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Deus Ex Regula: A Specific Theory of the Nondelegation Doctrine in Light of *Gundy v. United States*, 53 UIC J. Marshall L. Rev. 1047 (2021)

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DEUS EX REGULA: A SPECIFIC THEORY OF THE NONDELEGATION DOCTRINE IN LIGHT OF GUNDY V. UNITED STATES

POLATIP SUBANAJOUY*

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I. INTRODUCTION

“MAN is born free; and everywhere he is in chains.”¹

People are born with the natural rights to life, liberty, and property, but in a state of nature, where they sit without organized society, their lives are “solitary, poore, nasty, brutish, and short.”² To make life more sociable, rich, pleasant, peaceful, and long, people sacrifice their natural rights as consideration for the social contract.³ The social contract is an agreement to establish a

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1. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT & DISCOURSES 5 (G.D.H. Cole trans., London, Toronto, & New York, J.M. Dent & Sons Ltd. & E.P. Dutton & Co. 1923) (1762).

2. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 269 (Thomas Hollis ed., London, A. Millar *et al.* 1764) (1689) (using “e[s]tate” to refer to property and “property” to refer to natural rights); 1 CHARLES-LOUIS DE SECONDAT, BARON DE LA BRÉDE ET DE MONTESQUIEU, THE COMPLETE WORKS OF M. DE MONTESQUIEU 4-6 (London, T. Evans & W. Davis 1777) (1748) (theorizing that peace, not war, first characterizes a state of nature); THOMAS HOBBS, LEVIATHAN 97 (Clarendon Press 1909) (1651).

3. LOCKE, *supra* note 2, at 314-16; ROUSSEAU, *supra* note 1, at 14 (“But, as men cannot engender new forces, but only unite and direct existing ones, they have no other means of preserving themselves than the formulation, by aggregation, of a sum of forces great enough to overcome the resistance.”). *But see* Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 16-17 (2006) (rejecting social contract theory, because natural rights are not sacrificed as consideration for the social contract,

commonwealth to protect civil rights derived from those natural rights.⁴ Generations following the founding generation implicitly consent to be bound to the social contract by accepting the benefits of the commonwealth, such as military protection, and having the right to vote for representatives.⁵ The Constitution of the United States is the social contract for the United States, and the People, not the States, established that social contract.⁶ Citizens of the United States benefit by participating in the construction of vague provisions of the Constitution, such as through social activism.⁷

The origins of the Nondelegation Doctrine lie not in the Constitution but in the social contract theory upon which the Constitution was founded and is sustained, such as the Legislative Vesting Clause.⁸ Separation of powers principles underlie those

but, instead, governmental legitimacy depends on laws proper in not violating a person's rights and necessary for protecting other people's rights).

4. LOCKE, *supra* note 2, at 314-16.

5. See LOCKE, *supra* note 2, at 322 (justifying taxation); cf. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 280-85 (Bob Loomis & Lara Heimert eds. 2012) (proposing that constructions of vague constitutional provisions concerning gender equality anterior to the Nineteenth Amendment should prevail over constructions of vague constitutional provisions concerning the same posterior to the Nineteenth Amendment, for popular sovereignty legitimizes the former).

6. *McCulloch v. Maryland*, 17 U.S. 316, 412, 428-29 (1819) (employing structural reasoning to derive principles regarding the scope of federal power). *Contra* 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL & LEGAL HISTORY: FROM THE FOUNDING TO 1896, at 56-63 (Melvin I. Urofsky & Paul Finkelman eds., 3d ed. 2008) (featuring the Kentucky and Virginia Resolutions, which Thomas Jefferson and James Madison wrote respectively in opposition to four statutes: Naturalization Act, ch. 54, 1 Stat. 566 (1798) (repealed by Act of April 14, 1802, ch. 28, 2 Stat. 153); Aliens Act, ch. 58, 1 Stat. 570 (1798) (expired June 25, 1800); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired Mar. 3, 1801) [collectively, "Alien and Sedition Acts"]) [hereinafter, "CONSTITUTIONAL LAW & HISTORY DOCUMENTS"]. The Kentucky and Virginia Resolutions argued for compact theory, where the States, not the People, established the Constitution, and therefore Congress had no power to pass the Alien and Sedition Acts, the States retaining that power. *Id.*

7. JACK M. BALKIN, LIVING ORIGINALISM 74-81 (Elizabeth Knoll ed. 2011) (describing Constitutional Redemption as a theory that the Constitution contains many vague provisions, over which many people are enticed to construe and through which thereby the grand constitutional scheme reinforces popular sovereignty and itself).

8. Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 416-17 (2017) ("Unlike the U.S. Constitution, most state constitutions make direct reference to the nondelegability of legislative powers and do so in a number of ways."); compare, e.g., PENN. CONST. art. III, § 31 (prohibiting delegations of certain legislative powers "to any special commission, private corporation[,] or association"), with U.S. CONST. (lacking any explicit references to limitations in delegations between branches of government). *But see* *Touby v. United States*, 500 U.S. 160, 164-65 (1991) (deriving the Nondelegation Doctrine from U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.") [hereinafter, "Legislative Vesting Clause"]). The Legislative Vesting Clause

origins, and the Nondelegation Doctrine theoretically prohibits Congress from delegating legislative power to another branch to reinforce those principles.⁹ The Supreme Court has developed three tests to apply the Nondelegation Doctrine.¹⁰ They are the *Panama Refining Co.* test, the Intelligible Principle test, and the *American Power & Light Co.* test.¹¹ The story goes, as it is often told, that the New Deal ushered in an era of tremendous delegation of authority from Congress to President Franklin D. Roosevelt.¹² He sought to expand the administrative state, but the stringent *Panama Refining Co.* test invalidated two major sections of the National Industrial Recovery Act of 1933 (“NIRA”) and threw a wrench into those plans.¹³ However, whether resulting from political pressure or otherwise, the more lenient Intelligible Principle and *American Power & Light Co.* tests displaced the *Panama Refining Co.* test.¹⁴ The Court invalidated no other statutes or sections along nondelegation grounds, and the administrative state ballooned.¹⁵

nominally tethers the Nondelegation Doctrine to the text of the Constitution, but no nondelegation analysis actually directly derives from an interpretation or construction of the text of the Legislative Vesting Clause, in contrast to other constitutional law and its respective clauses. *See, e.g.*, *California v. Hodari D.*, 499 U.S. 621 (1991) (interpreting “seizure” of a person under U.S. CONST. amend. IV to require a laying on of hands or a submission to a show of authority and tethering thereby analysis to the actual words of the Constitution).

9. *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (“The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.”); MONTESQUIEU, *supra* note 2, at 199 (“When the legi[s]lative and executive powers are united in the [s]ame per[s]on, or in the [s]ame body of magi[s]trates, there can be no liberty[.]”).

10. *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 416-19 (1935) (the *Panama Refining Co.* test); *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (the Intelligible Principle test); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (the *American Power & Light Co.* test).

11. *See* case cited *supra* note 10 (describing the three tests the Supreme Court applies to the Nondelegation Doctrine).

12. *See* Michal R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67, 96-98 (1983) (discussing the general history of nondelegation issues during the New Deal).

13. *Pan. Ref. Co.*, 293 U.S. at 433; *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935); National Industrial Recovery Act of 1933, Pub. L. 73-67, 48 Stat. 195; *see, e.g.*, Thomas R. McCarthy & Richard W. Roberts, Jr., *American Trucking Associations v. Environmental Protection Agency: In Search and in Support of a Strong Nondelegation Doctrine*, 23 WHITTIER L. REV. 137, 143-45 (2001) (discussing the “Strong Nondelegation Doctrine” that invalidated the two sections); *Chrysler Corp. v. Brown*, 441 U.S. 281, 286 n.4 (1979) (discussing President Roosevelt’s “alphabet soup” of administrative agencies).

14. McCarthy & Roberts, Jr., *supra* note 13, at 145-47; Elizabeth C. Price, *Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman*, 48 SYRACUSE L. REV. 139, 160-63 (1998) (discussing a “switch in time that saved nine”). *But see* Whittington & Iuliano, *supra* note 8, at 429-30 (concluding that the rigidity of the *Panama Refining Co.* test is more “mythical than historical”).

15. McCarthy & Roberts, Jr., *supra* note 13, at 145-47; Price, *supra* note 14;

Many people, particularly conservatives, have criticized the administrative state.¹⁶ There has been extensive research as to whether the Nondelegation Doctrine should be reinvigorated to shrink the size of the administrative state (i.e., “big government”).¹⁷

Gundy v. United States portends to upend the Nondelegation Doctrine by revitalizing the *Panama Refining Co.* test.¹⁸ It foreshadows one of the most momentous legal paradigm shifts of the twenty-first century. Justice Alito concurred with the plurality, refusing to destabilize this regime without the collaboration of a majority of the Court.¹⁹ That concurrence was, however, tenuous, because Justice Alito expressed no administration for the plurality’s actual rationale.²⁰ Circumstances may have changed since then,

Whittington & Iuliano, *supra* note 8, at 429-30.

16. *See, e.g., The EPA Is Earning a Reputation for Abuse*, WASH. POST (May 3, 2012), www.washingtonpost.com/opinions/the-epa-is-earning-a-reputation-for-abuse/2012/05/03/gIQAucvzzT_story.html [perma.cc/XGT3-EMQ2] (noting an EPA administrator resigned over comments that the EPA’s enforcement policy was analogous to “ancient Roman soldiers’ practice of crucifying random victims in recently conquered territory”); Heath C. Dejean, *High-Stakes Word Search: Ensuring Fair and Effective IRS Centralization in Tax Exemption*, 75 LA. L. REV. 259, 260-62 (2014) (explaining the IRS’s Tea Party controversy, in which people accused the IRS of treating applications for tax exemption differently by reason of politics); and Eric Westervelt, *For VA Whistleblowers, a Culture of Fear and Retaliation*, NPR (June 21, 2018), www.npr.org/2018/06/21/601127245/for-va-whistleblowers-a-culture-of-fear-and-retaliation [perma.cc/3HNY-A7X7] (detailing rampant corruption in the United States Department of Veterans Affairs and efforts to retaliate against whistleblowers).

17. For example, Professor Keith E. Whittington and Associate Research Scholar Jason Iuliano released a groundbreaking study analyzing 2,506 cases of States applying the Nondelegation Doctrine. Whittington & Iuliano, *supra* note 8, at 418.

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

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 . . . until the late 1940s. Only then did lawyers begin digging it up in earnest and arguing to this Court that it had somehow displaced (*sub silentio* of course) all prior teachings in this area.

Id.

19. *Id.* at 2131 (Gorsuch, J., dissenting) (“But Justice Alito supplies the fifth vote for today’s judgment and he does not join either the plurality’s constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait.”); *id.* at 2130-31 (Alito, J., concurring) (“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 had not heard the oral arguments in this case and therefore recused himself. Nicholas Bagley, *On Gundy and the Nondelegation Doctrine*, YALE J. ON REG. (June 21, 2009), www.yalejreg.com/nc/12261-2 [perma.cc/RU5M-2968].

20. *Gundy*, 139 S. Ct. at 2130-31 (Alito, J., concurring) (“Nevertheless, since

with Justice Kavanaugh taking his seat,²¹ and with Justice Barrett taking her seat.²² This Comment will argue that the *Panama Refining Co.* test will not satisfy conservatives' hopes and desires of "shrinking the size of big government."²³ After all, at the outset, that test is a sheep in wolf's clothing. Liberals should also have an interest in legitimizing the administrative state, for rubber-stamping Congressional delegations does not inspire trust in the People that the separation of powers principles are being respected.

In Part II, this Comment will describe the history of the Nondelegation Doctrine. That history will demonstrate that the tests are inadequate to meet today's challenges regarding the administrative state. In Part III, this Comment will derive new rules for the Nondelegation Doctrine. Finally, in Part IV, this Comment will propose which existing rules should be retained and which new rules should be adopted. Then, it will synthesize these rules into a new test. That test will be based upon a specific theory of the Nondelegation Doctrine applicable to Congressional delegations to the President and his or her agents in the administrative state.

II. BACKGROUND

Administrative law may be best conceptualized as partitioned into *ex ante* ("out of the before") and *ex post* ("out of the after") administrative law.²⁴ The Nondelegation Doctrine squarely fits into *ex ante* administrative law, because whether a statute violates the

1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to *extraordinarily capacious* standards." (emphasis added)).

