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# *Gundy v. United states*: Breathing New (And Unexpected) Life into the Nondelegation Doctrine

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# Note

## *GUNDY V. UNITED STATES*: BREATHING NEW (AND UNEXPECTED) LIFE INTO THE NONDELEGATION DOCTRINE

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In *Gundy v. United States*,[1] the Supreme Court of the United States considered whether title 34, section 20913(d) of the United States Code,[2] which allows the Attorney General of the United States to "specify the applicability" of the Sex Offender Registration and Notification Act's ("SORNA") registration requirements to pre-Act offenders, violates the nondelegation doctrine.[3] The nondelegation doctrine is a principle of constitutional and administrative law that "bars Congress from transferring its legislative power to another branch of Government."[4] The Court held that section 20913(d) does not violate the nondelegation doctrine because it "makes clear that the Attorney General's discretion extends only to considering and addressing feasibility issues."[5] Because the Court's statutory interpretation of section 20913(d) is consistent with *Reynolds v. United States*,[6] which also interpreted the statutory meaning of SORNA, and because section 20913(d) provides an intelligible principle to guide the



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1. 139 S. Ct. 2116 (2019).

2. *See* 34 U.S.C. § 20913(d) (2018) ("The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).").

3. *Gundy*, 139 S. Ct. at 2121 ("This case requires us to decide whether 34 U.S.C. § 20913(d), enacted as part of the Sex Offender Registration and Notification Act (SORNA), violates [the nondelegation] doctrine.").

4. *Id.* at 2121–23.

5. *Id.* at 2123–24.

6. 565 U.S. 432 (2012); *see infra* Section IV.A.

Attorney General's discretion,[7] the outcome in *Gundy* was correct. The Court, however, underemphasized the many practical consequences that would have followed if the dissent's view had prevailed.[8]

## I. THE CASE

In October 2005, Herman Gundy "pleaded guilty under Maryland law for sexually assaulting a minor."[9] At the time, Gundy was on supervised release for an unrelated federal offense.[10] A conviction for sexual assault under Maryland law was a violation of the terms of Gundy's federal supervised release.[11] As a result, in March 2006, Gundy also pleaded guilty in federal court to violating the conditions of his release.[12] After completing both his state and federal prison sentences, Gundy took up residence in the state of New York.[13] Under the registration requirements of SORNA—as specified in regulations promulgated by the Attorney General—Gundy was required to register as a sex offender.[14] This he did not do.[15]

Accordingly, the United States District Court for the Southern District of New York found Gundy guilty of failing to register as a sex offender.[16] He then appealed to the United States Court of Appeals for the Second Circuit, which affirmed the lower court's decision and rejected Gundy's assertion that SORNA violated nondelegation principles.[17] Notably, the Second Circuit's opinion did not include any substantive discussion on the merits of Gundy's nondelegation claim.[18]

The Supreme Court of the United States granted certiorari to determine whether section 20913(d), enacted as part of SORNA, violates the

7. *See infra* Section IV.B.

8. *See infra* Section IV.C.

9. *Gundy*, 139 S. Ct. at 2122; *see also* United States v. Gundy, 804 F.3d 140, 143 (2d Cir. 2015) ("Herman Gundy was convicted of violating Maryland Criminal Law § 3-306, Sexual Offense in the Second Degree."), *aff'd*, 139 S. Ct. 2116 (2019).

10. United States v. Gundy, 695 F. App'x 639, 640 (2d Cir. 2017) ("While serving a federal sentence for violating Maryland Criminal Law § 3-306, Sexual Offense in the Second Degree, during his supervised release for a prior federal offense, Gundy was transferred from Maryland to a federal prison in Pennsylvania."), *aff'd*, 139 S. Ct. 2116 (2019).

11. *Gundy*, 804 F.3d at 143.

12. *Id.*

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

14. *Id.* SORNA was enacted in 2006. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 12 Stat. 587, 587–88 (adopting SORNA in Title I).

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

16. *Id.* at 143.

17. United States v. Gundy, 695 F. App'x 639, 641 n.2 (2d Cir. 2017) (rejecting Gundy's argument, which was made only for preservation purposes, that SORNA violates the nondelegation doctrine), *aff'd*, 139 S. Ct. 2116 (2019).

18. *Id.*

nondelegation doctrine by allowing the Attorney General to "specify the applicability" of SORNA's registration requirements for pre-Act offenders.[19]

## II. LEGAL BACKGROUND

In *Gundy v. United States*, the Supreme Court of the United States declined to invoke the nondelegation doctrine to invalidate an act of Congress that empowers the Attorney General to "'specify the applicability' of SORNA's . . . requirements" for pre-Act offenders.[20] Section II.A examines the statutory language of SORNA and the Court's interpretation of the Act's text and purpose in the relevant predecessor case of *Reynolds v. United States*.[21] Section II.B. recounts the origins and early applications of the nondelegation doctrine.[22] Lastly, Section II.C discusses the Supreme Court's articulation of the "intelligible principle standard" and retreat from using the nondelegation doctrine to strike down federal laws.[23]

### *A. Enacting and Interpreting SORNA in* Reynolds

Before tracing the history and applications of the nondelegation doctrine, it is helpful to understand the goals and statutory framework of SORNA.[24] The Act addresses a matter that had been on Congress's mind for decades—requiring individuals "convicted of certain sex crimes to provide state governments with (and to regularly update) information, such as names and current addresses, for inclusion on state and federal sex offender registries."[25] Before SORNA's enactment, sex offender registration "consisted of a patchwork of federal and 50 individual state registration systems."[26] In response, the Act was designed to promote uniformity and efficacy by repealing existing federal sex offender registration laws and replacing them with a single comprehensive registration scheme (i.e. SORNA).[27]

Among its provisions, SORNA mandates that sex offenders provide and update information that will be used on federal and state sex offender

19. *Gundy*, 139 S. Ct. at 2122–23 (quoting 34 U.S.C. § 20913(d)).

20. *Id.* (quoting 34 U.S.C. § 20913(d)) ("The District Court and Court of Appeals . . . rejected [Gundy's nondelegation] claim, as had every other court (including eleven Courts of Appeals) to consider the issue. . . . Today, we join the consensus and affirm." (citation omitted)).

21. *See infra* Section II.A.

22. *See infra* Section II.B.

23. *See infra* Section II.C.

24. Sex Offender Registration and Notification Act, 34 U.S.C. §§ 20901–91 (2018).

25. Reynolds v. United States, 565 U.S. 432, 434 (2012).

26. *Id.* at 435.

27. *Id.*

registries ("registration requirements").[28] Offenders who do not comply with SORNA's registration requirements are subject to a prison term of at least one year.[29] The Act applies prospectively for those offenders who were still in prison (or had not yet been convicted) at the time of SORNA's enactment ("post-Act offenders").[30] It also applies retroactively to those offenders who were released from prison before SORNA took effect ("pre-Act offenders").[31]

Post-Act offenders are required to register before they are released from prison in accordance with section 20913(b).[32] Of course, some offenders literally cannot satisfy this provision because they were released from prison prior to SORNA ever becoming law.[33] In other words, even if that group of offenders (i.e. the pre-Act offenders) registered and kept their registration current, they would not be doing so until *after* their release from prison.[34] This would violate section 20913(b).[35] To resolve this dilemma, section 20913(d)—the particular provision of SORNA at issue in *Gundy*—says that pre-Act offenders who cannot comply with the section 20913(b) requirement are subject to rules of registration as specified by the Attorney General.[36]

Still, a pertinent question remains: If you are a pre-Act offender, do you have to register even if the Attorney General has not promulgated rules of registration yet?[37] That is, does the text of SORNA automatically mandate that pre-Act offenders register unless they have been given a waiver of some sort, or does it instead suggest that pre-Act offenders do not have to register until the Attorney General affirmatively says that they must?[38] That was the question presented to the Court in *Reynolds v. United States*.[39] And in

28. 34 U.S.C. § 20913(a) ("A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.").

29. *Id.* § 20913(e) ("Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.").

30. *Id.* § 20913(b).

31. *Id.* § 20913(d).

32. *Id.* § 20913(b).

33. *See* Reynolds v. United States, 565 U.S. 432, 441 (2012) ("The *Second Statement*, for example, says that a sex offender must register before completing his prison term, but the provision says nothing about when a pre-Act offender who completed his prison term pre-Act must register.").

34. *See id.* (explaining that "Pre-Act offenders, aware of such complexities, lacunae, and difficulties, might . . . reach different conclusions about whether, or how, the new registration requirements applied to them").

35. *Id.*

36. 34 U.S.C. § 20913(d).

37. *Reynolds*, 565 U.S. at 434 (explaining that the Court had to determine *when* the registration requirements take effect with respect to pre-Act offenders).

38. *Id.*

39. *Id.*

*Reynolds*, the Court held that SORNA's registration requirements only apply to pre-Act offenders once "the Attorney General specifies that they *do* apply."[40]

As part of its statutory analysis, the Court in *Reynolds* made two observations about the Act that are relevant to the corresponding statutory analysis in *Gundy*. First, it noted that Congress intended for pre-Act offenders to be covered by SORNA's registration requirements.[41] Second, the Court explained that Congress had "no reason to believe" that the Attorney General would not promulgate rules mandating the registration of pre-Act offenders.[42] In a dissenting opinion, Justice Scalia also agreed that the Act was intended to apply to pre-Act offenders.[43] According to his dissent, it was "simply implausible that the Attorney General was given discretion to determine whether coverage of pre-Act offenders (one of the purposes of the Act) should exist."[44] But, unlike the majority, Justice Scalia thought that section 20913(d) meant that SORNA automatically applies to pre-Act offenders subject only to any exceptions made by the Attorney General.[45]

### *B. Origins and Applications of the Nondelegation Doctrine*

Though the *Reynolds* Court considered when the provisions of SORNA would apply to pre-Act offenders, it did not consider whether delegating this power to the Attorney General was constitutionally permissible in the first place. That is to say, the *Reynolds* Court did not contemplate whether section 20913(d) was a violation of the nondelegation doctrine. And while this question was ultimately answered by the plurality in *Gundy*, it is first necessary to understand what the nondelegation doctrine is and how it has been applied by the Court.

The power to legislate is vested in the Congress through Article I of the United States Constitution.[46] And, though the Court has recognized that Congress retains the ability to "obtain[] the assistance of its coordinate Branches,"[47] the Court has also held that Congress is precluded from delegating "strictly and exclusively legislative" powers from itself to other

40. *Id.* at 435 (emphasis added).

