NONDELEGATION ON STEROIDS

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INTRODUCTION

Even the most ardent defender of the idea that the Constitution forbids Congress to delegate legislative power to any other person or institution must admit that this principle has a puzzle at its heart. The limit on legislative delegation is said to ensure democratic accountability by forcing Congress, rather than other people or institutions, to make certain decisions. Yet this principle is also said to require enforcement by Article III courts, the one part of our government specially designed to be democratically *un*accountable. Congress, at least, can be held accountable if it fails to make the kinds of decisions the Constitution is said to commit to it; it can be called to account, in other words, for its failure of accountability. The federal courts cannot. How can we ensure that judicial oversight of Congress's delegations of power does not simply substitute one failure of accountability for another, less correctable one?[1]

This problem is deepened by the fact that neither the constitutional text nor the original constitutional debates describe the

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[1] The problem of ensuring accountability within the administrative state is a theme of Richard Stewart's work, including his seminal piece on the evolution of administrative law. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670–71 (1975).

contours of any principle of nondelegation,[2] yet this text and these debates are the chief interpretive sources for many of the most fervent defenders of this principle.[3] Nor did the legislators closest in time to the Constitution's framing—the members of the early Congresses—send consistent signals about their responsibilities in the face of any such principle.[4] Quite apart from whether the incommunicativeness of these sources demonstrates that in fact there was no principle of nondelegation at the founding,[5] it surely compounds the difficulty, for those who rely on such sources, of elaborating a judicial test for legislative delegation that will not merely replace one failure of accountability with another.

For close to a hundred years, the Supreme Court has confronted the tension between embracing a nondelegation principle, in principle, and actually enforcing the principle in a way that does not simply supplant a failure of congressional accountability with a new failure of judicial accountability. The Court has tried to accommodate this tension by embracing the principle in theory but policing it in fact with a mellow touch. Despite many opportunities, the Court has not invalidated a federal statute on nondelegation grounds since 1935; that year, the Court invalidated federal legislation twice—for the first time and for the last time—because it found that Congress had unlawfully delegated its legislative power to others.[6] Since that

[2] *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 UNIV. CHI. L. REV. 1721, 1729–30 (2002); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. (forthcoming 2021) (manuscript at 7–8).

[3] *See* Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 825 (2018).

[4] As the justices who embrace some form of originalism as a constitutional method have sent ever-clearer signals about their intention to vitalize the nondelegation doctrine, scholarship presenting new evidence on the framing generation's treatment of nondelegation has blossomed. *See, e.g.*, Kevin Arlyck, *Delegation and Remission* (August 2020) (workshop draft); Parrillo, *supra* note 2 (manuscript at 7, 10); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 1, 3).

[5] As forcefully argued by Julian Davis Mortenson and Nicholas Bagley. *See* Mortenson & Bagley, *supra* note 4 (manuscript at 29–30).

[6] *See* Panama Refin. Co. v. Ryan, 293 U.S. 388, 430 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495, 529, 541–42 (1935). Mark Tushnet would add a third case to the list: *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). *See* Mark Tushnet, *The Nondelegation Doctrine – Correcting a Common Error*, BALKINIZATION (Dec. 22, 2018, 12:10 PM), https://balkin.blogspot.com/2018/12/-

time, the Court has continued to insist that the nondelegation principle lives on even though the Court has never again found a federal statute that violates it.[7] The problem has been the Court's inability to identify any standard that would constrain Congress's delegations without over-empowering the unaccountable Court.[8]

This long détente between principle and power seems about to end. Five members of the Supreme Court have now served notice that they are ready to be more assertive in enforcing nondelegation.[9] And, although they may not agree on every relevant point, these justices appear to be converging on at least one test for identifying an improper delegation of legislative authority: a delegation is improper when Congress hands off an important policy issue to the executive branch for decision, and the executive uses that delegated power to control private conduct.[10]

The Supreme Court has never struck down a federal statute based on the test that these justices have proposed. In the two cases in which the Court invalidated a statute on nondelegation grounds, the Court cited the lack of direction from Congress on the relevant

the-nondelegation-doctrine-correcting.html. More conventionally accepted, however, is Cass Sunstein's memorable summation: that the nondelegation doctrine has had "one good year," and that was 1935. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 UNIV. CHI. L. REV. 315, 322 (2000).

[7] *See* Kristin E. Hickman, *Gundy, Nondelegation, and Never-Ending Hope*, REGUL. REV. (July 8, 2019), https://www.theregreview.org/2019/07/08/hickman-nondelegation/.

[8] *See* Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).

[9] A more detailed explanation of these five justices' positions follows. The conservative justices appear to have a majority on this point even without the recent addition of a sixth conservative justice. Before her nomination to the Court, Amy Coney Barrett had said little in print about the nondelegation principle, except to allude to the possibility that it might permit a sliding-scale approach in which the Court's scrutiny becomes more intense in areas where "the Constitution's allocation of authority reflects particular wariness of executive power." Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 319 n.286 (2014). In her written responses to Senators' questions during the confirmation process, Barrett declined to say whether she believed that agencies were now exercising unconstitutionally delegated authority because she did not think it appropriate to discuss abstract legal principles or hypotheticals. *See* S. COMM. ON THE JUDICIARY, 116TH CONG., NOMINATION OF AMY CONEY BARRETT TO THE SUPREME COURT, QUESTIONS FOR THE RECORD 84–85 (2020), https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20QFRs.pdf.

