

Notes

THE GORSUCH TEST: *GUNDY V. UNITED STATES*, LIMITING THE ADMINISTRATIVE STATE, AND THE FUTURE OF NONDELEGATION

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ABSTRACT

*The future of nondelegation is uncertain. Long considered an “axiom in constitutional law,” the nondelegation principle has almost never been seriously enforced—from the founding of the country to present day. After the Supreme Court’s decision in *Gundy v. United States*, that truism may soon change.*

*For much of its recent history, the Court has approached nondelegation challenges using the “intelligible principle” test. Now, for the first time in many years, five Justices have indicated a willingness to revisit that test. In his dissenting opinion in *Gundy*, Justice Gorsuch proposed a new test—the “Gorsuch test”—for adjudicating nondelegation disputes. He averred that a legislature can only give power under three circumstances: (1) to “fill up the details”; (2) to make the application of a rule dependent on certain executive fact-finding; or (3) to assign nonlegislative responsibilities to either the judicial or executive branch.*

This Note is among the first scholarly pieces to examine the Gorsuch test and its potential implications for administrative law. By tracing previous nondelegation tests and proposals, this Note argues that Justice Gorsuch’s proposal would severely curtail Congress’s ability to transfer authority efficiently, limit the administrative state, imperil

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potentially hundreds of thousands of statutes, cause doctrinal confusion, and force a change that will be difficult to apply. Ultimately, the Court should not adopt this proposal and instead continue to apply the decades-old intelligible principle test.

INTRODUCTION

Article I, § 1 of the Constitution vests legislative power in Congress.¹ The Supreme Court has interpreted this clause to bar congressional delegations of power to any other branch of government.² The nondelegation doctrine is “an axiom in constitutional law . . . universally recognized as a principle essential to the integrity and maintenance of the system of government ordained by the Constitution.”³ However, although nondelegation has been “universally recognized,” it has gone almost universally unenforced.⁴

For much of its recent history, the Court has analyzed nondelegation claims using the “intelligible principle” test established in *J.W. Hampton, Jr. & Co. v. United States*.⁵ So long as Congress laid down “an intelligible principle to which the person or body authorized . . . is directed to conform,” the delegation passed constitutional muster.⁶ Apart from two instances in 1935, no act of Congress has ever been struck down as violating this principle.⁷

On June 20, 2019, the Supreme Court handed down a fractured opinion in its nondelegation jurisprudence: *Gundy v. United States*.⁸ After hearing arguments in *Gundy* with only eight members (Justice Brett Kavanaugh had yet to be confirmed), the Court ruled on the

1. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

2. *Field v. Clark*, 143 U.S. 649, 697 (1892) (Lamar, J., concurring) (“[N]o part of this legislative power can be delegated by Congress to any other department of the government, executive or judicial. . .”).

3. *Id.*

4. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2364 (2001) (“It is, after all, a commonplace that the nondelegation doctrine is no doctrine at all.”).

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

6. *Id.* at 409.

7. See *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (“[I]n every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that [this case] goes beyond those limits.”); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (“We think that the . . . authority thus conferred is an unconstitutional delegation of legislative power.”); see also Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (remarking that the nondelegation doctrine “has had one good year, and 211 bad ones (and counting)”).

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

merits nine months later.⁹ Justice Elena Kagan wrote the plurality opinion and applied the traditional intelligible principle test to find the disputed statute constitutionally sound.¹⁰ But, strikingly, for the first time since 1935, four Justices expressed a willingness to revisit a doctrine that had been undisturbed for over eighty years. Justice Neil Gorsuch, joined by Justice Clarence Thomas and Chief Justice John Roberts, dissented and proposed a new test for approaching nondelegation challenges.¹¹ Justice Gorsuch averred that the legislature could only give power under three circumstances: (1) to “fill up the details”; (2) to make the application of a rule dependent on certain executive fact-finding; or (3) to assign nonlegislative responsibilities to either the judicial or executive branch.¹² The three prongs of his analysis formed the new “Gorsuch test.”¹³

Justice Samuel Alito provided the fifth vote to uphold the statute but wrote separately, noting that the Court has permitted “extraordinarily capacious standards” in the past.¹⁴ At the same time, he stated an openness to reconsidering the intelligible principle test if a majority of the Court would vote in its favor.¹⁵ Otherwise, it would be odd to single out this statute for lacking a discernable standard.¹⁶

Thus, the future of the doctrine seems to rest with Justice Kavanaugh, who tipped his hand in the early October 2019 term. In response to the same nondelegation statutory challenge raised in *Gundy*, Justice Kavanaugh agreed that “Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation in his *Gundy* dissent may warrant further consideration in future cases.”¹⁷ The Court, he

9. *Id.* at 2116. On October 6, 2018, four days after *Gundy* was argued, Justice Brett Kavanaugh joined the Court, cementing a five-Justice conservative majority. John Bresnahan & Burgess Evertett, *Kavanaugh Wins Confirmation to the Supreme Court*, POLITICO (Oct. 6, 2018, 3:14 PM), <https://www.politico.com/story/2018/10/06/kavanaugh-confirmation-vote-877357> [<https://perma.cc/6RTY-LVSC>].

10. *Gundy*, 139 S. Ct. at 2118, 2129.

11. *Id.* at 2131, 2136–37 (Gorsuch, J., dissenting).

12. *Id.* at 2136–37.

13. Given the lack of scholarly work on this topic, this Note creates the phrase “the Gorsuch test.”

14. *Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring).

15. *See id.* at 2131 (“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.”).

16. *Id.*

17. *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (mem.). In the October 2018 term, Justice Kavanaugh joined the conservative Justices in many high-profile cases, including joining Justice Gorsuch’s dissenting opinion in another major administrative law case, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., dissenting). In *Kisor*, Justice Kavanaugh agreed with

declared, must ensure that “major national policy decisions [are] made by Congress,” not the executive branch.¹⁸

Although observers should always be wary of prognostication on how a Justice might vote, it seems possible—if not likely—that there will be five votes to strike down broad delegations of power and apply some version of the Gorsuch test. If the Court chooses to adopt a stricter nondelegation test, it could imperil an estimated three hundred thousand rules that resemble the standard disputed in *Gundy*.¹⁹ These laws touch upon much of one’s daily life. They affect road safety, federal buildings, consumer finance, complex securities laws, banking, air travel, credit card transactions, and commercial trade, just to name a few areas.²⁰

The scholarship on nondelegation is voluminous.²¹ Even a unanimous nondelegation case prompts a bevy of articles on its holding, rationale, and impact.²² Given the split on the issue, the importance of understanding Justice Gorsuch’s *Gundy* dissent is paramount. At the very least, the dissent showcases a willingness to

Justice Gorsuch that the Court should no longer apply *Auer* deference, despite precedent doing so for almost eighty years and a recent Justice Scalia opinion upholding the deference. *Id.* at 2448.

18. *Paul*, 140 S. Ct. at 342.

19. Transcript of Oral Argument at 8, *Gundy*, 139 S. Ct. 2116 (No. 17-6086) [hereinafter Transcript of Oral Argument] (“[W]e’re told in one of the briefs that there are 300,000 such regulations [made pursuant to capacious standards] . . . So which, in fact, fall, as you said, within your specially harsh rule? All of the 300,000? We’ll be busy in this Court for quite a while.”).

20. *See infra* notes 251–55 and accompanying text (providing examples of broad delegations to executive agencies).

21. *See generally* Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL’Y 147 (2017) (calling for a “realignment” of the nondelegation doctrine that changes “the focus from the *scope* to the *nature* of the authority legally assigned”); Joseph Postell & Paul D. Moreno, *Not Dead Yet—Or Never Born? The Reality of the Nondelegation Doctrine*, 3 CONST. STUD. 41 (2018) (examining the importance of the nondelegation doctrine prior to 1940 and describing “the historical shift from the enforcement of the nondelegation doctrine to the accommodation of legislative delegation to the executive”); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017) (arguing that “[t]here was no golden age in which the courts enforced a robust nondelegation doctrine” and “the federal courts never posed a significant obstacle to the development of the administrative state and the delegation of extensive policymaking authority”).

22. For an example, consider the scholarship following *Whitman v. American Trucking Ass’ns*, 531 U.S. 457 (2001). *See generally* Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass’ns*, 87 CORNELL L. REV. 452 (2002) (noting that the *American Trucking* case “brings the unanswered question to center stage: Should courts use constitutional law or administrative law for requiring administrative standards?”); Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005) (criticizing the *American Trucking* decision for treating the nondelegation doctrine “as a nullity”).

reinvigorate the nondelegation doctrine. Quite possibly, it provides the method the Court will use to do so. This Note is one of the first academic pieces to examine the evolution of nondelegation tests and situate the Gorsuch test within the doctrine.²³ It argues that the Gorsuch test is stricter than any prior version and, if adopted, would severely curtail Congress's ability to give agencies power, thus limiting the administrative state.

Part I outlines the case law and reviews past proposals for a narrower nondelegation test than the intelligible principle test, emphasizing that even as the administrative state grew exponentially, no Court ever rigorously enforced the nondelegation principle. Part II introduces the disputed statute in *Gundy*, the factual circumstances underlying the case, the debates in the briefs and at oral argument, and the three fractured opinions. The case's history reveals that neither the Court nor the parties significantly considered adopting a new test for the nondelegation doctrine. Part III examines Justice Gorsuch's proposal in relation to previous tests and case law. Part IV considers the weaknesses of the Gorsuch test, analyzing its destabilizing effects on other broad statutes, the lack of doctrinal clarity, and difficult

23. When work began on this Note in the fall of 2019, no paper had been published on the *Gundy* opinion. As expected, interest has grown. The scholarly work, however, is still in its infancy. Only a few pieces have addressed *Gundy* significantly. See generally William D. Araiza, *Toward a Non-Delegation Doctrine That (Even) Progressives Could Like*, 3 AM. CONST. SOC'Y SUP. CT. REV. 211 (2020) (arguing in favor of a stricter nondelegation doctrine as a means to advance progressive policies); Aditya Bamzai, Comment, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164 (2019) (discussing the statutory interpretation involved and the relationship between *Gundy* and *Kisor*); Gary Lawson, *I'm Leavin' It (All) up to You: Gundy and the (Sort-of) Resurrection of the Subdelegation Doctrine*, 2018–2019 CATO SUP. CT. REV. 31 (2018–2019) (focusing on the future of nondelegation with Justice Kavanaugh on the Court and the doctrine of subdelegation); Wayne A. Logan, *Gundy v. United States: Gunning for the Administrative State*, 17 OHIO ST. J. CRIM. L. 185 (2019) (advocating for a more stringent nondelegation doctrine for delegations of criminal justice authority); Jennifer L. Mascott, *Gundy v. United States: Reflections on the Court and the State of the Nondelegation Doctrine*, 26 GEO. MASON L. REV. 1 (2018) (writing before the release of the Court's opinion to explain how the Justices viewed the nondelegation doctrine); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021), <https://ssrn.com/abstract=3512154> [<https://perma.cc/4BGA-N5SK>] (taking a comprehensive view on the nondelegation doctrine after noting Justice Gorsuch's reliance on it in *Gundy*); Jenny Roberts, *Gundy and the Civil-Criminal Divide*, 17 OHIO ST. J. CRIM. L. 207 (2019) (assessing the difference between nondelegation in the criminal and civil context after *Gundy*). No academic article significantly discusses the Gorsuch test within nondelegation case law or its implications. This Note contributes to the scholarship by framing the history of nondelegation by tests. It also argues that Justice Gorsuch's proposal not only seeks to revitalize the nondelegation principle but also represents a stringent formulation compared to earlier tests, both actual and proposed. Finally, it outlines why this move may be unwise and destabilizing.

applications of the proposal. Ultimately, this Note concludes that these weaknesses—destabilization, obscurity, and unmanageability—caution against the test’s adoption.