41. *Id.* at 442.

42. *Id.* at 444–45.

43. *Id.* at 450 (Scalia, J., dissenting).

44. *Id.*

45. *Id.* at 450–51.

46. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

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

branches of government.[48] As a result, if the power delegated by Congress is exceedingly broad and purely legislative in character, then the delegation will not pass constitutional muster.[49] This concept is known as the nondelegation doctrine.[50]

The Court was receptive to nondelegation challenges to federal laws on two occasions in 1935.[51] In each case, the Court looked to the breadth of the statute at issue to discern whether the challenged provisions transferred too much policymaking power from Congress to the executive branch. In both cases, the Court concluded that Congress had, in fact, impermissibly delegated power to a coordinate branch of government.[52] And thus, at least for a very brief time,[53] the nondelegation doctrine became one route for the judiciary to invalidate acts of Congress.[54]

In *Panama Refining Co. v. Ryan*,[55] the Court invoked the nondelegation doctrine to nullify a statutory provision that delegated power from Congress to the President but did not instruct the President on *when* or *how* to use that power.[56] At issue in that case was a particular aspect of the National Industrial Recovery Act ("NIRA") that authorized the President to prohibit the transportation of "hot oil" (i.e. petroleum and petroleum products that exceeded certain statutory quotas) in interstate or foreign commerce.[57] Importantly, NIRA's hot oil provision did not outline "circumstances or conditions in which transportation of petroleum or petroleum products should be prohibited."[58] In other words, discretion was left to the President alone to

48. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825); s*ee also* Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate, or transfer to others, the essential legislative functions with which it is thus vested.").

49. *Panama Refining Co.*, 293 U.S. at 421.

50. *See, e.g.*, *Mistretta*, 488 U.S. at 371–72 (explaining that "Congress generally cannot delegate its legislative power to another Branch"). A helpful corollary is to consider nondelegation inquiries as a particular application of a separation of powers analysis. When a legislative enactment is found to have violated nondelegation principles, the Court is saying the provision has not accorded due respect for the separation of powers—a feature that is, of course, required by the Constitution. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 319 (2000) (explaining that "the principle of nondelegation might seem . . . an inevitable implication of the division of powers").

51. *See infra* notes 55 and 63 and accompanying text.

52. *Mistretta*, 488 U.S. at 373.

53. *See infra* Section II.C.

54. *Mistretta*, 488 U.S. at 373.

55. 293 U.S. 388 (1935).

56. *Id.* at 417–18.

57. *Id.* at 414–15, 418; *see also id.* at 436 (Cardozo, J., dissenting) ("Oil produced or transported in excess of a statutory quota is known in the industry as 'hot oil,' and the record is replete with evidence as to the effect of such production and transportation upon the economic situation and upon national recovery.").

58. *Id.* at 417 (majority opinion).

determine when—if at all—the prohibition should be imposed.[59] Because NIRA's hot oil provision did not declare policy, establish a standard, or lay down a rule for when the President was authorized to invoke the prohibition, the Court held that it violated the nondelegation doctrine.[60] At the same time, though, the Court noted that delegations of legislative power are permissible when Congress provides an intelligible principle that instructs the delegee on how and when the power may properly be exercised.[61]

Just a few months later, in *A.L.A. Schecter Poultry Corp. v. United States*,[62] the Court employed the same rationale—that excessive delegations of policymaking power are unconstitutional—to nullify another provision of NIRA.[63] Under NIRA's "Live Poultry Code," the President was given authority to either (1) approve regulations of the poultry industry that promote "fair competition" if those regulations were proposed by trade or industrial associations, or (2) promulgate such regulations on his own motion.[64] Violations of the Code were punishable as misdemeanors and carried a fine of up to $500 per offense.[65] After recounting its analysis in *Panama Refining Co.*, the Court again emphasized that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed."[66] But, the Court said, this was exactly what the Live Poultry Code allowed.[67] Among its faults, the Live Poultry Code never defined what constituted "fair competition."[68] Rather, the Act seemed to leave it to the executive branch to determine for itself what "fair competition" meant.[69] And, in so doing, the executive branch alone could determine what conduct was and was not criminal under

59. *Id.*

60. *Id.* at 430.

61. *Id.* at 429–30 ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928))).

62. 295 U.S. 495 (1935).

63. *Id.* at 551.

64. *Id.* at 521–23 (citing 15 U.S.C. § 703) (1933)).

65. *Id.* at 523.

66. *Id.* at 537–38.

67. *Id.* (noting that under the Live Poultry Code, the President has broad power to impose codes that operate as penal statutes).

68. *Id.* at 531 ("The Act does not define 'fair competition.'").

69. *Id.* ("What is meant by 'fair competition' as the term is used in the act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? Or is it used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose and the President may approve (subject to certain restrictions), or the President may himself prescribe, as being wise and beneficent provisions for the government of the trade or industry in order to accomplish the broad purposes of rehabilitation, correction, and expansion which are stated in the first section of title 1?").

the Live Poultry Code.[70] As a result, the Live Poultry Code provision of NIRA was also rendered an unconstitutional violation of nondelegation principles.[71]

Both *Panama Refining Co.*[72] and *A.L.A. Schecter Poultry Corp.* relied on a legal principle, now known as the intelligible principle standard, derived from the 1925 case of *J.W. Hampton, Jr. & Co. v. United States*.[73] In *J.W. Hampton*, the Court stated as follows:

> If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under Congressional authority.[74]

Put differently, the *J.W. Hampton* Court indeed recognized that there are limits to the delegation of certain legislative authority, but in so doing, it also implicitly recognized that there are at least some permissible acts of delegation.[75]

### *C. The Court's Retreat from Nondelegation and Articulation of an Intelligible Principle Standard*

Two of the cases cited above—*Panama Refining Co.* and *A.L.A. Schecter Poultry Corp.*—are the only instances in which the Court has used the nondelegation doctrine to invalidate federal laws.[76] The Court has rejected *every* nondelegation challenge to a federal law ever since.[77] Strictly speaking, both of those decisions remain good law to this day. But the Court more clearly articulated the modern approach to nondelegation challenges in *Mistretta v. United States*.[78]

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70. *Id.* at 537–38.

71. *Id.* at 542.

72. Panama Refining Co. v. Ryan, 293 U.S. 388, 429–30 (1935) (citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

73. 276 U.S. 394 (1928).

74. *Id.* at 409.

75. *See Panama Refining Co.*, 293 U.S. at 430 (explaining that "the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend").

76. Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) ("As the Court points out, we have invoked the doctrine of unconstitutional delegation to invalidate a law only twice in our history, over half a century ago.").

77. *Id.*

78. *Id.*

Pervasive in the federal criminal justice system before the Sentencing Reform Act of 1984 was a practice called "indeterminate sentencing."[79] Although federal statutes specified minimum and maximum penalties for federal crimes, they also gave sweeping discretion to sentencing judges to determine the severity of an offender's punishment.[80] This discretion was shared, in part, with the federal parole commission.[81] The results were problematic.[82] It was not uncommon for similarly situated defendants to receive vastly different sentences depending on who the sentencing judge happened to be.[83] In response, Congress enacted the Sentencing Reform Act of 1984, which made drastic changes to the federal sentencing regime as it existed at the time.[84]

Most relevant for the present discussion, the Act revoked discretion from sentencing judges and created an independent commission (i.e. the Sentencing Commission) that was authorized to impose mandatory sentencing ranges on the United States district courts.[85] In effect, the Act tasked the Sentencing Commission with devising "sentencing guidelines for every federal criminal offense."[86] It also made the sentence, once imposed, basically determinate.[87] The Act abolished the federal parole system, limited the opportunity for an offender to appeal their sentence, and limited opportunities for early release.[88] As for the composition of the Sentencing Commission itself, the statute envisioned a bipartisan group of federal judges and other selected members who would serve a fixed term and could only be removed from their positions for cause.[89]

A few years after the Act took effect, John Mistretta brought a challenge to the new sentencing regime, asserting that it was a violation of the nondelegation doctrine.[90] According to Mistretta, Congress provided the Sentencing Commission with excessive legislative power by allowing the Commission to determine mandatory sentencing ranges.[91] But Mistretta had a problem. Unlike the essentially standardless delegations of power in

79. *Id.* at 363–67 (majority opinion).

80. *Id.* at 363, 365–66.

81. *Id.*

82. *See id.* at 365 ("Serious disparities in sentences . . . were common.").

83. *Id.* (recounting prior attempts by Congress to reduce the sentencing disparities between individual judges).

84. *Id.* at 367–69.

85. *Id.*

86. *Id.* at 371.

87. *Id.* at 367.

88. *Id.*

89. *Id.* at 368–69.

90. *Id.* at 370. At the point his case reached the Supreme Court, John Mistretta had already pleaded guilty to conspiracy and agreement to distribute cocaine. *Id.* at 370–71.

91. *Id.* at 371.

*Panama Refining Co.* and *A.L.A. Schecter Poultry Corp.*,[92] Congress included a whole host of guiding factors, purposes, and principles that the Commission was required to consider as it fashioned its sentencing guidelines.[93] For example, the Commission was required to "use current average sentences 'as a starting point' for its structuring of the sentencing ranges,"[94] evaluate "the nature and degree of the harm caused by the crime,"[95] and ensure that violent and repeat offenders received substantial time in prison.[96] To be sure, the Act still left the Commission with a large amount of discretion.[97] In fact, the Commission was even left to decide "which types of crimes and which types of criminals are to be considered similar for the purposes of sentencing."[98] Even still, the Court did not agree with Mistretta's assessment that the Act's delegated powers were too broad and too legislative in character to withstand a constitutional challenge.[99]

Writing for a near-unanimous court,[100] Justice Harry Blackmun explained "that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[101] In upholding the Act, the Court's majority once again emphasized that nondelegation challenges must be resolved under *J.W. Hampton*'s "'intelligible principle' test."[102] That is to say, as long as Congress has provided the delegee with an intelligible principle to guide its exercise of the delegated power, the delegation is constitutionally permissible.[103]

Following the *Mistretta* decision, the Court has upheld, among others, a law allowing the Secretary of Transportation to impose user fees on pipeline operators that were used to fund federal pipeline safety programs[104] and a law permitting "the Attorney General to add or remove substances [to a schedule of drugs under the Controlled Substances Act], or to move a substance from

92. *See supra* Section II.B.

