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Jarrod Alec Greth
University of New Mexico - School of Law

THE FUTURE OF NONDELEGATION: RESURRECTING THE DOCTRINE THROUGH A NOVEL BALANCING TEST

Jarrod Alec Greth*

ABSTRACT

In Gundy v. United States, the Supreme Court of the United States was split 4 - 4 on the question of nondelegation. With a vacancy on the Bench, half of the Court took no issue with Congress delegating nearly unlimited discretion to the United States Attorney General over the enforcement and applicability of the Sex Offender Registration and Notification Act to offenders whose crimes preceded the Act's enactment. The other half of the Court saw this grant of vast power as a violation of the nondelegation doctrine; the idea that Congress may not delegate its Article I law-making powers to any other branch of government. The Court has not struck down a law on nondelegation grounds since before the New Deal Era. This could soon change with the new majority on the Court. By adopting a novel balancing test, known as the major rules doctrine, this new Court could resurrect the spirit of the nondelegation doctrine and begin to return federal administrative law to a more interstitial role under a more traditional understanding of separation of powers.

By flipping the analysis from first considering the power delegating statute to now beginning with the promulgated administrative rule, the Court will be able to rein in actions taken by executive agencies which have far-reaching economic, political, or otherwise contentious effects. The implications of this reversal of nearly a century's worth of judicial deference to Congress and the various administrative agencies include (1) more deliberate law-making by Congress, (2) asymmetric effects across administrative agencies, and (3) increased accountability for regulation at the federal level.

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INTRODUCTION

The new majority of the Supreme Court of the United States has signaled that it has a problem with the Court's nearly century-long embrace of broad administrative rule-making. The last administrative rule that the Court found to violate the nondelegation doctrine—the principle that Congress may not delegate its law-making powers which are articulated in Article I of the United States Constitution to another branch of government—was in 1935 when the Court struck down a rule which made it a federal crime for butchers to allow customers to select their chickens for slaughter.[1] Since then, the Court has been exceedingly permissive towards Congress in its delegation of authority to the executive as well as deferential to the various administrative agencies' interpretations of their own scope of authority.[2]

With the current majority of the Court presumably being inclined to give a more originalist interpretation of Article I when answering a question of congressional delegation of power and administrative rule-making, the nondelegation doctrine might soon enjoy a renaissance. This impending shift has been signaled in the recent case of *Gundy v. United States*.[3]

In *Gundy*, the Supreme Court was tasked with deciding whether Congress overstepped its constitutionally prescribed boundaries when it delegated seemingly unlimited discretion to the Attorney General in determining the applicability of the Sex Offender Registration and Notification Act (SORNA) to offenders whose convictions preceded the legislation's enactment.[4] In a 5-3 plurality (Justice Kavanaugh was not yet on the Court at the time of argument), the statute in question was upheld as not being a violation of the nondelegation doctrine. Justice Kagan, who largely relied on the statutory construction the Court used in *Reynolds v. United States*,[5] looked not only to the Court's precedents which by and large have upheld vast delegation of power by Congress to administrative agencies but also to the legislative history of SORNA. Kagan, along with Justices Ginsberg, Breyer, and Sotomayor concluded not only that Congress *intended* for SORNA to apply to Pre-Act offenders, but also that the codification of unlimited discretion by the Attorney General in applying that intent was not a violation of the Legislative Vesting Clause in Article I of the Constitution.[6]

Dissenting, Justices Gorsuch and Thomas, along with Chief Justice Roberts, made an argument for why such broad discretion by an executive officer, such as the Attorney General, in the applicability of a criminal statute is incongruent with the separation of powers that is articulated in the Constitution.[7] Essentially, the dissent's argument was that the notion of deciding who is subject to criminal codes is a law-making determination, not a rule-making function. Justice Alito concurred in the judgement but stated that he was willing to reconsider the deferential approach that

1. A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
2. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
3. 588 U.S. ___ (2019).
4. 588 U.S. ___ (slip op. at 1).
5. 565 U.S. 432 (2012).
6. *Gundy*, 588 U.S. ___ (slip op. at 6); *See also* U.S. CONST. art. I, § 1.
7. *Id.* (slip op. at 6) (Gorsuch, J., dissenting).

the Court has taken to the question of nondelegation for the better part of the 20th century, if a majority of the Court felt so inclined.[8]

Justice Kavanaugh will likely be the tie-breaking vote in a future nondelegation case.[9] During his tenure on the D.C. Circuit of Appeals, Kavanaugh only tangentially addressed the issue of nondelegation in one case. In *United States Telecom Association v. FCC*,[10] the Court of Appeals considered granting a rehearing *en banc* on a contest against the Federal Communications Commission's ("FCC") 2015 Open Internet Order (commonly referred to as 'Net Neutrality'). Though the court issued a per curiam denial of rehearing, Kavanaugh filed a dissenting opinion where he invoked the major rules doctrine—a doctrine developed by the Supreme Court which relates to the principle of nondelegation—as grounds for why this FCC rule might be unconstitutional.[11] This dissent could be a signal for how Kavanaugh might approach administrative rules and the scope of both congressional and executive power in a future nondelegation case.

