Party Like It's 1935?: *Gundy v. United States* and the Future of the Non-Delegation Doctrine

By Matthew Cavedon & Jonathan Skrmetti

Note from the Editor:

This article discusses *Gundy v. United States*, a case involving the Non-Delegation Doctrine in which the Supreme Court granted certiorari.

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• Brief for Respondent, Gundy v. United States (2018) (No. 17-6086), https://www.supremecourt.gov/DocketPDF/17/17-6086/58355/20180802190422595_17-6086bsUnitedStates.pdf.

• Mark Joseph Stern, *The Supreme Court May Revive a Legal Theory Last Used to Strike Down New Deal Laws*, Slate (March 5, 2018), https://slate.com/news-and-politics/2018/03/supreme-court-may-revive-non-delegation-doctrine-in-gundy-v-united-states.html.

• Ian Millhiser, *How a strange Supreme Court case involving sex offenders could gut the EPA*, Think Progress (March 5, 2018), https://thinkprogress.org/gorsuch-environmental-regulation-epa-892f82ff3bc3/.

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Herman Avery Gundy was convicted of violating the federal Sex Offender Registration and Notification Act (SORNA). Because Mr. Gundy's underlying sex offense happened before SORNA's enactment, the statute empowered the Attorney General to determine whether or not the Act applied to him.[1] Mr. Gundy challenged this grant of authority by Congress to the executive branch, raising the Non-Delegation Doctrine. The U.S. Supreme Court agreed to hear his case, and oral arguments are scheduled for October 2, 2018.[2]

This grant of certiorari is remarkable, as many observers have thought (some approvingly, some lamentingly) that the Non-Delegation Doctrine was a non-starter this side of the Great Depression. A revival of the Doctrine could, depending on its nature, substantially limit the autonomy of the modern federal administrative state—a prospect that excites many conservatives and libertarians. On the other hand, a Supreme Court holding in Mr. Gundy's favor could drastically shorten SORNA's reach, which some right-of-center readers might deplore. And should the government prevail, the Court may effectively replace the principle of separation of powers with a new commitment to efficient technocracy, constitutionalizing the long trajectory of agency evolution at the expense of the Constitution's original meaning. Either way, *Gundy* is likely to be a landmark decision.

This article will familiarize readers with the two closely-related legal issues at stake in *Gundy*—the Non-Delegation Doctrine as a whole, and whether that Doctrine is especially stringent when criminal penalties are on the line. The discussion to follow will provide the background needed to see how *Gundy* could be decided—and just how historically important it could be.

I. A Very Brief Overview of the Non-Delegation Doctrine at the U.S. Supreme Court

Article I of the Constitution famously limits the scope of federal legislative power to the items enumerated therein,[3] and it vests that legislative power unequivocally in Congress.[4] As the nineteenth century drew to a close, the Supreme Court could uncontroversially assert: "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."[5]

When Wilsonian progressivism launched a period of administrative expansion, the associated desire for agency

1 34 U.S.C. § 20913(d) ("The Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act . . . .").

2 *See generally Gundy v. United States*, SCOTUSblog, http://www.scotusblog.com/case-files/cases/gundy-v-united-states/ (last accessed Sept. 9, 2018).

3 *See, e.g.*, United States v. Morrison, 529 U.S. 598, 610 (2000).

4 *See* U.S. Const. art. 1 § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

5 Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892) (per Harlan, J.). The dissent in *Marshall Field*—apparently a concurrence in judgment in modern parlance—agreed almost verbatim, stating "[t]hat no part of [the] legislative power can be delegated by congress to any other department of the government, executive or judicial, is an axiom in constitutional law, and is universally recognized as a principle essential to the integrity and maintenance of the system of government

expedience eventually prompted a doctrinal shift to a more pragmatic theory of delegation.[6] The Taft Court delineated Congress' authority to delegate the legislative power to the executive in a unanimous opinion affirming the President's adjustment of customs duties on the importation of barium dioxide: "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."[7] This became known as the intelligible-principle test.

The Court revisited the delegation of legislative power in two landmark 1935 cases arising from the National Industrial Recovery Act. In the first, the Court recognized that "there are limits of delegation which there is no constitutional authority to transcend," and held that a delegation of legislative power that established no policy, standard, or rule to constrain the delegation lacked an intelligible principle and thus failed to surmount the constitutional threshold.[8] In the second, again addressing a section of the National Industrial Recovery Act, the Court held unconstitutional a sweeping and unbounded delegation of legislative power to the President to promote via regulation "fair competition."[9]

The tide of global war washed away the vestiges of the Great Depression, a switch in time saved nine, and the Non-Delegation Doctrine fell from cherished principle to inert theory. In 1948, the Court decided the *Lichter* case, in which it confidently upheld a statute authorizing the Maritime Commission to prevent "excessive profits" in certain government contracts.[10] *Lichter* enumerated a variety of delegations that had been endorsed by the Taft and Hughes Courts as examples of Congress providing sufficient direction to the executive branch:

> 'Just and reasonable' rates for sales of natural gas, *Federal Power Comm'n v. Hope Gas Co.*, 320 U.S. 591; 'public interest, convenience, or necessity' in establishing rules and regulations under the Federal Communications Act, . . . *National Broadcasting Co. v. United States*, 319 U.S. 190; prices yielding a 'fair return' or the 'fair value' of property, *Sunshine Coal Co. v. Adkins*, 310 U.S. 381; 'unfair methods of competition' distinct from offenses defined under the common law, *Federal Trade Comm'n v. Keppel & Bros.*, 291 U.S. 304; 'just and reasonable' rates for the services of commission men, *Tagg Bros. & Morehead v. United States*, 280 U.S. 420; and 'fair and reasonable' rent for premises, with final determination in the courts, *Levy Leasing Co. v. Siegel*, 258 U.S. 242.[11]

Between the New Deal and the new millennium, the Non-Delegation Doctrine flickered on in the occasional dissent or concurrence. In 1963's *Arizona v. California*, an original jurisdiction case relating to water rights, Justice John Marshall Harlan, dissenting in part on behalf of himself and Justices William O. Douglas and Potter Stewart, objected to a congressional delegation that gave the Secretary of the Interior authority to allocate approximately 1.5 million acre-feet of water per year without any guidance as to how that allocation should be made.[12] Justice Harlan was concerned that "[t]he delegation of such unrestrained authority to an executive official raises . . . the gravest constitutional doubts."[13] He identified "two primary functions vital to preserving the separation of powers required by the Constitution" served by the intelligible-principle test: "it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people," and it "provide[s] the courts with some measure against which to judge the official action that has been challenged."[14]

Seventeen years later, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, then-Justice William Rehnquist delved into the philosophy underlying separation of powers as he explained his dissenting view that a provision of the Occupational Safety and Health Act included an unconstitutional delegation.[15] Justice Rehnquist embraced the intelligible-principle test as a meaningful check on executive

ordained by the constitution." 143 U.S. at 697 (Lamar, J., dissenting). Perhaps anticipating the arc of the delegation cases to come, Justice Lamar critiqued the majority's endorsement of what he viewed as an unconstitutional delegation of power to the president to regulate international commerce. *Id.* at 699.