93. *Mistretta*, 488 U.S. at 374–77 (describing the many guidelines and directives that Congress included in the Sentencing Reform Act).

94. *Id.* at 375 (quoting 28 U.S.C. § 994(m) (1994)).

95. *Id.*

96. *Id.* at 376–77.

97. *Id.* at 377.

98. *Id.* at 377–78.

99. *Id.* at 371.

100. Justice Scalia was the lone dissenter.

101. *Mistretta*, 488 U.S. at 372.

102. *Id.*(quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)); *see supra* note 61 and accompanying text.

103. *Mistretta*, 488 U.S. at 372–73.

104. Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 214–15 (1989).

one schedule to another."[105] The Court (post-*Schecter*) has yet to identify a single legislative delegation that fails the intelligible principle test.[106]

## III. THE COURT'S REASONING

In *Gundy v. United States*, the Supreme Court of the United States addressed whether section 20913(d) of SORNA, which allows the Attorney General to promulgate regulations that specify the registration requirements for pre-Act offenders, was an unconstitutional delegation of legislative power from Congress to the Attorney General.[107] In a plurality opinion authored by Justice Kagan, the Court upheld section 20913(d) on the basis that it does not violate nondelegation principles because the provision affirmatively requires the Attorney General to "apply SORNA's registration requirements *as soon as feasible* to offenders convicted before the statute's enactment."[108] Thus, under the plurality view, section 20913(d) only allows the Attorney General to delay enforcement of SORNA against pre-Act offenders for feasibility reasons.[109]

The Court began by acknowledging that Congress is prohibited from delegating or transferring strictly legislative power, but it noted that Congress is not precluded from *every* act of delegation.[110] Congress is permitted to delegate power so long as it provides an "intelligible principle" to guide the delegee (here, the Attorney General) in their exercise of discretion.[111] As a result, nondelegation inquiries (including the one at issue in *Gundy*) are largely questions of statutory interpretation.[112] The determination of whether Congress enacted a statute containing an intelligible principle will, in turn, answer the constitutional question—whether the nondelegation doctrine has been violated.[113]

For that reason, Justice Kagan's plurality opinion begins by answering the following question: Does SORNA—as Gundy and the dissenters contend—provide the Attorney General with "'unguided' and 'unchecked'

105. Touby v. United States, 500 U.S. 160, 162 (1991).

106. *See supra* note 76.

107. Gundy v. United States, 139 S. Ct. 2116, 2122–23 (2019) (plurality opinion).

108. *Id.* at 2121 (emphasis added). This is to say that the Attorney General may not exercise his discretion to determine *whether* SORNA should apply to pre-Act offenders in the first place. This *must* be done as soon as practicable or feasible. This Note will refer to this concept as the "feasibility standard."

109. *Id.*

110. *Id.* at 2123.

111. *Id.* ("The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion.").

112. *Id.*

113. *Id.*

authority"?[114] According to the plurality, the answer to that question is no.[115] The statute's purpose and history reveal the opposite intent by Congress.[116] As Justice Kagan explained, the Court already interpreted the statutory meaning of SORNA when it decided *Reynolds v. United States*.[117]

In *Reynolds*, the Court determined that SORNA was intended to cover both post-Act and pre-Act offenders.[118] Congress realized, however, that implementing a comprehensive registration program would present a major logistical concern: A large number of pre-Act offenders would have to be re-registered or newly registered.[119] Some of the offenders, for example, may have already registered under existing state registry schemes.[120] Moreover, many offenders would not be able to comply with the section 20913(b) requirement to register before completing their prison sentence because their prison sentence ended well before SORNA took effect.[121] Anticipating these administrative and transitional concerns, Congress crafted a solution in section 20913(d): The Attorney General would be responsible for examining the issues and enforcing the registration requirements of SORNA against the pre-Act offenders as soon as the transitional difficulties were resolved.[122]

In explaining the plurality's interpretation of section 20913(d), Justice Kagan noted that statutory interpretation is a "holistic endeavor" that looks not just to the challenged text by itself (as Gundy sought to do), but to the challenged text in the full context in which it appears, alongside its purpose and history.[123] And because everything from SORNA's declaration of purpose to its legislative history and definition of the term "sex offender" suggests a congressional intent for SORNA to cover pre-Act offenders, Gundy's argument fell short.[124] According to the plurality, a holistic statutory analysis of SORNA reveals that section 20913(d) "order[s] [pre-Act offenders'] registration as soon as feasible."[125]

Because the authority conferred by Congress to the Attorney General was limited only to allowing the Attorney General enough time to resolve

114. *Id.* (quoting Brief for Petitioner at 37, 45, *Gundy*, 139 S. Ct. 2116 (No. 17-6086)).

115. *Id.* at 2128 ("The phrase ['specify the applicability'] instead means 'specify *how* to apply SORNA' to pre-Act offenders if transitional difficulties require some delay.").

116. *Id.* at 2125 ("Congress had made clear in SORNA's text that the new registration requirements would apply to pre-Act offenders.").

117. *Id.* at 2124.

118. *Id.* at 2122.

119. *Id.*

120. *Id.*

121. *Id.* at 2124–25; *see also supra* text accompanying notes 33–36.

122. *Gundy*, 139 S. Ct. at 2125.

123. *Id.* at 2126 (quoting United Sav. Ass'n. of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988)).

124. *Id.* at 2127.

125. *Id.* at 2128.

practical issues before enforcing SORNA against pre-Act offenders, the plurality concluded that Congress provided an intelligible principle.[126] And because the Court routinely upholds acts of Congress that give executive officials discretion to implement governmental programs, the Court concluded that section 20913(d) did not present a nondelegation concern and was constitutionally permissible.[127]

In a brief solo concurrence, Justice Alito agreed with the plurality that SORNA did not offend the nondelegation doctrine given how the Court has interpreted the doctrine since 1935.[128] At the same time, however, he signaled that he would support an effort to reconsider the Court's approach to the nondelegation doctrine if reconsideration could garner majority support on the Court at a later time with the full Court's participation.[129]

The dissent, written by Justice Gorsuch, considered the plurality's view of the nondelegation doctrine to be fundamentally at odds with the Framers' notion of separation of powers.[130] And not only did the dissent's constitutional analysis favor Gundy, so too did its statutory analysis.[131]

In interpreting section 20913(d) of SORNA, Justice Gorsuch rejected the plurality's reading—that the Act requires the Attorney General to impose its registration requirements on pre-Act offenders as soon as feasible.[132] Much to the contrary, the dissent believed that SORNA gave the Attorney General "*carte blanche*"[133] about whether to take action.[134] In the dissent's view, the plurality simply "reimagine[d] the terms of the statute" by reading-

126. *Id.* at 2129.

127. *Id.* at 2130.

128. *Id.* at 2130–31 (Alito, J., concurring) (noting that the Court has uniformly rejected nondelegation challenges since 1935 and has upheld all delegations in which the statute includes a "discernable standard").

129. *Id.* at 2131 ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment."). Justice Kavanaugh was recused in *Gundy*. Later, in a statement respecting a denial of certiorari in an unrelated case, Justice Kavanaugh indicated that he would be open to the dissent's new approach to nondelegation cases. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in denial of certiorari) ("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.").

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

131. *Id.*

132. *Id.* at 2132 ("As the Department of Justice itself has acknowledged, SORNA 'does not require the Attorney General' to impose registration requirements on pre-Act offenders 'within a certain time frame or by a date certain; it does not require him to act at all.'" (quoting Brief for United States at 23, Reynolds v. United States, 565 U.S. 432 (2012) (No. 10-6549))).

133. *Id.* at 2144.

134. *Id.* at 2132 ("Congress thus gave the Attorney General free rein to write the rules for virtually the entire existing sex offender population in this country . . . .").

in a feasibility standard.[135] More, Justice Gorsuch suggested that his colleagues in the plurality misunderstood the Act's legislative history.[136] According to the dissenting opinion, Congress did not include the "specify the applicability" provision in section 20913(d) because of feasibility concerns; it did so because members of Congress could not agree on what to do with the pre-Act offenders.[137] In short, the dissent said that Congress—apparently caught between a rock and a hard place—passed the buck to the Attorney General, including on the central question of whether anything should be done at all.[138] The most plausible statutory analysis, as the dissent viewed it, is that SORNA allows the Attorney General to make "unbounded policy choices."[139] But even if the plurality's statutory analysis—that section 20913(d) includes a feasibility standard—was correct, the dissent asserts that SORNA would still be vulnerable to a nondelegation challenge.[140] Why? According to the dissent, even a feasibility standard is too broad of a delegation.[141] Because feasibility can mean different things to different people, the dissent argued that the term is too amorphous for there to be meaningful judicial review of whether the Attorney General's actions were because of feasibility concerns or for some other reason entirely.[142]

And that takes us to the constitutional question. Unlike Justice Kagan,[143] Justice Gorsuch's dissent did not apply the intelligible principle test to determine whether the SORNA delegation is constitutional.[144] The dissent declined to do so because under its view the intelligible principle test is entirely untethered from the Framers' constitutional design and does not

135. *Id.* at 2131.

136. *See id.* ("Congress concluded that something had to be done about these 'pre-Act' offenders too. But it seems Congress couldn't agree what that should be.").

137. *Id.* at 2131–32.

138. *Id.*

139. *Id.* at 2133.

140. *Id.* at 2145 ("But even this new dream of a statute wouldn't be free from doubt. A statute directing an agency to regulate private conduct to the extent 'feasible' can have many possible meanings: It might refer to 'technological' feasibility, 'economic' feasibility, 'administrative' feasibility, or even 'political' feasibility. Such an 'evasive standard' could threaten the separation of powers if it effectively allowed the agency to make the 'important policy choices' that belong to Congress while frustrating 'meaningful judicial review.' And that seems exactly the case here . . . ." (quoting Indus. Union Dep't., AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 676, 685–86 (1980) (Rehnquist, J., concurring in judgment))).

141. *Id.*

142. *Id.*

143. *Id.* at 2129 (plurality opinion) ("As noted earlier, this Court has held that a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority." (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928))).