This 4-4 split on the question of the nondelegation doctrine raises the following questions: (1) in what direction will the Court go, (2) if the Court decides to revitalize the nondelegation doctrine, what new test will the Court apply when considering whether Congress has crossed the line in the sand drawn by Article I; and (3) what are the implications of this potential new standard with regards to the broad rule-making authority enjoyed by the numerous administrative agencies?

This note will address the above questions as follows: Part I will discuss the constitutional foundations of and relevant precedents to the nondelegation doctrine. Part II will discuss the current legal standards of administrative law, namely *Chevron* and how it pertains to the nondelegation doctrine. Part III will explore the origins of the major rules doctrine, while Part IV will explore the doctrine's application and implications as well as how it interacts with the nondelegation doctrine insofar as it restricts far-reaching administrative rule-making while not addressing the constitutionally permissible scope congressional delegation of power. Finally, Part V will consider the potential salutary effect that that a judicial rule such as the major rules doctrine will have on how Congress drafts statutes.

BACKGROUND

I. Constitutional Foundation and Relevant Precedents

The nondelegation doctrine is derived from Article I, Section One, of the United States Constitution, which states, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[12] The idea is that this section of the Constitution vests *all* legislative power in Congress and Congress may not delegate that law-making

8. *Id.* (slip op. at 1) (Alito, J., concurring in the judgment).

9. Justice Kavanaugh recently signaled his support for reconsidering the Court's approach to the nondelegation doctrine in a denial of certiorari statement, *see* Paul v. United States, 589 U.S. ___ (No. 17-8830) (2019) (statement of Kavanaugh, J.) ("Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.").

10. 855 F.3d 381 (D.C. Cir. 2016).

11. *Id.* at 417–18.

12. U.S. CONST. art. I, § 1.

power away. Though there is no clause in the Constitution which specifically states that Congress may not delegate law-making power to another branch of government, this is a principle that is generally understood to be the case, especially amongst proponents of originalism.[13] The doctrine is derived from the implicit notion that the first three articles of the U.S. Constitution deliberately vest specific powers in the legislative, executive, and judicial branches of the federal government, and that in doing so the Framers intended each particular power to be siloed in the respective branches.[14] Unsurprisingly, this understanding of the Framers' original intent comes from The Federalist Papers, particularly those penned by James Madison.[15] Madison described the separation of powers laid out in the Constitution as "necessary" to our constitutional structure.[16] Essential to the Framers' very conception of the separation of powers is the notion that no branch may delegate its Constitutionally enumerated powers to another branch.

Prior to the New Deal and the advent of administrative governance, the United States Supreme Court ("the Court") enforced this principle rather faithfully.[17] The Court's first full discussion of the nondelegation doctrine was in *Wayman v. Southard*.[18] In the Court's majority opinion, Chief Justice Marshall highlighted that "[t]he legislature makes, the executive executes, and the judiciary construes the law."[19] Marshall also asserted that Congress may not delegate powers which are "strictly and exclusively legislative.[20] This is the judicial genesis of the nondelegation doctrine.

This formulation of the separation of powers begs the question: where does legislative power end and executive (or judicial) power begin? Sticking to a more originalist approach in answering this question, it is important to keep in mind the text-based distinctions between the legislative powers enumerated in Article I and the executive powers described in Article II.[21] Article II vests *the* executive power in a President of the United States.[22] The scope of what exactly this entails is the subject of much judicial and scholarly debate. Article II is explicit in describing what some of these executive powers are, such as the power to act as Commander-in-Chief

13. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–36 (2002).

14. *Id.* at 337.

15. *See generally* THE FEDERALIST NO. 48 (James Madison); THE FEDERALIST NO. 51 (James Madison).

16. The Federalist No. 51, at 288 (James Madison) (Clinton Rossiter ed., 1999) ("The necessary partition of power among the several departments laid down in the Constitution.").

17. Michael Sebring, *The Major Rules Doctrine: How Justice Brett Kavanaugh's Novel Doctrine Can Bridge the Gap between the Chevron and Nondelegation Doctrines*, 12 N.Y.U. J. L. & LIBERTY 189, 193 (2018) (discussing how since the New Deal, the application of the nondelegation doctrine has been "crimped" to allow the growth of modern administrative governance).