I. NONDELEGATION TESTS

Until the late Gilded Age, the Court rarely invoked the nondelegation doctrine. Even then, the Court never struck down a statute until the Great Depression, doing so in only one year.²⁴ For much of its history, the Court employed different phrasing while approaching nondelegation challenges, first using a “fill up the details” standard before settling on the intelligible principle test. Irrespective of the test’s exact wording, the result was the same: upholding the statute.²⁵ Proponents of a stricter doctrine have proposed new tests, but these proposals have never gained traction.

A. “Fill Up the Details”

The First and Second Congresses delegated often, forcing courts to confront nondelegation challenges early in American legal history.²⁶

24. See *supra* note 7 and accompanying text.

25. This Note does not attempt a historical gloss analysis of the nondelegation doctrine, but the relationship between that recently blossoming area of scholarship and this age-old question deserves more attention. See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012) (outlining four general points about historical gloss: (1) the role of historical practice in the separation of powers context; (2) institutional acquiescence; (3) the difference between executive and legislative acquiescence; and (4) the institutional context in any given area where the question arises). Specifically, Professors Curt Bradley and Neil Siegel identified three conditions for gloss: “(1) governmental practice; (2) longstanding duration; and (3) acquiescence, which we interpret below as requiring at least reasonable stability in the practice but not necessarily inter-branch constitutional agreement.” Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and Originalism Debate*, 106 VA. L. REV. 1, 18 (2020). All three conditions seem present in the nondelegation context. The practice of delegating power—or transferring it—is a governmental practice that has continued for over two hundred years. Moreover, both branches have apparently accepted the practice without issue. This idea finds further support in the justifications for gloss, namely: (1) “deference to nonjudicial actors”; (2) limits on judicial capacity; (3) “Burkean consequentialism” (the realities of governance); and (4) “reliance interests.” Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 64–67 (2017). A similar point applies to liquidation, “which would allow post-Founding historical practice to resolve indeterminacies in the Constitution’s original meaning and thereby ‘fix’ its meaning.” Bradley & Siegel, *supra*, at 39. Again, the long-standing practice of allowing Congress to delegate with broad standards, dating back to the Founding, favors continuing to allow them to do so.

26. See Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 738–39 (1994) (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993)) (“[T]he early history of the republic furnishes scant support for vigorous enforcement of a nondelegation doctrine.”); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI.

Almost immediately after ratification, Congress created the Departments of Treasury, War, and State; the Post Office; and a system of patent approvals entrusted to different departments.²⁷ Early statutes showcased broad delegations to enact rules or exercise wide discretion. One law authorized military pensions “under such regulations as the President of the United States may direct.”²⁸ On a later occasion, Congress granted the president the power to actually fix pay for all those wounded or disabled in battle, provided it was not more than a set maximum amount.²⁹

Eventually, one of these broad delegations was challenged, and the Supreme Court decided the first nondelegation challenge, *Cargo of the Brig Aurora v. United States*,³⁰ in 1813.³¹ Three years prior, Congress

L. REV. 1721, 1735–36 (2002) (listing a series of delegation statutes enacted by the First and Second Congresses). Originalist support for nondelegation is fiercely debated. *See, e.g.*, ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 92–93 (1941) (asserting that the Constitution contemplated a large measure of delegation); Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 719 (2019) (“I argue that the Nondelegation Doctrine has a firm foundation in the Constitution’s original meaning.”); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 332 (2002) (“There is something very fundamental—indeed, almost primal—about the nondelegation doctrine that keeps resuscitating it when any rational observer would have issued a ‘code blue’ long ago.”); Posner & Vermeule, *supra*, at 1722 (“The nondelegation position lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory.”); Sunstein, *supra* note 7, at 322 (“The Constitution does grant legislative power to Congress, but it does not in terms forbid delegations of that power, and I have been unable to find any indication, in the founding era, that such delegations were originally thought to be banned.”). The actual Vesting Clause of Article I, § 1 does not prohibit delegation, and the concept of delegation was barely mentioned in the Constitutional Convention, the Ratification debates, The Federalist Papers, and early governmental practices. *See* Posner & Vermeule, *supra*, at 1732–36 (discussing the lack of historical support for the nondelegation doctrine); *see also* U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”). This Note, however, focuses on the evolution of the nondelegation doctrine, leaving aside this robust scholarly debate.

27. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 34 (2012).

28. An Act Providing for the Payment of the Invalid Pensioners of the United States, ch. 24, 1 Stat. 95 (1789).

29. Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 719 (1969) (“[T]he President [can] fix the pay, not more than prescribed maxima, for military personnel wounded or disabled in the line of duty.”); *see also* An Act for Regulating the Military Establishment of the United States, ch. 10, 1 Stat. 119, 121 (1790) (providing that wounded military personnel “shall be placed on the list of the invalids of the United States, at such rate of pay, and under such regulations as shall be directed by the President of the United States . . .”).

30. *Cargo of the Brig Aurora v. United States* (*The Brig Aurora*), 11 U.S. (7 Cranch) 382 (1813).

31. *Id.* at 382. *Compare* *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (presenting *The Brig Aurora* as a nondelegation case), and Keith E. Whittington,

passed a law permitting the president to lift an embargo if France or Britain ceased violating American neutral commerce.³² The owner of the ship argued that Congress “could not transfer the legislative power to the President,” as it would give the proclamation “the force of a law.”³³ Congress could not have intended this result.³⁴ The opposing attorney rejected that contention, arguing the president could only determine the facts “upon which the law should go into effect.”³⁵ Justice William Johnson delivered the opinion, which never mentioned the word “delegation,” the Vesting Clause, the president, or the separation of powers.³⁶ Rather, the Court approved Congress’s exercise of discretion to revive the act “either expressly or conditionally, as their judgment should direct.”³⁷

The Court, under Chief Justice John Marshall, addressed nondelegation in *Wayman v. Southard*,³⁸ thirty-eight years after the Constitution’s ratification. At issue was the Process Act, which required federal courts to adopt state procedure while also permitting “such alterations and additions as the said Courts respectively shall, in their discretion . . . think proper.”³⁹ The defendant objected to the practice as an unlawful delegation of legislative authority that Congress “has not the power to make.”⁴⁰ Marshall agreed that Congress could not delegate “exclusively” legislative power, but it could “delegate to others, powers which the legislature may rightfully exercise itself.”⁴¹ He wrote:

The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less interest, in which a general provision may be

Judicial Review of Congress Before the Civil War, 97 GEO. L.J. 1257, 1291 (2009) (arguing that the Marshall Court upheld the challenged provision as not a “prohibited delegation”), with Posner & Vermeule, *supra* note 26, at 1737 (arguing that *The Brig Aurora* does not stand for the nondelegation principle).

32. *The Brig Aurora*, 11 U.S. (7 Cranch) at 383–84.

33. *Id.* at 386.

34. *Id.*

35. *Id.* at 387.

36. *See id.* at 388 (devoting only one paragraph to upholding the act by finding the law was not “without limitation”).

37. *Id.*

38. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825).

39. *Id.* at 41.

40. *Id.* at 42.

41. *Id.* at 43.

made, and power given to those who are to act under such general provisions to *fill up the details*.⁴²

Therefore, the Court needed to inquire into the extent of the powers given to the recipients by the law itself. The Process Act, the Court concluded, posed no constitutional issue.⁴³

Despite the dozens of times the issue was raised, no litigant successfully prevailed on a nondelegation challenge at the state level until the mid-nineteenth century or at the federal level until almost the mid-twentieth century.⁴⁴ In the interim, the American administrative state ballooned. In 1887, Congress created the Interstate Commerce Commission, the first independent agency of its kind.⁴⁵ Within the next few decades, it also established the Federal Trade Commission and the Board of Governors of the Federal Reserve.⁴⁶ By the Great Depression, it had created larger agencies, such as the National Labor Relations Board, the Federal Communications Commission, and the Securities and Exchange Commission.⁴⁷ In response, the Supreme Court faced an increasing number of nondelegation cases beginning at the end of the nineteenth century and continuing to present day.

In 1892, almost eighty years after *Wayman*,⁴⁸ the Supreme Court considered the nondelegation issue again in *Field v. Clark*.⁴⁹ The Marshall Field & Company challenged the authority conferred to the president under § 3 of the Tariff Act of 1890.⁵⁰ Under the act, the president could suspend the tariffs of certain countries if the trading

42. *Id.* (emphasis added).

43. Posner and Vermeule observe that “[m]odern commentators have sometimes read the last sentence of this passage as though Marshall were attempting a turgid explication of the ‘intelligible principle’ test.” Posner & Vermeule, *supra* note 26, at 1738. They disagree and argue that Marshall’s quote was never intended to become any form of the intelligible principle test. *Id.* at 1738–39. Rather, Marshall was simply drawing a line between exclusive powers and delegable powers. *Id.* If their reading is accurate, then neither the intelligible principle nor the Gorsuch test would be needed in adjudicating nondelegation challenges. It would instead only require a simple, formalist application.

44. See Whittington & Iuliano, *supra* note 21, at 419 (comparing all nondelegation cases from 1825 to 1940, with all unconstitutional delegation findings over the same period).

45. Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 41.

46. *Id.* at 42.

47. *Id.*

48. See Whittington & Iuliano, *supra* note 21, at 396 (“The Court had remarkably little to say regarding the delegation of legislative power from the late Marshall Court through the remainder of the nineteenth century.”).

49. *Field v. Clark*, 143 U.S. 649 (1892).

50. *Id.* at 650–51.

country agreed to some reciprocal trade agreement.⁵¹ Attorneys for Marshall Field argued that the ability to tax was inherently legislative, pursuant to the Taxing Clause of Article I.⁵² Rejecting the argument, the Court noted that Congress, not the president, chose to tax the products.⁵³ All the president could do was make the factual determination on whether a trade agreement rendered the tariffs unequal.⁵⁴ Congress needed discretion and efficiency to legislate, and hundreds of laws on the books reflected this truism. When the opinion was handed down, *Field* was the Court's clearest articulation of the nondelegation principle. Far from the oblique reference in *The Brig Aurora* or the esoteric line drawing in *Wayman*, the opinion clearly stated that Congress could not delegate "legislative power" and, moreover, that the nondelegation principle was "vital to the integrity and maintenance of the system of government ordained by the Constitution."⁵⁵

However, *Field's* robust elaboration of nondelegation had no practical effect on the outcome of nondelegation challenges, as the Court only occasionally used some form of the "fill up the details" approach when deciding nondelegation disputes. In such disputes, the Court found that the ability of the secretary of the treasury to control certain imports was "proper" because it entailed only "[t]he delegation of details."⁵⁶ Similarly, it considered the authority granted to the Internal Revenue Service commissioner to create stamps for margarine packages and to the secretary of the Bureau of Labor Statistics to inspect mines as a mere "matter of detail."⁵⁷ And it found that a law allowing the secretary of agriculture to "establish[] certain rules for the purpose of regulating the use and occupancy of the public forest" amounted to filling in "administrative detail[s]."⁵⁸

51. *Id.* at 680.

52. *Id.* at 695.

53. *Id.* at 693 ("What the President was required to do was simply in execution of the act of Congress.").

54. *Id.*

55. *Id.* at 692.

56. *Buttfield v. Stranahan*, 192 U.S. 470, 489 (1904).

57. *In re Kollock*, 165 U.S. 526, 533 (1897) ("[T]he designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail."); *St. Louis Consol. Coal Co. v. Illinois*, 185 U.S. 203, 211 (1902) ("It is obviously necessary that the number of inspections per year shall be determined by . . . some executive officer[,] [a]s it is clearly a matter of detail . . .").

58. *United States v. Grimaud*, 220 U.S. 506, 509, 516 (1911).