21. *United States v. Paul*, 718 F. App'x. 360 (6th Cir. 2017), *cert. denied*, No. 17-8830, 2019 U.S. LEXIS 7194 (U.S. Nov. 25, 2019) (Kavanaugh, J., concurring) (praising Justice Gorsuch's research regarding the Nondelegation Doctrine in *Gundy* and discussing the Major Questions Doctrine).

22. Steve Holland, *U.S. Supreme Court Nominee Barrett Pledges to Follow Law, Not Personal Views*, REUTERS (Oct. 11, 2020), www.reuters.com/article/us-usa-court-barrett-statement/u-s-supreme-court-nominee-barrett-pledges-to-follow-law-not-personal-views-idUSKBN26W0MM [perma.cc/D3FL-4S3J]. Justice Gorsuch seems to suggest that the Intelligible Principle test has been propped up at least by some judicial and scholarly bias. *Gundy*, 139 S. Ct. at 2138-40 (Gorsuch, J., dissenting). Whether Justice Barrett agrees, or how Justice Barrett will rule as a jurist on the high court, is not precisely known at the time of the writing of this Comment.

23. Whittington & Iuliano, *supra* note 8, at 405, 429-31 (suggesting that the two sections of the NIRA were invalidated because they were anomalously improper legislation and that reverting back to the *Panama Refining Co.* test would not have that much bite in regular cases).

24. Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1141 (2013) (explaining that Swedish economist and sociologist Gunnar Myrdal defined *ex ante* (i.e., "out of the before") as what is planned and *ex post* (i.e., "out of the after") as what actually happens).

Nondelegation Doctrine should be ascertainable at the statute's passage.²⁵ The *Panama Refining Co.* test synthesized much of the development of the Nondelegation Doctrine from the ratification of the Constitution to the New Deal.²⁶ The background of the Nondelegation Doctrine during that time period will demonstrate that it is fundamentally weak, and the *Panama Refining Co.* test's mythical stature as a tough test consequently will be demonstrated as unfounded. Moreover, the background of the Nondelegation Doctrine after the New Deal will demonstrate that Nondelegation Doctrine as *ex ante* administrative law weakened as *ex post* administrative law strengthened.

A. *The Nondelegation Doctrine pre-New Deal: We Didn't Start the Fire*

The incomparable philosopher John Locke's influence on the Founding Fathers cannot be understated.²⁷ He was the first to propose *delegata potestas non potest delegari*, meaning "A delegated power cannot be delegated."²⁸ That proposition lays the foundation for the separation of powers principles upon which the Nondelegation Doctrine relies.²⁹ The Constitution delegates all

25. This result follows logically. However an agent exercises a Congressionally delegated power, that exercise does not by itself cause Congress to change the power already delegated. To see how this result comports with precedent, see, for example, *A. L. A. Schechter Poultry Corp.*, 295 U.S. at 537 ("But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries?"). If the Nondelegation Doctrine were *ex post* administrative law, then the Court could logically wait and see whether those business associations do exercise impermissibly delegated powers. Here, however, the delegation was void *ab initio*. *Id.*

26. *Pan. Ref. Co.*, 293 U.S. at 421-30 (explaining the history on the Nondelegation Doctrine up to that point and how the case law demonstrates that "there are limits of delegation which there is no constitutional authority to transcend" and formalizing those limits into a test).

27. Susan Henderson-Utis, *What Would the Founding Fathers Do? The Rise of Religious Programs in the United States Prison System*, 52 HOW. L.J. 459, 464 (2009) ("John Locke influenced the Founding Fathers perhaps more than any other philosopher from the Enlightenment."); John L. Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force*, 89 NOTRE DAME L. REV. 1237, 1267 n.202 (2014) ("So great was Locke's influence on Jefferson that he considered Locke to be one of the three greatest men in history.").

28. Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 125 (2011) (translating *delegata potestas non potest delegari*).

29. John Locke submits:

The *legi[s]lative cannot transfer the power of making laws* to any other hands: for it being but a delegated power from the people, they who have it cannot pa[s]s it over to others. . . . And when the people have [s]aid,

legislative power to Congress, but Congress may “make all laws necessary and proper” to execute those delegated legislative powers.³⁰

In 1813, the Supreme Court, in *Cargo of the Brig Aurora v. United States*, confronted *sui generis* whether Congress had delegated its legislative power to the President in contravention of *delegata potestas non potest delegari*.³¹ This case arose after the expiration of the Non-Intercourse Act (“NIA”).³² Prior to the War of 1812, the NIA embargoed Great Britain and France for commandeering American sailors, but then the NIA expired.³³ Congress passed a statute that empowered the President to revive the NIA by proclaiming that France did not change her policies.³⁴ The President could do the same if Great Britain did not change her policies as well.³⁵ Thus, Congress conditioned the revival of the NIA on Presidential action.³⁶ Without explanation, the Court held there was “no sufficient reason[] why the legislature [could] not exercise its discretion in reviving the act of . . . 1809 . . . conditionally. . . .”³⁷

Twelve years after *Cargo of the Brig Aurora* in *Wayman v. Southard*, Chief Justice John Marshall, writing for a unanimous Court, better explained the Court’s reasoning when confronting issues of delegation.³⁸ The issue was whether Congress could delegate its power to amend and supplement procedural rules to

We will [s]ubmit to rules, and be governed by *laws* made by [s]uch men, and in [s]uch forms, no body el[s]e can [s]ay other men [s]hall make *laws* for them[.]

LOCKE, *supra* note 2, at 322-23.

30. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States[.]”); *id.*, § 8.

31. *Cargo of the Brig Aurora v. United States*, 11 U.S. 382, 388 (1813). If the People delegated legislative power to Congress and if *delegata potestas non potest delegari* were purely applied, Congress can delegate legislative power to no other entity. See *supra* notes 28-29 and accompanying text (introducing *delegata potestas non potest delegari*).

32. Non-Intercourse Act, Pub. L. No. 10-24, 2 Stat. 528 (1809).

33. Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1291-92 (2009) (discussing much of the history behind Congressional response towards the hostilities with Great Britain and France).

34. Act of Mar. 2, 1811, ch. 29, § 3, 2 Stat. 651, 651 (making the Non-Intercourse Act’s revival contingent on Presidential proclamation); Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1291 (2009) (describing contextual matters, such as how the Non-Intercourse Act superseded the unpopular Embargo Act of 1807, ch. 5, 2 Stat. 451, which embargoed all naval trade).

35. § 3, 2 Stat. at 651.

36. Jennifer L. Mascott, *Developments: Gundy v. United States: Reflections on the Court and the State of the Nondelegation Doctrine*, 26 GEO. MASON L. REV. 1, 16-17 (2018) (“So, Congress legislated the conditions under which trade restrictions were to remain in effect; the Executive just evaluated factually whether such considerations continued to exist”).

37. *Cargo of the Brig Aurora*, 11 U.S. at 388.

38. *Wayman v. Southard*, 23 U.S. 1 (1825).

federal courts, to whom those procedural rules would apply.³⁹ The Court held that Congress could and distinguished between “strictly and exclusively legislative powers” and those powers over minor details in which others, like courts, might fill.⁴⁰ The Court therefore *sub silentio* rejects *delegata potestas non potest delegari*.⁴¹ Those powers over minor details are intermixed with legislative powers, but the principle on its face does not admit of any such delegation, whatever the mixture.⁴²

Over half a century later, three seminal cases outlined in more detail the Nondelegation Doctrine of the United States before the New Deal.⁴³ They are *Marshall Field & Co. v. Clark*, *Mahler v. Eby*,

39. *Id.* at 42-43; see also Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 413-14 (2008) (describing other contextual matters, such as how the “Judiciary Act had empowered the judiciary to . . . ‘establish all necessary rules for the orderly conducting [of] business in the . . . courts’” and how the “Process Act required federal courts in common law actions to apply the procedural rules that existed as of 1789 in the states in which they sat,” subject to the federal courts’ supplement).

40. *Wayman*, 23 U.S. at 42-43, 45 (concluding that “Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself”).

41. See Whittington & Iuliano, *supra* note 8, at 408 (explaining how the Michigan Supreme Court reasons that *delegata potestas non potest delegari* is not a blanket prohibition, because the nature of legislative power lends itself to delegation in at least some cases, implying therefore that it is legislative power being delegated). *But see* Whittington & Iuliano, *supra* note 8, at 399 (stating that “executive officers ‘did not legislate’ so long as they ‘did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done.’” (quoting *United States v. Grimaud*, 220 U.S. 506, 518 (1911))).

42. Resolution of this issue over whether legislative or non-legislative power is being delegated could reconcile the seemingly inconsistent application of *delegata potestas non potest delegari*. See, e.g., *J. W. Hampton, Jr., & Co.*, 276 U.S. at 407 (distinguishing legislative power and executive power on the basis of legislative power involving a decision of what the law should be and therefore implying that delegations are of a non-legislative nature). If that maxim only applies to legislative power, but the legislature delegates duties and responsibilities to officials under those officials’ own inherent powers, like executive powers, there would be no contradiction. *Id.* The reason is that powers are not being re-delegated. *Id.* The legislature is simply exercising its legislative powers and compelling officials under their own inherent powers to enact those laws. *Id.* However, that formulation contains its own separation of powers issues or may not fall under the Nondelegation Doctrine at all. *Id.*

43. The three cases are not intended to be collectively exhaustive, as the Nondelegation Doctrine has a tremendous quantity of case law. See, e.g., Steven F. Huefner, *The Supreme Court’s Avoidance of the Nondelegation Doctrine in Clinton v. City of New York: More than “A Dime’s Worth of Difference”*, 49 CATH. U.L. REV. 337, 348-50 (2000) (choosing to discuss in its recounting of the history of the Nondelegation Doctrine *Buttfield v. Stranahan*, 192 U.S. 470 (1904)). *But see* Whittington & Iuliano, *supra* note 8, at 396 (explaining that “[t]he Court had remarkably little to say regarding the delegation of legislative power from the late Marshall Court through the remainder of the nineteenth century.”); *id.* at 396 n.109 (discussing how the Court greenlighted States’ delegation of eminent domain to railroad businesses).

and *J. W. Hampton, Jr., & Co. v. United States*.⁴⁴

First, in *Marshall Field & Co.*, the Court confronted whether Congress may condition tariffs on imports of “sugars, molasses, coffee, tea[,] and hides” on a Presidential finding.⁴⁵ Specifically, Congress wanted to incentivize reciprocal trade by only imposing tariffs against foreign nations upon a Presidential finding that those nations have imposed tariffs on the exports of those same products.⁴⁶ “The President had ‘no discretion,’ but merely ‘ascertained the existence of a particular fact’ that Congress had specified as necessary to trigger [the tariff].”⁴⁷ However, the President did exercise some discretion, such as that relating to the duration of the tariff.⁴⁸ The distinction is that this discretion was not something that Congress conferred: it was inherent in the President’s executory power.⁴⁹ Nonetheless, Congress itself declared the policy of incentivizing reciprocal trade and explicitly limited the President’s discretion in his fact-finding mission.⁵⁰ That fact led the Court to hold that this was a permissible delegation of legislative power.⁵¹

Second, in *Mahler*, the Court confronted whether Congress impermissibly delegated legislative power to the Secretary of Labor by allowing him to deport aliens found to be “undesirable residents.”⁵² Unlike *Marshall Field & Co.*, where there were explicit limits to the President’s discretion, none existed here.⁵³ Rather, the Court held that the “common understanding” afforded to “undesirable residents” was sufficient to limit the discretion of the

44. *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892); *Mahler v. Eby*, 264 U.S. 32 (1924); *J. W. Hampton, Jr., & Co.*, 276 U.S. 394.

45. *Marshall Field & Co.*, 143 U.S. at 680.

46. *Id.*

47. *Whittington & Iuliano*, *supra* note 8, at 397 (quoting *Marshall Field & Co.*, 143 U.S. at 693).

48. *Cf. Marshall Field & Co.*, 143 U.S. at 693 (stating that such discretion related to enforcement and that it was of a different nature than any power Congress could delegate); *id.* (implying therefore that that discretion did not create nondelegation issues).

49. *Whittington & Iuliano*, *supra* note 8, at 399 (“[E]xecutive officers ‘did not legislate’ so long as they ‘did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done.’” (quoting *Grimaud*, 220 U.S. at 518)).

50. *Marshall Field & Co.*, 143 U.S. at 692-93.

