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NONDELEGATION OF MAJOR QUESTIONS

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I. INTRODUCTION

The Supreme Court has many tools at its disposal to address improper delegations of legislative power by Congress to the executive branch. Two of these tools are the nondelegation doctrine and the major questions doctrine.[1] The nondelegation doctrine is a sledgehammer. Able to declare entire statutory provisions unconstitutional, its ability to do a lot of damage is perhaps the reason the Court never uses it.[2] Indeed, the Court has only used it twice, both times in 1935.[3] Although it's old and rusty, the Court continues to keep it in the toolbox just in case.[4] Since 1935, the Court has been using other, seemingly less destructive tools to do similar work.[5] As recently pointed out by Justices Gorsuch and Kavanaugh, the modern major questions

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1. *See* Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting).

2. *Cf.* Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (pointing out that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law" because the judicial branch is in no better position to decide that question).

3. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2364 (2001).

4. *See Gundy*, 139 S. Ct. at 2121 (plurality opinion) (announcing in the first sentence of the opinion that "[t]he nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government" but refraining from enforcing the doctrine and upholding the delegation at issue).

5. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315-16 (2000).

doctrine is one of these tools.[6] There are, of course, others in the toolbox.[7]

This Article provides a background of the nondelegation doctrine and the major questions doctrine and examines their similarities and differences. It highlights the Court's latest nondelegation case, *Gundy v. United States*, where an eight-member Court ultimately upheld the delegation at issue there,[8] but four Justices clearly would have used the rusty sledgehammer to demolish it.[9] This Article also notes Justice Kavanaugh's statement respecting the denial of certiorari in *Paul v. United States*, where he responded to Justice Gorsuch's *Gundy* dissent and likened the nondelegation doctrine to the major questions doctrine.[10] This Article explores Justice Kavanaugh's unique view of the major questions doctrine.

Because of the recent surge in interest to revive the nondelegation doctrine, and because the Court's current test for measuring delegations has prevented the Court from enforcing the doctrine, this Article ultimately proposes that the "major questions" test from the major questions doctrine should become the new basis for enforcing the nondelegation doctrine. This Article does not seek to explore the many arguments for or against the nondelegation doctrine in general. Decades of scholarship exist on the topic.[11] Rather, this Article proposes a new test for the doctrine in response to these recent developments.

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6. *Gundy*, 139 S. Ct. at 2141-42 (Gorsuch, J., dissenting) (noting that both the major questions doctrine and the void-for-vagueness doctrine are two tools the Court uses to rein in improper delegations); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of certiorari) (explaining that the major questions doctrine is "closely related" to the traditional nondelegation doctrine).

7. *See, e.g.*, Sunstein, *supra* note 5, at 330-35.

8. *See Gundy*, 139 S. Ct. at 2121 (plurality opinion).

9. Justice Gorsuch wrote the dissent, joined by Chief Justice Roberts and Justice Thomas. *Id.* at 2131 (Gorsuch, J., dissenting). Justice Alito concurred in the judgment but likely would have joined the dissent if there would have been another Justice on the Court to supply a majority opinion. *See id.* at 2131 (Alito, J., concurring in the judgment).

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

11. For criticism of the doctrine, see, for example, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002). For a recent attack of the doctrine on historical and originalist grounds, see Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021), https://ssrn.com/abstract=3512154. For a direct response to that article, see Philip Hamburger, *Delegating or Divesting?*, 115 NW. U.L. REV. ONLINE 88 (2020). For a further glimpse into the modern support of the doctrine, see, for example, Ronald A. Cass, *Delegation*

II. THE NONDELEGATION DOCTRINE

A. Background

The principle of nondelegation—that Congress may not delegate its lawmaking power to others—is rooted in the Constitution's separation of powers and derived from the language in Article I.[12] That Article begins, "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."[13] As John Locke explained:

> The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands.[14]

Therefore, at least in theory, any statute enacted by Congress that transfers "legislative power" to another branch violates the nondelegation doctrine and shall be declared unconstitutional by the courts if challenged.[15]

As the plurality in *Gundy* defined it, "[t]he nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."[16] By defining it, the plurality of course recognized that the doctrine exists and may be used to strike down impermissible delegations.[17] Indeed, the Supreme Court has continually reaffirmed the doctrine's existence and announced its core tenets with confidence.[18] Yet the doctrine is

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Reconsidered: A Delegation Doctrine for the Modern Administrative State, 40 HARV. J.L. & PUB. POL'Y 147 (2017), Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002), and DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1995).

12. *Gundy*, 139 S. Ct. at 2123 (plurality opinion).

13. U.S. CONST. art. I, § 1.

14. John Locke, *The Second Treatise of Government* § 141, *in* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 363 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (emphasis omitted).

15. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472-73 (2001).

16. *Gundy*, 139 S. Ct. at 2121.

17. *Id.*

18. *See, e.g.*, *Whitman*, 531 U.S. at 472 ("[Article I's] text permits no delegation of those [legislative] powers"); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932) ("That the legislative power of Congress cannot be delegated is, of course, clear.");

not actually enforced—at least not literally.[19] Congress routinely delegates the authority to regulate, and administrative agencies today make more rules governing private conduct than Congress itself.[20] When asked to strike down these delegations as unconstitutional under the nondelegation doctrine, the Supreme Court routinely upholds them.[21] Enforcing the doctrine, therefore, has become a line-drawing exercise between constitutional and unconstitutional delegations. Only twice has the Court ever held that a delegation crossed that line of constitutionality.[22] Both cases were decided in 1935 and involved the same New Deal act.[23]

In *Panama Refining Co. v. Ryan*, the Court struck down a provision of the National Industrial Recovery Act (NIRA) that granted the President the power to "prohibit" (if he chose) the interstate transportation of petroleum in excess of state law quotas.[24] The Court examined its prior nondelegation cases, all of which had upheld delegations on the basis that Congress had declared (at a minimum) its general policy before the delegee could act.[25] In the delegation at hand, the Court concluded that Congress "ha[d] declared no policy, ha[d] established no standard, [and] ha[d] laid down no rule" by which the President was required to follow.[26] The statute gave the President complete discretion to decide *whether* interstate transportation of excess

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Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of [our] system of government . . . ."); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825) ("It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative.").

19. *See* Sunstein, *supra* note 5, at 322 (noting that the "doctrine has had one good year, and 211 bad ones (and counting)").

20. *See* Aaron Gordon, *Nondelegation*, 12 N.Y.U. J. L. & LIBERTY 718, 720-21 (2019).

21. *Id.* at 725-26.

22. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935).

23. David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224-25 (1985).

24. *See Panama Ref.*, 293 U.S. at 406, 430.

25. *See id.* at 423-30.

26. *Id.* at 430.

petroleum *should* be prohibited[27]—a decision, the Court held, that Congress must make.[28]

In *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down another section of the NIRA that "authorize[d] the President to approve 'codes of fair competition'" for virtually any industry or trade.[29] Pursuant to the Act, the President issued an executive order and established the "Live Poultry Code," which imposed numerous regulations on the poultry industry in New York City, including slaughterhouses like the Schechters'.[30] Each violation of the code constituted a criminal offense, and the Schechters were convicted on eighteen counts in federal court.[31] At the outset of its analysis, the Court recognized that the power delegated by this section of the NIRA was significantly more broad than the statutory grant in *Panama Refining*.[32] In *Panama Refining*, the authority granted was narrowly defined: the President could decide whether or not to prohibit the interstate transportation of excess petroleum.[33] Here, the President could establish vast codes of regulations that would affect entire industries.[34] Although the NIRA seemingly limited the President's power to enact codes by providing "condition[s]" of approval, these conditions did nothing to limit the President's substantive policy-making discretion.[35] The Court found this discretion to be "virtually unfettered" and concluded that the "code-making authority thus conferred [was] an unconstitutional delegation of legislative power."[36] In his concurrence, Justice Cardozo called it "delegation running riot."[37]

