugh silently questions the current doctrine because if he agreed with the current approach, he would not find that it warrants further consideration. Perhaps his concurrence is like Justice Alito's in that it welcomes future delegation challenges by announcing his willingness to question the Court's approach should another delegation question come before the Court.<sup>198</sup> If Justice Kavanaugh participated in the *Gundy* decision, the outcome might have been different as all signs point to his favoring a strong application of the nondelegation doctrine like Justice Gorsuch.<sup>199</sup>

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193. Christopher Walker, *Judge Kavanaugh on Administrative Law and Separation of Powers*, SCOTUS BLOG (July 26, 2018, 2:55 PM), <https://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/> [<https://perma.cc/4EYW-LE2J>].

194. See Chemerinsky, *supra* note 191 ("With Kavanaugh on the bench, it is easy to see five justices who will be willing to revive the nondelegation doctrine and bring about a dramatic change in administrative law."); see also Yoo & Phillips, *supra* note 8 (discussing how the current administrative state does not comport with the vision of the founders and how the addition of Justice Kavanaugh to the Court may result in the Court reigning in the administrative state).

195. Chemerinsky, *supra* note 191.

196. *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring).

197. *Id.*

198. Chemerinsky, *supra* note 191.

199. Prior to his appointment to the Supreme Court, Justice Kavanaugh served as a judge on the D.C. Circuit Court of Appeals—the court which hears the most administrative law cases in the United States. During his twelve years on the bench for the D.C. Circuit, he heard over 300 cases which clearly show he is a jurist committed to separation of powers like Justice Gorsuch. He advocates for reading the precise wording of constitutional text while being mindful of its history and tradition. In doing so, he believes it ensures each branch stays constrained by its enumerated powers and prohibits infringement upon other branches while protecting individual liberty. *Judge Kavanaugh and the Constitution*, SENATE RPC (Aug. 28, 2018), <https://www.rpc.senate.gov/policy-papers/judge-kavanaugh-and-the-constitution> [<https://perma.cc/5HBT-FXKC>]. Having heard over 300 cases, one can see Justice Kavanaugh's commitment to separation of powers in his writings from the court. See, e.g., *U.S. Telecom Ass'n v. Fed. Comm'n's Comm'n*, 855 F.3d 381, 419 (2017) (Kavanaugh, J.,

B. *Justice Barrett on Nondelegation*

Unlike Justice Kavanaugh, Justice Barrett's views on the administrative state—namely nondelegation—remain relatively unknown.<sup>200</sup> This is partly due to Justice Kavanaugh's serving on the D.C. Circuit before his nomination, the court which most contributes to administrative law;<sup>201</sup> in contrast, Justice Barrett served on the Seventh Circuit before her nomination. Nevertheless, she is an originalist like the late-Justice Scalia, a mentor for whom she clerked, and was a member of the Federalist Society, an organization that emphasizes the importance of the nondelegation principle.<sup>202</sup>

Although Justice Barrett's opinions are limited, she has acknowledged exceptions to the nondelegation doctrine exist.<sup>203</sup> She has also stated “the notoriously lax ‘intelligible principle’ test reflects the Court’s conclusion that the decision of how to carry out routine social and economic policy belongs almost entirely to Congress.”<sup>204</sup> This indicates Justice Barrett may be willing to revisit the nondelegation doctrine in limited settings, but may not partake in a total revision like Justice Gorsuch advocates for his in *Gundy* dissent. Regardless, Justice Barrett's approach to the administrative state and nondelegation is somewhat inconsequential as she will only add to a majority if she shares her colleagues' views on the matter.

The Court seemingly has the power to change the nondelegation doctrine to a more formalized approach with at least a five-member majority. The position of Chief Justice Roberts and Justices Gorsuch and Thomas are known because of the dissent in *Gundy*. Justice Kavanaugh is likely to support the same effort. Furthermore, Justice Alito made it clear in his *Gundy* concurrence that he is open to reevaluating nondelegation. The

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dissenting) (explaining the president does not have free standing authority to write rules and only may act pursuant to grants of authority from Congress); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 688 (2008) (Kavanaugh, J. dissenting) (discussing the importance of separation of powers that the founders so cautiously established).

200. Shannon Osaka, *Amy Coney Barrett's Confirmation Could Revive This Hidden Doctrine—and Derail Climate Action*, GRIST (Oct. 26, 2020), <https://grist.org/politics/this-hidden-doctrine-could-stymie-climate-action-under-the-new-supreme-court-with-amy-coney-barrett/> [https://perma.cc/3FJG-V297] [hereinafter Osaka, *Derail Climate Action*].

201. Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L.J. 779, 781 (2002).

202. Osaka, *Derail Climate Action*, *supra* note 200.

203. See Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 317 (2014) (“[T]he Suspension Clause stands as an exception to the nondelegation doctrine, which emphasizes the extremely broad leeway that Congress enjoys in assigning responsibilities to the Executive Branch.”).

204. *Id.* at 318.

Court likely has a majority supporting a more formal approach to nondelegation, with the ability to tailor administrative law the next time the issue is before the Court.

With some Justices hopeful for another nondelegation challenge, the nondelegation doctrine may soon find itself reinvigorated to its former 1935 glory.<sup>205</sup> With former Vice President Joseph Biden's election to the Presidency,<sup>206</sup> President Trump will not fill any more Supreme Court seats. Although President Biden may prevent a reinvigorated nondelegation doctrine from coming to fruition.<sup>207</sup> Yet, to get to the Court, a case must first start in the lower courts, another area where President Trump has made a significant impact.

### C. *The Lower Federal Courts*

President Trump's biggest impact on the federal judiciary is greatly felt in the lower courts as he inherited an unusually large number of federal judge vacancies.<sup>208</sup> Continuing to work in lockstep with the Federalist Society, President Trump set records by filling roughly 25% of the federal judiciary with his nominees within his first two years in office.<sup>209</sup> President Trump appointed more federal appellate judges than any other president in history—appointing forty-eight circuit court judges—in less than three years.<sup>210</sup>

205. Yoo & Phillips, *supra* note 8.

206. Scott Detrow & Asma Khalid, *Biden Wins Presidency, According to AP, Edging Trump in Turbulent Race*, NPR (Nov. 7, 2020, 11:26 AM), <https://www.npr.org/2020/11/07/928803493/biden-wins-presidency-according-to-ap-edging-trump-in-turbulent-race> [<https://perma.cc/B929-Y94B>].

207. There is much speculation to whether President Biden will attempt to undo the conservative stronghold on the federal judiciary secured under former-President Trump. Many speculate that President Biden, along with the help of Congress, may attempt to stack the Supreme Court to obtain a liberal majority or strip the federal courts of jurisdiction on particular issues. Christopher K. Sprigman, *A Constitutional Weapon for Biden to Vanquish Trump's Army of Judges*, THE SOAPBOX (Aug. 20, 2020), <https://newrepublic.com/article/158992/biden-trump-supreme-court-2020-jurisdiction-stripping> [<https://perma.cc/89QY-FRPE>]. This would certainly be an unprecedented change to the modern federal judiciary that may rob the judicial branch of its apolitical and co-equal status. Such a dramatic change in an attempt to liberalize the federal judiciary may leave the nondelegation doctrine in exile for another eighty-five years.

208. Hawkins, *supra* note 176, at 29.

209. *Id.*

210. *Id.*; see also Millhisser, *supra* note 178 (“At [a similar point] point in the Obama presidency, Obama had appointed only 24 court of appeals judges, meaning that Trump is appointing appellate judges twice as fast as Obama. At a similar point in their presidencies, President George W. Bush had filled only 30 seats on the federal appellate bench; President Clinton, 27; President George H.W. Bush, 31; and President Reagan, 23.”).

The record-setting amount in this short period is significant as one in every four federal circuit court of appeals judge is now a Trump appointee,<sup>211</sup> leading to “flipping” multiple circuit courts with Republican-appointed majorities.<sup>212</sup> President Trump has made quick use of his appointment powers to change the circuit courts’ judicial philosophy. This is significant because, as Justice Sotomayor once quipped, “the [circuit] court of appeals is where policy is made.”<sup>213</sup> While courts do not “make” policy, they certainly shape the law as many laws are broad and unclear. As the judicial philosophy of the circuit courts becomes more conservative with President Trump’s appointments, their philosophy will be reflected in the law’s interpretation.