51. *Id.*

52. *Mahler*, 264 U.S. at 40. The Court also confronted whether Congress enacted an *ex post facto* law by increasing the “punishment” for crimes aliens already had committed and been punished. *Id.* at 38-40 (holding that deportation is not a punishment because it goes to fundamental sovereign powers and that therefore there was no *ex post facto* law).

53. *Marshall Field & Co.*, 143 U.S. at 693; *Huefner*, *supra* note 43 (“[The power to exclude immigrants deemed undesirable] was a wide and powerful discretionary authority, upheld because of the Court’s willingness to trust that the Secretary shared, and would adhere to, this ‘common understanding’”).

Secretary of Labor.⁵⁴ In addition, the Court viewed deportation as an irreducibly political question.⁵⁵ Although *Mahler* features similarities with past cases, it also markedly differs from them because the Secretary of Labor's fact-finding mission was to determine whether an alien was an "undesirable resident."⁵⁶ This seems on its face to be more opinion than fact.⁵⁷

Finally, in the landmark case *J. W. Hampton, Jr., & Co.*, Chief Justice and former President William Howard Taft wrote for a unanimous Court confronting whether Congress impermissibly delegated its power to the President.⁵⁸ Specifically, the power was to modify tariffs on products imported from competing foreign countries that were found to have production costs lower than those in the United States.⁵⁹ As the Nondelegation Doctrine developed, two relevant factors in deciding whether a Congressional delegation is permissible are whether Congress has declared the policy and whether it has imposed limitations on the agent's discretion.⁶⁰ In *J. W. Hampton, Jr., & Co.*, Congress declared the policy of equalization, and the President's discretion was limited in one of two ways.⁶¹ First, the clarity of the policy itself constrained any fact-finding or Presidential action to it.⁶² Second, in the alternative, there were procedural safeguards of notice and hearing for the

54. *Mahler*, 264 U.S. at 40.

55. *Id.* *But see* *Marbury v. Madison*, 5 U.S. 137, 165-66 (1803) (recognizing that the President does have discretionary political power but that the law is concerned when rights become vested); CONSTITUTIONAL LAW & HISTORY DOCUMENTS, *supra* note 6, at 176-78 (containing and discussing *Stuart v. Laird*, 5 U.S. 299 (1803)). There, a judgment was entered in favor of the respondent in a court that the Judiciary Act of 1801, ch. 4, 2 Stat. 89, established but was abolished by the Judiciary Act of 1802, ch. 31, 2 Stat. 156. CONSTITUTIONAL LAW & HISTORY DOCUMENTS, *supra* note 6, at 176-78. Chief Justice Marshall rode circuit thereafter to affirm the judgment, and the Court held that it was in Congress' discretion to abolish federal courts inferior to the Supreme Court and transfer caseloads. *Id.*

56. *Compare Mahler*, 264 U.S. at 40 (conditioning deportation upon the Secretary of Labor's finding that an alien is an "undesirable resident"), with *Cargo of the Brig Aurora*, 11 U.S. at 388 (conditioning Presidential power upon a determination of whether Great Britain or France had ceased performing certain conduct regarding trade, which determination seeming to have more of a "factual" character to it).

57. *See* cases cited *supra* note 56 (comparing *Mahler*, 264 U.S. at 40 with *Cargo of the Brig Aurora*, 11 U.S. at 388).

58. *J. W. Hampton, Jr., & Co.*, 276 U.S. at 400-01, 413 ("Section 315 and its provisions are within the power of Congress").

59. *Id.* at 400-01.

60. *E.g.*, *Marshall Field & Co.*, 143 U.S. at 692-93 (noting that advanced prescription of duties on designated products go to Congress' determination of policy).

61. *J. W. Hampton, Jr., & Co.*, 276 U.S. at 404-05.

62. *Id.* (suggesting that whether a disparity existed between the United States' production costs and a foreign nation's left little room for objective dispute and noting that the statute required reevaluations of these disparities "from time to time").

Tariff Commission, which assisted the President's fact-finding mission.⁶³ The Court's analysis has proceeded as one would expect from prior precedent thus far, but the Court next stated: "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."⁶⁴ Prior to *J. W. Hampton, Jr., & Co.*, patterns of analysis were emerging, and Chief Justice Taft attempted to summarize those patterns through the phrase "intelligible principle."⁶⁵ That one phrase will be a flashpoint in the Nondelegation Doctrine.⁶⁶

In terms of the strength of the Nondelegation Doctrine as originally understood, it never actually invalidated a statute during this time period.⁶⁷ The States did invalidate some of their statutes along nondelegation grounds with more detailed reasoning, but the States' Nondelegation Doctrine was no juggernaut either.⁶⁸ That was all changed after the New Deal, a period between 1933 to 1936 when President Franklin Delano Roosevelt attempted to reform

63. *Id.*

64. *Id.* at 409; Meaghan Dunigan, *The Intelligible Principle: How It Briefly Lived, Why It Died, and Why It Desperately Needs Revival in Today's Administrative State*, 91 ST. JOHN'S L. REV. 247, 254-55 (2017) ("The intelligible principle was first articulated in *J.W. Hampton, Jr., & Co. v. United States.*").

65. *J. W. Hampton, Jr., & Co.*, 276 U.S. at 409.

66. In Justice Gorsuch's words:

No one at the time thought the phrase meant to effect some revolution in this Court's understanding of the Constitution. While the exact line between policy and details, lawmaking and fact-finding, and legislative and non-legislative functions had sometimes invited reasonable debate, everyone agreed these were the relevant inquiries. 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. Tellingly, too, he wrote the phrase seven years before *Schechter Poultry* and *Panama Refining*, and it did nothing to alter the analysis in those cases, let alone prevent those challenges from succeeding by lopsided votes.

Gundy, 139 S. Ct. at 2139 (Gorsuch, J., dissenting).

67. Whittington & Iuliano, *supra* note 8, at 402.

68. *Id.* at 405-17 (discovering that States in a nondelegation analysis considered whether legislatures transferred "controlling power," whether the agents were qualified, or whether legislatures were abdicating responsibility or electoral accountability). However, the States are nevertheless excellent sources for comparison with the federal government on the Nondelegation Doctrine because all States must have republican forms of government, and therefore their form of government is much more similar to the federal government than most foreign states. See, e.g., Nanping Liu & Michelle Liu, *Justice Without Judges: The Case Filling Division in the People's Republic of China*, 17 U.C. DAVIS J. INT'L L. & POL'Y 283, 318-19 (2011) (describing how Chinese administrative law works and how alien it may seem when compared to United States administrative law).

social and economic policies following the Great Depression.⁶⁹

B. The Nondelegation Doctrine during the New Deal

In 1935, the Court developed and applied a test from *Panama Refining Co. v. Ryan* when it confronted whether Congress impermissibly delegated powers to the President by passing Title I of the National Industrial Recovery Act (“NIRA”), which allowed the President to prohibit interstate and foreign transfers of hot oil.⁷⁰ Hot oil is oil in volumes exceeding state quotas, arguably affecting interstate commerce, and the President issued Executive Orders prohibiting the same.⁷¹ In order for a delegation to be valid, Congress must (1) declare a policy with respect to the subject matter, (2) set up a standard for the agent’s actions, and (3) require a finding by the agent in the exercise of authority to enact the law.⁷² Unlike many of the other statutes discussed, NIRA and other similar statutes passed during the beginning of President Roosevelt’s administration were quite hastily written.⁷³ The Court held that not all the elements of the Nondelegation Doctrine were satisfied.⁷⁴ The Court, therefore, invalidated the Executive Orders and implicitly the relevant portions of NIRA along nondelegation grounds.⁷⁵

That same year, in *A. L. A. Schechter Poultry Corp. v. United States*, the Court also addressed another nondelegation issue as to

69. Franklin Delano Roosevelt, *1933 Inauguration*, YOUTUBE, www.youtube.com/watch?v=MX_v0zxM23Q [perma.cc/4L4G-W6L3] (last visited Nov. 1, 2019).

70. *Pan. Ref. Co.*, 293 U.S. at 405-10; National Industrial Recovery Act of 1933, Pub. L. No. 73-67, 48 Stat. 195.

71. *Pan. Ref. Co.*, 293 U.S. at 405-10.

72. *Id.* at 416-19. *But see Gundy*, 139 S. Ct. at 2136-37 (Gorsuch, J., dissenting) (combining the second and third elements, maintaining the first element, but adding another element for assignments of non-legislative responsibilities, such as powers inherent to other branches, like the President’s powers over foreign policy).

73. Valerie A. Sanchez, *A New Look at ADR in New Deal Labor Law Enforcement: The Emergence of a Dispute Processing Continuum Under the Wagner Act*, 20 OHIO ST. J. ON DISP. RESOL. 621, 630 n.18 (2005) (explaining that there was a rush in legislating that the Great Depression caused and that this haste might have lowered the quality of statutes passed); see also Bruce E. Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 YALE L. & POL’Y REV. 729, 738 (1999) (characterizing President Roosevelt’s economic programs as “hastily conceived”).

74. *Pan. Ref. Co.*, 293 U.S. at 418 (demonstrating that (1) was not satisfied, because Congress declared a policy in general but not specifically with respect to hot oil, whose definition was itself dependent upon state law and not an Act of Congress); *id.* at 418-19 (demonstrating that (2) and (3) were not satisfied, because the President did not conduct a fact-finding mission in the oil industry, and his discretion was not limited).

75. *See Pan. Ref. Co.*, 293 U.S. at 418.

whether a company could be convicted of violating a Live Poultry Code.⁷⁶ The President certified business leaders as “impos[ing] no inequitable restrictions on admission to membership” and being “truly representative”; consequently, the business leaders promulgated the Live Poultry Code.⁷⁷ The Court applied the *Panama Refining Co.* test and held that even though Congress had declared a policy, it had nevertheless impermissibly delegated legislative power by violating the second and third elements.⁷⁸

Frustrated by these key sections of the NIRA being invalidated, President Roosevelt infamously threatened to pack the Supreme Court with younger judges who would presumably be more sympathetic with the New Deal agenda.⁷⁹ The public reaction was intensely negative and this court-packing scheme failed, but Justice Roberts switched from tending to oppose to tending to support New Deal legislation.⁸⁰ This “switch in time that saved nine” might not actually have been primarily motivated by politics.⁸¹ Regardless of the motivation, it certainly made a fine difference with regards to the development of the Nondelegation Doctrine.

76. *A. L. A. Schechter Poultry Corp.*, 295 U.S. at 537-38.

77. *Id.* (noting that familiarity with an industry or expertise does not justify constituting those familiar into a secondary legislature).

78. *Id.* at 538-40 (holding that (2) the standards were inadequate because they only limit the President in choosing the business leaders and not in promulgating the “code of fair competition” itself and that (3) a fact-finding mission as broad as ensuring that the business leaders refrain from monopolistic practices procures no positive fact-finding mission with adequate limits to Presidential discretion); see also Arthur B. Mark, III, *Annual Survey of the United States Supreme Court and Federal Law: Casenotes United States v. Morrison, the Commerce Clause and the Substantial Effects Test: No Substantial Limit on Federal Power*, 34 CREIGHTON L. REV. 675, 709-10 (2001) (stating: “Chief Justice Charles Hughes, writing for the Court, reasoned first that the codes authorized under the NIRA were law and not rules because the codes place individuals under a duty to act or refrain from acting and imposed criminal penalties for violating the codes’ provisions.”). The Court also invalidated the statute along interstate commerce grounds. *A. L. A. Schechter Poultry Corp.*, 295 U.S. at 542-50 (observing that much of New York’s poultry gets transported from out-of-State, but the regulated actions concerning the preparation and selling of poultry all occur intrastate); *id.* (recognizing that these regulated actions do not directly cause an adverse effect upon interstate commerce); see also Rebecca E. Hatch, *The Violence Against Women Act: Surviving the Substantial Effects of United States v. Lopez*, 31 SUFFOLK U. L. REV. 423, 430 n.41 (1997) (discussing the interstate commerce grounds involving the NIRA).

79. Elizabeth L. Robinson, *Revival of Roosevelt: Analyzing Expansion of the Supreme Court of North Carolina in Light of the Resurgence of State “Court-Packing” Plans*, 96 N.C.L. REV. 1126, 1133-36 (2018).

80. *Id.*

81. Samuel R. Olken, *Historical Revisionism and Constitutional Change: Understanding the New Deal Court*, 88 VA. L. REV. 265, 269-72, 290-94 (2002) (disagreeing with the conventional story that the Court’s changes in position were due to political pressure).