6 *Cf.* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1215, 1223 n.6 (2015) (Thomas, J., concurring in the judgment). Recent scholarship has argued that outside of 1935, the Non-Delegation Doctrine never provided a meaningful check on the scope of executive lawmaking. *See generally* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379 (2017). Whether or not this empirical claim is true, the Court's transparency in endorsing delegations of legislative power to the executive branch steadily increased through the twentieth century.

7 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (per Taft, C.J.).

8 Panama Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935).

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

10 *See* Lichter v. United States, 334 U.S. 742, 785 (1948).

11 334 U.S. at 786 (internal citations abbreviated). *Keppel & Bros.* predated *Schechter Poultry* and *Panama Refining* and essentially applied a form of proto-*Skidmore* deference to the Federal Trade Commission's interpretation of "unfair method of competition." *See* 291 U.S. at 314. *Schechter Poultry* distinguished *Keppel & Bros.* and noted that the scope of the "unfair methods of competition" language in the FTCA addressed in *Keppel & Bros.* was "left to judicial determination as controversies arise," whereas the operative language of the NIRA then before the Court "delegate[d] legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable." 295 U.S. at 539. *Tagg Bros.* also predated the 1935 non-delegation cases and addressed the authority of the Secretary of Agriculture to set rates for interstate commerce of livestock at a stockyard. *See* 280 U.S. at 431. *Levy Leasing Co.*, the third case in the string cite to arise before non-delegation's watermark year, addressed a vagueness challenge to state statutory language unrelated to any agency delegation, and was resolved by the Court through direct analogy to the Fifth Amendment's "just compensation" standard. 258 U.S. at 249–50.

12 *See* 373 U.S. 546, 603, 626 (1963) (Harlan, J., dissenting in part).

13 *Id.* at 626.

14 *Id.*

15 448 U.S. 607, 672–76 (1980).

lawmaking.[16] Like Justice Harlan in *Arizona*, Justice Rehnquist argued that robust enforcement of that standard would ensure that the most democratically responsive branch of government drove social policy, and that courts would have a meaningful metric to determine whether a delegation went too far.[17] Although Justice Rehnquist enthusiastically endorsed application of the Non-Delegation Doctrine to invalidate unconstitutional delegations of legislative authority,[18] he adhered to the pragmatic view that too robust a Non-Delegation Doctrine could frustrate the effectiveness of government, and he followed Chief Justice William Howard Taft's admonition in *J.W. Hampton, Jr., & Co. v. United States* that "delegations of legislative authority must be judged 'according to common sense and the inherent necessities of the governmental co-ordination.'"[19]

Despite these occasional outbreaks of non-delegation, the Court—including even the dissenters who endorsed the application of the Doctrine to invalidate certain exceptional delegations—continued to view the vast majority of congressional delegations to agencies as unremarkable and constitutionally sound.

The modern push for a more robust Non-Delegation Doctrine took shape when Justice Clarence Thomas penned a solo concurrence in *Whitman v. American Trucking Associations*.[20] Justice Thomas' efforts differed substantially from the prior efforts to enforce the Non-Delegation Doctrine: rather than disputing whether Congress sufficiently articulated an intelligible principle, Justice Thomas took aim at the intelligible-principle test itself. As the majority fortified the existing case law built upon *J.W. Hampton Jr. & Co.*, Justice Thomas endorsed a return to constitutional first principles at the expense of stare decisis.

Writing for the Court and endorsing the status quo, Justice Antonin Scalia emphasized that throughout its history, the Court:

> found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition."[21]

His opinion echoed his earlier *Mistretta* dissent in which he—while contesting a delegation of raw legislative power uncoupled from any exercise of executive or judicial power—conceded that "the scope of delegation is largely uncontrollable by the courts"; this concession led him to adopt a posture of deference toward Congress' determination that a statute delegating the power to make law contains a sufficiently intelligible principle to constrain the delegee.[22] Justice Scalia's articulation of the general non-justiciability of delegation in his *Mistretta* dissent echoed in his *Whitman* opinion:

> The whole theory of *lawful* congressional 'delegation' is . . . that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be.[23]

Justice Thomas acknowledged in his brief concurring opinion in *Whitman* that the Court's decision fit neatly within its case law regarding the intelligible-principle requirement for statutory direction to an agency. But he succinctly set down a marker announcing his willingness in the future to consider whether the Court's "delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[24] Justice Thomas argued that the intelligible-principle requirement set out in the case law conflicts with Article I's Vesting Clause, and that "there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'"[25]

Fourteen years after his *Whitman* concurrence, Justice Thomas unleashed a lengthy and impassioned critique of the Court's separation-of-powers jurisprudence in an opinion concurring in the judgment of *Department of Transportation v. Association of American Railroads*.[26] Justice Thomas aimed squarely

16 *Id.*

17 *See id.* at 685–86.

18 *Id.* at 686.

19 *Id.* at 675 (quoting *J.W. Hampton*, 276 U.S. at 351).

20 531 U.S. 457 (2001). At the intermediate appellate level, a panel of the D.C. Circuit had held that the EPA's interpretation of a statute, though not necessarily the text of the statute itself, violated the Non-Delegation Doctrine. Am. Trucking Ass'ns, Inc. v. U.S. E.P.A., 175 F.3d 1027, 1034 (D.C. Cir. 1999); *see also* Am. Trucking Ass'ns, Inc. v. U.S. E.P.A., 195 F.3d 4, 6–8 (1999) (modifying prior opinion on petition for panel rehearing).

21 *Id.* at 474. This passage, and the surrounding section, was joined by the entire Court except Justice John Paul Stevens. *See* 531 U.S. at 459.

22 Mistretta v. United States, 488 U.S. 361, 416-17 (1989) (Scalia, J., dissenting) (discussed in more detail below).

23 *Id.* at 417 (quoted in part in *Whitman*, 531 U.S. at 475). Justice Scalia touched on delegation of legislative powers again in *City of Arlington v. F.C.C.*, 569 U.S. 290, 304 n.4 (2013), explaining that agency rulemaking and adjudication "take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive power.'" Chief Justice John Roberts, in dissent, agreed with this sentiment but pointedly noted that "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating." *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting).

24 531 U.S. at 487.

25 *Id.* In a separate opinion, Justice Stevens took a diametrically opposite position and rejected the notion that the Constitution places any limits on Congress' ability to delegate legislative power. *See* 531 U.S. at 489 (Stevens, J., concurring in part and concurring in the judgment).