B. “Intelligible Principle”

The Supreme Court’s adherence to any form of a “fill up the details” standard was short-lived. Even before the Court announced the intelligible principle test, earlier cases released contemporaneously with “fill up the details” cases forecasted a change in approach with broad phrases, such as “general rule.”⁵⁹ Congress gave the Interstate Commerce Commission authority to regulate commerce by conducting reports, setting up a uniform system of accounts, and prohibiting methods of accounting as the Commission deemed fit.⁶⁰ In *Interstate Commerce Commission v. Goodrich Transit Co.*,⁶¹ the Court believed that the statute was not a delegation of legislative authority, finding instead that the statute provided “general rules for . . . guidance.”⁶² Similarly, the Court upheld an Ohio act that assigned an administrative body the “power to ascertain the facts and conditions to which the policy and principles apply.”⁶³ So long as the act furnished a standard and avoided “arbitrary judgment, whim and caprice,” it was not constitutionally deficient.⁶⁴ Congress was also allowed to grant power to the secretary of labor to take “aliens of certain classes” into custody with a warrant because the “background of a declared policy” proved “sufficiently definite.”⁶⁵ Lastly, the Court used such capacious formulations as “primary standard” and “general rule” in upholding the power of the secretary of war to control bridges for the safe navigation of waterways.⁶⁶

The pivotal case for nondelegation came in 1928. In *J.W. Hampton, Jr., & Co. v. United States*,⁶⁷ the government brought suit under § 315 of Title III of the Tariff Act of 1922, which allowed the president to adjust tariffs to equalize the differences between foreign countries.⁶⁸ The act established guidelines for the president to consider, including the differences in production, such as “wages, costs of

59. See *Union Bridge Co. v. United States*, 204 U.S. 364, 386 (1907) (“[Congress] stopped, however, with this *declaration of a general rule* and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed . . .” (emphasis added)).

60. *Interstate Com. Comm’n v. Goodrich Transit Co.*, 224 U.S. 194, 203–04 (1912).

61. *Interstate Com. Comm’n v. Goodrich Transit Co.*, 224 U.S. 194 (1912).

62. *Id.* at 215.

63. *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 245 (1915).

64. *Id.*

65. *Mahler v. Eby*, 264 U.S. 32, 36–37, 40 (1924).

66. *Union Bridge Co. v. United States*, 204 U.S. 364, 385–86 (1907).

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

68. *Id.* at 401.

material, and other items in costs of production”; the differences in selling prices; various foreign policy interests; and “other advantages or disadvantages in competition.”⁶⁹ The Hampton company, subject to a higher tariff rate by presidential proclamation, argued that the act amounted to an unconstitutional delegation of power to the president.⁷⁰ The solicitor general countered that Congress only assigned “a fact-finding power” to the president, which presented no problem under the current doctrine, and cited a line of cases to support the proposition, including *The Brig Aurora*, *Wayman*, and *Field*.⁷¹ The Court agreed with the United States. So long as Congress prescribed “an *intelligible principle* to which the person or body authorized to fix such rates [was] directed to conform, such legislative action [was] not a forbidden delegation of legislative power.”⁷² The case bore similarity, the Court asserted, to *Field*, where the president had the duty to control reciprocal agreements.⁷³ Later courts would derive the intelligible principle test from *Hampton*, upholding a law if it had an “intelligible principle” for the agency to follow.⁷⁴

Only in *Panama Refining Co. v. Ryan*⁷⁵ and *A.L.A. Schechter Poultry Corp. v. United States*⁷⁶ did the nondelegation doctrine become a basis for striking down a statute—the National Industrial Recovery Act (“NIRA”). In *Panama Refining*, the Court considered a challenge to § 9(c) of NIRA, the hot oil provision. This provision allowed the president to ban the transportation of interstate and foreign commerce of petroleum and petroleum products when in excess of the amount permitted by state law or under regulation by a state agency.⁷⁷ The Court stated that though Congress had the “necessary resources of flexibility and practicality,” it could not pass legislative power to another branch of government.⁷⁸

69. *Id.* at 401–02.

70. *Id.* at 395–96, 400.

71. *Id.* at 398–99.

72. *Id.* at 409 (emphasis added).

73. *Id.* at 409–10.

74. *See, e.g.*, *Lichter v. United States*, 334 U.S. 742, 785 (1948) (using *Hampton*’s intelligible principle test to confirm that “[i]t is not necessary that Congress supply administrative officials with a specific formula for their guidance” (quoting *Hampton*, 276 U.S. at 409)).

75. *Pan. Refin. Co. v. Ryan*, 293 U.S. 388 (1935).

76. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). For background, see generally AMITY SHLAES, *THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION* 214–45 (2007) (describing the legal, legislative, and social context behind *Schechter*).

77. *Pan. Refin. Co.*, 293 U.S. at 406–07.

78. *Id.* at 421.

In *Schechter*, § 3 of NIRA fared no better, as a unanimous Court determined that it also constituted an impermissible delegation of legislative authority for similar reasons as § 9(c). NIRA granted the president or trade groups, as approved by the president, the power to establish “codes of fair competition,” so long as the codes imposed no inequitable restrictions on membership to the groups, did not promote monopolies, and did not hurt small businesses.⁷⁹ The Live Poultry Code was promulgated pursuant to NIRA, and the Schechters were convicted for violating eighteen counts of the code.⁸⁰ In siding with the Schechters, the Court examined whether the term “codes of fair competition” sufficiently limited the scope of authority.⁸¹ NIRA never specified a definition for “codes of fair competition,” and neither the common law concept of “unfair competition” nor a similar statutory term in the Federal Trade Commission Act could be read into the statute.⁸² The stated goal of NIRA, to effectuate certain policy objectives,⁸³ provided too much discretion to the executive.⁸⁴

As quickly as the doctrine sprouted to life, it withered.⁸⁵ For nondelegation, the Court kept its broader formulation of delegable functions but returned to underenforcing the principle, even as Congress conveyed more and more power to agencies. In *Currin v. Wallace*,⁸⁶ the Court examined the Tobacco Inspection Act of 1935,

79. *Schechter*, 295 U.S. at 521–22.

80. *Id.* at 519, 22.

81. *Id.* at 519, 521–25.

82. *Id.* at 530–32.

83. *Id.* at 531 n.9.

84. *Id.* at 538–39.

85. Following Roosevelt’s court-packing attempt in 1937, a constitutional law revolution occurred. Cf. ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 120–46 (Sanford Levinson ed., 6th ed. 2016) (contextualizing the constitutional revolution within the general change in jurisprudence around World War II). See generally Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001) (debating the effects of the revolution in the new century). With the revolution came major changes in other doctrines, most famously to the Commerce Clause, and the end of heightened scrutiny for certain economic liberties under the Due Process Clause. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (holding that Congress may regulate activity “if it exerts a substantial economic effect on interstate commerce” regardless of whether it is “direct” or “indirect”); *United States v. Darby*, 312 U.S. 100, 115 (1941) (finding that “the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress”); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (holding that Congress may regulate intrastate activities “if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions”).

86. *Currin v. Wallace*, 306 U.S. 1 (1939).

which authorized the secretary of agriculture to establish standards of tobacco and designate markets where it could be purchased and sold.⁸⁷ Though facially similar to NIRA, the Tobacco Inspection Act was a permissible delegation of power.⁸⁸ Similarly, the newly enacted Agricultural Adjustment Act of 1938, which granted the secretary of agriculture the ability to fix a quota for crop production and allotment among states and farms, had enough “specified factors” to “protect against arbitrary action.”⁸⁹ The comparable Agricultural Marketing Agreement Act of 1937 required the secretary of agriculture to fix and equalize the prices to be paid to producers for milk. It created no issue.⁹⁰ The purpose of the act, “to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce,” gave sufficient guidance to the secretary.⁹¹ Even powers granted to a committee of private industry citizens, soundly rejected in *Schechter*, encountered no resistance.⁹² It was constitutional for such committees to simply gather facts given that Congress could rely on experts to determine social and economic conditions.⁹³

In the immediate post-1937 case law, the Court universally approved broad delegations of power, but not usually with a clear formulation of how to approach the problem. The Court continued to cite *Hampton*, even though the words “intelligible principle” appeared only intermittently.⁹⁴ Critics of the intelligible principle test understand this lack of consistency as evidence that the *Hampton* Court never intended that the intelligible principle test would become the doctrine.⁹⁵ But this distinction is somewhat of a red herring. For several

87. *Id.* at 1.

88. *Id.* at 15–18.

89. *Mulford v. Smith*, 307 U.S. 38, 48–49 (1939).

90. *United States v. Rock Royal Coop.*, 307 U.S. 533, 574 (1939).

91. *Id.* at 575–76.

92. *Opp Cotton Mills, Inc. v. Adm’r of the Wage and Hour Div. of the Dep’t of Lab.*, 312 U.S. 126, 135–36, 142–44 (1941). The fact that “boards as fact-finding agencies” comprised of citizens could develop congressional policy in pursuit of a statutory standard resembles a *sub silentio* overruling of *Schechter*. *Id.* at 144.

93. *Id.* at 145–46.

94. *See, e.g., Yakus v. United States*, 321 U.S. 414, 426 (1944) (holding that delegation of congressional power is valid so long as the prescribed standards are “sufficiently definite and precise” to determine “whether the will of Congress has been obeyed”).

95. *See Gundy v. United States*, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting) (“[I]t seems plain enough that [Chief Justice Taft] sought only to explain the operation of these traditional tests; he gave no hint of a wish to overrule or revise them.”); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 81–82 (2015) (Thomas, J., concurring) (“The analysis in *Field* and *J.W. Hampton* may have been premised on an incorrect assessment of the statutes To the extent

decades, the Court never adopted clear language, using different phrasing each time.⁹⁶ There was often a coupling of some “guiding principle” with a need to “fill up the details.” The ideas mirrored two sides of the same issue. When a statute outlined an intelligible principle, the agency, of course, had to fill in the details in accordance with that principle. When an agency had to “fill up the details,” it did so pursuant to the standard of the law. It is a different matter entirely to suggest that the word “detail” carried significant weight, such that it differed from policy altogether.

Eventually, later cases would clearly embrace and faithfully employ the intelligible principle test.⁹⁷ If the statute had an intelligible principle to guide agency discretion, then it passed muster. As for *Panama Refining* and *Schechter*, while never repudiated, they have effectively become a dead letter—a symbolic check that courts have mentioned but never given full consideration, no matter how similar the scrutinized law was to NIRA.⁹⁸

More recently, the pattern of upholding broad delegations has continued, even as opponents of current nondelegation jurisprudence have emerged. In *Mistretta v. United States*,⁹⁹ the Court examined the power of the Sentencing Commission, promulgated pursuant to the

our modern jurisprudence treats them as sanctioning the ‘delegation’ of such power, it misunderstands their historical foundations and expands the Court’s holdings.”).

96. See, e.g., *Fed. Radio Comm’n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 276 (1933) (upholding Congress’s delegation of power to the Federal Radio Commission “to exercise the administrative judgment essential in applying legislative standards to a host of instances”); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932) (“The proviso does not delegate legislative power but confers administrative functions entirely valid within principles established by numerous decisions of this court . . .”).

97. See, e.g., *Lichter v. United States*, 334 U.S. 742, 785 (1948) (referring with approval to the choice to “leav[e] to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply” (quoting *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 421 (1935))).

98. For examples of later cases upholding laws like NIRA, see *Currin v. Wallace*, 306 U.S. 1, 6 (1939) (finding constitutional the Tobacco Inspection Act of 1935, which authorized the “Secretary of Agriculture . . . to investigate the handling, inspection and marketing of tobacco and to establish standards by which its type, grade, size, condition, or other characteristics may be determined”); *Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Connally*, 337 F. Supp. 737, 762 (D.D.C. 1971) (“Given a legislative enactment, there have not been any Supreme Court rulings holding statutes unconstitutional for excessive delegation of legislative power since the *Panama Refining* and *Schechter* cases invalidated provisions of the National Industrial Recovery Act of 1933.” (emphasis added)); see also Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Counter-majoritarian Difficulty*, 145 U. PA. L. REV. 759, 839 n.214 (1997) (“The Court has not struck down a statute on nondelegation grounds since the New Deal. Instead, the Court has upheld a variety of open-ended statutes over nondelegation challenges.”).