In terms of enforcing the nondelegation doctrine, these cases have not been followed.[38] The "intelligible principle" test

27. *See id.* at 406.
28. *See id.* at 430.
29. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521-22, 551 (1935).
30. *Id.* at 523-25.
31. *Id.* at 519.
32. *Id.* at 530.
33. *Id.*
34. *See Schechter Poultry*, 295 U.S. at 541-42.
35. *Id.* at 538-39.
36. *Id.* at 542.
37. *Id.* at 553 (Cardozo, J., concurring).
38. *See* 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 138 (6th ed. 2019).

eventually became the standard by which all delegations would be measured (and upheld).[39] As the plurality stated it in *Gundy*, "a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'"[40] Therefore, while legislative power theoretically may not be delegated to another branch, the Court has upheld nearly every delegation it has faced because it has determined that Congress provided an "intelligible principle" sufficient to limit the delegated authority.[41] Some of the most common justifications for allowing Congress to delegate in this way include: (1) Congress's lack of technical expertise and inability to understand the implications of difficult policy decisions,[42] (2) the idea that executive agencies *are* politically accountable,[43] (3) the principle that courts should not substitute Congress's intent to delegate with their own policy judgments,[44] and (4) the general assertion that, in today's complex society, Congress simply cannot do its job without the ability to delegate.[45]

So, what qualifies as an "intelligible principle"? The answer is pretty much anything. The Court has found an intelligible principle in even the most broad and seemingly limitless delegations.[46] For example, the Court has upheld delegations that grant authority to make decisions that are "generally fair and

39. *See* Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1857 (2019).

40. Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (brackets in original) (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).

41. *See* Coglianese, *supra* note 39, at 1855-57. It's important to note, however, that some scholars have argued that authority conferred to the executive branch by statute is not a delegation of legislative power at all. Rather, Congress *exercises* its legislative power when it confers the power, and the executive branch exercises "executive" power when it acts in accordance with the statutory grant. *See, e.g.*, Posner & Vermeule, *supra* note 11, at 1723.

42. *See* HICKMAN & PIERCE, *supra* note 38, at 150.

43. *See id.* at 152-54.

44. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001) ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'") (citations omitted).

45. Mistretta v. United States, 488 U.S. 361, 372 (1989).

46. *See, e.g.*, Cass, *supra* note 11, at 167-68.

equitable"[47] and in the "public interest."[48] Many scholars have recognized, I think rightly, that these kinds of standards are meaningless.[49] Consequently, these standards give agencies and other bodies vast discretion to make generally applicable rules that regulate private conduct and society as a whole.[50]

It is worth noting, however, that the "intelligible principle" language comes from *J. W. Hampton, Jr., & Co. v. United States*,[51] a case decided in 1928, seven years before *Panama Refining* and *Schechter Poultry*. Yet, in those cases, the Court did not rely on the so-called "test" to strike down the delegations as unconstitutional. *Panama Refining* only referred to the phrase in passing when discussing *J.W. Hampton* but did not rely on the phrase for its holding.[52] *Schechter Poultry* never mentioned "intelligible principle" at all.[53] As Justice Gorsuch pointed out, "the phrase sat more or less silently entombed until the late 1940s" when "lawyers beg[a]n digging it up in earnest . . . ."[54] The intelligible principle test, however, remains the primary test used by the courts today.[55]

B. *Gundy* and SORNA

In the Supreme Court's latest nondelegation case, *Gundy v. United States*, a four-Justice plurality declared the particular delegation at issue one that "easily passes constitutional muster"

47. *E.g.*, Yakus v. United States, 321 U.S. 414, 420 (1944).

48. *E.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 225-26 (1943).

49. *See, e.g*, HICKMAN & PIERCE, *supra* note 38, at 133; Cass, *supra* note 11, at 167-70; Lawson, *supra* note 11, at 328-29; *see also* WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS 217 (1974) (Justice Douglas opining in his autobiography that "'[p]ublic interest' is too vague a standard to be left to free-wheeling administrators.").

50. *Cf.* Gordon, *supra* note 20, at 720-21, 724.

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

52. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 429-30 (1935).

53. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541 (1935) (discussing *J.W. Hampton* but not quoting its "intelligible principle" language).

54. Gundy v. United States, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting).

55. *Compare id.* at 2123 (plurality opinion) (affirming the "intelligible principle" standard as the primary test), *with id.* at 2131 (Alito, J., concurring in the judgment) (agreeing with the plurality that the delegation at issue passes the "approach [the] Court has taken for many years" but suggesting a readiness to abandon that approach if a majority of the Court were willing to do so).

under the intelligible principle approach.[56] Justice Alito curiously agreed but concurred only in the judgment because he would "reconsider the approach [the Court] ha[s] taken for the past 84 years."[57] He did not join the dissent, however, because "a majority is not willing to do that, [and] it would be freakish to single out the provision at issue here for special treatment."[58] Critical to Alito's decision, Justice Kavanaugh was not on the Court when *Gundy* was argued and thus did not participate in the outcome to supply a majority opinion one way or the other.[59]

Justice Gorsuch wrote the dissent, joined by Chief Justice Roberts and Justice Thomas, and disagreed with the plurality's interpretation of the statute.[60] More importantly, Gorsuch asserted that the "intelligible principle" test for measuring delegations "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked"[61] and argued that it should be abandoned in favor of more traditional principles.[62] Thus, four Justices expressed interest in reviving the nondelegation doctrine (counting Justice Alito). That is significant. The last time even two Justices advocated in a single case for enforcing the nondelegation doctrine was in 1981.[63]

Gundy involved a provision of the Sex Offender Registration and Notification Act (SORNA).[64] Passed in 2006, the Act created a nationwide system of mandatory registration for those convicted of sex offenses.[65] The Act's registration requirements thus clearly applied to all future sex offenders.[66] But for those convicted of

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56. *Id.* at 2121 (plurality opinion). Justice Kagan wrote for the plurality, joined by Justices Ginsburg, Breyer, and Sotomayor.

57. *Id.* at 2131 (Alito, J., concurring in the judgment).

58. *Id.*

59. *Gundy*, 139 S. Ct. at 2120. In fact, Justice Kavanaugh was confirmed by the Senate only four days after *Gundy* was argued. *See* Petition for Rehearing, *Gundy*, 139 S. Ct. 2116 (No. 17-6086), 2019 WL 3202508, at *1-2.

60. *See Gundy*, 139 S. Ct. at 2145-48 (Gorsuch, J., dissenting).

61. *Id.* at 2139.

62. *See id.* at 2136-41.

63. *See* Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 543-44 (1981) (Rehnquist, J., dissenting, joined by Burger, C.J.).

64. *Gundy*, 139 S. Ct. at 2121 (plurality opinion); 34 U.S.C. § 20913(d) (2006).

65. *See* 34 U.S.C. §§ 20901, 20911-13.

66. *See* 34 U.S.C. § 20913(b).

sex offenses before SORNA's enactment, Congress granted to the Attorney General "the authority to specify the applicability of the [Act's] requirements . . . and to prescribe rules for the registration of any such sex offenders."[67]

Petitioner Herman Gundy, a pre-Act sex offender, was convicted for failing to register under SORNA, a crime punishable by fine, imprisonment up to ten years, or both.[68] Gundy challenged that conviction under the nondelegation doctrine, arguing that Congress impermissibly delegated legislative power to the Attorney General by allowing the Attorney General to specify SORNA's applicability to pre-Act offenders.[69] The four-Justice plurality, along with the help of Justice Alito's concurrence in the judgment, upheld the delegation as constitutional because the Act contained an "intelligible principle" that sufficiently limited the Attorney General's authority.[70]

In the plurality's view, "Congress had made clear in SORNA's text that the new registration requirements would apply to pre-Act offenders."[71] Although Congress did not state it explicitly in the text, the plurality construed SORNA to require the Attorney General to apply SORNA's registration requirements to pre-Act offenders "as soon as feasible."[72] The plurality discovered this intelligible principle after doing some statutory interpretation, looking to the Act's stated purpose, its definition of "sex offender," and its legislative history.[73] Although it may seem unusual for the plurality to infer a standard that the Act never explicitly stated, the Court has previously construed statutes to find similar standards.[74] The dissent,

67. 34 U.S.C. § 20913(d).