Justice Alito’s concurrence in *Gundy* is a welcome invitation to challenge broader statutes as unconstitutional delegations of power to restore the proper separation of powers articulated in Justice Gorsuch’s dissent.<sup>214</sup> Emboldened by *Gundy*, such challenges are likely to soon end up in a circuit court of appeals. While the Supreme Court is the court of last resort for a select few, a circuit court of appeals is where many cases end. In 2018, the Supreme Court heard only seventy-six cases, while the twelve circuit courts of appeals had 49,363 filings in total.<sup>215</sup> This means for thousands of cases a year, the judges on the circuit court are the final arbiters of an issue. As the court’s dynamics change with the addition of judges possessing conservative judicial philosophy, circuit courts will likely come to different conclusions on the same issue—like nondelegation.

Conservative judicial philosophy favors a strict construction of the Constitution, adhering to the framers’ original intent.<sup>216</sup> As such, since the

211. Colby Itkowitz, *1 in Every 4 Circuit Court Judges Is Now a Trump Appointee*, WASH. POST (Dec. 21, 2019, 6:32 PM), [https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fa1e98-2336-11ea-bed5-880264cc91a9\\_story.html](https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fa1e98-2336-11ea-bed5-880264cc91a9_story.html) [<https://perma.cc/2UR8-KVNQ>].

212. See Tim Ryan, *Trump Flips Another Circuit to Majority of GOP Appointees*, COURTHOUSE NEWS SERV. (Nov. 20, 2019), <https://www.courthousenews.com/trump-flips-another-circuit-to-majority-gop-appointees/> [<https://perma.cc/58JF-DJ2C>] (stating the Second, Third, and Eleventh Circuit Courts of appeals now have a majority of Republican appointed judges after President Trump’s nominees were confirmed).

213. Millhiser, *supra* note 178.

214. *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring) (“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.”).

215. Itkowitz, *supra* note 211.

216. Randy E. Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL’Y 273, 275 (1987).

Constitution vests all legislative power in Congress, conservative judges strictly construe this provision, limiting the scope of the legislature's ability to delegate. Judges with a stronger conservative judicial approach, like the ones appointed by President Trump, are likely to share views like Justice Gorsuch and favor a more formalized approach to nondelegation.

The Supreme Court often takes cases to resolve circuit court splits—the circumstance when two or more circuit courts arrive at a different conclusion on the same issue.<sup>217</sup> If the same statute was challenged as an unconstitutional delegation of power in separate circuit courts and the courts differed on their application of the nondelegation doctrine, we may see another nondelegation case before the Supreme Court in the next few years. With President Trump's influence on how the lower courts will interpret the law, it is likely the difference in interoperative approaches to nondelegation are growing and will lead to circuit splits. Chief Justice Roberts and Justices Gorsuch, Thomas, Alito, and Kavanaugh seem ready to address another nondelegation issue and tailor the law's approach to strengthen the constitutional command of separation of powers.

However, suppose the nondelegation doctrine was strengthened, requiring statutes to contain a more formalized delegation of power, as Justice Gorsuch suggests. Thus, forcing Congress, not an executive agency, to make fundamental policy judgments. In that case, it is likely to create tension with the current Administrative Procedure Act.

#### V. THE ADMINISTRATIVE PROCEDURE ACT AND NONDELEGATION

The current expansive and ever-growing administrative state is founded on two documents—the Constitution and the Administrative Procedure Act.<sup>218</sup> Regulations promulgated by government agencies created within the discretion delegated to them by Congress play an everyday role in American lives.<sup>219</sup> Strikingly, by the end of 2016, the Code of Federal Regulations contained tens of thousands of rules totaling more than 175,000

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217. *Circuit Split*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/circuit\\_split](https://www.law.cornell.edu/wex/circuit_split) [<https://perma.cc/XNQ7-VML5>].

218. Bamzai, *Delegation and Interpretive Discretion*, *supra* note 5, at 166.

219. See Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 122 (2016) (mentioning everyday situations in which Americans may encounter regulation promulgated by a federal agency).

pages.<sup>220</sup> In 2016 alone, with power delegated to them by Congress, federal administrative agencies filled over 95,000 pages of the *Federal Register* with proposed rules, notices, and over 3,800 final rules promulgated by agencies—an increase from the 3,410 final rules promulgated in 2015.<sup>221</sup> In contrast, during that same two year period, Congress only passed 329 public laws taking up a modest, by comparison, 3,036 pages in the *Statutes at Large*.<sup>222</sup> This illustrates the enormous amount of delegation from Congress to federal agencies. The People’s representatives give unelected bureaucrats the power to promulgate thousands of rules with the force of law to dictate Americans’ daily lives.