18. 23 U.S. (10 Wheat.) 1 (1825).

19. *Id.* at 46.

20. *Id.* at 42.

21. Utilizing a more textualist and originalist approach is appropriate in the context of this note, as the current majority on the Court is manifestly sympathetic to these arguments and legal theories. As such, looking at the nondelegation doctrine through this lens will provide insight into the Court's reasoning moving forward.

22. U.S. CONST. art. II, § 1 (emphasis added).

of the Armed Forces[23] and the power to appoint judges and officers.[24] Article II also articulates that Congress by law may vest the appointment of "inferior officers" in the President.[25] This means that even the most hardnosed textualist must acknowledge that Congress may delegate *some* power to the president via statute.

The current accepted position of the Court is that Congress may delegate authority to the executive so long as the delegating legislative act lays down an "intelligible principle" by which the person or agency is directed to conform.[26] This language comes from *Mistretta v. United States*, where the Court weighed in on the constitutionality of criminal sentencing guidelines promulgated by the United States Sentencing Commission. *Mistretta* gives both Congress and the executive wide discretion in the types of power they are able to wield.

It seems that under the *Minstretta* rule the only limiting principle on Congress's ability to delegate power to the executive is that the Court must find an "intelligible principle" in the statute to which the executive is directed to conform. This rule will inevitably come to odds with a majority who is more interested in preserving an originalist understanding of the separation of powers than was the majority in the *Mistretta* court. A Court which gives more credence to the structural separation of powers, as understood by the Framers, will likely take umbrage with Congress passing statutes which delegate what it sees as law-making power to the various administrative agencies– regardless of how "intelligible" the statute is. In other words, there must be some other limiting principle beyond merely an "intelligible" method by which the delegated power is conveyed.

This is precisely the issue raised by the dissent in *Gundy*. The first objection raised in Justice Gorsuch's dissent is that the Constitution vests law-making power in Congress, not in any administrative agency or executive branch official.[27] This insistence that the Constitution restricts the permissible scope of Congress's ability to delegate power goes further than Justice Scalia's dissent did in *Reynolds*.[28] In *Reynolds*, the Court was required to interpret the same statute that was at issue in *Gundy*, 34 U.S.C. Section 20913(d).[29] In *Reynolds* the Court upheld the statute 7-2, with Justices Scalia and Ginsburg dissenting. There, the dissent's primary issue was

23. U.S. CONST. art. II, § 2 cl. 1.

24. U.S. CONST. art. II, § 2 cl. 2.

25. *Id*.

26. Mistretta v. United States, 488 U.S. 361, 372 (Here, the Court illustrates for the first time that so long as legislation sets forth an "intelligible principle" for which to guide a person or administrative body, the delegation of such power is constitutionally sound.); The Court also equates an "intelligible principle" to "minimum standards." *Id.* at 379.

27. *Gundy*, 588 U.S. ___ (slip op. at 1) (Gorsuch, J., dissenting) ("The Constitution promises that only people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens . . . . [I]f a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?").

28. Reynolds v. United States, 565 U.S. 432 (Scalia, J., dissenting).

29. 34 U.S.C. § 20913(d) (2018) ("The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules of the registration of any such sex offender.").

with the majority's interpretation of the phrase "specify the applicability."[30] Though the dissent mentioned that the constitutionality of a criminal statute granting the Attorney General unlimited discretion in deciding to whom it applies is suspect,[31] this observation seems almost secondary. The Court's statutory interpretation of §20913(d) was a significant factor in the majority's argument in *Gundy*.

Justice Kagan's majority opinion in *Gundy* addresses the issue of nondelegation in two ways: (1) by citing precedent that a delegation of power is constitutional as long as Congress sets out an intelligible principle to guide the delegee's exercise of authority,[32] and (2) by interpreting the statute to mean that Congress *intended* for SORNA to apply to pre-Act offenders. If Congress so intended, this would mean that the Attorney General never had unlimited discretion in the application of SORNA, thus disposing of the nondelegation issue entirely.