68. *Gundy*, 139 S. Ct. at 2122; *see* 18 U.S.C. § 2250(a) (2016).

69. Brief for Petitioner, at 23-24, *Gundy*, 139 S. Ct. 2116 (No. 17-6086).

70. *See Gundy*, 139 S. Ct. at 2129-30.

71. *Id.* at 2125.

72. *Id.* at 2121.

73. *See id.* at 2123, 2126-29.

74. The plurality pointed to *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) and *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104-05 (1946) as two examples. *Gundy*, 139 S. Ct. at 2123. Even Justice Rehnquist looked to legislative history and statutory context in the "*Benzene* case" in his attempt to ascertain a more definite standard beyond the explicitly stated feasibility standard there. *See* Indus. Union Dep't v. Am. Petrol. Inst. (*The Benzene Case*), 448 U.S. 607, 675-82 (1980) (Rehnquist, J., concurring in the judgment).

however, took issue with the plurality's interpretation because the "feasibility" standard was nowhere to be found in SORNA's text.[75] Justice Gorsuch said it was a figment of the government's (and the plurality's) imagination.[76] But even if the statute contained such a limitation, Gorsuch argued, it still left the Attorney General "free to make all the important policy decisions" regarding how SORNA applied to pre-Act offenders.[77]

The first line of the dissent explains Gorsuch's general argument: "The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty."[78] He expanded that argument and stressed the idea that, at a minimum, Congress may not delegate to others its power to make rules that *restrict the people's liberty*.[79] Notwithstanding that general principle, Gorsuch looked to caselaw and outlined three ways in which Congress *may* permissibly delegate its power to regulate: (1) when Congress makes the policy decisions but authorizes another branch to "fill up the details";[80] (2) when Congress makes the application of its pre-decided rule conditioned on executive fact-finding;[81] and (3) when Congress assigns authority to another branch that the Constitution already vests in that other branch.[82]

Gorsuch argued that when Justice Taft first wrote of an "intelligible principle" in *J.W. Hampton*, he only used the phrase to explain the operation of the traditional tests as used in prior cases, not alter their analysis.[83] The simple "remark" eventually "[took] on a life of its own" when lawyers began arguing that the broad phrase displaced the Court's traditional tests.[84] For decades now, the Court has been using the intelligible principle "test" as

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Moreover, the Supreme Court has regularly construed ambiguous statutes in a way that avoids serious constitutional questions. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

75. *Gundy*, 139 S. Ct. at 2145-46 (Gorsuch, J., dissenting).
76. *Id.* at 2145.
77. *Id.*
78. *Id.* at 2131.
79. *See id.* at 2131, 2133-34.
80. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).
81. *Id.*
82. *Id.* at 2137.
83. *Id.* at 2139.
84. *Id.*

the primary way to measure delegations.[85] Gorsuch explained, however, that some of the Court's decisions under the intelligible principle test are likely consistent with the more traditional tests.[86]

Gorsuch then went on to apply the traditional tests to SORNA.[87] While admitting that what qualifies as mere "details" under the first test can be "difficult to discern," Gorsuch found it "hard to see how SORNA leaves the Attorney General with only details to fill up" when it gives him the discretion "to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them."[88] Nor was the Attorney General's discretion as to pre-Act offenders conditioned on executive fact-finding.[89] Although Congress could have conditioned the Act's applicability to pre-Act offenders on a finding such as "offenders who [] present an 'imminent hazard to the public safety,'" Congress did no such thing.[90] SORNA "gave the Attorney General unfettered discretion to decide which requirements to impose on which pre-Act offenders."[91] Lastly, SORNA did not assign authority that the executive branch already enjoyed discretion over.[92] Instead, it gave the nation's chief prosecutor the authority to write his own "criminal code" regarding sex offenders who fail to register—"a quintessentially legislative power," Gorsuch asserted.[93]

"In the end," Gorsuch argued, "there isn't a single policy decision concerning pre-Act offenders on which Congress even tried to speak,"[94] and SORNA vested legislative power in the Attorney General—a violation of the separation of powers and the nondelegation doctrine.[95] While Gorsuch advocated for enforcing the nondelegation doctrine under traditional principles,

85. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); Mistretta v. United States, 488 U.S. 361, 372 (1989); Lichter v. United States, 334 U.S. 742, 785 (1948).

86. *Gundy*, 139 S. Ct. at 2140 (Gorsuch, J., dissenting).

87. *See id.* at 2143.

88. *Id.*

89. *Id.*

90. *Id.* (quoting Touby v. United States, 500 U.S. 160, 166 (1991)).

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

92. *Id.* at 2143-44.

93. *See id.* at 2144.

94. *Id.* at 2143.

95. *See id.* at 2144-45.

he recognized that the Court has been using other doctrines to "rein in Congress's efforts to delegate legislative power," one of which is the major questions doctrine.[96]

C. Justice Kavanaugh's *Paul* Statement

In a statement respecting the denial of certiorari in *Paul v. United States*,[97] Justice Kavanaugh praised Gorsuch's *Gundy* opinion but interpreted it in a way that likened the traditional nondelegation doctrine to the modern major questions doctrine:

> I agree with the denial of certiorari because this case ultimately raises the same statutory interpretation issue that the Court resolved last Term in [*Gundy*]. I write separately because Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases. Justice Gorsuch's opinion built on views expressed by then-Justice Rehnquist some 40 years ago in [the *Benzene* case]. In that case, Justice Rehnquist opined that major national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch.
>
> In the wake of Justice Rehnquist's opinion, the Court has not adopted a nondelegation principle for major questions. But the Court has applied a closely related statutory interpretation doctrine . . . .
>
> . . . .
>
> Like Justice Rehnquist's opinion 40 years ago, Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.[98]

More on then-Justice Rehnquist's *Benzene* opinion later.[99]

The day the Court denied certiorari in *Paul*, the Court denied a petition to rehear *Gundy* with a full panel of nine.[100] Kavanaugh did not participate in the decision to rehear *Gundy* and thus may

96. *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

97. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of certiorari). The *Paul* case essentially presented the same issue as *Gundy*. *See id.*

98. *Id.*

99. *See infra* Part IV.A.

100. Gundy v. United States, 140 S. Ct. 579, 579 (2019) (mem.) (reh'g denied).

or may not have wanted to retry the case, but he clearly indicated his interest in reviving and enforcing the nondelegation doctrine in his *Paul* statement issued the same day.[101] But perhaps he would go about it in a different way than Justice Gorsuch and would incorporate the principles of the major questions doctrine. Before that analysis, first a brief background on the major questions doctrine as we know it.

III. THE MAJOR QUESTIONS DOCTRINE

A. Background

The major questions doctrine is a relatively new tool.[102] If the nondelegation doctrine is a sledgehammer, the major questions doctrine might be a kitchen utility knife, a tool used to cut the excess fat off of an agency-fattened statute. While the nondelegation doctrine would strike down the statute itself, the major questions doctrine would strike down an agency's rule interpreting the statute.[103] Technically speaking, therefore, the two doctrines do *not* do the same work.

To state the major questions doctrine in one sentence: courts will not defer to an agency's reasonable interpretation of an ambiguous statute when doing so would grant the agency power to decide a question of major economic and political significance.[104] The doctrine has traditionally been viewed as an exception to the revolutionary "*Chevron* deference."[105]

The *Chevron* case[106] announced a two-step process that courts generally follow when analyzing an agency's interpretation of a statute.[107] At step one, a court will ask "whether Congress has directly spoken to the precise question at issue" and/or whether the statute is "silent or ambiguous" on the

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

102. *See* Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 358 (2016) (noting the doctrine's "creation" in the 1990s, post-*Chevron*).

