

Boston University School of Law

Scholarly Commons at Boston University School of Law

Faculty Scholarship

2019

"I'm Leavin' It (All) Up To You": *Gundy* and the (Sort-of) Resurrection of the Subdelegation Doctrine

Gary S. Lawson

Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Constitutional Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Gary S. Lawson, "I'm Leavin' It (All) Up To You": *Gundy* and the (Sort-of) Resurrection of the Subdelegation Doctrine, in *Cato Supreme Court Review* 31 (2019).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/2549

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



“I’m Leavin’ It (All) Up to You”: *Gundy* and the (Sort-of) Resurrection of the Subdelegation Doctrine

Gary Lawson*

In 2000, Cass Sunstein quipped that the conventional nondelegation doctrine, which holds that there are judicially enforceable constitutional limits on the extent to which Congress can confer discretion on other actors to determine the content of federal law, “has had one good year, and 211 bad ones (and counting).”¹ The “one good year,” he said, was 1935, when the Court twice held unconstitutional certain provisions of the National Industrial Recovery Act that gave the president power to approve or create codes of conduct for essentially all American businesses, subject only to very vague, and often contradictory, statutory exhortations to pursue various goals.² In 2018, Professor Sunstein still claimed: “To say the least, the standard nondelegation doctrine does not have a glorious past. In all of American history, it has had just one good year.”³

The “one good year” quip, while undeniably clever,⁴ was not entirely accurate when Sunstein made it, either in 2000 or 2018.

* Philip S. Beck Professor, Boston University School of Law.

¹ Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000).

² See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

³ Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 Geo. Wash. L. Rev. 1181, 1207 (2018).

⁴ Absolutely clever enough to warrant reuse, in fact. Cf. Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 Fla. L. Rev. 1551, 1567 (2012) (unashamedly reusing a quip previously used in Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 Ave Maria L. Rev. 1, 18 (2007)).

The conventional⁵ nondelegation—or, more precisely, nonsub-delegation⁶—doctrine actually did pretty well in the early 1920s, when the Supreme Court held unconstitutional, expressly on sub-delegation grounds, congressional statutes letting the federal courts fill in the content of a criminal law⁷ and letting state legislatures fill in the content of federal admiralty law.⁸ And it is hard to judge the effectiveness of something like the nonsubdelegation doctrine by a simple count of cases holding statutes unconstitutional. The bite of such a doctrine in the nation’s first century and a half may have come largely from the way that it shaped the drafting of statutes or prevented their enactment altogether.⁹ Nonetheless, Professor Sunstein was correct in 2000 and 2018 to say that 1935 was the only year in which a congressional statute giving discretion to federal *executive agents*—the president, a cabinet official, or an administrative agency—was formally held unconstitutional by the Supreme Court on subdelegation grounds.

He is still correct in 2019. Whether he will still be correct in 2020, 2021, or any subsequent year is an open question. In *Gundy v. United States*, decided on June 20, 2019, the Supreme Court declined—by

⁵ Professor Sunstein maintains that a nonconventional, or nonstandard, variant of the doctrine is vibrant, consisting of a series of interpretative canons that collectively establish the proposition: “*Executive agencies cannot make certain kinds of decisions unless Congress has explicitly authorized them to do so.*” Sunstein, *supra* note 3, at 1182 (emphasis in original). That is a descriptively accurate (and characteristically acute) account of modern case law. This article concerns only the standard or conventional doctrine which limits the power of Congress to grant lawmaking or law-defining discretion even pursuant to explicit authorizations.

⁶ The “nonsubdelegation” label is correct, for reasons to be explained later. See *infra* notes 55–60 and accompanying text. In this article, I will use “nonsubdelegation doctrine” and “subdelegation doctrine” interchangeably, essentially employing whichever term sounds best in a given context.

⁷ See *United States v. L. Cohen Grocery Store Co.*, 255 U.S. 81 (1921) (holding unconstitutional a statute prohibiting “unjust or unreasonable” charges for any “necessaries”).

⁸ See *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) (holding unconstitutional statutes that made state workmen’s compensation laws applicable in admiralty cases); *Washington v. W.C. Dawson*, 264 U.S. 219 (1924) (same). Credit is due to Professor David Schoenbrod for emphasizing the importance of these pre-1935 decisions. See David Schoenbrod, *Consent of the Governed: An Underenforced Constitutional Norm* (manuscript of March 13, 2019) (on file with author).

⁹ See Joseph Postell & Paul D. Moreno, *Not Dead Yet—or Never Born? The Reality of the Nondelegation Doctrine*, 3 *Const. Studies* 41 (2018).

the intriguing vote of 4-1-3—to employ the nonsubdelegation doctrine against a federal statute that appeared, on its face, to give the attorney general the untrammelled power to determine to whom a federal criminal law will apply. The “4” was partly a function of creative (though not impossible or irrational) statutory interpretation that found implied limits on the attorney general’s authority and partly a straightforward application of nearly a century of post-New Deal precedents upholding congressional subdelegations that make the statute at issue in *Gundy* unquestionably seem, as the *Gundy* plurality put it, “small-bore.”¹⁰ On the other hand, the “1-3,” and the missing ninth vote in the case, offer more than modest solace to those who hope for the reinvigoration of a constitutional rule against subdelegation of legislative power. Lawyers even now are likely lining up the next challenges, which one suspects will expressly be framed as invitations to the Court—invitations that four justices have announced are welcome—to reconsider, and perhaps overrule, a line of cases which consistently upholds subdelegations as long as Congress provides an “intelligible principle”¹¹ to guide executive (or judicial) lawmaking discretion and consistently finds “intelligible principles where less discerning readers find gibberish.”¹²

To be sure, this may all be wishful thinking. I am not a disinterested observer in this process and will probably be filing amicus briefs in future cases urging the Court to resurrect the nonsubdelegation doctrine. Nonetheless, *Gundy* is the first time since 1935 that more than two justices in a case have expressed interest in reviving some substantive principle against subdelegation of legislative authority.¹³ And while you never count your votes until they are cast,¹⁴ it is very hard to read *Gundy* and not count to five under your breath.

¹⁰ *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019).

¹¹ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

¹² Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 329 (2002).

¹³ See *Am. Textile Manuf. Inst., Inc. v. Donovan*, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting, joined by Burger, C.J.).

¹⁴ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). For a poetic (yes, really) account of *Casey* and its dashing of expectations, see Gary Lawson, *Casey at the Court*, 17 Const. Comment. 161 (2000).

Part I details the facts of *Gundy* and its unlikely path to the Court, including a brief summary of modern subdelegation case law and its relation to original constitutional meaning.¹⁵ Part II summarizes the various opinions in *Gundy* and how they relate to the case law of the past century and the rise of the administrative state. Part III speculates—in a useful way, I hope—about the future direction of subdelegation challenges.

I. *Gundy*'s Unlikely Path to the Supreme Court

Sex offenders are understandably unpopular sorts. No one wants to live next door to a convicted sex offender. Of course, no one probably wants to live next door to a convicted burglar or fraudster either, but sex offenders carry with them a special stigma, as reflected in federal rules of evidence that allow their past misdeeds to be admitted as evidence of present misconduct when such an inference is generally prohibited for every other kind of past misdeed (including murder).¹⁶ It is therefore not entirely surprising that governments at both the state and federal level in recent decades have enacted statutes requiring convicted sex offenders to “register,” so that their locations can be tracked by government officials and by private citizens among whom they live.

Congress gave this registration process a huge push in 1994 with the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act,¹⁷ which spelled out federal standards for state sex-offender registration laws and then told states that they would lose ten percent of their law enforcement grant money if they

¹⁵ The focus on case law is more than a bit misleading. In order for the Court to rule on a subdelegation challenge, Congress has to pass a law posing the problem, and either the president has to sign it or Congress has to enact it over a presidential veto. Either Congress or the president—Congress certainly and the president usually—can stop an unconstitutional subdelegation in its tracks by simply failing to enact or sign the relevant law. The courts are the last backstop, not the first backstop, against constitutional violations. But since neither modern Congresses nor modern presidents have ever shown any interest in policing the boundaries of subdelegation, I will focus my attention on judicial doctrine.

¹⁶ See Fed. R. Evid. 404(a)(1), (b)(1) (setting forth the general rule against using past acts to show a person's “character” and then inferring conduct from that character); Fed. R. Evid. 413–15 (carving out exceptions to that rule for sexual assault and child molestation).