II. *Chevron* Deference and Nondelegation

Much of the Court's extant willingness to defer to the judgement of administrative agencies comes from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[33] The *Chevron* doctrine governs much of modern administrative jurisprudence.[34] The *Chevron* doctrine is a judicial mechanism designed to interpret statutory ambiguities by first considering whether Congress has spoken directly to the issue, and then deferring to an administrative agency's interpretation of the statute, so long as the interpretation is reasonable.[35]

Implicit in the *Chevron* doctrine is the idea that Congress has the power to "turn off" the judicial deference to administrative agency interpretation simply by passing unambiguous statutes with clear intent.[36] The Court has in recent years began limiting *Chevron*'s application, which further presents an opening for those seeking a revival of the nondelegation doctrine.[37] For example, in *United States v. Mead*[38] the Court rejected the U.S. Customs Service's interpretation of a federal tariff schedule, a statute prescribed by Congress, as applied to certain categories of goods. The Court reasoned that Congress did not intend to delegate the power to make "force of law" rulings to the U.S. Customs Service.[39]

Another limitation on the application of *Chevron* deference is the major questions doctrine. The basic idea behind the major questions doctrine is that Congress does not implicitly delegate the power to make "extraordinarily" important

30. *Reynolds*, 565 U.S. 432, 448 (Scalia, J., dissenting) ("I do not share the Court's belief that to 'specify the applicability' more naturally means, in the present context, to 'make applicable' . . . .").

31. *Id.* at 450.

32. Gundy v. United States, 588 U.S. ___ (slip op. at 3) (2019) (citing *Witman v. American Trucking Assns., Inc.*, 531 U.S. 457, 474–75).

33. 467 U.S. 837 (1984).

34. David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 206 (2001) ("In the beginning . . . there was *Chevron.*").

35. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 512 (1989).

36. Barron, *supra* note 34, at 212.

37. Sebring, *supra* note 17, at 199.

38. 533 U.S. 218 (2001).

39. *Id.* at 231–32.

policy choices to administrative agencies when it enacts ambiguous statutes.[40] Said another way: if a statute is ambiguous enough to raise "major questions" of economic or political significance, rules promulgated by administrative agencies pursuant to the enforcement of these statutes are not granted *Chevron* deference. Alongside the major questions doctrine is a more contemporary legal doctrine, which stems from the same policy interests but considers the specific implications of the administrative rule under review. This is known as the major rules doctrine.

III. The Major Rules Doctrine

In *United States Telecom Association v. FCC*,[41] the District of Columbia Circuit Court reviewed a challenge to the FCC's "net neutrality" rule. This new rule issued by the FCC sought to reclassify internet service providers as engaging in telecommunication rather than being information services.[42] This rule change carried with it substantial regulatory and policy implications, as telecommunications are treated very differently from information services under federal law.[43] The challenge to the rule alleged that Congress had not authorized the FCC to regulate the internet service providers in this manner.[44] The D.C. Circuit Court ultimately denied the challenge an *en banc* rehearing, however Judge Kavanaugh issued a dissent in the decision where he articulated the "major rules" doctrine as a rationale for why the net neutrality rule should be struck down.[45] Essentially, the major rules doctrine considers several factors including (1) economic impact of the rule, (2) the number of people or parties affected, (3) the presence of highly mobilized interest groups, (4) intense public focus, (5) political engagement, and (6) fundamental statutory transformation.[46] These factors are considered and weighed against the express authority Congress has granted the promulgating agency when considering if the rule should be granted *Chevron* deference.[47] A significant difference between the major questions doctrine and the major rules doctrine is that while the major questions doctrine merely asks that questioned administrative rules carrying major political and economic significance be reviewed *de novo* prior to being granted *Chevron* deference; the major rules doctrine asserts that rules which are found to be "major" in light of considering the above six factors are *prima facie* violative of the nondelegation doctrine.[48] Considering both the underlying policy interests and Justice Kavanaugh's previous predilection towards the major rules doctrine, as articulated in his *United States Telecom Ass'n* dissent, this could be the rule and approach the Court implements moving forward in nondelegation cases.

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40. *See generally* King v. Burwell, 135 S. Ct. 2480 (2015) (where the Court reiterated that questions of "deep economic and political significant" are not granted *Chevron* deference); *See also* RICHARD MURPHY, 33 FEDERAL PRACTICE & PROCEDURE JUDICIAL REVIEW § 8429 (2d ed.).

41. 855 F.3d 381 (D.C. Cir. 2017).

42. *Id.* at 383.

43. *See id.* at 384.

44. *See id.* at 383.

45. *United States Telecom Ass'n*, 855 F.3d at 422–23 (Kavanaugh, J., dissenting).

46. *Id.* at 422–24.

47. *See id.*

48. *See* Sebring, *supra* note 17, at 212.