103. *Cf. id.* at 396.

104. *See, e.g.*, Util. Air Reg. Grp. v. EPA, 573 U.S. 302, 324 (2014).

105. *See* King v. Burwell, 135 S. Ct. 2480, 2488-89 (2015); Joshua S. Sellers, *"Major Questions" Moderation*, 87 GEO. WASH. L. REV. 930, 939 (2019).

106. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

107. *E.g.*, *King*, 135 S. Ct. at 2488.

topic.[108] If the statute is silent or ambiguous and Congress has not otherwise directly spoken to the issue, the court will defer to the agency's interpretation so long as it is a "reasonable" one (step two).[109] "In extraordinary cases," however, a court will not follow that analysis if the ambiguity involves a question of "deep 'economic and political significance.'"[110] Instead, the court will simply interpret the statute itself, rather than defer to the agency's interpretation.[111] *Chevron* is premised on the theory that Congress implicitly delegates to agencies the authority to clarify ordinary ambiguities.[112] But courts will hesitate before concluding that Congress intended such an implicit delegation when the ambiguity involves a question of major economic and political significance.[113]

In *FDA v. Brown & Williamson Tobacco Corp.*, the Food and Drug Administration (FDA) had interpreted its authority to regulate "drugs" and "devices" to include cigarettes and other tobacco products.[114] Under *Chevron* step one, the Court went beyond textual ambiguity and looked extensively to Congress's tobacco-specific legislation passed subsequent to the FDA's creation.[115] By placing the FDA's authority in that context, the Court determined that Congress had in fact "directly spoken to the question at issue and precluded the FDA from regulating tobacco products."[116] Therefore, the analysis essentially ended at *Chevron* step one, and the FDA simply could not regulate tobacco products without clear authorization by Congress.[117] The Court clearly noted, however, that the inquiry under *Chevron* step one may be influenced by the significant "economic and political" nature of the regulatory issue.[118] Regarding the FDA's regulation of tobacco products, the Court was "confident that Congress

108. *Chevron*, 467 U.S. at 842-43.
109. *See id.* at 843-45.
110. *King*, 135 S. Ct. at 2488-89.
111. *See id.* at 2489.
112. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).
113. *Id.*
114. *Id.* at 126-27.
115. *See id.* at 143-56.
116. *Id.* at 160-61.
117. *See Brown & Williamson*, 529 U.S. at 160-61.
118. *See id.* at 159-60.

could not have intended to delegate a decision of such economic and political significance . . . ."[119] Thus, the case was essentially a *Chevron* case that ended at the ambiguity step, but the Court provided an alternative basis for its holding under what has since been known as the major questions doctrine.[120]

The Court again invoked the major questions doctrine in *Utility Air Regulatory Group v. EPA*.[121] The Environmental Protection Agency (EPA) had decided to expand its power to regulate greenhouse gasses of motor vehicles to include the regulation of millions of stationary sources.[122] The Court seemed to skip *Chevron*'s analysis altogether and go straight to attacking the EPA's interpretation on major questions grounds.[123] The Court held that the EPA's interpretation was "unreasonable because it would bring about an enormous and transformative expansion" by asserting its authority to regulate "a significant portion of the American economy" without clear congressional authorization.[124] The Court also found significant the EPA's previous admissions that it did *not* have the very authority it claimed to now have.[125] Because the EPA's decision to expand its authority was one of "vast 'economic and political significance,'" the rule was deemed "invalid" until Congress clearly addressed the matter.[126]

In *King v. Burwell*, the Court solidified the major questions doctrine as independent from *Chevron*'s analysis.[127] The case involved the question of whether the Affordable Care Act's tax

119. *Id.* at 160.

120. *See* Richardson, *supra* note 102, at 366, 370.

121. Util. Air Reg. Grp. v. EPA, 573 U.S. 302 (2014).

122. *See id.* at 307, 324.

123. *See id.* at 324.

124. *Id.* (citing *Brown & Williamson*, 529 U.S. at 159).

125. *Id.*

126. *See Util. Air*, 573 U.S. at 324, 333.

127. King v. Burwell, 135 S. Ct. 2480, 2488-89 (2015); *see also, e.g.*, Richardson, *supra* note 102, at 379-80. *But cf.* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 421 n.2 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (explaining that *King* was "somewhat different" from the typical major questions case because the statutory provision involved "major" tax credits, not regulation of "major" private activity); Mila Sohoni, *King's Domain*, 93 NOTRE DAME L. REV. 1419, 1432 (2018) (noting that *King* involved large spending by the federal government rather than by private parties and arguing that *King*'s invocation of the major questions doctrine independent of *Chevron* should only apply in cases with similar circumstances).

credits were available in states that had a federal-run exchange.[128] At the outset of the Court's analysis, it declared that it would not defer to the agency's arguably reasonable interpretation of an ambiguous statute.[129] Chief Justice Roberts, writing for the Court, determined that this was one of those "extraordinary cases" that involved a question of "deep 'economic and political significance'" because it would involve billions of dollars of tax credits and would affect the price of health insurance for millions of people.[130] Denying *Chevron* deference, the Court then proceeded to interpret the statute itself.[131] The Court ultimately concluded that the agency's interpretation was the proper one after all.[132]

B. Justice Kavanaugh's Approach

Before taking the bench at the Supreme Court, Justice Kavanaugh wrote an instructive opinion on his view of the major questions doctrine as a judge on the U.S. Court of Appeals for the D.C. Circuit.[133] In *U.S. Telecom Association v. FCC*, then-Judge Kavanaugh outlined what he calls the major "rules" doctrine.[134] In Kavanaugh's view, such a doctrine already exists under the Supreme Court's precedents—it's the major questions doctrine, but it goes beyond simply saying that *Chevron* won't apply.[135] Kavanaugh's version presumes agency rules of major economic and political significance to be unlawful unless Congress has clearly authorized the agency to issue such a rule.[136]

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128. *See King*, 35 S. Ct. at 2485.

129. *See id.* at 2488-89.

130. *Id.* (internal citations omitted).

131. *See id*.

132. *See id.* at 2496.

133. *See generally* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417-35 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

134. *See generally id.* For more on Kavanaugh's "novel" doctrine, see Michael Sebring, *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 (2018).

135. *See U.S. Telecom*, 855 F.3d at 426 n.7 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

136. *Id.* at 421; Sebring, *supra* note 134, at 206, 212.

The issue in *U.S. Telecom* was the Federal Communications Commission (FCC)'s 2015 net neutrality rule, which classified broadband internet as a "telecommunications service" rather than an "information service," thus subjecting internet service providers to the stringent regulations of common carriers under the Communications Act.[137] Dissenting from the denial to rehear the case en banc, Justice Kavanaugh took the opportunity to explain that, because the FCC's net neutrality rule was (1) a major rule and (2) not clearly authorized by Congress, the net neutrality rule should be declared unlawful.[138] As support, Kavanaugh cited the usual major *questions* cases, except, most notably, *King v. Burwell*.[139]

Kavanaugh relegated *King* to a footnote where he claimed that the Court applied a "form" of the major "rules" doctrine when it simply denied *Chevron* deference and reviewed the agency's interpretation de novo (ultimately siding with the agency).[140] This is the precise reason why Kavanaugh's major *rules* doctrine differs from the Supreme Court's major *questions* doctrine: If the Court in *King* had followed Kavanaugh's formulation, it would have declared the agency's interpretive rule unlawful after determining that it was a major rule,[141] assuming Congress had not clearly mandated such an interpretation.[142] Of course, the Court denied *Chevron* deference instead, engaged in a de novo review of the proper interpretation, and ultimately upheld the agency's interpretation as the best interpretation.[143] Therefore, Kavanaugh was only left to rely on those major questions cases where the Supreme Court actually struck down the agency's

137. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 689 (D.C. Cir. 2016).

