

## COMMENT

### THE NONDELEGATION SCHISM: ORIGINALISM VERSUS CONSERVATISM

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The Supreme Court appears poised to breathe new life into the nondelegation doctrine, a judicially created theory of constitutional law stating that Congress may not delegate its legislative power to the executive or any other entity. Scholars have long criticized the nondelegation doctrine as poorly defined, unsupported by constitutional text and history, and impossible to implement without a major expansion of the judiciary’s role. This Comment adds to this scholarship by arguing that the conservative majority’s proposed nondelegation revival is best understood not as the resurrection of a unified theory but rather as two distinct doctrinal inventions reflecting the ideological commitments of their chief proponents. Whereas Justice Gorsuch fashions an originalist standard from cases selected from before the New Deal Era, Justice Kavanaugh applies a modern functionalist test to invalidate major rules disfavored by conservatives. Each approach has something the other lacks—historical pedigree on the one hand, analytical simplicity on the other. Although the Justices appear eager to blend their approaches, the Justices’ approaches are in fact fundamentally incompatible with each other and deeply flawed on their own terms. Indeed, the facts of Justice Gorsuch’s old cases largely fail Justice Kavanaugh’s test—and betray expansive delegations at odds with Justice Gorsuch’s own understanding. Justice Kavanaugh’s approach likewise fails in its attempt to graft an interpretive test of convenience onto constitutional law. The rift between these approaches is more than academic, as the two standards produce different results in a contested area of regulatory law—federal greenhouse gas limits. This finding suggests that supporters of the administrative state should focus not just on whether the nondelegation doctrine is revived but also on what form it takes. How the Court resolves this split may provide an answer to a question likely to define the new majority: When does originalism trump conservatism?

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#### INTRODUCTION

The Supreme Court appears ready to revisit the nondelegation doctrine, the constitutional theory that Congress may not delegate its legislative power to the executive branch or any other entity.<sup>1</sup> Although the nondelegation doctrine has only twice been used to strike down a federal statute, both times in 1935,<sup>2</sup> recent opinions by the Court’s conservative majority indicate that the Court may be ready to revitalize the doctrine’s application to administrative law.<sup>3</sup> Court observers have anticipated a coming shift in the doctrine, with many foreseeing disruptive consequences for administrative agencies across a wide range of federal policy,<sup>4</sup> including federal action to address climate change.<sup>5</sup> While others

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1. Andrew Coan, *Eight Futures of the Nondelegation Doctrine*, 2020 WIS. L. REV. 141, 144.

2. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935).

3. See *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of cert.) (“Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.”). Justice Alito, while concurring in the *Gundy* judgment, nevertheless expressed a willingness to join the dissenters in a future case. See *Gundy*, 139 S. Ct. at 2130 (Alito, J., concurring).

4. See W. Mike Jayne, *As Far as Reasonably Practicable: Reimagining the Role of Congress in Agency Rulemaking*, 21 FEDERALIST SOC’Y REV. 84, 90 (2020); Joseph Postell, *The Nondelegation Doctrine After Gundy*, 13 N.Y.U. J.L. & LIBERTY 280, 280 (2020).

5. See Jonathan Skinner-Thompson, *Administrative Law’s Extraordinary Cases*, 30 DUKE ENV’T L. & POL’Y F. 293, 314 (2020).

predict more modest consequences for administrative law,<sup>6</sup> the nondelegation debate has nevertheless attracted widespread attention, becoming the rare doctrine of administrative law to receive sustained attention in the popular press.<sup>7</sup> Within this growing literature, there is no shortage of criticism directed toward the prospect of a revitalized nondelegation doctrine.<sup>8</sup> Less focus, however, has been dedicated to exploring the details of the new conservative majority's novel and still-emerging approach to nondelegation<sup>9</sup>—a jurisprudence that to date in fact represents two distinct paths, each reflecting the ideological preferences of its chief proponent.<sup>10</sup>

Writing in dissent in *Gundy v. United States*,<sup>11</sup> Justice Gorsuch criticized the Court's current permissive approach to nondelegation.<sup>12</sup> Grounding his critique in originalism, Justice Gorsuch drew from several Founding Era and pre-New Deal cases that he argued define the historical limits of Congress's ability to delegate its legislative power.<sup>13</sup> The first set of cases identified by Justice Gorsuch recognizes Congress's ability to delegate the power to "fill up the details" of general statutory schemes,

6. See Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 177 (2019); Coan, *supra* note 1, at 142.

7. See, e.g., Ian Millhiser, *The Supreme Court's Coming War with Joe Biden, Explained*, VOX (Mar. 27, 2021, 9:00 AM), <https://www.vox.com/22276279/supreme-court-war-joe-biden-agency-regulation-administrative-neil-gorsuch-epa-nondelegation> [<https://perma.cc/3APC-7KUE>]; Julian Davis Mortenson & Nicholas Bagley, *There's No Historical Justification for One of the Most Dangerous Ideas in American Law*, ATLANTIC (May 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/nondelegation-doctrine-origionalism/612013/> [<https://perma.cc/4DNK-H4W9>]; Ramesh Ponnuru, *Conservative Justices Aren't About to Abolish the Government*, BLOOMBERG: OPINION (Dec. 11, 2019, 7:00 AM), <https://www.bloomberg.com/opinion/articles/2019-12-11/conservative-justices-aren-t-about-to-abolish-the-government>.

8. See, e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282 (2021); Lisa Heinzerling, *Nondelegation on Stilts*, 29 N.Y.U. ENV'T L.J. (forthcoming 2021) (manuscript at 1), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3706964](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3706964) [<https://perma.cc/U5RW-PD56>]; Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 383 (2017).

9. *But see* Heinzerling, *supra* note 8, at 3.

10. Several articles identify Justice Kavanaugh's major rules doctrine as a path forward for the nondelegation doctrine while not intensively examining the two doctrines' compatibility. *See id.* at 8; Jarrod Alec Greth, Note, *The Future of Nondelegation: Resurrecting the Doctrine Through a Novel Balancing Test*, 50 N.M. L. REV. 509, 511 (2020); Michael Sebring, Note, *The Major Rules Doctrine: How Justice Brett Kavanaugh's Novel Doctrine Can Bridge the Gap Between the Chevron and Nondelegation Doctrines*, 12 N.Y.U. J.L. & LIBERTY 189, 192 (2018). None has explored in detail the cases behind Justice Gorsuch's standard. *But see* Postell, *supra* note 4, at 297–98 (discussing Justice Gorsuch's standard generally).

11. 139 S. Ct. 2116 (2019) (Gorsuch, J., dissenting).

12. *See id.* at 2139 (Gorsuch, J., dissenting).

13. *See id.* at 2135–37 (Gorsuch, J., dissenting).

retaining for itself “important subjects.”<sup>14</sup> The second category is one of executive factfinding, where “Congress prescribes the rule” and then “make[s] the application of that rule depend on executive fact-finding,” though it would appear that the overriding rule would still be subject to the “fill-up-the-details” standard.<sup>15</sup> The third and final group of cases is not really the delegation of legislative power at all but rather Congress “assign[ing] the executive and judicial branches certain non-legislative responsibilities.”<sup>16</sup> According to Justice Gorsuch, these historical cases define the proper dimensions of Congress’s ability to delegate its legislative power, one that is “comparatively modest” by today’s standards.<sup>17</sup>

Separately, Justice Kavanaugh, concurring with the Court’s denial of certiorari in *Paul v. United States*,<sup>18</sup> centered a brief discussion of the nondelegation doctrine on the major questions doctrine, a rule of statutory interpretation meant to limit unintended congressional delegations of broad legislative authority to the executive branch.<sup>19</sup> According to Justice Kavanaugh, the major questions doctrine states that Congress must “expressly and specifically decide major policy questions itself” or else must “expressly and specifically delegate” resolution of such questions to the agency.<sup>20</sup> In Justice Kavanaugh’s understanding, a revitalized nondelegation doctrine would prohibit the second option altogether, prohibiting agencies from resolving major questions even when Congress has clearly granted discretion to do so.<sup>21</sup> Three years prior, then-Judge Kavanaugh defined major questions as those of “vast economic and political significance”<sup>22</sup>—an intuitive standard taking into account the money at stake for regulated parties, the broad economic impact, the number of affected individuals, and the attention paid by Congress and the public.<sup>23</sup> In Justice Kavanaugh’s view, this standard would mean that “major national policy decisions must be made by Congress and the

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14. *Id.* at 2136 (Gorsuch, J., dissenting) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

15. *Id.* at 2136 (Gorsuch, J., dissenting).

16. *Id.* at 2137 (Gorsuch J., dissenting).

17. *See id.* (Gorsuch, J., dissenting).

18. 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring in the denial of cert.).

19. *See id.* at 342 (Kavanaugh, J., concurring in the denial of cert.).

20. *Id.* (Kavanaugh, J., concurring in the denial of cert.).

21. *See id.* (Kavanaugh, J., concurring in the denial of cert.).

22. *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

23. *See id.* at 423 (Kavanaugh, J., dissenting from the denial of rehearing en banc) (“[D]etermining whether a rule constitutes a major rule sometimes has a bit of a ‘know it when you see it’ quality.”).

President in the legislative process,” not by administrative agencies through rulemaking.<sup>24</sup>

To date, neither Justice has made a full-fledged attempt to bridge these two versions of nondelegation.<sup>25</sup> And yet each provides something that the other lacks. Justice Gorsuch’s framework finds its persuasive power in a century-old understanding of the Constitution,<sup>26</sup> whereas Justice Kavanaugh’s test suffers from a notable lack of constitutional pedigree.<sup>27</sup> Conversely, Justice Kavanaugh’s inquiry presents a clear analytical test tied to recent caselaw from which to draw comparisons,<sup>28</sup> whereas Justice Gorsuch’s vague standard must be gleaned from the convoluted holdings of old cases.<sup>29</sup> A nondelegation doctrine that is both justifiable and administrable will depend on how well the conservative majority of the Court can stitch together these two notions.<sup>30</sup> Such a reconciliation would have vast consequences for administrative law and key regulatory priorities of the Biden administration.

This Comment concludes that the task of harmonizing these two paths will be harder than many commentators—and the Justices themselves—may have assumed. Part I traces the history of the nondelegation doctrine from the early nineteenth century to the modern day. Part II explores and critiques the two paths in detail, beginning with Justice Kavanaugh’s major questions test and then moving to Justice Gorsuch’s pre-New Deal cases. Part III tests the compatibility of these two approaches by applying Justice Kavanaugh’s major questions test to three of Justice Gorsuch’s handpicked cases. Part IV evaluates the future prospects of a volatile area of regulatory law—federal greenhouse gas regulations—under these two distinct nondelegation standards. Part V offers several paths forward for the Court. Finally, this Comment concludes that the Court’s treatment of the nondelegation doctrine may be an early indicator of how faithful the majority will remain to originalist judicial philosophy when it conflicts with conservative policy priorities.

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24. *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., concurring in the denial of cert.).

25. Each Justice in his respective writing cited the other’s framework, *see Gundy v. United States*, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting) (discussing the major questions doctrine); *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., concurring in the denial of cert.) (citing “fill-up-the-details decisions”), but neither made an attempt to bridge the analytical divide identified here.

26. *See infra* Section II.B.

27. *See infra* Section II.A.

28. *See infra* Section II.A.

29. *See infra* Section II.B.

30. *See* Heinzerling, *supra* note 8, at 13 (“These theorists make their argument for vitalizing the nondelegation principle in formalist and originalist terms. When it comes to giving content to this principle, however, they take refuge in functionalism and modern practice.”).

I. THE NONDELEGATION DOCTRINE THROUGH *GUNDY*

In its first two centuries, the nondelegation doctrine went from a never-violated theory of constitutional law rooted in the separation of powers to a robust check on the emerging administrative state and back again. A traditional catalogue of nondelegation cases traces this arc, formed from the citations of courts and academics.<sup>31</sup> Set against this background, Justice Gorsuch's dissent in *Gundy* is best understood as a significant departure.