26 135 S. Ct. 1225, 1240 (2015). The dispositive issue before the Court in *Association of American Railroads* was whether Amtrak is a governmental entity. *See id.* at 1228. The Court acknowledged that "questions implicating the Constitution's structural separation of powers and the Appointments Clause" remained outstanding. *Id.* Justice Samuel Alito wrote a separate concurrence addressing a number of constitutional issues and acknowledging, perhaps reluctantly, his understanding that "the formal reason why the Court does not enforce the nondelegation doctrine with more vigilance is that the other branches of Government have vested powers of their own that can be used in ways that resemble lawmaking." 135 S. Ct. at 1237 (Alito, J., concurring).

at the intelligible-principle test and opined that "[a]n examination of the history of [legislative and executive] powers reveals how far our modern separation-of-powers jurisprudence has departed from the original meaning of the Constitution."[27] Justice Thomas traced "the idea that the Executive may not formulate generally applicable rules of private conduct" to the fundamental concept of the rule of law as it emerged in classical antiquity, then followed that line of thinking through Magna Charta to the Founding.[28] His close analysis of the Court's non-delegation jurisprudence intertwined with an appreciation of the principles underlying separation of powers as articulated by Locke and Hume, Coke and Blackstone, Madison and Hamilton, and living theorists such as Maurice Vile and Philip Hamburger.[29]

Marshaling the combined forces of law, reason, and prudence, Justice Thomas castigated the Court's intelligible-principle jurisprudence as an abdication of the duty to enforce the separation-of-powers doctrine that defines the constitutional structure of the federal government. "To the extent that the 'intelligible principle' test was ever an adequate means of enforcing [the distinction between legislative and executive power], it has been decoupled from the historical understanding of [those] powers and thus does not keep executive 'lawmaking' within the bounds of inherent executive discretion."[30] The intelligible-principle test allowed Congress to provide such minimal guidance to the administrative state that executive branch recipients of delegated power could make political judgments about what is unfair or unnecessary, make trade-offs between competing policy goals, and even decide which policy goals the agency wants to pursue; it has "given sanction to the Executive to craft significant rules of private conduct."[31] Justice Thomas called for a "return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power."[32]

Justice Thomas' stirring opinion in *Association of American Railroads* has been cited in five opinions from the Courts of Appeals. Significantly, four of those were authored by Justice Thomas' now-colleague, Justice Neil Gorsuch.[33] Given the narrow window between publication of *Association of American Railroads* and Justice Gorsuch's elevation to the Supreme Court—barely two years—one can reasonably infer that Justice Thomas' position has achieved particular resonance with Justice Gorsuch. The exact extent of that influence should become clear when the Court resolves *Gundy*.

II. *Gundy* Brings the Non-Delegation Doctrine Before the Supreme Court

Herman Gundy was convicted of sexual offense in the second degree in Maryland in October 2005.[34] He was sentenced to twenty years' imprisonment, with ten years suspended. Committing that offense also violated the terms of Mr. Gundy's federal supervised release arising from a prior federal conviction; he was sentenced to another twenty-four months' imprisonment for that violation. Mr. Gundy served his state sentence and then his federal sentence, the latter first in Maryland and then in Pennsylvania.[35] In 2012, as his federal sentence wound down, he was transferred to a halfway house in New York.[36] He received a furlough to make that trip—from a federal correctional institute in Pennsylvania to the Bronx—unescorted; the terms of the furlough acknowledged that he remained in the custody of the Attorney General throughout his travels despite the lack of an escort.[37] Following his stint at the halfway house, Mr. Gundy was released from custody to a residence in New York.[38] Mr. Gundy did not register as a sex offender.[39] The federal government indicted Mr. Gundy in January 2013 and charged him with violating SORNA.[40]

SORNA requires sex offenders, a category that includes Mr. Gundy, to register with the National Sex Offender Registry, and to update that registration whenever the sex offender travels in interstate or foreign commerce.[41] SORNA applies prospectively to sex offenders convicted following its passage in 2006.[42] For those convicted before 2006, such as Mr. Gundy, SORNA provides

27 *Id.* at 1240–41.

28 *Id.* at 1242–43.

29 *Id.* at 1242–45, 1252. Justice Thomas' concern that delegation threatens the structural separation of powers, and thus undermines the interbranch checks and balances that serve to protect individual liberty, has been similarly embraced by key members of the Trump administration. *See, e.g.*, Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463 (2015) (arguing that delegation corrupts Congress' collective interest in its institutional authority by incentivizing individual members of Congress to focus on influencing the executive branch agencies); Donald McGahn, 17th Annual Barbara K. Olson Memorial Lecture (Nov. 18, 2017), *available at* https://fedsoc.org/conferences/2017-national-lawyers-convention?#agenda-item-barbara-k-olson-memorial-lecture.

30 *Id.* at 1250 (citing *Whitman*, 531 U.S. at 487 (Thomas, J., concurring)).

31 *Id.* at 1251.

32 *Id.* at 1252.

33 *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1154 n.5 (10th Cir. 2016) (Gorsuch, J., concurring); Caring Hearts Personal Home Services, Inc. v. Burwell, 824 F.3d 968, 969 (10th Cir. 2016); De Niz Robles v. Lynch, 803 F.3d 1165, 1171 (10th Cir. 2015); United States v. Nichols, 784 F.3d 666, 671 n.3, 672 n.4 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc) (discussed in more detail below). The fifth appellate citation to Justice Thomas' opinion came from Judge Kent Jordan in *Egan v. Delaware River Port Authority*, 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring in the judgment).

34 United States v. Gundy, 804 F.3d 140, 143 (2d Cir. 2015), *cert. granted*, 86 USLW 3438 (U.S. Mar. 5, 2018) (No. 17-6086). The government provides additional detail: "In 2004, petitioner gave cocaine to an 11-year-old girl and raped her, for which he was convicted of a sexual offense under Maryland law." Brief for Respondent at 2, United States v. Gundy (2018) (No. 17-6086).

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

36 *Id.* at 144.

37 *Id.*

38 *Id.*

39 *Id.*

40 804 F.3d at 144.

41 *See* 804 F.3d at 141–42 (citing 18 U.S.C. § 2250, 42 U.S.C. § 16919).