¹⁷ 108 Stat. 2038 (codified at 42 U.S.C. §§ 14071 et seq. (1994)).

did not adopt the federal standards.¹⁸ Every state unsurprisingly complied, but the patchwork of state laws did not sweep in everyone who might be considered a sex offender. Due to these coverage gaps, Congress in 2006 passed the Sex Offender Registration and Notification Act (SORNA)¹⁹ to require, as a matter of federal law, registration of all sex offenders, both state and federal. The law makes it a federal crime, punishable by up to ten years in prison, to fail to register as a sex offender.²⁰

Registration requires providing a great deal of information to the government, including your name, place of residence, place of work, place of attendance as a student, social security number, license number, travel plans, and “[a]ny other information required by the Attorney General.”²¹ The registrant must also update that information each time there is any change.²² How long offenders must register depends upon various tiers, based on the perceived seriousness of the underlying offenses.²³ Each state must include in its published registry:

- (1) A physical description of the sex offender.
- (2) The text of the provision of law defining the criminal offense for which the sex offender is registered.
- (3) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.
- (4) A current photograph of the sex offender.

¹⁸ See *id.* at § 14071(g)(2) (1994).

¹⁹ 120 Stat. 590 (codified at 34 U.S.C. §§ 20901 et seq. (2012)).

²⁰ 18 U.S.C. § 2250 (2012); 34 U.S.C. § 29013 (2012). The term “sex offender” is defined at some length—with many cross-references to other provisions—in 34 U.S.C. § 20911 (2012). A jurisdictional prerequisite for the registration requirement is that the convicted sex offender “travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country.” 18 U.S.C. § 2250(a)(2)(B). Does Congress have the enumerated constitutional power to require persons convicted of state crimes to register as sex offenders, on pain of federal criminal penalties, simply because those persons travel across state lines? As a matter of original meaning probably not, though no one has brought, or will likely bring, that challenge.

²¹ 34 U.S.C. § 20914(a)(8) (2012).

²² *Id.* § 20913(c).

²³ *Id.* § 20915(a).

- (5) A set of fingerprints and palm prints of the sex offender.
- (6) A DNA sample of the sex offender.
- (7) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.
- (8) Any other information required by the Attorney General.²⁴

All of this information must be provided by sex offenders “(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.”²⁵ Obviously, offenders who were convicted and served their sentences before the effective date of the act—July 27, 2006—cannot possibly comply with the literal terms of this timing provision. They cannot give information “before completing a sentence” if they have already completed that sentence. Accordingly, one very large question looming over SORNA is how, if at all, its registration provisions apply to people whose criminal sentences were completed before the act took effect. Since violation of the registration provisions can carry up to ten years in prison,²⁶ this is a matter of no small importance. As the Department of Justice put it in 2007: “This issue is of fundamental importance to the initial operation of SORNA, and to its practical scope for many years, since it determines the applicability of SORNA’s requirements to virtually the entire existing sex offender population.”²⁷

The statute’s solution to this problem reads, in full, as follows:

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).²⁸

²⁴ *Id.* § 20914(b).

²⁵ 34 U.S.C. § 20913(b) (2012).

²⁶ 18 U.S.C. § 2250(a)(3) (2012).

²⁷ Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8896 (2007).

²⁸ 34 U.S.C. § 29013(d) (2012).

"Yes, that's it."²⁹ In other words, Congress did not decide in the statute whether pre-SORNA offenders needed to register. It told the attorney general to decide that question.

On February 16, 2007, more than six months after enactment of SORNA, Attorney General Alberto Gonzalez promulgated an interim rule declaring: "The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act."³⁰ That rule categorically made SORNA apply retroactively to all sex offenders, regardless of the dates of their convictions. The interim rule was adopted as a final rule in 2010.³¹ Along the way, subsequent attorneys general imposed different obligations on *states* to register offenders (remember that states can lose some of their federal money if they fail to comply with federal standards for maintaining registration systems). On July 2, 2008, Attorney General Michael Mukasey issued "Guidelines" for implementing the 2007 interim rule which declared states to be in compliance with SORNA if they registered offenders who "are incarcerated or under supervision, either for the predicate sex offense or for some other crime; . . . are already registered or subject to a pre-existing sex offender registration requirement under the jurisdiction's law; or . . . hereafter reenter the jurisdiction's justice system because of conviction for some other crime (whether or not a sex offense)."³² That guideline did not make states responsible for keeping track of all prior offenders, because "[a]s a practical matter, jurisdictions may not be able to identify all sex offenders who fall within the SORNA registration categories . . . , particularly where such sex offenders have left the justice system and merged into the general population long ago."³³ On January 11, 2011, Attorney General Eric Holder issued modified guidelines indicating that states comply with SORNA if they register prior offenders who re-enter the justice system "through a subsequent criminal conviction in cases in

²⁹ Gundy, 139 S. Ct. at 2132 (Gorsuch, J., dissenting).

³⁰ 72 Fed. Reg. at 8897 (codified at 28 C.F.R. § 72.3 (2007)).

³¹ Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81849, 81853 (2010).

³² Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38046 (2008).

³³ *Id.*

which the subsequent [non-sex-offense] criminal conviction is for a felony, i.e., for an offense for which the statutory maximum penalty exceeds a year of imprisonment.”³⁴ In other words, states would not be held responsible for registering prior offenders who have subsequent non-sex-related misdemeanor convictions. But throughout these changes, the various attorneys general consistently ruled that all *offenders* violated SORNA if they failed to register, regardless of the varying obligations of the states to keep track of them.

In 2005, Herman Gundy pleaded guilty to a second-degree sexual offense in Maryland for rape of a minor (to whom he supposedly also gave cocaine). Gundy served five years in state prison and then two additional years in a federal prison and a halfway house on a federal charge.³⁵ He was released from prison in New York in 2012, where he failed to register as a sex offender. On January 7, 2013, he was indicted on federal charges under SORNA for failing to register. “The indictment alleged that petitioner: (1) was ‘an individual required to register’ under SORNA based on the 2005 Maryland sex offense, (2) traveled in interstate commerce, and (3) ‘thereafter resided in New York without registering’ as required under SORNA.”³⁶ Gundy objected that “the nondelegation doctrine prohibited Congress from outsourcing to the Attorney General the fundamentally legislative decision about whether SORNA applies to pre-Act offenders.”³⁷ If that claim is correct, the statute under which Gundy was charged and convicted in 2013 was unconstitutional.

According to the Constitution, Gundy appears to have a point.

The Constitution vests “[all] legislative Powers herein granted . . . in a Congress of the United States, which shall consist of a Senate and House of Representatives.”³⁸ The attorney general is none of the above. The only involvement of other actors in the lawmaking process is the requirement that congressionally enacted laws be presented to

³⁴ Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1639 (2011).

³⁵ When Gundy was convicted in Maryland, he was under supervised release from a prior federal cocaine offense. His Maryland state-law offense violated the terms of his federal supervised release, so he was sentenced to two years in prison for that federal supervised-release violation. See *United States v. Gundy*, 804 F.3d 140, 143–44 (2d Cir. 2015).

³⁶ Brief for Petitioner at 14, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086).

³⁷ *Id.*

³⁸ U.S. Const. art. I, § 1.

the president for signature or veto³⁹ and the vice president's power to preside over the Senate and break ties in that body.⁴⁰

To be sure, the statute about which Gundy complains was enacted by Congress with the signature of the president, in accordance with the Constitution's formal provisions for lawmaking. When the attorney general determined SORNA's retroactive effect, he was doing exactly what Congress had decreed by law that the attorney general should do: determine SORNA's retroactive effect. Of course, the doctrine invoked by Gundy says something stronger than simply that Congress cannot allow other actors to exercise the formal power to vote on legislation.⁴¹ It says that there are *substantive* limits on the kind of discretion that Congress can grant to other actors to define the content of federal law.

Suppose, for example, that Congress enacted a law using the formal constitutional procedures for lawmaking that said, "The attorney general shall have power to promulgate regulations to prohibit blonzfrinken, as determined by the attorney general." The attorney general then promulgates regulations making it a crime to transport Pokémon cards in interstate commerce, announcing that the attorney general has determined that interstate transport of Pokémon cards is blonzfrinken. Are the regulations lawful? If the answer is no (and, as I will demonstrate in a moment, it is *most definitely* no), it must be because there is some fundamental constitutional baseline regarding the obligations of Congress to determine the content of federal law. No one thinks that Congress must enact only laws that clearly and decisively resolve every possible issue that can arise under them—that kind of precision is not humanly possible. But that does not mean that anything goes. There are at least three different paths that all independently lead to the conclusion that Congress cannot grant limitless discretion to other actors to determine the content of federal law.

³⁹ U.S. Const. art. I, § 7, cls. 2, 3.

⁴⁰ U.S. Const. art. I, § 3, cl. 4.

⁴¹ For the view that the Constitution *only* forbids Congress from allowing other actors to vote on legislation, see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721 (2002); Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. Chi. L. Rev. 1331 (2003). For a (decisive, I think, but then I'm biased) rebuttal, see Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 Geo. Wash. L. Rev. 235 (2005).

