EIGHT FUTURES OF THE NONDELEGATION DOCTRINE

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INTRODUCTION

Among close observers of the United States Supreme Court, there is a palpable sense of anticipation. Conservatives eagerly anticipate a sweeping constitutional revolution—a new "golden age of jurisprudence" in the words of Arizona Supreme Court Justice Clint Bolick.[1] Liberals regard this prospect with mounting dread. But both sides take it more or less for granted that dramatic change is inevitable across a wide spectrum of doctrinal domains, spanning federalism, the administrative state, religious freedom, abortion rights, gun rights, property rights, and much more.

There is obviously something to this view. According to standard political science measures, the appointments of Neil Gorsuch and Brett Kavanaugh may well produce the most conservative Supreme Court in more than eighty years.[2] It would be genuinely shocking if the next decade did not yield a rightward shift of some kind. It would not be at all surprising if that shift were quite significant, especially in the constitutional law of guns, religion, and abortion. But the judicial capacity model of Supreme Court decision-making developed in my book *Rationing the Constitution* suggests that both sides should temper their

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1. Clint Bolick, Justice, Ariz. Supreme Court, Lecture at the University of Arizona, James E. Rogers College of Law: "A Golden Age of Jurisprudence" (September 17, 2019).

2. *See* Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007) (current data available at http://epstein.wustl.edu/research/JCS.html [https://perma.cc/RFZ9-Q9L4]); Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002) (current data available at https://mqscores.lsa.umich.edu/measures.php [https://perma.cc/77ZD-6Q9Q]).

expectations.[3] A sweeping revolution in U.S. constitutional law is unlikely to be imminent.

The reason is straightforward, if frequently overlooked: The Supreme Court is a tiny institution capable of deciding only a small fraction of the constitutional questions generated by the operation of the U.S. government. In many of the most important constitutional domains, the limits of judicial capacity strongly constrain the Court to defer to the political process, to cast its decisions in the form of hard-edged categorical rules, or both. To do otherwise would invite more litigation than the Court can handle. Since categorical rules are frequently clumsy and poorly matched to their underlying purposes, the limits of judicial capacity create a strong hydraulic pressure on the Court to employ deferential doctrines like rational basis review that effectively cede the field to other institutional actors.

The point should not be overstated. As I write in the book, "The Supreme Court is capable of issuing occasional decisions that reshape major areas of public policy and thwart the will of democratic majorities."[4] But Justice Scalia was wrong to worry about "a Supreme Court standing . . . at the apex of government, empowered to decide all constitutional questions, always and everywhere primary in its role."[5] The same goes for today's prophets of a glorious—or inglorious—conservative constitutional revolution.

Part I briefly summarizes my judicial capacity model, with special emphasis on the distinction between normal domains, where judicial capacity does not strongly constrain the Supreme Court, and capacity-constrained domains, where—as the name implies—capacity limits have a much more powerful constraining effect. Part II then proceeds to the central question I explore in this Essay: What should we expect to see in the coming years in capacity-constrained domains where the newly fortified conservative majority is highly motivated to expand the scope and rigor of judicial review? Focusing on the nondelegation doctrine as an illustrative example, I will sketch six potential scenarios consistent with the judicial capacity model. Part III then concludes by sketching two alternative scenarios that would, to varying degrees, represent falsifications of that model.

I. THE JUDICIAL CAPACITY MODEL IN A NUTSHELL

The judicial capacity model consists of three central propositions:

3. *See generally* ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING (2019).

4. *Id.* at 2.

5. *United States v. Windsor*, 570 U.S. 744, 779 (2013) (Scalia, J., dissenting).