[10] *See* Gundy v. United States, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring); *id.* at 2136 (Gorsuch, J., dissenting); *see also* Paul v. United States, 140 S. Ct. 342, 342 (2019). For elaboration of the justices' views, see *infra* Part I.

issues—or what the Court has called an "intelligible principle"—rather than the sheer importance of the issues or the regulatory valence of the executive's decision.[11] For the Court now to embark on a project of undoing Congress's work based on the justices' proposed approach would mark a wholly new moment in constitutional law, in which federal laws charging administrative agencies with tackling the major problems of our day, such as climate change, might be vulnerable to judicial invalidation precisely because they address important problems.

The Court should step back from this brink. Indeed, if the conservative justices truly do not want to substitute their own views of wise public policy for those of the political branches, they should run, screaming, away from the approach they have suggested for legislative delegations. Their proposed approach is nothing other than a gerrymander: it precisely trims and shapes Congress's domain to ensure victory for a conservative vision of regulatory policy that has been a source of political contestation for decades.

In Part I, I describe the nature, scope, and method of the conservative justices' emerging approach to legislative delegations of power. In Part II, I critically analyze the proposal to judge legislative delegations based on the importance of the issues at stake. In Part III, I critique the asymmetrical nature of the conservative justices' likely approach. Throughout, I find that the conservative justices' originalist method deepens the political bias of their new framework for legislative delegation.

I. THE NEW NONDELEGATION

Although a handful of academics have complained for years about the Supreme Court's failure to enforce the nondelegation principle,[12] it was not until recently that the Court's conservative majority coalesced around an intention to vitalize this principle and to develop a new standard for policing it. The conservative justices' emerging approach to nondelegation has three aspects: (1) they propose to make the lawfulness of legislative delegations turn on the importance of the underlying policy questions; (2) they will likely deploy their new test only against agency decisions to regulate

[11] *See Panama Refin. Co.,* 293 U.S. at 415–20; *Schechter Poultry Corp.*, 295 U.S. at 500, 531–542.

[12] *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 14 (1993).

private behavior, not against agency decisions not to regulate private behavior; and (3) in scrutinizing laws based on this approach, they will invoke the expectations of the generation that framed the Constitution. Three separate opinions in two recent matters give a preview of the conservative justices' likely approach.

In *Gundy v. United States*, the Court considered whether the Sex Offender Notification and Registration Act (SORNA) violated the nondelegation doctrine as applied to sex offenders convicted before SORNA's enactment.[13] SORNA did not automatically trigger registration requirements for these offenders, but instead empowered the Attorney General to "specify the applicability" of these requirements.[14] The plurality opinion, written by Justice Kagan and joined by three colleagues, found enough guidance to the Attorney General in SORNA to supply the "intelligible principle" that the Court has historically required for legislative delegations.[15]

Justice Gorsuch dissented, joined by Chief Justice Roberts and Justice Thomas. These three justices would have struck down SORNA as an unconstitutional delegation of legislative power.[16] Justice Gorsuch described at some length what he saw as the purpose and meaning of the nondelegation principle. He argued that the Court had, in embracing a highly forgiving "intelligible principle" test, strayed from "the original meaning of the Constitution," and that "the Constitution does not permit judges to look the other way" when "constitutional lines are crossed."[17] Enforcing the separation of powers, he wrote, is "about respecting the people's sovereign choice to vest the legislative power in Congress alone" and "safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law."[18]

Justice Gorsuch offered a three-part test—"guiding principles," he said, offered by "the framers"[19]—for distinguishing valid from invalid legislative delegations.[20] The first of Justice Gorsuch's

[13] *See* 139 S. Ct. at 2121, 2122.
[14] *Id.* at 2122 (quoting 34 U.S.C. § 20913(d)).
[15] *See id.* at 2123–24.
[16] *See id.* at 2143–45 (Gorsuch, J., dissenting).
[17] *Id.* at 2139, 2135.
[18] *Id.* at 2135.
[19] *Id.* at 2135–36, 2137.
[20] *Id.*

principles is the subject of this Article:[21] Congress must make "the policy decisions when regulating private conduct," but it may empower the other branches to "fill up the details."[22]

Although Justice Gorsuch here referred to "policy decisions," without qualification, the rest of his opinion signals that his focus is on *important* policy decisions. For example, as support for his test, Justice Gorsuch cited Chief Justice Marshall's dictum in the 1825 case of *Wayman v. Southard*.[23] Justice Marshall in that case noted:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.[24]

Here, in addition to acknowledging the difficulty of drawing a line between legislative and other action, Justice Marshall implied that "important subjects" must be handled by Congress but matters of "less interest"—"details"—may be delegated to others. In deciding whether SORNA violated this precept, Justice Gorsuch returned repeatedly to the question of whether the statute handed off "*important* policy decisions" to the executive.[25]

In describing this test for nondelegation, Justice Gorsuch conspicuously omitted *Whitman v. American Trucking Associations*—in which the Court unanimously rejected a nondelegation challenge to the Clean Air Act's provision requiring EPA to set national ambient air quality standards[26]—from his accounting of the Court's decisions that would remain acceptable even under his new approach.[27] This omission may be a signal that Justice Gorsuch and

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[21] The dissenting justices in *Gundy* (Roberts, Gorsuch, and Thomas) also would allow Congress to "prescribe[] [a] rule governing private conduct" and then make the rule "depend on executive fact-finding," and would allow Congress to assign "certain non-legislative responsibilities" to the courts and the executive. *Id.* at 1236–37. Justices Alito and Kavanaugh did not opine on these two additional tests in their recent discussions of nondelegation, and I do not discuss them further here. *See id.* at 2130–31 (Alito, J., concurring in the judgment); *see also* Paul v. United States, 140 S. Ct. 342, 342 (2019).

[22] *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

[23] *See id.* at 2136 (citing Wayman v. Southard, 23 U.S. 1, 43 (1825)).

[24] Wayman v. Southard, 23 U.S. 1, 43 (1825).