First, the Constitution's structure obviously assumes that there is substantive content to the three great powers of government. Article III vests the "judicial Power of the United States" in federal courts,⁴² Article II vests the "executive Power" in the president,⁴³ and Article I, as noted, vests "[a]ll legislative Powers herein granted" in Congress.⁴⁴ Three different kinds of powers are vested in three distinct institutions. That whole scheme is pointless and incoherent unless the three governmental powers describe different things.

The Constitution nowhere specifically defines what distinguishes legislative, executive, and judicial powers, but it assumes that an honest reader understands that some such distinction exists. Back in 1787, James Madison observed that "[e]xperience has instructed us, that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive, and judiciary. . . . Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science."⁴⁵ Nonetheless,

[t]hat adept-puzzling obscurity . . . did not stop Madison from categorically declaring that various powers of government are "in their nature . . . legislative, executive, or judiciary." Nor did it stop John Adams from stating that the "three branches of power have an unalterable foundation in nature; that they exist in every society natural and artificial . . .; that the legislative and executive authorities are naturally distinct; and that liberty and the laws depend entirely on a separation of them in the frame of government. . . ." Nor did it prevent many state constitutions of the founding era from including separation-of-powers clauses that expressly distinguished, again without express definitions, the legislative from the executive from the judicial powers. Nor did it prevent the United States Constitution from basing its entire scheme of governance on the distinctions among those powers. However difficult it may be at the margins to distinguish those categories of power from each other, the founding generation assumed that there was a fact of the matter about those distinctions

⁴² U.S. Const. art. III, § 1.

⁴³ U.S. Const. art. II, § 1.

⁴⁴ U.S. Const. art. I, § 1.

⁴⁵ The Federalist No. 37, at 286 (James Madison) (John C. Hamilton ed., 1866).

and that one could discern that fact in at least a large range of cases. The communicative meaning of the Constitution of 1788 cannot be ascertained without reference to some such distinction, even if legal scholars or political scientists (adept or otherwise) find the distinction unhelpful or confusing.⁴⁶

And once one understands that there is substantive content to the legislative, executive, and judicial powers, it is not hard to mark out the broad outlines. Judicial power is quintessentially the power to decide cases in accordance with governing law, executive power is quintessentially the power to carry laws into effect, and legislative power is quintessentially the power to make laws. Something that looks formally like the exercise of judicial or executive power, because it decides a case or executes a law, could *in reality* be an exercise of legislative power if it truly creates rather than implements or interprets the law. Telling judges or executives that "blonzfrinken" is prohibited leaves it to those judicial or executive actors to determine the content of the law. It tells them to act as legislators exercising legislative power, and the Constitution does not permit such a subdelegation of legislative power to other actors. As I have written previously:

Suppose that Congress enacts a "statute" that consists of blank verse or gibberish (or even Robert Bork's famous inkblot). The marks on the page of the Statutes at Large literally make no sense. If a court or the President tried to implement such a "statute," on the theory that any enactment by Congress must have some identifiable meaning, they would not be engaged in "interpretation" in any useful sense of that term. They would simply be making up a law—that is, exercising legislative power in the guise of interpretation. As used in the Constitution, the term "executive power" does not mean anything done by an executive actor, and the term "judicial power" does not mean anything done by a court. These are terms with real content. The courts and the President exceed their enumerated powers by purporting to give meaning to gibberish just as surely as they would exceed their enumerated powers by directly inserting their own texts into the Statutes at Large.⁴⁷

⁴⁶ Gary Lawson, *Take the Fifth . . . Please! The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 B.Y.U. L. Rev. 611, 623–24 (2017) (footnotes omitted).

⁴⁷ Lawson, *supra* note 12, at 339–40 (footnotes omitted).

That does not mean that there are necessarily crisp lines among the legislative, executive, and judicial powers, but it does mean that there are lines. I will say more about the process of drawing those lines in Part III.

Second, one can reach the same conclusion by examining the Constitution's scheme of enumerated powers. From James Madison,⁴⁸ to John Marshall,⁴⁹ to William Rehnquist,⁵⁰ to John Roberts,⁵¹ it has been clear that the federal government is a government of limited and enumerated powers. More precisely, the federal government is a government of *institutions* with limited and enumerated powers. The various powers granted to the federal government *are not actually granted to the federal government*. They are granted to specific institutions within the federal government. Each federal institution—most notably including Congress, the president, and the federal courts—is granted specific, enumerated powers (though in the case of the president and the courts those enumerated powers consist of entire categories of governmental action). Any action by those institutions must be grounded in, or at least fairly inferred from, those specific powers. Congress has no expressly enumerated power to subdelegate its law-defining authority to other actors. Any such power must come, if at all, from the Necessary and Proper Clause (or the “Sweeping Clause,” as it was known until the 20th century), which gives Congress power “to make all

⁴⁸ The Federalist No. 45, at 292 (James Madison) (C. Rossiter ed., 1961) (“The powers delegated by the proposed Constitution to the federal government are few and defined.”).

⁴⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.”).

⁵⁰ *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“We start with first principles. The Constitution creates a Federal Government of enumerated powers.”).

⁵¹ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534–35 (2012) (Roberts, C.J.) (“The Federal Government ‘is acknowledged by all to be one of enumerated powers.’ That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government’s powers. . . . The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions.”).

Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."⁵² It is not very difficult to conclude that it cannot possibly be "proper" for Congress to give other actors so much discretion to be effectively exercising the substance of the legislative power. Nor, from the other direction, can it be "proper" to tell actors whose only granted powers are executive or judicial that they should be determining the content of federal law. The Necessary and Proper Clause is not an authorization for Congress to blow apart the constitutional structure.⁵³

In an earlier scholarly life, I developed both foregoing lines of argument against subdelegation of legislative power at great length.⁵⁴ I still think that either line sufficiently establishes the constitutional pedigree of a principle against giving anyone other than Congress too much power to define the content of federal law. But both lines are subsumed under and superseded by a more fundamental consideration that most clearly establishes the constitutional pedigree of the principle against allowing other actors to define too much of the content of federal law.

The Constitution is a kind of agency, or fiduciary, instrument. As fiduciary instruments often do, the document's author, or principal—named "We the People"⁵⁵—vests authority over some portion of We the People's affairs in certain designated agents. The overwhelming evidence for viewing the Constitution as some kind of agency/fiduciary instrument was first assembled in modern times by Robert Natelson,⁵⁶ was noted by Philip Hamburger,⁵⁷ and was further

⁵² U.S. Const. art. I, § 8, cl. 18.

⁵³ See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 *Duke L.J.* 267 (1993); Lawson, *supra* note 41.

⁵⁴ See Lawson, *supra* note 41; Lawson, *supra* note 12.

⁵⁵ U.S. Const. pmbl.

⁵⁶ See, e.g., Robert G. Natelson, *The Constitution and the Public Trust*, 52 *Buff. L. Rev.* 1077 (2004); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 *Case W. Res. L. Rev.* 243 (2004); Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 *U. Rich. L. Rev.* 191 (2001).

⁵⁷ Philip Hamburger, *Is Administrative Law Unlawful?* 377–80 (2014).

developed at book length by myself and Guy Seidman.⁵⁸ (In older times, it was so obviously taken for granted that the Constitution is an agency instrument that there was little point in making the characterization explicit.) One can argue about what kind of fiduciary instrument the Constitution most resembles—a power of attorney, a corporate charter, a trust, or a *sui generis* kind of agency instrument—but it is pretty clearly somewhere within the family of such instruments. And for purposes of the principle against subdelegation, the precise characterization of the Constitution as one or another kind of fiduciary instrument does not matter because the 18th-century rules for subdelegation were the same across the entire family of such instruments: subdelegation of delegated fiduciary authority is strictly forbidden unless it is expressly authorized by the instrument or is incidental by custom or necessity to delegated authority.⁵⁹ Accordingly, the principle against delegation of legislative authority is better called the principle against *subdelegation* of legislative authority.

The Congress is vested with all legislative powers herein granted, meaning that We the People have entrusted or delegated that particular power to specific institutional actors. Because those actors are fiduciaries, they are not permitted to subdelegate their authority without either specific authorization in the instrument (which does not exist) or custom or strict necessity (which also does not exist) that makes the power of subdelegation an incident to the grant of delegated authority.

And this is all apart from the many arguments against subdelegation of legislative authority grounded in concerns other than original meaning.⁶⁰ All in all, “[t]he rule against subdelegation of legislative authority is among the clearest constitutional rules one can imagine.”⁶¹ “Indeed, there are few propositions of constitutional meaning as thoroughly overdetermined as the unconstitutionality

⁵⁸ Gary Lawson & Guy Seidman, “A Great Power of Attorney”: Understanding the Fiduciary Constitution (2017).