42 804 F.3d at 142 (citing 42 U.S.C. § 16913(d)).

that its applicability is determined by the Attorney General.[43] Exercising that delegated authority, the Attorney General passed regulations applying SORNA in full to pre-2006 offenders, with limited exceptions.[44] The statute did not explicitly require this. Indeed, some have even said that Congress' grant of authority was so amorphous that the Attorney General could have opted to exempt all sex offenders convicted prior to SORNA's passage, cover all of them, or—as in fact happened—find some middle ground.[45]

Without yet raising this argument, Mr. Gundy first moved to dismiss the indictment against him for failure to state an offense. He argued that he was required to register only after he had traveled to New York and thus could not have violated Section 2250(a)—the section defining the crime of failure to register—the elements of which must be satisfied sequentially.[46] The district court granted the motion, rejecting the government's argument that Mr. Gundy was required to register as soon as SORNA became retroactive by the Attorney General's determination.[47] The government appealed to the Second Circuit. The appellate panel reversed and held that SORNA's registration requirements "attached [to Mr. Gundy] at the latest on August 1, 2008, the effective date of the Attorney General's final guidelines."[48]

On remand, Mr. Gundy was convicted. He appealed to the Second Circuit. The court of appeals affirmed the district court, focusing its opinion on Mr. Gundy's argument that his travel from Pennsylvania to New York did not trigger Section 2250(a). Nestled at the tail end of the opinion was a blanket rejection of Mr. Gundy's remaining arguments as meritless, including "Gundy's argument—foreclosed by *United States v. Guzman*,[49] and made only for preservation purposes—that SORNA violates antidelegation principles."[50]

Mr. Gundy petitioned for certiorari, and the Supreme Court granted his petition with respect to his fourth question presented: "Whether SORNA's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d) violates the nondelegation doctrine."[51]

Mr. Gundy's brief is a muscular paean to the separation of powers, arguing that the Constitution prohibits delegation of legislative powers, particularly in the criminal context, and that the operative language of SORNA "impermissibly delegates quintessentially 'legislative' powers" and fails the intelligible-principle test.[52]

A battalion of amici sallied into the case, all of them writing in support of Mr. Gundy's cause.[53] Many of the amici argue for a substantial change in the law to limit congressional delegations of legislative authority, which could be implemented via either a toothier intelligible-principle test or a more hermetic seal between the legislative and executive branches. Taking the opposite tack and recognizing that *Gundy* has the potential to mark a bold new era of non-delegation, the Araiza et al. brief instead argues for a restrained approach that simply applies the existing case law to find a lack of an intelligible principle in this case.

Alone against Mr. Gundy, the government filed a plucky brief arguing that SORNA as a whole supplies an intelligible principle to guide the Attorney General and limit the delegated authority.[54] Because the mechanics of applying SORNA to previously convicted sex offenders created "practical problems," the United States argues, Congress delegated power to the Attorney General to ensure that he had the flexibility to implement the requirements effectively.[55] The crux of the argument is that:

> The delegation of authority to address transition-period implementation issues concerning pre-Act offenders did not erase SORNA's overriding objective to establish a comprehensive national system for the registration of sex offenders, designed to provide the broadest possible protection to the public. Congress merely delegated to the Attorney General the judgment whether that clear general policy would be offset, in the case of pre-SORNA sexual offenders, by problems of administration, notice and the like for this discrete group of offenders—problems well suited to the Attorney General's on-the-ground assessment.[56]

In addition, the government argued that "the limited scope of the authority SORNA confers on the Attorney General made detailed

43 *Id.*

44 *See* 804 F.3d at 142–43 (citing 72 Fed. Reg. 8894, 8896 (Feb. 28, 2007); 72 Fed. Reg. 30,210, 30212 (May 30, 2007); 73 Fed. Reg. 38,030, 38,063 (July 2, 2008); 75 Fed. Reg. 81,849, 81,850 (Dec. 29, 2010)). The regulations authorizing retroactive application of SORNA include a limited exception for sex offenders who "have been in the community for a greater amount of time than the registration period required by SORNA." 73 Fed. Reg. at 38,046–47 (quoted at 804 F.3d at 143 n.3).

45 *See, e.g.*, *Nichols*, 784 F.3d at 668-69 (Gorsuch, J., dissenting).

46 *See Gundy*, 804 F.3d at 144.

47 *Id.*

48 *Id.* at 145.

49 591 F.3d 83, 91-93 (2d Cir. 2010).

50 United States v. Gundy, 695 Fed. App'x 639, 641 & n.2 (2d Cir. 2017).

51 86 USLW 3438. The relevant statute was subsequently codified at 34 U.S.C. § 20913. *See, e.g.*, Brief for Petitioner at 1, Gundy v. United States, No. 17-6086.

52 *See* Br. for Pet., Gundy v. United States (2018) (No. 17-6086).

53 The amici include the Cato Institute and Cause of Action; the Competitive Enterprise Institute, Reason Foundation, and Cascade Policy Institute; the National Association of Federal Defenders; Pacific Legal Foundation; Philip Hamburger's New Civil Liberties Alliance; the Center for Constitutional Jurisprudence; William D. Araiza and 14 Other Constitutional, Criminal, and Administrative Law Professors; the American Civil Liberties Union; Scholars Whose Work Includes Sex Offense Studies; the Institute for Justice; the Downsize DC Foundation, DownsizeDC.org, the Free Speech Coalition, Free Speech Defense and Education Fund, U.S. Constitutional Rights Legal Defense Fund, Public Advocate of the United States, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee; the National Association of Criminal Defense Lawyers; and the Becket Fund for Religious Liberty.

54 *See* Br. for Resp., Gundy v. United States (2018) (No. 17-6086).

55 *Id.* at 25.

56 *Id.* at 28 (internal quotations, brackets, and citations omitted).

statutory direction unnecessary."[57] Indeed, "the scope of the authority SORNA granted the Attorney General is no different for nondelegation purposes from the discretion to exempt otherwise covered individuals from the duty to register."[58]

The Court's willingness to grant certiorari strictly on the non-delegation issue suggests that the government may have a challenging road ahead. Yet, as the broad spectrum of amici show, even if the Court decides to enforce the Non-Delegation Doctrine in this case, there are a variety of paths the Court could take that could have very different ramifications for administrative law and the separation of powers.

III. Five Options for the Court

Based on the Court's jurisprudence, there are essentially five ways the Court could resolve *Gundy*. The first is to maintain the Scalian position that the intelligible-principle test is effectively non-justiciable based on the lack of a clear constitutional distinction between legislating and executive activity that looks like legislating. The second option would be to adopt the position Justice Stevens took in his *Whitman* concurrence and hold that the delegation of legislative power to the executive branch is altogether unremarkable and poses no constitutional problem. While it is possible the Court could either stay the course or adopt a broader endorsement of delegation, those seem like the least likely outcomes. The extraordinary nature of the delegation in *Gundy*—in which the challenged statute effectively allowed the Attorney General to create a crime and then imprison people for violating it—is such that an affirmance would obviate *Schechter Poultry* and *Panama Refining*, whether explicitly or not, and end the lingering threat of some sort of judicial limit on congressional delegation. There is no reason to think that a majority of the Court has any appetite for expanding Congress' authority to delegate legislative power.