138. *U.S. Telecom*, 855 F.3d at 422-26 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

139. *Id.* at 420-21.

140. *Id.* at 421 n.2.

141. *Id.* at 421.

142. In fact, the Court clearly implied that Congress had not authorized the agency's decision when it said, "[H]ad Congress wished to assign that question to an agency, it surely would have done so expressly." King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (internal citations omitted). The Court also explicitly said, albeit a little later in the opinion, that the relevant section's language was "ambiguous." *Id.* at 2491.

143. *See id.* at 2489-96.

rule.[144] Of those cases, *Utility Air* provides the clearest support for Kavanaugh's major *rules* doctrine by requiring "clear congressional authorization" for an agency to claim regulatory authority over a decision of "vast 'economic and political significance.'"[145]

Kavanaugh maintained that "an *ambiguous* grant of statutory authority is not enough" for an agency to claim regulatory authority over a major issue (unlike *Chevron* deference, where it is usually enough).[146] But if any confusion existed before as to what Kavanaugh's doctrine requires,[147] Kavanaugh provided a succinct statement of his take on the major questions doctrine in his *Paul* statement:

> In order for an executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must either: (i) expressly and specifically decide the major policy question

144. *See U.S. Telecom*, 855 F.3d at 420-21 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

145. Util. Air Reg. Grp. v. EPA, 573 U.S. 302, 324 (2014) (citations omitted). However, in that case, two other factors proved significant in the Court's decision: the EPA's previous admissions that it did not have the authority it granted to itself, *see id.*, and the EPA's "tailoring" or "rewriting" of the statute's *un*-ambiguous terms to make its interpretation more reasonable, *see id.* at 325, 328.

146. *U.S. Telecom*, 855 F.3d at 421 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

147. Judge Srinivasan, in his concurrence in the denial of rehearing en banc, stressed the important point that there are "two distinct species of ambiguity": (1) ambiguity about whether the statute itself clearly mandates a particular rule and (2) ambiguity about whether the statute clearly *authorizes* an agency to issue that rule. *Id.* at 386 (Srinivasan, J., concurring in the denial of rehearing en banc). Srinivasan claimed that Kavanaugh wrongly conflated the two. *Id.* Indeed, it is confusing. But Srinivasan confused things even further when he restated the second species as an ambiguity that seems even broader: ambiguity about whether the statute clearly authorizes an agency to "resolve the question," perhaps between a couple alternatives (which seems to have been the case here). *Id.* at 387. Rather than address the differences between the [potentially three] species, Kavanaugh responded by saying that he could not find any statutory language that "clearly classifies ISPs as telecommunications providers" *or* "clearly *authorizes* the agency to classify ISPs as telecommunications providers." *Id.* at 426 n.6 (Kavanaugh, J., dissenting from the denial of rehearing en banc) (emphasis added). Therefore, in his view, the statute was ambiguous in terms of the first two species. Srinivasan, however, asserted that the Supreme Court (in its *Brand X* opinion) had already determined that the statute clearly authorized "the FCC [] to answer [the] question." *Id.* at 387 (Srinivasan, J., concurring in the denial of rehearing en banc). Both Kavanaugh and Judge Brown disputed this line of argument. *Id.* at 426 n.6 (Kavanaugh, J., dissenting from the denial of rehearing en banc); *see also id.* at 403 (Brown, J., dissenting from the denial of rehearing en banc).

> itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority *both* to decide the major policy question and to regulate and enforce.[148]

In other words, Kavanaugh would uphold an agency's major rule so long as Congress has either clearly authorized the rule itself or clearly delegated the authority to *decide* the rule.[149] However, Kavanaugh now defines "clear" congressional authorization (from *U.S. Telecom*) to mean "express[] and specific[]" congressional authorization, which is a more definite and harder standard to prove.[150]

What is most interesting about Kavanaugh's *Paul* statement is that it is written in the context of the nondelegation doctrine, not the major questions doctrine. The statement was left very open-ended, simply expressing that Gorsuch's *Gundy* opinion "raised important points that may warrant further consideration in future cases."[151] Presumably, however, if Kavanaugh is willing to uphold major agency rules that are expressly delegated by Congress, he is also willing to uphold the statutory delegations themselves. But that may not be the case, given that Kavanaugh praised Gorsuch's opinion, which "built on views expressed by then-Justice Rehnquist"—who argued for nondelegation of major questions![152] It seems odd to want it both ways. Justice Gorsuch, however, would almost certainly not permit delegations of authority to decide major questions, as Kavanaugh himself recognized.[153]

IV. NONDELEGATION OF MAJOR QUESTIONS

Judges and commentators alike have noted the similarities between the traditional nondelegation doctrine and the modern

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148. Paul v. United States, 140 S. Ct. 342 (Kavanaugh, J., concurring in the denial of certiorari) (emphasis added) (citations omitted).

149. *See id.*

150. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 426 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc); *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., concurring in the denial of certiorari).

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

152. *Id.*

153. *Id.*

major questions doctrine.[154] But do they actually do the same work as Justice Gorsuch seemed to suggest? Technically speaking, no. The major questions doctrine can be used to invalidate agency rules while the nondelegation doctrine can be used to invalidate statutes.[155] But they do share one major similarity: they both operate to limit the policymaking power of executive and independent agencies.[156] In so doing, proponents of both doctrines also have the goal of limiting *Chevron*'s reach.[157]

One disadvantage of the major questions doctrine, however, is that courts may be required to use it time and time again to invalidate major agency rules that all stem from the same statutory delegation of authority. It invites agencies to try again and thus creates the possibility for constant litigation in the courts. The nondelegation doctrine kills the problem at the source by invalidating the delegation itself, thereby preventing future major rules from being issued without clear congressional

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154. *See, e.g.*, *id.*; Gundy v. United States, 139 S. Ct. 2116, 2141-42 (2019) (Gorsuch, J., dissenting); Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1198-1203 (2018); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2043-48 (2018); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 60-63 (2010) (referring to the major questions doctrine as the "elephants-in-mouseholes doctrine").

155. *Cf., e.g.*, Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got it Wrong)*, 60 ADMIN. L. REV. 593, 617-18 (2008) (discussing how the nondelegation doctrine, unlike the major questions doctrine, constrains Congress rather than executive agencies).

156. While both doctrines have the effect of invalidating an agency's rule interpreting a statute, the nondelegation doctrine goes a step further by invalidating the statute itself. *Cf. id.*

157. In fact, while on the Tenth Circuit, then-Judge Gorsuch invoked *Marbury v. Madison* to argue for the total elimination of *Chevron*. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151-58 (10th Cir. 2016) (Gorsuch, J., concurring). Justice Kavanaugh has argued to skip *Chevron*'s ambiguity step (step one) and go straight to interpreting the statutory text instead. *See* Brett M. Kavanaugh, The Role of the Judiciary in Maintaining the Separation of Powers, Lecture Before The Heritage Foundation (Oct. 25, 2017) (transcript available at [https://perma.cc/WZ38-4RMV]). But even that would seem to render *Chevron* meaningless. There would be no need for step two, because a court would always choose its interpretation over the agency's, even if the agency's interpretation was a "reasonable" one. Notwithstanding, Kavanaugh would still "defer to agencies in cases involving statutes using broad and open-ended terms" such as "reasonable, appropriate, feasible, or practicable." *Id.* (internal quotes omitted).

authorization.[158] For example, if the major questions doctrine had been around when *Schechter Poultry* was decided, it may have been used to invalidate the Live Poultry Code because the Court would have considered it to be a decision of major economic and political significance.[159] But the President could have continued to establish *other* wide-ranging codes of regulation with an even greater scope than the Live Poultry Code, and the courts would be called on to invalidate those as well.[160]

There must be a tool the courts can use in the rarest of circumstances to enforce the separation of powers and the promise of the Constitution that the most important policy decisions (at a minimum) are made only one way: by passage of a bicameral legislature with presentment to the President.[161] To be sure, that tool is supposed to already exist—the nondelegation doctrine. And, in fact, it was used in *Schechter Poultry* and *Panama Refining*.[162] But as it sits now, Congress can delegate away massive swaths of policymaking authority so long as it provides an "intelligible principle" to guide the delegee's hand (which has proven to mean almost anything).[163] Instead of limiting the *nature* or *subject matter* of delegations, the intelligible principle approach is only capable of limiting the *degree of discretion* within such delegated authority—and it evidently allows a lot of discretion.[164]

Clearly there is an appetite for some sort of revival of the nondelegation doctrine. If the longstanding "intelligible principle" test for measuring delegations is now disfavored, what should the test be? Just within the last decade, the major questions doctrine has found secure footing in the Supreme Court thanks to *Utility Air* and *King*.[165] Is it possible to transfer this "major

158. *Cf.* Moncrieff, *supra* note 155, at 618.