⁵⁹ See *id.* at 113–17.

⁶⁰ Important arguments along these lines have been made by Marty Redish, see Martin H. Redish, *The Constitution as Political Structure* 136–37 (1995), and David Schoenbrod, see David Schoenbrod, *Power without Responsibility: How Congress Abuses the People Through Delegation* (1993).

⁶¹ Lawson & Seidman, *supra* note 58, at 117.

of subdelegations of legislative authority."⁶² No wonder that Chief Justice John Marshall, in the Supreme Court's first serious encounter with the principle against subdelegation, confidently declared: "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."⁶³

Of course, to say that there is a constitutional principle against subdelegation does not say what that principle encompasses. As already noted, it cannot be the case that every federal law must neatly and cleanly resolve every possible circumstance that can arise under it. Executive power and judicial power involve *some* degree of interpretative authority. But that authority must be genuinely interpretative rather than creative. At some point, the power of "interpretation" shades so much into the power of law creation that it ceases to be an executive or judicial function and becomes a legislative function which can only be performed by the legislating authorities.

In Part III, I will say much more about the line-drawing problem raised by the constitutional rule against subdelegation. For Herman Gundy's purposes, it does not seem to matter. There is plainly nothing in SORNA for the attorney general to interpret with respect to the statute's application to pre-SORNA offenders. The statute simply tells the attorney general to decide the matter. It does not, for example, identify a set of facts (such as whether Great Britain is violating the neutral commerce of the United States⁶⁴) for the attorney general to find, nor does it contain an ambiguous statutory term (such as "purity, quality, and fitness for consumption"⁶⁵) for an executive agent to construe. The statute simply tells the attorney general to decide whether and to whom the law applies. It is hard to imagine a statute that more plainly does precisely what the basic fiduciary, and hence constitutional, rule against subdelegation forbids.

So Herman Gundy goes free? Not so fast.

As it happens, Mr. Gundy's lawyers could not plausibly have made the above arguments to federal judges in 2013. Those arguments are

⁶² Gary Lawson, Representative/Senator Trump?, 21 Chap. L. Rev. 111, 119 (2018).

⁶³ Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

⁶⁴ The example is drawn from *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813).

⁶⁵ The example is drawn from *Buttfield v. Stranahan*, 192 U.S. 470 (1904).

all grounded in the Constitution's original meaning, and resort to original meaning as a method for determining the scope of Congress's power to subdelegate legislative authority vanished from the legal scene in the 1930s. In that respect, Cass Sunstein is correct: 1935 was the last, even if not the only, good year for the traditional doctrine against subdelegation of legislative authority.

The New Deal changed much of American constitutional law, and the principle against subdelegation of legislative authority was among the most notable casualties. Prominent New Deal cases upheld against subdelegation challenges statutes that authorized the Federal Communications Commission to grant broadcast licenses "if public convenience, interest, or necessity will be served thereby"⁶⁶; allowed a federal price administrator to fix prices which "in his judgment will be generally fair and equitable"⁶⁷; and instructed the Securities and Exchange Commission to approve a corporate financial structure if it "does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders."⁶⁸ The modern law was aptly summarized in 1989 in *Mistretta v. United States*,⁶⁹ in which the Court effectively declared the subdelegation doctrine nonjusticiable. In upholding sweeping authority to the United States Sentencing Commission to determine the appropriate range of sentences for violations of federal criminal laws—a "legislative" function if there ever was one—the Court announced that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."⁷⁰ The Court latched onto a statement from a 1928 case that

⁶⁶ 47 U.S.C. § 307 (2012) (upheld in *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943)).

⁶⁷ Emergency Price Control Act, 56 Stat. 23 (1942) (upheld in *Yakus v. United States*, 321 U.S. 414 (1944)). For an important modern study of the *Yakus* case, see James R. Conde & Michael S. Greve, *Yakus and the Administrative State*, 42 *Harv. J.L. & Pub. Pol'y* 807 (2019).

⁶⁸ 15 U.S.C. § 79k (2012) (upheld in *Am. Power & Light Co. v. SEC*, 329 U.S. 90 (1946)).

⁶⁹ 488 U.S. 361 (1989).

⁷⁰ *Id.* at 372. Presumably, according to the Court, Congress's "job" is to facilitate regulations with which a majority of the Court agrees rather than to exercise the powers actually granted to Congress by the Constitution. Just so we are clear.

had remarked, while upholding a grant of power to the president to determine tariff levels to "equalize the . . . costs of production" between American and foreign producers, that "[i]f Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."⁷¹ It is, therefore, "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."⁷²

The catch is that, given the sweeping delegations upheld since the 1930s, it is virtually impossible to find anything that the Court will not regard as adequate delineations of general policies and boundaries. Justice Antonin Scalia, while dissenting from the judgment in *Mistretta* on technical grounds concerning the specific functions of the Sentencing Commission,⁷³ went even further than did the majority in rejecting arguments based on the degree of discretion granted to executive (or judicial) agents:

But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree. . . . As the Court points out, we have invoked the doctrine of unconstitutional delegation to invalidate a law only twice in our history, over half a century ago. What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a "public interest" standard?

⁷¹ *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409 (1928) (emphasis added).

⁷² *Am. Power & Light*, 329 U.S. at 90 (quoted in *Mistretta*, 488 U.S. at 372–73).

⁷³ The Sentencing Commission has no adjudicative authority; it is purely a rule-making body. According to Justice Scalia, executive authority must have some at least formal connection to law execution in order to be valid. An agency that does nothing but make rules, unconnected to any enforcement authority, is simply "a sort of junior varsity Congress." 488 U.S. at 427 (Scalia, J., dissenting).

In short, I fully agree with the Court's rejection of petitioner's contention that the doctrine of unconstitutional delegation of legislative authority has been violated because of the lack of intelligible, congressionally prescribed standards to guide the Commission.⁷⁴

A decade later, Justice Scalia authored an opinion for the Court rejecting a subdelegation challenge to a statute that defines primary air quality standards under the Clean Air Act as "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator [of the Environmental Protection Agency], based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health."⁷⁵ Secondary standards were defined as standards which "specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air."⁷⁶ Invoking essentially the same authorities relied upon a decade earlier in *Mistretta*, the Court quickly brushed aside any subdelegation concerns on the ground that the statutes above are "in fact well within the outer limits of our nondelegation precedents."⁷⁷

Moreover, in the period between *Mistretta* and *American Trucking*, the Court declined multiple opportunities to carve out enclaves within which a subdelegation principle might operate—for the taxing power,⁷⁸ criminal laws,⁷⁹ and the death penalty in military

⁷⁴ *Id.* at 415–16 (citations omitted).

⁷⁵ 42 U.S.C. § 7409(b)(1) (2012).

⁷⁶ *Id.* at § 7409(b)(2).

⁷⁷ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

⁷⁸ *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 222–23 (1989) (finding "no support . . . for . . . application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power").

⁷⁹ *Touby v. United States*, 500 U.S. 160, 166–67 (1991) (finding that the attorney general's power to move [after considering eight factors] controlled substances among schedules, which effectively determines the penalties associated with illegal activity involving each substance, "passes muster even if greater congressional specificity is required in the criminal context").

courts martial.⁸⁰ Those 80 years of precedents are so sweeping that they constitute essentially a fortiori authority for upholding any congressional grant of discretionary authority to executive or judicial agents—quite possibly including the authority under the National Industrial Recovery Act that was found unconstitutional in 1935.

To see just how thoroughly the subdelegation doctrine has been buried since 1935, consider two of the most prominent pieces of legislation in modern times: the Troubled Asset Relief Program and the Affordable Care Act (ACA). The former statute handed the secretary of the treasury nearly a trillion dollars in order to “purchase . . . troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary.”⁸¹ The statute defined (to use the term loosely) “troubled assets” as “any other financial instrument that the Secretary . . . determines the purchase of which is necessary to promote financial stability.”⁸² And one of the key provisions of the Affordable Care Act was the definition of a “qualified health plan,” which is the only kind of plan that can be sold on ACA exchanges. The criteria for certification of a plan as qualified are: “The Secretary [of Health and Human Services] shall, by regulation, establish criteria for the certification of health plans as qualified health plans,”⁸³ subject only to nine vague considerations that the secretary must take into account.⁸⁴ To my knowledge, none of these provisions in some of the most high-profile and wide-reaching statutes in American history was ever even subject to a serious subdelegation challenge. Everyone assumed that such challenges would be frivolous.