[25] *Gundy*, 139 S. Ct. at 2145, 2146–47 (Gorsuch, J., dissenting) (emphasis added).

[26] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 457–58 (2001).

[27] *See Gundy*, 139 S. Ct. at 2135–37 (Gorsuch, J., dissenting).

the colleagues who joined his dissent believe that *American Trucking* was wrongly decided.

In his concurrence in the judgment in *Gundy*, Justice Alito picked up on a similar theme. Justice Alito agreed that SORNA's standard was "adequate under the approach this Court has taken for many years," but indicated that "[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."[28] He expressed concern about the Court's decisions authorizing agencies "to adopt important rules pursuant to extraordinarily capacious standards," citing *American Trucking* without elaboration.[29] Justice Alito's concurrence is brief, but illuminating. The specific reference to "important rules" aligns with the first part of the standard embraced by Justice Gorsuch's dissent. All four of the conservative justices who participated in *Gundy* thus seem to agree that one target of their coming battle against legislative delegations should be "important" agency decisions.

Justice Kavanaugh did not participate in *Gundy* because he was not yet confirmed when the case was argued. Soon after *Gundy*, however, in *Paul v. United States*, Justice Kavanaugh spontaneously declared that he, too, was interested in revisiting the problem of nondelegation. In the context of a routine denial of certiorari, Justice Kavanaugh issued his own statement announcing that while he agreed that the Court should not grant review in another case challenging SORNA on nondelegation grounds, he believes that Justice Gorsuch's "scholarly analysis . . . may warrant further consideration in future cases."[30] Justice Kavanaugh spoke admiringly of Justice Gorsuch's opinion in *Gundy* insofar as it questioned the constitutionality of "congressional delegations to agencies of authority to decide major policy questions."[31] He interpreted Justice Gorsuch's opinion, and a much earlier opinion by then-Justice Rehnquist,[32] to allow Congress to give an administrative agency "regulatory authority over a major policy question of great economic and political importance" only if Congress itself has "expressly and specifically"

[28] *Id.* at 2131 (Alito, J., concurring).

[29] *Id.* at 2130–31 (citing *Whitman*, 531 U.S. at 472).

[30] Paul v. United States, 140 S. Ct. 342, 342 (2019).

[31] *Id.*

[32] *See* Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst. (*The Benzene Case*), 448 U.S. 607, 671 (1980).

decided the major policy question.[33] Justice Kavanaugh adds a likely fifth vote—along with Justices Thomas, Alito, Gorsuch, and Chief Justice Roberts—for the idea that Congress may not hand off important decisions to administrative agencies.

A second, less clearly expressed feature of the conservative justices' emerging approach to nondelegation is that their new, more restrictive test for legislative delegations appears to apply only to cases in which an agency controls private behavior, and not to cases in which an agency declines to control private behavior at the expense, for example, of public health. Several passages in recent opinions are suggestive of this approach. In *Gundy*, Justice Gorsuch describes legislative power—the kind of power Congress may not delegate to others—as "the power to adopt *generally applicable rules of conduct governing future actions by private persons*" and "the power to prescribe *rules limiting their liberties*."[34] Likewise, in *Gundy*, recall that Justice Alito criticized the Court's long acceptance of statutory "provisions that authorized agencies to adopt important *rules* pursuant to extraordinarily capacious standards."[35] In *Paul*, Justice Kavanaugh singled out an agency's exercise of "*regulatory* authority" as the event of concern for nondelegation purposes.[36] Justice Kavanaugh also referred in positive terms to then-Justice Rehnquist's dissent in the *Benzene* case, in which Rehnquist indicated that he would have struck down the provision of the Occupational Safety and Health Act that the Occupational Safety and Health Administration (OSHA) used to regulate benzene in the workplace—but would have given a free pass to OSHA to set "no standard at all."[37] The quoted passages appear to signal that only decisions regulating private behavior—and not decisions *not* to regulate private behavior—will be subject to the conservative justices' new test for legislative delegations.[38]

[33] *Paul*, 140 S. Ct. at 342.

[34] *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (emphasis added).

[35] *Id.* at 2130–31(Alito, J., concurring) (emphasis added).

[36] *Paul*, 140 S. Ct. at 342 (emphasis added).

[37] *Am. Petroleum Inst.*, 448 U.S. at 687, 688.

[38] The opinions by Justices Gorsuch and Alito, in focusing on "rules," may also embrace the idea that Congress may not hand off to the executive the authority to issue legally binding general rules. Justice Thomas defended this view at length in Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 66–76 (2015). For a compelling account of historical evidence against this view of nondelegation, see Parrillo, *supra* note 2.

Further evidence that the conservative justices might apply their new constitutional principle only to regulatory limits on private behavior comes from cases applying a closely related statutory principle: the major questions doctrine. In several cases, the Court has indicated that it expects clarity from Congress when it hands off to agencies interpretive decisions of great economic and political significance.[39] Yet, as above, the conservative justices have deployed this interpretive principle only to agency decisions that regulate private conduct, not to agency decisions that decline to regulate private conduct.

The conservative justices themselves have linked the "major questions" idea in statutory interpretation to their approach to nondelegation. In *Gundy*, Justice Gorsuch observed that the interpretive rule for major questions is only "nominally a canon of statutory construction," and that the Court had applied this doctrine "in service of" the nondelegation principle.[40] In *Paul*, Justice Kavanaugh likewise drew on the interpretive canon in elaborating the constitutional principle.[41] Given the justices' acknowledgment of the connection between the two doctrines, it seems fair to predict that the same asymmetry that characterizes the justices' approach to statutory interpretation will reappear in their approach to nondelegation.