144. *Id.* at 2141 (Gorsuch, J., dissenting) (characterizing the intelligible principle test as a "misadventure" by the Court).

even find support in the case in which the phrase was first uttered.[145] According to the dissenters, the correct way to determine the permissibility of a congressional delegation is not by resorting to the familiar intelligible principle test but rather by conducting a tripartite "traditional separation-of-powers test[]."[146]

Under such an approach, Congress is permitted to delegate authority—without offending the separation of powers—in only three circumstances.[147] First, Congress may allow another branch of government to "fill up the details" when Congress itself has made the underlying policy decision.[148] In these instances, delegation is acceptable because Congress has provided enough information for the courts and the public to determine whether or not the delegee has followed (or exceeded) Congress's guidance.[149] Second, Congress is permitted to enact laws that are contingent on fact finding by the executive branch.[150] So, for example, Congress can pass a law that schedules the construction of a bridge, and it can condition the bridge's construction on a cabinet secretary first making a "finding" that such a bridge would not interfere with navigation capabilities.[151] In essence, the "fact-finding" standard says that Congress can make the operation of a new law contingent upon a specified triggering condition.[152] This, under the dissent's analysis, would not raise a separation of powers concern.[153] Third, Congress may assign non-legislative responsibilities to the other branches (for example, Congress can assign certain foreign affairs powers to the executive branch because those powers are inherently within the scope of executive power).[154] In other words, there is no separation of powers concern when Congress "delegates" power to the executive branch that is already properly within the scope of executive power.[155]

This tripartite test, according to the dissent, is what Chief Justice Taft really was getting at when he first used the term "intelligible principle" in

145. *Id.* at 2139 ("This mutated version of the 'intelligible principle' remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked.").

146. *Id.* ("For two decades, no one thought to invoke the 'intelligible principle' comment as a basis to uphold a statute that would have failed more traditional separation-of-powers tests."). This Note will refer to this test interchangeably as the "tripartite test," "modified test," or "dissent's test."

147. *Id.* at 2136–37.

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

149. *Id.*

150. *Id.*

151. *Id.* at 2136–37 (citing Miller v. Mayor of New York, 109 U.S. 385, 393 (1883)).

152. *Id.*

153. *Id.*

154. *Id.* at 2137.

155. *Id.*

*J.W. Hampton, Jr. & Co. v. United States*.[156] The dissent argued that SORNA does not satisfy *any* of the prongs of the above-mentioned test.[157] First, it does not "fill up the details"[158] because the applicability of SORNA's registration requirements to pre-Act offenders is not a "detail" in any sense of the word.[159] Rather, it is a major policy concern that would implicate some 500,000 offenders.[160] Second, there was no "fact-finding" involved in section 20913(d) because the text of the provision did not set any criteria for when or how to enforce the statute against pre-Act offenders.[161] And third, SORNA has nothing to do with foreign affairs or other inherent powers of the executive branch.[162] Because, according to the dissent, the delegation in section 20913(d) failed the tripartite test, it constituted an impermissible delegation of legislative power.[163]

## IV. ANALYSIS

In *Gundy v. United States*, the Supreme Court of the United States held that section 20913(d) of SORNA did not violate nondelegation principles because the provision required the Attorney General to apply SORNA's registration requirements to pre-Act offenders "as soon as feasible."[164] *Gundy* was correctly decided because the Court's statutory interpretation of SORNA in *Reynolds v. United States* already revealed that the Attorney General is accorded only limited discretion under the Act.[165] Moreover, the *Gundy* plurality opinion remains faithful to the approach the Court has taken with nondelegation cases since 1935.[166] The plurality opinion would have been made more persuasive, however, by emphasizing the practical consequences of reviving the nondelegation doctrine given the regularity

156. *Id.* at 2139 ("And when Chief Justice Taft wrote of an 'intelligible principle,' it seems plain enough that he sought only to explain the operation of these traditional tests; he gave no hint of a wish to overrule or revise them.").

157. *Id.* at 2143–44.

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

159. *Id.* at 2143 ("But it's hard to see how the statute before us could be described as leaving the Attorney General with only details to dispatch.").

160. *Id.*

161. *Id.* ("Far from deciding the factual predicates to a rule set forth by statute, the Attorney General himself acknowledges that the law entitles him to make his own policy decisions.").

162. *Id.* at 2143–44.

163. *See id.* at 2145 ("Most everyone, the plurality included, concedes that if SORNA allows the Attorney General as much authority as we have outlined, it would present 'a nondelegation question.'").

164. *See supra* Section III.

165. *See infra* Section IV.A.

166. *See infra* Section IV.B.

with which Congress delegates limited authority to executive officials and agencies to implement policy.[167]

### *A. The Plurality's Statutory Analysis of SORNA Is Convincing, Especially in the Aftermath of* Reynolds

When the Court decided *Reynolds* in 2012, it realized that Congress fashioned SORNA to obligate the Attorney General to take certain actions (namely, "to apply the new requirements to pre-Act offenders").[168] Yet, according to the dissenting opinion in *Gundy*, section 20913(d)'s delegation went too far because it gave the Attorney General "a blank check" to exercise discretion in whatever manner the Attorney General saw fit.[169] But as Justice Kagan observed in the plurality opinion, the Court has never read the provisions of SORNA so broadly.[170] And because the *Reynolds* Court already adopted a narrow interpretation of SORNA,[171] the *Reynolds* interpretation of SORNA merits deference under the doctrine of statutory stare decisis.[172]

#### *1. The* Reynolds *Court Already Determined that SORNA Only Provides the Attorney General with Limited Delegated Powers*

A close reading of *Reynolds* reveals the *Gundy* dissenters' position—that the Attorney General could refuse to apply SORNA to pre-Act offenders—was one of the arguments the Government made when the Court first considered the breadth of SORNA in 2012.[173] But this was an argument that was rejected by the Court then and is no more persuasive now.[174] Although the Court acknowledged that SORNA did not apply to pre-Act offenders until the Attorney General affirmatively said that it did,[175] the Court never stated (or even implied) that the Attorney General could simply decline to implement the statute's provisions against pre-Act offenders in the first

167. *See infra* Section IV.C.

168. Reynolds v. United States, 565 U.S. 432, 444–45 (2012).

169. Gundy v. United States, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting).

170. *Id.* at 2124 (plurality opinion) ("[W]e made clear [in *Reynolds*] how far SORNA limited the Attorney General's authority. And in that way, we effectively resolved the case now before us.").

171. *See infra* Section IV.A.1.

172. *See infra* Section IV.A.2.

173. *Reynolds*, 565 U.S. at 444–45 ("The Act's language, the Government continues, consequently gives the Attorney General the power *not* to specify anything . . . . [Yet,] [t]his argument bases too much upon too little.").

174. *Id.* Although the *Reynolds* Court concluded that SORNA's provisions do not apply to pre-Act offenders until the Attorney General says they apply, the *Reynolds* Court never suggested that the Attorney General possessed the power to conclude—on his own initiative—that they would never apply.

175. *See supra* note 40 and accompanying text.

place.[176] On the contrary, the *Reynolds* majority noted that it would be difficult to believe Congress thought the Attorney General would fail to apply SORNA's requirements to pre-Act offenders given that a primary objective of the Act was to ensure all offenders (both pre-Act and post-Act offenders) would be subject to the Act's registration requirements.[177] Even the *Reynolds* dissenters agreed with the majority on this point.[178] And so, even though the *Gundy* dissent critiques the plurality's reliance on legislative history,[179] SORNA's legislative history—at least as far as the legislation's core purposes and reach are concerned—seems to have been largely agreed upon by the *Reynolds* Court.[180]

But as the *Gundy* dissenters tell the story, SORNA's legislative history at most reveals the "hope[s] and wishe[s]"[181] of some members of Congress that perhaps some of the pre-Act offenders would someday be subject to SORNA's registration requirements.[182] Consider, though, SORNA's statement of purpose. There, Congress made its objective clear: It sought to create a "comprehensive" registration scheme for those offenders implicated by SORNA.[183] And given this background, the delegation in section 20913(d) has quite a lot of meaning. It is not, as the dissent argues, a vague expression of faith that the Attorney General might take action someday.[184] It would be quite counterintuitive indeed to assume that Congress created a "comprehensive" sex offender registration scheme that, for some reason or another, did not have to apply to pre-Act offenders.[185]

Thus, Justice Kagan's view that SORNA requires the Attorney General to specify the Act's applicability to pre-Act offenders "as soon as feasible"[186] is not only a reasonable statutory interpretation but also the most likely.[187] Principal Deputy Solicitor General Jeffery Wall, who argued in favor of SORNA's constitutionality on behalf of the United States, made much the

176. *See supra* text accompanying notes 42 and 44.

177. *Reynolds*, 565 U.S. at 444 ("[The power claimed by the Government] is inconsistent with Congress' intent to ensure the speedy registration of thousands of 'lost' pre-Act offenders . . . .").

178. *See supra* note 44 and accompanying text; *see also* Gundy v. United States, 139 S. Ct. 2116, 2124 (2019) (plurality opinion) ("In recognizing all this, the majority (temporarily) bonded with the dissenting Justices, who found it obvious that SORNA was 'meant to cover pre-Act offenders.'" (quoting *Reynolds*, 565 U.S. at 448 (Scalia, J., dissenting))).

179. *Gundy*, 139 S. Ct. at 2147 (Gorsuch, J., dissenting).

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

181. *Gundy*, 139 S. Ct. at 2146 (Gorsuch, J., dissenting).

182. *Id.*

183. *Id.* at 2126–27 (plurality opinion).

184. *See supra* text accompanying note 181.

185. *Gundy*, 139 S. Ct. at 2126–27 (plurality opinion) (defining the term "comprehensive" as "all-encompassing or sweeping").

186. *Id.* at 2121.

187. *See supra* note 108 and accompanying text.

same point during oral argument: "And I—to be honest with you, I think it defies both the text of SORNA and reality to think that Congress was agnostic about whether hundreds of thousands of people who have committed very serious sex offenses, as Petitioner has, should be required to register."[188]

Simply put, the fact that section 20913(d) allows some level of discretion is hardly dispositive of whether the Act allows absolute discretion.[189] And as Justice Kagan explained during oral argument, no member of the *Reynolds* Court, which interpreted the same provision, disagreed with the premise that Congress intended for the statute to cover pre-Act offenders.[190] Nothing about the statute's history or purpose leads to such a belief.[191] After all, Congress had a good reason for not requiring "*instantaneous* registration"[192] of pre-Act offenders in the statute itself—it would have been a logistical impossibility for all of the pre-Act offenders to strictly comply with the text of SORNA if not for language allowing them to be phased in over time.[193]

### *2. The Statutory Interpretation in* Reynolds *Carries Special Weight Under the Doctrine of Statutory Stare Decisis*

Because the plurality's rationale is consistent with the statutory interpretation of the *Reynolds* Court, the plurality decision finds added support in the doctrine of statutory stare decisis.[194] Under this doctrine, the Court gives greater precedential force to its own statutory interpretations than it does its constitutional interpretations.[195] As then-Professor Amy Coney

188. Oral Argument at 47:19, *Gundy*, 139 S. Ct. 2116 (No. 17-6086), https://www.oyez.org/cases/2018/17-6086.

189. *Gundy*, 139 S. Ct. at 2126 (plurality opinion) (noting that such an argument only prevails if one reads "the first half of § 20913(d), isolated from everything else").