To be sure, there were occasional snippets in some Supreme Court opinions that nodded towards a theoretical subdelegation doctrine,⁸⁵ but, given the post-1935 caselaw, it was no surprise that every circuit court—11 in all—that faced subdelegation challenges to the provision in SORNA telling the attorney general to determine whether and how the statute applies to pre-Act offenders rejected the challenges summarily. It was also no surprise when, in 2010, the

⁸⁰ *Loving v. United States*, 517 U.S. 748 (1996).

⁸¹ 12 U.S.C. § 5211 (2012).

⁸² *Id.* at § 5202.

⁸³ 42 U.S.C. § 18031(c)(1) (2012).

⁸⁴ *Id.* at § 18031(c)(1)(A)-(I).

⁸⁵ See Gary Lawson, *Federal Administrative Law* 157–65 (8th ed. 2019).

Second Circuit, as one of those eleven circuits to do so, brusquely dismissed a subdelegation challenge to the statute:

A delegation is constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. In other words, Congress needs to provide the delegated authority's recipient an "intelligible principle" to guide it. The Attorney General's authority under SORNA is highly circumscribed. SORNA includes specific provisions delineating what crimes require registration, where, when, and how an offender must register, what information is required of registrants, and the elements and penalties for the federal crime of failure to register. If § 16913(d) gives the Attorney General the power to determine SORNA's "retroactivity," it does so only with respect to the limited class of individuals who were convicted of covered sex offenses prior to SORNA's enactment; the Attorney General cannot do much more than simply determine whether or not SORNA applies to those individuals and how they might comply as a logistical matter. . . . The Supreme Court has upheld much broader delegations than these.⁸⁶

Thus, by the time Herman Gundy's subdelegation challenge reached the Second Circuit, that court had already decided the issue against him. Gundy nonetheless raised the challenge, which the court and Gundy both acknowledged "was foreclosed . . . and made only for preservation purposes,"⁸⁷ and which the court dismissed in a one-sentence footnote.⁸⁸

Gundy sought certiorari in the Supreme Court on three statutory questions⁸⁹ and also on the preserved question of subdelegation,

⁸⁶ *United States v. Guzman*, 591 F.3d 83, 92–93 (2d Cir. 2010) (cleaned up).

⁸⁷ *United States v. Gundy*, 695 Fed.App. 639, 641 n.1 (2d Cir. 2017).

⁸⁸ See *id.*

⁸⁹ "(1) Whether convicted sex offenders are 'required to register' under the federal Sex Offender Notification and Registration Act ('SORNA') while in custody, regardless of how long they have until release. (2) Whether all offenders convicted of a qualifying sex offense prior to SORNA's enactment are 'required to register' under SORNA no later than August 1, 2008. (3) Whether a defendant violates 18 U.S.C. § 2250(a), which requires interstate travel, where his only movement between states occurs while he is in the custody of the Federal Bureau of Prisons and serving a prison sentence." Petition for a Writ of Certiorari at i, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086).

which was as wild a long shot as one can imagine. For more than 80 years, the Court had been indicating that it was not going to enforce a principle against congressional subdelegation. It had consistently upheld subdelegations incomparably more important and sweeping than the relatively minor provision in SORNA. Furthermore, there was no circuit split. The court of appeals opinion dismissing Gundy's challenge (in one sentence) was not even published, indicating that the Second Circuit did not consider the opinion of any general interest. It is true that the statute in SORNA contained literally no explicit statutory guidance—no "intelligible principle," in the Court's parlance—to guide the attorney general, but surely one could interpolate into the statute something like "for the public interest, convenience, or necessity" or "fair and equitable" or some other essentially meaningless weasel phrase that the Court had repeatedly taken as an adequate "intelligible principle." It was not at all obvious that a petition for certiorari was worth the printing fees.

The Department of Justice certainly thought little of the case. It waived its right to respond to the certiorari petition, which it often does when it regards a petition as so obviously meritless that there is no point in wasting time and energy answering it. Any single justice, however, can ask the government (or any party) to respond to a certiorari petition following a waiver of response,⁹⁰ and that happened in this case. (The Court, as a matter of practice, does not disclose which justice or justices make those requests.) The government reacted to this request for a response as one might expect:

Every court of appeals to decide such a nondelegation challenge to SORNA has rejected it—ten of them in published decisions and one in multiple unpublished decisions.

This Court has repeatedly denied petitions for writs of certiorari raising the same nondelegation claim [citing 15 cases]. There is no reason for a different outcome here.

This Court's decisions recognize that the nondelegation doctrine is satisfied when a statutory grant of authority sets

⁹⁰ See David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 *Geo. Mason L. Rev.* 237, 242 (2009).

forth an “intelligible principle” that “clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.” As the Court has repeatedly observed, it has found only two statutes that lacked the necessary “intelligible principle”—and it has not found any in the last 80 years.

In enacting SORNA, Congress “broadly set policy goals that guide the Attorney General,” and it “created SORNA with the specific design to provide the broadest possible protection to the public, and to children in particular, from sex offenders.” Congress identified the Attorney General as its agent and it “made virtually every legislative determination in enacting SORNA, which has the effect of constricting the Attorney General’s discretion to a narrow and defined category.” This “Court has upheld much broader delegations than” Section 16913(d). Further review is not warranted.⁹¹

No one filed any *amicus curiae* briefs in support of Gundy’s petition for certiorari. Why would they? Surely, the government was right, and there was no reason to expect the Court to take this case.

And yet, on March 5, 2018, the Supreme Court granted certiorari in Gundy’s case, “limited to Question 4 presented by the petition,”⁹² which was “(4) Whether SORNA’s delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d) violates the nondelegation doctrine.”⁹³ That means that at least four justices thought the issue worthy of consideration. It is fair to say that no one, presumably including Gundy’s lawyers, saw that one coming. I sure didn’t.

In the face of at least four justices signaling that something of consequence was potentially on the table, 13 *amicus curiae* briefs were filed on the merits—all 13 on the side of Gundy. Several of the filings that were nominally on behalf of Gundy, however, encouraged the Court to decide the case on narrow grounds that would not call into question the main line of subdelegation authority over the

⁹¹ Brief for the United States in Opposition at 21–24, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086) (copious citations omitted).

⁹² *Gundy v. United States*, 138 S. Ct. 1260 (2018).

⁹³ Petition for Certiorari, *supra* note 89, at i.

past 80 years. The ACLU, for example, urged the Court to carve out special rules for criminal cases without implicating the many vague civil statutes that empower the administrative state.⁹⁴ A brief filed by a group of scholars declared that, because SORNA's section 20913 contains literally no guidance at all to the attorney general, "[t]his is an exceptional case involving an exceptional statute" and that the "case does not require the Court to make new law in the area of the nondelegation doctrine."⁹⁵ A wide range of other filers, on the other hand, urged the Court to reconsider its whole body of subdelegation jurisprudence and, in particular, to move away from the constant invocation of an "intelligible principle" as the magic phrase to dismiss subdelegation challenges.⁹⁶

The momentum had clearly shifted. Why would the Court take Gundy's case if not to reconsider, in some fundamental way, the approach to subdelegation that it had been taking for the better part of a century? Could Herman Gundy take a place alongside Clarence Earl Gideon⁹⁷ as among history's most unlikely fashioners of constitutional law?

II. The Decision: Bombshell or Misfire?

Gundy lost. Five justices voted to uphold his conviction. But for everyone other than Gundy, it was hardly a cut-and-dried outcome.

⁹⁴ See Brief Amicus Curiae of the American Civil Liberties Union in Support of Petition at 6–16, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086).

⁹⁵ Brief of William D. Araiza and 14 Other Constitutional, Criminal, and Administrative Law Professors as Amici Curiae in Support of Petitioner at 3–4, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086).

⁹⁶ See, e.g., Brief Amicus Curiae of Center for Constitutional Jurisprudence in Support of Petitioner, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086); Brief of the New Civil Liberties Alliance as Amicus Curiae in Support of Petitioner, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086); Brief Amicus Curiae of Institute for Justice in Support of Reversal, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086); Brief Amicus Curiae of Pacific Legal Foundation in Support of Reversal, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086); Brief of the Competitive Enterprise Institute, Reason Foundation, and Cascade Policy Institute as Amici Curiae in Support of Petitioner, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086); Brief of the Cato Institute and Cause of Action Institute as Amici Curiae in Support of Petitioner, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086).

⁹⁷ See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that indigent criminal defendants must be provided counsel by the government).