ANALYSIS & IMPLICATIONS

IV. Defining a Major Rule

If the Court resurrects the nondelegation doctrine through a balancing test like the major rules doctrine, the effect would not be the decimation of the administrative state but rather would require that administrative agencies promulgate rules that serve more as gap-fillers in congressionally passed policy rather than rules which usurp Congress's Article I powers. This is not to say that *every* delegation of power by Congress would be struck down. The major rules doctrine is grounded in two overlapping presumptions: "(1) a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch; and (2) a presumption that Congress intends to make major policy decisions itself."[49] These principles leave room for administrative discretion not only in terms of interpreting the statutes which delegate authority, but also in terms of administrative policy choice.

This approach addresses the constitutional balance of law-making and rule-making powers by analyzing the administrative rule rather than the statute it is promulgated under. This is distinctly different from the old nondelegation doctrine employed in the early 20th century,[50] which approached the issue from the opposite direction; by looking at the statute to determine if Congress's law-making power had been improperly delegated to the Executive Branch. By flipping how the issue of nondelegation is approached to begin with the administrative rule, the Court will be able to rein in vast administrative power without having to overturn *Chevron*.

Applying the major rules doctrine to the scenario in *Gundy* requires a few assumptions to be made. First, the focus in the question presented needs to shift from the constitutionality of 34 U.S.C. Section 20913(d) (2018)[51] to the constitutionality of a particular rule set forth by the Department of Justice. For the sake of argument, consider a rule like the one made by Attorney General Mukasey in 2008;[52] this rule required pre-Act offenders to comply with SORNA fully, meaning that the Department of Justice retroactively extended the reach of SORNA boundlessly. As a pre-Act offender, the petitioner in *Gundy* was certainly subjected to complying with 73 Fed. Reg. 38030. If the Court were to apply a major rules analysis to this rule, it would consider: (1) the economic impact of the rule, (2) the number of people or parties affected, (3) the presence of highly mobilized interest groups, (4) the intensity of public focus, (5) political engagement around the subject matter of the rule, and (6) fundamental statutory transformation.[53]

Economic Impact. There certainly would be economic costs associated with retroactively requiring the registration and notification of all individuals who are

49. *United States Telecom Ass'n*, 855 F.3d at 419.

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

51. Which states: "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of an such sex offender."

52. The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030 (July 2, 2008).

53. *United States Telecom Ass'n*, 855 F.3d at 422–424.

considered sex offenders under SORNA whose convictions preceded the passage of the Act. These costs would be borne by both the government and by the applicable individuals. The government would have the costs of notification, of determining *who* to notify, and of ensuring registration. One of the concerns when drafting SORNA was the costly burden that would be imposed on the states and local governments, who would need to overhaul their current sex offender registration schemes, if and when SORNA was to be applied to pre-Act offenders.[54] Additionally, the pre-Act offenders would incur the criminal costs associated with failure to register, if they either do not receive notice that they must register, or willfully fail to comply.

The number of people or parties affected. At the time SORNA was passed there were a half-million pre-Act offenders.[55] Though this is not necessarily a substantial block of the country's population, it still is a substantial number of people in absolute terms.

The presence of highly mobilized interest groups. After the Court granted *certiorari* to *Gundy*, multiple interest groups filed amicus briefs with the Court.[56] These interest groups ranged from civil liberties groups like the American Civil Liberties Union (ACLU) and the Institute for Justice, to the National Association of Criminal Defense Lawyers, to the Becket Fund for Religious Liberty.[57] This demonstrates that a wide range of varying public interests are at play in this matter, which further indicates that a large number of people are potentially affected by the balance of power issue that the Court is grappling with.

The intensity of public focus. While there is not necessarily evidence of a huge swell of public indignation towards SORNA's and the Department of Justice's treatment of sex offenders, that is not to say that the implication of the underlying principles of *how* our legal system goes about deciding who regulates who is not a matter of public focus. This is illustrated by the fact that the range of *amici curiae* filed in *Gundy* was so eclectic.[58]

Political Engagement. The legal treatment of sex offenders is certainly a topic of great political engagement. The topic is one which garners strong feelings by those who fear the effect that such individuals might have on public safety, by those who view perpetrators of such crimes with disgust, as well as by those who worry about the treatment of even the most reviled among the population.[59] Exactly what to do with and about those who commit crimes that elicit such strong emotions is an ongoing discussion in American society.

Fundamental statutory transformation. The statute granting the Attorney General the authority to prescribe rules regarding the applicability of SORNA to pre-Act offenders reads:

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54. Gundy v. United States, 588 U.S. ___ (slip op. at 2-3) (2019) (Gorsuch, J., dissenting).

55. *Id.*, 588 U.S. ___, (slip op. at 1) (Gorsuch, J., dissenting).

56. *See* SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/gundy-v-united-states [https://perma.cc/75DQ-264S].