190. Oral Argument at 10:20, *Gundy*, 139 S. Ct. 2116 (No. 17-6086), https://www.oyez.org/cases/2018/17-6086 ("[Justice Scalia] — he was dissenting, but nine Justices in Reynolds all had the same view of this statute, which is that this statute demanded comprehensiveness in the registration of pre-Act sex offenders. In other words, both in the majority and in the dissent, this was the one point in common, that they said this statute was designed for something and this statute did something, that it insisted that 'sex offender' should be read broadly to include any individual who was convicted of a sex offense and that all those people should be registered, you know, with some feasibility recognition.").

191. *See supra* Part III.

192. *Gundy*, 139 S. Ct. at 2130 (plurality opinion) (quoting Reynolds v. United States, 565 U.S. 432, 443 (2012)).

193. *Id.* at 2128.

194. *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317 (2005) (explaining "that a party advocating the abandonment of a statutory precedent bears a greater burden" than a party advocating the abandonment of a constitutional precedent).

195. *Id.*; *see also* Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. REV. 1165, 1175 (2016) ("Often called 'statutory stare decisis,' the principle that precedents in statutory cases are not to be overturned lightly is justified on several grounds."); *see, e.g.*, Toolson v. New

Barrett[196] explains, statutory stare decisis is often defended under two primary lines of thought.[197] First, some believe that if Congress has failed to amend a statute (say, for example, SORNA) after the Court's first attempt at construing its meaning (here, the decision in *Reynolds*), then Congress has acquiesced to the Court's interpretation.[198] Otherwise, the theory goes, Congress would not have remained silent but would have taken legislative action to correct the Court's interpretive mistake.[199] Second, others believe that statutory stare decisis is a defensible doctrine because of separation of powers concerns.[200]

According to then-Professor Barrett, the separation of powers approach to statutory stare decisis was prominently supported by Justice Black.[201] He believed that statutory interpretation necessarily involves some level of policymaking—a task the judiciary should be reluctant to engage in.[202] Accordingly, Justice Black's position was that if the Court must engage in policymaking to resolve a case or controversy, it should do so as infrequently as possible.[203] In other words, it should make a policy determination only once and allow the interpretation to stand unless instructed otherwise by Congress.[204] Professor Lawrence Marshall takes a slightly different view than Justice Black.[205] Rather than viewing statutory stare decisis as a "constitutional mandate," Professor Marshall views the doctrine as "an

York Yankees, Inc., 346 U.S. 356, 357 (1953) (refusing to revisit an earlier statutory interpretation of federal antitrust laws). *But see* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1427–39 (1988) (providing examples of when the Court *has* opted to overrule its past statutory interpretations).

196. Amy Coney Barrett is now a judge on the United States Court of Appeals for the Seventh Circuit. *See* David G. Savage, *Amy Coney Barrett Is the Favorite of Social Conservatives, but Democrats are Already Taking Aim*, L.A. TIMES (July 9, 2018, 6:00 AM), https://www.latimes.com/politics/la-na-pol-amy-barrett-supreme-court-20180709-story.html (noting that Barrett was confirmed by the United States Senate in 2017).

197. Barrett, *supra* note 194, at 322.

198. *Id.* ("The rationale that has been discussed most widely in both the cases and commentary is the one I will call 'congressional acquiescence'—the belief that congressional inaction following the Supreme Court's interpretation of a statute reflects congressional acquiescence in it.").

199. *Id.* at 322–23.

200. *Id.* at 323.

201. *Id.* at 325 ("Justice Black is closely associated with the Supreme Court's statutory stare decisis doctrine, for he was one of its most vocal advocates.").

202. *Id.*

203. *Id.*

204. *Id.* at 325–26.

205. *Id.* at 326 (explaining that modern textualists are less likely to follow Justice Black's separation of powers rationale and more likely to follow the rationale furthered by Professor Marshall); *see also* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 183 (1989) (arguing that "the Supreme Court should adopt an absolute rule of stare decisis for all of its statutory . . . decisions" and "that it is critical to reinvolve Congress as an active participant in [the] ongoing process of statutory lawmaking").

interpretive principle derived from, but not required by, the Constitution's separation of powers."[206] The doctrine is worthwhile, in Professor Marshall's estimation, because Congress is more likely to amend its own statutes if it can confidently predict the Court will refuse to depart from its initial interpretation unless Congress tells it to do so.[207] In brief, Professor Marshall's argument is that statutory stare decisis encourages Congress to take legislative action.[208]

Whichever rationale one finds the most persuasive, the fact remains that the Court tends to accord its prior statutory interpretations great deference.[209] This provides yet another reason why Justice Kagan was correct that *Reynolds* "effectively resolved" Gundy's case.[210] Both the *Reynolds* majority and dissent agreed that SORNA was designed to reach pre-Act and post-Act offenders.[211] Thus, to the extent that the Court was required to engage in policymaking to interpret SORNA in *Reynolds*, part of its policy determination was that Congress sought for pre-Act offenders to be covered in the overall registration scheme.[212] Under the doctrine of statutory stare decisis, there is no need to revisit that interpretation once again, despite the *Gundy* dissenters' insistence to the contrary.[213] And while adopting the dissent's position would not require directly overturning a statutory interpretation, it would undoubtedly undermine the premise on which the statutory analysis of *Reynolds* was based.[214] In sum, the *Reynolds* Court used SORNA's statutory text and legislative history to interpret the Act's purpose and effect,[215] but the *Gundy* dissenters would have the Court re-examine the

206. Barrett, *supra* note 194, at 326–27.

207. *Id.* at 327 ("In fact, to better serve that end, Marshall proposes that the Supreme Court upgrade its statutory presumption from 'super strong' to 'absolute' on the theory that if Congress knows that change can come only from it—i.e., that the Supreme Court will *never* overrule its statutory precedents—Congress will be more likely to override statutory interpretations that it does not like.").

208. *Id.* ("This version of the separation-of-powers rationale is about creating an incentive for congressional action.").

209. *See supra* note 194.

210. Gundy v. United States, 139 S. Ct. 2116, 2124 (2019) (plurality opinion) ("In *Reynolds*, the Court considered whether SORNA's registration requirements applied of their own force to pre-Act offenders or instead applied only once the Attorney General said they did. We read the statute as adopting the latter approach. But even as we did so, we made clear how far SORNA limited the Attorney General's authority. And in that way, we effectively resolved the case now before us.").

211. *See supra* notes 177–178 and accompanying text.

212. *See supra* notes 177–178 and accompanying text.

213. *See supra* notes 133–134 and accompanying text.

214. *See Gundy*, 139 S. Ct. at 2123 (plurality opinion) ("This Court has already interpreted § 20913(d) to . . . require the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible."); s*ee also id.* at 2124 ("Everything in *Reynolds* started from the premise that Congress meant for SORNA's registration requirements to apply to pre-Act offenders.").

215. *Id.* at 2124.

*Reynolds* judgment as if it never occurred.[216] The doctrine of statutory stare decisis expressly cautions against this practice.[217]

Taken together, it is evident that Congress restricted the extent of SORNA's delegation.[218] Congress did not intend to give the Attorney General total decisional authority on how to apply SORNA to pre-Act offenders, but rather to provide the Attorney General a reasonable amount of time to assess the logistical and transitional difficulties of imposing the Act's requirements on pre-Act offenders and to develop a plan so that they too would be subject to SORNA.[219] The Court has routinely upheld precisely this type of delegation.[220] If there is a case to be made for reviving the nondelegation doctrine, *Gundy* certainly is not it.

### *B. The Court Correctly Applied the Intelligible Principle Test and Recognized That There Are Many Areas of Permissible Delegation*

Not only has the plurality applied a standard (i.e. the intelligible principle standard) that is consistent with constitutional stare decisis,[221] the plurality also has left open the door to using other interpretive mechanisms to limit the amount of discretion Congress can confer to administrative agencies.[222] Thus, a correct statutory reading of SORNA easily leads to the conclusion that the Act did not contain an unconstitutional delegation of legislative power.[223]

#### *1. The Plurality's Opinion Is Consistent with the Doctrine of Constitutional Stare Decisis*

Just as the doctrine of statutory stare decisis provides support for the *Gundy* plurality's opinion, so too does constitutional stare decisis.[224] As Section II.C explains, nondelegation inquiries have long been conducted under the intelligible principle standard.[225] Recall the intelligible principle standard requires only that Congress provide a "broad general directive[]" to

216. *Id.* at 2148 (Gorsuch, J., dissenting) ("*Reynolds* would make a difference only if it bound us as a matter of *stare decisis* to adopt an interpretation inconsistent with the statute's terms. And, of course, it does no such thing.").

217. *See supra* notes 203 and 207 and accompanying text.

218. *See supra* note 115 and accompanying text.

219. *See Gundy*, 139 S. Ct. at 2130 (plurality opinion) (noting that Congress is "dependent" on "executive officials to implement its programs").

220. *See infra* Section IV.B.

221. *See infra* Section IV.B.1.

222. *See infra* Section IV.B.2.

223. *Gundy*, 139 S. Ct. at 2129 (plurality opinion).

224. *See id.* at 2124 ("Given [our statutory interpretation], Gundy's constitutional claim must fail. Section 20913(d)'s delegation falls well within permissible bounds.").

225. *See supra* Section II.C.

guide the delegee's exercise of power.[226] And recall that the Court has applied the intelligible principle test to every contested delegation since 1935 and has—with only two exceptions—always found that Congress provided an intelligible principle somewhere within the delegating act.[227]

So, the relevant question is: Is SORNA finally an example of a post-1935 legislative act that has delegated power to the executive branch yet failed to provide an intelligible principle? For the reasons that follow, the answer to that question has to be no.