First, the Supreme Court can decide only 150 to 200 cases per year. This is widely recognized, long-established, and not original to me.[6]

Second, this limited capacity is a function not just of limited resources and personnel but, crucially, of deep-seated judicial norms—in particular, the Court's long-standing commitments to holding oral argument and issuing substantial written opinions and the justices' aversion to delegating substantial decision-making authority to administrative staff. If the Court were to relax either of these commitments, it could decide far more cases, but this seems unlikely, at least in the near term. Of special importance for present purposes is the Supreme Court's long-standing commitment to maintaining uniformity in the application and enforcement of federal law, which leads the Court to grant review virtually every time a lower court invalidates a federal statute.[7]

Third, in constitutional domains implicating the validity of a large number of federal statutes, judicial capacity limits starkly restrict the menu of doctrinal options available to the Supreme Court. More specifically, those limits create an almost irresistible pressure on the Court to cast its decisions in the form of clear but clumsy categorical rules or to defer to the constitutional decisions of other government actors. Categorical rules allow prospective litigants and lower-court judges to readily predict outcomes in advance. Deference reduces the expected value of bringing suit by increasing the odds that the government will prevail. Often, the constraints of judicial capacity compel the Supreme Court both to adopt clear rules and to defer to other government actors. Any other approach would invite more litigation than the Court could handle without sacrificing its basic commitments to minimum professional standards and the uniformity of federal law.[8]

Constitutional domains where this is the case I call "capacity-constrained." To oversimplify slightly, these are domains implicating a large number of federal statutes. All other domains I refer to as "normal domains." In the latter, the Court reviews such a tiny fraction of cases that the volume of litigation invited by its decisions imposes no strong constraint on the development of constitutional doctrine. Even if the Court's decisions in these areas invite a flood of new cases, as they sometimes do, nearly all of the resulting burden falls on the lower courts, whose capacity is far more malleable than that of the Supreme Court. It is also of less immediate concern to the justices. Examples of capacity-constrained domains include the commerce and spending powers, the nondelegation doctrine, the President's Article II powers over the federal administrative state, equal protection, and regulatory takings. Examples of

6. COAN, *supra* note 3, at 14. *See generally* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

7. COAN, *supra* note 3, at 15 n.4 (collecting sources).

8. *Id.* at 23–24.

normal domains include the Second Amendment, abortion rights, and the religion clauses.[9]

In normal domains, the limits of judicial capacity impose few if any constraints on the ambitions of a newly emboldened conservative majority. I thus have no comfort to offer liberals—or caution to offer conservatives—about the future of constitutional law in these areas. About capacity-constrained domains, however, the judicial capacity model does make a clear prediction: the Supreme Court will be strongly constrained to employ some combination of hard-edged categorical rules and strong deference to the political process. This sounds fairly straightforward, but as I shall explain, it could play out a number of different ways in practice. The judicial capacity model does not entirely foreclose the possibility of a sweeping conservative constitutional revolution. But it does make that prospect decidedly less likely.

II. THE FUTURES OF THE NONDELEGATION DOCTRINE

The nondelegation doctrine provides a helpful illustration. The principle at stake is familiar: Congress is constitutionally prohibited from delegating its legislative powers to the President or administrative agencies operating under presidential supervision. This principle has a few withering academic critics but also many proponents across the ideological spectrum. More important for present purposes, it has deep roots in Supreme Court case law stretching back two centuries.[10]

Yet there is a major problem: The line between legislative and executive power is extraordinarily hazy. In a world of limited resources, the executive branch must set enforcement priorities and communicate them to thousands of ground-level officials, spread over a vast geographic territory. The decisions of those officials, in turn, must be reviewed and, in some cases, reversed to ensure equitable and coherent enforcement of the law. Emerging issues must be identified, evaluated, and triaged; interagency conflicts must be negotiated; and so on. The exercise of such discretion on a large scale virtually necessitates the establishment of

9. *Id.* at 20–31. Of course, the boundaries of constitutional domains can be drawn in any number of ways. Abortion, for instance, is a subset of substantive due process, which is unquestionably a capacity-constrained domain, since all regulatory laws limit someone's liberty. I treat it as a separate normal domain here simply to emphasize that judicial capacity does not significantly constrain the Court's doctrinal choice-set with respect to abortion rights. This is purely a matter of labeling. Nothing of substance turns on it, and it would be equally accurate to describe abortion rights as a narrow categorical limitation on the government's generally sweeping power to limit individual liberty in the capacity-constrained domain of substantive due process. Separately, judicial capacity limits will generally not constrain the Court's ability to retreat from existing constitutional protections, which reduces the expected value of bringing new litigation.