A. *The Traditional History of Nondelegation*

The nondelegation doctrine emerged during the early nineteenth century as a logical extension of Article I's Vesting Clause and the separation of powers principle it embodies.<sup>32</sup> The case usually cited first in the traditional nondelegation catalogue is *Wayman v. Southard*,<sup>33</sup> a dispute turning on whether Congress had the authority to delegate to federal courts the power "to make all necessary rules for the orderly conducting business."<sup>34</sup> After dispensing with a challenge to Congress's authority to regulate court procedure under the Necessary and Proper Clause,<sup>35</sup> Chief Justice Marshall turned to the question of whether Congress could validly delegate that power to the courts themselves.<sup>36</sup> Although it was clear, Chief Justice Marshall wrote, that Congress could not delegate "powers which are strictly and exclusively legislative," it could delegate some "powers which the legislature may rightfully exercise itself."<sup>37</sup> The delineation of such delegable powers, however, "has not been exactly drawn."<sup>38</sup> Apart from the "important subjects" that must be decided by the legislature, there are "those of less interest" in which Congress may make a "general provision," leaving to other branches the power "to fill up the details."<sup>39</sup> Because the court procedures at issue were "minor regulations" that were guided by "great outlines marked out" by Congress, the delegation was valid.<sup>40</sup>

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31. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2123, 2129 (2019) (plurality opinion).

32. See U.S. CONST. art. I, § 1; but see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1729 (2002) (arguing that the Article I Vesting Clause does not limit delegations by Congress).

33. 23 U.S. (10 Wheat.) 1 (1825).

34. *Id.* at 22 (quoting the Judiciary Act of 1789, § 17, 1 Stat. 73, 83).

35. *Id.* at 21–22.

36. *Id.* at 42.

37. *Id.* at 42–43.

38. *Id.* at 43.

39. *Id.*

40. *Id.* at 45.

The next major entry in the traditional nondelegation catalogue did not come for another century when the Court heard *J.W. Hampton, Jr. & Co. v. United States*.<sup>41</sup> In *Hampton*, the Court addressed whether Congress could delegate to the executive branch the power to raise tariff rates to protect domestic industries exposed to competition from low-cost foreign production.<sup>42</sup> In a unanimous opinion authored by Chief Justice Taft, the Court distinguished the “power to make the law,” which Congress may not delegate, from “discretion as to its execution.”<sup>43</sup> So long as Congress establishes “an intelligible principle” to which the executive “is directed to conform,” the Court reasoned, the delegation is permissible.<sup>44</sup> Under the facts of the case, the Court determined that Congress had provided such an intelligible principle by limiting the executive’s discretion to factual findings of the cost of overseas production.<sup>45</sup>

*B. “One Good Year”: Nondelegation in the New Deal Era*

The nondelegation doctrine met its moment in the early years of the New Deal Era, when the Court used the doctrine to strike down provisions of the National Industrial Recovery Act of 1933 (NIRA)—its only two uses to date.<sup>46</sup> In *Panama Refining Co. v. Ryan*,<sup>47</sup> the Court was asked to review a provision of NIRA that granted the president authority to prohibit the interstate transportation of so-called “hot oil”—petroleum produced in excess of state limits.<sup>48</sup> The Court found that the provision of NIRA “establishe[d] no criterion” and “declare[d] no policy” to guide the president’s actions and therefore granted the president “an unlimited authority to” decide the policy “as he may see fit.”<sup>49</sup> NIRA’s general expressions of policy were not enough to “limit[] or control[]” the delegation of power to the president.<sup>50</sup> Such unfettered legislative authority, the Court reasoned, must be beyond Congress’s power to delegate to others “if our constitutional system is to be maintained.”<sup>51</sup>

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41. 276 U.S. 394 (1928).

42. *Id.* at 401–04.

43. *Id.* at 407 (quoting *Cincinnati, W. & Z. R. Co. v. Clinton County Comm’rs*, 1 Ohio St. 77, 88 (1852)).

44. *Id.* at 409.

45. *Id.* at 411 (“[The president] was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.”).

46. See Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (“We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).”).

47. 293 U.S. 388 (1935).

48. *Id.* at 405, 418.

49. *Id.* at 415.

50. *Id.* at 419.

51. *Id.* at 421.

Later that same year, in *A.L.A. Schechter Poultry Corp. v. United States*,<sup>52</sup> the Court struck down another provision of NIRA that authorized the president to adopt a “code of fair competition” written by industry to govern the trade in live poultry.<sup>53</sup> The Court noted that NIRA did not define the term “fair competition,” nor did it provide any special procedure for factfinding, such as the Federal Trade Commission Act, to help guide its application.<sup>54</sup> As in *Panama Refining*, the Court found NIRA’s broad statements of policy to be insufficient to constrain the president’s exercise of “unfettered discretion to make whatever laws he thinks may be needed or advisable” for the benefit of the industry.<sup>55</sup> By authoring the creation of codes without providing any specific standards, Congress made “an unconstitutional delegation of legislative power” that undermined the law.<sup>56</sup> It would be the last time the Court would so hold.

In the wake of *Panama Refining*, *Schechter Poultry*, and other cases striking down New Deal legislation on other grounds,<sup>57</sup> the Court underwent a major ideological realignment brought on by executive pressure and President Roosevelt’s appointees.<sup>58</sup> For decades thereafter, the nondelegation doctrine sat largely dormant, its precedents guiding legislative drafting but otherwise not meaningfully constraining the delegation of authority to administrative agencies.<sup>59</sup> So long as Congress provided an “intelligible principle”—a standard never since violated—a delegation of authority would be constitutional.<sup>60</sup>

### C. The Modern Approach: Canon of Construction

In the last forty years, the nondelegation doctrine has been relevant not as grounds on which the Court has struck down delegations of authority but rather as a canon of construction.<sup>61</sup> In *Industrial Union Department, AFL-CIO v. American Petroleum Institute (The Benzene Case)*,<sup>62</sup> the Court narrowly construed the Occupational Safety and Health

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52. 295 U.S. 495 (1935).

53. *See id.* at 521–23.

54. *Id.* at 531–33.

55. *Id.* at 537–38.

56. *Id.* at 542.

57. *See United States v. Butler*, 297 U.S. 1 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

58. *See* 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 20, 26 (1998).

59. In this regard, the *Gundy* plurality sits squarely in the mainstream. Indeed, plenty of broader delegations of authority have been approved under the “intelligible principle” standard. *See Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality opinion) (collecting cases).

60. *Id.*

61. *See* Sunstein, *supra* note 46, at 316; *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989).

62. 448 U.S. 607 (1980).

Act to avoid an unconstitutional delegation of power to the executive branch. At issue were the secretary of labor's regulations that established workplace exposure standards for benzene based on its carcinogenic properties, even though such risk had not been quantified.<sup>63</sup> In a plurality opinion, Justice Stevens reasoned that "in the absence of a clear mandate," the statute must be read narrowly to avoid a grant of "unprecedented power over American industry."<sup>64</sup> According to Justice Stevens, if the statute were read so broadly as to permit regulation under such circumstances, it "would make such a 'sweeping delegation of legislative power' that it might be unconstitutional" under the Court's *Schechter Poultry* and *Panama Refining* precedents.<sup>65</sup> Though not commanding a majority, Stevens's use of the nondelegation doctrine as an interpretive tool was repeated in later Court opinions.<sup>66</sup>

Applying the nondelegation doctrine as a canon of construction maintains some of the doctrine's benefit of encouraging democratic accountability while sparing the judiciary the task of policing Congress's administrative designs with an indefinite constitutional standard.<sup>67</sup> But even as this interpretive doctrine found more frequent use, a lonely minority urged the Court to return to its 1935 role of more actively policing the delegations of Congress to administrative agencies.<sup>68</sup> This viewpoint has now become the majority view of the Court. Now, what was once seen as a sleepy anachronism of administrative law appears poised for reinvigoration.

## II. TWO DIVERGENT PATHS TO NONDELEGATION

Conservative justices in recent years have proposed two distinct paths for revitalizing the nondelegation doctrine. First, following then-Justice Rehnquist's concurrence in the judgment in the *Benzene Case*, Justice Kavanaugh proposed applying the Court's major questions doctrine as a substantive limit on which powers Congress may delegate rather than as a merely procedural limit on how Congress may delegate those powers, as has been the Court's practice to date.<sup>69</sup> Second, Justice Gorsuch in his *Gundy* dissent attempted to fashion a set of standards from the Court's pre-

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63. See *id.* at 618–23 (plurality opinion).

64. *Id.* at 645 (plurality opinion).

65. *Id.* at 646 (plurality opinion) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935)).

66. See *Mistretta*, 488 U.S. at 373 n.7.

67. See Sunstein, *supra* note 46, at 317.

68. See *The Benzene Case*, 448 U.S. at 686–87 (Rehnquist, J., concurring in the judgment) ("If we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it.")

69. See *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of cert.).

New Deal jurisprudence that he says better reflects the Founding Era's conception of the limits to congressional delegation of legislative power.<sup>70</sup> These two paths differ fundamentally in their origins, justifications, and outcomes.

*A. Justice Kavanaugh's Major Questions Test*

Justice Kavanaugh's apparent favored approach is to apply the major questions doctrine as a substantive limit on legislative delegation.<sup>71</sup> This path provides an analytically concrete, factors-based test drawing on the Court's recent major questions caselaw, but it lacks historical pedigree. In this proposed application of the major questions doctrine, Congress must "expressly and specifically decide the major policy questions itself," delegating to the agency only the power to "regulate and enforce."<sup>72</sup> Congress may not delegate to others its power "to decide . . . major policy question[s]," no matter how "expressly" or "specifically" that delegation is done.<sup>73</sup>

Justice Kavanaugh finds his most notable support in then-Justice Rehnquist's concurrence in the judgment in the *Benzene Case*. Under Justice Kavanaugh's reading of the case, Justice Rehnquist's opinion stands for the principle that "major national policy decisions must be made . . . in the legislative process."<sup>74</sup> In that case, Justice Rehnquist indeed found that Congress had made "an invalid delegation" to the secretary of labor to decide whether a toxic substance standard was "feasible."<sup>75</sup> However, Justice Rehnquist's analysis suggests a subtler rule than the one Justice Kavanaugh describes. Justice Rehnquist began his opinion by quoting John Locke: legislative power can be "only to make laws, and not to make legislators."<sup>76</sup> But Justice Rehnquist quickly qualified that statement, acknowledging the Court's countervailing sense over centuries that "delegations of legislative authority must be judged 'according to common sense and the inherent necessities of governmental co-ordination.'"<sup>77</sup>

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70. See *Gundy v. United States*, 139 S. Ct. 2116, 2135–37 (2019) (Gorsuch, J., dissenting).

71. See *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., concurring in the denial of cert.).

72. *Id.* (Kavanaugh, J., concurring in the denial of cert.).

73. *Id.* (Kavanaugh, J., concurring in the denial of cert.).

74. *Id.* (Kavanaugh, J., concurring in the denial of cert.).

75. *The Benzene Case*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment).

76. *Id.* at 672–73 (Rehnquist, J., concurring in the judgment) (quoting JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ¶ 141 (Richard H. Cox ed., 1982) (1689)).

77. *Id.* at 674–75 (Rehnquist, J., concurring in the judgment) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928)). Note that *Hampton*

Justice Rehnquist's caution is evident in his two-part analysis. First, Justice Rehnquist sought to determine whether sufficient standards were ascertainable from the statute.<sup>78</sup> Second, Justice Rehnquist paused to consider whether the delegation was nevertheless "justifiable" because of "inherent necessities."<sup>79</sup> After a lengthy review of the statute's legislative history, Justice Rehnquist concluded that the statute permitted the agency to "reject [regulations] for any reason whatsoever."<sup>80</sup> Justice Rehnquist then proceeded to reject the possibility that "prescrib[ing] detailed rules" in the context of the regulation would be "unreasonable and impracticable."<sup>81</sup> Justice Rehnquist instead found that "Congress chose, intentionally or unintentionally, to pass [its] difficult choice" to the agency.<sup>82</sup> Concluding, Justice Rehnquist admonished the Court for failing to "reshoulder the burden of ensuring that Congress itself make the critical policy decisions" because such "hard choices" and "fundamental policy decisions" are "the very essence" of legislative power.<sup>83</sup> But he never acknowledged the second part of his analysis, the necessity analysis. And, critically, Justice Rehnquist provided no guidance on what constitutes a "critical" or "fundamental" policy decision, nor did he cite controlling authority in support of his assertions.<sup>84</sup>

Filling in the gaps left by Justice Rehnquist, Justice Kavanaugh in *Paul* next points to the line of cases establishing the Court's major questions doctrine.<sup>85</sup> Following the Court's landmark holding in *Chevron, U.S.A., Inc. v. NRDC, Inc.*,<sup>86</sup> the major questions doctrine was gradually integrated into the framework of the *Chevron* analysis as a check on

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established the Court's permissive "intelligible principle" test, which it continues to follow. See *supra* Section I.A.