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

Sentencing Reform Act of 1984, to issue then-binding guidelines that applied to all persons convicted in the federal court system.¹⁰⁰ Despite the Commission's immense authority, the eight-Justice majority found the act had prescribed a sufficient intelligible principle to constrain its power.¹⁰¹ Only Justice Antonin Scalia disagreed.¹⁰²

Justice Scalia, though, later wrote the unanimous opinion of the Court in *Whitman v. American Trucking Ass'ns*¹⁰³ upholding a broad grant of authority to the Environmental Protection Agency ("EPA").¹⁰⁴ Under § 109(b)(1) of the Clean Air Act, the EPA must set primary ambient air quality standards to "protect the public health with an adequate margin of safety."¹⁰⁵ When construed to avoid using a cost-benefit analysis, the standard had no constitutional deficiency.¹⁰⁶ It did not differ significantly from past precedent, Scalia observed.¹⁰⁷ From *Mistretta* to *Gundy*, the Court, either unanimously or with only one dissent, upheld broad delegations to the secretary of transportation to "establish a schedule of fees" for all "persons operating" pipeline facilities,¹⁰⁸ to the attorney general to establish categories of criminal conduct for different drugs,¹⁰⁹ and to the president to "restrict the death sentence to murders in which certain aggravating circumstances have been established."¹¹⁰

100. *Id.* at 367–68.

101. *Id.* at 379.

102. He emphasized that nondelegation had thus far focused on "the *degree* of generality contained in the authorization," but the powers of the Commission pertained to legislative functions, thus constituting an impermissible delegation of power. *Id.* at 419–20 (Scalia, J., dissenting).

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

104. *Id.* at 465.

105. *Id.* at 476.

106. *See id.* at 471 ("The text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA.").

107. *See id.* at 473–74 (comparing the "limits on the EPA's discretion . . . to the ones approved in *Touby v. United States*, 500 U.S. 160 (1991)" and to the provision of the Occupational Safety and Health Act of 1970 "which the Court upheld in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 488 U.S. 607, 646 (1980)").

108. *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 214 (1989).

109. *Touby*, 500 U.S. at 162. The Court notes:

The [Controlled Substance] Act establishes five categories or "schedules" of controlled substances, the manufacture, possession, and distribution of which the Act regulates or prohibits . . . [Section] 201(a) of the Act authorizes the Attorney General to add or remove substances, or to move a substance from one schedule to another.

Id.

110. *Loving v. United States*, 517 U.S. 748, 769 (1996).

C. *New Proposals*

Over the past fifty years, several groups have unsuccessfully advocated to revive the nondelegation principle. Interestingly, the first efforts came not from the Supreme Court but from academics, who postulated that the unchecked ability of Congress to delegate was undemocratic.¹¹¹ Scholar John Hart Ely delivered a forceful critique. He argued that the vast majority of legislating comes from “faceless bureaucrats” that “[were] neither elected nor reelected.”¹¹² For the really “hard issues,” representatives “shrewdly prefer[red] not to have to stand up and be counted but rather to let some executive-branch bureaucrat . . . take the inevitable political heat.”¹¹³ Such a system, condoned by the Supreme Court, eroded people’s faith in democracy.¹¹⁴

Eventually, the scholarly frustration resonated with members of the Supreme Court. Although writing only in concurrence or dissent, then-associate Justice William Rehnquist led the push, first in *Industrial Union Department, AFL-CIO v. American Petroleum Institute (Benzene)*,¹¹⁵ then again in *American Textile Manufacturers Institute v. Donovan (Cotton Dust)*.¹¹⁶ He, not Justice Gorsuch, was the

111. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 132 (1980) (“[B]y refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic.”); JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 93 (1978) (“[A] principal office of the nondelegation doctrine is to ensure that controverted issues of policy and opinion be resolved . . . by those who draw their special character from a representative relationship to the people.”); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 131 (1969) (“Much fun has been made of the myth the courts tried to create, that agencies were merely ‘filling in the details’ of Acts of Congress.”); Bernard Schwartz, *Of Administrators and Philosopher-Kings: The Republic, the Laws, and Delegations of Power*, 72 *NW. U. L. REV.* 443, 446 (1977) (“[I]n the absence of meaningful standards, administrative discretion is left completely at large.”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1667, 1672 (1975) (“These principles [of democratic government] would, however, be deprived of all practical significance were the legislature permitted to delegate its lawmaking power in gross.”); J. Skelly Wright, *Beyond Discretionary Justice*, 81 *YALE L.J.* 575, 583 (1972) (“[T]he delegation doctrine retains an important potential as a check on the exercise of unbounded, standardless discretion by administrative agencies.”).

112. ELY, *supra* note 111, at 131.

113. *Id.* at 132 (internal quotations omitted).

114. *Id.*; see also *id.* at 134 (“If we can just get our legislators to legislate we’ll be able to understand their goals well enough. I’m not saying we may not still end up with a fair number of clowns as representatives, but at least then it will be because clowns are what we deserve.”).

115. *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst. (Benzene)*, 448 U.S. 607 (1980).

116. *Am. Textile Mfrs. Inst. v. Donovan (Cotton Dust)*, 452 U.S. 490 (1981).

first Justice to propose a new test for nondelegation, though the test never gained enough support to form a majority.¹¹⁷

Both the *Benzene* and *Cotton Dust* cases involved provisions of the Occupational Safety and Health Act. The actual statutory text has been described as “a mass of confused and conflicting language.”¹¹⁸ In *Benzene*, Justice Rehnquist’s concurrence focused on § 6(b)(5) of the act that enabled the secretary of labor to establish standards for “toxic materials or harmful physical agents . . . to the extent feasible,” so that no employee would be harmed by regular exposure.¹¹⁹ Unlike the Court’s previous nondelegation opinions, Justice Rehnquist began with a discussion of constitutional principles.¹²⁰ He based his understanding in John Locke’s *Second Treatise of Civil Government*, where Locke wrote that the legislative power cannot be transferred to another authority.¹²¹ After using Locke to frame the historical basis for his view, Rehnquist formulated the “important functions” of nondelegation that each law must pass: (1) it must be consistent with “orderly governmental administration” ensuring “important choices of social policy are made by Congress”; (2) the recipient of the authority must be guided by an intelligible principle; and (3) courts must be able to meaningfully review if an agency has exceeded that standard.¹²² In announcing his test, Rehnquist did not jettison the intelligible principle test. He merely added to its requirements.

As applied in *Benzene*, the grant to the secretary of labor failed on each count.¹²³ The decision as to which regulations should be enacted was a legislative policy choice.¹²⁴ The feasibility standard had no guiding principle, and the word “feasibility” left the courts without

117. See Jay S. Bybee & Tuan N. Samahon, *William Rehnquist, The Separation of Powers, and the Riddle of the Sphinx*, 58 STAN. L. REV. 1735, 1750 (2006) (noting that although Justice Rehnquist was never in the majority, he “attempted to use the nondelegation doctrine to hold Congress’s ‘feet to the fire’ by forcing Congress to be conscientious”).

118. KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6 (6th ed. 2018).

119. *Benzene*, 448 U.S. at 671 (Rehnquist, J., concurring) (quoting 29 U.S.C. § 655(b)(5) (2018)).

120. See *id.* at 672–73 (invoking John Locke, the Framers, and the Federalist Papers). Later, Justice Gorsuch adopted a similar opening in his dissent in *Gundy*. See *Gundy v. United States*, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting) (referring to the Framers, Chief Justice Marshall, and John Locke).

121. *Benzene*, 448 U.S. at 672–73 (Rehnquist, J., concurring).

122. *Id.* at 685–86.

123. *Id.* at 686.

124. *Id.*

meaningful judicial review.¹²⁵ Rehnquist applied the same test in his dissenting opinion for a similar case a year later, *Cotton Dust*, reaching the same conclusion.¹²⁶ Ultimately, in both *Benzene* and *Cotton Dust*, the majority decided the case on grounds other than nondelegation,¹²⁷ though the majority in *Benzene* based its reading, in part, on constitutional concerns.¹²⁸ In *Cotton Dust*, Rehnquist convinced Chief Justice Burger to join his reasoning,¹²⁹ and the ultimate majority had only a bare five votes.¹³⁰

The fractured votes, invocation of nondelegation, and forceful presentation by Justice Rehnquist ostensibly presaged a revival of the nondelegation principle.¹³¹ At least for the next thirty-five years, such predications were wrong.¹³² Rehnquist's three-part test never found majority support, and the Court routinely upheld broad grants of power to agencies.¹³³ Justice Rehnquist found himself instead agreeing with the intelligible principle concept.¹³⁴

Before his confirmation, then-Judge Gorsuch assessed the constitutionality of the same statute involved in *Gundy*, explained below, and he raised similar concerns about nondelegation in his dissent from a denial of rehearing en banc.¹³⁵ Though in a less-

125. *Id.*

126. *Am. Textile Mfrs. Inst. v. Donovan (Cotton Dust)*, 452 U.S. 490, 543–48 (1981) (Rehnquist, J., dissenting).

127. *See id.* at 508–09 (majority opinion) (holding that the delegating statute only precluded agency adoption of a health-based rule absent a finding of “feasibility”); *Benzene*, 448 U.S. at 614–15 (holding that the delegating statute precluded agency adoption of a health-based rule absent a finding that the pre-existing situation created a “a significant health risk”); *see also* HICKMAN & PIERCE, *supra* note 118, § 2.6 (discussing the holdings of *Benzene* and *Cotton Dust*).

128. *Benzene*, 448 U.S. at 646 (“If the Government were correct . . . the statute would make such a ‘sweeping delegation of legislative power’ that it might be unconstitutional . . .”).

129. *Cotton Dust*, 452 U.S. at 543 (Rehnquist, J., dissenting).

130. *Id.* at 492 (majority opinion).

131. HICKMAN & PIERCE, *supra* note 118, § 2.6 (“*Benzene* and *Cotton Dust* seemed to foreshadow increased Supreme Court reliance on some version of the nondelegation doctrine.”).

132. *Id.* (“Since 1989, however, the Court has upheld five broad delegations of power—one to an independent agency, two to executive agencies, one to the Attorney General and one to the President.”).

133. *See, e.g., Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 458 (2001) (“Statutes need not provide a determinate criterion for saying how much of a regulated harm is too much to avoid delegating legislative power.”).

134. *See id.* at 472 (joining Part III of the majority opinion reaffirming the intelligible principle test).

135. *See United States v. Nichols*, 784 F.3d 666, 670 (10th Cir. 2015) (mem.) (Gorsuch, J., dissenting from denial of rehearing en banc) (“There’s ample evidence, too, that the framers of the Constitution thought the compartmentalization of legislative power not just a tool of good

developed manner, Gorsuch pushed for a stronger application of the nondelegation doctrine. He drew a contrast between “most traditional delegation tests” and the recent intelligible principle test that the Court adopted.¹³⁶ A delegation “run riot,” he explained, was “inimical to the people’s liberty and our constitutional design.”¹³⁷ Still a circuit judge, Gorsuch could do little to change binding precedent—until he was elevated to the Supreme Court, where he would refine his position into a more concrete proposal.

II. *GUNDY V. UNITED STATES*

The statute at issue in *Gundy* was the Sex Offender Registration and Notification Act (“SORNA”).¹³⁸ Throughout the case, both the government and the defendant focused on whether the disputed provision of SORNA had an intelligible principle. At no point did either the parties or any Justice suggest adopting a new framework for applying the nondelegation doctrine. That issue was not briefed, except by one amicus,¹³⁹ and was never debated in oral argument. Nonetheless, Justice Gorsuch offered a new test for assessing nondelegation.