Yakus v. United States was a part of that switch in time and marked a paradigm shift of the Court for the Nondelegation Doctrine.⁸² As World War II raged, President Roosevelt and his majority in Congress attempted to control inflation with the Emergency Price Control Act (“EPCA”), which permitted the Office of Price Administration (“OPA”), an administrative agency under the direction of the President, to regulate the price of meat.⁸³ The genius of EPCA was that OPA could regulate the price of wholesale or retail meat, but not the price of the actual livestock.⁸⁴ Accordingly, the price of livestock rose, and meat packers, with no control over the price of livestock, had to pay the farmers selling the livestock to them (probably at market value) and stay in business without contravening OPA’s mandates.⁸⁵ Albert Yakus, “a highly respected member of the local community and leader of his synagogue,” believed this to be an impossible task for his meat-packing business, increased his wholesale and retail meat prices in contravention of OPA’s mandates, and earned himself a criminal record.⁸⁶

Whatever might have been the wisdom of EPCA or OPA’s agency actions, the Court did analyze the nondelegation issue through the *Panama Refining Co.* test and held that all the elements were satisfied.⁸⁷ In addition, Chief Justice Stone made this architectonic observation:

The Constitution . . . does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.⁸⁸

C. *The Nondelegation Doctrine and Other Administrative Law post-New Deal*

It might seem as though the Nondelegation Doctrine was weakened after *Yakus*. For people who continued to seek a strong

82. *Yakus v. United States*, 321 U.S. 414 (1944).

83. James R. Conde & Michael S. Grieve, *Yakus and the Administrative State*, 42 HARV. J.L. & PUB. POL’Y 807, 809, 824-25 (2019); Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23.

84. Conde & Grieve, *supra* note 83, at 809.

85. *Id.*

86. *Id.* at 809-10.

87. *Yakus*, 31 U.S. at 423, 425-26 (“It is enough to satisfy the statutory requirements . . . that the prices fixed will tend to achieve that objective and will conform to those standards, and that the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting”).

88. *Id.* at 424.

Nondelegation Doctrine, however, to say that that quest suffered a major setback after *American Power & Light Co. v. SEC* would be an understatement.⁸⁹ The Electric Bond and Share Company holding system consisted of three tiers: first, the Electric Bond and Share Company; second, five subholding companies including the defendants; and, finally, “237 direct and indirect subsidiaries.”⁹⁰ This structure made it difficult for minority shareholders to influence boards of directors in the holding system.⁹¹ In 1935, Congress passed the Public Utility Holding Company Act (“PUHCA”) to break apart these concentrations of power.⁹² In a similar vein to *Mahler*, PUHCA applied to “holding companies,” “subsidiaries,” or “affiliates” but permitted the SEC to interpret what those terms meant.⁹³ The SEC tackled holding systems that “unduly or unnecessarily complicate[d] the structure or unfairly or inequitably distribute[d] voting power” pursuant to Section 11(b)(2) of PUHCA and sought dissolution of the petitioners.⁹⁴ Here, the Court reasons that a delegation is good if “Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority” and held that the Nondelegation Doctrine had not been violated.⁹⁵ The *American Power & Light Co.* test has received criticism, whether rightly or wrongly, but it is plainly a diminution of the *Panama Refining Co.* test, because it sets the bar so low for Congress to make a proper delegation.⁹⁶ Thus was born the *Panama Refining Co.* test, the Intelligible Principle test, and the *American Power & Light Co.* test, and thusly did the latter two bury the former summarily.⁹⁷

89. *Am. Power & Light Co.*, 329 U.S. 90.

90. *Id.* at 95-96.

91. *Id.* at 96 (“After appropriate notice and hearing, the Commission found that the corporate structure and continued existence of American and Electric unduly and unnecessarily complicated the Bond and Share system and unfairly and inequitably distributed voting power among the security holders of that system[.]”).

92. Public Utility Company Holding Act of 1935, 15 U.S.C. § 79-79(z)-6 (2000), *repealed by* Energy Policy Act of 2005, 42 U.S.C. §§ 16451-16463 (2018); Roberta S. Karmel, *Is the Public Utility Holding Company Act a Model for Breaking up the Banks that Are Too-Big-to-Fail?*, 62 HASTINGS L.J. 821, 850-55 (2011) (discussing the origins and purposes of PUHCA).

93. Karmel, *supra* note 92, at 851.

94. 15 U.S.C. § 79(b)-2 (2018); *Am. Power & Light Co.*, 329 U.S. at 96; Andrew Dudley, *Opening Borders: Congressional Delegation of Discretionary Authority to Suspend or Repeal the Laws of the United States*, 41 ARIZ. ST. L.J. 273, 299-300 (2009) (characterizing the delegation as “quasi-legislative”).

95. *Am. Power & Light Co.*, 329 U.S. at 105.

96. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 370 n.170 (2002) (being skeptical of whether the statute’s background and context adequately limits the SEC’s discretion).

97. *See, e.g.*, *Chapman v. US Commodity Futures Trading Co.*, 788 F.2d 408, 411 (7th Cir. 1986) (holding that an administrative law judge’s harsh sanctions against a party were within statutory limits, implying consequently that the state’s delegation of power to the administrative law judge passed the broad

Now, in 1989, much later than the aforementioned cases, *Mistretta v. United States* quintessentially represents how the Nondelegation Doctrine functions presently.⁹⁸ It concerned whether Congress impermissibly delegated legislative power to the United States Sentencing Commission (“Sentencing Commission”) to promulgate Sentencing Guidelines.⁹⁹ The Sentencing Commission was composed of three Article III judges the President appointed and four nonjudicial members.¹⁰⁰ The Sentencing Guidelines sought to promote more consistent sentencing and bound trial judges in their discretion at sentencing.¹⁰¹ The Court applied the Intelligible Principle and the *American Power & Light Co.* tests, which were satisfied, and merely noted that *Panama Refining Co.* and *A. L. A. Schechter Poultry Corp.* were the only times the Court had invalidated a statute along nondelegation grounds and that it had not done so since, without applying the *Panama Refining Co.* test.¹⁰² This analysis has stood relatively undisturbed – that is, until *Gundy v. United States*.¹⁰³

In 2006, Congress had established “a comprehensive, national sex offender registration system” through the Sex Offender Registration and Notification Act (“SORNA”) to combat “potential gaps and loopholes” in the previous laws offering offenders refuge.¹⁰⁴ Congress delegated the Attorney General to decide

American Power & Light Co. test, and determining that the decision therefore could only be disturbed upon a showing of abuse of discretion); *United States v. Hickernell*, 690 F. Supp. 272, 275 (S.D.N.Y. 1988) (applying the Intelligible Principle test and holding that Congress had not impermissibly delegated legislative power to the United States Sentencing Commission pursuant to the Sentencing Reform Act of 1984, 28 U.S.C. §§ 991-98 (2018), where the defendant pled guilty to crimes and was sentenced in accordance with guidelines the Sentencing Commission promulgated).

98. *Mistretta*, 488 U.S. 361.

99. *Id.* at 362-63.

100. *Id.* at 384-408 (explaining the composition of the Sentencing Commission, the general purposes behind the Sentencing Guidelines, and the numerous arguments advanced against the Sentencing Guidelines along nondelegation and other separation of powers grounds and rejecting the argument that mixing Article III judges with nonjudicial members would deprive the judicial branch of its independence, because the Article III judges are not conscripted to serve on the Sentencing Commission, and trial judges regularly make decisions regarding sentencing anyways); *Id.* at 413 (Scalia, J., dissenting) (“While the products of the Sentencing Commission’s labors have been given the modest name ‘Guidelines,’ . . . they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed”).

101. *Id.* at 384-408.

102. *Mistretta*, 488 U.S. at 372-78.

103. *See Gundy*, 139 S. Ct. at 2121-30 (proceeding along the same analysis as *Mistretta* with applications of the Intelligible Principle and *American Power & Light Co.* tests, except that the Court construed an ambiguous provision too).

104. 34 U.S.C. § 20911-32 (2018); Steven J. Grocki, *Sex Offender Registration and Notification Act (SORNA)*, U.S. DEP’T OF JUSTICE, www.justice.gov/criminal-ceos/sex-offender-registration-and-notification-act-sorna

whether SORNA should apply to sex offenders convicted before the passage of SORNA (“pre-enactment sex offenders”).¹⁰⁵ The Supreme Court confronted whether Congress had impermissibly delegated to the Attorney General legislative power that led to the conviction of Herman Gundy, a pre-enactment offender.¹⁰⁶ The most poignant moment during the oral arguments came when Justice Breyer paraphrased the petitioner’s argument regarding delegating power for criminal statutes to the United States Department of Justice:

And there is a particular danger when you combine prosecuting a person with the writing of the law under which you prosecute. And the danger is captured in the bill of attainder clause. It's captured maybe in [the] ex post facto clause. It's captured in the word “liberty.” And it is that particular danger that means where you have a person whose job is prosecuting, be careful, especially careful, that that person cannot also write the law under which he prosecutes. Because there we risk vendetta.¹⁰⁷

Although none of the opinions focused on the unique circumstances posed from a delegation of SORNA rulemaking to the chief prosecutor, the United States having a “government of laws and not men” implies that there should be some daylight between creation and execution of the criminal law.¹⁰⁸ Under the Intelligible Principle and *American Power & Light Co.* tests, these considerations fall by the wayside, and the majority had no trouble upholding the delegation.¹⁰⁹ Justice Gorsuch, writing for the dissent, argued that the Nondelegation Doctrine has been diluted

[perma.cc/CYK9-FFS7] (last updated Mar. 6, 2018); see also MARIEL ALPER & MATTHEW R. DUROSE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP (2005-14), at 5 (2019), www.bjs.gov/content/pub/pdf/rrsorsp9yfu0514.pdf [perma.cc/38V6-MNK7] (“Overall, prisoners released after serving time for rape or sexual assault (7.7%) were more than three times as likely as other released prisoners (2.3%) to be arrested for rape or sexual assault during the 9 years following release.”). *But see* Wendy Sawyer, *BJS Fuels Myths About Sex Offense Recidivism, Contradicting its Own New Data*, PRISON POL’Y INITIATIVE (June 6, 2019), www.prisonpolicy.org/blog/2019/06/06/sexoffenses/ [perma.cc/PV26-S4CZ] (stating: “What the report doesn’t say is that the same comparisons can be made for the other offense categories: People released from sentences for homicide were more than twice as likely to be rearrested for a homicide[, and] those who served sentences for robbery were more than twice as likely to be rearrested for robbery.”). For constitutional arguments against SORNA, see Jesse Kelley, *The Sex Offender Registry: Vengeful, Unconstitutional and Due for Full Repeal*, HILL (Mar. 5, 2018), www.thehill.com/opinion/criminal-justice/376668-the-sex-offender-registry-vengeful-unconstitutional-and-due-for-full [perma.cc/889L-SRPG] (arguing that SORNA violates the Fifth, Eighth, and Fourteenth Amendments).

105. 34 U.S.C. § 20913(d).

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

107. Oral Argument at 37:01, *Gundy*, 139 S. Ct. 2116 (No. 17-6086), www.oyez.org/cases/2018/17-6086 [perma.cc/W44A-DZWS].

108. *Marbury*, 5 U.S. at 163.

109. *Gundy*, 139 S. Ct. at 2129.

through the Intelligible Principle test because of an imprecise summarization, and the Court should return to the *Panama Refining Co.* test to revitalize the Nondelegation Doctrine.¹¹⁰ Applying the *Panama Refining Co.* test, Justice Gorsuch characterized Congress as delegating to the Attorney General the ultimate policy-making decision as to whether SORNA should apply to pre-enactment sex offenders, and therefore Congress could not have declared a policy with respect to this subject-matter.¹¹¹ By contrast, the Court actually did argue that this delegation would have passed muster under the *Panama Refining Co.* test by characterizing Congress as delegating to the Attorney General only discretion relating to whether SORNA would feasibly apply to pre-enactment sex offenders.¹¹²

And so the story of the Nondelegation Doctrine has been told, or has it? The Nondelegation Doctrine should be understood in the larger context of administrative law. In the same year as *Panama Refining Co.*, the Court held in *Humphrey's Executor v. United States* that Congress may require that the President only remove officers in agencies for cause, if those agencies are not wholly within the executive branch.¹¹³ This is the only other *ex ante* administrative law principle relevant to the Comment. Finally, *ex post* administrative law is a world unto itself, and that body of law has largely developed, ironically enough, because the Nondelegation Doctrine has weakened, but administrative agencies must nevertheless be checked and balanced.¹¹⁴ It is beyond the

110. *Id.* at 2139.