78. *The Benzene Case*, 448 U.S. at 675–76 (Rehnquist, J., concurring in the judgment).

79. *Id.* (Rehnquist, J., concurring in the judgment).

80. *Id.* at 682 (Rehnquist, J., concurring in the judgment).

81. *Id.* at 684–85 (Rehnquist, J., concurring in the judgment) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

82. *Id.* at 685 (Rehnquist, J., concurring in the judgment).

83. *Id.* at 687 (Rehnquist, J., concurring in the judgment).

84. Justice Rehnquist cited *Arizona v. California*, 373 U.S. 546 (1963), but only Justice Harlan's dissent in part. *The Benzene Case*, 448 U.S. at 685 (Rehnquist, J., concurring in the judgment). He also cited *United States v. Robel*, 389 U.S. 258, but only Justice Brennan's concurrence in the result. *The Benzene Case*, 448 U.S. at 685 (Rehnquist, J., concurring in the judgment). The balance of Justice Rehnquist's citations are to the traditional nondelegation catalogue. See, e.g., *id.* at 674 (Rehnquist, J., concurring in the judgment) (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928); then citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)).

85. *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of cert.) (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014); then citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); then citing *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994)).

86. 467 U.S. 837 (1984).

deference to agency interpretations of ambiguous statutes.<sup>87</sup> In a much-cited journal article, then-Judge Stephen Breyer noted that “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves.”<sup>88</sup> In *FDA v. Brown & Williamson Tobacco Corp.*,<sup>89</sup> the Court adopted this view as a matter of interpretive “common sense” that Congress is unlikely to have delegated “a decision of such economic and political significance to an agency in so cryptic a fashion.”<sup>90</sup> In *Utility Air Regulatory Group v. EPA*,<sup>91</sup> the Court restated the standard succinctly: “We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”<sup>92</sup> Although acknowledging the doctrine’s development outside the context of nondelegation, Justice Kavanaugh nevertheless suggests that its framework could be applied to nondelegation cases—without explaining how such a transfer would be justified by the constitutional underpinnings of the nondelegation doctrine.<sup>93</sup>

Though not stated in *Paul*, Justice Kavanaugh had previously fashioned these major questions cases into a factors-based test in *U.S. Telecom Association v. FCC*.<sup>94</sup> Writing in dissent, then-Judge Kavanaugh voted to vacate the FCC’s net neutrality rule because it was a “major rule” without clear congressional authorization.<sup>95</sup> Judge Kavanaugh proceeded to explain his proposed test for determining whether a rule implicates a major question.<sup>96</sup> Synthesizing key precedent, Judge Kavanaugh identified four factors for identifying a major question: (1) the amount of money at

87. See, e.g., *Brown & Williamson*, 529 U.S. at 132–33; *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014).

88. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

89. 529 U.S. at 120.

90. *Id.* at 133, 160; see also *MCI*, 512 U.S. at 231, 234 (finding it “highly unlikely” that Congress would have granted agency discretion to create “a whole new regime of regulation” in the single term “modify”).

91. 573 U.S. 302 (2014).

92. *Id.* at 324 (quoting *Brown & Williamson*, 529 U.S. at 160).

93. *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of cert.).

94. 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

95. *Id.* at 418 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

96. *Id.* at 422–23 (Kavanaugh, J., dissenting from the denial of rehearing en banc). In a nod to his expansive view of the doctrine, Judge Kavanaugh in *U.S. Telecom* attempts a rhetorical sleight of hand, referring to a “major rules doctrine” rather than the established “major questions doctrine.” See *id.* (Kavanaugh, J., dissenting from the denial of rehearing en banc). This distinction is potentially significant, as it would sweep in even major rules based on Congress’s clearly established policy choices. See Skinner-Thompson, *supra* note 5, at 309. Justice Kavanaugh appears to have since retreated from the “major rules” language. See *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., concurring in the denial of cert.).

stake for regulated entities, (2) the magnitude of the impact on the economy, (3) the number of people affected by regulation (though presumably not those affected by a failure to regulate), and (4) the amount of attention paid by Congress and the public.<sup>97</sup> Judge Kavanaugh offered no guidance on how much of any factor must be present. Indeed, he admitted that the inquiry has “a ‘know it when you see it’ quality” with “close cases” and “debates at the margins.”<sup>98</sup>

Judge Kavanaugh in *U.S. Telecom* also offered his explanation of the constitutional underpinnings and practical application of the major questions doctrine as an interpretive tool. Departing from the Court’s “common sense” rationale in *Brown & Williamson*,<sup>99</sup> Judge Kavanaugh substituted the constitutional reasoning of the *Benzene Case* plurality,<sup>100</sup> grounding his reading of the major questions doctrine in constitutional separation-of-powers principles.<sup>101</sup> These considerations create a “presumption against the delegation of major lawmaking authority” and a related “presumption that Congress intends to make major policy decisions itself.”<sup>102</sup> While not specifically invoking the nondelegation doctrine, Judge Kavanaugh relied upon the same constitutional arguments as those employed by past proponents of the nondelegation doctrine<sup>103</sup>—leaving conspicuously unanswered the question of what would happen if Congress *did* clearly delegate a major question to the executive. Justice Kavanaugh suggests an answer in *Paul*: such a delegation would be invalid.<sup>104</sup>

In the context of statutory interpretation, Judge Kavanaugh’s factors work a curious result. The test assumes legislative purposes that Congress may or may not have had for any given piece of legislation: protecting against pecuniary losses for regulated parties, privileging economic growth above other objectives, and reducing burdens on those subject to regulation.<sup>105</sup> While the Supreme Court, in applying the major questions

97. *U.S. Telecom*, 885 F.3d at 422–23 (Kavanaugh, J., dissenting from the denial of rehearing en banc) (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Brown & Williamson*, 529 U.S. 120; *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994)).

98. *Id.* at 423 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

99. *See Brown & Williamson*, 529 U.S. at 133.

100. *See The Benzene Case*, 448 U.S. 607, 645–46 (1980) (plurality opinion).

101. *U.S. Telecom*, 885 F.3d at 419 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

102. *Id.* (Kavanaugh, J., dissenting from the denial of rehearing en banc).

103. *See supra* Section I.A.

104. *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of cert.).

105. *See* Daniel Deacon, *Judge Kavanaugh and “Weaponized Administrative Law,”* YALE J. REGUL.: NOTICE & COMMENT (July 11, 2018), <https://www.yalejreg.com/nc/judge-kavanaugh-and-weaponized-administrative-law-by-daniel-deacon/> [<https://perma.cc/9S5S-3MSS>]; *see generally* Cass R. Sunstein & Adrian

doctrine, has consistently been careful to analyze a statute on its own terms,<sup>106</sup> Judge Kavanaugh's test supplants its own values for those expressed by Congress.<sup>107</sup> This shortcoming is amplified when the test is applied to the nondelegation doctrine. As commentators have long cautioned, any expansion of the nondelegation doctrine would confer great power on the judiciary to strike down Congress's administrative designs.<sup>108</sup> Rather than handing discretion back to Congress, any courts employing the nondelegation doctrine to strike down legislation would instead be retaining it for themselves.<sup>109</sup> Under Judge Kavanaugh's test, this judicial discretion would then be directed in service of preferred policy objectives.

Beyond these prudential concerns, Judge Kavanaugh's major questions test from *U.S. Telecom* fails to conform with precedent when applied to nondelegation. The caselaw supporting his test is recent and thin, represented by only a handful of cases dating back no further than 1994.<sup>110</sup> In a context of delegation—a doctrine supposedly grounded in constitutional principles and ancient Lockean notions<sup>111</sup>—these cases fail to provide the historical reach one would expect. The major questions doctrine also suffers from a failure of logic when applied to nondelegation. The major questions doctrine articulated in the *Brown & Williamson* line of cases is, after all, grounded in the “common sense” presumption that Congress speaks clearly when it intends to assign a major question to an

Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 398 (2015) (identifying the broader trend of judge-made doctrines prioritizing private interests above public benefits in the D.C. Circuit).

106. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133–37 (2000) (identifying Congress's purpose of ensuring safe and effective products as inconsistent with delegating the question of regulating tobacco, which is never safe); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 322–24 (2014) (identifying Congress's purpose of regulating industrial sources as inconsistent with delegating the question of regulating small greenhouse gas-emitting sources); *King v. Burwell*, 576 U.S. 473, 485–86 (2015) (identifying Congress's purpose of establishing health insurance exchanges as inconsistent with delegating the question of tax credit availability).

107. What's more, the test's fourth factor appears to shift the relevant frame of reference from the time of the statute's enactment to the time of the regulation's promulgation. See Skinner-Thompson, *supra* note 5, at 309. In the context of climate regulation, the distinction has real effect: it is the difference between considering whether Congress in 1970 would have wanted the EPA to regulate newly understood pollutants in the future versus simply considering the state of the political debate in 2021. See *id.*

108. See Sunstein, *supra* note 46, at 327.

109. See *id.*

110. See *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 420–21 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (citing *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994); *Brown & Williamson*, 529 U.S. 120; *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Utility Air*, 573 U.S. 302).

111. See *supra* text accompanying note 76.

administrative agency.<sup>112</sup> The major questions doctrine embodied in *Brown & Williamson* considers the political and economic interests involved and asks whether Congress would have in fact intended such a question to be resolved by the agency.<sup>113</sup> The touchstone for the analysis is Congress's intent.<sup>114</sup>

Applying the major questions caselaw to nondelegation undermines the doctrine's basic logic. In the world of nondelegation, Congress's intent is irrelevant: even an unambiguous grant of legislative power to an administrative agency to decide a major question is invalid.<sup>115</sup> And so *Brown & Williamson*'s "common sense" presumption becomes merely a handy yardstick—a judicially created device justified by assumptions about Congress's intent now used to tell Congress that its intent is unconstitutional. This circular reasoning erodes any legitimacy the major questions doctrine has as an interpretive tool. Applied to nondelegation, the major questions doctrine becomes a test without clear justification—a mere expression of a judicial policy preference against regulation.<sup>116</sup>

To provide a greater claim to constitutional legitimacy, Justice Kavanaugh in *Paul* begins the task of interweaving his major questions test with Justice Gorsuch's historical analysis of great old cases.<sup>117</sup> But though he refers approvingly to "Justice Gorsuch's scholarly analysis," Justice Kavanaugh does not engage with the substance of that analysis.<sup>118</sup> It is therefore necessary to closely consider Justice Gorsuch's dissent in *Gundy* on its own terms.

### *B. Justice Gorsuch's New Nondelegation Catalogue*

In his *Gundy* dissent, Justice Gorsuch provides that which Justice Kavanaugh's major questions test lacks—precedent stretching back to the Founding Era.<sup>119</sup> But what he gains in constitutional pedigree, Justice

112. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 160 (2000). In the context of a *Chevron* analysis, this inquiry makes sense because *Chevron* deference itself is a presumption about which branch Congress would rather have resolving statutory ambiguities. See *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984).

113. *Brown & Williamson*, 529 U.S. at 133, 160.

114. See also Breyer, *supra* note 88, at 370 ("Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves.").

115. See *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of cert.).

116. Professor Lisa Heinzerling makes this same point. See Heinzerling, *supra* note 8, at 3.

117. See *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., concurring in the denial of cert.).

118. *Id.* (Kavanaugh, J., concurring in the denial of cert.).