“Congress is the constitutional body of the administrative state.”<sup>223</sup> As Justice Gorsuch recognized in his dissent, Congress often delegates to avoid political responsibility for unpopular decisions. Delegation through broad statutes allows legislators to avoid confronting “hard political decisions which underlie legislative precision.”<sup>224</sup> This avoidance corrupts a fundamental principle of nondelegation—accountability.<sup>225</sup> As delegation increases, political accountability decreases.<sup>226</sup> Such corruption of fundamental principles has left some to declare that administrative regulations are unlawful.<sup>227</sup>

Even if delegation is appropriate, and it seems like it almost always is at the federal level, Congress then imposes additional requirements an agency

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220. Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1101 (2018) (citing CLYDE WAYNE CREWS JR., COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 19–20 (2017)), <https://cei.org/sites/default/files/Ten%20Thousand%20Commandments%202017.pdf> [<https://perma.cc/6TDC-3JPR>].

221. *Id.*

222. *Id.* at 1102.

223. Robert C. Sarvis, *Legislative Delegation and Two Conceptions of the Legislative Power*, 4 PIERCE L. REV. 317, 346 (2006).

224. George Bunn et al., *No Regulation Without Representation: Would Judicial Enforcement of a Stricter Nondelegation Doctrine Limit Administrative Lawmaking?*, 1983 WIS. L. REV. 341, 371 (1983) (quoting Nelson Rosenbaum, *Statutory Structure and Policy Implementation: The Case of Wetlands Legislation*, 8 POLY STUDIES J. 575, 576 (1980)).

225. There are three fundamental principle of nondelegation: “democratic accountability for legislators and the President, inter-branch accountability for executive and administrative action, and limitation on government power through checks-and-balances.” Martin Edwards, *Who's Exercising What Power: Toward a Judicially-Manageable Nondelegation Doctrine*, 68 ADMIN. L. REV. 61, 65 (2016).

226. *Id.*

227. PHILLIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 493 (2014).

must fulfill before it can promulgate a rule.<sup>228</sup> Congress has created the monstrous administrative state and subsequently works to keep it from going rogue. As a side effect of Congress's delegations, it imposes on itself the responsibility to create additional requirements to establish safeguards and ensure agencies stay within their allotted discretion. To do so, Congress passed the Administrative Procedure Act to establish limitations and create consistencies for federal agency actions.<sup>229</sup>

#### A. *The Administrative Procedure Act*

Rulemaking is a federal agency's ability to "specify, clarify, and refine Congress's work-product—in short, to finish the task of legislating."<sup>230</sup> The APA is designed to establish procedural limits to cabin threats to individual liberty associated with the administrative state's growth.<sup>231</sup> For an Act regulating the 3,000-plus final rules promulgated last year, one can imagine how detailed and complicated the Act can be.

The APA applies to all federal agencies in general and therefore does not contain specific provisions applicable to either executive or independent regulatory agencies.<sup>232</sup> Under the APA, the distinction is in the procedure required by the different grants of legislative authority to make either an informal or formal rule.<sup>233</sup> A "rule" made under the APA is defined broadly as any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" or describing the organization, procedure, or practice requirements of an agency.<sup>234</sup>

Informal rulemaking requires three steps: (1) an agency must give notice to potentially interested parties by publishing proposed rules in the *Federal*

228. See generally Administrative Procedure Act, 5 U.S.C. § 551–59 (1946) (placing requirements on federal agencies that must be fulfilled prior to implementing rules).

229. Scott F. Johnson, *Administrative Agencies: A Comparison of New Hampshire and Federal Agencies' History, Structure and Rulemaking Requirements*, 4 PIERCE L. REV. 435, 438 (2006) [hereinafter Johnson, *Administrative Agencies*].

230. Cornelius M. Kerwin, *Administrative Law and Regulation: Making Rules: An Introduction, Rulemaking: How Government Agencies Write Law and Make Policy*, 93 MICH. L. REV. 1511, 1512 (1995) [hereinafter Kerwin, *Administrative Law and Regulation*].

231. Dominique Custos, *The Rulemaking Power of Independent Regulatory Agencies*, 54 AM. J. COMP. L. (SUPP. ISSUE) 615, 623 (Fall 2006) [hereinafter Custos, *The Rulemaking Power*].

232. For the purpose of this paper it is not consequential to distinguish between executive or independent agencies. The conclusion of this paper would apply to either and, therefore, will make no distinction and will simply refer to a general "federal agency." *Id.* at 624.