Two cases relating to climate change vividly illustrate the conservative justices' asymmetrical interpretive approach to major agency decisions. In *Massachusetts v. EPA*, states and other petitioners challenged EPA's refusal to regulate greenhouse gases as "air pollutants" under the Clean Air Act's mobile source standards program.[42] Justice Scalia wrote a dissent for himself and three conservative justices, finding the relevant language of the Clean Air Act ambiguous and deeming EPA's interpretation "eminently reasonable."[43] He scolded the majority for "substituting its own desired outcome for the reasoned judgment of the responsible agency"; *"[n]o matter how important the underlying policy issues at stake*," he said, the principle of *Chevron* deference dictated a result in favor of EPA.[44]

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[39] *See, e.g.*, Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

[40] *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting).

[41] *See Paul*, 140 S. Ct. at 342.

[42] *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007).

[43] *Id.* at 559 (Scalia, J., dissenting).

[44] *Id.* (emphasis added). Although four conservative justices were in dissent in *Massachusetts*, it is fair to worry that, with the ascension of Justices Gorsuch,

In *Utility Air Regulatory Group v. EPA (UARG)*, on the other hand, the Court rejected EPA's application of the Clean Air Act's stationary-source permitting program to greenhouse gases.[45] Writing for the majority this time, Justice Scalia concluded that EPA's interpretation "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization," and observed, "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[46]

Together, the conservative justices' opinions in *Massachusetts* and *UARG* stand for the following propositions. If Congress wants to deprive an agency of regulatory power over a question of great economic and political significance, it does not need to say so in clear terms, and an agency renouncing that power should receive deference.[47] If, however, Congress wants to grant an agency regulatory power over an important question, it must speak clearly, and an agency affirming such power in the absence of clear legislative authorization should not receive deference. *Massachusetts* and *UARG* both involved climate change, and both involved EPA's regulatory power to address major sources of greenhouse gases. But in *UARG*, EPA actually wanted to act on climate change, whereas in *Massachusetts*, it did not, and for the conservative justices that made all the difference.[48]

Last, a word about the likely interpretive method of the conservative justices' new approach to nondelegation. The justices who want to invigorate the nondelegation doctrine have draped their newfound assertiveness in humility, explaining that they are following the framers' design and that doing so is their job as Article III

Kavanaugh, and Barrett to the Court since that case was decided, the dissenting position in *Massachusetts* will now dominate.

[45] *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 302–03 (2014).

[46] *Id.* at 324.

[47] Since *Massachusetts v. EPA*, the conservative justices have become openly hostile to the principle of *Chevron* deference. *See, e.g.*, Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron's *Domain*, 70 DUKE L. J. (forthcoming 2021) (manuscript at 1). Today, they might frame an opinion in a case like *Massachusetts v. EPA* in terms of their beliefs about how clear Congress must be in order to assign major questions to administrative agencies rather than in terms of *Chevron* deference.

[48] For further discussion of the major questions idea in the context of climate change, see Lisa Heinzerling, *The Rule of Five Guys*, 119 U. MICH. L. REV. (forthcoming 2021) (manuscript at 10–11).

judges.[49] In their separation of powers opinions, these justices all rely on claims that modern government structures and arrangements are out of step with the Constitution's original design.[50] Some, like Chief Justice Roberts, suffice with a smattering of evidence; a couple of quotes from Madison here, a shout-out to George Washington there, an early legislative debate thrown into the mix, and they call it a day.[51] Others, like Justice Thomas, delve deeper into the historical record and seem to regard original meaning as authoritative.[52] But all, to some degree, invoke the mindset of the framing generation in justifying their approach to the separation of powers. And, most notable for present purposes, even Chief Justice Roberts—arguably the most faint-hearted of the Court's originalists—joined Justice Gorsuch's opinion in *Gundy*, which repeatedly invokes the framers' putative expectations about legislative delegations of power.[53]

In sum, five Supreme Court justices appear ready, perhaps even eager, to adopt a more assertive approach to the nondelegation principle—and to apply that approach selectively. Their emerging framework for evaluating legislative delegations appears to turn on the importance of the underlying question and the regulatory valence of the executive branch's response to the delegation. The justices explain their new assertiveness by invoking the framers' expectations and the justices' own obligation to follow them. But in the remainder of this Article, I contest that claim, and critically assess the conservative justices' emerging approach to nondelegation.

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[49] *See* Gundy v. United States, 139 S. Ct. 2116, 2139, 2135 (2019) (Gorsuch, J., dissenting); *see also* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 61 (2015) (Alito, J., concurring).

[50] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197–98, 2201 (2020); *Gundy*, 139 S. Ct. at 2135, 2139 (Gorsuch, J., dissenting); *Ass'n of Am. R.Rs.*, 575 U.S. at 67, 69 (Thomas, J., concurring); *id.* at 57 (Alito, J., concurring); Coal. for Responsible Regul., Inc. v. EPA, No. 09-1322, 2012 WL 6621785, at *22 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting).

[51] *See Seila Law LLC*, 140 S. Ct. at 2197–98 (citing, as authority for its historical analysis of the separation of powers, letters from George Washington to Count de Moustier and from James Madison to Thomas Jefferson, a statement on the floor of Congress by James Madison, and Congress's "Decision of 1789," in which Vice President John Adams broke the Senate's tie on the question of presidential removal power).

[52] *See Ass'n of Am. R.Rs.*, 575 U.S. at 69–74 (Thomas, J., concurring in the judgment) (offering extended historical analysis, covering the periods before and during the constitutional framing, of the separation of powers).

[53] *See Gundy*, 139 S. Ct. at 2133–36 (Gorsuch, J., dissenting).