10. *Id.* at 91 n.1 (collecting sources).

general rules to govern the functions of subordinate officials and to provide notice to regulated parties.[11]

At what point does such rule-making cross the line dividing executive from legislative power? No satisfactory bright-line test suggests itself. As Justice Scalia put it, "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action . . . ."[12] Yet any vague standard purporting to place serious restraints on congressional delegation would call into question thousands of statutory delegations of power, whose invalidation by lower courts the Supreme Court would feel compelled to review.[13]

Faced with this unattractive menu of choices, it is hardly surprising that the Court has embraced an approach of categorical deference under the guise of the "intelligible principle" doctrine.[14] Indeed, conventional historical accounts recognize only two Supreme Court decisions invalidating federal legislation on nondelegation grounds, both decided in 1935 amidst the Court's broader efforts to hold the New Deal in check. As Cass Sunstein memorably quipped, the nondelegation doctrine has had one good year and more than 200 bad ones.[15] Against this much-repeated witticism, Mark Tushnet correctly notes that *Carter v. Carter Coal*[16] was also a nondelegation case, and it was decided in 1936.[17] So maybe the doctrine has had two good years. But the essential point remains: Since 1937, the Court has upheld every delegation of power it has reviewed, including many that confer extraordinarily broad rule-making authority on the executive branch.[18]

This hands-off approach is just what the judicial capacity model would predict in a capacity-constrained domain implicating the validity of innumerable federal statutes. It has also been enormously consequential, making possible the geometric expansion of the federal administrative state in the post-New Deal era.[19]

Is that era coming to an end? The Supreme Court's recent decision in *Gundy v. United States*[20] offers more than a little grist for speculation.

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11. *Id.* at 92.

12. *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting); *see also* COAN, *supra* note 3, at 96 (internal quotations omitted).

13. COAN, *supra* note 3, at 97; *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

14. COAN, *supra* note 3, at 93.

15. Cass R. Sunstein, *Is the Clean Air Act Unconstitutional*?, 98 MICH. L. REV. 303, 330 (1999).

16. 298 U.S. 238 (1936).

17. Mark Tushnet, *The Nondelegation Doctrine -- Correcting a Common Error*, BALKINIZATION (Dec. 22, 2018, 11:22 PM), https://balkin.blogspot.com/2018/12/the-nondelegation-doctrine-correcting.html [https://perma.cc/KS68-A476].

18. COAN, *supra* note 3, at 94.

19. *Id.* at 89–90.

20. 139 S. Ct. 2116 (2019).

Gundy upheld Section 20913(d) of the Sex Offender Registration and Notification Act against a nondelegation challenge. But the vote was five to three—with Justice Kavanaugh not participating. Justice Alito concurred in the judgment but refused to join Justice Kagan's plurality opinion applying the Court's highly deferential nondelegation precedents. Indeed, Alito expressly announced his support for reconsidering those precedents in a future case.[21] The three dissenting justices—Roberts, Thomas, and Gorsuch—were unwilling to wait. Justice Gorsuch's dissent, joined in full by Roberts and Thomas, advocates just the sort of vague but stringent nondelegation standard that the judicial capacity model predicts the Court will be compelled to avoid in capacity-constrained domains.[22]

More specifically, Gorsuch would permit Congress to delegate only two forms of rule-making authority to the executive branch: (1) the authority to "fill up the details" in a federal statutory scheme; and (2) the authority to make factual findings necessary to implement congressional policy directives.[23] As to the first, Gorsuch explains that "Congress must set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed."[24] As to the second, Gorsuch sets forth the applicable test in the form of three questions:

> 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.[25]

For ease of reference, I will call this combination of exceedingly mushy standards "the Gorsuch approach."

If a majority of the Supreme Court embraces this approach, it will cast a pall over thousands upon thousands of federal statutory provisions. If the Court attempts to sustain this approach over an extended period of time, it will be faced with an avalanche of lower court decisions invalidating federal statutes that the justices will themselves feel compelled to review.