Section 20913(d) provides an "intelligible principle" to guide the Attorney General's exercise of authority.[228] The provision requires the Attorney General to apply the registration requirements of SORNA to pre-Act offenders "as soon as feasible."[229] Put differently, the Attorney General had no choice but to require pre-Act offenders to register (just like their post-Act offender counterparts) as soon as the Department of Justice resolved any transitional and practical difficulties inherent to implementing SORNA.[230] Feasibility standards are admittedly imprecise by definition, but the intelligible principle standard does not—nor has it ever been construed to—require exactitude.[231] And though the dissent feared that a feasibility standard would be immune from meaningful judicial review,[232] that fear is unfounded. Suppose the Attorney General refused to apply SORNA's registration requirements to pre-Act offenders for no other reason than he just did not feel like it. In such an instance, the Attorney General clearly would have abandoned his responsibility under section 20913(d) to apply those registration requirements "as soon as feasible."

But cast aside, for a moment, the feasibility standard and assume the *Gundy* dissenters are correct that it is not plausible to read such a standard into section 20913(d).[233] Are there any other intelligible principles to be found in SORNA? A thorough reading of SORNA's text reveals that there are indeed. Not only does SORNA limit the universe of offenders who must register to only sex offenders, it even identifies which subset of sex offenders

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

227. *See supra* text accompanying note 106.

228. *Gundy*, 139 S. Ct. at 2123–24 (plurality opinion).

229. *Id.* at 2121; *see also supra* note 108 and accompanying text.

230. *Gundy*, 139 S. Ct. at 2129 (plurality opinion) ("The statute conveyed Congress's policy that the Attorney General require pre-Act offenders to register as soon as feasible. Under the law, the feasibility issues he could address were administrative—and, more specifically, transitional—in nature.").

231. *See supra* Section II.C.

232. *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting).

233. *See supra* text accompanying notes 181–182. As discussed *supra*, there are many reasons to believe that the feasibility standard is, in fact, a reasonable interpretation of the section 20913(d) mandate. *See supra* Section IV.A.1.

are subject to the registration requirements.[234] It tells us what information those sex offenders must provide to be SORNA compliant.[235] It tells us how quickly after changing their "name, residence, employment, or student status" a sex offender must update their registration information to remain SORNA compliant.[236] And, of course, SORNA tells us what criminal penalty attaches for those who fail to comply with the law's demands.[237] In effect, each of these provisions are an example of policies or standards that confine the Attorney General's discretion. And, returning to the feasibility standard, SORNA also tells us when the Attorney General must apply each of these standards to the pre-Act offenders—the Attorney General must do so as soon as feasible.[238] As a result, it is hardly difficult for SORNA to pass the intelligible principle test.[239]

For good measure, consider two other instances when the Court has identified an intelligible principle. In *Touby v. United States*[240]—a case about the Controlled Substances Act—the Court upheld the constitutionality of a statutory amendment that allowed the Attorney General to temporarily classify so-called "designer drugs" as schedule I controlled substances.[241] And what "intelligible principle" did Congress provide the Attorney General in those instances? It required only that the Attorney General consider "three of the eight factors required for permanent scheduling" and that the Attorney General determine that scheduling was necessitated because of an immediate hazard to public safety.[242] *Touby* is also notable for what it did not require. It did not require the Attorney General to engage in the formal administrative rulemaking process nor did it provide *any* opportunity for meaningful judicial review.[243] And even though the Attorney General's scheduling of a substance would have the effect of criminalizing that substance's use, the Court still concluded it was not an unconstitutional delegation of power.[244]

234. 34 U.S.C. § 20911 (2018) (defining the term "sex offense" and explaining that some sex offenses, such as those involving consensual sexual conduct, are not implicated by SORNA's registration requirements).

235. *Id.* § 20914(d) (explaining that sex offenders must provide, among other things, their name, social security number, residential address, and license plate number).

236. *Id.* § 20913(c) (explaining that the offender must appear in person to notify a sex offender registry official of any changes within three business days of such a change occurring).

237. *Id.* § 20913(e) ("Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.").

238. *See supra* Section IV.A.

239. *Gundy*, 139 S. Ct. at 2129 (plurality opinion).

240. 500 U.S. 160 (1991).

241. *Id.* at 162–63, 169.

242. *Id.* at 163 (citing 21 U.S.C. § 811(h)).

243. *Id.*

244. *Id.* at 169.

Before *Touby*, the *Mistretta* Court upheld the creation of a federal Sentencing Commission, even though the Commission was given the power to impose binding sentencing ranges on federal trial judges.[245] Although the Commission was required to consider certain factors as it made its determinations, Congress left it to the Commission to determine which crimes should be considered similar for purposes of sentencing.[246] Congress also charged the Commission with the ability to make determinations about the severity of offenses.[247]

Thus, it cannot be disputed that the delegations in *Touby* and *Mistretta* gave a great amount of discretion to the Attorney General and Sentencing Commission, respectively. And yet, even then, nearly every member of the Court agreed that the delegations were constitutionally permissible.[248] The discretion in SORNA is nowhere near as great. Unlike in *Mistretta*, in which the Commission was empowered to determine the severity of criminal sanctions, SORNA accords the Attorney General no comparable power. Once the Attorney General resolves the transitional difficulties of SORNA, both pre-Act and post-Act offenders must be treated exactly the same.[249] SORNA also tells us what penalties non-compliant sex offenders will face.[250] And, unlike in *Touby*, which effectively permitted the Attorney General to make a policy judgment about whether a given substance posed a threat to the public,[251] the Attorney General is only permitted to delay enforcing SORNA against pre-Act offenders for feasibility reasons.[252] If the delegations in *Touby* and *Mistretta* posed no nondelegation concern, *Gundy* should have been a slam dunk.[253] It is telling indeed that when asked to determine the constitutionality of SORNA "all federal circuit courts addressing the issue had rejected . . . nondelegation challenges."[254]

For its part, the dissent made clear that it found little value in the Court's nondelegation precedents.[255] Unable to rely on the intelligible principle standard to strike down section 20913(d), the dissent instead offered an

245. Mistretta v. United States, 488 U.S. 361, 369 (1989).

246. *Id.* at 377–78.

247. *Id.* at 377.

248. *See supra* note 100 (noting that Justice Scalia was the lone dissenter in *Mistretta*). There was no dissenting opinion in *Touby*.

249. Gundy v. United States, 139 S. Ct. 2116, 2123–24 (2019) (explaining that the Attorney General *only* has discretion to consider and address SORNA's feasibility issues).

250. 34 U.S.C. § 20913(e) (2018).

251. *See supra* note 242 and accompanying text.

252. *See supra* note 249.

253. *Gundy*, 139 S. Ct. at 2129 (asserting that determining SORNA's constitutionality "is easy").

254. Wayne A. Logan, Gundy v. United States*: Gunning for the Administrative State*, 17 OHIO ST. J. CRIM. L. 185, 185 (2019).

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

entirely different test for nondelegation challenges.[256] But its proposed tripartite test is nowhere to be found in *Touby*, *Mistretta*, or any other recent nondelegation case. As a result, the dissent's approach cannot be reconciled with principles of constitutional stare decisis. As Section IV.C.3 explains, it is hard to know if the delegations in *Touby* or *Mistretta* could survive the dissent's reformulated nondelegation standard.[257]

### *2. Overbroad Delegations Can Already Be Narrowed or Invalidated Through Existing Interpretive Mechanisms*

Nondelegation doctrine aside, there are already other ways, including the substantive canons of statutory construction, for the Court to curb broad acts of delegation—and the *Gundy* plurality has done nothing to preclude the Court from using those methods in future cases. As this Section explains, the void for vagueness canon, canon of constitutional avoidance, and major questions doctrine each remain avenues to limit acts of Congressional delegation.

First, Justice Gorsuch noted in his dissent that the Court's void for vagueness doctrine remains an avenue for challenging laws that could be applied arbitrarily.[258] It tells us that the Court may invalidate laws that either (1) fail to give fair notice of what conduct is prohibited, or (2) are so standardless that they effectively encourage arbitrary or discriminatory enforcement.[259] In either instance, the challenged legislation violates principles of due process.[260] And according to the *Gundy* dissent, "most any challenge to a legislative delegation can be reframed as a vagueness complaint."[261]

Second, though perhaps more controversial, there is the canon of constitutional avoidance.[262] This canon expresses the idea that if the Court is presented with a construction of a statute that raises constitutional doubt, the Court should instead construe the statute to avoid the constitutional problem "unless such [a] construction is plainly contrary to the intent of Congress."[263] The rationale for the avoidance canon was summarized most

256. *See supra* Section III.

257. *See infra* Section IV.C.3.

258. *Gundy*, 139 S. Ct. at 2142.

259. Emily M. Snoddon, Comment, *Clarifying Vagueness: Rethinking the Supreme Court's Vagueness Doctrine*, 86 U. CHI. L. REV. 2301, 2302 (2019).

260. *Id.*

261. *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J. dissenting).

262. *See* VALERIE C. BRANNON, CONG. RESEARCH SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 29–30 (2018) (providing an explanation of the substantive canons of statutory construction).

263. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (citing NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 499–501, 504 (1979)); *see*

effectively by Justice White[264]: Because Congress (like the Court) "swears an oath to uphold the Constitution," the Court should be reticent to assume that Congress would draft a statute that violates the Constitution.[265]

Despite its routine use, the avoidance canon has garnered criticism from legal scholars, especially those who approach statutory interpretation from a textualist perspective.[266] As Judge Barrett has argued, substantive canons like constitutional avoidance can be used in a manner that is *inconsistent* with congressional intent.[267] One can think of this use of constitutional avoidance—the variety that "advance[s] policies *independent* of those expressed in the statute"[268]—as "aggressive avoidance." And indeed, reluctance to embrace aggressive avoidance has a great deal of logical appeal. When the Court strains itself to find *any* interpretation that will avoid constitutional conflict, even if highly implausible and likely contrary to Congress's true intent, the Court has not acted as a faithful agent of Congress.[269] It has instead rewritten the statute as if the Court were itself a legislature.[270] It may be a fine line to draw, but there is a distinction between interpreting the law, on the one hand, and entirely reshaping a legislative enactment, on the other.[271]

Still, textualists (Judge Barrett and the late Justice Antonin Scalia among them) agree that this concern fades away when two competing statutory interpretations are *equally* plausible and only one of those interpretations raises constitutional doubt.[272] One can think of this as "standard avoidance." In those instances, the avoidance canon serves only

*also* BRANNON, *supra* note 262, at 29 (noting that the avoidance canon urges reading statutes in a manner that "avoid[s] the constitutional issue").