233. *Id.* (citing Administrative Procedure Act, 5 U.S.C. § 553 (1946)).

234. 5 U.S.C. § 551(4) (1946).

*Register*; (2) an agency must give interested parties the opportunity to respond to the proposed rule through written and oral means; and (3) after allowing time for comment and gathering additional information, the agency must publish a statement explaining the final form thirty days before the rule's effective date.<sup>235</sup> Informal rulemaking is generally satisfied by giving people a reasonable opportunity to participate in the rulemaking process.<sup>236</sup> The quasi-legislative nature of these requirements allows for public input on the promulgation of rules that will affect their everyday lives, but it does not mandate the agency adopt into the final rule the positions advanced by public comments.<sup>237</sup>

Rules are typically promulgated under informal requirements, but occasionally formal rulemaking can be mandated under sections 556 and 557. Formal rulemaking only applies “when rules are required by statute to be made on record after an opportunity for agency hearing.”<sup>238</sup> The formal rulemaking procedure is trial-like, as the agency must provide a party the opportunity to present evidence and conduct cross-examination in a hearing presided over by an agency official or administrative law judge.<sup>239</sup> The need for the rule must be supported by substantial evidence on the record.<sup>240</sup> However, the Supreme Court interpreted formal rulemaking narrowly, holding it is only required when Congress mandates the rulemaking proceeding be “on the record.”<sup>241</sup> Congress rarely imposes this rulemaking standard on agencies, so the formal rulemaking process is essentially nonexistent in administrative law.<sup>242</sup>

Though formal procedures are rarely required, Congress occasionally imposes additional requirements in tandem with informal rulemaking. Hybrid rulemaking is the requirement of procedures above what is imposed by the informal rulemaking standards.<sup>243</sup> Hybrid rulemaking lends itself to

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235. *Id.* at § 553(a)-(e).

236. Custos, *The Rulemaking Power*, *supra* note 231, at 624; Johnson, *supra* note 229, at 446.

237. Johnson, *supra* note 229, at 449.

238. 5 U.S.C. §§ 553(c), 556–57 (describing when formal rulemaking may be necessary).

239. CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 3 (2017).

240. Comment, *Implementing the National Environmental Policy Act Through Rulemaking: The Implications of Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, 126 U. PA. L. REV. 148, 155–56 (1977) [hereinafter *Implementing the National Environmental Policy Act*].

241. CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 3 (2017) (citing *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 251 (1973)).

242. *Id.*

243. *Implementing the National Environmental Policy Act*, *supra* note 240, at 150.

greater flexibility than formal rulemaking and provides for greater public participation than informal rulemaking.<sup>244</sup> Some of the hybrid requirements placed on agencies before they can act include: developing information on the paperwork burden generated by the rules, reducing regulatory burden on small business, holding hearings, or conducting environmental impact statements.<sup>245</sup> This is all necessary because Congress chooses to pass on bare-bones legislation to federal agencies to be implemented with their discretion.<sup>246</sup> Federal agencies are bloated with discretion.

B. *Will a Revived Nondelegation Doctrine Reduce Agency Bloat?*

Federal regulations cost Americans roughly \$1.9 trillion in 2016.<sup>247</sup> This is an exuberant amount of money spent based on the recommendations of unelected officials. Agency bloat is amplified by the requirements imposed on them by the APA to ensure these quasi-legislative bodies do not abuse their rulemaking power. The Environmental Protection Agency (EPA) is perhaps one of the most bloated federal agencies as it has expanded its scope over time to create some of the broadest delegations with no repercussion—particularly with the Clean Air Act.<sup>248</sup>

To illustrate hybrid rulemaking in action, from 2010 to 2017, federal agencies conducted a total of 1,161 environmental impact statements.<sup>249</sup> The average timeframe for each impact statement was four years and five months.<sup>250</sup> This is just one example of the hundreds of hybrid rulemaking rules imposed on federal agencies under the APA, which consumes a lot of time and money. If nondelegation were revived with a more formalized

244. *Id.*

245. Custos, *The Rulemaking Power*, *supra* note 231, at 628.

246. *See id.* at 619 (“Moreover, the widespread of rulemaking does not necessar[ily] derive from a clear congressional intent.”); *see also Cost and Burden of Federal Regulations Reach \$1.9 Trillion*, COMPETITIVE ENTER. INST. (May 31, 2017), <https://cei.org/content/costs-and-burden-federal-regulations-reach-19-trillion> [<https://perma.cc/GHA4-UWX6>] (reporting for every law enacted last year, eighteen rules were issued).