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

160. *See id.*

161. *See* U.S. CONST. art. I, § 7; *cf.* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 945-51 (1983).

162. *Schechter Poultry*, 295 U.S. at 541-42; Panama Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935).

163. *See* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality opinion).

164. *See* Cass, *supra* note 11, at 183-84.

165. King v. Burwell, 135 S. Ct. 2480, 2488-89 (2015); Util. Air Reg. Grp. v. EPA, 573 U.S. 302, 324 (2014).

questions" idea to the nondelegation doctrine? Does the rationale behind the major questions doctrine—that Congress does not implicitly delegate major questions—provide support to those who argue for a revival of the nondelegation doctrine but simultaneously loathe the intelligible principle approach? This Article attempts to answer those questions in the affirmative.

Michael Sebring has argued for simply implementing Justice Kavanaugh's major *rules* doctrine with the caveat that there should be a presumption *against* finding a "major rule."[166] This may well be a "compromise solution . . . between proponents of a fully enforced nondelegation doctrine[] and those who view the administrative state as serving a necessary function in a modern, complex governmental regulatory regime."[167] However, as Sebring rightly admits, this will likely not satisfy those who advocate for an enforceable nondelegation doctrine because it still allows Congress to "delegate resolution of major political issues, so long [as] Congress does so through a clear statement."[168] Therefore, a revised version of the nondelegation doctrine would be preferred if possible, all while retaining the existing major questions doctrine as another tool in the toolbox.

Another proposal that falls short is Professor David Schoenbrod's new approach.[169] While recognizing the impediments to enforcement of the nondelegation doctrine (or as Schoenbrod calls it, the "consent-of-the-governed norm"),[170] Schoenbrod has suggested a complex half-measure in which the Court would first call upon Congress to approve any new and significant regulations tending to violate the consent-of-the-governed norm.[171] "If Congress does not respond to the call" by a certain date, the Court would then strike down the regulation if it would affect the annual economy by $100 million or more.[172] Although Schoenbrod claims that this test would replace the "intelligible principle" test commonly associated with the

166. *See* Sebring, *supra* note 134, at 191, 225-26.

167. *Id.* at 249.

168. *Id.* at 246 (emphasis omitted).

169. *See generally* David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213 (2020).

170. *Id.* at 216, 254-55.

171. *See id.* at 257-58.

172. *See id.* at 258-59.

nondelegation doctrine, his approach would only strike down the regulations themselves rather than the statutes that delegate their authority.[173]

A. Justice Rehnquist and the *Benzene* Case

As Justice Kavanaugh noted, the Supreme Court has not yet recognized an affirmative judicial doctrine that would declare statutory delegations of "major questions" unconstitutional.[174] But at least one Justice since the dawn of the intelligible principle approach has argued for a version of it. In the *Benzene* case, Justice Rehnquist would have declared unconstitutional a provision of the Occupational Safety and Health Act because it delegated to the Secretary of Labor the authority to make an "important choice[] of social policy."[175] Chief Justice Burger agreed with Justice Rehnquist's arguments just one year later in a similar case.[176]

In the *Benzene* case, section 6(b)(5) of the Act allowed the Secretary to promulgate regulations of toxic materials and other harmful substances "which most adequately assure[], to the extent feasible, [and] on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity . . . ."[177] This gave the Secretary the power to set the lawful minimum level of exposure to harmful substances (in this case benzene) in workplaces nationwide.[178] The way in which the Secretary was to determine the appropriate level, however, was not clearly spelled out in the Act.[179] Setting the level would

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173. *See id.* at 262-63.

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

175. Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst. (*The Benzene Case*), 448 U.S. 607, 685-87 (1980) (Rehnquist, J., concurring in the judgment). Additionally, Justice Rehnquist believed that the provision at issue failed to provide an intelligible principle sufficient to guide the Secretary's discretion. *See id.* at 685-86. Justice Rehnquist would have required challenged delegations to pass both inquiries. *See id.*

176. *See* Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting, joined by Burger, C.J.).

177. *The Benzene Case*, 448 U.S. at 612 (plurality opinion) (quoting 29 U.S.C. § 655(b)(5) (1970)).

178. *See* 29 U.S.C. § 655(b)(5).

179. *Cf. The Benzene Case*, 448 U.S. at 612-14 (plurality opinion).

naturally require a balancing of the statistical risks for health complications or potential death with the economic costs to be borne by employers in preventing those risks.[180] The decision of how to strike that balance (or even whether to engage in a balancing), Justice Rehnquist argued, was "quintessentially one of legislative policy."[181] And because he would classify it as a "difficult," "important," "critical," and "fundamental" policy decision (seemingly using those terms interchangeably),[182] Justice Rehnquist would have invalidated the relevant portion of section 6(b)(5) of the Act as an unconstitutional delegation.[183]

Although he did not express it in the same way, Justice Rehnquist would likely have regarded the Secretary's decision as one of "deep 'economic and political significance,'" to use the language of the modern major questions doctrine.[184] The Secretary's proposed rule would have involved hundreds of millions of dollars in compliance costs on a nationwide scale—at least $453 million in the first year and recurring annual costs of $34 million[185]—and would have involved a balancing of statistical human lives with those economic costs.[186]

B. The Proposal

In this section, I argue that the Court should consider replacing the current intelligible principle approach to the nondelegation doctrine with an approach that declares delegations of authority to decide "major questions" unconstitutional. Scholars have argued a similar proposition.[187] As to what

180. *See id.* at 672, 685 (Rehnquist, J., concurring in the judgment).

181. *Id.* at 686.

182. *Id.* at 685-87.

183. *Id.* at 687-88.

184. King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (quoting Util. Air Reg. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

185. *See The Benzene Case*, 448 U.S. at 628-29 (plurality opinion). Notably, these are pre-1980 figures, not adjusted for inflation.