119. See *Gundy v. United States*, 139 S. Ct. 2116, 2135–37 (2019) (Gorsuch, J., dissenting).

Gorsuch loses in analytical simplicity.<sup>120</sup> Instead of a neat four-factor test, Justice Gorsuch describes an unwieldy triad of “important guiding principles” handed down from the Framers and illustrated by representative cases from before the New Deal Era.<sup>121</sup> First, Congress may delegate authority to other branches to “fill up the details” of a statutory scheme so long as Congress itself “makes the policy decisions.”<sup>122</sup> Second, Congress may make its policy decisions conditional on an executive finding of fact.<sup>123</sup> And third, Congress may allocate “non-legislative responsibilities” to the other two branches.<sup>124</sup>

All of the work is done by the first principle. Justice Gorsuch’s third category is a legal truism—a congressional delegation of non-legislative power does not violate the prohibition against congressional delegations of legislative power—and is not really a part of the nondelegation doctrine so much as an acknowledgement that not all subjects of legislation are comprised solely of delegations of legislative power.<sup>125</sup> And Justice Gorsuch’s second principle—that Congress may authorize executive factfinding—presupposes that Congress has already made all relevant policy decisions, including presumably exactly what fact must be found and how.<sup>126</sup> Thus, notwithstanding the tripartite organization, all analytical roads lead back to the first principle, that Congress may only leave the executive discretion to “fill up the details.”<sup>127</sup> But how to distinguish between “details” and “policy decisions”?<sup>128</sup> Although he nods to the Court’s major questions doctrine and its prohibition on vagueness,<sup>129</sup> Justice Gorsuch seems intent on finding historical guidance in the numerous cases he cites.<sup>130</sup>

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120. Justice Gorsuch seems to anticipate the analytical difficulty of his principles. He quotes Chief Justice Marshall as having said that delineating the legislative, executive, and judiciary powers “is a subject of delicate and difficult inquiry.” *See id.* at 2135 (Gorsuch, J., dissenting) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825)).

121. *See id.* at 2135–37 (Gorsuch, J., dissenting).

122. *Id.* at 2136 (Gorsuch, J., dissenting) (quoting *Wayman*, 23 U.S. (10 Wheat.) at 43).

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

124. *Id.* at 2137 (Gorsuch, J., dissenting).

125. *See id.* (Gorsuch, J., dissenting).

126. *See id.* at 2136 (Gorsuch, J., dissenting).

127. *See id.* (Gorsuch, J., dissenting).

128. Professor Lisa Heinzerling likewise identifies this hole at the heart of Justice Gorsuch’s standard. *See Heinzerling, supra* note 8, at 5.

129. *See Gundy*, 139 S. Ct. at 2141–42 (Gorsuch, J., dissenting).

130. Justice Gorsuch makes one other clear statement on the matter: “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.” *Id.* at 2136 (Gorsuch, J., dissenting) (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944)). Curiously, the plurality identified *Yakus* as an example of the capacious breadth of the current “intelligible principle” test. *See id.* at 2129 (plurality opinion). Justice Gorsuch provides no further guidance on how to navigate this standard.

Over little more than a single reporter page, Justice Gorsuch cites no fewer than six cases from before 1920, each of which upheld a facially ministerial executive act—and nearly all of which are outside of the traditional nondelegation catalogue.<sup>131</sup> To begin, Justice Gorsuch describes his first principle with *Wayman v. Southard*,<sup>132</sup> the case widely recognized as the judicial origin of the nondelegation doctrine,<sup>133</sup> which upheld the Judiciary Act of 1789’s delegation to federal courts the authority to make their own procedural rules.<sup>134</sup> Proceeding then in order of triviality, Justice Gorsuch next cites the obscure case of *In re Kollock*,<sup>135</sup> a late nineteenth-century case upholding Congress’s delegation to the commissioner of internal revenue of the authority to set labeling requirements for margarine packages.<sup>136</sup> Next, Justice Gorsuch cites *United States v. Grimaud*,<sup>137</sup> an early twentieth-century decision that validated Congress’s authorization for the secretary of agriculture to regulate uses of public forests.<sup>138</sup>

Turning to his second principle, Justice Gorsuch identifies *The Cargo of the Brig Aurora v. United States*,<sup>139</sup> the Founding-Era case in which the Court upheld Congress’s delegation to the president of the authority to impose an embargo against Great Britain or France if the other power ceased its interference with American trade.<sup>140</sup> Skipping forward seventy years, Justice Gorsuch next cites *Miller v. Mayor of New York*,<sup>141</sup> which validated Congress’s approval of the Brooklyn Bridge’s construction contingent on the secretary of war finding no interference with navigation

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131. See *id.* at 2136 (Gorsuch, J., dissenting).

132. 23 U.S. (10 Wheat.) 1 (1825).

133. See *supra* Section I.A.

134. *Wayman*, 23 U.S. (10 Wheat.) at 42–46.

135. 165 U.S. 526 (1897).

136. *Id.* at 537.

137. 220 U.S. 506 (1911).

138. *Id.* at 516. In the margin, Justice Gorsuch cites *Buttfield v. Stranahan*, 192 U.S. 470 (1904), which validated a delegation of power to the secretary of the treasury to prohibit the import of certain grades of tea, *id.* at 496, and *ICC v. Goodrich Transit Co.*, 224 U.S. 194 (1912), which affirmed a delegation of authority to the Interstate Commerce Commission to establish a uniform system of accounting for railroad common carriers. *Id.* at 210, 215. Neither holding is particularly revelatory for purposes of Justice Gorsuch’s nondelegation standard.

139. 11 U.S. (7 Cranch) 382 (1813).

140. *Id.* at 383, 388. Some scholars reject reading *Aurora* as a nondelegation case. See Posner & Vermeule, *supra* note 32, at 1737–38 (“Nothing in *The Brig Aurora* endorses the delegation metaphor; if anything, the Court’s terse dismissal of the claim suggests the absence of constitutional limits on statutory grants to the executive.”); Mortenson & Bagley, *supra* note 8, at 282 (calling the case a “rejection of what might have been a nondelegation argument”). This Comment accepts Justice Gorsuch’s assertion of the case’s relevance for the purposes of analysis.

141. 109 U.S. 385 (1883).

on the East River.<sup>142</sup> In Justice Gorsuch’s telling, these two cases speak to Congress’s ability to condition legislation on executive factfinding, but they also help clarify his distinction between “details” and “policy.”<sup>143</sup>

Taken as a whole, Justice Gorsuch’s tour of grand old cases does not itself provide a workable standard for distinguishing “details” from “policy.” But these cases—at least on their face—do seem to support his conclusion that pre-New Deal delegations of legislative authority were “comparatively modest” relative to what came once the federal government “began to grow explosively.”<sup>144</sup> Justice Gorsuch’s thesis depends on drawing this chronological line in the sand. Without it, his standard would have to account for the Court’s line of cases applying the current “intelligible principle” test, which Justice Gorsuch denigrates as a “passing comment” with “no basis in the original meaning of the Constitution [or] in history.”<sup>145</sup> But these century-old cases present a crucial problem for the purposes of discerning a standard: none of these cases ever found an unconstitutional delegation of legislative power.<sup>146</sup> To define the contours of a constitutional standard, it is usually necessary to do more than identify cases that do not meet it.<sup>147</sup> This is a fundamental shortcoming of Justice Gorsuch’s approach and a gap that Justice Kavanaugh appears eager to fill in *Paul*.

### C. Synthesizing the Two Paths

Justice Kavanaugh’s attempt to marry his major questions test with Justice Gorsuch’s historical framework is essential to the future viability of a revitalized nondelegation doctrine. Justice Kavanaugh writes, “The opinions of Justice Rehnquist and Justice Gorsuch would not allow . . . congressional delegations to agencies of authority to decide major policy questions.”<sup>148</sup> By lumping together Justice Rehnquist’s concurrence in the judgment in the *Benzene Case* with Justice Gorsuch’s dissent in *Gundy*, Justice Kavanaugh skips past the possibility that Justice Gorsuch’s pre-

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142. *Id.* at 393.

143. *See Gundy v. United States*, 139 S. Ct. 2116, 2136–37 (2019) (Gorsuch, J., dissenting).

144. *See id.* at 2137 (Gorsuch, J., dissenting). Justice Gorsuch here suggests a connection between the size of the administrative state with the breadth of authority delegated to its agencies. *See id.* (Gorsuch, J., dissenting). It is worth noting that these need not be related.

145. *See id.* at 2139 (Gorsuch, J., dissenting).

146. *See id.* at 2136–37 (Gorsuch, J., dissenting).

147. Justice Gorsuch does reference *Schechter Poultry* and *Panama Refining*, but he frames them as merely applying the nondelegation standard evident at the Founding to clearly overreaching legislation. *See id.* at 2137–38 (Gorsuch, J., dissenting).

148. *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of cert.).

New Deal cases do not actually support the major questions test fashioned by Justice Kavanaugh. In fact, there is little reason to think that they would.

A cursory glance points to several potential issues. First, the gap in time alone between the end of Justice Gorsuch's caselaw in 1912 and the start of Justice Kavanaugh's precedents in 1994 suggests that harmonizing the two approaches may be difficult.<sup>149</sup> Second, Justice Rehnquist himself struggled to find precedent to support his theory, as illustrated by his failure to cite to controlling authority.<sup>150</sup> And, as discussed above, Justice Kavanaugh's test creates a circular line of reasoning when applying major questions caselaw to nondelegation.<sup>151</sup> Since the future of the nondelegation doctrine may depend on the compatibility of these two paths, it is worth considering in greater detail just how well Justice Gorsuch's cases would support Justice Kavanaugh's major questions test.

### III. APPLYING KAVANAUGH'S TEST TO GORSUCH'S CASES

In applying the facts of the old cases cited by Justice Gorsuch to the major questions test proposed by Justice Kavanaugh, it is clear that the two paths are not compatible. If they were, one would expect the “comparatively modest” delegations<sup>152</sup> from Justice Gorsuch's cases to all easily pass Justice Kavanaugh's four-part major questions test. But they do not. The three most substantial cases cited by Justice Gorsuch in his nondelegation catalogue are *Aurora*, *Miller*, and *Grimaud*—which address trade embargoes, the construction of the Brooklyn Bridge, and the management of national forests, respectively.<sup>153</sup> For each case, this Part provides a brief background of the facts, identifies the congressional delegation of authority at issue, and analyzes the delegation's compatibility with Justice Kavanaugh's four-factor major questions test from *U.S. Telecom*.<sup>154</sup> This analysis exposes an inherent incompatibility of the two approaches and a fundamental misreading of congressional delegations of authority prior to the New Deal Era, which—even in Justice Gorsuch's handpicked cases—were often expansive.<sup>155</sup>

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149. See *supra* notes 110, 138 and accompanying text.

150. See *supra* note 84.

151. See *supra* text accompanying notes 112–16.

152. *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

153. See *supra* Section II.B. The other four cases address court procedure, margarine labeling, tea imports, and railroad accounting. See generally *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825) (court procedure); *In re Kollock*, 165 U.S. 526 (1897) (margarine labeling); *Buttfield v. Stranahan*, 192 U.S. 470 (1904) (tea imports); *ICC v. Goodrich Transit Co.*, 224 U.S. 194 (1912) (railroad accounting).