Four justices—Justices Elena Kagan, Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor, who some would call the “liberal bloc”⁹⁸—thought that section 20913(d) of SORNA “easily passes constitutional muster.”⁹⁹ Indeed, they were puzzled why the Court had even taken the case.¹⁰⁰

The plurality opinion invoked the usual suspects, most notably *Mistretta* and *Yakus*, for the modern “intelligible principle” idea. It repeated *Mistretta*’s now-stock phrase that “Congress simply cannot do its job absent an ability to delegate power under broad general directives” and noted that “we have held, time and again, that a statutory delegation is constitutional as long as Congress ‘lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.’”¹⁰¹ Under that approach, “a nondelegation inquiry always begins (and often almost ends) with statutory interpretation,” because “[o]nly after a court has determined a challenged statute’s meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I. And indeed, once a court interprets the statute, it may find that the constitutional question all but answers itself.”¹⁰² Indeed, if all one needs is an “intelligible principle” in the statute, and if anything at all, however empty or vacuous, counts as an “intelligible principle,” this is an accurate description of the inquiry.

The plurality found that “intelligible principle” for section 20913(d) in an interpretation of the statute—though not at all an implausible interpretation. The plurality invoked SORNA’s “declaration of purpose” (“In order to protect the public from sex offenders and offenders against children . . . , Congress in this chapter establishes a comprehensive national system for the registration of those

⁹⁸ Personally, I am not terribly keen about putting people into blocs, but on “hot button” issues—and the survival of the administrative state is surely a “hot-button” issue—the concept of blocs has enough descriptive value to warrant at least a mention in quotation marks, though probably not much more than that.

⁹⁹ *Gundy*, 139 S. Ct. at 2121.

¹⁰⁰ *Id.* 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. We nonetheless granted certiorari.”) (citation omitted).

¹⁰¹ *Id.* at 2123 (citations omitted).

¹⁰² *Id.*

offenders"¹⁰³), some subtle textual clues elsewhere in SORNA,¹⁰⁴ legislative history "showing that the need to register pre-Act offenders was front and center in Congress's thinking,"¹⁰⁵ and problems of feasibility with registering pre-Act offenders¹⁰⁶ to conclude that the statute "require[s] the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible."¹⁰⁷ "The text, considered alongside its context, purpose, and history, makes clear that the Attorney General's discretion extends only to considering and addressing feasibility issues."¹⁰⁸ In other words, the plurality read the statute to require the attorney general to apply SORNA to all pre-Act offenders to the extent feasible.¹⁰⁹

That reading of the statute surely makes the subdelegation in SORNA, as the plurality described it, "distinctly small-bore."¹¹⁰ The United States Code is full of vague feasibility requirements.¹¹¹ Accordingly, said the plurality, "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs."¹¹² And that surely can't be the case, can it?

The plurality's statutory interpretation, while perhaps a bit strained, is not entirely implausible. Surely Congress meant for the attorney general to exercise the granted authority under section 20913(d), if not solely with "feasibility" in mind, then at least in a "fair and equitable" manner or with an eye towards the "public interest, convenience, or necessity." The Court has long upheld statutes containing such language, and interpolating language of that sort into SORNA is not a wild stretch. If the Court's precedents from the past 80 years

¹⁰³ 34 U.S.C. § 20901 (2012).

¹⁰⁴ See *id.* at § 20911(1) (defining a sex offender as "an individual who *was* convicted of a sex offense," suggesting that all sex offenders, past and present, are presumptively obligated to register) (emphasis added).

¹⁰⁵ Gundy, 139 S. Ct. at 2127.

¹⁰⁶ See *id.* at 2128.

¹⁰⁷ *Id.* at 2123–24.

¹⁰⁸ *Id.*

¹⁰⁹ See *id.* at 2129 ("The statute conveyed Congress's policy that the Attorney General require pre-Act offenders to register as soon as feasible.").

¹¹⁰ *Id.* at 2130.

¹¹¹ See *id.*

¹¹² *Id.*

hold sway, the plurality's result was not surprising. Indeed, even a holding that declined to interpolate any such language into section 20913(d) but maintained the Court's precedents would not have had much consequence. It simply would have required Congress, whenever it designated someone else to make law, to include some vague reference to fairness, equity, the public interest, or feasibility. The absence of any of those empty references from section 20913(d) is likely more of a scrivener's error than a constitutional violation.

Thus, the real question in *Gundy* was whether the grant of certiorari indicated that a majority of justices are willing to reconsider 80 years of precedent. The answer to that question: maybe.

Justice Samuel Alito concurred in the judgment, meaning that he agreed with the plurality that *Gundy's* conviction was valid. But his reasons for upholding section 20913(d) are intriguing enough, and short enough, to reproduce in full substance:

The Constitution confers on Congress certain "legislative [p]owers," and does not permit Congress to delegate them to another branch of the Government. Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards.

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. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.

Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.¹¹³

Obviously, Justice Alito is not going to get any encouragement "to reconsider the approach we have taken for the past 84 years" from any of the four justices in the plurality. Can he find four other justices who he can join in reconsidering the Court's approach to subdelegation problems?

¹¹³ *Id.* at 2130–31 (Alito, J., concurring in the judgment) (citations omitted).

He seemingly can find three compatriots with ease. Justice Neil Gorsuch, joined by Chief Justice John Roberts and Justice Clarence Thomas (who has long advocated reconsideration of the Court's subdelegation precedents¹¹⁴), wrote a lengthy dissent—almost twice as long as the plurality opinion. The dissent described the plurality's approach as "[w]orking from an understanding of the Constitution at war with its text and history"¹¹⁵; and while Justice Alito was looking for a five-justice majority before reconsidering the Court's precedents, Justice Gorsuch said, "Respectfully, I would not wait."¹¹⁶

While a large chunk of the dissenting opinion challenges the plurality's interpretation of section 20913(d) as containing an unwritten register-offenders-to-the-maximum-extent-feasible requirement,¹¹⁷ the opinion's real bite comes in its head-on challenge to the Court's approach to subdelegation since the New Deal.

Justice Gorsuch's dissent is in significant measure a primer on basic constitutional structure and the separation of powers.¹¹⁸ It could readily be assigned in civics classes, and no summary can do it justice. Using some of the arguments previously presented here, it argues that a principle against legislative delegation (it *does not* adopt the agency/fiduciary language of subdelegation—maybe next time?) is fundamental to the constitutional order, essential to governmental accountability, and protective of liberty, especially the liberty of minorities (such as sex offenders) who are given an often potent voice through the Constitution's multi-layered, multi-constituency, and complex process for enacting legislation. The real question, however, is: "What's the test?"¹¹⁹ How does one know when Congress has (sub)delegated legislative power?

¹¹⁴ See *Whitman*, 531 U.S. at 487 (Thomas, J., concurring) ("As it is, none of the parties to this case has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.")

¹¹⁵ *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

¹¹⁶ *Id.*

¹¹⁷ See *id.* at 2145–48.

¹¹⁸ See *id.* at 2133–35.

¹¹⁹ *Id.* at 2135.

Justice Gorsuch identified three considerations that might validate what seem like broad grants of discretion to executive or judicial agents. “First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to ‘fill up the details.’”¹²⁰ “Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.”¹²¹ “Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities. . . . So, for example, when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if ‘the discretion is to be exercised over matters already within the scope of executive power.’”¹²² Those considerations, he argued, might justify some of the results reached by the Court in modern times.¹²³ But the big problem, he maintained, is that the Court has not been asking those questions. Instead, it has been asking, as did the plurality in *Gundy*, whether the statute at issue supplies an “intelligible principle.”

That term originated in the subdelegation context in 1928¹²⁴ in *J.W. Hampton, Jr., & Co. v. United States*.¹²⁵ Following other cases in which presidents were given power to determine the applicability of tariffs based on fact-finding concerning congressionally specified events,¹²⁶ the statute in *Hampton* authorized the president to alter the amount of tariffs to “equalize the . . . costs of production” between the United States and the exporting nation. The Court declared that the permissibility of such grants of power must be judged “according

¹²⁰ *Id.* at 2136.

¹²¹ *Id.*

¹²² *Id.* at 2137 (quoting David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1260 (1985)).

¹²³ *Id.* at 2139, 2140.

¹²⁴ The phrase “intelligible principle” appeared in Supreme Court cases five times prior to 1928 in other contexts, none of which is relevant to the subdelegation inquiry.

¹²⁵ 276 U.S. at 409.