57. *Id.*

58. *Id.*

59. *Cf.* Brief of Scholars Whose Work Includes Sex Offense Studies as Amici Curiae Supporting Petitioner, Gundy v. U.S., 588 U.S. ___ (2019) (No. 17-6086).

> 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 [enacted July 27, 2006] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders.[60]

Though the language of this statute is open to varying interpretations, what is not ambiguous is the fact that it grants the Attorney General wide discretion in the types of rules he or she may promulgate under it. To that end, the Mukasey rule's interpretation does not fundamentally transform the statute. Any intelligible rule would arguably be permitted under a statute which grants such wide unambiguous discretion.

In light of considering the six factors of the major rules test, it is not difficult to see how the Court could reject a rule like the Mukasey rule in the context of *Gundy*. The rule is far reaching, affects a substantial amount of people, drew the attention of several interest groups, and there is substantial political engagement around the subject matter. Additionally, though the rule does not seem to fundamentally transform the statute, that is not dispositive. The current Court would more than likely strike down such a rule under a major rules analysis when you consider the dissent in *Gundy* as well as Justice Alito's Concurrence. Though this approach differs substantially from that of the dissent, which focuses on the statute rather than the administrative rule, it reaches the same result but through a more narrowly tailored exception to a pre-existing rule.

This approach is arguably more palatable to the critics of a reemergent nondelegation doctrine, who emphasize the importance of preserving administrative power in the interest of harnessing and utilizing the technical field expertise which is housed within the various administrative agencies. By starting with the rule in question when considering an issue of nondelegation, the Court could temper a possible truncation of administrative power with an acknowledgement that certain administrative functions require administrative discretion.

Thinking through possible future applications of the major rules doctrine yields different results for different types of administrative agencies. Agencies whose scope and regulatory purpose are of a highly technical nature would be the most impervious to a nondelegation challenge. A piece of *Chevron* which will survive an adoption of the major rules analysis is deference by the Court to an administrative agency which has special expertise.[61] This is because these rules generally do not garner intense public focus or political engagement.

For example, suppose that the director of the National Hurricane Center (NHC) wishes to promulgate a new rule that would modify how hurricanes are categorized.[62] The NHC is a division of the National Oceanic and Atmospheric

60. 34 U.S.C. § 20913(d) (2018).

61. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

62. The NHC currently classifies hurricanes based on their wind speed.

Administration (NOAA),[63] which in turn is within the United States Department of Commerce.[64] There is no statute which expressly gives the Department of Commerce, NOAA, or NHC the authority to categorize hurricanes; however, there is a statute which creates the department of commerce,[65] whose mission includes "providing the data necessary to support commerce . . . "[66] and one of the fundamental activities of the NOAA is to provide weather information to the public.[67] Weather clearly can have a substantial effect on commerce. Forecasting and providing accurate weather information requires a great deal of technical expertise. This is something Congress cannot realistically be expected to do via statute; thus, it has delegated authority to the Executive Branch. This delegation of power is allowable under the major rules doctrine and nondelegation doctrine.

Administrative rules that, once implemented, evoke great public scrutiny for perceived political reasons or even perceived economic impact would be more likely to be struck down as violative of the major rules doctrine, even if the rule is promulgated through an agency which historically has regulated highly technical fields. Consider the rule currently being contemplated by the U.S. Food and Drug Administration ("FDA"), which would ban the manufacture and sale of all flavored e-cigarette products.[68] The policy aim of the rule is to curb teen use of nicotine products.[69] The FDA is a federal agency of the United States Department of Health and Human Services ("HHS").[70] The mission of HHS is to "[e]nhance and protect the health and well-being of all Americans."[71] The FDA was created through an express delegation of authority by Congress via the "Federal Food, Drug, and Cosmetic Act."[72] The FDA would more than likely attempt to justify its proposed ban on flavored e-cigarettes under subsection (b)(1) of Section 393.[73]

63. NHC VISITOR INFORMATION, https://www.nhc.noaa.gov/aboutvisitor.shtml#loc [https://perma.cc/B5YM-KYTG].

64. *Bureaus and Offices,* U.S. DEP'T. COMMERCE, https://www.commerce.gov/bureaus-and-offices [https://perma.cc/8YBC-Z9G3].

65. 15 U.S.C. § 1501 (2018); *See also* 5 U.S.C. § 591 (2018).

66. *About Commerce*, U.S. DEP'T. COMMERCE, https://www.commerce.gov/about [https://perma.cc/8S5V-NUPY].

67. *New Priorities for the 21st Century*, NOAA' STRATEGIC PLAN (June 10, 2016), https://www.performance.noaa.gov/wp-content/uploads/FY05-10_NOAA_Strategic_Plan.pdf [https://perma.cc/Y6V5-9L95].