154. See *supra* text accompanying note 97.

155. This is not a new point. Two decades ago, Cass Sunstein made the same point, calling it “misleading to suggest that the nondelegation doctrine was a well-

*A. Aurora: Trading on Past Glories*

In *Aurora*, where Justice Gorsuch sees a simple delegation of a finding of fact, history suggests a much more complex decision was passed to the executive. Only a generation after the revolution, the United States found itself caught between two warring European powers, Great Britain and Napoleonic France.<sup>156</sup> Late in 1807, the nation appeared delicately balanced between war and peace, pushed to the brink by European aggression against U.S. commercial vessels.<sup>157</sup> In December of that year, President Jefferson signed the Embargo Act, a highly controversial and permanent injunction on all foreign trade, regardless of source.<sup>158</sup> Unpopular at home, the embargo also led to intensive lobbying efforts by Britain and France to reverse the measures, with Napoleon calculating that a restoration of trade between America and France would force Britain again to war with its former colonies.<sup>159</sup> In the waning days of the Jefferson presidency, Congress replaced the Embargo Act with a more targeted non-intercourse act against Britain and France,<sup>160</sup> which it allowed to expire under intense pressure from shipping interests.<sup>161</sup>

In place of the expiring act, Congress in 1810 passed legislation authorizing the president to restore non-intercourse with one nation if the other should “so revoke or modify her edicts as that they shall cease to violate the neutral commerce of the United States.”<sup>162</sup> On a largely party-line vote, a deeply ambivalent Congress passed the legislation, granting the president, in the words of historian Henry Adams, “a discretion

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entrenched aspect of constitutional doctrine, suddenly abandoned as part of some post-New Deal capitulation to the emerging administrative state.” Sunstein, *supra* note 46, at 322; see also Posner & Vermeule, *supra* note 32, at 1735–36 (recounting several broad delegations of authority by the First and Second Congresses). More recently, Julian Davis Mortenson and Nicholas Bagley published a seminal work on delegation at the Founding, and Nicholas Parrillo has offered a detailed analysis of the federal direct tax of 1798. See Mortenson & Bagley, *supra* note 8, 280–82; Nicholas Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1302 (2021). Keith Whittington and Jason Iuliano picked up this argument from the early nineteenth century to the New Deal. See Whittington & Iuliano, *supra* note 8, at 383. This Comment builds on these earlier works by focusing specifically on the cases held up by Justice Gorsuch as illustrative of the nondelegation doctrine.

156. PAUL LANGFORD, *THE EIGHTEENTH CENTURY, 1688–1815*, at 227 (1976).

157. 1 HENRY ADAMS, *THE FORMATIVE YEARS: A HISTORY OF THE UNITED STATES DURING THE ADMINISTRATIONS OF JEFFERSON AND MADISON* 460 (1947).

158. *Id.* at 465–67.

159. LANGFORD, *supra* note 156, at 228.

160. Act of March 1, 1809, Pub. L. No. 10-24, 2 Stat. 528.

161. HENRY ADAMS, *HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF JAMES MADISON* 138–39, 148 (1986).

162. Act of May 1, 1810, Pub. L. No. 11-39, § 4, 2 Stat. 605, 606.

dangerous, unconstitutional, and unnecessary.”<sup>163</sup> Opponents of the new act viewed its failure to restrict trade with Britain, which at the time still dominated American trade, as effectively equivalent to alliance with Britain.<sup>164</sup> Viewed in this context, a finding of French revocation of its policies was as good as a declaration of war against Britain. Later that year, faced with an ambiguous correspondence from France that did not clearly promise a cessation of its interference, President Madison nevertheless made just such a finding in favor of France.<sup>165</sup> The proclamation restored America’s non-intercourse policy against Great Britain, a step that contemporary decisionmakers expected to result in war.<sup>166</sup> Two years later, the United States indeed formally declared war on Great Britain.<sup>167</sup>

It is hard to see how the issue delegated to the executive in *Aurora*—the question of whether France continued “to violate the neutral commerce of the United States”<sup>168</sup>—would not classify as a major question under Justice Kavanaugh’s four-factor test.<sup>169</sup> The amount of money at stake was nothing short of America’s entire trade with Great Britain, its chief commercial partner.<sup>170</sup> The magnitude of the impact on the overall economy was equally immense, with ramifications for nascent American industry.<sup>171</sup> The non-intercourse policy affected any American involved in an industry relying on imports or exports and was the focus of the fiercest national political argument for many years.<sup>172</sup> Though Justice Gorsuch would argue that these considerations are beside the point—the task left to the president, after all, was limited—the historical record makes clear that the choice left to the president was not one constrained to mere factfinding: it was a policy choice motivated by policy preferences consciously delegated by Congress at the president’s urging.<sup>173</sup>

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163. See ADAMS, *supra* note 161, at 137–40.

164. *Id.* at 138.

165. *Id.* at 208–13; 1 ANNALS OF CONGRESS 1248 (James Daniel Richardson ed., 1896) (1810).

166. ADAMS, *supra* note 161, at 212.

167. *Id.* at 452.

168. Act of May 1, 1810, Pub. L. No. 11-39, § 4, 2 Stat. 605, 606.

169. See *supra* text accompanying note 97.

170. See ADAMS, *supra* note 161, at 15.

171. See *id.* at 16–17.

172. *Id.* at 137–40.

173. See *supra* text accompanying notes 156–67. As Justice Gorsuch notes, *Aurora* also may have been upheld as a delegation of a non-legislative power because regulation of international trade is at least partly within the traditional realm of the executive. *Gundy v. United States*, 139 S. Ct. 2116, 2136–37 (2019) (Gorsuch, J., dissenting). But this does not matter for purposes of this Comment’s analysis since Justice Gorsuch presents *Aurora* as independently valid under his first category and indeed descriptive of his standard for what counts as “details.” See *id.* at 2136 (Gorsuch, J., dissenting).

*B. Miller: A Bridge Too Far*

*Miller* is the closest call of Justice Gorsuch's most significant cases. By Justice Gorsuch's telling, *Miller* was a straightforward case concerning a simple finding of fact prescribed by Congress and carried out by the executive.<sup>174</sup> But the historical record reveals a more complex delegation of authority to the executive. The Brooklyn Bridge at the time of its construction was to be the longest single-span bridge in the world.<sup>175</sup> Seen as crucial to the continued development of Manhattan and Brooklyn, the bridge promised to eliminate the unpredictable and hazardous necessity of crossing the East River by ferry.<sup>176</sup> The promise of the Great Bridge, as it was known, captured the imagination of post-Civil War America—hailed by its designer as not merely the greatest bridge but indeed “the greatest engineering work of the continent, and of the age.”<sup>177</sup> The bridge originally was planned to reach an elevation 130 feet above the water, high enough to allow most but not all of the sailing ships that at that time serviced Manhattan and Brooklyn docks upstream, including the Brooklyn Navy Yard.<sup>178</sup> Because of its interference with the navigation of vessels, the bridge faced stiff public opposition, including from shippers and warehouse owners whose businesses would be disrupted by the bridge's construction.<sup>179</sup> What's more, the East River upstream from the proposed bridge represented perhaps the most critical port in the United States and one of the great shipbuilding centers of the world,<sup>180</sup> making the bridge's construction an issue of national importance.

When the bridge company sought approval from Congress, which was required because of its construction in navigable waters, Congress approved the bridge but only on the condition that it not “obstruct, impair, or injuriously modify the navigation of the river.”<sup>181</sup> Rather than determine this fact itself, Congress delegated the task to the secretary of war without further guidance on how to make the assessment—a delegation that the Supreme Court upheld.<sup>182</sup> The secretary of war, in turn, delegated the task to the chief of engineers who, in turn, appointed a review panel of military engineers to analyze the bridge's plans.<sup>183</sup> After a thorough review, the

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174. See *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

175. DAVID McCULLOUGH, *THE GREAT BRIDGE* 31 (1972).

176. *Id.* at 25–26.

177. *Id.* at 27.

178. *Id.* at 29, 31–32.

179. *Id.* at 28.

180. *Id.* at 106.

181. *Miller v. Mayor of New York*, 109 U.S. 385, 386 (1883); Act of March 3, 1869, Pub. L. No. 40-139, § 1, 15 Stat. 336, 337.

182. *Miller*, 109 U.S. at 393; § 2, 15 Stat. 336, 337.

183. McCULLOUGH, *supra* note 175, at 35, 88.

panel produced a report outlining its findings.<sup>184</sup> In this report, the panel construed the statutory term, “obstruct,”<sup>185</sup> made technical findings of fact,<sup>186</sup> considered input from interested parties,<sup>187</sup> and weighed the economic costs and benefits of the proposal.<sup>188</sup> In relaying this report, the chief of engineers recommended that approval be conditioned on the bridge being raised to 135 feet above the water<sup>189</sup>—a modification that proved costly for the builder.<sup>190</sup> The secretary adopted these recommendations in full with a two-sentence endorsement.<sup>191</sup>

Based on the record available to the *Miller* Court, it is a close call whether this delegation to the secretary of war would have been considered a major question under Justice Kavanaugh’s test—closer than perhaps either Justice would assume.<sup>192</sup> Starting first with the amount of money at stake, it is clear that upstream shipping and warehouse interests considered the bridge’s effect on navigation to be a “seriously detrimental” cost and a “tax upon commerce,” although not so much as to threaten all upstream traffic.<sup>193</sup> Looking next to the impact on the economy as a whole, navigation to and from one of America’s most important ports seems like the sort of impact captured by the test.<sup>194</sup> The third factor—the number of people affected—is perhaps the strongest in favor of considering East River navigation a “detail,” although the bridge permanently altered the commercial and personal lives of everyone directly or indirectly connected to the shipping and warehouse trades upstream.<sup>195</sup> Finally, the attention Congress and the public paid to the issue of navigation—although less than the broader interest in constructing the bridge—was hardly insignificant. It was the sole substantive condition placed upon Congress’s approval<sup>196</sup>

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184. 2 SEC’Y WAR ANN. REP. 397 (1869) [hereinafter SEC’Y WAR ANN. REP.].

185. *Id.* at 399–400 (“[W]e are of the opinion that it was not the intention to use the word ‘obstruct’ in its strictest sense, but to imply by it that the bridge should not present a serious obstacle to the passage of vessels.”).

186. *Id.* at 400 (“An addition of five to ten feet to the present height would permit almost every vessel submerged to half-load line . . . to pass with top-gal-lants standing.”).

187. *Id.* at 399 (“[T]he striking of [upper masts] would involve a cost which [shippers] maintain would be seriously detrimental to the various interests involved.”).

188. *Id.* at 401 (“[T]he commission has been convinced by its examination of the subject that a bridge is rapidly becoming a necessity . . .”).

189. *Id.* at 405.

190. MCCULLOUGH, *supra* note 175, at 88–89.

191. SEC’Y WAR ANN. REP., *supra* note 184, at 405.

192. *See U.S. Telecom Ass’n v. FCC*, 885 F.3d 381, 422–23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

193. *See* SEC’Y WAR ANN. REP., *supra* note 184, at 399.

194. *See* MCCULLOUGH, *supra* note 175, at 106.

195. *See Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting). *See* MCCULLOUGH, *supra* note 175, at 25–28.

196. *See* Act of March 3, 1869, Pub. L. No. 40-139, § 1, 15 Stat. 336, 337.

and an issue that generated heated debate locally.<sup>197</sup> In sum, the case is a close call under Justice Kavanaugh’s major questions test. It is hardly the sort of delegation one would expect to see held up as an example of congressional modesty.

*C. Grimaud: Missing the Forest for the Trees*

In *Grimaud*, the historical facts reveal a sweeping delegation of legislative authority over some of the most critical economic activities for entire states in the American West: management of the public domain. In the decades following the Civil War, westward expansion brought new settlers into direct conflict with American Indian tribes, the limits of the land, and each other.<sup>198</sup> Economies of entire states rose up around exploitation of the land, particularly through ranching, the pursuit of which was marked by violence, economic turmoil, and ecological depletion.<sup>199</sup> Ranching interests became politically powerful in the state and territorial legislatures of the region and in the halls of Congress.<sup>200</sup> Even as the federal government granted title to some of the lands to homesteaders, Congress authorized the president to designate vast swaths of valuable forest and rangeland as forest reserves, retaining the land in federal ownership.<sup>201</sup> Between 1891 and 1897, the federal government designated nearly forty million acres as forest reserves across the West<sup>202</sup>—an area the size of Georgia.<sup>203</sup> Congress, initially slow to act in regulating exploitation of these lands, eventually was forced to address the destructive consequences of unmanaged grazing and other unregulated uses.<sup>204</sup>

After several years of public interest and congressional debate among powerful ranching interests, conservationists, and other land users, Congress acted.<sup>205</sup> In 1897, Congress granted the secretary of agriculture the authority to “make such rules and regulations” as necessary to “regulate [the] occupancy and use” of forest reserves to protect them against “destruction” and “depredations,” making violation of such rules

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197. See McCULLOUGH, *supra* note 175, at 28.