247. *Cost and Burden of Federal Regulations Reach \$1.9 Trillion*, *supra* note 246.

248. The Clean Air Act and Clean Water Act grant incredibly broad discretion regarding technology and admission standards. William McGarth & Jeffery Jay, *The Nondelegation and Enviro Regs. Post-Gundy*, LAW360 (July 18, 2019, 2:42 PM), <https://www.law360.com/articles/1179508/the-nondelegation-doctrine-and-enviro-regs-post-gundy> [<https://perma.cc/8FM7-VNX9>].

249. Press Release, Executive Office of the President Council on Environmental Quality, Environmental Impact Statements Timelines (Dec. 14, 2018) (on file with author).

250. *Id.*

approach like Justice Gorsuch's,<sup>251</sup> a tension would likely be created with the APA because the need for all the rulemaking procedures would be reduced as delegation lessens.

If the purpose of the APA is to give guidance in specifying and clarifying Congress's work product, and if delegation lessened and Congress had to make the fundamental policy judgments, federal agencies can shift from spending so much time clarifying Congress's mandates to actually implementing them. That is not to say Congress must specify every detail, which might slow down the system even more. However, if statutes contained more detail than stating to implement it in "the public interest," it would likely make rulemaking more efficient and less costly.<sup>252</sup> The less detail an agency has to fill in, the more efficient it will be in implementing a congressional act.<sup>253</sup> Perhaps the number and length of environmental impact statements would not be necessary.

The purpose of a rulemaking hearing is to allow interested persons to shape the law governing their everyday lives.<sup>254</sup> Political accountability comes into play because the people have already spoken through the election of their congressional representatives who are the ones tasked with representing people's interests in regulations. If the people must again advocate on their own, then what exactly do congresspeople do? With a stronger nondelegation doctrine, Congress will have to limit agency authority to just findings of fact to implement Congress's policy judgments. By reducing delegation, there will be less need to monitor agencies to keep them from going rogue, as Congress would further detail the policy to be implemented. Thus, the APA's purpose would be diminished in part while still serving as a vital check on further congressional mandate.

## VI. CONCLUSION

The constitutionally mandated nondelegation doctrine is dead—at least for the time being. Nondelegation is not about shrinking the size of the

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251. Recall the three questions Justice Gorsuch stated should be asked: "Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And . . . did Congress, and not the Executive Branch, make the policy judgements?" *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting).

252. *Implementing the National Environmental Policy Act*, *supra* note 240, at 178 (citing *Env't. Def. Fund, Inc. v. Corps of Eng'rs*, 348 F. Supp 916, 927 (N.D. Miss 1972), *aff'd*, 492 F.2d 1123 (5th Cir. 1974)).

253. *Id.* at 150.

254. Johnson, *Administrative Agencies*, *supra* note 229, at 449.

administrative state. It is about enforcing the Constitution. Our founders sought to protect individual liberty by granting all legislative power to Congress, but that has given way to political expediency. The uncontested truth is all legislative power is vested in Congress; however, the struggle over the past eighty-four years centers on what is considered legislative. *Gundy* is the most recent showing of this struggle. Delegation is necessary to keep the government from getting bogged down in minutia, but Congress must first establish a complete policy framework for administrative agencies to fill in.

In narrowly construing a challenged statute under nondelegation, the Court created a tradition of straining to read a statutory scheme to avoid a delegation issue. This is what Justice Gorsuch seeks to change with his reasoning in *Gundy*. Many see his dissent as the beginning of a transformation in administrative law. President Trump's judicial appointments have created a more conservative federal judiciary, which as a whole likely support stronger requirements for delegations from Congress. With a majority of Justices now on the Court who support reevaluating nondelegation, it is likely the intelligible principle may give way to a more formalized approach.

Until then, the APA will continue to guide agency discretion as federal bureaucrats promulgate thousands of rules a year. While the different types of rulemaking requirements seek to ensure agency discretion is cabined within appropriate limits, the limits are essentially limitless when statutes are vaguely worded. However, if agency delegation is limited by a revived doctrine, the APA's purpose would be diminished in part and rulemaking would be more efficient, as the full policy detail would have to come from Congress.

The Court must call foul when necessary to restore the separation of powers, protect individual liberty, and keep delegation from running riot. Stand by and watch, over the next few years—administrative law in the United States is going to change.