111. *Id.* at 2143 (concluding also that Congress has assigned no fact-finding mission and acknowledging that one method by which this method could have been satisfied would be for Congress to have declared that SORNA applies to all pre-enactment sex offenders, but the Attorney General may exempt certain individuals on a case-by-case basis according to guidelines).

112. *Id.* at 2128-30 (construing SORNA in such a manner as to conclude that Congress actually had made the decision to apply SORNA to pre-enactment sex offenders in general but left to the Attorney General the decision as to which pre-enactment sex offenders SORNA should apply in accordance with feasibility constraints, which the Attorney General must determine on a case-by-case basis).

113. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631-32 (1935).

114. *Gundy*, 139 S. Ct. at 2141-42 (Gorsuch, J., dissenting)

While it's been some time since the Court last held that a statute improperly delegated the legislative power to another branch—thanks in no small measure to the intelligible principle misadventure—the Court has hardly abandoned the business of policing improper legislative delegations. When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines.

Id.

Ex post administrative law is logically not applicable to the Nondelegation Doctrine, because whether the Nondelegation Doctrine has been violated must be ascertainable at the time of a statute's passage. *Cf.* PETER T. WENDEL, A

scope of this Comment to review *ex post* administrative law, but the Administrative Procedure Act is a significant source of limitations on agency action.¹¹⁵

III. ANALYSIS

Analysis of the Nondelegation Doctrine requires consideration of law most fundamental to our system of government.¹¹⁶ This section will show that original methods, precedent, structural reasoning, and Living Originalism are the most appropriate paradigms through which to analyze the Nondelegation Doctrine.

A. Constitutional Theory

The predominant constitutional theories are Originalism, which is premised on the intent of the Framers, the intent of the ratifiers, original methods, or the original public meaning,¹¹⁷ Living

POSSESSORY ESTATES AND FUTURE INTERESTS PRIMER 2 n.2, 172-205 (3d ed. 2007) (noting regarding conveyances how future interests are present property rights and whether the Rule against Perpetuities has been violated may be determined at the time of conveyance, although the modern trend is to “wait and see”).

115. *E.g.*, 5 U.S.C. § 706(2) (2018).

The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . . or unwarranted by the facts. . . .

Id.

116. *See, e.g.*, LOCKE, *supra* note 2, at 322-23 (discussing the Nondelegation Doctrine in a work describing social contract theory, upon which commonwealth governments are formed).

117. For Originalism premised on the intent of the Framers, see *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 626-46 (1949) (Vinson, C.J., dissenting) (analyzing how, in the absence of the Framers’ “specific intent,” “a provision concerned solely with the mechanics of government,” such as a citizen of the District of Columbia not having diversity to a citizen of a State under U.S. CONST. art. III, § 2, cannot be construed to have a meaning more amenable to the times, for the Court does not have an “amendatory function”); *Kelo v. City of New London*, 545 U.S. 469, 506-11 (2005) (Thomas, J., dissenting) (differentiating “public use” from “public purpose” by distinguishing nuisance law and eminent domain law with respect to private property at English common law and arguing that English common law informed the Framers’ intent, which therefore fixes the meaning of the Public Use Clause under U.S. CONST. amend. V [hereinafter “Fifth Amendment”]). For Originalism premised on the intent of the ratifiers, see Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981) (explaining how the intent of the ratifiers should control over the intent of the Framers, presumably because it is the ratifiers who gave legal force and effect to the Constitution, but uncertainty regarding the former requires the latter to become a “fair reflection” of the

Originalism,¹¹⁸ and Living Constitutionalism.¹¹⁹ These constitutional theories all receive significant criticism,¹²⁰ but analysis of the Nondelegation Doctrine need not resolve these disputes, for many of those constitutional theories are

former). For Originalism premised on original methods, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894-902 (1985) (examining how the “intent” of written legal documents, such as contracts and statutes, might have been ascertained subjectively or objectively at common law, *inter alia*); *id.* at 885-88 (finding how early constitutional theorists would have relied on common law interpretation of the Constitution, if at all, and how they would have examined the intent behind the Constitution, but that intent would not have been the subjective intent of the Framers or the ratifiers). For Originalism premised on the original public meaning, see *Kelo*, 545 U.S. at 511-14 (Thomas, J., dissenting) (describing how states had similar eminent domain language in their constitutions as that in the Fifth Amendment and how many behaved in a manner indicative of Justice Thomas’ interpretation of “public use”).

118. See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 241-47, 262-67 (2009) (arguing that Originalism evolves “to reflect current interpretive values” just like Living Constitutionalism evolves “to reflect current societal values” but noting that Originalism is not necessarily debunked for attempting to fix the Constitution’s meaning when it itself is a fluid theory); BALKIN, *supra* note 7, at 3-58 (describing the method of text and principle, where the Constitution contains an interpretive framework ascertainable under Originalist methods, but irreducibly vague phrases within that framework should be construed in such a manner that promotes Constitutional Redemption for every generation of Americans).

119. See, e.g., AMAR, *supra* note 5, at 68-79 (theorizing that the Constitution should be construed with its written and unwritten aspects in mind but arguing that the unwritten Constitution does not include the proposition that the United States is a Christian nation as a result of the “Year of Our Lord” phrase beneath Article VII, because such construction would explicitly contravene the Establishment Clause of U.S. CONST. amend. I); *id.* (tethering therefore the unwritten Constitution to the written Constitution by prohibiting explicit contradictions of the text); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877-81, 884-89 (1996) (arguing that many other constitutional theories, such as Originalism, are premised on sovereign command but that the common law, with its inherent malleability, would be a more historical and optimal *modus operandi* of applying constitutional principles).

120. E.g., Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226, 245-48 (1988) (describing how Originalism premised on original intent has been criticized for being unable to determine how it would be possible to ascertain the intent of a collection of people, when intent technically reduces to one person’s psychological state, and explaining why the original intent of the ratifiers should supersede that of the Framers under Originalism’s logic); James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 B.U.L. REV. 1171, 1173 (2012) (describing, although not necessarily criticizing, how Living Originalists dress “up their theories in the garb of originalism”); *id.* at 1180-82 (criticizing how Common Law Constitutional Interpretation fails to distinguish between constitutional law (i.e., precedent interpreting the Constitution) and the Constitution itself).

inapplicable.¹²¹ Although cases nominally point to the Legislative Vesting Clause as the *locus* of the Nondelegation Doctrine, the Legislative Vesting Clause neither says anything about the extent to which legislative power may be delegated after having vested nor implies a mechanism to ascertain that extent.¹²² The Nondelegation Doctrine contains a fundamental indeterminacy in its relation to the constitutional text.¹²³

To demonstrate the fundamental indeterminacy through *reductio ad absurdum*, assume that the Nondelegation Doctrine is fixed within the Legislative Vesting Clause.¹²⁴ However, although the Nondelegation Doctrine is usually applied to the legislative branch, it also applies just as much to the executive and judicial branches.¹²⁵ The Constitution contains Executive and Judicial Vesting Clauses, which therefore should also be *loci* of the Nondelegation Doctrine.¹²⁶ However, the Nondelegation Doctrine cannot then be fixed within the Legislative Vesting Clause, and therefore the Nondelegation Doctrine is neither fixed there nor anywhere else.¹²⁷ This Comment focuses primarily on legislative delegations to officials from other branches, primarily the executive branch, as when Congress delegates to the President.¹²⁸ Nevertheless, the Nondelegation Doctrine applies to all forms of

121. See *infra* notes 130-135 and accompanying text (explaining the inapplicability of these constitutional theories).

122. See *supra* note 8 and accompanying text (explaining the origins of the Nondelegation Doctrine).

123. See *infra* notes 125-128 and accompanying text (explaining the fundamental indeterminacy of the Nondelegation Doctrine in its relation to the Constitution).

¹²⁴ See generally Dale Jacquette, *Mathematical Proof and Discovery Reductio ad Absurdum*, 28 INFORMAL LOGIC 242, 244-46 (2008) (explaining *reductio ad absurdum* with examples).

125. The Supreme Court of New York at General Term sitting in Kings County wrote:

[T]he same reasoning that would permit a legislator to transfer his power to his constituents, would authorize any other elective officer to do the same. Thus the governor when applied to, to pardon a criminal, might, being unwilling to take the responsibility of deciding upon the application himself, call an election and submit it to the people. The courts, whenever a case of peculiar difficulty came before them, might call together their constituents to ascertain how the popular feeling stood. . . . Every person must perceive how preposterous such a proceeding would be! And how deservedly contemptible every officer and court who should resort to such means of evading the just responsibilities of his office, would be held.

Whittington & Iuliano, *supra* note 8, at 413 (quoting *Thorne v. Cramer*, 15 Barb. 112, 116-17 (N.Y. Gen. Term 1851)).

126. U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1.

127. Compare U.S. CONST. art. I, § 1, with U.S. CONST. art. II, § 1, and U.S. CONST. art. III, § 1.

128. *Wayman*, 23 U.S. at 42-43, 45; *J. W. Hampton, Jr., & Co.*, 276 U.S. at 413.

delegations, which need not originate from Congress.¹²⁹

By contrast, Originalism premised on the intent of the Framers, the intent of the ratifiers, and original public meaning focuses on specific language and finds meaning therein.¹³⁰ The Nondelegation Doctrine is found in no specific language of the Constitution and is therefore incompatible with those three forms of Originalism.¹³¹ Neither is Living Constitutionalism compatible, if only explicit textual contradiction limits possible constitutional construction,¹³² because the Constitution's text does not make any explicit references to the Nondelegation Doctrine¹³³. Under this standard of limitation, it could be argued that the Nondelegation Doctrine should both exist and not exist at the same time. No one seriously contends that our tripartite system of government should become unitary. It would defeat the purpose of a tripartite system of government if those branches, when vested with their powers,¹³⁴ could simply choose to delegate all their powers away, for their distinctions would then be without a difference. A theory that renders that outcome possible should not be applicable to the Nondelegation Doctrine.

However, although Professor Jack M. Balkin's Living Originalism focuses on specific language for purposes of ascertainment,¹³⁵ and therefore could encounter similar aforementioned issues, its theory of constitutional redemption promotes the renewal of every generation's consent to be bound by this social contract that is the Constitution of the United States.¹³⁶ The fundamental purpose behind the Nondelegation Doctrine is to make certain that branches of government themselves properly decide the issues the People assign them through her Constitution. This is to prevent those branches from merely kicking the can down the road. That purpose is intrinsic to constitutional renewal.

Originalism premised on original methods,¹³⁷ Living

129. Whittington & Iuliano, *supra* note 8, at 413.

130. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 581-88 (2008) (interpreting "to keep and bear arms" by researching contemporary dictionary definitions and narrowing down the definitions by reasoning through the implications of "to keep" and "to bear" being conjoined).

131. *See* U.S. CONST. (containing no such explicit language).

132. *See supra* note 119 and accompanying text (discussing differing constitutional interpretations).

133. *See* U.S. CONST. (containing no such explicit language).

134. U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1.

135. *See supra* note 118 and accompanying text (describing Balkin's discussion on Living Originalism).

136. *See supra* note 5 and accompanying text (discussing the social contract theory).

137. Originalism premised on original methods must be applied in such a manner that it does not rely on specific language, due to issues relating to the fundamental indeterminacy of the Nondelegation Doctrine. For an example of a form of such Originalism that does rely on specific language, *see* John O.

Constitutionalism's Common Law Constitutional Interpretation,¹³⁸ structural reasoning,¹³⁹ and Living Originalism, to the extent discussed, all remain applicable to the Nondelegation Doctrine. Results from applying those constitutional theories should be compared. What this analysis demonstrates is that the Nondelegation Doctrine should be ascertained through general methods, not outcome-determinative rules. But remember – it is all just a theory: a constitutional theory.¹⁴⁰

McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 756 (2009) (“There are also interpretive rules, defined as rules that provide guidance on how to interpret the language in a document.”). It also argues that original methods applying these interpretive rules could solve the issue of irreducibly vague constitutional text not having a fixable meaning without resorting to construction. *Id.* at 751-58. However, this Comment will attempt to apply such Originalism without being tethered to specific language in § III(B) *infra*.