II. THE POLITICS OF IMPORTANCE

None of the conservative justices' recent statements on nondelegation explains how to decide whether an agency's decision is important. Likewise, although the Court has, in the context of statutory interpretation, identified certain issues as ones of major "economic and political significance,"[54] it has not explained how it makes this determination. As a judge on the D.C. Circuit, Justice Kavanaugh conceded that this interpretive test "has a bit of a 'know it when you see it' quality."[55] One prominent conservative legal scholar has described the constitutional test of importance in a way that is openly, almost defiantly, tautological: "Congress must make whatever decisions are important enough to the statutory scheme in question so that Congress must make them."[56]

A tautological test is no test at all. It does not advance the effort to develop an approach to nondelegation that does not over-empower the courts by allowing judges to fill the vacuum with their own political preferences. And Justice Kavanaugh's acknowledgment of a "know it when you see it" quality is more damning than he lets on. The phrase comes, of course, from Justice Potter Stewart's famous remark about identifying hard-core pornography for First Amendment purposes:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.[57]

The high-handed humbleness reflected in this statement—I'm sure I'm right but I can't tell you why—is not a good attitude for judges

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[54] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

[55] United States Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, C.J., dissenting).

[56] Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 361 (2002). Two and a half decades after first formulating this test for nondelegation, Professor Lawson discovered that it was not tautological after all, if one bases one's determination of twenty-first-century importance on the eighteenth-century private law of agency. *See* Gary Lawson, *Mr. Gorsuch, Meet Mr. Marshall: A Private-Law Framework for the Public-Law Puzzle of Subdelegation* 8 (Am. Enter. Inst., Pub. Law & Legal Theory Paper No. 20-16, 2020), https://ssrn.com/abstract=3607159.

[57] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

to adopt in reviewing legislative choices. The obvious subjectivity of a constitutional test based on the importance of the underlying issues should make the conservative justices reluctant to go down this path. If nothing else, they might reflect on the likely damage to public perception of the Court if it starts to reject Congress's legislation on important matters precisely because it is important.

One can see how loose a judicial test based on the importance of a policy judgment is by looking at cases applying the interpretive canon for major questions. While on the D.C. Circuit, then-Judge Kavanaugh's dissent in *SeaWorld of Florida v. Perez* provided a master class in manipulating the characterization of an agency decision to make the decision appear gigantic when it was actually workaday. In that case, he dissented from a panel decision upholding a fine against SeaWorld after a killer whale mutilated and killed a trainer during a public performance.[58] The panel majority affirmed the finding of the Occupational Safety and Health Administration (OSHA) that SeaWorld had violated the Occupational Safety and Health Act's "general duty" clause, which requires "[e]ach employer" to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[59]

SeaWorld adjudicated a dispute involving one company's failure to provide a safe working environment on one day. Nevertheless, Kavanaugh transformed the case into a "major" decision. He insisted that if OSHA could penalize SeaWorld for failing to protect its trainers against its killer whales, then OSHA could prohibit punt returns in NFL football and fast driving in NASCAR, thus turning one enforcement action against one theme park into a frontal assault on American professional sports.[60] With the importance test and a

[58] *See generally* SeaWorld of Fla. v. Perez, 748 F.3d 1202 (D.C. Cir. 2014); *see also id.* at 1216–22 (Kavanaugh, J., dissenting).

[59] 29 U.S.C. § 654(a)(1); *see generally SeaWorld of Fla.*, 748 F.3d 1202 (affirming that SeaWorld violated the Occupational Safety and Health Act's general duties clause).

[60] *See SeaWorld of Fla.*, 748 F.3d at 1222 (Kavanaugh, C.J., dissenting) ("[I]t is simply not plausible to assert that Congress, when passing the Occupational Safety and Health Act, silently intended to authorize the Department of Labor to eliminate familiar sports and entertainment practices, such as punt returns in the NFL, speeding in NASCAR, or the whale show at SeaWorld").

dose of analogical reasoning in hand, a motivated judge can transform just about any agency decision into a constitutional problem.

Things do not get better when one considers conservative proposals for giving shape to the concept of importance. Alone among the current justices, Justice Kavanaugh has tried to elaborate on the framework for determining whether an agency's decision is important. In the context of statutory interpretation and application of the "major questions" idea, then-Judge Kavanaugh spelled out some of the factors that he gleaned from Supreme Court decisions emphasizing the significance of a regulatory issue: "the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue."[61]

The factors Kavanaugh highlighted bear a striking resemblance to those that presidents since Ronald Reagan have used to determine whether there should be White House review of an agency rule. All of the executive orders pertaining to this oversight process in the last forty years have focused in part on the sheer amount of money involved in a particular regulatory action, singling out rules that have an annual effect on the economy of more than $100 million for particular attention—an analog to Kavanaugh's consideration of the amount of money a rule involves.[62] These orders also single out rules that significantly affect productivity, competition, jobs, and other factors—a counterpart to Kavanaugh's factor citing the overall impact on the economy.[63] For nearly thirty years, executive orders have called for White House review for "novel legal or policy issues," which may overlap significantly with the congressional and public attention Kavanaugh calls out as a final factor in determining importance.[64]

Tellingly, conservative legal scholars who have long called for assertive enforcement of the nondelegation principle have also begun to develop a connection between importance for nondelegation purposes and the longstanding test for White House review of agency rules. Steven Calabresi and Gary Lawson have suggested

[61] United States Telecom Ass'n v. FCC, 855 F.3d at 381, 422–23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[62] *See* Exec. Order No. 12,291, 3 C.F.R. § 1(b)(1) (1981); Exec. Order No. 12,866, 58 Fed. Reg. 51,735, § 3(f)(1) (Sept. 30, 1993).

[63] *See* 3 C.F.R. § 1(b)(3) (1981); Exec. Order No. 12,866, at § 3(f)(1).