¹²⁶ See *Field v. Clark*, 143 U.S. 649 (1892) (upholding, over two dissenting votes, a grant to the president of the power to suspend duty-free importation from countries that impose “reciprocally unequal and unreasonable” trade restrictions on American goods); *Cargo of the Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813) (upholding a grant to the president of the power to stop a statutory embargo by determining that a foreign country had ceased to violate the neutral commerce of the United States).

to common sense and the inherent necessities of the governmental co-ordination,"¹²⁷ and it followed with the now famous language: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."¹²⁸ There was no indication that the Court in *Hampton* thought that it was doing anything new or different from prior cases, much less that it was laying down a mantra that was henceforth to serve as the final word on subdelegation challenges. As Justice Gorsuch said, "it seems plain enough that [the Court in *Hampton*] . . . sought only to explain the operation of . . . traditional tests."¹²⁹

Justice Gorsuch wrote that "the 'intelligible principle' remark eventually began to take on a life of its own,"¹³⁰ gaining steam in the late 1940s. "Only then did lawyers begin digging it up in earnest and arguing to this Court that it had somehow displaced (*sub silentio* of course) all prior teachings in this area."¹³¹ And, Justice Gorsuch concluded, "[t]his 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."¹³² A correct understanding of the intelligible principle idea, he argued, is readily available:

To determine whether a statute provides an intelligible principle, we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.¹³³

So how far would Justice Gorsuch and the other dissenters take the subdelegation principle? After noting that a number of doctrines,

¹²⁷ *J.W. Hampton, Jr., & Co.*, 276 U.S. at 406.

¹²⁸ *Id.* at 409.

¹²⁹ *Gundy*, 139 S. Ct. at 2139.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 2141.

such as the void-for-vagueness doctrine in criminal law, already do some of the work that could be done under the principle of subdelegation,¹³⁴ Justice Gorsuch addressed the elephant in the room: If the Court began enforcing a serious principle against subdelegation, how much of modern government would survive? The Court in *Mistretta* openly grounded its decision on this concern, and the question came up in the oral argument in *Gundy*, in which Justice Breyer raised the specter of having to consider the constitutionality of some 300,000 administrative rules.¹³⁵ The dissent responded:

Nor would enforcing the Constitution’s demands spell doom for what some call the “administrative state.” The separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government. Instead, it is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation’s course on policy questions like those implicated by SORNA. What is more, Congress is hardly bereft of options to accomplish all it might wish to achieve. It may always authorize executive branch officials to fill in even a large number of details, to find facts that trigger the generally applicable rule of conduct specified in a statute, or to exercise non-legislative powers. Congress can also commission agencies or other experts to study and recommend legislative language. Respecting the separation of powers forecloses no substantive outcomes. It only requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution.¹³⁶

All in all, that makes five votes to affirm *Gundy*’s conviction, three votes to overturn it, three votes to reconsider the Court’s whole approach to subdelegation problems, and a fourth vote to reconsider the Court’s whole approach to subdelegation problems if, but only if, a fifth vote for that enterprise can be found. That all makes it of more than passing importance that only eight justices participated in the decision in *Gundy* (hence the 4-1-3 split). *Gundy* was argued to the Court on October 2, 2018. Brett Kavanaugh was sworn in on

¹³⁴ See *id.* at 2140–42.

¹³⁵ Transcript of Oral Arg., *Gundy v. United States* at 7–8, 139 S. Ct. 2116 (2019) (No. 17-6086).

¹³⁶ *Gundy*, 139 S. Ct. at 2145.

October 6, 2018. While he technically could have participated in the decision despite missing oral argument, he obviously elected not to do so. Had he participated, would he and Justice Alito have formed the necessary majority to reconsider the Court's approach to subdelegation? Would that reconsideration have taken the form outlined in Justice Gorsuch's dissent? And if so, what would be the likely consequences of a subdelegation doctrine along the lines suggested by Justice Gorsuch?

These questions are all potentially related. Whether and how Justice Kavanaugh will join the party may well depend on what is being served. In the next Part, I will speculate on what the opinions in *Gundy* suggest about future cases and the administrative state more broadly.¹³⁷

III. Constitutionalist Restoration or Conservative Retrenchment?

The Court's abandonment of subdelegation principles over the past 80 years has been a nonpartisan affair. In the early 1980s, then-Justice William Rehnquist and Chief Justice Warren Burger made some small noises about reviving some kind of subdelegation doctrine,¹³⁸ but those noises faded quickly. Chief Justice Rehnquist joined the near-unanimous majority opinion in *Mistretta* and the unanimous opinion in *American Trucking Ass'n* without a peep. Indeed, in the years between *Mistretta* in 1989 and *American Trucking Ass'n* in 2001, the combined votes in the Supreme Court on the merits of subdelegation challenges was 53-0. The only voice that was at all out of tune was Justice Thomas, who suggested in *American Trucking Ass'n*: "As it is, none of the parties to this case has examined the text of the Constitution or asked us to reconsider our precedents on cessations of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence

¹³⁷ The key word in this sentence is "speculate." The key fact that lies behind this speculation is that if I was actually any good at predicting the outcomes of Supreme Court cases, I would not be a law professor. I would be selling that remarkable talent to the highest bidder and becoming spectacularly rich. So treat everything in Part III accordingly.

¹³⁸ See *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring in the judgment); *Am. Textile Manuf. Inst., Inc.*, 452 U.S. at 543 (Rehnquist, J., dissenting) (joined by Burger, C.J.).

has strayed too far from our Founders' understanding of separation of powers."¹³⁹

And what of Justice Thomas's fellow conservative and originalist colleague, Justice Scalia? Justice Scalia was perhaps the Court's most vigorous *opponent* of reviving the subdelegation doctrine, as evidenced by his separate opinion in *Mistretta* and his brief and dismissive majority opinion in *American Trucking Ass'n*. The reasons for Justice Scalia's distaste for judicial enforcement of the subdelegation doctrine are not hard to find. Justice Scalia's jurisprudence is best explained by his famous article "The Rule of Law as a Law of Rules."¹⁴⁰ That article—published in 1989, the same year as *Mistretta*—makes clear that, for Justice Scalia, the judicial task of deciding cases according to law means deciding cases according to *rules*. By these lights, if a proposed legal norm cannot be reduced to a rule that can be neutrally and technically applied by a judge, then it does not really count as law.¹⁴¹ In the context of the subdelegation doctrine, Justice Scalia simply could not come up with an inquiry that was sufficiently rule-like to allow him to apply the doctrine judicially. Thus, as he said in *Mistretta*, "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree."¹⁴² Once Justice Scalia called the subdelegation inquiry a matter of degree rather than principle, that took it out of the realm of judicial enforceability (though presumably it could and should be enforced by Congress and the president). Any doctrine of subdelegation would not, in his view, be a law of rules.

Justice Scalia's replacement on the Court, Justice Gorsuch, had expressed some interest in reviving the subdelegation doctrine while a lower court judge,¹⁴³ so one could reasonably surmise that his elevation created two justices rather than one who would consider taking a critical look at the Court's subdelegation precedents.

¹³⁹ 531 U.S. at 487 (Thomas, J., concurring).

¹⁴⁰ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

¹⁴¹ For a more detailed description, and a detailed constitutional critique, of this aspect of Justice Scalia's jurisprudence, see Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 Notre Dame L. Rev. 483 (2014).

¹⁴² 488 U.S. at 415 (Scalia, J., dissenting).

¹⁴³ See *Gutierrez-Brizuela v. Lynch*, 834 F3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring).

Nevertheless, given the strong opposition even from conservative originalists to reconsideration of the modern subdelegation doctrine, it is clear why almost no one saw coming the grant of certiorari in *Gundy*.

So how will Justice Kavanaugh view the subdelegation problem when he finally addresses it? *That* is the \$64,000 (or perhaps 300,000-rule) question, and the available data point in different directions.

On the one hand, Justice Kavanaugh appears to be committed, more or less, to a jurisprudence of original meaning, especially in the area of separation of powers. "More or less" is plenty good enough in the context of subdelegation, because even a modest commitment to original meaning yields a principle against subdelegation of legislative power. As Justice Scalia noted in his *Mistretta* dissent, "the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system." That much is easy.

On the other hand, two countervailing considerations might—emphasize *might*—lead Justice Kavanaugh to the same position that was taken by Justice Scalia. One is precedent. The modern subdelegation doctrine has been embodied in case law for more than 80 years. A great many statutes have been enacted with that modern doctrine (or lack of doctrine) as the legal background. Even a modest commitment to stare decisis counsels with some measure of weight against reconsideration of that doctrine. How strongly Justice Kavanaugh values stare decisis over constitutional meaning is surely a question that many people are waiting to see answered in many contexts. The returns are obviously not yet in after only one (partial) term.

A second consideration is the same set of concerns that drove Justice Scalia. If one is truly an originalist—or, as I would prefer to term it, a constitutionalist—one will not worry too much about how rule-like or standard-like a norm the Constitution prescribes in any given setting. To a constitutionalist, that is the Constitution's call to make, not the judge's. If the Constitution gives you a vague and mushy standard, a constitutionalist will do his or her best to apply the vague and mushy standard. There is no a priori reason to suppose that the Constitution will always prescribe crisp and clear rules, and there is a great deal of empirical evidence to

the contrary.¹⁴⁴ Constitutionalists think that cases should be decided on the basis of the Constitution, whatever role for courts that turns out to prescribe.