Not every statute subject to challenge under the Gorsuch approach will ultimately be invalidated. But that's part of the problem. A large

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21. *Id.* at 2130–31 (Alito, J., concurring in the judgment).
22. *Id.* at 2131 (Gorsuch, J., dissenting).
23. *Id.* at 2136 (Gorsuch, J., dissenting).
24. *Id.* (Gorsuch, J., dissenting) (footnote omitted).
25. *Id.* at 2141 (Gorsuch, J., dissenting).

fraction of existing delegations of power—quite possibly a majority—could plausibly be said to violate the nondelegation doctrine as Justice Gorsuch understands it. The uncertainty about which will actually fail his constitutional test is likely to precipitate considerably more litigation than a bright-line rule invalidating the same number of statutes.[26]

Is it possible to imagine the Court taking this course nevertheless? Yes, it is. Although only three justices signed onto the approach in *Gundy*, a fourth, Justice Alito, clearly expressed his enthusiasm for overhauling the nondelegation doctrine.[27] He was apparently held back from joining the dissenters only by his unwillingness to take this dramatic step for the benefit of sex offenders.[28] Kavanaugh did not participate in *Gundy*, as I have mentioned, but his other writings on the administrative state suggest a broad sympathy with the views expressed in Gorsuch's dissent.[29]

Against these hardly trivial considerations, the judicial capacity model marshals the evidence of history. Despite ample ideological temptations and strategic opportunities, no Supreme Court majority in the past eighty-four years has invoked the nondelegation doctrine to invalidate a federal statute. The same pattern holds across a range of other capacity-constrained domains that I discuss in the book, with one slight variation: In several of those domains, the Court has imposed narrow limits on congressional power in the form of categorical rules that clearly insulate the vast majority of federal legislation against serious constitutional challenge (whatever other ambiguities these rules may suffer from). But in none of these domains has the Court embraced—and attempted seriously to sustain—the sort of stringent but vague standard advocated by Justice Gorsuch in *Gundy*.[30]

I do not expect this pattern to change in future nondelegation cases. But this prediction leaves open at least six possible scenarios consistent with the judicial capacity model. Roughly the same six scenarios could be sketched, with appropriate modifications, for any of the capacity-constrained domains that now seem ripe for a conservative revolution—the commerce power, the spending power, presidential administration, regulatory takings, etc. Only the last—and least plausible—of the six

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26. *Cf.* COAN, *supra* note 3, at 170 (discussing the litigation-limiting virtues of a categorical prohibition on delegated rule-making authority).

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

28. *Id.* at 2131 (Alito, J., concurring in the judgment) ("[B]ecause a majority is not willing to [reconsider the "intelligible principle" doctrine], it would be freakish to single out the provision at issue here for special treatment.").

29. *See, e.g.*, *Paul v. United States*, 140 S. Ct. 342 (2019) (describing the denial of certiorari) ("Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his Gundy dissent may warrant further consideration in future cases.").

30. *See generally* COAN, *supra* note 3 (surveying the pattern of Supreme Court decisions across a wide range of capacity-constrained domains).

would vindicate the currently popular prophesies of conservative constitutional revolution.

Scenario 1: *The Sober Second Thought.* As Adrian Vermeule notes in a recent essay, libertarian and conservative opponents of the administrative state have been anticipating the Second Coming of the nondelegation doctrine for a long time—at least thirty years.[31] In his tart description, "This eschatological hope isn't some recent development. It's the ordinary state of conservative jurisprudence, the perpetual 'Soon! But not yet' of conservative constitutional *parousia*."[32] Faced with the potential disruption and avalanche of litigation that a resurrected nondelegation doctrine would invite, one or more of the conservative justices might well have occasion for sober second thoughts.