The third option is to take up Chief Justice Rehnquist's position, articulated in his *American Petroleum Institute* concurrence, that the intelligible-principle test should have teeth to "ensur[e] that Congress itself make[s] the critical policy decisions."[59] Even dull and modest teeth would be enough, in the case of *Gundy*, to invalidate a delegation of authority that allows the executive branch to define a crime. This course would allow the Court to continue to constrain congressional abdication of legislative authority through the somewhat nebulous threat of a constitutional limit on delegations, but without deviating from its existing jurisprudence. Enforcement of the Non-Delegation Doctrine in *Gundy* could be seamlessly incorporated into the existing case law, and it would be identified in the future as the third example of Congress exceeding the outer limit of its authority. For Justices inclined to demark the boundary between executive and legislative powers while adhering to stare decisis, the path of Rehnquist may be the most palatable option.

The fourth option, the Thomastic option, is to reconsider whether the intelligible-principle test is the constitutionally appropriate means of limiting congressional delegations of lawmaking authority. Under this approach, the Court would determine that a strict separation of powers—implementing the Lockean and Madisonian concepts that ostensibly drove the Court's nineteenth-century decisions—does not permit Congress to give executive agencies the authority to enact generally applicable rules of private conduct. Such a decision could be written with nuanced care to harmonize it with the prior line of cases, but it would nevertheless mark a substantial departure from current administrative law.[60] Should the Court elect to take this approach, it could be a profound development in constitutional law. Even if the Court charts a different course, it seems likely that this position will motivate memorable separate opinions from an enthusiastic subset of the Court.

The fifth option is an intriguing compromise: The Court could avoid making any broad pronouncements on the Non-Delegation Doctrine generally by bifurcating it between criminal and non-criminal cases. Such an approach could allow the Thomastics on the Court to apply a more robust concept of separation of powers to criminal cases while leaving the legal structure underlying the modern administrative state essentially undisturbed. The remainder of this article examines this fifth option in detail.

IV. *Gundy* Could Establish a Heightened Criminal Non-Delegation Standard

Perhaps, as a number of jurists and amici have suggested, there is an especially searching non-delegation inquiry when an administrative rule triggers criminal sanctions. This notion has been debated for over a century, and Justice Gorsuch is one key recent proponent.

A. The Long Debate Over Whether There Is a Heightened Non-Delegation Doctrine in Criminal Cases

Judges have disagreed about whether the threat of criminal punishment triggers greater scrutiny of delegations since at least the late 1800s.[61] It is axiomatic, from all the way back in English common law, that "A CRIME . . . is a [sic] act committed, or

57 *Id.* at 29.

58 *Id.* at 30.

59 448 U.S. at 687.

60 Justice Thomas has provided a helpful metaphor to explain his occasional willingness to reexamine precedent:

> When you get a case, you have the last decision in the line. That's what's on your desk. . . . The last decision in the line is like a caboose on a train. Let's go from the caboose all the way up to the engine, and see what really went on, and let's think it all through. You might get up to the caboose and find out: Oh, there's nobody in the engine. . . . You say, "There's nobody driving the train. What happened? Where did we go wrong? Maybe we're headed in the wrong direction. Let's think it through."

Orin Kerr, *Justice Thomas on Stare Decisis*, Volokh Conspiracy (Oct. 8, 2007), *available at* http://volokh.com/posts/1191880808.shtml (quoting Justice Thomas as reported in a currently unavailable blog post by Jan Crawford Greenberg). The train metaphor is particularly memorable because Justice Thomas' lengthy rethinking of the line of Non-Delegation Doctrine cases arose in the *Association of American Railroads* case.

61 Many of the cases discussed here are cited in Justice Gorsuch's partial concurrence in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 et seq. (2018).

omitted, in violation of *a public law*."[62] That has often been taken to mean that only a statute can criminalize an act. Indeed, it is why the Supreme Court abolished federal common-law crimes, holding that Congress alone "must first make an act a crime, [and] affix a punishment to it."[63]

Not long after common-law crimes' abolition, the executive branch began criminalizing actions through statutory interpretations. But the Supreme Court resisted this trend. For instance, in the late 1800s, the federal government tried to prosecute an oleomargarine dealer for improper bookkeeping.[64] A federal statute required oleomargarine *manufacturers* to keep proper books.[65] But that provision did not facially apply to dealers, and the statute only criminalized dealers' neglect of "the things required by law."[66] But the Treasury Department's implementing regulations imposed bookkeeping requirements on dealers.[67] In *United States v. Eaton*, the Supreme Court found the prosecution of the dealer unlawful. Its analysis was both statutory and based on the separation of powers. It began by observing that it had already abolished federal common-law crimes.[68] After noting that "regulations [cannot] alter or amend a . . . law,"[69] the Court interpreted the statute to foreclose the prosecution. "It would be a very dangerous principle," the Court insisted, "to hold that a thing prescribed by the Commissioner of Internal Revenue . . . could be considered as a thing 'required by law'" pursuant to a statute.[70] Again, a crime can only be established by a public law—that is, a statute.[71] The Court established a clear-statement rule: "If Congress intended to make it an offence . . . it would have done so distinctly . . . ."[72] While regulations may be lawful, "it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offence in a citizen, *where a statute does not distinctly* make the neglect in question a criminal offence."[73]

Despite *Eaton*, the next major relevant Supreme Court case upheld a prosecution. In *United States v. Grimaud*, there was "no act of Congress which, in express terms, declare[d] that it [would] be unlawful to graze sheep on a forest reserve."[74] Statutory law merely required—on pain of criminal sanctions—that citizens' use of forest reserves "for 'all proper and lawful purposes'" be subject to "the rules and regulations covering" such areas.[75] The Court made quick work of a challenge to this:

> If, after the passage of the act and the promulgation of the rule, the defendants drove and grazed their sheep upon the reserve, in violation of the regulations, they were making an unlawful use of the Government's property. In doing so they thereby made themselves liable to the penalty imposed by Congress.[76]

Grimaud distinguished *Eaton*, characterizing the *Eaton* prosecution as:

> putting the regulations above the statute. . . . [W]hen Congress enacted that a certain sort of book should be kept, the Commissioner could not go further and require additional books; or, if he did make such regulation, there was no provision in the statute by which a failure to comply therewith could be punished.[77]

This reading, while reasonable in itself, completely ignored *Eaton's* focus on the separation of powers.[78]

Eaton's worries about criminalization by regulation briefly bobbed up in the Supreme Court's only two cases sustaining non-delegation challenges. *Panama Refining Co. v. Ryan* connected *Eaton*-esque concerns to due process:

> If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown.[79]

There was also a whiff of special scrutiny for criminal matters in *A.L.A. Schechter Poultry Corp. v. United States*.[80] The opinion noted that fair-competition codes carried criminal sanctions and coercive power.[81] The Court disapproved that such power was being exercised "due to the effect of the executive action."[82] These side-notes did not go unnoticed. The Court held in *Fahey v. Mallonee* that both opinions "emphasized" the criminal features of the delegations at issue in subjecting them to particular

62 4 William Blackstone, *Commentaries* *5 (emphasis added).