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

187. *See e.g.*, Cass, *supra* note 11, at 184, 188-93 (arguing that "the *nature* of the power conferred, rather than the *scope* of the power, must be the linchpin for limiting delegations" and that "policy choices of major importance" cannot be delegated); Lawson, *supra* note 11, at 376-77 (arguing that "Congress must make the central, fundamental decisions, but Congress can leave ancillary matters to the President or the courts").

constitutes a "major question" under the proposal, that is answered below in subsections (2) and (3).[188]

1. Jurisprudential Support

While this Article does not examine the constitutional arguments for or against the nondelegation doctrine generally, a nondelegation doctrine that prohibits delegations of major questions finds plenty of support in the Supreme Court's case law. First and foremost, the proposal is consistent with the Court's earliest sentiments on the topic of delegation. In *Wayman v. Southard*, Chief Justice John Marshall, writing for the Court, distinguished between "those important subjects, which must be entirely regulated by the legislature itself" and "those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[189] Clearly Chief Justice Marshall believed that non-major and fill-up-the-details decisions could be delegated away to the other branches.[190] Chief Justice Marshall admitted, however, that the line between major and non-major subjects "has not been exactly drawn."[191] Nevertheless, the power to decide the "important" subjects, if identifiable, is a "strictly and exclusively legislative [power]" that cannot be delegated.[192]

Indeed, until the "intelligible principle" test transformed the Court's analysis in the mid-20th century, the Court essentially employed a major questions approach based on the nature of the authority delegated rather than an approach that asked whether the delegation was specific enough.[193] As Justice Gorsuch pointed out, the Court repeatedly upheld delegations either because they (1) only delegated the authority to "fill up the details" or (2) made the application of a pre-decided policy contingent on executive fact-finding.[194] The Court in *Panama Refining* recognized these traditional tests and specifically noted

188. *See infra* Part IV.B.ii-iii.
189. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).
190. *See id.* at 43-44.
191. *Id.* at 43.
192. *See id.* at 42-43.
193. *See* Cass, *supra* note 11, at 161-64.
194. Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

that, as long as Congress establishes the "primary" policy standards, those entrusted to execute the law may do what is necessary to carry out Congress's policy, but no more.[195]

Nondelegation of major questions is also consistent with the two cases in which the Supreme Court actually used the nondelegation doctrine to invalidate grants of authority.[196] Both cases involved delegations of major questions, and neither relied on the intelligible principle test.[197]

In *Panama Refining*, Congress granted to the President the power, in his sole discretion, to prohibit the interstate and foreign transportation of petroleum in excess of what state law allowed to be produced or removed from storage.[198] Furthermore, any violation of whatever the President decided was punishable by fine, imprisonment, or both.[199] Thus, any rule the President promulgated would have affected the entire petroleum industry by imposing serious constraints on its operation and commerce.[200] As the Court specifically concluded, the statute did not leave mere details to fill in, nor did it make a pre-determined policy decision contingent on executive fact-finding.[201] Congress left this major policy decision up to the President, and the Court rightly declared it to be an unconstitutional delegation of legislative power.[202]

In *Schechter Poultry*, Congress granted to the President the authority to approve entire "codes of fair competition" for virtually any trade or industry upon application by their respective organizations.[203] Other than provide that the President's codes must not "promote monopolies" or oppress small businesses, the Act contained almost no limits to what the President could regulate.[204] This gave even greater policymaking power to the President than the more specific provision in *Panama Refining*.[205]

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195. Panama Ref. Co. v. Ryan, 293 U.S. 388, 426 (1935).

196. *See supra* notes 51-52 and accompanying text.

197. *See supra* notes 51-52 and accompanying text.

198. *Panama Ref.*, 293 U.S. at 406.

199. *Id.*

200. *Cf. id.* at 415.

201. *See id.* at 430 (concluding that the statutory provision went beyond the traditional limits of delegation).

202. *See id.*

203. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 522 (1935).

204. *See id.* at 538-39.

205. *See id.*

There is no doubt this would be considered a delegation of power to decide *many* major questions.

Enforcing a nondelegation doctrine that prohibits delegations of major questions ensures that Congress—the body most accountable to the people—makes the important policy decisions governing society. While it has become largely accepted that interstitial matters may be delegated,[206] Congress cannot escape its duty to make the hard policy decisions by passing that responsibility off to others.[207] As demonstrated below, however, the test I propose is rather restrictive and would likely not satisfy many formalist proponents of the nondelegation doctrine.

2. How Would the Test Work?

Probably the quickest and easiest way to attack this proposed version of the nondelegation doctrine is to write off the "major questions" threshold as an unworkable test. However, for the sake of doctrinal simplicity, I would adopt essentially the same standard as the Supreme Court's major questions doctrine, which has typically been expressed as whether the issue is one of major "economic and political significance."[208] Still, there are complications in implementing this standard in the nondelegation context.

Notwithstanding, for a moment, the potential for arbitrary application because of the test's broad language, how would courts analyze whether Congress delegated a major question? Would it be in light of the agency's rule being challenged or by only looking to the statute itself? Just because the agency's rule is considered a major one under the major questions doctrine, does that conclusively establish that Congress improperly delegated a major question such that the statutory provision must be declared unconstitutional?

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206. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

207. *See* Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst. (*The Benzene Case*), 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment).

208. King v. Burwell, 135 S. Ct. 2480, 2489 (2015); Util. Air Reg. Grp. v. EPA, 573 U.S. 302, 324 (2014); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 147, 160 (2000).

I believe the better rule would be to look only to the statute itself. Remember, the major questions doctrine is still in the toolbox and perfectly capable of analyzing the rules themselves. Of course, if a statute violates the nondelegation doctrine, the agency's rule would also be invalidated. Therefore, the test should be whether the statute would cause the agency to decide a question of major economic and political significance no matter what the agency actually decided. In the event that a statute does not violate the nondelegation doctrine under this test but the agency's actual rule constitutes a major decision, the major questions doctrine is available.[209] But to strike down a statute simply because an agency wrongly interpreted the statute and enlarged its authority unilaterally would frustrate Congress's ability to enact legislation.

3. "Major Economic and Political Significance" Factors

Getting back to the broad language of the test: major economic and political significance. Critics would argue the test could lead to arbitrary and political decisions by judges.[210] It forces judges to engage in line-drawing by deciding what constitutes a question of major economic and political significance.[211] But the current "intelligible principle" test fares no better: it has proved to be an unworkable test that also engages in line-drawing and can lead to arbitrary results.[212] Line-drawing may, therefore, be inevitable in nondelegation cases, but "the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution."[213] And I believe that the major questions test

209. However, this scenario would seem to contravene the main rationale behind the major questions doctrine—that Congress does not implicitly delegate major questions.

210. *See e.g.*, Gordon, *supra* note 20, at 823. *Cf.* Loshin & Nielson, *supra* note 154, at 45-48 (discussing, in the major questions doctrine context (but using "elephants-in-mouseholes"), how major questions are often "in the eye of the beholder" and how the Supreme Court Justices have been very unpredictable when applying the doctrine); Moncrieff, *supra* note 155, at 612-13 (arguing that a "bare majorness rule" for the major questions doctrine would be "error-prone because the majorness line is too difficult to administer").

211. *See* Sebring, *supra* note 134, at 242-43.

212. *See, e.g.*, Moncrieff, *supra* note 155, at 619.

213. Dep't of Transp. v. Ass'n of Am. R.R.s, 575 U.S. 43, 61 (2015) (Alito, J., concurring).

would come closer to enforcing the Constitution's separation of powers than the intelligible principle test. The solution to the line-drawing problem is to ensure that the test has as much guidance as possible. Therefore, I would adopt a set of factors—most of which have already been recognized by the Supreme Court in its major questions cases—along with a presumption *against* finding a major delegation.

With all the factors, it is important under this proposal to divorce the statute's language from the agency's rule being challenged. Just because an agency's rule may be considered major by the factors doesn't necessarily mean that Congress delegated a major question. It might just mean that the agency wrongly interpreted and expanded the authority granted to it by Congress. Again, the proposed test is whether the statute would cause the agency to decide a major question no matter what decision it reached.[214] This is a serious limitation on the doctrine.

Furthermore, I would impose a presumption *against* finding a major delegation since the test could prove to be arbitrary and unpredictable in the most difficult cases. The presumption against finding a violation would provide predictability and would limit the doctrine's application to only the clearest violations.[215] It would also help to alleviate the legitimate concern that judges might invalidate congressional statutes based on their subjective determination that a particular issue is a major one. Nevertheless, some combination of the following factors could overcome the presumption and thus determine that a delegated issue is one of major economic and political significance.

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214. Despite the fact that some delegations may present the binary choice of the delegee to regulate or not regulate (similar to the delegation in *Panama Refining*), this should not preclude the nondelegation doctrine's enforcement under this proposal. Presumably, if an agency's rule or regulation is being challenged, the delegee has chosen to regulate. Therefore, so long as Congress has delegated the authority to act, the nondelegation doctrine can be used to invalidate a statutory provision based on those potential positive actions.