A. *The Gundy Case*

Congress enacted SORNA as part of a growing federal intervention into policing sex crimes, which was previously the purview of the states.¹⁴⁰ SORNA expanded existing registration requirements for sex offenders.¹⁴¹ Now, under SORNA, a sex offender must register

government or necessary to protect the authority of Congress from encroachment by the Executive but essential to the preservation of the people’s liberty.”).

136. *Id.* at 672.

137. *Id.* at 677.

138. *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019).

139. *See infra* note 176 and accompanying text.

140. *See Gundy*, 139 S. Ct. at 2121 (explaining that every state and the District of Columbia had a sex offender registration statute but the statutes “varied along many dimensions” before SORNA).

141. *Id.* (“SORNA makes ‘more uniform and effective’ the prior ‘patchwork’ of sex-offender registration systems. The Act’s express ‘purpose’ is to ‘protect the public’ . . . by ‘establish[ing] a comprehensive national system for [their] registration.’” (alterations in original) (citations omitted) (first quoting *Reynolds v. United States*, 565 U.S. 432, 435 (2012); then quoting 34 U.S.C. § 20901 (2018)).

in every state where he lives, is a student, or is an employee.¹⁴² The registration system has two main provisions. Subsection (b) provides the “general rule.”¹⁴³ If a sex offender is in prison, that person must register before completing his sentence.¹⁴⁴ If the individual is not incarcerated, then he must register within three days of being sentenced.¹⁴⁵ Subsection (b) affects only offenders sentenced after the passage of SORNA, the “post-Act offenders.”¹⁴⁶ Subsection (d) catches all those not included above. It 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 or its implementation in a particular jurisdiction, 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).¹⁴⁷

Subsection (d) was intended to cover the “pre-Act offenders,” some 500,000 people.¹⁴⁸ Pursuant to SORNA, the attorney general established a rule to apply the registration requirements to the pre-Act offenders.¹⁴⁹

On October 3, 2005, Herman Gundy entered an *Alford* plea in Maryland state court for a second-degree sexual offense.¹⁵⁰ He was sentenced to twenty years in prison and five years of probation, with ten of the twenty years suspended.¹⁵¹ Later, Gundy confessed to violating his federal supervised release.¹⁵² He received a two-year prison sentence to be served directly after his Maryland sentence for his sexual offense.¹⁵³ Eventually, Gundy was moved to a reentry facility in the Bronx, and he was released in 2012, becoming a resident of the

142. 34 U.S.C. § 20913(a) (“A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.”).

143. *Gundy*, 139 S. Ct. at 2122.

144. *Id.*

145. *Id.*

146. *Id.* at 2132 (Gorsuch, J., dissenting).

147. 34 U.S.C. § 20913(d).

148. *Gundy*, 139 S. Ct. at 2122, 2143.

149. *Id.* at 2122.

150. *United States v. Gundy*, No. 13 Crim. 8, 2013 WL 2247147, at *1 (S.D.N.Y. 2013), *rev'd* 804 F.3d 140 (2d Cir. 2015), *aff'd*, 139 S. Ct. 2116 (2019); *see also* Brief for Petitioner at 13, *Gundy*, 139 S. Ct. 2116 (No. 17-6086) [hereinafter Brief for Petitioner].

151. *Gundy*, 2013 WL 2247147, at *1.

152. *Id.*

153. *Id.*

state.¹⁵⁴ Afterward, Gundy continued to live in New York but failed to register as a sex offender under SORNA.¹⁵⁵ The U.S. Attorney's Office for the Southern District of New York brought charges against him soon thereafter.¹⁵⁶

As Professor Jennifer Mascott has noted, *Gundy* was “unusual” from the beginning.¹⁵⁷ Gundy was represented by a public defender.¹⁵⁸ The petition for certiorari raised four questions, totaled only twenty pages, and dedicated a mere two pages to whether SORNA involved an unconstitutional delegation.¹⁵⁹ There was no circuit split.¹⁶⁰ In fact, eleven courts of appeals had rejected similar claims.¹⁶¹ The Supreme Court had also declined fifteen times to review SORNA nondelegation claims.¹⁶² It had addressed the exact same provision in *Reynolds v. United States*,¹⁶³ albeit answering a different question.¹⁶⁴ At first, the solicitor general's office did not even file a brief opposing certiorari, only doing so once instructed.¹⁶⁵ Still, the then nine-member Court

154. *Id.*

155. *Gundy*, 139 S. Ct. at 2122 (“After his release from prison in 2012, Gundy came to live in New York. But he never registered there as a sex offender. A few years later, he was convicted for failing to register, in violation of § 2250.”).

156. *Gundy*, 2013 WL 2247147, at *1.

157. *See Mascott, supra* note 23, at 8 (“From the start, this case had a relatively unusual posture for a case in which the Court would eventually grant review.”).

158. *Id.* (“[R]ather than a case involving a well-known corporate entity, a state, or a federal actor or a case with clients represented by a well-known Supreme Court litigator, Gundy petitioned *in forma pauperis* represented by a local public defender.”).

159. *See* Petition for Writ of Certiorari, *Gundy*, 138 S. Ct. at 1–20 (No. 17-6086); *see also* Mascott, *supra* note 23, at 8 (“Gundy initially petitioned for certiorari review on four separate questions, the *fourth* of which was his nondelegation claim.”).

160. *Gundy*, 139 S. Ct. at 2122 (“The District Court and Court of Appeals for the Second Circuit rejected that claim, as had every other court (including eleven Courts of Appeals) to consider the issue.”).

161. *See Mascott, supra* note 23, at 12 (“[T]he [Brief in Opposition] cited eleven courts of appeals that had rejected such claims.”).

162. *See id.* at 12–13 (“The next page of the [Brief in Opposition's] argument included a string citation to fifteen occasions on which the Supreme Court had denied certiorari review to SORNA nondelegation claims.”).

163. *Reynolds v. United States*, 565 U.S. 432 (2012).

164. *Id.* at 436, 439; *see also Gundy*, 139 S. Ct. at 2124 (“This is not the first time this Court has had to interpret § 20913(d). In *Reynolds*, the Court considered whether SORNA's registration requirements applied of their own force to pre-Act offenders or instead applied only once the Attorney General said they did.”).

165. Mascott, *supra* note 23, at 8.

granted the writ of certiorari on March 5, 2018 as to whether SORNA impermissibly delegated power to the attorney general.¹⁶⁶

After the Court agreed to hear the case, petitioners, respondents, and thirteen amici filed briefs.¹⁶⁷ Gundy stressed that the restraints imposed by the nondelegation doctrine should be particularly restrictive in the criminal context.¹⁶⁸ He claimed that SORNA failed the intelligible principle test by neglecting to provide a standard for the policy.¹⁶⁹ The government argued that Congress did not violate the nondelegation principle, as it supplied an intelligible principle by making the attorney general register the pre-Act offenders “to the maximum extent feasible.”¹⁷⁰ All the amici who filed briefs supported Gundy,¹⁷¹ including, to name a few, the Cato Institute,¹⁷² the National Association of Federal Defenders,¹⁷³ the American Civil Liberties Union,¹⁷⁴ and the Becket Fund for Religious Liberty.¹⁷⁵ Of all the amici,

166. *United States v. Gundy*, 804 F.3d 140 (2d Cir. 2015), *cert. granted*, 86 U.S.L.W. 3438 (U.S. Mar. 5, 2018) (No. 17-6086).

167. *Mascott*, *supra* note 23, at 7.

168. Brief for Petitioner, *supra* note 150, at 17–23. Repeatedly, Gundy emphasized the criminal nature of SORNA in the hopes that the Court would account for the liberty interest in the nondelegation context. Whether the doctrine applies differently in the criminal context remained unclear at the time of his brief and remains so today. *See* F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. (forthcoming 2020) (manuscript at 5 n.9) (on file with the *Duke Law Journal*) (noting that no prior scholarship “has addressed specifically how the principles underlying the nondelegation doctrine apply to criminal laws”). In an earlier opinion on SORNA while a judge on the Tenth Circuit, then-Judge Gorsuch made a similar point:

It’s easy enough to see why a stricter rule would apply in the criminal arena. The criminal conviction and sentence represent the ultimate intrusions on personal liberty and carry with them the stigma of the community’s collective condemnation—something quite different than holding someone liable for a money judgment

United States v. Nichols, 784 F.3d 666, 672–73 (10th Cir. 2015) (mem.) (Gorsuch, J., dissenting from denial of rehearing en banc). Ultimately, Justice Gorsuch did not pick up this thread when dissenting in *Gundy*. *See* Hessick & Hessick, *supra*, at 5 (“[N]one of the justices in *Gundy* grappled with [the criminal law delegation] issues.”).

169. Brief for Petitioner, *supra* note 150, at 23.

170. Brief for the United States at 13, *United States v. Gundy*, 139 S. Ct. 2116 (2019) (No. 17-6086) [hereinafter Brief for United States].

171. *Mascott*, *supra* note 23, at 7.

172. Brief for the Cato Institute et al. as Amicus Curiae Supporting the Petitioner, *Gundy*, 139 S. Ct. 2116 (No. 17-6086).

173. Brief for the National Association of Federal Defenders as Amicus Curiae Supporting the Petitioner, *Gundy*, 139 S. Ct. 2116 (No. 17-6086).

174. Brief for the American Civil Liberties Union as Amicus Curiae Supporting the Petitioner, *Gundy*, 139 S. Ct. 2116 (No. 17-6086).

175. Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting the Petitioner, *Gundy*, 139 S. Ct. 2116 (No. 17-6086).

only the Center for Constitutional Jurisprudence advocated replacing the intelligible principle test.¹⁷⁶

The Court heard oral argument for the case on October 2, 2018 with only eight Justices on the bench.¹⁷⁷ Soon-to-be-Justice Kavanaugh would be confirmed four days later.¹⁷⁸ If there was seemingly little appetite to unsettle doctrine in the petition and amici filings, that only continued at oral argument. The members of the Court gave little indication that they were considering adopting a new test.

Sarah Baumgartel, counsel for Gundy, never contended that the intelligible principle test insufficiently enforced the nondelegation doctrine. Rather, from the beginning, she posited that the “lack of standard” altogether doomed SORNA.¹⁷⁹ She met quick resistance, beginning with Chief Justice Roberts, who noted that the government claimed to have a standard that satisfied the intelligible principle test.¹⁸⁰ The intelligible principle was to “apply the . . . requirements in the law to the maximum extent feasible.”¹⁸¹ Justice Sonia Sotomayor extracted a concession: the Court had routinely read statutory limitations to avoid constitutionality problems.¹⁸² Baumgartel then admitted, after further questioning from Justice Kagan, that § 20913(d), if read with a feasibility standard, would likely not pose any constitutional issues.¹⁸³ Thus, Gundy’s argument necessitated reading SORNA to allow the attorney general complete discretion to register or not register the 500,000 possible offenders.

Principal Deputy Solicitor General Jeffrey Wall argued on behalf of the government. Wall stated unequivocally that the attorney general could only make judgments as to the requirements of SORNA based on feasibility, not some other policy judgment.¹⁸⁴ Even if the Court doubted the argument, Wall claimed, it should still construe the statute

176. See Brief for the Center for Constitutional Jurisprudence as Amicus Curiae Supporting the Petitioner at 10, *Gundy*, 139 S. Ct. 2116 (No. 17-6086) (“The ‘intelligible principle’ doctrine has failed if it was meant as a check against an unconstitutional delegation This Court should instead require Congress to enact judicially manageable guidelines to govern the scope of any delegations of authority.”).

177. *Gundy*, 139 S. Ct. at 2116; see *supra* note 9 and accompanying text.

178. See *supra* note 9 and accompanying text.

179. Transcript of Oral Argument, *supra* note 19, at 3–4.

180. *Id.* at 4.

181. *Id.*

182. *Id.* at 22.

183. *Id.* at 24–25.