63 United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812).

64 United States v. Eaton, 144 U.S. 677, 686 (1892).

65 *Id.*

66 *Id.* at 685.

67 *Id.*

68 *Id.* at 687.

69 *Id.*

70 *Id.* at 688.

71 *Id.* at 687–88 (citing William Blackstone, 4 *Commentaries* *5).

72 *Id.*

73 *Id.* (emphasis added).

74 220 U.S. 506, 521 (1911).

75 *Id.*

76 *Id.*

77 *Id.* at 519.

78 Curiously, *Grimaud* did not distinguish *Eaton* in the most obvious way available: *Grimaud* concerned regulations governing the use of federal property, a core executive function, whereas *Eaton* addressed a regulation of private activity. *See, e.g.*, Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1270 (9th Cir. 1988), *vac'd & remanded by* United States v. Chavez-Sanchez, 488 U.S. 1035 (1989) (Wiggins, J., dissenting) (acknowledging, but rejecting, such a "core functions" analysis).

79 293 U.S. 388.

80 295 U.S. 495.

81 *Id.* at 529.

82 *Id.* at 537–38.

non-delegation scrutiny.[83] Based on *Fahey*, one might think there had emerged a clear rule in favor of tightening the delegation belt in criminal cases.

But other precedent from the same time period pointed in the other direction. In *M. Kraus & Brothers, Inc. v. United States*, a case about price controls, the Court demanded nothing more than that the criminally prohibited conduct "be set forth with clarity in the regulations and orders which [the executive branch was] authorized by Congress to promulgate," because "Congress has warned the public [through the statute] to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability."[84] The *Kraus* Court followed *Grimaud* in distinguishing *Eaton* on statutory grounds.[85] It did not mention any of the other cases discussed above.

For the next twenty years, concerns about delegating away the criminalization power were mostly limited to minority opinions.[86] Dissenting in *Barenblatt v. United States*, Justice Hugo Black made a vagueness[87] argument that echoed *Eaton*'s holding, emphasizing that statutes themselves have to clearly spell out what conduct is illegal: "[T]he standard of certainty required in criminal statutes is more exacting than in noncriminal statutes. This is simply because it would be unthinkable to convict a man for violating a law he could not understand."[88] Justice William Brennan picked up on this idea in his concurrence in *United States v. Robel*.[89] He did so while distinguishing delegations carrying criminal sanctions from other delegations. He fully granted that "Congress ordinarily may delegate power under broad standards,"[90] but he thought that "[t]he area of permissible indefiniteness narrows . . . when the regulation invokes criminal sanctions and potentially affects fundamental rights."[91] Before the *Robel* defendant (a registered Communist employed at a shipyard of possible military importance) could be sent "to prison for holding employment at a certain type of facility," Justice Brennan wanted to be satisfied that "Congress authorized the proscription as warranted and necessary."[92] Why? Because the public has a right to know whether power is flowing from the proper authorities:

> [P]ersons engaged in arguably protected activity . . . must not be compelled to conform their behavior to commands, no matter how unambiguous, from delegated agents whose authority to issue the commands is unclear. The legislative directive must delineate the scope of the agent's authority so that those affected by the agent's commands may know that his command is within his authority and is not his own arbitrary fiat.[93]

The dual priorities voiced by Justices Black and Brennan—the public's right to know what is expected of them and who it is that holds those expectations—apparently soon convinced their peers. *Smith v. Goguen* expressed dismay at "standardless" statutory language that "allows policemen, prosecutors, and juries to pursue their personal predilections."[94] While *Goguen* was a vagueness case, its holding could just as easily have come from *Schechter*: "Legislatures may not . . . abdicate their responsibilities for setting the standards of the criminal law."[95] This holding received more force from another vagueness case, *Kolender v. Lawson*, which reiterated that *legislatures* must tell people what they cannot lawfully do:

> [T]he void-for-vagueness doctrine requires that *a penal statute* define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."[96]

While criminal justice "is certainly a matter requiring the attention of all branches of government," the legislature alone must clearly state the rules.[97] The Court even went so far toward special standards for criminal cases as to find that its precedent "expressed greater tolerance of [vagueness in] enactments with

83 Fahey v. Mallonee, 332 U.S. 245, 249 (1947).

84 327 U.S. 614, 622 (1946). *Cf.* Yakus v. United States, 321 U.S. 414, 423–27 (1944).

85 *M. Kraus & Bros., Inc.*, 327 U.S. at 620 n.4.

86 *But cf.* United States v. Evans, 333 U.S. 483, 486 (1948) (saying, with respect to an ambiguous statute, that "defining crimes and fixing penalties are legislative, not judicial, functions").

87 To be sure, the due process Vagueness Doctrine is distinct from the Non-Delegation Doctrine. But the two have significant overlap. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application"—concerns that also underpin the Non-Delegation Doctrine. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

88 360 U.S. 109, 137 (1959).

89 389 U.S. 258 (1967).

90 *Id.* at 274.

91 *Id.* at 275.

92 *Id.* at 272, 277.

93 *Id.* at 281 (internal citation omitted).

94 415 U.S. 566, 575 (1974).

95 *Id.*

96 461 U.S. 352, 357–58 (1983) (emphasis added) (internal citations omitted).

97 *Id.* at 361.

civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."[98]

But just as *Grimaud* had swiftly taken the wind out of *Eaton*'s sails nearly a century before, *Mistretta v. United States* did the same to this line of cases. This article has already discussed *Mistretta*, which upheld Congress' establishment of the U.S. Sentencing Commission, and which featured a vigorous dissent by Justice Scalia.[99] But he did not address whether criminal cases deserve special treatment; in fact, he expressed concern about a hypothetical "Medical Commission" deciding issues like "the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research."[100] Still, the criminal character of the sanctions directly at issue obviously weighed on him. Following a lengthy discussion of just how much power the Commission had over "application of the ultimate governmental power short of capital punishment," he concluded that "the basic policy decisions governing society are to be made by the Legislature."[101]

Justice Scalia revisited this issue in two more dissents over two decades later. The first again decried what he took to be an unlawful delegation of criminalization power, without considering whether there is a heightened non-delegation standard:

> [I]t is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals. That seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable . . . .[102]

Later, Justice Scalia inched slightly closer to embracing a special standard, at least for statutory interpretation:

> [L]egislatures, not executive officers, define crimes. . . . With deference to agency interpretations of statutory provisions to which criminal prohibitions are attached, federal administrators can in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain. Undoubtedly Congress may make it a crime to violate a regulation, but it is quite a different matter for Congress to give agencies—let alone for us to *presume* that Congress gave agencies—power to resolve ambiguities in criminal legislation.[103]