But if one is less a constitutionalist than a *conservative*,¹⁴⁵ one might worry a great deal about the “appropriate” judicial role, public perceptions of the Court, the dangers of judicial “activism,” and a host of other policy-laden considerations that are not grounded in constitutional meaning. Judicial *conservatives*, as opposed to judicial *constitutionalists* or *originalists*, have long worried about exactly these sorts of considerations. Indeed, those considerations are a large part of what defines someone as a judicial conservative. While perhaps not all these conservative considerations point against judicial enforcement of a subdelegation doctrine, at least some of them seem to do so with considerable force. A judiciary that seriously enforced a subdelegation doctrine would likely be very active (or, if one prefers, “activist”) in the course of applying a constitutional standard that seems to require judges to exercise a strong measure of individual judgment about exactly which matters Congress must resolve when enacting statutes. If Justice Kavanaugh proves to be more of a conservative than a constitutionalist, he could easily conclude, as did Justice Scalia, that enforcement of the subdelegation principle is not properly a judicial function even if the subdelegation principle is clearly part of the Constitution’s meaning.

It is tempting to find evidence of precisely such a conservative-over-constitutionalist tendency in *Rucho v. Common Cause*,¹⁴⁶ in which a 5-4 majority, including all the Court’s conventionally labeled conservatives, held that questions of partisan gerrymandering are nonjusticiable political questions. The decision, joined by Justice Kavanaugh, was grounded largely in the Court’s inability to devise a standard for sorting out permissible from impermissible districting decisions that was “clear, manageable, and politically

¹⁴⁴ For a more detailed discussion of the many ways in which the Constitution does not actually prescribe the kinds of rules that Justice Scalia sought, see Calabresi & Lawson, *supra* note 141.

¹⁴⁵ For more on the crucial distinction between conservatism on the one hand and originalism/constitutionalism on the other, see Gary Lawson, *Conservative or Constitutionalist?*, 1 *Geo. J.L. & Pub. Pol’y* 81 (2002).

¹⁴⁶ 139 S. Ct. 2484 (2019).

neutral."¹⁴⁷ Might the same considerations apply to subdelegation problems?

Maybe, but one must be careful when trying to extrapolate from *Rucho*. If one is a constitutionalist, it is pellucidly clear that Section 1 of the Fourteenth Amendment says nothing about voting, districting, or other political rights, and that all the case law that has developed under that provision is pretty obviously wrong.¹⁴⁸ Finding some number of those cases to be "political questions" partially restores the constitutional baseline without overruling some widely popular decisions. That is arguably different from refusing to enforce a clear, and even obvious, constitutional norm simply because the norm does not fit Justice Scalia's idea of a rule. Whether that kind of thinking drove Justice Kavanaugh in *Rucho* is not clear. I guess we'll all see in due course.

Of course, the conflict between conservatism and constitutionalism only exists for the subdelegation doctrine if one cannot come up with, to borrow a phrase, a clear, manageable, and politically neutral test for distinguishing forbidden subdelegations of legislative power from valid enactments that simply leave some measure of executive or judicial discretion in interpretation and application of law. This was the problem that Justice Gorsuch was obviously trying to address with his three-part standard for identifying permissible grants of discretion: it is all right for Congress to grant discretion for (1) filling up the details of a statute, (2) prescribing executive or judicial fact-finding, or (3) clarifying and implementing pre-existing executive or judicial powers. Would this inquiry have satisfied Justice Scalia? Will it satisfy Justice Kavanaugh if he inclines towards Justice Scalia's position?

¹⁴⁷ *Id.* at 2498 (quoting *Vieth v. Jubilerer*, 541 U.S. 267, 307–08 (2004) (Kennedy, J., concurring in the judgment)).

¹⁴⁸ See Akhil Reed Amar, *America's Constitution: A Biography* 391–92 (2005); Section 2 of the Fourteenth Amendment (and subsequent amendments such as the Fifteenth Amendment) clearly addresses some of those questions, and it is possible that some of the Section 1 cases could be correctly decided if the state-created political arrangements are so deviant that they deprive the people of a state of a "republican" form of government. See U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union, a Republican Form of Government"); Akhil Reed Amar, *The Constitution Versus the Court: Some Thoughts on Hills on Amar*, 94 *Nw. U. L. Rev.* 205, 210 (1999).

It seems it certainly would not satisfy Justice Scalia. To take the three parts of Justice Gorsuch's inquiry in reverse order:

Surely if Congress simply helps the president or the courts carry out pre-existing executive or judicial powers by prescribing statutory discretion, it would be a law "necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution . . . in any Department or Officer thereof" and would pose no constitutional problem. The difficulty, of course, is figuring out what counts as pre-existing executive or judicial powers. There are going to be very easy cases (appropriations for carrying on the business of the courts, for example), but plenty of hard cases will arise as well. Is prescribing criteria for the military death penalty an executive or legislative function?¹⁴⁹ The president has the "executive Power" and is "Commander in Chief,"¹⁵⁰ but Congress has power to "make Rules for the Government and Regulation of the land and naval Forces."¹⁵¹ Is leaving the matter to the president allowing exercise of executive power or improper delegation-by-default of legislative power? It could be the former if the president has residual disciplinary power over the military that exists unless supplanted by Congress. Maybe the president has such power, but it is hardly something that can be determined by reference to a clear, rule-like line. Unless one clearly knows the content of the legislative, executive, and judicial powers, the third of Justice Gorsuch's three categories of permissible grants of discretion will be difficult for courts to administer.

It is also fine and well to say, in principle, that Congress can make the effect (and even the effective date) of laws depend on fact-finding by executive or judicial agents. That kind of "contingent legislation" has been around since the time of the Founding.¹⁵² The problem is determining when Congress has simply let other agents find facts that trigger statutorily prescribed legal consequences and when it has let other agents make or determine the content of the law. The clarity of this line depends, among other things, on the

¹⁴⁹ See *Loving*, 517 U.S. 748 (upholding presidential power to prescribe criteria for the military death penalty).

¹⁵⁰ U.S. Const. art. II, § 1, cl. 1; art. II, § 2, cl. 2.

¹⁵¹ U.S. Const. art. I, § 8, cl. 14.

¹⁵² See Lawson, *supra* note 12, at 361–65.

clarity of the line between fact and law, and that is decidedly *not* a clear line. The literature on the law-fact distinction is voluminous. The bottom line is that there is a distinction to be drawn between law and fact—indeed, the Constitution demands that it be drawn in some contexts¹⁵³—but that there is no clear principle that can be used to draw it. The law-fact distinction is conventional, not meta-physical or epistemological.¹⁵⁴ The (conventional) line must often be drawn solely on the basis of policy, and that is precisely what Justice Scalia was trying to avoid.

Finally, Justice Gorsuch said that Congress can enlist the aid of executive and judicial agents to “fill up the details”¹⁵⁵ of statutes. In the abstract, this must be correct. It cannot be the case that every statute must address every possible contingency that can arise under it. Not every executive action under a statute must give rise to an action in the nature of mandamus. But how does one tell a detail from an essential element? In *Wayman v. Southard*, Chief Justice John Marshall drew the distinction by separating “those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.”¹⁵⁶ I have argued at some length that this is precisely the inquiry demanded by the Constitution.¹⁵⁷ And it is precisely the kind of inquiry with which Justice Scalia wanted no part and which he considered judicially unenforceable.

So, in the next case that comes along, will Justice Kavanaugh take the constitutionalist route, as have Justices Thomas and Gorsuch, or the conservative route, as did Justice Scalia? And will Chief Justice Roberts and Justice Alito, who have generally been more conservative than constitutionalist in their times on the Court, stick to their guns when the statute, instead of being silent about the limits of discretion,

¹⁵³ See, e.g., U.S. Const. amend. VII (“no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law”).

¹⁵⁴ For a short summary of the point, see Gary Lawson, *Evidence of the Law: Proving Legal Claims* 35–44 (2017). For a longer account, see Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 Nw. U. L. Rev. 1792 (2003).

¹⁵⁵ *Wayman*, 23 U.S. (10 Wheat.) at 43.

¹⁵⁶ *Id.* at 42–43.

¹⁵⁷ See Lawson, *supra* note 12, at 372–78.

calls for decisions based on the public interest, fairness and equity, or feasibility? How many of those 300,000 regulations actually concern matters of “less interest” rather than “important subjects”?

The decision in *Gundy*, of course, answers none of these questions. But it raises them in a doctrinally serious way, and that is far more than one could have said before Herman Gundy’s unlikely petition for certiorari. Maybe Gundy will someday take his place alongside Clarence Earl Gideon after all.