184. *Id.* at 42.

narrowly to avoid the constitutional problem.¹⁸⁵ Several Justices asked about reading limiting language into the statute to save it from a constitutional challenge.¹⁸⁶ And that is exactly what the plurality opinion did.

Justice Kagan, joined by Justices Stephen Breyer, Ruth Bader Ginsburg, and Sotomayor, wrote for the plurality.¹⁸⁷ The Court faced, in the eyes of the plurality, two different readings of the statute: to give complete discretion to the attorney general over when or if to apply the SORNA requirements to pre-Act offenders or, alternatively, to mandate the attorney general to apply the SORNA requirements as soon as possible, to the extent feasible.¹⁸⁸ The text, structure, purpose, and legislative history of § 20913(d) demonstrated that the attorney general only had the power to adjust the registration requirements for pre-Act offenders as needed for feasibility.¹⁸⁹ He could not issue a categorical excusal for some or all individuals. In light of the numerous delegations with even broader standards the Court had sustained over the years, the plurality easily answered the question of SORNA's constitutionality.¹⁹⁰ If "SORNA's delegation is unconstitutional," the plurality concluded, then so was "most of Government."¹⁹¹

Justice Alito cast the deciding vote in *Gundy*, voting to affirm without joining the plurality's analysis.¹⁹² He reasoned that the statute did have a discernable standard based on current doctrine.¹⁹³ However, he was amenable to changing the Court's approach to nondelegation, which has been untouched for eighty-four years, provided that a majority of the Court could support a single approach.¹⁹⁴ Otherwise, "it

185. *Id.*

186. During oral argument Justice Sotomayor asked Baumgartel "why is the reading in a feasibility here so unusual, given . . . [the Court has] routinely . . . read into delegation cases limits[?]" *Id.* at 22. Similarly, Justice Kagan noted there seemed to be "some language in the statute that supports the government's reading" of "some feasibility constraint . . . in the statute as long as you're taking the statute as a whole." *Id.* at 10–11.

187. *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019).

188. *Id.* at 2123.

189. *See id.* at 2123–29 (discussing the correct interpretation of § 20913(d)).

190. *Id.* at 2129.

191. *Id.* at 2130.

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

193. *Id.* at 2130.

194. *Id.* at 2131 ("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.")

would be freakish to single out the provision at issue here for special treatment.”¹⁹⁵

Given the vote split, many legal commentators agree that the nondelegation test faces an uncertain future.¹⁹⁶ Although a reinvigoration is not guaranteed, the possibility remains strong that the Court will revisit and, potentially, apply the Gorsuch test, either in part or in whole.

B. Gorsuch’s Dissent

As to how to reinvigorate the nondelegation doctrine, Justice Gorsuch, joined by Justice Thomas and Chief Justice Roberts, authored a dissent, in which he proposed a test that would accomplish that goal.¹⁹⁷ First, beginning with the statutory analysis, Gorsuch took the opposite reading of § 20913(d) of SORNA, finding it gives a blank check to the attorney general to impose registration requirements on any number of pre-Act offenders, or on none at all.¹⁹⁸ This reading entailed a “vast” and uncontrolled “breadth of authority.”¹⁹⁹ Indeed, nothing could be salvaged from the text, structure, purpose statement, or legislative history to counter the plain meaning.²⁰⁰ Different attorneys general used the authority granted by the statute in varying ways.²⁰¹ The government, in *Reynolds*, even suggested a similar reading.²⁰²

195. *Id.*

196. *See, e.g.,* Trevor Burrus, *Neil Gorsuch Catches a Hail Mary for the Constitution*, AM CONSERVATIVE (June 28, 2019, 1:13 PM), <https://www.theamericanconservative.com/articles/neil-gorsuch-catches-a-hail-mary-for-the-constitution> [<https://perma.cc/M3GQ-7ZNP>] (arguing that Justice Gorsuch’s opinion “could eventually roll back decades of executive overreach”); Mila Sohoni, *Opinion Analysis: Court Refuses to Resurrect Nondelegation Doctrine*, SCOTUSBLOG (June 20, 2019, 10:32 PM), <https://www.scotusblog.com/2019/06/opinion-analysis-court-refuses-to-resurrect-nondelegation-doctrine> [<https://perma.cc/JG9L-V5ST>] (“For the nondelegation doctrine, the significance of *Gundy* lies not in what the Supreme Court did today, but in what the dissent and the concurrence portend for tomorrow.”).

197. *Gundy*, 139 S. Ct. at 2131, 2136–37 (Gorsuch, J., dissenting).

198. *Id.* at 2132.

199. *Id.*

200. *See id.* at 2146–47 (“And as we have seen, the only part of the statute that speaks to pre-Act sex offenders—§ 20913(d)—makes plain that they are *not* automatically subject to all the Act’s terms but are left to their fate at the hands of the Attorney General.”).

201. *Id.* at 2132.

202. *See id.* (“As the Department of Justice itself has acknowledged, SORNA ‘does not require the Attorney General’ to impose registration requirements on pre-Act offenders.” (quoting Brief for the United States at 23, *Reynolds v. United States*, 565 U.S. 432 (2012) (No. 10-6549))).

Second, after interpreting the statute broadly, Gorsuch moved to his nondelegation discussion. He emphasized that the principle of the separation of powers was enshrined within the Constitution. Legislative power, John Locke wrote, “cannot transfer . . . for it being but a delegated power from the people, they who have it cannot pass it over to others.”²⁰³ In a nation with unchecked legislative delegations, laws would no longer “be few in number,” which would deprive them of social legitimacy and risk hurting minority interests.²⁰⁴ A citizen could not hold a legislator accountable if that legislator had given her legislative authority to another person.²⁰⁵ A power or responsibility struggle might ensue between Congress and the executive.²⁰⁶ Each one would aim to gain the credit without shouldering the blame for difficult decisions.²⁰⁷ Liberty must be cherished, and, in Gorsuch’s eyes, nondelegation protects liberty interests.²⁰⁸

As a result, Gorsuch argued that a Court should only uphold a statute if: (1) the agency’s task is to “fill up the details”; (2) the application of the statute turns on executive fact-finding; or (3) the grant of power involves certain nonlegislative responsibilities.²⁰⁹ First, filling up the details requires that Congress itself make the policy decision.²¹⁰ Examples of detail filling include ordering federal courts to follow state rules but make alterations, assigning to the Internal Revenue Service commissioner the duty to design a tax stamp, and granting the secretary of agriculture the ability to adopt rules regulating the use of public forests to avoid destruction.²¹¹ Second, executive fact-finding involves the gathering of factual information by either the president or one of his subordinates to decide if a statute should apply.²¹² This could be the state of trade relations or trade interference with a foreign power, or whether a bridge might cause difficulty with maritime navigation of the East River.²¹³ Finally, nonlegislative responsibilities include tasks already within the scope of

203. *Id.* at 2133.

204. *Id.* at 2135.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 2136–37.

210. *Id.* at 2136.

211. *Id.*

212. *Id.*

213. *Id.*

the executive power, such as certain “foreign affairs powers” entrusted to the president.²¹⁴

Applying the three-part test to his reading of § 20913(d), Gorsuch found that the act amounted to an unconstitutional delegation of legislative power. Admittedly, details “can sometimes be difficult to discern,” and Congress can, even under the new test, allow an agency to fill up “highly consequential” ones.²¹⁵ What mattered most in *Gundy*, however, was whether Congress “prescribe[d] the rule governing private conduct.”²¹⁶ Gorsuch speculated that members of Congress could not agree on an approach to pre-Act offenders, so it delegated that policy choice to the attorney general.²¹⁷ Such a choice was not one of filling up details—rather, it was an exercise of legislative authority. Moreover, Congress could have made the statute simply turn on executive fact-finding. By perhaps giving criteria to the attorney general to investigate, such as the chance of an offender committing another crime, Congress might have satisfied the second prong.²¹⁸ It did not. Nor did SORNA touch on “overlapping authority with the executive.”²¹⁹ The “duties and rights” of citizens involved a “quintessentially legislative power.”²²⁰ Given that the disputed provision in SORNA could satisfy no element of the newly created test, the dissenters would have struck it down as an unconstitutional delegation of power.²²¹ More broadly, three Justices would evaluate all future challenges to congressional authority using the Gorsuch test.

III. THE GORSUCH TEST IN PERSPECTIVE

Understanding how Justice Gorsuch’s proposal relates to previous nondelegation tests and case law offers clues to its potential impact. Undoubtedly, the Gorsuch test, if ever applied, would be the strictest form of the nondelegation principle in the past ninety years—maybe longer. To begin, Justice Gorsuch adopted the “fill up the details” formulation used by the Court during the nineteenth century, in

214. *Id.* at 2137.

215. *Id.* at 2143.

216. *Id.*

217. *Id.* at 2144 (“The statute here also sounds all the alarms the founders left for us. Because Congress could not achieve the consensus necessary to resolve the hard problems associated with SORNA’s application to pre-Act offenders, it passed the potato to the Attorney General.”).

218. *Id.* at 2143.

219. *Id.* at 2143–44.

220. *Id.* at 2144.

221. *Id.* at 2143–45.

addition to the two other areas he identified. Seemingly, this implies at least a broader test than just “fill up the details” alone. But the Court never used this nineteenth century test to strike down a statute for violating the nondelegation principle using this nineteenth century test. Indeed, as detailed above,²²² numerous capacious standards survived this review. If Justice Gorsuch envisions just applying the test more rigorously, then his proposal’s application, even if no different in form, would still be more stringent.

Clearer is Justice Gorsuch’s stance on the intelligible principle inquiry. He believed that the *Hampton* Court never wanted to create the intelligible principle test.²²³ Chief Justice Taft “sought only to explain the operation of [certain] traditional tests.”²²⁴ The current nondelegation doctrine instead “[took] on a life of its own.”²²⁵ The passing phrase became a standard that virtually no statute has failed. To Justice Gorsuch, “This mutated version of the ‘intelligible principle’ remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked.”²²⁶ Thus, the Court must abandon it. This stance markedly differs from even the *Panama Refining* Court’s reasoning, which did not seek to repudiate any previous tests or cases.²²⁷ Justice Gorsuch remarked that no one believed the phrase would ever become the foundation for the nondelegation doctrine.²²⁸ He even refused to state whether the statute at issue in *Hampton* would satisfy the “traditional tests” he announced, only conceding that a “good argument” could be made on the subject.²²⁹

In addition, Justice Gorsuch’s version would more tightly police legislative delegation than Justice Rehnquist’s *Benzene* formulation.²³⁰ Rehnquist argued that the Court must examine whether: (1) the grant of power is consistent with “orderly governmental administration,” ensuring that “important choices of social policy are made by

222. See *supra* notes 56–58 and accompanying text.

223. *Gundy*, 139 S. Ct. at 2131, 2138–39 (Gorsuch, J., dissenting).

224. *Id.* at 2139.

225. *Id.*

226. *Id.*

227. See *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 429–30 (1935) (finding limits on the ability of Congress to delegate but not overturning any case law or test).

228. *Gundy*, 139 S. Ct. at 2131, 2139 (Gorsuch, J., dissenting).

229. *Id.*

230. *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst. (Benzene)*, 448 U.S. 607, 686–87 (1980) (Rehnquist, J., concurring).