Meanwhile, the Court as a whole hemmed and hawed. In *Touby v. United States*, decided in 1991, it candidly noted that its "cases are not entirely clear as to whether more specific guidance [than what the intelligible-principle test mandates] is in fact required."[104] In *Loving v. United States*, the Court seems to have come down firmly in favor of applying the ordinary non-delegation standard: "There is no absolute rule . . . against Congress' delegation of authority to define criminal punishments."[105] A delegation is proper "so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations 'confin[e] themselves within the field covered by the statute.'"[106] But what about the public's right to know by what authority criminal laws are promulgated? "The exercise of a delegated authority to define crimes may be sufficient in certain circumstances to supply the notice to defendants the Constitution requires."[107] *Loving* should be read cautiously, though, given its facts. It concerned whether or not the president had the power to identify aggravating factors in capital cases in courts martial.[108] The majority specifically noted that this matter was within "the traditional authority of the President" over the armed forces.[109] *Loving* is also limited by later precedent denying deference to administrative agencies' interpretations of criminal statutes.[110]

Still, with sweeping proclamations both against and in favor of heightened non-delegation scrutiny, *Touby* remains correct that the "cases are not entirely clear."[111]

B. Resolving the Constitutionality of Applying SORNA Retroactively Using a Heightened Non-Delegation Doctrine

Perhaps the right context for settling the dispute is SORNA's retroactivity. Judge Carlos Lucero and then-Judge Gorsuch certainly thought so in 2015. Each dissented from the denial of

98 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498–99 (1982).

99 As discussed above, Justice Scalia would have held that the Commission *was* compatible with the Non-Delegation Doctrine. *Mistretta*, 488 U.S. at 416. His critical analysis, which shares some analytical overlap with the non-delegation precedent at issue here, was based instead on the Vesting Clause and the lack of any related exercise of executive or judicial power to provide constitutional cover. *Id.* at 416–17.

100 *Id.* at 422 (Scalia, J., dissenting).

101 *Id.* at 413, 415.

102 Reynolds v. United States, 565 U.S. 432, 450 (2012) (Scalia, J., dissenting). *See also id.* at 448 (deeming SORNA to be facially retroactive, and interpreting the supposed delegation at issue in *Gundy* "as conferring . . . an authority to make exceptions to the otherwise applicable registration requirements."). Of course, if *Gundy* adopts this approach—in which Justice Ginsburg joined—then it can sidestep non-delegation. But the price would be overturning *Reynolds*, the outcome of which was supported by six current justices.

103 Whitman v. United States, 135 S. Ct. 352, 353 (2014) (Scalia, J., respecting denial of cert.) (internal citation omitted).

104 Touby v. United States, 500 U.S. 160, 166.

105 517 U.S. 748, 768 (1996).

106 *Id.* (citing *Grimaud*, 220 U.S. at 518).

107 *Id.* (citing *M. Kraus & Bros., Inc.*, 327 U.S. at 622).

108 *Id.* at 751–52.

109 *Id.* at 772; *see also id.* at 776 (Scalia, J., concurring in part and concurring in judgment) ("[I]t would be extraordinary simply to infer . . . a special limitation upon tasks given to the President as Commander in Chief, where his inherent powers are clearly extensive."); *id.* at 778 (Thomas, J., concurring in judgment) ("[B]y concurring in the judgment in this case, I take no position with respect to Congress' power to delegate authority or otherwise alter the traditional separation of powers outside the military context."). Perhaps this is the vindication of the 'core functions' approach mentioned above at footnote 78?

110 Abramski v. United States, 134 S. Ct. 2259, 2274 (2014); United States v. Apel, 134 S. Ct. 1144, 1151 (2014).

111 500 U.S. at 166.

rehearing en banc in *United States v. Nichols*.[112] The panel decision in that case upheld SORNA's retroactive application against a non-delegation challenge.[113] With fairly little analysis, the panel "decline[d] to abandon the well-settled 'intelligible principle' standard."[114] Judge Lucero concisely disagreed.[115]

Judge Gorsuch provided a more thorough critique. His dissent was based on the separation of powers, with added support from concern for personal liberty. "If the separation of powers means anything," he began, "it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce."[116] In fact, the power to criminalize is at the very heart of non-delegation:

> Without a doubt, the framers' concerns about the delegation of legislative power had a great deal to do with the criminal law. The framers worried that placing the power to legislate, prosecute, and jail in the hands of the Executive would invite the sort of tyranny they experienced at the hands of a whimsical king.[117]

As an antidote to such despotism, the Founders enshrined "the principle that the scope of individual liberty may be reduced only according to the deliberately difficult processes prescribed by the Constitution, a principle that may not be fully vindicated without the intervention of the courts."[118]

Judge Gorsuch reviewed much of the precedent discussed in this article. He found that "the [U.S. Supreme] Court has never expressly held that an intelligible principle alone suffices to save a putative delegation when the criminal law is involved."[119] What is more, that Court had never faced a situation as broad as the one in *Nichols*, where "legislation le[ft] it to the nation's top prosecutor to specify whether and how a federal criminal law should be applied to a class of a half-million individuals."[120] Under the circumstances, Judge Gorsuch thought that it was "easy enough to see why a stricter rule would apply in the criminal arena"—liberty interests, originalism, and modern over-criminalization:

> The criminal conviction and sentence represent the ultimate intrusions on personal liberty and carry with them the stigma of the community's collective condemnation—something quite different than holding someone liable for a money judgment because he turns out to be the lowest cost avoider. Indeed, the law routinely demands clearer legislative direction in the criminal context than it does in the civil and it would hardly be odd to think it might do the same here. When it comes to legislative delegations we've seen, too, that the framers' attention to the separation of powers was driven by a particular concern about individual liberty and even more especially by a fear of endowing one set of hands with the power to create and enforce criminal sanctions. And might not that concern take on special prominence today, in an age when federal law contains so many crimes—and so many created by executive regulation—that scholars no longer try to keep count and actually debate their number?[121]

According to Judge Gorsuch, perhaps no case better could have represented these problems than *Nichols*. "[T]he discretion conferred" was simply:

> extraordinary—in its breadth (allowing the Attorney General to apply none, some, or all of SORNA's requirements to none, some, or all past offenders), in its subject matter (effectively defining a new crime), in its chosen delegate (the nation's top prosecutor), and in the number of people affected (half a million).[122]

These considerations showed that "more, not less, guidance [wa]s required."[123]

For these reasons, and drawing inspiration from *Touby*, Judge Gorsuch would have adopted a three-part test for delegations implicating the power to criminalize. First, "Congress must set forth a clear and generally applicable rule"; second, that rule must "hinge[ ] on a factual determination by the Executive"; and third, "the statute provides criteria the Executive must employ when making its finding."[124] The delegation at issue in *Nichols* (and *Gundy*) easily failed that standard. Congress just "pointed to a problem that needed fixing and more or less told the Executive to go forth and figure it out."[125] Judge Gorsuch concluded: "By any plausible measure . . . that is a delegation run riot, a result inimical to the people's liberty and our constitutional design."[126]

C. Justice Gorsuch's View Evolved

But Justice Gorsuch's reasoning from *Nichols* may not carry over to *Gundy*. Consider his partial concurrence in *Sessions*

112 784 F.3d 666 (10th Cir. 2015).