138. This Comment does not take the position that precedent interpreting and construing the Constitution is itself the Constitution. That said, some Originalists premised on original methods may contend that only original methods should be used to interpret the Constitution. However, if it seems imprecise to determine a multi-member body's intent, it would seem all the more imprecise to determine a multi-member body's intended result from applying sometimes conflicting methods that by design are not outcome-determinative. The justification for original methods may be more along the lines of how it limits the set of possible “correct” interpretations. Nevertheless, the true persuasiveness of original methods comes from how the common law, as articulated by Sir William Blackstone, 1 MELVIN L. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 83-87 (3d ed. 2011) (describing how, although some Americans did want to break completely from the British legal system, the common law as articulated by Sir Blackstone ultimately withstood the test of time during and after the American Revolution, probably due to the common law's merits). Also, other enlightened political philosophies strongly influenced the Founding Fathers and have much more independent merit, arguably more than any other legal tradition at that time. *Id.* However, the common law was by no means perfect. *Id.* at 84. Some amendments do mandate constructive rules on the courts. U.S. CONST. amend. IX; U.S. CONST. amend. XI. However, courts develop new interpretive and constructive rules that improve on those imperfect original methods and do not make their way into the Constitution all the time. It strains credulity to suppose that amendments must sanction all innovations in constitutional interpretive and constructive method before courts may use them. Moreover, amendments passed after the Founding technically have different original methods with respect to the Framers or ratifiers that passed them, and many amendments, such as U.S. CONST. amend. XIV, heavily modify the Constitution from the Founding Fathers. Thus, the Founding Fathers' original methods should be recognized for their special merits and should be applied to the Nondelegation Doctrine, but that application does not estop other methods, which may have independent merit of their own.

139. See generally CHARLES BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 10-15, 17-19, 22-27, 29-32 (1969) (explaining structural reasoning as a method of construing the Constitution).

140. An homage to *The Game Theorists*, YOUTUBE, www.youtube.com/user/MatthewPatrick13 [perma.cc/47GH-HBLM] (last visited May 18, 2020).

B. Applying Such Proper Constitutional Theories to Congressional Delegations to the President

There are many original methods,¹⁴¹ and it may feel like searching for a needle in a haystack to find original methods relevant to the Nondelegation Doctrine. However, Sir William Blackstone, a major influence on the Founding Fathers and their generation, and his canons of statutory construction will be useful to analyze the Nondelegation Doctrine for new nondelegation principles.¹⁴² One such canon is *ut res magis valeat, quam pereat* (“One part of a statute must be so construed by another, that the whole may (if possible) stand . . .”).¹⁴³ Implicit in that canon is that each part of the statute is presumed not to be superfluous; in fact, another general interpretive rule from original methods is that constitutional text should not be rendered “redundant or surplusage.”¹⁴⁴

Applied to the Constitution and the Nondelegation Doctrine, with structural reasoning, Sir Blackstone’s canon and the aforementioned interpretive rule yield some meaningful results.¹⁴⁵ The Constitution provides that the President “shall take Care that the Laws be faithfully executed.”¹⁴⁶ The Constitution also provides for legislative power through enumerated powers and implied powers pursuant to the Necessary and Proper Clause.¹⁴⁷ When Congress delegates to the President, Congress does so under an enumerated power in conjunction with the Necessary and Proper Clause.¹⁴⁸

141. McGinnis & Rappaport, *supra* note 137, at 755-58 (discussing various original methods).

142. UROFSKY & FINKELMAN, *supra* note 138, at 83-87.

143. 1 WILLIAM BLACKSTONE, COMMENTARIES *89 (analyzing, for example, how an act of Parliament vesting land in “the king and his heirs, saving the right of A,” and a lease providing for A in the land for three years suggests that A has a term of years of three and that the king has a vested remainder in fee simple).

144. McGinnis & Rappaport, *supra* note 137, at 756 (justifying this interpretive rule on the grounds that people writing formal documents intentionally tend to eliminate redundancies).

145. See *infra* notes 149-152 and accompanying text (applying Sir Blackstone’s canon and interpretive rule).

146. U.S. CONST. art. II, § 3.

147. U.S. CONST. art. I, § 8.

148. Even without the Necessary and Proper Clause, the enumerated powers in and of themselves would imply that Congress has power to have an agent carry out the law in such a manner that the agent has absolutely no discretion, or else the enumerated powers would be mere surplusage as Congress itself is not expected to execute the law. See, e.g., *id.*, cl. 2 (providing for Congress to have power to “borrow money on the credit of the United States,” but, if Congress wants to borrow a specific amount of money from a lender but is unable to have an agent carry that out, then Congress never truly had that “power” at all). Congressional delegation to agents who have no discretion is consistent with the rationale in *Marshall Field & Co.*, 143 U.S. at 692-93.

However, the Take Care Clause limits the contours of that delegation, particularly because of the usage of the word “faithfully.”¹⁴⁹ The Take Care Clause would become mere surplusage should Congress be able to delegate to the President in such a manner that the President’s duty to execute the law would exceed the Take Care Clause.¹⁵⁰ After all, the Constitution could have simply been written without a Take Care Clause, without the explicit standard that the President’s implied duty is to execute the law.¹⁵¹ Interpreted under *ut res magis valeat, quam pereat*, there is an upper limit to the Nondelegation Doctrine.¹⁵² If Congress delegates to the President a duty to execute a law, and the President has discretion to fill in the details of the law, the discretion cannot be so expansive that it dissipates the element of faith necessary to carry out the law.

To explain, in a popular dictionary from the eighteenth century, faith is defined as “a[ss]ent” to another’s proposition whose truth is not “immediately perceived” from one’s own “rea[s]on or experience” but is “believe[d]” to have been “discovered and known by the other.”¹⁵³ In other words, there is no faith in knowledge, and a president who knows the laws he or she must execute – because he or she created those laws – need not and cannot execute them faithfully.¹⁵⁴ There must be some daylight between the President and the laws he or she must execute, for “there is a particular danger when you combine prosecuting a person with the writing of the law under which you prosecute.”¹⁵⁵ This principle should apply to any authority in other officials derived from the President. This result is also consistent with precedent that implies Congress does not re-delegate its legislative powers in contravention of *delegata potestas non potest delegari* but instead exercises its legislative powers and compels other officials pursuant to their own inherent powers to realize that legislative vision.¹⁵⁶

However, the conjunction of the Necessary and Proper Clause with the enumerated power allows Congress to modify the agent’s discretion in filling in the “minor details” of the law as the agent carries the law out. *Wayman*, 23 U.S. at 42-43, 45. The extent to which Congress may modify the agent’s discretion is the Nondelegation Doctrine fundamentally for Congressional delegations.

149. U.S. CONST. art. II, § 3.

150. McGinnis & Rappaport, *supra* note 137, at 756 (discussing the mere surplusage rule).

151. U.S. CONST. art. II, § 3.

152. 1 WILLIAM BLACKSTONE, COMMENTARIES *89.

153. NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London, Thomas Cox, 2d ed. 1731).

154. *Id.*

155. Oral Argument at 37:01, *Gundy*, 139 S. Ct. 2116 (No. 17-6086), www.oyez.org/cases/2018/17-6086 [perma.cc/K3VZ-ZFMP].

156. See *supra* note 42 (discussing delegation of legislative vs. non-legislative power).

C. *Clinton v. City of New York*

Another precedent that informs the debate about what the Nondelegation Doctrine should be post-*Gundy* is *Clinton v. City of New York*.¹⁵⁷ It will be shown that the dissent was correct in pointing out the nondelegation issues but that the Court was nevertheless correct in its holding.

After President Clinton signed the Line Item Veto Act of 1996 (“Line Item Veto Act”) into law on April 9, 1996, immediately there were questions regarding its constitutional validity.¹⁵⁸ Before proceeding further with the discussion of the Line Item Veto Act, it is critical to clarify that it applied only to a bill relating to discretionary budgetary authority, new direct spending, or limited tax benefits and did not allow the President to cross out provisions in a bill and then sign the edited version into law.¹⁵⁹ Rather, the President signed the bill in whole, and then the Line Item Veto Act operated on the new law and allowed the President to cancel out portions of the statute after certain criteria had been met.¹⁶⁰ Those criteria are that those cancellations must “reduce the Federal budget deficit,” “not impair any essential Government functions,” and “not harm the national interest.”¹⁶¹

The history of the Line Item Veto Act is ripe with controversy, but it is facially concerned with the Presentment Clause.¹⁶² The Constitution requires that all bills Congress passes be presented before the President, who may sign or veto them, and, if he or she vetoes them, Congress may override those vetoes through

157. *Clinton v. City of New York*, 524 U.S. 417 (1998).

158. Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), *invalidated by Clinton*, 524 U.S. 417; Thomas C. Weisert, *Timing Isn't Everything: The Supreme Court Decides that a Presidential Cancellation Does Indeed "Walk, Swim, and Quack" like a Line-Item Veto*, 29 SETON HALL L. REV. 1618, 1626-28 (1999) (remarking also that passage of the Line Item Veto Act required a confluence of political factors).

159. Weisert, *supra* note 158, at 1628 n.43.

160. *Clinton*, 524 U.S. at 473-74 (Breyer, J., dissenting) (“When the President ‘canceled’ the two appropriation measures now before us, he did not repeal any law nor did he amend any law. He simply followed the law, leaving the statutes, as they are literally written, intact.”); Mary E. Foster, *The Line Item Veto Act After Raines v. Byrd*, 20 T. JEFFERSON L. REV. 323, 323 (1998). This Article was actually written just as the Supreme Court was about to hear oral arguments for *Clinton v. City of New York*. *Id.* at 351.

161. Michael G. Locklar, *Is the 1996 Line-Item Veto Constitutional?*, 34 HOUS. L. REV. 1161, 1173 n.90 (1997).

162. Foster, *supra* note 160, at 324-25 (explaining that, initially, Members of Congress, who presumably did not vote for the bill, challenged the constitutionality of the Line Item Veto Act in federal court, and President Clinton declined to exercise any powers under it as the case was pending). *But see id.* at 325-26; *Raines v. Byrd*, 521 U.S. 811, 829-30 (1997) (explaining that the Supreme Court held that the case was not ripe for adjudication and that President Clinton began cancelling provisions from statutes in accordance with the Line Item Veto Act from then).

supermajorities.¹⁶³ Justice Breyer, Justice O'Connor, and Justice Scalia, a rather unusual coalition,¹⁶⁴ fairly and succinctly articulated the Court's syllogistic reasoning in invalidating the Line Item Veto Act.¹⁶⁵ The fallacy in the Court's logic goes back to the mechanics of the Line Item Veto Act, for the President does not actually repeal or amend any laws pursuant to any constitutional powers.¹⁶⁶ Rather, he or she exercises only his or her statutory powers under the Line Item Veto Act, which merely deprives any cancelled law of its legal effects.¹⁶⁷ As Justice Breyer himself acknowledges, this is a nuanced logical distinction, but he demonstrates it by hypothesizing about how a challenged law on which the Line Item Veto Act operated in *Clinton* could have been reworded to satisfy the Court's concerns.¹⁶⁸ This demonstration is exactly the kind of Congressional delegation of power that is the

163. The Presentment Clause more fully reads:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

U.S. CONST. art. I, § 7.

164. See Robin West, *The Supreme Court, 1989 Term: Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 55 n.68 (1990) (describing Justice O'Connor and Justice Scalia's longstanding feud as to whether a rules-based approach or a standards-based approach is better).

165. Justice Breyer illustrated the majority's logic as follows:

Major Premise: The Constitution sets forth an exclusive method for enacting, repealing, or amending laws.

Minor Premise: The Act authorizes the President to "repeal or amend" laws in a different way, namely by announcing a cancellation of a portion of a previously enacted law.

Conclusion: The Act is inconsistent with the Constitution.

Clinton, 524 U.S. at 474.

166. *Id.*

167. *Id.*

168. Justice Breyer hypothesizes:

Section One. Taxes . . . that were collected by the State of New York from a health care provider before June 1, 1997 and for which a waiver of provisions [requiring payment] have been sought . . . are deemed to be permissible health care related taxes . . . *provided however that the President may prevent the just-mentioned provision from having legal force or effect if he determines x, y and z.* (Assume x, y and z to be the same determinations required by the Line Item Veto Act.).