Congress”; (2) the recipient of the authority is guided by an intelligible principle; and (3) the recipient of the authority has exceeded that standard.²³¹ The intelligible principle standard was still central for Justice Rehnquist, who merely supplemented it with a review of whether Congress made the general policy considerations and whether the recipient of the delegation had acted within the grant of power.²³² Justice Rehnquist did not go so far as to say that the Court should engage in an extensive inquiry into whether an administrative rule really filled up the details of the statute or enacted major policy. Rather, he focused on the idea that “important choices of social policy” should be made by the legislature—a less absolutist stance than Justice Gorsuch’s prohibition against agencies making any policy determinations.²³³

Again, in contrast to Justice Rehnquist’s formulation, the Gorsuch test would discard the phrase “intelligible principle.”²³⁴ Possibly, Justice Gorsuch’s antipathy toward the current test is rooted in the application of the nondelegation principle, not the word choice itself. Alternatively, he might just think that a word choice closer to the originalist meaning of the nondelegation principle is the preferred route. In any event, Justice Rehnquist, far more so than Justice Gorsuch, acknowledged the benefits of delegation by maintaining a balance in his proposal with the intelligible principle test.²³⁵ Congress needs the ability to function efficiently by leaving some things to agencies. Thus, Rehnquist implied that there is inherently something different in “important” versus routine policy decisions by agencies.²³⁶ Gorsuch does not acknowledge the same distinction.

Although Justice Gorsuch has not specifically advocated overruling any previous case law, it is worth considering whether many

231. *Id.* at 685–86.

232. *Id.*

233. *Compare id.* at 685 (“[T]he nondelegation doctrine . . . ensures . . . that important choices of social policy are made by Congress.”), with *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (“[A]s long as Congress makes the policy decisions . . . it may authorize another branch to ‘fill up the details.’”).

234. *Gundy*, 139 S. Ct. at 2138–39 (Gorsuch, J., dissenting) (“No one at the time thought the phrase meant to effect some revolution in this Court’s understanding of the Constitution.”).

235. See *Benzene*, 448 U.S. at 685–86 (Rehnquist, J., concurring) (“[T]he doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an ‘intelligible principle’ to guide the exercise of the delegated discretion.” (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) and *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935))).

236. *Id.*

cases would still be good law under his test. The Court has decided over a dozen nondelegation cases since 1935. And each time, it has sustained the statutory grant of authority. Justice Gorsuch referred to only four nondelegation opinions favorably in his analysis: *Touby v. United States*,²³⁷ *Loving v. United States*,²³⁸ *Skinner v. Mid-America Pipeline Co.*,²³⁹ and *State Oil Co. v. Khan*.²⁴⁰ Conspicuously absent from his list were many of the seminal post-*Schechter* nondelegation cases: *Benzene*, *Cotton Dust*, *Mistretta*, and *Whitman*.

The consequences of not explaining how a new test affects old case law could be dire. Combined with the sheer number of statutes that use a general standard, the lack of clarity in the doctrine could open the floodgates to thousands of lawsuits. Additionally, litigants may raise a nondelegation issue more frequently.²⁴¹ Criminals convicted under administrative rules established under now-suspect laws might hurriedly challenge their sentences. Companies seeking to avoid liability or regulation could preemptively dispute the ability of regulatory bodies, such as the Securities and Exchange Commission, the Federal Reserve, and the Consumer Financial Protection Bureau. Alternatively, they may delay litigation for years, raising challenges to each of the statutory provisions that governs the case. Agency actions might be chilled. Unable to know if their regulations will be upheld, bound by a test without clarity, and without the financial resources to fight every lawsuit, administrative bodies may forgo issuing major regulations altogether. Although some courts might see “fill up the details” as simply a moderately more stringent intelligible principle test, doctrinal approaches will likely vary greatly, and there is a potential for an uneven application of law based on such factors as the size of the court docket, the location of the challenge, and even political

237. *Touby v. United States*, 500 U.S. 160 (1991).

238. *Loving v. United States*, 517 U.S. 748 (1996).

239. *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212 (1989).

240. *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

241. More work is needed to measure the number of nondelegation challenges *simply raised*, as opposed to the number of nondelegation cases *decided*, both historically and since the Supreme Court issued *Gundy*. As of June 8, 2020, Westlaw recorded eighty-three citing references to the case. Citing References for *Gundy v. United States*, 139 S. Ct. 2116 (2019), WESTLAW (last visited June 8, 2020). That seems to be a remarkably high number considering how infrequently these challenges were raised. Unfortunately, it is impossible to draw any inferences until empirical studies have examined this question.

ideology. Regardless, as in the wake of other dramatic shifts,²⁴² lower courts will likely be left perplexed.

IV. IMPLICATIONS

Although many areas of government might be destabilized by Justice Gorsuch's proposal, there are a few examples, identified from previous cases, law review articles, and case briefs, that will likely be most affected by a change in doctrine. Further, theoretically applying the Gorsuch test to two recently decided cases in lower court opinions, which used the intelligible principle test, illustrates the difficulty in changing nondelegation jurisprudence.

A. *The "Three Hundred Thousand" Problem*

Part of the criticism of Justice Gorsuch's test can be distilled into a simple phrase: "Look before you leap." There is a looming question for the nondelegation doctrine—if you applied the reasoning in Justice Gorsuch's dissent in *Gundy* to other nondelegation challenges, how would that affect the countless other statutes with similar phrasing to SORNA? At oral argument, Justice Breyer estimated that the number of standards as broad as SORNA could be three hundred thousand.²⁴³ Congress has relied on the intelligible principle understanding of the nondelegation doctrine for almost a hundred years. Under this reliance, Congress has enacted statutes that have shaped American lives in large and small ways.

Justice Breyer drew particular attention in oral argument to laws regulating the Securities and Exchange Commission.²⁴⁴ To his point, the Commission can promulgate rules controlling the means of a short sale "as necessary or appropriate in the public interest or for the protection of investors."²⁴⁵ But the Commission's authority extends even further to overseeing securities and enforcing any violation of its

242. Consider both the outpouring of scholarship and lower court confusion in the wake of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See, e.g., William H. J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEGAL STUD. 474, 474 (2017) ("Ever since *Twombly* and *Iqbal* introduced the doctrine of plausibility pleading, a cottage industry of legal scholars (including myself) has undertaken to detect [their] effects . . . on litigants and case outcomes. Results so far have been equivocal . . .").

243. See Transcript of Oral Argument, *supra* note 19, at 7–8.

244. *Id.* at 7 ("What about the most famous regulation, that I think people in this room would imagine, Rule 10b-5?").

245. 15 U.S.C. § 78j (2018); see also 17 C.F.R. § 240.10b5-1 (2018) (regulating insider trading under the authority of 15 U.S.C. § 78j).

rules with steep criminal penalties.²⁴⁶ A strict application of the Gorsuch test might render one of the most influential bodies in American government powerless. Correspondingly, it could leave consumers without certain protections and rob the markets of structures deriving from these regulations. The power of the Commission does not depend on merely filling up details. It must constantly evaluate policy considerations, in the interests of the statute, that guide its rulemaking discretion.

In *Gundy*, the government and plurality identified a few illustrative examples of laws that could be upended if the nondelegation doctrine changed.²⁴⁷ Under the Foreign Agents Registration Act, every foreign agent must include a “conspicuous statement” of their communications with certain foreign powers.²⁴⁸ The attorney general can define a “conspicuous statement,” then prosecute and imprison someone for not meeting the definition.²⁴⁹ The Federal Reserve Board can decide whether certain restrictions that carry criminal penalties apply to forms of credit.²⁵⁰ A change in the policy of the Board could alter the status for thousands, all of whom could spend time in jail based on an agency definition.

As for examples from historical cases and scholarship, the Federal Trade Commission operates to prevent “unfair methods of competition.”²⁵¹ The Federal Communications Commission can grant or deny licenses based on vague standards of “public convenience and necessity” or “public interest.”²⁵² The secretary of transportation,

246. 15 U.S.C. § 78ff(a).

247. See *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (noting at least two statutes that delegate feasibility determinations to executive officials); Brief for United States, *supra* note 170, at 45 & nn.10–11 (citing numerous statutes where Congress has delegated to an executive agency the determination of whether someone will face criminal liability as well as the “authority to prescribe substantive requirements in rules and regulations and has separately made it a crime to violate those requirements”).

248. 22 U.S.C. §§ 614(b), 618 (2018).

249. *Id.* § 614(b).

250. 15 U.S.C. § 78g(c)(3)(B).

251. *Id.* § 45(a). Indeed, the *Schechter* Court actually approved the Federal Trade Commission when ruling on *NIRA. A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 504 (1935).

252. See 47 U.S.C. § 214(a) (2018) (“No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby”); *id.* § 307(a) (“The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.”); *id.* § 309(a) (“[T]he

through the National Highway Transportation and Safety Authority, sets standards as “practicable” to “meet the need for motor vehicle safety.”²⁵³ The Federal Aviation Administration can “take such other action, including the modification of safety and security procedures and flight deck redesign, as may be necessary to ensure the safety and security of the aircraft.”²⁵⁴ In times of economic depression, Congress has given emergency power to the president to “issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries.”²⁵⁵ Ultimately, it is difficult to argue, using Justice Gorsuch’s rationale, that these statutes may not also be impermissible delegations.

B. Uneasy Application

The confusing nature of the Gorsuch test becomes more apparent when used to decide two sample nondelegation challenges, one criminal and one civil, in the lower courts.²⁵⁶ The standards

Commission shall determine, in the case of each application filed with it to which § 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application”); *see also* Robert L. Pacholski, Note, *FCC and Reciprocity: An Examination of the Public Interest Standard*, 62 TEX. L. REV. 319, 319 (1983) (“Such a broad mandate [granted to the Commission] . . . holds the potential for abuses of power through expansive and groundless construction of the term ‘public interest.’”). *But see* Nat’l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (rejecting the claim “that the standard of ‘public interest’ governing the exercise of the powers delegated to the Commission by Congress is so vague and indefinite that, if it be construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional.” Instead, the Court notes that the Commission does not make “mere general reference to public welfare without any standard to guide determinations”) *Id.* (quoting *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932)).

253. 49 U.S.C. § 30111(a) (2018). Although not assessing the delegation, the Court examined a standard made pursuant to this authority in *Motor Vehicle Manufacturers Ass’n of the U.S. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

254. 49 U.S.C. § 44903.

255. *See* The Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799 (formerly codified at 12 U.S.C. § 1904).

256. No precise formula was used in selecting these two cases. Rather, the aim was to find two that captured representative nondelegation challenges under the intelligible principle test within the past twenty years. Some fact patterns were quite lengthy and, as such, did not lend themselves to the format of a Note. For more examples of nondelegation challenges that might lead to a different outcome under the Gorsuch test, see *United States v. Brown*, 364 F.3d 1266, 1272 (11th Cir. 2004) (finding that “promot[ing] and regulat[ing] the use of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose . . . [of] conserve[ing] the scenery” is not too broad under constitutional nondelegation standards); *United States v. Garfinkel*, 29 F.3d 451, 455, 459 (8th Cir. 1994) (holding that the Federal Drug Administration’s ability to enact “regulations . . . relating to the protection of the public health” meaningfully restrains agency action); *U.S. Commodity Futures Trading Comm’n v. Oystacher*, 203 F. Supp. 3d 934, 950–52 (N.D. Ill. 2016)

promulgated by Congress in both cases were broad, and agencies created rules pursuant to those broad standards. The litigants raised nondelegation challenges and lost. Under the Gorsuch test, the result in each case might have been different—or might not have been. Theorizing the application of a different rule demonstrates both the lack of clarity with the Gorsuch test and the far-reaching consequences of changing nondelegation jurisprudence.