198. See RAY ALLEN BILLINGTON & MARTIN RIDGE, WESTWARD EXPANSION: A HISTORY OF THE AMERICAN FRONTIER 321 (6th ed., abr. 2001).

199. See *id.* at 321, 334–38; WILLIAM D. ROWLEY, U.S. FOREST SERVICE GRAZING AND RANGELANDS: A HISTORY 5–8 (1st ed. 1985).

200. ROWLEY, *supra* note 199, at 9, 24.

201. *Id.* at 4.

202. See *id.* at 4, 26–27.

203. See Louis De Vorse, George Hendricks & Robert J. Norrell, *Georgia*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Georgia-state> (last updated Aug. 26, 2021).

204. ROWLEY, *supra* note 199, at 22–23.

205. *Id.* at 24–31.

a criminal offense.<sup>206</sup> In this short legislation, Congress failed to explicitly decide the question of whether grazing would be permitted on forest reserves and provided the secretary no further guidance on how such uses should be managed.<sup>207</sup> In response, the secretary promulgated a regulation governing grazing on forest reserves that required shepherders to obtain a permit and pay a fee for the privilege of grazing sheep on the reserves.<sup>208</sup> In *Grimaud*, the Court upheld this fee and permit system and the criminal penalty associated with noncompliance, holding that the delegation was constitutional.<sup>209</sup>

Applying Justice Gorsuch's four-factor test, Congress's delegation to prevent "destruction" of the forest would again appear to be a major rule. The amount of money at issue in 1897 was potentially immense, including all revenue from the extraction of natural resources from forest reserves.<sup>210</sup> The impact on the economy of western states was potentially severe with many people affected: revenue from shepherding alone significantly affected the economies of entire states.<sup>211</sup> Lastly, the political salience of the issue for western states hardly could be overstated, as demonstrated by the fierce debate inside Congress and beyond.<sup>212</sup> To place such discretion in the hands of the executive with so little guidance would seem to be the epitome of a suspect delegation in the view of today's Court. It is certainly not illustrative of a bygone era of careful judicial policing of congressional delegations of authority.

In sum, at least two of the cases handpicked by Justice Gorsuch as examples of acceptable delegations would fail the major questions test as proposed by Justice Kavanaugh. This finding would not be a surprise to scholars who have examined the complex history of congressional delegations.<sup>213</sup> Where this leaves the future of the Court's nondelegation jurisprudence is unclear. Will the Court recognize this incompatibility and rethink its plans to revamp the nondelegation doctrine? Will the Court select one of these two proposed paths and abandon the other? Or will the Court forge ahead, lashing together Justice Gorsuch's originalist cases with Justice Kavanaugh's functionalist test, unaware of or unconcerned with their incompatibility? To better answer this question, it is worth

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206. Act of June 4, 1897, ch. 2, 30 Stat. 11, 35.

207. ROWLEY, *supra* note 199, at 31.

208. *United States v. Grimaud*, 220 U.S. 506, 521–22 (1911).

209. *See id.* at 522–23.

210. ROWLEY, *supra* note 199, at 4–5.

211. *Id.* at 8.

212. *Id.* at 23–24.

213. *See* Sunstein, *supra* note 46, at 322 (“[T]he practice of early congresses strongly suggests that broad grants of authority to the executive were not thought to be problematic.”); Posner & Vermeule, *supra* note 32, at 1735 (“[C]onsistent early practice . . . decisively established the permissibility of statutory grants to the president unchecked by any apparent intelligible principle.”).

considering a discrete area of regulatory policy likely to appear before the Court again in coming terms: federal regulation of greenhouse gases. By considering the fate of such regulations under each version of the nondelegation doctrine, it may be possible to better understand the tradeoffs facing the Court when charting a path forward.

#### IV. CASE STUDY: GREENHOUSE GAS REGULATION

Scholars have identified a revitalized nondelegation doctrine as a threat to any new attempts to regulate greenhouse gases under existing statutes,<sup>214</sup> but no analysis has yet attempted to differentiate between the two distinct standards described by Justices Gorsuch and Kavanaugh. This section begins by tracing a brief history of climate regulation under the Clean Air Act and then examines the prospects for such regulations under the nondelegation standards of Justices Gorsuch and Kavanaugh. It finds that greenhouse gas regulation of any kind is likely to be struck down under Justice Kavanaugh's major questions test. The fate of such regulations under Justice Gorsuch's historical nondelegation standard is less clear. How these two proposed nondelegation paths converge—or not—could be a deciding factor for greenhouse gas regulation in the Biden era.

##### A. *The Clean Air Act and Greenhouse Gases*

All federal greenhouse gas regulations to date have been promulgated under the Clean Air Act,<sup>215</sup> a fifty-year-old statute that empowers the U.S. Environmental Protection Agency (EPA) to regulate air pollutants that endanger public health or welfare.<sup>216</sup> The Supreme Court's treatment of greenhouse gas regulation under the Clean Air Act began with the Court declaring such regulation not a major question under the *Brown & Williamson* standard.<sup>217</sup> In more recent challenges, however, the Court has changed course, drawing on the major questions doctrine to deny deference to the EPA when the agency defines key statutory terms.<sup>218</sup> This evolution illustrates the expansion of the major questions doctrine over the

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214. See Skinner-Thompson, *supra* note 5, at 293; Ann Carlson, *Greenhouse Gas Regulations Under the Clean Air Act Are Doomed*, LEGALPLANET (Nov. 27, 2019), <https://legal-planet.org/2019/11/27/greenhouse-gas-regulations-under-the-clean-air-act-are-doomed/> [<https://perma.cc/F7QH-7VKV>].

215. See Kyle Danish & Avi Zevin, *The Clean Air Act and Global Climate Change*, in THE CLEAN AIR ACT HANDBOOK 563 (Julie R. Domike & Alec C. Zacaroli eds., 4th ed. 2016).

216. See, e.g., 42 U.S.C. §§ 7411, 7521.

217. See *infra* text accompanying note 224.

218. See *infra* text accompanying notes 240–41.

past decade, a trend echoed by Justice Kavanaugh's more aggressive interpretation of the doctrine in *U.S. Telecom*.<sup>219</sup>

The key legal question underlying attempts at regulation has been whether greenhouse gases are rightfully considered air pollutants for purposes of the Clean Air Act<sup>220</sup>—the key provisions of which were enacted in 1970<sup>221</sup> and last amended in 1990.<sup>222</sup> Prior to 2000, two EPA general counsels had found that carbon dioxide did in fact satisfy the definition of “air pollutant” under the act.<sup>223</sup> Following the Supreme Court's decision in *Brown & Williamson* and a change in administrations, the EPA reversed its view, reasoning that regulating greenhouse gases as air pollutants under the Clean Air Act would be precisely the sort of significant economic and political action the Court cautioned against attributing to a broadly worded statute.<sup>224</sup>

In the 2007 case of *Massachusetts v. EPA*,<sup>225</sup> the U.S. Supreme Court weighed in, holding that the EPA did indeed have the authority to regulate greenhouse gas emissions under the Clean Air Act.<sup>226</sup> The Court dismissed the EPA's argument that *Brown & Williamson* precluded such an expansive reading of the act, reasoning that the statutory text was unambiguously broad and thereby reflected Congress's clear intent to grant the EPA broad powers to regulate major new pollutants into the future.<sup>227</sup> Even under a *Brown & Williamson* analysis, a broad reading of “air pollutant” would not produce the “extreme” or “counterintuitive” results that would have accompanied FDA regulation of tobacco products, the Court reasoned.<sup>228</sup> In light of the EPA's authority, the Court found that the agency had failed to offer a reasoned explanation for its refusal to regulate greenhouse gases, holding that the EPA's stated justifications were arbitrary and capricious.<sup>229</sup> Writing in dissent, Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, disagreed with the majority's construction of the statutory term “air pollutant,” finding sufficient support in the plain text to support the EPA's narrower

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219. See *supra* Section II.A.

220. See *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007).

221. Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676 (1970).

222. Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399 (1990).

223. See *Is CO<sub>2</sub> a Pollutant and Does EPA Have the Power to Regulate It?: Joint Hearing Before the Subcomm. on Nat'l Econ. Growth, Nat. Res., and Regul. Affs. of the Comm. on Gov't Reform and the Subcomm. on Energy and Env't of the Comm. on Sci. H.R.*, 106th Cong. 11–26 (1999) (statement of Gary Guzy, General Counsel, U.S. EPA).

224. See Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003).

225. 549 U.S. 497 (2007).

226. *Id.* at 528.

227. *Id.* at 528–30.

228. *Id.* at 530–31.

229. *Id.* at 534.

definition.<sup>230</sup> The Court's conservatives did not suggest that *Brown & Williamson's* major questions doctrine applied to the analysis given the unambiguous meaning of the text.<sup>231</sup>

In response to the Court's ruling and following another change in administrations, the EPA proceeded to regulate greenhouse gases under the Clean Air Act. The EPA first issued a finding that greenhouse gases endanger public health and welfare.<sup>232</sup> The agency next issued regulations to reduce greenhouse gas emissions from several sources, including new or expanded stationary sources, such as power plants, under the Prevention of Significant Deterioration (PSD) program.<sup>233</sup> This attempt to regulate greenhouse gases under the PSD program was challenged in *Utility Air Regulatory Group v. EPA*.<sup>234</sup>

In *Utility Air*, the Supreme Court held that the Clean Air Act did not support regulation of sources under the PSD program based solely on their emission of greenhouse gas.<sup>235</sup> Writing for the majority, Justice Scalia distinguished *Massachusetts v. EPA* by clarifying that the term "air pollutant" need not include greenhouse gases everywhere it is used in the Clean Air Act.<sup>236</sup> The broad definition assigned to the term by the Court in *Massachusetts v. EPA* was "not a command to regulate" but rather "a description of the universe of substances EPA may *consider* regulating under the Act's operative provisions."<sup>237</sup> It was the EPA's obligation to reasonably interpret "air pollutant" in the context of each regulatory program to determine whether including greenhouse gases would produce an "extreme" or "counterintuitive" result.<sup>238</sup>

In the context of the PSD program, the Court held that it was not reasonable for the agency to include greenhouse gases in the definition for "air pollutants" for which certain thresholds would trigger a source's regulation.<sup>239</sup> The Court offered two independent reasons: that such an interpretation would force an excessive workload on the government and that it would greatly expand EPA's regulatory remit without unambiguous

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230. *Id.* at 555–60 (Scalia, J., dissenting).

231. *See id.*

232. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. Chapter 1).

233. Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 77,698 (Dec. 13, 2010); 42 U.S.C. § 7475.

234. 573 U.S. 302 (2014).

235. *Id.* at 315.

236. *Id.* at 319.

237. *Id.* (emphasis in original).

238. *Id.* at 318 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 531 (2007)).

239. *Id.* at 323–24.

authorization from Congress.<sup>240</sup> In support of the latter point, the Court cited *Brown & Williamson*, stressing that the Court “expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”<sup>241</sup> The power to regulate greenhouse gas emissions for tens of thousands of new sources and millions of operating sources, the Court said, was precisely the sort of authority *Brown & Williamson* sought to control.<sup>242</sup>

Following *Utility Air*, the EPA proceeded to issue the Clean Power Plan, which regulated new and existing power plants under section 111(d) of the Clean Air Act.<sup>243</sup> The Supreme Court stayed the implementation of the plan<sup>244</sup>—an extraordinary measure suggesting the Court’s discomfort with the regulation.<sup>245</sup> Still, other avenues for regulation exist for the EPA to regulate so long as greenhouse gases remained “air pollutants” under the act-wide definition established by *Massachusetts v. EPA*.<sup>246</sup> By contrast, the current Court could prohibit the EPA from regulating greenhouse gases under any provision of the Clean Air Act by applying a new nondelegation doctrine to this act-wide definition.<sup>247</sup> Under a new nondelegation standard, even if Congress intended to grant the EPA the power to regulate then-unimagined pollutants, such a delegation of legislative power would be invalid.<sup>248</sup> Whether the nondelegation doctrine applies to the delegation at issue in *Massachusetts v. EPA* depends on the version of the doctrine adopted by the Court.