[64] Exec. Order No. 12,866 at § 3(f)(4).

that the Court could begin enforcing the nondelegation principle by using the $100 million threshold "as a benchmark for determining whether there has been an unconstitutional delegation of power by Congress to an agency."[65] Calabresi and Lawson explain:

> [A]ny change in the law that has that big of an effect on the economy probably ought by definition to be made by Congress; the monetary benchmark will surely be underinclusive rather than overinclusive of those actions that, as a matter of original meaning, violate the subdelegation doctrine. . . . The line is concededly arbitrary, but it is not obvious to us why an underinclusive arbitrary line is worse than no line at all.[66]

David Schoenbrod has offered a similar proposal:

> To define significant regulations in modern circumstances, the Court could rely upon the definition of "significant regulatory action" in the executive order that has been in force for more than a quarter century under two Democratic and two Republican Presidents. In particular, the Court could rely upon the first part of the executive order's definition that defines significant regulations as having an "annual effect on the economy of $ 100 million or more." So, a regulation would be deemed significant if it increased *or* decreased costs by such amount. The $100 million test does not, of course, appear in the Constitution, but the Court regularly adopts bright-line tests to make judicially manageable enforcement of norms that the Constitution states in amorphous terms.[67]

It is hard to overstate the breathtakingly political nature of the test that these scholars have proposed. Let us remember that this test—and the systematic White House review it triggers—was first put in place by President Reagan, who campaigned and governed based on a deregulatory ideology. The presidents after him, of both parties, who have continued to subject agency decisions to White House scrutiny have done so with deeply political goals in mind. Republican presidents have been able to point to their oversight as evidence of their neoconservative credentials; Democratic presidents have

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[65] Calabresi & Lawson, *supra* note 3, at 856.

[66] *Id.* at 857.

[67] David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J. L. & PUB. POL'Y 213, 259 (2020). Schoenbrod rejects the other categories that define significance for purposes of White House review—effects on productivity, etc., and the presence of novel legal or policy issues as too "amorphous" to be judicially manageable. *Id.* at 260.

been able to use it as proof they are not too left-leaning on regulatory issues. And the White House review process triggered by this test is itself saturated with politics and controversy.[68] Adopting such a test for constitutional nondelegation purposes would make a joke of the justices' pretense of neutrality.

It is head-spinning to see self-styled constitutional originalists flacking a test for nondelegation that comes from executive orders issued in the late twentieth century. These theorists make their argument for vitalizing the nondelegation principle in formalist and originalist terms. When it comes to giving content to this principle, however, they take refuge in functionalism and modern practice. With this bait and switch, from formalism to functionalism and from originalism to living constitutionalism, they manage to have it both ways: a vitalized nondelegation principle, but one trimmed to fit the political commitments of contemporary regulatory reformers.

The justices' apparent willingness to judge Congress's work based on the importance of the underlying policy issues also puts the lie to the conservative justices' claims to a faithful and impartial constitutional originalism. The policy issues the country faces today are—do I even need to say it?—vastly different from those faced by the framing generation. What does that generation have to say about which of today's issues should be considered important in a constitutionally relevant sense? Courts obviously cannot ask what people thought, then, about the importance of regulating greenhouse gases under the Clean Air Act or embracing net neutrality under the Federal Communications Act. To be able to see comparisons and contrasts between policy issues in the framing generation and policy issues now, one would have to pitch views about policy importance at a much higher level of generality. But condoning retreat to a higher level of generality, without a theory about the correct level of generality at which to read the Constitution's provisions, just invites the very subjectivity the justices claim to escape.[69]

The brazenly political nature of the conservative justices' proposed test for legislative delegations should be enough to make them rethink their approach. But their approach has another fundamental

[68] *See generally* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV'T L. REV. 325 (2014) (discussing the legally and politically fraught history of the White House review process).

[69] *See* Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 1, 53 (2017).

problem as well: how will the courts decide whether Congress has decided the important questions? Two fundamentally different ways of deciding whether Congress has decided an issue appear in the relevant case law: interpreting legislative history or applying a clear statement rule.

One way of figuring out whether Congress has made the decision on an important policy question is to consult legislative history to determine whether members of Congress chose to turn over a fundamental policy choice to someone else. This is the way Justice Rehnquist approached the nondelegation question in his dissent in the *Benzene* case—newly significant because of Justice Kavanaugh's hat tip to Rehnquist's opinion in *Paul*.[70] Rehnquist's opinion painstakingly reconstructed the legislative process that led to the statutory provision requiring regulation of workplace health hazards to the extent feasible, analyzing revisions to the text as well as statements by members of Congress about what they believed those revisions meant or accomplished.[71] Rehnquist concluded that everyone thought they had gotten what they wanted, even though they wanted very different things: "the legislative history," he wrote, "demonstrates that the feasibility requirement . . . is a legislative mirage, appearing to some Members but not to others, and assuming any form desired by the beholder."[72] In failing to come to a meeting of the minds on the meaning of feasibility, Rehnquist argued, Congress had avoided making the "clear, if difficult, choice between balancing statistical lives and industrial resources or authorizing the Secretary to elevate human life above all concerns save massive dislocation in an affected industry."[73]

This approach has two challenges. One is that it seems to require an impossible level of consensus from members of Congress. To pass a statute on an important issue, a congressional majority would need not only to agree on the explicit terms of the statute, but also to agree about their own subjective understandings of those terms. Only when they came to consensus on their subjective understandings would their work pass constitutional muster. One might just as well require members of Congress, before they legislate, to

[70] *See* Paul v. United States, 140 S. Ct. 342, 342 (2019).

[71] *See* Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst. (*The Benzene Case*), 448 U.S. 607, 676–82 (1980).