Every federal criminal law, no matter how seemingly insignificant, could be impacted by the Gorsuch test, as demonstrated by *United States v. Komatsu*.²⁵⁷ There, Towaki Komatsu approached a Court Security Officer (“CSO”) outside of a courthouse building in New York City.²⁵⁸ The CSO was on his way to work.²⁵⁹ Komatsu shouted a profanity at the CSO, who returned the insult.²⁶⁰ In response, Komatsu charged at him with a pen in his hand.²⁶¹ The CSO parried the thrust and forced Komatsu to the ground.²⁶²

After the incident was reported, Komatsu was charged with violating 40 U.S.C. § 1315 and the accompanying federal rule 41 C.F.R. § 102-74.390.²⁶³ Section 1315 instructs the secretary of homeland security to “prescribe regulations necessary for the protection and administration of property owned or occupied by the Federal Government.”²⁶⁴ Violators can either be fined, imprisoned for a period up to thirty days, or both.²⁶⁵ The secretary then promulgated a rule penalizing persons on federal property for behavior that:

(drawing upon text, legislative findings, and purpose to determine that the Spoofing Statute of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2012 “provide[s] an intelligible principle guiding the [agency’s] conduct”); *Rothe Dev. Inc. v. Dep’t of Def.*, 107 F. Supp. 3d 183, 188–89, 211–12 (D.D.C. 2015) (ruling that the Small Business Administration’s power to “acquire procurement contracts from other government agencies and to award . . . those contracts by small businesses ‘whenever [the agency] determines such action is necessary’” to help disadvantaged individuals satisfies the intelligible principle test); *Def. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 127 (D.D.C. 2007) (upholding the power of the Department of Homeland Security to build barriers across the border of the United States to “deter illegal crossings”).

257. *United States v. Komatsu*, No. 18-cr-651, 2019 WL 2358020, at *1 (E.D.N.Y. June 4, 2019).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at *2.

264. 40 U.S.C. § 1315(c) (2018).

265. *Id.*

- (a) Creates loud or unusual noise or a nuisance;
- (b) Unreasonably obstructs the usual use of entrances, foyers, lobbies, corridors, offices, elevators, stairways, or parking lots;
- (c) Otherwise impedes or disrupts the performance of official duties by Government employees; or
- (d) Prevents the general public from obtaining the administrative services provided on the property in a timely manner.²⁶⁶

The government cited parts (a) and (c) in *Komatsu*'s indictment to support its position.²⁶⁷ In turn, the defendant raised numerous constitutional objections, including a nondelegation challenge to § 1315.²⁶⁸

Magistrate Judge Tiscione decided *Komatsu* only a couple of weeks before the *Gundy* opinion was released, disposing of the challenge in one page.²⁶⁹ Under current doctrine, § 1315 has an intelligible principle, “the protection and administration of property owned or occupied by the Federal Government.”²⁷⁰ Indeed, three other courts examining the same issue agreed.²⁷¹ Because the regulation that *Komatsu* violated was made pursuant to an intelligible principle, it is constitutionally sound.

Under the Gorsuch framework, the case may have been resolved against the government. The first prong instructs that an agency can only “fill up the details,” with the major policy decision residing with Congress. Here, the attorney for the defendant could argue that “protection and administration” of government property gives too much leeway to the Department of Homeland Security to make important policy decisions, thus doing more than “filling up the details.” The operative word in the statute is “may,” which is permissive, unlike the “shall” in SORNA, which is mandatory. The

266. 41 C.F.R. § 102-74.390 (2019).

267. See *Komatsu*, 2019 WL 2358020, at *2 (“The Government cites subsections (a) and (c) of the regulation [41 C.F.R. § 102-74.390] in its Second Superseding Information”); see also Second Superseding Misdemeanor Info., at 1, *Komatsu*, 2019 WL 2358020 (citing 41 C.F.R. § 102-74.390).

268. See Defendant Towaki *Komatsu*'s Reply Memorandum in Support of His Pre-trial Motions at 6–10, *Komatsu*, 2019 WL 2358020.

269. *Komatsu*, 2019 WL, 2358020 at *1.

270. *Id.* at *5 (citing 40 U.S.C. § 1315 (2018)).

271. *Id.* at *6.

secretary could establish hundreds of rules, tens of rules, or no rules at all. She possesses the complete power to prohibit virtually any activity in federal government buildings. If the secretary chooses, she could allow people to run freely, shout with microphones, hold rallies, or harass potential litigants on the way to the courtroom.

Alternatively, the secretary could impose very stringent requirements up to any other constitutional bar. She could ban any communication devices, limit the number of times a person can enter a building, or decide to impose a fee. The text of the statute is not constraining. Like in *Gundy*, this power also carries the criminal penalty of imprisonment. And the secretary's choice would affect millions of visitors to public buildings, many times the number of sexual offenders affected by SORNA. Consequently, the secretary is arguably making policy decisions, not filling up details, and her choices will be the ones visible to the public. If the Gorsuch test prioritizes political accountability, then § 1315 allows legislators to circumvent the task of setting potentially unpleasant rules in the public sphere. This abdication of legislative responsibility would be an unconstitutional delegation of power.

Nor can it be argued that § 1315 involves executive fact-finding or nonlegislative responsibilities. The statute does not ask the agency to make any factual determinations, such as whether a warring power has blocked trading or if a bridge might interfere with commerce. Further, rules regulating conduct in government buildings have never been the traditional domain of the executive. They do not fall under the president's national-security or foreign-affairs-related powers. Therefore, neither the second nor third prongs of the Gorsuch test would save this delegation of power from its alleged constitutional deficiency.

Of course, the test can arguably be applied more liberally. The "fill up the details" formulation may reach more activities than indicated in Gorsuch's dissent. The government might contend that Congress still made the major policy decision to regulate the space around federal properties but just needed the secretary to designate what types of activities would fall within the statute. It is not clear, however, why that same logic would not apply to SORNA. Congress made the decision to have some pre-Act offenders included within the statute, and the attorney general, under Gorsuch's reading, had the discretion regarding when and how to enroll them. Thus, this example illustrates the capacious nature of the "fill up the details" prong. The line between

“policy” and “details” can be so easily blurred as to render the distinction almost unenforceable.

A 2008 challenge to a civil statute, in *Michigan Gambling Opposition v. Kempthorne*²⁷² out of the D.C. Circuit, exemplifies how the civil side of the judicial system is potentially affected. A small band of the Pottawatomi Indians²⁷³ living in Michigan wanted land to construct a casino.²⁷⁴ The tribe’s size had dwindled after decades of harsh federal policy that left most members landless and destitute.²⁷⁵ The unemployment rate was six times that of the neighboring area, and the casino offered a step toward “economic self-sufficiency.”²⁷⁶ After obtaining recognition of their tribal status under the Bureau of Indian Affairs (“BIA”) and complying with all the formal procedures, the tribe and the BIA planned to acquire a trace of land in a rural area of Grand Rapids for their casino operation.²⁷⁷ Under § 5 of the Indian Reorganization Act (“IRA”), the secretary of the interior can “in his discretion . . . acquire, through purchase . . . any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing land for Indians.”²⁷⁸ The Michigan Gambling Opposition argued that § 5 of IRA violated the nondelegation doctrine.²⁷⁹

A divided panel found that the phrase “for Indians” satisfied the intelligible principle test.²⁸⁰ In light of the purpose, structure, and legislative history of IRA, in addition to the broad standards approved by the Supreme Court, the panel considered it permissible. The purpose of IRA was to “rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression.”²⁸¹ Other parts of IRA help define § 5’s scope. These provisions govern tribal trusts, help return lands to the trusts, place

272. *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008) (per curiam).

273. The actual spelling of the Pottawatomi Tribe varies. See CARL WALDMAN, *ENCYCLOPEDIA OF NATIVE AMERICAN TRIBES* 234 (2006) (spelling the tribe’s name as “Potawatomi” and noting that “[d]ifferent spellings are preserved in place-names as well as historical records”). This Note reproduces the nomenclature used by the D.C. Circuit, the “Pottawatomi Indians,” but does not endorse any specific terminology.

274. *Mich. Gambling*, 525 F.3d at 26.

275. See *id.* (noting that the tribe’s size dwindled concurrently with broad federal policies designed to break up tribal holdings).

276. *Id.*

277. *Id.* at 26–27.

278. 25 U.S.C. § 5108 (2018).

279. *Mich. Gambling*, 525 F.3d at 27–28.

280. *Id.* at 30.

281. *Id.* at 31 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973)).

limits on transfers, and give federal dollars to support economic developments.²⁸² Several house and senate reports fortify the conclusion that § 5 must be read in light of helping tribes overcome “economic and social challenges.”²⁸³ The standard “need not be utterly unambiguous,” and, thus, the phrase “for Indians” sufficed to guide agency discretion.²⁸⁴

The interpretive method used by the majority in *Michigan Gambling* aligns exactly with the plurality in *Gundy* and, as such, would probably be rejected under Justice Gorsuch’s version of the nondelegation doctrine. Both the *Gundy* plurality and the *Michigan Gambling* panel used the purpose, structure, and legislative history of each respective piece of legislation to help discern an intelligible principle. Given that Justice Gorsuch rejected that approach, § 5 of IRA likely would meet the same fate under his test. Under the Gorsuch test, the language could not be saved by turning to the methods of statutory interpretation, such as using legislative history and the canon of constitutional avoidance. Thus, “for Indians” would be understood in its broadest possible sense to allow the secretary of the interior to purchase land for whatever possible purpose if it simply went to indigenous groups. This expansive reading of the statute would be subject to the three-part test proposed by Justice Gorsuch.

It is unlikely § 5 of IRA would survive a stricter nondelegation doctrine. First, buying any land “for Indians” does more than task the secretary of the interior with filling up the details. She can buy the land for any reason, whether good or bad. One day the purchase might be for herding. The next day the purchase might be for an amusement park. There are no limits on her discretion of how to buy land, for what purpose, and who might be affected. Here, the secretary chose gambling, an activity that Congress might not sanction itself given the complexities of state law or the possible perception of the practice as a moral vice. There may be political fallout from a law that used federal tax dollars to buy land for more casinos. But the legislative branch avoided these problems by passing the buck to a faceless bureaucrat. The statute requires more than filling up details. It needs large policymaking.

Any effort to save this part of the IRA as either “executive fact-finding” or “overlapping authority with the executive” would not

282. *Id.*

283. *Id.* at 32.

284. *Id.* at 33.

succeed.²⁸⁵ The ability to purchase any land does not depend on any type of fact, such as the end of a war. The secretary of the interior can purchase land irrespective of any conditions. Congress did not impose them, and the statute cannot be understood to include any. Purchasing land for economic revitalization does not fall within a traditional executive area. Section 5 would not be within any prong of the Gorsuch test. Of course, like in *Komatsu*, the government could assert creative ways of framing the statute to fit within “fill up the details.” The standard “for Indians” could require the secretary to just assign particular uses of lands already designated for use. If the reviewing court approached the challenge like Justice Gorsuch examined SORNA though, the different framing of the issue would not change the outcome. Section 5 of the IRA would meet the fate of countless other statutes that have relied on decades of the intelligible principle test to empower agencies. Both criminal and civil statutes alike would have difficulty satisfying Justice Gorsuch’s test.

CONCLUSION

The future of nondelegation is unclear. Courts continue to examine statutes to determine if they set out an intelligible principle to guide agency action. However, with the addition of Justice Kavanaugh, at least five Justices have expressed, in one form or another, a desire to alter the decades-old intelligible principle standard.

Against the backdrop of two hundred years of congressional reliance and the still-ubiquitous need for Congress to delegate efficiently, the choice to consider revitalizing the nondelegation principle raises questions. The problem, however, is not just the *choice* to revisit this topic but also the *method* Justice Gorsuch has suggested. The Gorsuch test provides minimal doctrinal clarity. It rests mostly upon nineteenth and early twentieth century cases that, at the height of judicial scrutiny, did not strike down broad grants of power. Problems would abound if a litigator tried to apply the Gorsuch test to the potentially hundreds of thousands of laws that resemble the standard in SORNA. Moreover, the very structure of power sharing between the legislative and executive branches could be upended. If the Supreme Court decides to revisit nondelegation, it should be

285. See *supra* notes 209–19 and accompanying text (describing the prongs of the Gorsuch test); see also *Gundy v. United States*, 139 S. Ct. 2216, 2143–44 (2019) (Gorsuch, J., dissenting) (concluding SORNA failed on the second and third prongs of executive fact-finding and shared executive authority, respectively).

cognizant of the various problems that will accompany a change in jurisprudence. Better yet, the Court should retain the intelligible principle test to ensure stability in the law, the government, and the court system.