264. *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

265. *Id.*

266. *See generally* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010) (explaining the tension between substantive canons of construction and "a strong commitment to legislative supremacy"); *see also* Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy, Kisor, *and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 169–76 (2019) (arguing that the *Gundy* plurality aggressively applied the avoidance canon).

267. Barrett, *supra* note 266, at 110 ("A court applying a canon to strain statutory text uses something other than the legislative will as its interpretive lodestar, and in so doing, it acts as something other than a faithful agent.").

268. *Id.* (emphasis added).

269. *Id.*

270. *See id.* (noting that an important component of statutory interpretation is the notion of legislative supremacy).

271. *See id.* at 123–24 ("Substantive canons are in significant tension with textualism, however, insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute.").

272. *Id.* at 123 ("Substantive canons [like constitutional avoidance] are in no tension with faithful agency insofar as they are used as tie breakers between equally plausible interpretations of a statute. Textualists have no difficulty taking policy into account when language is ambiguous.").

as "an interpretive tiebreaker—[in other words,] if there are two equally plausible readings of the statute, the avoidance canon selects the winner."[273] The competing interpretations of SORNA are precisely such an example.[274] And in this way, using the canon of constitutional avoidance to read a feasibility standard into section 20913(d) is a result that is consistent with textualism because the feasibility standard is an equally (if not more) reasonable reading of SORNA.[275] Thus, one of the more persuasive criticisms of the avoidance canon—that it can be used to "select the *less* plausible interpretation if doing so avoids constitutional difficulties"[276]—is inapplicable here.[277]

Finally, the *Gundy* dissenters remind us that the Court has used the major questions doctrine to invalidate agency actions that have substantial economic and political effects.[278] As a general matter, Congress authorizes agencies to take certain actions by drafting authorizing statutes.[279] Often those statutes contain ambiguities.[280] And under a well-known administrative law doctrine known as *Chevron* deference, the agencies themselves are given leeway to adopt a reasonable interpretation of ambiguous statutory directives.[281] So long as the agency's interpretation is

273. Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV., 1275, 1280 (2016).

274. *See supra* text accompanying notes 186–187.

275. *See supra* text accompanying note 188.

276. Fish, *supra* note 273, at 1280 (emphasis added).

277. *But see* Bamzai, *supra* note 266, at 169 ("The plurality's method of interpreting SORNA is an aggressive, albeit implicit, application of the principle that the Court can address nondelegation challenges by 'giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.'" (quoting Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989))).

278. Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) ("But we don't [allow an executive agency to fill in statutory gaps] when the 'statutory gap' concerns 'a question of deep "economic and political significance" that is central to the statutory scheme.'" (quoting King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015))).

279. Joshua S. Sellers, *"Major Questions" Moderation*, 87 GEO. WASH. L. REV. 930, 932 (2019).

280. *Id.*

281. *Id.*; *see also* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (citations omitted); David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 205–06 (2001) ("In the beginning (at least for the purposes of this article), there was *Chevron*. The question in that case concerned whether the Environmental Protection Agency (EPA) had acted lawfully when it issued a rule, in accordance with applicable notice-and-comment procedures, defining the term 'stationary source' in the Clean Air Act to refer to whole plants, rather than each pollution-emitting device within them. In sustaining the rule, the Court prescribed a by now well-known, two-step inquiry to govern judicial review of an agency's interpretation of a statute that the agency administers. The first question is

reasonable, it will be left undisturbed if challenged in court.[282] But there is an exception. Under the major questions doctrine, the agency action receives considerably less deference when the statutory ambiguity is one that is a matter of great political or economic significance.[283] In these instances, the Court has the ability to override the agency's interpretation.[284]

So, if these interpretive mechanisms (among others) exist as means to cabin the amount of authority conferred to the executive branch by legislative enactments, why the sudden need to overrule well-settled law to resuscitate a doctrine that has long been relegated to the legal history books? The dissent does not offer a sufficiently compelling reason.[285]

### *C. The Court Underemphasized the Practical Consequences of Reviving the Nondelegation Doctrine*

The *Gundy* Court correctly recognized that nondelegation inquiries are basically statutory analyses.[286] Thus, as one might expect, Justice Kagan spent the bulk of her opinion walking through the plurality's statutory interpretation of SORNA.[287] After identifying an intelligible principle in section 20913(d) (i.e. the feasibility standard), the plurality concluded that SORNA—like so many statutes before it—posed no nondelegation problem.[288] But largely lost in the plurality's opinion was a discussion of why the Court permits administrative deference in the first place and why the approach suggested by the dissent would have such profound consequences for the modern administrative state. In short, the plurality opinion does not spend much time discussing the practical problems of reviving the nondelegation doctrine other than to warn that "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional."[289] Though

'whether Congress has directly spoken to the precise question at issue'; if so, the agency must comply with that judgment. The second question, reached only if Congress failed to speak clearly, is whether the agency has adopted a 'reasonable' interpretation of the statute; if so, the courts must accept that interpretation.") (footnotes omitted).

282. Sellers, *supra* note 279, at 932.

283. *Id.* at 946 (explaining that "major questions" allow the Court to "circumvent the traditional deference regime").

284. *Id.* at 947 (noting that critics assert the major questions doctrine "has almost invariably been used in opposition to agency *action*").

285. In fact, the dissent undercut its argument that such a dramatic reversal was appropriate when it readily acknowledged that the Court has never "just throw[n] up [its] hands" in instances where "the separation of powers is at stake." Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

286. *Id.* at 2123 (plurality opinion) ("[A] nondelegation inquiry always begins (and often almost ends) with statutory interpretation.").

287. *Id.*

288. *Id.* at 2129.

289. *Id.* at 2130.

not in an exhaustive manner, this Section seeks to fill that gap. Section IV.C.1 discusses the institutional competency argument for allowing administrative agencies to exercise delegated powers.[290] Section IV.C.2 explains that upholding acts of congressional delegation promotes judicial restraint.[291] Lastly, Section IV.C.3 examines the logistical complications inherent to a revival of the nondelegation doctrine.[292]

### *1. The Current Application of the Nondelegation Doctrine Recognizes the Institutional Competencies of the Respective Branches of Government*

As an initial matter, it is worth considering why the Court should (and does) permit delegations of power in the first place. One of the main reasons for allowing limited delegations of authority is that Congress cannot perform its lawmaking function if it is bogged down by the minutiae of implementing those governmental programs itself.[293] A complementary argument can be made that, at least in some instances, an executive department or agency is more institutionally competent to work through the nuances of administering a complex law than a legislative body.[294] As such, Congress simply assigns this work to those administrative agencies.[295]

This argument is especially compelling in instances when the agency is tasked with resolving issues that are highly technical or scientific in nature.[296] But even when the delegation is not because a heightened level of expertise is needed (for example, if the delegation exists to address feasibility concerns), an administrative agency may still be the better institution to deal with the underlying problem.[297] In these instances, there is simply no need for Congress to expend the time necessary to contemplate every possible transitional hurdle involved in enforcing a new statutory scheme. The intelligible principle standard, thus, recognizes that Congress should instead

290. *See infra* Section IV.C.1.

291. *See infra* Section IV.C.2.

292. *See infra* Section IV.C.3.

293. *See supra* text accompanying note 101.

294. *See supra* note 219.

295. *See* Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1602 (2018) (explaining that "[t]he administrative state was designed by Congress" itself).

296. *Id.* at 1647 ("But properly applied, the doctrines that instruct courts to defer to agencies involve well-thought-out agency policies informed by scientific judgments, longstanding acquaintance with the issues involved or express delegations from Congress to make particular determinations.").

297. *Id.* at 1651 ("In today's world of global interdependence and economic, political, and security threats emerging from every corner of the planet, any other course of action for the United States [other than one involving a regulatory regime] would be foolhardy.").

focus on the "big picture," not the intricacies of enforcing the law.[298] Indeed, this is the purpose of the executive branch.

Additionally, limited delegation of policymaking power to the executive branch allows agencies to "respond to changing circumstances" (via the administrative rulemaking process) more quickly than is possible through the traditional legislative process.[299] Consider, for example, how SORNA might have been affected had Congress specified a particular timeline for enforcement of the registration requirements against pre-Act offenders. Say section 20913(d) mandated a five-year phase-in period before SORNA's registration requirements would apply to pre-Act offenders but that the Attorney General found a workable solution that could be implemented within six months. What reason would there be to prevent the Attorney General from acting swiftly? And outside of the SORNA context, the examples are even clearer. Suppose a vehicle safety report was released that recommended a new (and relatively inexpensive) innovation in airbag equipment that could save thousands of lives. Is there any good reason to wait for Congress to pass a new piece of legislation when the Department of Transportation, staffed with experts on automotive safety, could do so more quickly? Probably not—especially given that those agency experts are still required to follow the intelligible principle(s) that Congress has provided to guide its decisional authority.[300]

### *2. The Current Application of the Nondelegation Doctrine Recognizes the Value of Judicial Restraint*

In his impassioned dissent in *Gundy*, Justice Gorsuch extolled the virtues of the separation of powers and political accountability and explained the thought process undergirding the Framers' design of the American constitutional structure.[301] According to the dissent, these principles and foundational history cannot be squared with the Court's current approach to

298. *See id.* at 1609 ("Legislatively, for the most part Congress has been supportive of the administrative state. After all, the existence and structure of federal agencies is based on statutes passed by Congress. Congress consistently delegates authority to administrative agencies, shields some of them from complete presidential control, and prescribes deferential judicial review of agency action while occasionally exempting some agency actions from review altogether.").

299. Kathryn E. Kovacs, *Did the Dissent in* Gundy v. United States *Open Up a Can of Worms?*, AM. CONST. SOC'Y: EXPERT F. (June 24, 2019), https://www.acslaw.org/expertforum/did-the-dissent-in-gundy-v-united-states-open-up-a-can-of-worms/.

300. *See supra* Section II.C (explaining the intelligible principle standard).

301. Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (explaining that the Framers believed our system of governance would be frustrated if Congress were permitted to "announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals").

the nondelegation doctrine.[302] Yet, the approach the dissent proposed would raise a jurisprudential dilemma of a different kind—namely, whether it gives due respect to the value of judicial restraint. And indeed, this argument complements the institutional competency argument.[303]

When Congress decides to delegate power from itself to the executive branch, it is doing so because it has made a judgment that the executive branch can properly exercise that delegated power. But successful invocations of the nondelegation doctrine necessarily mean that the Court has used its power of judicial review to substitute its judgment over that of Congress.[304] Of course, no one suggests that this means Congress can never go too far in its delegations. In some instances, the congressional delegation of power may be so all-encompassing that it offends the separation of powers. And in these situations—situations where there is no intelligible principle to guide the delegee's exercise of power—the nondelegation doctrine remains a viable option. Even still, without reaching the nondelegation question, the Court will likely be able to invoke the major questions doctrine or a substantive canon of statutory construction to read the delegation narrowly.[305] And if the Court chooses to adopt an equally plausible (yet narrower) interpretation to avoid a constitutional conflict, the Court is acting as a faithful agent of Congress by giving meaning to the statutory language embedded within the challenged act.[306]

Still, larger problems with reviving the nondelegation doctrine exist. Judges may resort to their own ideological priors and policy preferences to distinguish permissible delegations from those that are impermissible.[307] Take, for example, one of the prongs of the dissent's tripartite analysis—the "fill up the details" test.[308] How is the Court supposed to distinguish a

302. *Id.* at 2139 (arguing that the intelligible principle standard has "take[n] on a life of its own" that is completely divorced from its original meaning and context).

303. *See supra* Section IV.C.1.

304. In other words, the Court is overriding Congress's judgment that certain details are best left to the Executive to discern. *See* Lisa Heinzerling, *How the Supreme Court Created a Constitutional Case Against the Administrative State*, AM. CONST. SOC'Y: EXPERT F. (Aug. 29, 2018), https://www.acslaw.org/expertforum/how-the-supreme-court-created-a-constitutional-case-against-the-administrative-state/ ("As Justice Scalia once wrote, given the 'multifarious' and 'highly political' nature of the relevant inquiry, 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 that law.'"). This judgment substitution takes shape in the most dramatic fashion—eliminating entire provisions of legislative enactments. *See id.*

305. *See supra* Section IV.B.2.

306. Barrett, *supra* note 266, at 123.

307. Heinzerling, *supra* note 304 ("A large worry is that unelected judges applying a revitalized nondelegation doctrine would be left to follow their own, personal impulses in drawing the line separating acceptable from unacceptable delegations.").

308. Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

"detail" from an integral part of a statutory scheme? The dissent does not tell us. As a consequence, there is little to stop the "fill up the details" test from becoming anything more than a subjective value judgment by the reviewing court.[309]

Judicial overreach becomes even more troublesome given that the risk would be created by disregarding nearly a century of precedent because, according to the dissenters, the Court seems to have misunderstood a key aspect of constitutional law each time it has been asked to resolve a case about it.[310] In essence, the dissent has argued that time and time again the Court has applied the wrong standard to contested acts of delegation.[311]

And even though the dissent cleverly characterizes its approach as a mere return to the "traditional rule" of nondelegation,[312] everyone—including the dissent's author—acknowledges that the dissent's proposed standard is a significant departure from the approach to nondelegation inquiries that the Court has used in every nondelegation challenge since 1935.[313] Given this history, adopting the dissent's tripartite approach and discarding the intelligible principle standard as it has been applied for the last eighty-five years would embody judicial hubris of the very worst kind.

### *3. Reviving the Nondelegation Doctrine Would Result in a Logistical Nightmare*

Finally, it remains unclear how the dissent would apply its proposed standard to the acts of delegation (too numerous to name) that have survived under the existing intelligible principle standard but would trigger scrutiny under the dissent's tripartite test.[314] Indeed, the Court's longstanding approach to the nondelegation doctrine has proven imminently workable because only the most egregious acts of delegation come within its reach.[315] This has in turn given Congress the ability mostly to determine for itself

309. *Id.*

310. *See supra* Sections II.B–C, IV.B.

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

312. *Id.* at 2139.

313. *See id.* at 2130 (plurality opinion) (explaining that "most of Government is unconstitutional" under the dissent's view of nondelegation); *see also id.* at 2130–31 (Alito, J., concurring) (noting that SORNA's delegation is permissible "under the approach [the] Court has taken for many years"); *id.* at 2139 (Gorsuch, J., dissenting) (arguing that the dissent's approach is a return to a "more traditional separation-of-powers test[]" and a departure from the Court's "mutated version of the 'intelligible principle'" test).

314. *See* Brief for the United States at 56, *Gundy*, 139 S. Ct. 2116 (No. 17-6086) ("If petitioner means to argue that Congress can never confer authority on the Executive to make such determinations, his rule would be at odds with this Court's many decisions to the contrary, and it would frustrate Congress's ability to enlist the Executive's assistance in dealing with complex and changing problems." (citations omitted)).

315. *See supra* note 76 and accompanying text.

which decisions are best left to departmental and agency experts,[316] and it has prevented the courts from becoming overburdened with nondelegation claims.[317] Most importantly, it recognizes the large role the administrative state now plays in American government.[318] Congressional delegations are simply a fact of life in modern governance.[319] Everything from clean air standards[320] to financial regulation,[321] food and drug laws,[322] and workplace safety rules[323] are a product of the administrative process that necessarily involve delegations of power from Congress to administrative agencies.[324] In fact, (depending on who you ask) there are more than 400—yes, 400—administrative agencies responsible for making these determinations.[325] And all of these agencies exist because Congress has delegated power to them to

316. William D. Araiza, *Toward a Non-Delegation Doctrine That (Even) Progressives Could Like*, AM. CONST. SOC'Y SUP. CT. REV., 2018-2019, at 211, 219–220, https://www.acslaw.org/wp-content/uploads/2019/10/ACS-Supreme-Court-Review-2018-2019.pdf (noting that Congress often delegates power in the face of a lack of substantive expertise or because of Congress's own "institutional inflexibility"); *see also supra* Section IV.B.

317. *See* Erwin Chemerinsky, *Chemerinsky: How the Roberts Court Could Alter the Administrative State*, AM. BAR ASS'N J. (Sept. 4, 2019), http://www.abajournal.com/news/article/chemerinsky-the-roberts-court-could-alter-the-administrative-state (explaining that new limits on the administrative state would lead to an increase in "judicial review of agency decisions").

318. Nicholas Bagley, *"Most of Government Is Unconstitutional,"* N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/opinion/sunday/gundy-united-states.html ("Since 1935, the Supreme Court has approved laws telling agencies to regulate 'in the public interest' and to set pollution standards 'requisite to protect the public health.' Not once in the 84 years since has the Supreme Court invalidated a law because it offends the so-called nondelegation doctrine.").

319. *See, e.g.*, Beermann, *supra* note 295, at 1602 ("Administrative state skeptics, especially in the academy . . . continue to take aim at the heart of the administrative state. Unfortunately for administrative state skeptics, the courts and Congress consistently turn those efforts back, maintaining the features of the administrative state by and large intact.").

320. *Id.* at 1612 ("[A]nd any suggestion that the Court was ready to reinvigorate the nondelegation doctrine was laid to rest in the Court's 2001 decision upholding a key provision of the Clean Air Act against a nondelegation challenge."). *But see* Gundy v. United States, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting) (arguing in favor of a reinvigorated nondelegation doctrine).

321. *See* Beermann, *supra* note 295, at 1646 ("The regulatory standards enforced through inspections and subpoenas protect the physical and financial well-being of millions of people, ranging from workers who rely on OSHA safety standards in their workplaces to patients who rely on the FDA to ensure the safety of drugs, medical devices, and food products to investors who rely on the SEC and other agencies to ensure the safety of financial products and markets.").

322. *Id.*

323. *Id.*

324. *Id.* at 1612

325. *See* Clyde Wayne Crews Jr., *How Many Federal Agencies Exist? We Can't Drain The Swamp Until We Know*, FORBES (July 5, 2017), https://www.forbes.com/sites/waynecrews/2017/07/05/how-many-federal-agencies-exist-we-cant-drain-the-swamp-until-we-know/#4f9078f21aa2 (explaining the difficulty of counting how many federal agencies there are).

create rules and regulations germane to their respective areas of expertise.[326] But if the intelligible principle standard were tossed away, all of these delegations could presumably be litigated (or re-litigated) in the federal courts.[327] Whether they would survive is anyone's guess.

Thus, as Professor Lisa Heinzerling has explained, the consequences of reviving the nondelegation doctrine would be devastating for the U.S. regulatory framework.[328] According to Professor Heinzerling:

> In determining the constitutional validity of the modern administrative state, the nondelegation doctrine is the big one. The only doctrine that could come close, in terms of damage to the premises underlying the administrate state, would be the substantive due process theory embraced and then abandoned in the first half of the twentieth century.[329]

Not to worry, the *Gundy* dissent says,[330] *some* already-approved delegations are consistent with its reformulated standard.[331] But left unsaid is which (or how many) delegations would not survive. More to the point, the dissent does not explain—as a practical matter—how the courts, Congress, and the executive branch would clean up the mess that would be made if countless acts of delegation suddenly became constitutionally nonviable.[332] Certainly, these are questions that must be answered before dismantling a "federal government [that has grown] explosively."[333]

## V. CONCLUSION

In *Gundy v. United States*, the Supreme Court of the United States held that section 20913(d) of SORNA does not violate the nondelegation doctrine because the provision requires the Attorney General to apply SORNA's registration requirements to pre-Act offenders "as soon as feasible."[334] The Court was correct in its judgment because the Court's statutory interpretation of SORNA was consistent with its prior decision in *Reynolds v. United States*, and because the outcome in *Gundy* was within the bounds of the intelligible

326. *See* Beermann, *supra* note 295, at 1605 ("Further, Congress has instructed federal courts reviewing the exercise of regulatory discretion to defer to agency judgments, and the courts, including the Supreme Court, have embraced that requirement with alacrity.").

327. *See* Chemerinsky, *supra* note 317.

328. Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1970 (2017).

329. *Id.*

330. Gundy v. United States, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting) (arguing the dissent's approach would not "spell doom for what some call the 'administrative state'").

331. *Id.*

332. *See* Bagley, *supra* note 318.

333. *Gundy*, 139 S. Ct. at 2137.

334. *See supra* note 108 and accompanying text.

principle test that the Court has used in nondelegation cases since 1935.[335] But the plurality's opinion would have been more persuasive had it emphasized the negative practical consequences likely to follow from adopting the dissent's position.[336]

335. *See supra* Section IV.A–B.

336. *See supra* Section IV.C.