Prime candidates include Justice Kavanaugh, with his pragmatic streak (an early contrast with Gorsuch's millenarian originalism); Roberts, with his sense of responsibility as Chief Justice; and Justice Alito with his fondness for delegated law enforcement, homeland security, and immigration authority. If this seems unlikely after *Gundy*, recall that Justice Scalia authored *Whitman v. American Trucking Association*[33]—by any standard, one of the Court's most deferential nondelegation decisions—only after furiously denouncing delegation in his classic *Mistretta* dissent.[34] As Vermeule sums it up, channeling the White Queen in *Through the Looking Glass*: "Jam yesterday (yesterday being 1935), and jam tomorrow, but never jam today."[35]

Scenario 2: *Speak Loudly and Carry a Small Stick*. Rather than backing down completely, opponents of expansive delegation might impose modest limits on Congress's power in the form of categorical rules that operate to clearly insulate the vast majority of federal legislation from constitutional doubt. The Court has taken a similar approach in other capacity-constrained domains. Think of the per se prohibition on multi-level removal restrictions established in *Free Enterprise Fund v. PCAOB*[36] or the activity-inactivity distinction that five justices embraced in *NFIB v. Sebelius*.[37] Both of these rules ostensibly threatened only a single novel federal statute, a point Chief Justice Roberts explicitly emphasized in his controlling opinions. In this way, the conservative majority managed to

31. Adrian Vermeule, *Never Jam Today*, YALE J. ON REG. NOTICE & COMMENT (June 20, 2019), https://www.yalejreg.com/nc/never-jam-today-by-adrian-vermeule/ [https://perma.cc/P34A-98TX].

32. *Id.*

33. 531 U.S. 457 (2001).

34. *Compare Whitman*, 531 U.S. 457, *with Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting); Vermeule, *supra* note 31 (making this point).

35. Vermeule, *supra* note 31 (alluding to LEWIS CARROLL, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE (1871)).

36. 561 U.S. 477 (2010).

37. 567 U.S. 519 (2012).

take bold rhetorical stands in favor of federalism and the unitary executive, while simultaneously walling off the vast majority of federal legislation against serious constitutional challenge.[38]

What would a similar approach look like in the context of the nondelegation doctrine? The best example is probably the per se prohibition on congressional delegations to private actors invoked by Judge Janice Rogers Brown in the Amtrak case in 2013.[39] Another, somewhat more ambitious alternative would be a per se prohibition on delegations involving criminal punishment or the preemption of state law.[40] Either of these approaches would allow the Court to make a symbolic statement about the tyrannical potential of administrative law-making, while insulating the vast majority of federal legislation from serious nondelegation challenge.

Scenario 3: *The Lower Courts Would Prefer Not To*. Even if the Supreme Court's next nondelegation decision embraces something like the Gorsuch approach, the reception of that decision in the lower courts will be crucial in determining the meaning of the nondelegation doctrine on the ground. If those courts, like Herman Melville's famous scrivener, "prefer not to" put real teeth in the nondelegation doctrine, the Gorsuch approach stands a real chance of dying on the vine. This is exactly what has happened on the few occasions when the Supreme Court embraced stringent but vague standards in other capacity-constrained domains.[41]

To name just one example, *Penn Central Transportation Co. v. New York*[42] seemed to invite lower courts to undertake a searching but amorphous review of regulatory takings that would have called into question a broad swath of federal legislation.[43] But the lower courts, by and large, interpreted this new standard as something akin to rational basis review. The Supreme Court could have stepped in and reversed these deferential decisions until the lower courts fell in line, but it chose not to.[44]

When the lower courts failed to rein in the federal commerce power after *United States v. Lopez*[45] and *United States v. Morrison*,[46] Glenn

38. *See* COAN, *supra* note 3, at 64–65; *NFIB*, 567 U.S. at 549–51 (Roberts, C.J.); *Free Enterprise Fund*, 561 U.S. at 507–08.

39. *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013) ("Federal lawmakers cannot delegate regulatory authority to a private entity.").

40. *See, e.g.*, Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 819 (2019) ("[A] Nondelegation Doctrine limited to the criminal context would be easy to administer and historically justifiable, but perhaps not entirely logical, given that many civil penalties are arguably more severe than many criminal penalties.").

41. *See generally* COAN, *supra* note 3.

42. 438 U.S. 104 (1978).