Id. at 475.

topic of this Comment.¹⁶⁹ Justice Breyer is correct that this issue relates more to the Nondelegation Doctrine than the Presentment Clause.¹⁷⁰

In applying the *Panama Refining Co.* test, legislative history demonstrates that the policy underlying the Line Item Veto Act was to prevent pork-barrel spending.¹⁷¹ However, the Line Item Veto Act itself does not seem specifically to address this or any other policy.¹⁷² Nevertheless, the criteria (i.e., that those cancellations must “reduce the Federal budget deficit,” “not impair any essential Government functions,” and “not harm the national interest”)¹⁷³ are standards that limit the President’s discretion, and, under *Yakus*, it is sufficient for the fact-finding mission to be that the agency action should promote the policy and conform to the standards.¹⁷⁴ For that reason, if Congress is treated as having declared a policy, it would seem as though the Line Item Veto Act should have passed muster under the Nondelegation Doctrine.¹⁷⁵

But the result defies common-sense. There should be no way for the Line Item Veto Act to pass muster under the Nondelegation Doctrine because it is as extreme a “delegation” as one could conceive. The Line Item Veto Act essentially says that Congress can pass a spending or taxing bill with its own policies, but the President can effectively nullify that spending or taxing statute under what appears to be a super-policy delegated from Congress to override the very own policy Congress establishes every time it passes a bill.¹⁷⁶ And yet, formally, after this analysis, the Line Item Veto Act does not run afoul of the *Panama Refining Co.* test.¹⁷⁷ That may suggest that, even if the Court brings the test back, it needs more reinforcement.

169. *See Pan. Ref. Co.*, 293 U.S. at 416-19.

170. *But see Clinton*, 524 U.S. at 442-44 (arguing that the Nondelegation Doctrine does not apply and distinguishing *Marshall Field & Co.* by asserting that, in that case, the conditions between the passage of the Tariff Act and an assessment of a Presidential tariff may be materially different, but, here, the conditions between the passage of a law and Presidential action to apply the Line Item Veto Act to deprive the law of legal effect are not materially different). Where this Comment differs from Justice Stevens is in asserting that the Nondelegation Doctrine does apply to this case, but the distinction demonstrates how indeterminate it is and why it must be revised to become more amenable to application.

171. Pork-barrel spending is where Congressmen add provisions to spending or taxing bills to benefit local interests, even though the purpose of those bills is to benefit the nation as a whole. Foster, *supra* note 160, at 323-24.

172. 110 Stat. at 1200-12.

173. Locklar, *supra* note 161, 1173 n.96.

174. *Yakus*, 321 U.S. at 423 (setting such an arguably loose standard).

175. *See supra* note 171 and accompanying text (discussing the policy of the Line Item Veto Act).

176. *Clinton*, 524 U.S. at 444-45.

177. *Id.* at 442-44.

D. Reiteration Time

Reiteration time is central to analyzing nondelegation issues.¹⁷⁸ For the purpose of this Comment, reiteration time is defined as the period with which an agent assesses the situation to find out whether the condition allowing for a delegation has been triggered.¹⁷⁹ The prime example of a delegation with high reiteration time¹⁸⁰ is *J. W. Hampton, Jr., & Co.*, where the President would have to reevaluate equalization conditions “from time to time,” but not all the time.¹⁸¹ However, Congress has limited agency discretion only with the proviso that the agent must act “in the public interest.”¹⁸² Congress essentially increases the frequency of reevaluating the condition (i.e., that the public interest is being satisfied) to such an extent that the condition is essentially continuously being triggered.¹⁸³ In other words, the reiteration time is extremely low, and the condition is being reevaluated continuously.¹⁸⁴

178. See, e.g., *Yakus*, 31 U.S. at 427 (legitimizing the standard that agency action must be “in the public interest,” which implies that (a) the agent is continuously assessing the situation and that (b) the agent will always say that the condition has been triggered, because the standard has such a low threshold). Therefore, (a) and (b) imply that the agent’s power will always be activated in a delegation limited at most by “the public interest,” unless the agent suddenly decides that it is no longer acting in the public interest. *Id.*

179. *Id.* The period concept here is also analogous to that in elementary mathematics and physics. See, e.g., Khan Academy, *Amplitude, Period, Frequency, and Wavelength of Periodic Waves*, YOUTUBE (Mar. 16, 2010), www.youtube.com/watch?v=tJW_a6JeXD8 [perma.cc/24UE-92CN] (explaining period and frequency, *inter alia*, in the context of periodic waves). In the sciences, period is convertible to frequency, and, here, it may be more intuitive to think of the relationships from a frequency standpoint. *Id.* For example, if the standard is “in the public interest,” then that implies the frequency of reevaluation is high and essentially continuous; therefore, the period (the time the agent gets between reevaluations of the condition’s satisfaction) is extremely low. E.g., *Yakus*, 31 U.S. at 427 (providing the other half of the analogy).

180. That is, the agent has a lot of time to reevaluate the conditions triggering the delegation. Or the frequency with which the agent must do so is low. See Khan Academy, *supra* note 179 (discussing the inverse relationship).

181. *J. W. Hampton, Jr., & Co.*, 276 U.S. at 404-05.

182. *Yakus*, 321 U.S. at 427 (consolidating several cases where “in the public interest” or something similar sufficiently limited discretion); *Gundy*, 139 S. Ct. at 2129 (consolidating similarly several cases where “in the public interest” sufficiently limited discretion); Dunnigan, *supra* note 64, at 261-62 (discussing one of the first cases to use the standard of “in the public interest” in nondelegation contexts, to wit, *Nat’l Broad. Co. v. United States*, 319 U.S. 190 (1943)).

183. *But cf.* Dunnigan, *supra* note 64, at 271-72 (proposing that the Nondelegation Doctrine have a formal factual determination requirement and therefore implying that standards like “in the public interest” are insufficient and are therefore in themselves too dissimilar to traditional conditions).

184. See Khan Academy, *supra* note 179 (discussing the inverse relationship).

Ideally, this should not be an issue because, if agents have to reevaluate their conditions all the time, they should be more ready to detect when their conditions are no longer being satisfied.¹⁸⁵ However, human nature tends towards complacency and diminished levels of scrutiny when a person has to reevaluate anything constantly.¹⁸⁶ While Americans have a “government of laws and not men,” the laws are nevertheless being carried out by humans.¹⁸⁷ Recipients of Congressional delegations will accordingly more likely than not exercise far less scrutiny over the exercise of their delegated powers, when only something like the “public interest” constrains them.¹⁸⁸ These agents receive no active reinforcement from a discrete condition they must analyze to determine whether their delegations have been triggered or are at an end.¹⁸⁹ Thus, reiteration time is directly related to the level of scrutiny with which recipients of Congressional delegations exercise over the conditions triggering those delegations.¹⁹⁰

Various jurists outside the Supreme Court have noted concerns about the “public interest” standard for nondelegation issues.¹⁹¹

185. For a stellar example, see *Mahler*, 264 U.S. 32 (deciding whether the Secretary was properly delegated power to determine the desirability of aliens). There, the only limit to the Secretary’s discretion was whether his or her determination of undesirable aliens comported with the “common understanding.” *Id.* at 40. In other words, the Secretary ideally would be evaluating all the time whether his or her determinations were comporting with common understanding. *Id.* This is unlike *Cargo of the Brig Aurora*, 11 U.S. at 388, where the President only has to determine discretely one time whether Great Britain or France have satisfied the conditions.

186. Timothy Ludwig, *Complacency Comes When Reinforcement Goes, so Reinforce More*, INDUS. SAFETY & HYGIENE NEWS (July 1, 2016), www.ishn.com/articles/104361-complacency-comes-when-reinforcement-goes-so-reinforce-more [perma.cc/A9SV-PMAC] (“Common wisdom suggests complacency is built up over time working a process over and over. ‘Habituation’ may take over. This means you go on autopilot and your ability to notice changes in the hazard, or perhaps your own behavior, fades.”). Here, the process being worked over and over is reevaluation of the conditions triggering a Congressional delegation. See *supra* note 185 (discussing *Mahler*, 264 U.S. 32, where the Secretary had to reevaluate over and over whether his determinations comported with common understanding).

187. *Marbury*, 5 U.S. at 163. See generally Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 90-95 (2009) (discussing legal realism and how it incorporates social sciences into practicing and theorizing about the law); Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1921-26 (2005) (discussing in-depth how legal realists conceived legal rules and the nuances thereof in terms of actions and obligations).

188. *Yakus*, 321 U.S. at 427.

189. Cf. *People v. Carter*, 97 Ill. 2d 133, 148, 150 (1982) (Moran, J., dissenting) (arguing that the “public interest” is too vague a standard to be permissible under Illinois’s Nondelegation Doctrine).

190. See *supra* note 178-189 and accompanying text (discussing reiteration time).

191. E.g., *Carter*, 97 Ill. 2d at 150 (Moran, J., dissenting) (“The vague ‘public interest’ standard for granting the exemptions creates too great a danger of

However, most courts, not desiring to oppose the Supreme Court's post-*Yakus* jurisprudence, have not decided to invalidate a delegation on the public interest grounds.¹⁹² By contrast, legal scholarship has indeed thrown a much less flattering light on the public interest standard, from many angles.¹⁹³ Demanding someone to be on watch 24/7 will naturally be less effective than requesting someone to be on watch at specific moments in time, four times a day. If agents have more reiteration time, with more precise goals in reevaluating whether their Congressional delegations remain in effect, delegation will become more discrete and immediate.¹⁹⁴ Discrete and immediate delegations let the People feel as though it is their elected representatives, not unelected bureaucrats, who run the show.¹⁹⁵ However, the nature of administrative agencies has changed.¹⁹⁶ Initially, there were no permanent administrative agencies, but as time went on, permanent administrative agencies proliferated.¹⁹⁷ Whether standards should be applied differently if

arbitrary classification to uphold, especially when the personal liberty of the defendant may be at stake in a criminal proceeding.”); *AARP v. EEOC*, 390 F. Supp. 2d 437, 451 (E.D. Pa. 2005) (concerning a delegation to an agency to make exemptions in the public interest); *id.* at 452-54 (questioning, ultimately hypothetically, whether it would be proper for the agency to interpret a statute against Congress' own explicitly interpretation, for the agency would seemingly have no details to fill).

192. *E.g.*, *Free Speech v. Reno*, No. 98 Civ. 2680 (MBM), U.S. Dist. LEXIS 3058, at *28 (S.D.N.Y. Mar. 18, 1999) (holding that the public interest standard was sufficiently specific so as not to violate the Nondelegation Doctrine).

193. See Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, 443-45 (2001) (mentioning a number of scholars who have criticized the public interest standard as being too weak, too indeterminate, too discretionary, etc.).

194. Foundationally, the legislative process is supposed to be restrictive, with overruling a Presidential veto requiring a high bar. U.S. CONST. art. I, § 7; see also *Filibuster and Cloture*, UNITED STATES SENATE, www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm [perma.cc/Y8FY-2GGA] (last visited Oct. 31, 2020) (explaining the filibuster, which is not found in the Constitution but in practice adds an additional layer of difficulty for legislation to pass through Congress); Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1202 (1988) (discussing how the Founding Fathers took their minimalist government for granted). For Congress to be able to pass legislation with so many blank details, and to have the President or administrative agencies fill in those details, defeats the purpose of having such a restrictive legislative process in the first place.

195. See Jill Rosen, *Washington Bureaucrats Tend to Believe Americans Know 'Very Little' About Key Issues*, JOHNS HOPKINS UNIV. (Sep. 28, 2016), hub.jhu.edu/2016/09/28/low-opinion-dc-insiders-american-public/ [perma.cc/59BS-PZLE] (demonstrating this wide divide between regular citizens and bureaucrats, who are delegated their power).

196. A. Michael Nolan, *State Agency-Based v. Central Panel Jurisdictions: Is There a Deference?*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 5-6 (2009) (presenting how the Interstate Commerce Commission was the first permanent administrative agency in 1887).

197. *Id.*

administrative agencies are temporary or permanent is certainly plausible.