215. *Cf.* Sebring, *supra* note 134, at 225-26 (arguing for a similar presumption in the context of the major "rules" doctrine).

a. Economic Impact

The inevitable economic impact of an agency's interpretation or rule under the statute would be one of the most relevant factors. Economic impact has been a significant factor in almost every major questions case.[216] This usually involves the amount of costs imposed on the industries and private parties regulated.[217] However, the Court in *King* took notice of the "billions of dollars in [*government*] spending each year."[218] Admittedly, it may be quite difficult in many cases to discern the inevitable economic impact simply by looking to the statute's language. Therefore, it may be permissible for the Court to make reasonable inferences from the amount of economic impact caused by the agency's actual rule when determining what the impact might be if another rule were issued. And of course, if the agency's actual rule does *not* cause a major economic impact, the statute itself cannot be faulted for purposes of this factor.

b. Scope of Regulation

Often discussed in conjunction with economic impact, the Court has looked to the scope of regulation in its major questions cases.[219] This factor looks to (1) whether the regulation affects an entire major industry, (2) the number of industries or people affected, and (3) whether the regulation applies on a nationwide scale.[220] The larger the scope of the inevitable regulation, the more likely a major delegation exists.[221]

c. Political Significance

Another factor that has played a role in many major questions cases is the amount of political engagement or controversy surrounding an issue.[222] For example, in *Gonzales v.*

216. *See* Richardson, *supra* note 102, at 382-83.
217. *See* Sohoni, *supra* note 127, at 1425-26.
218. King v. Burwell, 135 S. Ct. 2480, 2489 (2015).
219. *See* Sebring, *supra* note 134, at 215-16.
220. *See id.* at 216, 218-20.
221. *See id.* at 220.
222. *See* Richardson, *supra* note 102, at 383.

Oregon, the Court noted "[t]he importance of the issue of physician-assisted suicide, which has been the subject of an 'earnest and profound debate' across the country . . . ."[223] This factor may be measured by the degree of public attention to the issue or the amount of political debate among politicians in Washington.[224] However, this factor alone most assuredly should not be dispositive because of the risk that some judges may subjectively find a particular issue to be "major" or "important" when others would not.

d. Conduct Regulating or Liberty Restrictive

The last factor under the proposal does not measure a question's "majorness" *per se*. Rather, it is a threshold factor that must be met for a violation of the nondelegation doctrine to exist: the statute must have granted the delegee the authority to adopt a rule of general applicability regulating conduct or restricting personal liberty.[225] Furthermore, if a delegation grants the authority to restrict personal liberty or impose criminal penalties, the delegation's "majorness" likely *is* bolstered when combined with other factors.[226]

Article I's vesting clause has been interpreted as prohibiting Congress from delegating away its "legislative power."[227] While scholars have argued over the precise meaning of "legislative power," Alexander Hamilton described Congress's power as the power to "prescribe[] the rules by which the duties and rights of every citizen are to be regulated."[228] In 1810, the Court described it as the power to "prescribe general rules for the government of society."[229] Therefore, at a minimum, Congress must have delegated the authority to adopt a rule of general applicability

223. Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997)).

224. *See* Richardson, *supra* note 102, at 384; *see also* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423-24 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

225. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).

226. *See infra* notes 235-36 and accompanying text.

227. Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality opinion).

228. THE FEDERALIST NO. 78, at 575 (Alexander Hamilton) (John C. Hamilton ed., 1864).

229. *See Fletcher*, 10 U.S. (6 Cranch) at 136.

regulating conduct for there to be a violation of the nondelegation doctrine. A strict formalist approach would declare all delegations of "legislative power" to violate the doctrine.[230] Under this proposal, however, the distinction is that the delegation of legislative power must also be "major" to violate the nondelegation doctrine. While surely unsavory to the strict formalists (of which there are very few these days), this approach responds to the endless debate over the precise definition of "legislative power" and serves as a compromise between the formalists and those pragmatists who would argue that Congress is incapable of making many hard policy decisions itself.[231]

In both *Gundy* and a former Tenth Circuit case, Justice Gorsuch stressed the idea that grants of authority to decide whether to restrict people's personal liberty, and specifically whether to impose criminal penalties, are especially egregious.[232] For purposes of this proposal, Gorsuch would likely regard those questions that impose restrictions on personal liberty as major questions, or at least more major.[233] This factor, however, will not be enough in itself.

For example, in *Gundy*, the Attorney General's authority to decide whether to impose SORNA's registration requirements on pre-Act offenders would affect approximately half a million people in addition to imposing criminal penalties for those failing to meet the requirements.[234] Therefore, the scope of regulation is somewhat significant, and the liberty-restricting nature of the delegation heightens its "majorness." This may or may not, however, be enough to overcome the presumption against finding

230. *See* Sean P. Sullivan, *Powers, But How Much Power? Game Theory and the Nondelegation Principle*, 104 VA. L. REV. 1229, 1245 (2018).

231. *Cf., e.g.*, Mistretta v. United States, 488 U.S. 361, 372 (1989) ("Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

232. *See Gundy*, 139 S. Ct. at 2131, 2144-45, 2148 (Gorsuch, J., dissenting); *see also* United States v. Nichols, 784 F.3d 666, 672-73 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc).

233. *See Nichols*, 784 F.3d at 672-73 (Gorsuch, J., dissenting from the denial of rehearing en banc) ("It's easy enough to see why a stricter rule would apply in the criminal arena. The criminal conviction and sentence represent the ultimate intrusions on personal liberty and carry with them the stigma of the community's collective condemnation . . . .").

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

a major delegation. It would likely come down to whether the question has a large economic impact or political significance.[235]

V. CONCLUSION

The recent surge in interest in reviving the nondelegation doctrine[236] combined with the dissatisfaction of the intelligible principle approach comes at a time when the Court has strengthened and established its major questions doctrine. It is for this reason that I propose a revision in the Court's approach to the nondelegation doctrine. The proposal is merely a starting point, however, and would undoubtedly need some refining. I invite others to critique the proposal and point out its potential flaws. But it seems that there comes a point when the separation of powers must be enforced. That line, I believe, can easily be drawn by requiring (at a minimum) that Congress make the most important and significant decisions regulating society.

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235. As for economic impact, Justice Gorsuch mentioned in his dissent that applying SORNA's registration requirements to pre-Act offenders threatened to impose costly burdens on states. *Id.* at 2132. It may also have an economic impact in the sense that more taxpayer money would be used to imprison those pre-Act offenders who would violate SORNA's requirements. As for political significance, it's hard to see how imposing penalties on sex-offenders is an especially controversial political issue.

236. This Article was first written before Justice Ginsburg's passing. Now with Justice Barrett and Justice Kavanaugh on the Court (Kavanaugh did not participate in the *Gundy* decision), there may be two extra votes to enforce the nondelegation doctrine. However, it doesn't appear that Justice Barrett ever decided a nondelegation case while on the Seventh Circuit. She previously discussed, without arguing against, the Supreme Court's lax enforcement of the nondelegation doctrine in an article regarding the specific issue of whether Congress may delegate to the President the decision to suspend the privilege of the writ of habeas corpus during an emergency. *See* Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 317-19 (2014). Justice Barrett's general views of the doctrine are likely influenced by her mentor, Justice Scalia, who struggled in nondelegation cases to decide between two of his most closely held, but conflicting, tenets: (1) the preference of deferring to Congress on matters of policy and thus avoiding judicial intervention into Congress's decision to entrust others with discretion and (2) enforcing the Constitution's express separation of powers between the legislative and executive branches. *See generally* William K. Kelley, *Justice Scalia, the Nondelegation Doctrine, and Constitutional Argument*, 92 NOTRE DAME L. REV. 2107 (2017).