43. *Id.*

44. COAN, *supra* note 3, at 142.

45. 514 U.S. 549 (1995).

46. 529 U.S. 598 (2000).

Reynolds and Brannon Denning posed an apt question: "What if the Supreme Court held a constitutional revolution and nobody came?"[47] The answer is that there would be no constitutional revolution in reality, at least not without much more work by the Supreme Court. It is easy to imagine events playing out in just this way if the Court embraces the Gorsuch approach. The law on the books would remain a vague and stringent standard, but the law in action would be a rule of categorical deference.

Scenario 4: ***Advance and Retreat.*** This is something like the opposite of Scenario 3. Today's lower federal courts are staffed by three years of Trump nominees and counting, most of them hand-picked by Federalist Society leadership for ideological dependability. Such judges might be all too ready to take up arms in Justice Gorsuch's crusade against the administrative state. If this is the case and if the Supreme Court embraces the Gorsuch approach in its next major nondelegation decision, the lower courts can be counted on to hand down a raft of decisions that the Supreme Court will feel compelled to review. To the justices, this may feel something like Napoleon's winter in Moscow. At this point, they will have two choices: (1) stay the course at the risk of overwhelming the Court's limited capacity or (2) retreat to safer ground. Such a retreat might be wholesale à la Napoleon's ignominious withdrawal from Russia or merely partial. More concretely, the Court might revert to the highly deferential approach that has prevailed since the New Deal or it might retrench to the kind of narrow categorical rules I described in Scenario 2. Faced with such stark alternatives, it would not be at all surprising to see Chief Justice Roberts, Justice Alito, or Justice Kavanaugh switch sides.

Scenario 5: ***Canons, Not Heavy Constitutional Artillery.*** In a widely cited 2000 article, Cass Sunstein argued that the nondelegation doctrine has not been abandoned. Rather, it "has merely been renamed and relocated. Its current home consists of a set of nondelegation canons, which forbid executive agencies from making certain decisions on their own."[48] To oversimplify slightly, these canons invoke the principle of constitutional avoidance as a reason to construe statutory delegations of power narrowly when broader readings would threaten important values, such as federalism and tribal sovereignty. In addition to or instead of the approaches I have just sketched, a Supreme Court motivated to revive the nondelegation doctrine without exceeding its capacity limits might increase the robustness and number of nondelegation canons. Such canons could well generate significant new litigation but, unlike the constitutional nondelegation doctrine, they do not result in the invalidation of federal

47. Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez*, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 369.

48. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000).

legislation. The Supreme Court therefore does not feel compelled to review such a high fraction of the resulting cases.[49]

Scenario 6: ***The Full Hamburger***. The name of this scenario is an homage to Philip Hamburger, perhaps the most ardent academic supporter of an expanded nondelegation doctrine. Rather than embrace the mushy standards of the Gorsuch approach, the Supreme Court might adopt the bright-line rule advocated by Hamburger (and, following him, Justice Thomas).[50] Thomas's concurrence in the 2015 Amtrak case captures this rule succinctly: "The Executive [branch] may not formulate generally applicable rules of private conduct."[51] Such a rule would invalidate a far greater number of legislative delegations than the Gorsuch approach, but it would do so with much greater clarity and precision. As such, it might actually invite less litigation, and it would be much easier for the Supreme Court to consolidate similar cases for joint disposition.[52]

Going the full Hamburger would still generate a lot of litigation, quite possibly more than the Supreme Court could handle without sacrificing minimum professional standards and its commitment to the uniformity of federal law. But this is an open question. A highly motivated Supreme Court might be able to revive a sweeping nondelegation doctrine within the limits of judicial capacity, if it is willing to embrace this sort of broad categorical rule.[53] This is the one scenario consistent with the judicial capacity model that is also consistent with prophesies of conservative constitutional revolution.