IV. PROPOSAL

In *Gundy*, the dissent signaled that it would overturn the Intelligible Principle test and revert the Nondelegation Doctrine back to the *Panama Refining Co.* test.¹⁹⁸ The *Panama Refining Co.* test has the aforementioned three elements.¹⁹⁹ To reiterate, they are that Congress must (1) declare a policy with respect to the subject matter, (2) set up a standard for the agent's actions, and (3) require a finding by the agent in the exercise of authority to enact the law.²⁰⁰ They should remain. However, the analysis has demonstrated that new principles should be applied to the Nondelegation Doctrine, whether as new elements or new manners of viewing the elements.²⁰¹

A. *The Faithfulness Element*

(4) There must be such separation between the process of writing the law and executing the law such that the processes are not unified in the same figure, unless the recipient of the Congressional delegation is the President.²⁰² “Power tends to corrupt and absolute power corrupts absolutely.”²⁰³ This quotation may be a bit hyperbolic, but there is a basis for being concerned about conjoining the powers within the agents of the President, members of the unelected bureaucracy.²⁰⁴ The same danger about power tending to corrupt may also apply to the President, who is an

198. *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting) (“But JUSTICE ALITO supplies the fifth vote for today’s judgment and he does not join either the plurality’s constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait.”); *id.* at 2130-31 (Alito, J., concurring) (“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 had not heard the oral arguments and therefore recused himself.

199. *Pan. Ref. Co.*, 293 U.S. at 418.

200. *Id.* at 416-19. *But see Gundy*, 139 S. Ct. at 2136-37 (Gorsuch, J., dissenting) (combining the second and third elements, maintaining the first element, but adding another element for assignments of non-legislative responsibilities, such as powers inherent to other branches, like the President’s powers over foreign policy).

201. *See supra* § III(B), (C), (D) (analyzing the issues with the Nondelegation Doctrine).

202. *See supra* § III(B) (applying proper constitutional theories to congressional delegations to the president).

203. John Dalberg-Acton, *Lord Acton writes to Bishop Creighton that the same moral standards should be applied to all men, political and religious leaders included, especially since “Power tends to corrupt and absolute power corrupts absolutely”* (1887), LIBERTY FUND, oll.libertyfund.org/quotes/214 [perma.cc/5XPF-9UHM] (last visited Oct. 27, 2020).

204. *See supra* note 107 and accompanying text (iterating the dangers).

elected official.²⁰⁵ However, unlike the President's agents, the President has unitary executive theory, which does justify the President having substantial powers alone.²⁰⁶ In addition, if the concern over corrupting power continues to endure, the President is only one person, so he or she cannot practically receive and exercise too much delegated powers anyway without assigning them to his agents.²⁰⁷

B. The Impracticability Element

(5) Directly exercising the delegated power must be so impracticable for Congress itself to do, that it would interfere with the legislative process for Congress to do so. Chief Justice Stone famously said the following:

The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.²⁰⁸

He is absolutely correct. At the same time, on the other end of the spectrum, the Constitution does demand that Congress perform functions for which it is entirely practicable for Congress itself to do.²⁰⁹ For example, it would be inconceivable for Congress to delegate its power to set the budget for the federal government to an administrative agency of economics professors, even if Congress sets out a policy, establishes certain guidelines and limits on

205. See Dalberg-Acton, *supra* note 203 (distinguishing not between whether the recipient of power is elected or unelected).

206. See Morrison v. Olson, 487 U.S. 654, 697-723 (1989) (Scalia, J., dissenting) (arguing for unitary executive theory in the context of a controversy over the degree of autonomy in the independent counsel). Compare U.S. CONST. art. II, § 1 (vesting all executive power in one person), with U.S. CONST. art. I, § 1 (vesting all legislative power in a bicameral legislature), and U.S. CONST. art. III, § 1 (vesting all judicial power in federal courts, which would likely have numerous personnel).

207. U.S. CONST. art. II, § 1 (vesting all executive power in one person).

208. *Yakus*, 321 U.S. at 424.

209. U.S. CONST. art. I, § 8, cl. 11 (granting the power for Congress to declare war). There are many powers of Congress where it would be impracticable on its face for Congress itself to perform. See, e.g., *id.* at cl. 10 (punishing piracies and felonies on the high seas, such act of punishing presumably requiring dedicated prosecutors who could devote their time to such an effort). However, declaring war is one of those actions where it would be inconceivable for Congress to delegate away. Congress may certainly create commissions to find facts about an international conflict, but absent truly extreme circumstances, it would never be so impracticable that Congress cannot perform its function to declare war. *Id.* at cl. 11.

discretion, and requires findings that its actions promote that policy and follows those standards, all in the public interest.²¹⁰ There are certain questions that Congress must itself answer and cannot delegate to another entity, because they are so fundamental to the institution and the reason people elect Congressmen and Senators in the first place.²¹¹

In *Clinton*, the Line Item Veto Act required the President to find that overturning a spending or taxing statute furthered the policy thereof.²¹² Even though this requirement may have formally satisfied the third element of the *Panama Refining Co.* test, this requirement would not satisfy this new fifth element.²¹³ In *Cargo of the Brig Aurora*, it was necessary for Congress to delegate tariff-enacting powers to the President, for Members of Congress cannot be expected to monitor the conditions prevailing overseas in order to determine whether the conditions for tariffs have been satisfied.²¹⁴ That is the President's job as the sole organ of foreign policy.²¹⁵ In *Mahler*, members of Congress are not going to be able to determine which aliens residing in the United States are undesirable or not on a case-by-case basis, albeit that delegation may violate other principles.²¹⁶ By contrast, nothing about the fact-finding mission of the Line Item Veto Act makes it impracticable for Congress itself to act.²¹⁷ It would not be impracticable for Congress to make its own decision as to whether a spending or taxing bill should be passed or not, if it wants to prevent pork-barrel

210. *Pan. Ref. Co.*, 293 U.S. at 416-19.

211. Cf. Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2029-41 (2018) (describing the development of the major questions doctrine, which also evaluates whether it is appropriate for an administrative agency to fill in the details of a statute, where those details may indeed not be minor in deciding a question of such magnitude that it would only be appropriate for Congress to answer).

212. *But see Clinton*, 524 U.S. at 442-44 (arguing that the Nondelegation Doctrine does not apply and distinguishing *Marshall Field & Co.* by asserting that, in that case, the conditions between the passage of the Tariff Act and an assessment of a Presidential tariff may be materially different, but, here, the conditions between the passage of a law and Presidential action to apply the Line Item Veto Act to deprive the law of legal effect are not materially different).

213. Indeed, Congress had already exercised its ability to pass the legislation in the first place, and it did not leave details to be filled in. *Clinton*, 524 U.S. at 473-74 (Breyer, J., dissenting). Instead, the President essentially overwrites those details with his or her own policy preferences. *Id.* There is therefore no impracticality for Congress directly to exercise its powers itself, because it literally did do so, and the President is overwriting that policy, not filling in the details.

214. *Cargo of the Brig Aurora*, 11 U.S. at 388.

215. U.S. CONST. art. II, § 3 (stating that the President would accept or receive ambassadors and therefore implying that it is the President's prerogative to determine what constitutes an ambassador and therefore which nations the United States recognizes).

216. *Mahler*, 264 U.S. at 40.

217. *See supra* note 213 (discussing the impracticality argument).

spending.²¹⁸

C. Reiteration Time Considerations

The public interest standard is too generic and should not provide for a good Congressional delegation under any circumstance.²¹⁹ The public interest standard sets the reiteration time extremely low and therefore leads to little scrutiny from agents reevaluating whether the conditions triggering their power still stand.²²⁰ Moreover, from a common-sense standpoint, rare will be the public servant who comes to the epiphany that he or she is not acting in the public interest.²²¹ That said, the actual reiteration time the President or an administrative agency receives should depend on the circumstances. For example, a permanent administrative agency may need more flexibility with its reiteration time to handle disparate situations without having to go back to Congress every time.²²² Nevertheless, the blank check of an “in the public interest” delegation should still be too much for the most permanent of institutions.²²³

D. Reanalyzing Gundy

Whether people agree, the plurality did reason that the facts of *Gundy* would pass constitutional muster under the *Panama Refining Co.* test.²²⁴ Whether they would pass muster under this Comment’s new proposed restrictions is a different question. The move the plurality makes that confounds the *Panama Refining Co.* test is that it places the interpretation and construction question before the nondelegation issue.²²⁵ “It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably

218. Foster, *supra* note 160, at 323-24.

219. See *supra* § III(D) (discussing reiteration time and the public interest standard).

220. See *supra* notes 185-190 and accompanying text (describing the issues with the public interest standard).

221. Dalberg-Acton, *supra* note 203.

222. See Nolan, *supra* note 197-197 and accompanying text (overviewing the permanency aspect of administrative agencies in the modern era).

223. See *supra* § III(D) (discussing reiteration time and the public interest standard).

224. See *supra* note 112 and accompanying text (discussing the plurality reasoning in *Gundy*, 139 S. Ct. at 2128-30).

225. *Gundy*, 139 S. Ct. at 2128-30 (construing SORNA in such a manner as to conclude that Congress actually had made the decision to apply SORNA to pre-enactment sex offenders in general but left to the Attorney General the decision as to which pre-enactment sex offenders SORNA should apply in accordance with feasibility constraints, which the Attorney General must determine on a case-by-case basis); see also *id.* at 2119 (“Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation.”).

susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.”²²⁶ This is an absolutely fascinating question because these two longstanding doctrines²²⁷ seem to be heading for a direct collision.²²⁸ Nevertheless, it is beyond the scope of this Comment to opine on this issue, because the Faithfulness Element and the Impracticality Element do not depend on the statutory text itself and therefore could not be defeated by interpretation and construction.²²⁹

As Justice Breyer pointed out, “there is a particular danger when you combine prosecuting a person with the writing of the law under which you prosecute.”²³⁰ The Attorney General serves at the pleasure of the President, and therefore the Faithfulness Element should apply to the Attorney General, as much as to the President.²³¹ Here, there is absolutely no daylight between the writing of the law and the execution of the law.

Moreover, it would not be impracticable for Congress itself to determine feasibility by analyzing the costs and benefits with its own set of eyes. The Attorney General makes the ultimate determination of whether SORNA applies to certain classes of people and then is asked to apply SORNA to those people.²³² But, the Attorney General is simply in no better a position than Congress

226. United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 407 (1909) (stating what has become the Constitutional Avoidance Canon).

227. That is, the Nondelegation Doctrine and the Constitutional Avoidance Canon.

228. When it is all boiled down, the Nondelegation Doctrine is about Congress being sloppy and giving others too much of a blank check to carry out its will. *See supra* 8-17 and accompanying text (discussing the general policy considerations behind the Nondelegation Doctrine). On the other hand, the Constitutional Avoidance Canon is about the judicial branch interpreting and construing statutory text leniently, so as not to conflict with the legislative branch. *Del. & Hudson Co.*, 213 U.S. at 407. Here, in *Gundy*, the Court used the Constitutional Avoidance Canon to *read into* the delegation the restriction that presumably would put SORNA in compliance with the plurality’s understanding of the Nondelegation Doctrine. *See supra* note 112 and accompanying text. The only point this Comment will make on this issue is that this is a nice bailout for Congress, but how much judicial economy is there to keep bailing Congress out?

229. Reiteration time considerations do, however, depend upon the statutory text. *See supra* § III(D) (discussing reiteration time).

230. Oral Argument at 37:01, *Gundy*, 139 S. Ct. 2116 (No. 17-6086), *supra* note 107.

231. U.S. CONST. art. II, § 2; *see also* Donald J. Kochan, *Dealing with Dirty Deeds: Matching Nemo dat Preferences with Real Property Law Pragmatism*, 64 U. Kan. L. Rev. 1, 5-7 (2015) (discussing the common law principle of *nemo dat quod non habet* (i.e., “No one gives who does not have”) in the context of real estate). In this context, the President cannot give a power the Faithfulness Element does not constrain, for all the President’s powers are unencumbered by it.

232. 34 U.S.C. § 20913(d).

so that it would be impracticable for Congress to make this policy decision itself. Finally, the plurality mentions how the public interest standard has been upheld a lot in support of its argument, but it is not completely clear whether it applies to SORNA.²³³ Nevertheless, what this reanalysis has demonstrated is that the facts of *Gundy* would not pass muster under the two new elements, regardless of how the statute is construed.

V. CONCLUSION

The Nondelegation Doctrine is one of the oldest legal topics, and it is one that has received some of the most scholarly contributions. The Intelligible Principle test should be stricken down because it does not adequately assure fidelity to the People from administrative agencies. However, people should be cautious about reverting to the original Nondelegation Doctrine because it may not be much better than the one it is replacing. Admittedly, adding the Faithfulness Element, the Impracticality Element, and restricting reiteration time may not perfect the Nondelegation Doctrine, but it should go some way towards fashioning a more perfect Union.

233. *Gundy*, 139 S. Ct. at 1229.