68. *Trump Administration Combating Epidemic of Youth E-Cigarette Use with Plan to Clear Market of Unauthorized, Non-Tobacco-Flavored E-Cigarette Products*, FDA (Sept. 11, 2019), https://www.fda.gov/news-events/press-announcements/trump-administration-combating-epidemic-youth-e-cigarette-use-plan-clear-market-unauthorized-non [https://perma.cc/PQ2Z-X364].

69. *Id*.

70. *Agencies & Offices*, HHS, https://www.hhs.gov/about/agencies/hhs-agencies-and-offices/index.html [https://perma.cc/NC94-LXWF].

71. *About HHS*, https://www.hhs.gov/about/index.html [https://perma.cc/57TW-V6HP].

72. 21 U.S.C § 393 (2018).

73. 21 U.S.C. § 393(b)(1) (2018) ("The Administration shall promote the public health by promptly and efficiently reviewing clinical research and talking appropriate action on the marketing of regulated products in a timely manner.").

Considering the six factors of a major rules doctrine analysis,[74] the FDA's proposed e-cigarette ban seems to be most provocative of factors (1), (2), (5), and to a lesser extent (6). Beginning by first looking at the potential economic impact of the ban; the e-cigarette industry generated roughly $2,350,000,000 in the United States in 2016.[75] "Vape shops"[76] may constitute as much as twenty percent of this market.[77] That means that vape shops generate about $470,000,000 in revenue in the United States, per annum. The effect of banning the sale of such a large part of this niche industry's product would have substantial effect on the industry's nearly half a billion-dollar annual revenue. As for the second fact, number of people affected, the Centers for Disease Control that in 2014 there were about 3.7% of all adults in America (approximately 9 million people) who used e-cigarettes daily or almost daily.[78] Following the logic of the application of the major rules factors to SORNA,[79] if a half-million people might be considered a substantial number of people under a major rules analysis, then nine million people affected by an administrative rule would also trigger a concern under the same judicial test. Considering the fifth factor, political engagement, the proposed ban on flavored e-cigarettes has stirred up a considerable amount of political interest.[80]

Finally, consider the sixth factor: fundamental statutory transformation. Though this is perhaps the weakest argument for how the proposed FDA rule provokes heightened judicial scrutiny under a major rules analysis, it could be argued that the rule misinterprets the meaning and purpose of 21 U.S.C. Section 393(b)(1).[81] Section 393(b) outlines the mission and regulatory scope of the FDA. The FDA is delegated the power, among others, to promote public health by efficiently reviewing data and clinical research and taking appropriate steps to regulate the marketing of products within its scope of authority.[82] A potential argument that could be made

74. The factors being: (1) economic impact, (2) number of people affected, (3) the presence of highly mobilized interest groups, (4) intensity of public focus, (5) political engagement, and (6) fundamental statutory transformation.

75. *Electronic Cigarettes (e-cigarettes) Dollar Sales in the United States*, STATISTA, https://www.statista.com/statistics/285143/us-e-cigarettes-dollar-sales [https://perma.cc/B347-AJQN].

76. Meaning boutique retailers who sell exclusively e-cigarettes and e-cigarette accessories.

77. *E-Cigarettes: Facts, Stats, and Regulations*, TRUTH INITIATIVE (Nov. 11, 2019), https://truthinitiative.org/research-resources/emerging-tobacco-products/e-cigarettes-facts-stats-and-regulations [https://perma.cc/8ECX-ERSY].

78. CHARLOTTE A. SCHOENBORN & RENEE M. GINDI, ELECTRONIC CIGARETTE USE AMONG ADULTS: UNITES STATES, 2014, https://www.cdc.gov/nchs/data/databriefs/db217.pdf [https://perma.cc/FKB5-N6CL].

79. Where there were a half-million Pre-Act Offenders affected by the rule promulgated by the U.S. Attorney General.

80. *See* Annie Karni, Maggie Haberman & Sheila Kaplan, *Trump Retreats From Flavor Ban for E-Cigarettes*, N.Y. TIMES (Nov. 17, 2019), https://www.nytimes.com/2019/11/17/health/trump-vaping-ban.html [https://perma.cc/BYE2-NVBF]; *See also* Shannon Pettypiece, *Trump Hosts Heated White House Vaping Debate*, NBC NEWS (Nov. 22, 2019), https://www.nbcnews.com/politics/white-house/trump-hosts-heated-white-house-vaping-debate-n1089891 [https://perma.cc/U6S9-P7LW].

81. *Supra* note 73.