### B. Under Kavanaugh’s Major Questions Test

The validity of the *Massachusetts v. EPA* delegation is relatively straightforward under Justice Kavanaugh’s major questions test. Although the Court in *Massachusetts v. EPA* found greenhouse gas regulation under

240. *Id.*

241. *Id.* at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

242. *Id.* Notwithstanding this rejection, the Court did allow, by a separate 7-2 majority, the EPA to regulate greenhouse gases when emitted by sources that already required PSD permitting for their emission of traditional pollutants. *Id.* at 332. On this point, Justices Alito and Thomas dissented. *Id.* at 344–50 (Alito, J., dissenting).

243. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,710 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60); 42 U.S.C. § 7411.

244. *West Virginia v. EPA*, 136 S. Ct. 1000, 1000 (2016).

245. See Courtney Scobie, *Supreme Court Stays EPA’s Clean Power Plan*, ABA PRAC. POINTS (Feb. 17, 2016), <https://www.americanbar.org/groups/litigation/committees/environmental-energy/practice/2016/021716-energy-supreme-court-stays-epas-clean-power-plan/>.

246. See *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007).

247. See Skinner-Thompson, *supra* note 5, at 314; Carlson, *supra* note 214.

248. See Skinner-Thompson, *supra* note 5, at 314.

the Clean Air Act to not be a major question triggering *Brown & Williamson*, this conclusion was dictum since the Court found the term “air pollutant” to be unambiguously capacious.<sup>249</sup> Given another chance, the Court’s recent caselaw strongly suggests that today’s Court would find differently.<sup>250</sup> Already the Court in *Utility Air* identified regulation of small sources of greenhouse gas emissions under the PSD and Title V programs as the sort of assertion of authority excluded from *Chevron* by the major questions doctrine.<sup>251</sup> It seems clear that Justice Kavanaugh would have no trouble finding greenhouse gas regulation under any provision of the Clean Air Act a major question.<sup>252</sup>

Following then-Judge Kavanaugh’s four factors from *U.S. Telecom*<sup>253</sup>—rather than the “common sense” reasoning of the *Brown & Williamson* Court grounded in congressional intent<sup>254</sup>—the regulation of greenhouse gases is at least on par with, if not more significant than, regulation of tobacco products by the FDA<sup>255</sup> or the provision of tax credits under the Affordable Care Act.<sup>256</sup> Considering just the Clean Power Plan, compliance costs range in the billions of dollars a year, according to the agency’s estimates.<sup>257</sup> The impact of the rule would be vast since it will reach nearly the entire economy by affecting the price of electricity.<sup>258</sup> And the rule would result in tens of thousands of job losses.<sup>259</sup> Finally, there are few issues of the past decade that have received as much attention from the public and Congress as climate change.<sup>260</sup> In short, greenhouse gas regulations easily meet Justice Kavanaugh’s major questions test—indeed,

249. See *Massachusetts v. EPA*, 549 U.S. at 530–31 (citation omitted) (“EPA’s reliance on *Brown & Williamson Tobacco Corp.* . . . is similarly misplaced. . . . There is no reason, much less a compelling reason, to accept EPA’s invitation to read ambiguity into a clear statute.”).

250. See *supra* Section IV.A.

251. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

252. Indeed, Justice Kavanaugh argued that the major questions doctrine should be applied to greenhouse gas regulation under the PSD program at issue in *Utility Air*. See *Coal. for Responsible Regul., Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at \*18 (D.C. Cir. Dec. 20, 2012).

253. The four factors are (1) the money at stake, (2) the impact on the economy, (3) the number of people affected, and (4) the degree of public and congressional attention. See *supra* text accompanying note 97.

254. See *supra* Section II.A.

255. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–61 (2000).

256. See *King v. Burwell*, 576 U.S. 473, 485–86 (2015).

257. See U.S. ENV’T PROT. AGENCY, EPA-452/R-15-003, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE, at ES-9 (2015).

258. *Id.* at ES-24.

259. *Id.* at ES-25.

260. See, e.g., Zach Hrynowski, *Several Issues Tie as Most Important in 2020 Election*, GALLUP (Jan. 13, 2020), <https://news.gallup.com/poll/276932/several-issues-tie-important-2020-election.aspx> [<https://perma.cc/ZYD8-5GBV>].

it is precisely the sort of regulation for which the test seems to have been created.

The only question remaining is how broadly a major questions nondelegation test for greenhouse gases would sweep. Unlike in previous applications of the major questions doctrine, under a nondelegation analysis, the Court would not be limited to applying the test to only ambiguous statutory terms—for example, the term “air pollutant” for purposes of the permitting triggers under the PSD program.<sup>261</sup> Indeed, the Court applying a nondelegation doctrine could rule any statutory term an unconstitutional delegation of authority as applied to greenhouse gases no matter its ambiguity—even the act-wide definition of “air pollutant” found to unambiguously include greenhouse gases by the Court in *Massachusetts v. EPA*.<sup>262</sup> Because such an interpretation would grant the EPA the discretion to decide whether to regulate greenhouse gases under the act’s various programs, this delegation from Congress—even if made unambiguously—would likely be held unconstitutional under Justice Kavanaugh’s test.<sup>263</sup> Even keeping *Massachusetts v. EPA*’s statutory interpretation in place, the Court thus would have grounds to invalidate any EPA regulation of greenhouse gases based on the nondelegation doctrine.<sup>264</sup>

### C. Under Gorsuch’s Nondelegation Cases

Under a proper reading of Justice Gorsuch’s pre-New Deal cases, the decision to regulate greenhouse gases under the Clean Air Act seems to fit comfortably with the sort of policy decisions affirmed by the Court in those early cases.<sup>265</sup> Although this reading is contrary to Gorsuch’s own understanding of the doctrine, it is the clearest takeaway from his otherwise standardless discussion of the historical origins of the nondelegation doctrine in *Gundy*. This conclusion is best appreciated by comparing the policy decision to regulate greenhouse gases with the delegation of authority approved by the Court in each of Gorsuch’s most substantive cases.

Compared to the delegation at issue in *Aurora*, the decision to regulate greenhouse gases seems easily constitutional. In *Aurora*, the Court approved Congress’s delegation to the president to make a finding of fact that was anything but straightforward.<sup>266</sup> In choosing to interpret France’s ambiguous declarations as committing to end its interference

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261. See *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 314 (2014).

262. 549 U.S. 497, 528–29 (2007).

263. See *Skinner-Thompson*, *supra* note 5, at 314.

264. See *id.*

265. See *supra* Section II.B.

266. See *supra* Section III.A.

with U.S. trade, President Madison irreparably damaged relations with Great Britain and pushed the nation to war.<sup>267</sup> While categorized by Gorsuch as a finding of fact, this determination was in reality much more.<sup>268</sup> Likewise, the finding that greenhouse gases are air pollutants within the definition of the Clean Air Act is—at least on its face—a factual determination.<sup>269</sup> If the current Court is determined to consider the implications of such a factual finding, then it must square its newfound concern with the vast consequences Congress rightfully delegated to the president in *Aurora*. While greenhouse gas regulation undoubtedly will affect substantial portions of the U.S. economy, the question of choosing sides between two warring European powers was at least as weighty.

Judged against the legislative authority passed to the executive in *Miller*, greenhouse gas regulation appears to be of comparable significance. In *Miller*, Congress handed a politically sensitive issue to the secretary of war to defuse—whether to allow the construction of the Brooklyn Bridge and, if so, at what height.<sup>270</sup> In directing the secretary to determine whether the bridge would “obstruct, impair, or injuriously modify the navigation” of the East River,<sup>271</sup> Congress handed to the executive the complex task of weighing the costs and benefits of building the bridge, ultimately resulting in a judgment call about the relative importance of the various economic interests that would be either harmed or benefited by the bridge.<sup>272</sup> Similarly, Congress charged the executive through the Clean Air Act with making difficult decisions about balancing the costs and benefits of regulating various air pollutants. Relying upon the expert analysis and judgment of the EPA, Congress reasonably entrusted such delicate political decisions to the only branch of government answerable to a leader elected by the country as a whole. While arguments could be made about the local nature of the issue in *Miller* and the presumption established by Congress for approval, there is nevertheless no easy categorical distinction between the EPA’s task and that assigned to the secretary of war in *Miller*.

Finally, the power granted to the secretary of agriculture in *Grimaud* is perhaps the most closely analogous to greenhouse gas regulation among Justice Gorsuch’s old cases. In *Grimaud*, Congress delegated vast power to the executive to regulate the use of forest reservations and to protect them against harm—criminalizing such violations in the process.<sup>273</sup> Out of

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267. See *supra* Section III.A.

268. See *supra* Section III.A.

269. See *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007); 42 U.S.C. § 7602(g).

270. See discussion *supra* Section III.B.

271. *Miller v. Mayor of New York*, 109 U.S. 385, 386 (1883); Act of Mar. 3, 1869, 15 Stat. 336, 337.

272. See discussion *supra* Section III.B.

273. See discussion *supra* Section III.C.

such scant statutory language, the secretary established comprehensive rules for grazing—a major economic activity in the pioneer West—and created a permitting program and associated fee.<sup>274</sup> Much like greenhouse gases, sheep grazing was mentioned nowhere in the statute.<sup>275</sup> Nevertheless, Congress’s broad direction to prevent harm to forests was enough to justify the executive’s regulation of the activity in the eyes of the *Grimaud* Court.<sup>276</sup> Compared to the scant policy guidance provided in the forest statute, the Clean Air Act positively brims with expressions of policy to guide the executive.<sup>277</sup> If *Grimaud* is not merely a permissible but indeed an exemplary delegation of legislative power to the executive, then the decision to regulate greenhouse gases under the Clean Air Act likewise must be constitutional. Though perhaps not fitting with Justice Gorsuch’s own understanding of nondelegation, the cases in which he grounds his proposed nondelegation revamp in fact seem to support a delegation of legislative power to the executive to decide whether to regulate greenhouse gas emissions. This finding illustrates the stakes for how the Court proceeds—an outcome that is far from clear.

#### V. SEARCHING FOR THE LEAST BAD OUTCOME

Given the rift between the nondelegation approaches of Justices Gorsuch and Kavanaugh, the conservative majority could choose at least four plausible routes forward: the Kavanaugh approach, the Gorsuch approach, some other alternative, or nothing at all. Each of these possible directions presents different incentives and risks for the Court—and creates different challenges for the continued administration of federal agencies.<sup>278</sup> Given the harm posed in particular by Justice Kavanaugh’s amalgamation, supporters of the modern administrative state ought to focus on securing the most beneficial—or least harmful—outcome possible.

##### A. *The Kavanaugh Stitch-Up*

As the first plausible outcome, the Court may simply proceed with implementing Justice Kavanaugh’s major questions test as a substantive limitation on congressional delegations to administrative agencies,

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274. See discussion *supra* Section III.C.