[72] *Id.* at 681.

[73] *Id.* at 685.

stand on their heads while reciting the value of pi to a thousand digits.

The other limitation of Rehnquist's approach, for several of the conservative justices, is that its interpretive method is out of step with theirs. Rehnquist not only looked at legislative history, a taboo practice for most of the conservative justices,[74] but also probed the subjective understandings of individual legislators as to what the central statutory term meant, an inquiry alien to today's text-driven Court. Unless the Court is prepared to reinvent its approach to statutory interpretation at the same time as it invigorates the nondelegation principle, it will have to find another way of figuring out whether Congress has decided the policy questions the Court deems important.

Justice Kavanaugh has offered such an alternative. Recall that in *Paul*, he read Rehnquist's opinion in *Benzene* and Gorsuch's opinion in *Gundy* to allow Congress to give an administrative agency "regulatory authority over a major policy question of great economic and political importance" only if Congress itself has "expressly and specifically" decided the major policy question.[75] Kavanaugh's approach to deciding whether Congress decided a question, it appears, is simply to look at the language of a statute. If it does not "expressly and specifically" decide a major policy question, then it is unconstitutional for an agency to exercise regulatory power over that question. Under Kavanaugh's approach, statutory ambiguity on a major policy question— whether deliberate or accidental—will not do.

To put it another way, Kavanaugh's approach appears to entail that, at least when it comes to important questions, statutory ambiguity is unconstitutional. This is nondelegation on steroids.

III. LOPSIDED LIBERTY

In addition to proposing to make their judgments of the constitutionality of legislative delegations turn on the importance of the

[74] *See, e.g.*, Digit. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 783–84 (2018) (Thomas, J., joined by Alito and Gorsuch, concurring in part and in the judgment) (declining to join portion of majority opinion invoking the purpose of the statute as indicated in a Senate Report); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2123–24 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

[75] *Paul*, 140 S. Ct. at 342.

underlying policy issues, five conservative justices have signaled that these judgments will also depend on the executive's response to that delegation: the delegation will be imperiled only if the executive branch uses its delegated power to regulate private behavior.

The consequences for regulatory policy will be dramatic. If, to take two examples from prior cases, the Court determines that Congress has not decided whether the Food and Drug Administration (FDA) may regulate tobacco products under the Food, Drug, and Cosmetic Act, or whether the EPA may regulate greenhouse gases under the Clean Air Act, then an FDA rule that regulates tobacco or an EPA rule that regulates greenhouse gases will be held to be unconstitutional exercises of legislative power insofar as these are rules that decide important questions of policy in regulating private conduct. If, however, FDA disclaims authority to issue a rule regulating tobacco products, or EPA disclaims authority to issue a rule regulating greenhouse gases, the Court will not strike down these decisions as unconstitutional exercises of legislative power because they do not regulate private conduct.

There are three fundamental problems with making a judgment of constitutionality turn on the character of the agency's exercise of delegated authority. The first problem is that doing so flouts the Court's own ruling in *Whitman v. American Trucking Associations*. In *American Trucking*, EPA appealed from the invalidation of a rule setting national ambient air quality standards for ozone and particulate matter under the Clean Air Act.[76] The lower court had found that the Clean Air Act was constitutional insofar as it met the Court's lenient requirements for delegations to agencies, but held that EPA itself had violated the nondelegation principle by failing to adopt an interpretation of the statute that limited the agency's own discretion.[77] As Justice Scalia put it, the D.C. Circuit had held that "EPA's interpretation (but not the statute itself) violated the nondelegation doctrine."[78] The Supreme Court unanimously and emphatically rejected this new twist in nondelegation jurisprudence:

> In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency . . . We have never suggested that an agency can cure an unlawful

[76] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 463 (2001).

[77] *See* Am. Trucking Assn's v. EPA, 175 F.3d 1027, 1033, 1034, 1058 (D.C. Cir. 1999).

[78] *Whitman*, 531 U.S. at 472.

> delegation of legislative power by adopting in its discretion a limiting construction of the statute . . . The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise . . . would *itself* be an exercise of the forbidden legislative authority.[79]

American Trucking teaches that an agency cannot fix a nondelegation problem by restricting its own power. Thus, FDA cannot cure Congress's failure to decide whether to regulate tobacco products by declining to exercise the power to regulate tobacco products, nor can EPA cure Congress's failure to decide whether to regulate greenhouse gases by declining to regulate greenhouse gases. A nondelegation problem is one that inheres in the underlying statute itself; it does not turn on the nature of an agency decision interpreting that statute. The conservative justices' apparent intention to consult the nature of an agency decision in resolving nondelegation issues contradicts the Court's unanimous ruling in *American Trucking*.

A second problem with the asymmetrical application of the conservative justices' proposed test for nondelegation is that it is inconsistent with the nondelegation problem these justices have identified. The justices appear to agree that the core problem with some delegations of authority from Congress to the executive is that the wrong actor will be making an important decision; an official or agency will decide rather than Congress.

But an agency cannot avoid making a decision of major importance by refusing to exercise statutory authority. By refusing, the agency makes a decision with the same degree of importance as a decision agreeing to regulate. When, for example, FDA decides that it does not have the authority to regulate tobacco products under the Food, Drug, and Cosmetic Act, the agency is making a decision of exactly the same economic and political magnitude as a decision that it does have such authority; only the direction, not the magnitude, of these decisions is different. Likewise, when EPA decides that it does not have the authority to regulate greenhouse gases under the Clean Air Act, it is making a decision of exactly the same economic and political magnitude as a decision that it does have such authority; here, too, only the direction, not the magnitude, of these decisions is different. A decision to regulate and a decision not

[79] *Id.* at 472–73.

to regulate are mirror images of one another in terms of importance. These decisions cover the same ground, address the same circumstances, involve the same facts. Everything is the same, except reversed.