There is, however, good reason to doubt that the Court will be willing to go this far. A constitutional prohibition on all externally binding agency rules would be almost indescribably disruptive to the ordinary operations of the federal government. It would also threaten many forms of agency authority that the Court's conservatives have strong ideological reasons to support. I therefore consider this the least likely of the six scenarios I have sketched thus far.[54]

III. FALSIFYING THE JUDICIAL CAPACITY MODEL

Before closing, I want to briefly discuss two additional scenarios that are, to varying degrees, inconsistent with the judicial capacity model. If either of these scenarios comes to pass, it will be necessary to reevaluate—

49. Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 774 n.43 (2016).

50. *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

51. *Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment).

52. COAN, *supra* note 3, at 172.

53. *Id.* at 172–73.

54. *Id.* at 173.

and perhaps abandon—the model. I cannot deny that this would wound my intellectual pride to some degree, but it would also teach us something interesting about the U.S. Supreme Court as an institution.

Scenario 7: ***The Faustian Bargain***. As I emphasized at the outset, the limits of judicial capacity do not spring from resource constraints alone. They are also, crucially, the result of longstanding norms of Supreme Court practice, most notably the Court's commitment to maintaining certain minimum professional standards and its commitment to reviewing virtually every lower court decision that invalidates a federal law. If a majority of the Court is willing to sacrifice these commitments, the constraints of judicial capacity will impose no obstacle to a revived nondelegation doctrine resembling—or identical to—the Gorsuch approach. Most straightforwardly, such a Court might simply refuse to review a large number of lower-court decisions invalidating federal laws.[55] Alternatively, the justices might grant certiorari and decide large numbers of cases without oral argument or substantial written opinion. Neither of these possibilities strikes me as likely, but both are clearly possible if a majority of the Court is sufficiently motivated to dismantle the administrative state—or to undertake any other sweeping constitutional reform effort.[56]

In one sense, this scenario would represent a confirmation, not a falsification, of the judicial capacity model. After all, one of the model's main contributions is the central role of norms in constituting the limits of judicial capacity.[57] The model also acknowledges the contingency of the specific norms that have starkly limited the Court's capacity for at least the past eighty-five years.[58] Nevertheless, the dissolution of these norms would deprive the judicial capacity model of its explanatory and predictive power—and thus of most significant utility going forward. At the same time, this scenario would teach us something quite interesting and important about the tradeoffs between norms and decisional capacity in a hierarchical court system.

Scenario 8: ***Chicken Little.*** What if the Supreme Court embraces the Gorsuch approach in a sustained way—with the active cooperation of the lower courts—and the sky does not fall? That is, what if no flood of cases materializes? This possibility, which obviously cannot be ruled out *a priori*, would represent an even more direct challenge to the judicial capacity model. It would also raise a number of interesting questions: *Why*

55. This option may come to seem more palatable if a conservative Supreme Court comes to see the lower courts as reliable ideological allies. *Cf.* Charles M. Cameron et al., *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 103 (2000).

56. COAN, *supra* note 3, at 36.

57. *Id.* at 14–18.

58. *Id.* at 37.

did no flood of cases materialize? Were there too few plaintiffs, with too few resources—or, what amounts to the same thing—too little organization? Was the judicial capacity model wrong to assume, following a large body of existing literature, that stringent constitutional doctrines invite more litigation than deferential ones? That standards invite more litigation than rules? Did a sympathetic conservative administration acquiesce in unfavorable lower court decisions or simply settle widespread legal challenges *en masse* outside of court? Whatever the answers to these questions, are they peculiar to the nondelegation doctrine? Or do they generalize to all the domains I have described as capacity-constrained? Are they peculiar to our particular historical moment? Or do they also undermine the judicial capacity model's retrospective explanatory power? The list could go on, but I think the point is clear.

CONCLUSION

The first five scenarios I have sketched in this Essay strike me as more likely than the last three. This holds not just for the nondelegation doctrine but for all the capacity-constrained domains I discuss in *Rationing the Constitution*. If this is right, there may well be a significant rightward shift in U.S. constitutional law. That shift could affect millions of lives, sometimes in very profound ways. But it will not constitute a sweeping constitutional revolution. Indeed, in many of the most important constitutional domains, judicial capacity will keep the Supreme Court constrained within fairly narrow bounds. By and large, the fate and future of the country will be determined elsewhere. Probably.