275. See Act of June 4, 1897, 30 Stat. 11, 36.

276. See *supra* Section III.C.

277. See 42 U.S.C. § 7401.

278. In examining these possible outcomes, I rely greatly on Professor Andrew Coan’s judicial capacity model and its application to the nondelegation doctrine. See Coan, *supra* note 1. See generally ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING 19 (2019).

disregarding its logical fallacies and contradiction with originalism.<sup>279</sup> This outcome would represent arguably the greatest judicial coup for conservative regulatory policy in a generation.<sup>280</sup> To do so would open the Court to ideological, political, and prudential challenges. Ideologically, Justice Kavanaugh would have to convince the originalist members of the Court's conservative wing that his major questions test in fact bears any resemblance to the original public meaning of the nondelegation doctrine—a task this Comment suggests would be far from easy.<sup>281</sup> Relatedly, the Court would subject itself to criticisms of the inconsistency of its approach—a dynamic one scholar has called a constitutional “bait and switch.”<sup>282</sup> Justice Kavanaugh also would have to convince his colleagues committed to judicial restraint of the scheme's wisdom, as the Court surely would face criticism over its expansion of the judicial role.<sup>283</sup>

For an issue that has already proven its salience in the popular imagination,<sup>284</sup> an aggressive nondelegation doctrine also would present a political headache for the Court. The more institutionally minded Justices of the Court's conservative wing would have to be comfortable denying the executive branch the ability to address many of the defining policy challenges of our time based on a newly resurrected judicial doctrine.<sup>285</sup> It may turn into a practical headache as well: such an approach would open the floodgates to judges rejecting agency decisions they find distasteful based on a loose analysis of importance,<sup>286</sup> perhaps causing the Court to beat a hasty retreat when it can no longer keep up with the deluge.<sup>287</sup> Finally, as the preceding greenhouse gas example makes clear, this outcome promises to subject administrative agencies to the most sweeping challenges to their authority and presents the gravest risk to the functioning of government.<sup>288</sup> For these reasons, supporters of the administrative state

279. See *supra* Section II.A.

280. See Jayne, *supra* note 4, at 90–94 (outlining the litany of conservative regulatory objectives served by a resuscitated nondelegation doctrine). *But see* Kristin E. Hickman, *Foreword: Nondelegation as Constitutional Symbolism*, 80 GEO. WASH. L. REV. (forthcoming 2021) (manuscript at 5–6, 39), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3863501](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3863501) [<https://perma.cc/XMW6-XMAA>] (arguing that Justice Kavanaugh's approach would create only incremental and symbolic change, at least when analyzed using the factors of *King v. Burwell*).

281. See *supra* Part III.

282. See Heinzerling, *supra* note 8, at 13.

283. See Sunstein, *supra* note 46, at 327.

284. See *supra* text accompanying note 7.

285. See Heinzerling, *supra* note 8, at 18 (calling such a move “not just political, but partisan”).

286. See Heinzerling, *supra* note 8, at 10; Sunstein, *supra* note 46, at 327.

287. See Coan, *supra* note 1, at 150 (outlining “Scenario 4: Advance and Retreat”).

288. See *supra* Part IV.

should object with particular vigor to Justice Kavanaugh's proposed doctrinal invention.

### *B. Gorsuch's Catalogue Going Alone*

Alternatively, the Court could jettison Justice Kavanaugh's major questions test and rely solely on the cases identified by Justice Gorsuch and the broad principles they trace.<sup>289</sup> While this outcome avoids the most serious legitimacy and prudential concerns of the Kavanaugh approach, it leaves the Court with a vague and unwieldy standard to police while simultaneously invalidating the past eighty-five years of precedent that would guide the decisions of judges.<sup>290</sup> It is possible that lower courts, confounded by the obscure cases and their holdings, simply would shy away from resolving cases by means of the nondelegation doctrine.<sup>291</sup> Indeed, some judges seeking to analogize to the facts of *Aurora*, *Miller*, or *Grimaud* may find themselves unsatisfied with the results.<sup>292</sup> Others may simply recognize the self-defeating nature of a standard built upon cases that themselves fall short of unconstitutionality.<sup>293</sup> Still others may accept the invitation to glean and apply their own novel set of factors based on their own view of the *Gundy* cases.<sup>294</sup> In exchange for this mess, the Court swaps a blatantly ahistorical test for one that is at least plausibly constitutional on its face—although recent scholarship may make even that pretense difficult to maintain.<sup>295</sup>

### *C. Doing Nothing*

It is of course not too late for the conservative majority to reverse course and reconsider its commitment to nondelegation altogether. This outcome, however, seems unlikely. To be sure, there are compelling doctrinal and prudential reasons for the conservative majority to rethink its nondelegation project.<sup>296</sup> Indeed, the "sober second thought" is a well-worn modality of judicial decision-making.<sup>297</sup> And it is true that the return of the nondelegation doctrine has been foretold several times before—

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289. See *supra* Section II.B.

290. See *supra* note 59.

291. See *Coan*, *supra* note 1, at 149–50.

292. See *supra* Section IV.C.

293. See *supra* text accompanying note 147.

294. See, e.g., *Florida v. Becerra*, No. 8:21-cv-839-SDM-AAS, slip op. at 86 (M.D. Fla. June 18, 2021).

295. See *Mortenson & Bagley*, *supra* note 8, at 280.

296. See *supra* Section II.B; see also *supra* note 8 and accompanying text.

297. See *Coan*, *supra* note 1, at 148.

without any revolution to date.<sup>298</sup> What makes this time different? Several things.

First, not since 1935 have so many Justices expressed a desire to assert a robust nondelegation doctrine.<sup>299</sup> With the addition of Justice Barrett, whose views are likely to resemble those of her fellow originalists,<sup>300</sup> the conservatives even have a vote to spare, eliminating the possibility that any one Justice can sink the ship. Second, the Court's conservatives today face a different political and institutional landscape from the one they faced in 1980 or 1989. Writing during the early days of the contemporary era of conservative judicial dominance, Justices Rehnquist and Scalia still espoused judicial restraint as a carryover value from the previous regime of liberal control.<sup>301</sup> Today's conservatives, on the other hand, have experienced forty years of conservative judicial supremacy, a fact that bolsters their willingness for judicial engagement,<sup>302</sup> particularly in the area of regulatory law.<sup>303</sup> Third, today's Justices face greater pressure from political supporters to deliver on key policy objectives than did Justices Rehnquist and Scalia.<sup>304</sup> Given this pressure,

298. See Adrian Vermeule, *Never Jam Today*, YALE J. REGUL.: NOTICE & COMMENT (June 20, 2019), <https://www.yalejreg.com/nc/never-jam-today-by-adrian-vermeule/> [<https://perma.cc/A6D4-YHRF>].

299. Compare *Gundy v. United States*, 139 S. Ct. 2116, 2131 (Gorsuch, J., dissenting) (writing for three Justices), *id.* at 2130 (Alito, J., concurring in the judgment), and *Paul v. United States*, 140 S. Ct. 342, 342 (Kavanaugh, J., concurring in the denial of cert.), with *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting) (writing alone), and *The Benzene Case*, 448 U.S. 607, 686–87 (1980) (Rehnquist, J., concurring in the judgment) (writing alone).

300. Even the most generous observers predict that Justice Barrett is likely to favor restricting congressional delegations in some instances. See Randolph J. May, *Justice Ginsburg's Replacement Won't Decimate the Administrative State*, YALE J. REGUL.: NOTICE & COMMENT (Sept. 25, 2020), <https://www.yalejreg.com/nc/justice-ginsburgs-replacement-wont-decimate-the-administrative-state-by-randolph-j-may/> [<https://perma.cc/U2F7-87CR>]; Jim Saksa, *Barrett, with Scalia as Model, May Be a Moderate on Regulation*, ROLL CALL (Oct. 8, 2020, 6:00 AM), <https://www.rollcall.com/2020/10/08/barrett-with-scalia-as-model-may-be-a-moderate-on-regulation/> [<https://perma.cc/Q2GG-VCPC>]. See also Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014) (citation omitted) (noting several exceptions to the “notoriously lax ‘intelligible principle’ test”).

301. See Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 216, 225 (2019).

302. See *id.* at 216.

303. See Donald McGahn, White House Counsel, Keynote Address at the Federalist Society's National Lawyers Convention, at 13:44 (Nov. 17, 2017), <https://www.c-span.org/video/?437462-8/2017-national-lawyers-convention-white-house-counsel-mcgahn> [<https://perma.cc/2TMM-WZVC>] (“The greatest threat to the rule of law in our modern society is the ever-expanding regulatory state, and the most effective bulwark against that threat is a strong judiciary.”).

304. It is difficult to imagine prominent conservative U.S. senators openly criticizing Justices Rehnquist or Scalia for particular rulings, as has been the case with

a wholesale turnaround on a well-publicized question of law<sup>305</sup> is unlikely to be an appealing option.

#### D. The Intelligible Principle with Bite

The fourth and final outcome is some continuation of a modified status quo—an intelligible principle with bite.<sup>306</sup> Rather than embracing the sweeping new standard of Justices Gorsuch and Kavanaugh, the Court could instead take a smaller leap, invalidating the delegation at issue within the framework of the familiar intelligible principle test.<sup>307</sup> The result would be the same fundamental test that the Court has used throughout its modern history, only applied differently—either by carving out specific exceptions<sup>308</sup> or by simply proceeding case by case, with factors to be gleaned later.<sup>309</sup> Unlike Justice Gorsuch’s pre-New Deal revival, lower courts still would be restrained by the past eighty-five years of intelligible principle caselaw, which is at least fundamentally compatible with the modern administrative state.

This outcome would achieve the conservative majority’s policy aims of returning the judiciary to an oversight role over congressional delegations while stemming, at least in part, the tide of new nondelegation challenges.<sup>310</sup> Although Justice Gorsuch dismisses the intelligible principle standard as a “passing comment,”<sup>311</sup> it nevertheless may offer the most agreeable path forward for the Court. Such an approach may appeal particularly to Chief Justice Roberts,<sup>312</sup> who would have the power to assign any nondelegation opinion in which he is in the majority. In this

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Chief Justice Roberts. *See, e.g.*, Jack Brewster, *Republicans Turn on John Roberts in Wake of Monumental SCOTUS Decisions*, FORBES (June 30, 2020, 12:50 PM), <https://www.forbes.com/sites/jackbrewster/2020/06/30/republicans-turn-on-john-roberts-in-wake-of-monumental-scotus-decisions/?sh=3cd1baff43af> [https://perma.cc/V8UP-ESV4].

305. *See supra* text accompanying note 7.

306. *Cf.* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972) (inspiring the term rational basis with “bite”).

307. *See Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality opinion).

308. *See, e.g.*, Barrett, *supra* note 300, at 318.

309. *Cf.* Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2072 (2015) (identifying nine factors likely to trigger rational basis with bite).

310. *See* Daniel Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We’re Expecting*, 71 EMORY L.J. (forthcoming 2022) (manuscript at 50), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3809905](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3809905) [https://perma.cc/9CB5-YA9Z] (calling this “the ‘shock and awe’ approach”).

311. *See Gundy v. United States*, 139 U.S. 2116, 2139 (2019) (Gorsuch, J., dissenting).

312. *See id.*

way, a six-justice majority with the Chief Justice may be a preferable outcome for regulatory agencies than a five-justice majority without him. For supporters of the administrative state, this may be the least bad outcome on offer.

#### CONCLUSION

The prospects of a revitalized nondelegation doctrine illustrate a key dynamic likely to shape this new conservative era: the tension between originalism and conservative policy priorities.<sup>313</sup> The mismatch between Justice Gorsuch's originalist approach to nondelegation and Justice Kavanaugh's functionalist attack on the administrative state is unlikely to be the only scenario in which originalist readings conflict with the conservative majority's preferred disposition of key cases.<sup>314</sup> How the conservative Justices resolve this discrepancy will indicate how seriously those Justices intend to be bound by judicial philosophy when faced with the opportunity to disrupt disfavored policy. This dynamic is likely to be a defining story of the new conservative majority. The nondelegation doctrine may well be one of its earliest chapters.

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313. See generally ERIC J. SEGALL, ORIGINALISM AS FAITH 192–93 (2018); Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & P. POL'Y 29 (2011); David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & P. POL'Y 137 (2011); Jeffrey Pojanowski, *Conservatives and Originalism: Their Relationship, Reconsidered*, L. & LIBERTY: F. (July 23, 2019), <https://lawliberty.org/forum/conservatives-and-originalism-their-relationship-reconsidered/> [<https://perma.cc/XTL5-EQP3>].

314. See, e.g., Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 619–20 (2019); Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U.L. REV. 1187, 1229 (2015); Bradley Silverman, *The Originalist Case for Letting State Courts and Officials Alter State Election Rules*, HARV. L. & POL'Y REV. (Nov. 3, 2020), <https://harvardlpr.com/2020/11/03/the-originalist-case-for-letting-state-courts-and-officials-alter-state-election-rules/> [<https://perma.cc/AU2C-BH7W>].