113 775 F.3d 1225 (10th Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 1113 (2016).

114 *Id.* at 1232.

115 *Nichols*, 784 F.3d at 667 (Lucero, J., dissenting from denial of rehearing en banc) ("[T]he Constitution demands something more than an 'intelligible principle' when Congress delegates its power to define crimes to the executive branch agency charged with prosecuting those crimes.").

116 *Id.* at 668 (Gorsuch, J., dissenting from denial of rehearing en banc).

117 *Id.* at 670.

118 *Id.* at 671; *cf. Robel*, 389 U.S. at 281 (Brennan, J., concurring) ("[P]ersons engaged in arguably protected activity . . . must not be compelled to conform their behavior to commands, no matter how unambiguous, from delegated agents whose authority to issue the commands is unclear. The legislative directive must delineate the scope of the agent's authority so that those affected by the agent's commands may know that his command is within his authority and is not his own arbitrary fiat.").

119 *Nichols*, 784 F.3d at 672 (Gorsuch, J., dissenting from denial of rehearing en banc).

120 *Id.*

121 *Id.* at 672–73 (internal citations omitted).

122 *Id.* at 676.

123 *Id.*

124 *Id.* at 673.

125 *Id.* at 674.

126 *Id.* at 677.

v. Dimaya.[127] *Dimaya* concerned a vagueness challenge to the definition of "crime of violence" in the Immigration and Nationality Act.[128] An alien found to have committed such a crime suffered civil penalties such that removal from the country became "a virtual certainty."[129]

The *Dimaya* majority framed the decision in terms of vagueness. A plurality of the Court emphasized both the importance of immigrants having fair notice of what consequences they could face, and vagueness as "a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not."[130] The plurality rejected the government's contention that a lower vagueness standard should have applied in *Dimaya* than in criminal cases, observing that deportation is a severe consequence and that immigration is closely tied to criminal adjudications.[131] Following criminal precedent regarding a similar statute, a majority of the Court found the definition of "crime of violence" to be unconstitutionally vague.[132]

The *Dimaya* plurality did not decide whether there is a special non-delegation standard for criminal cases. Its refusal to weaken the criminal vagueness doctrine for a civil case might hint that the degree of scrutiny always depends on the severity of the real-world consequences. But *Gundy* is *Dimaya*'s procedural inverse. In *Dimaya*, the government asked the Court to *lower* its criminal vagueness standard for a civil case. In *Gundy*, the question is whether the non-delegation standard *rises* when criminal sanctions loom. That might be a distinction with a difference. The *Dimaya* plurality simply did not say enough to tell.

But Justice Gorsuch showed his cards. His hand has changed somewhat in the four years since his *Nichols* dissent, and he now thinks there is only one vagueness/non-delegation standard[133] for both civil and criminal cases. He reached this conclusion through historical study and practical concerns. Examining early precedent, Justice Gorsuch found that "[c]ourts refused to apply vague laws in criminal cases involving relatively modest penalties"—and "in civil cases too."[134] Justice Gorsuch then turned to modernity. Given that "the severity of the consequences counts when deciding the standard of review," he invited the Court to "take account of the fact that today's civil laws regularly impose penalties far more severe than those found in many criminal statutes":

> Today's 'civil' penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies. And not only are 'punitive civil sanctions . . . rapidly expanding,' they are 'sometimes more severely punitive than the parallel criminal sanctions *for the same conduct*.'[135]

"Given all this," Justice Gorsuch could not demand a heightened standard for criminal cases. Instead, he was convinced that "the criminal standard should be set *above* our precedent's current threshold," rather than that "the civil standard should be buried *below* it."[136]

Here would be a reason to both decide *Gundy* in the Petitioner's favor *and* reject a special non-delegation standard for criminal cases. If this is the tack some of the *Gundy* justices take, we can expect to see some variant on Justice Gorsuch's bottom line from *Dimaya*:

> [T]his isn't your everyday ambiguous statute. It leaves the people to guess about what the law demands—and leaves judges to make it up. You cannot discern answers to any of the questions this law begets by resorting to the traditional canons of statutory interpretation. No amount of staring at the statute's text, structure, or history will yield a clue. Nor does the statute call for the application of some preexisting body of law familiar to the judicial power. The statute doesn't even ask for application of common experience. Choice, pure and raw, is required. Will, not judgment, dictates the result.[137]

To summarize, many judges have been disturbed by the notion of legislators drafting general criminal statutes, then leaving to bureaucrats the details of deciding who goes to prison and for what. *Especially* when those bureaucrats are prosecutors who are themselves "engaged in the often competitive"—and politically charged—"enterprise of ferreting out crime."[138] Some judges, including in the SORNA context, have proposed heightening the scrutiny demanded by the Non-Delegation Doctrine as a way of ensuring that people are only prosecuted when proper public authority demands it. Others have decided that the dire consequences to liberty and constitutional governance do not end at the threshold between criminal and civil cases, and so the

127 138 S. Ct. 1204, 1223 et seq. (2018).

128 *Id.* at 1210 (majority opinion).

129 *Id.* at 1211.

130 *Id.* at 1212 (plurality opinion).

131 *Id.* at 1213.

132 *Id.* at 1223 (majority opinion) (citing *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding similar statute's definition of "violent felony" void for vagueness)).

133 His opinion painstakingly links these two areas of law. *See id.* at 1227–28. Justice Thomas—who rejects vagueness as a basis for striking down laws, and so dissented in *Dimaya*—refused to do the same, but left the door open to non-delegation challenges against overly general statutes. *Id.* at 1248 (Thomas, J., dissenting).

134 *Id.* at 1226 (Gorsuch, J., concurring in part and concurring in the judgment).

135 *Id.* at 1229 (internal citation omitted).

136 *Id.* This could mean *both* standards should be raised, with the criminal one still ultimately set higher than the civil. But Justice Gorsuch focused on the similarities between many civil and criminal sanctions. Either a single standard, or different ones based on real-world consequences, seems likelier to be his preferred outcome.

137 *Id.* at 1232.

138 Johnson v. United States, 333 U.S. 10, 14 (1948).

better route is simply to demand more exact statutes across the board. Either approach would not bode well for the government in *Gundy*.

V. Conclusion

Gundy may well be the case that revitalizes the Non-Delegation Doctrine. Or, it could give the Doctrine one good leg, making it very important in criminal cases but still ineffectual in virtually all civil ones. Either way, there is a good chance that it will be one of the most important criminal and administrative law cases of the early twenty-first century.