The third problem with the asymmetrical application of the nondelegation principle is the narrow and privileged view of liberty it reflects. The five conservative justices all explain their views on the separation of powers by emphasizing that the purpose of separating powers is to protect liberty.[80] When the conservative justices talk about liberty, however, they mean the liberty that comes from freedom from governmental interference. They do not mean, for example, the liberty that comes from programs designed to redress past and ongoing injustices inflicted by the government and private persons and entities. One can see this point by comparing the D.C. Circuit's decision upholding the constitutionality of the structure of the Consumer Financial Protection Bureau (CFPB) to the Supreme Court's decision invalidating it. The D.C. Circuit responded in this way to a company's argument that the independence of the CFPB diminished liberty:

> It remains unexplained why we would assess the challenged removal restriction with reference to the liberty of financial services providers, and not more broadly to the liberty of the individuals and families who are their customers. Congress determined that, without the Dodd-Frank Act and the CFPB, the activities the CFPB is now empowered to regulate contributed to the 2008 economic crisis and Americans' devastating losses of property and livelihood. Congress understood that markets' contribution to human liberty derives from freedom of contract, and that such freedom depends on market participants' access to accurate information, and on clear and reliably enforced rules against fraud and coercion. Congress designed the CFPB with those realities in mind.[81]

[80] *See* Free Enter. Fund v. Pub. Co. Oversight Acct. Bd., 561 U.S. 477, 501 (2010); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 61(2015) (Alito, J., concurring); *id.* at 74 (Thomas, J., concurring); Gundy v. United States, 139 S. Ct. 2116, 2135–36 (2019) (Gorsuch, J., dissenting); United States Telecom Ass'n v. FCC, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, C.J., dissenting).

[81] PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 106 (D.C. Cir. 2018) (Pillard, J.) (citation omitted).

When, however, the Supreme Court decided to invalidate the structure of the CFPB—in the name of "liberty"—it did not mention the liberty of those protected by that structure.[82]

In fact, in discussing the argument for limits on government, the justices almost seem to forget why there is a government in the first place. In his dissent in *Gundy*, Justice Gorsuch revealingly mangles James Madison's famous quote about men not being angels. Gorsuch cites Madison in observing that because "men are not angels," society needs to protect "minority rights" by limiting the legislature.[83] But here is Madison's full quote: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[84] Madison knew what the conservative justices seem to have forgotten: governments are needed to protect people from harms caused by other, non-angelic people.

Moreover, here, too, the conservative justices' originalist impulses deepen the bias of their approach to nondelegation. At the moment, the people whose views originalists invoke in finding constitutional meaning are either the individual framers and ratifiers of the Constitution,[85] or the "reasonable person" whose imagined views on constitutional meaning at the time of the Constitution's framing are used to prove its original public meaning.[86] The people whose views count overwhelmingly toward determining original constitutional meaning are, in other words, either eighteenth-century white male property owners, many of whom enslaved other humans, or hypothetical eighteenth-century reasonable people who miraculously fit the same description.[87] Enslaved people, formerly enslaved people, people of color, and women are not among the actual individuals or hypothetical archetypes who serve as sources of original constitutional meaning.[88] Yet there is no reason in the world

[82] *See Seila Law*, 140 S. Ct. at 2202–03.

[83] *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

[84] THE FEDERALIST NO. 51 (James Madison).

[85] *See* Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 BYU J. PUB. L. 283, 285 (2014).

[86] *See* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006).

[87] *See id.* at 72–73 (describing the elite characteristics of the hypothetical author and audience of the Constitution).

[88] On the problems for originalism created by the exclusion of these groups from the deliberations over the Constitution, see Jamal Greene, *Originalism's*

to believe that enslaved people, formerly enslaved people, people of color, and women held the same view of liberty as slave owners, former slave owners, white people, and men. Shrinking the meaning of today's liberty to fit the expectations of elite, white, male, eighteenth-century property owners, many of whom enslaved other humans, will systematically disfavor laws that aim to correct imbalances of power by regulating one group of people to protect another. Purporting to do so in the name of "the people's sovereign choice" in ratifying the Constitution in the eighteenth century, when sovereignty supposedly belonged "not to a person or institution or class but to the whole of the people,"[89] is a pretty lie.

CONCLUSION

In the name of ensuring democratic accountability, five justices have signaled that they are prepared to become more assertive in reviewing Congress's delegations of power to other people and institutions. These justices all appear to agree that one good test for separating proper from improper delegations would turn on the importance of the relevant policy issues and the regulatory valence of the delegatee's response. This is a bad test if the justices do not wish to empower themselves to overturn Congress's work based on their own political judgments about the modern regulatory state. It is a very good test if that is their aim.

In one sense, the conservative justices' newfound assertiveness on legislative delegations is of a piece with their newfound assertiveness in overturning legislative protections of agency independence.[90] Both weaken Congress and aggrandize the Court. But there is an important difference. The decisions diminishing Congress's power to control the independence of administrative agencies also strengthen the president, no matter who the president is. The conservative justices' emerging approach to nondelegation, however, strengthens only the president whose administration wishes to

Race Problem, 88 DENV. U. L. REV. 517, 518 (2011); James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 713–14 (2016); Mary Anne Case, *The Ladies? Let's Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 445 (2014).

[89] Gundy v. United States, 139 S. Ct. 2116, 2135, 2133 (2019) (Gorsuch, J., dissenting).

[90] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483–84, 496 (2010).

avoid, rather than embrace, action on the major policy problems of our day. Their approach is not just political, but partisan.