82. *See* 21 U.S.C. § 393(b) (2018).

against the proposed flavor ban is that since the vaping phenomena is so new[83] and the data are so disparate[84] the FDA would be acting outside of the plain language of Section 393(b). The argument could be made that since the health data pertaining to vaping is so controversial, that acting on such data is not lending it to "efficient review" or "promoting the public health" as articulated under the statute. Put another way, until there is more conclusive data pertaining to the health risks and usage trends of vaping, the FDA would be acting outside of its authority if the agency were to implement such a wide sweeping ban on vaping products.

The counter to this argument is that even if the Court acknowledged that it is factually true that the available data concerning vaping and e-cigarette use is too scant to draw scientifically conclusions from, Section 393(b) should still be granted *Chevron* deference. Under *Chevron* there is more than thirty years of precedent for judicially mandated deference to administrative agency interpretation of its own statutory grant of power. This is a very compelling argument, especially since the Court would be asked to apply an alien construction of the power-delegating statute in light of *Chevron*, despite its plain language ambiguity. However, the major rules test is a balancing test of six factors, and no factor is dispositive. Even if the Court found that the FDA's proposed rule banning flavored e-cigarettes did not fundamentally transform the power delegating statute, the proposed rule could still plausibly fail a major rules analysis.

V. Salutary Effect of Changing How Congress Drafts Statutes

The Court's application of the major rules doctrine would, in effect, address the issue of nondelegation while keeping intact the sort of administrative discretion and freedom that many argue is necessary for a complex modern society's functioning. By flipping the approach of the analysis to require the administrative rule to pass a factor analysis, rather than confronting power-delegating statutes head on, the Court will be able to balance these interests.

This new approach will more than likely have an impact on how Congress drafts statutes. If rules are being struck down as violative of the major rules doctrine, this means that there are almost certainly great numbers of individuals affected by the rule, there are large highly-mobilized interest groups either advocating for and/or against the conduct being regulated, and (as such) there is great political engagement around the topic. These forces can be assumed to be present in such a scenario because the Court would necessarily have to consider them before striking down such a rule. The passion and political energy of these groups and individuals will then have to turn their sights to Congress in order for their desired ends to be met. This can manifest in a few ways. One way is that political pressure will be put on

83. *See* Dennis Thompson, *U.S. Smoking Rate Hits New Low, But Vaping Rises*, WEBMD (Nov. 14, 2019), https://www.webmd.com/smoking-cessation/news/20191114/fewer-americans-than-ever-smoke-but-vaping-poses-a-growing-threat-cdc#1 [https://perma.cc/N59G-2GVY].

84. *Accord CDC, FDA, States Continue to Investigate Severe Pulmonary Disease Among People Who Use E-cigarettes*, CDC (Aug. 23, 2019), https://www.cdc.gov/media/releases/2019/s0821-cdc-fda-states-e-cigarettes.html [https://perma.cc/D9LC-JEZB]; Brad Rodu, *Misty Math: FDA Claims About Teen Vaping Don't Add Up,* REAL CLEAR PUBLIC AFFAIRS (Apr. 9, 2019), https://www.realclearpublicaffairs.com/articles/2019/04/09/misty_math_fda_claims_about_teen_vaping_dont_add_up.html [https://perma.cc/Z7HW-8XAZ].

individual members of Congress to pass legislation in pursuance of these desired outcomes. Hypothetically, under great pressure by their constituents, congresspersons and senators, who hope to be reelected will act accordingly and will draft and pass legislation that strives for these outcomes and results so desired by the people.

Critics of this admittedly simplistic and idealistic view will counter by saying that this is not what will actually happen. They will point to the other way in which this refocusing of the politically engaged groups will manifest: lobbying. With these mobilized interest groups focusing on Congress, the worry is that lobbying will substantially increase and that members of the federal legislature will only further be beholden to special interests.

The role of lobbying and special interests in the legislative process is an important consideration. However, it is worth noting that as a factor in a major rules analysis, the existence of interest groups *precedes* the question. The rule under review would only be struck down under a major rules analysis if there already were a presence of highly mobilized interest groups. Essentially, the problem of special interests is independent of the goal of the nondelegation doctrine and though an adoption of the major rules test will not mitigate this issue, it also will not exacerbate it.

CONCLUSION

The nondelegation doctrine, which has laid largely dormant for nearly a century in American constitutional law could very well enjoy a resurrection in the 21st century. In light of the Court's most recent decision in *Gundy* and the past decision-making and reasoning of the one voice on the Court who did not weigh in on that decision; it is evident that the new Court is keen to go a different direction in future cases concerning the scope of administrative rule-making power. The major rules doctrine appears to be a prime candidate for what type of test and analysis the new majority of the Court will employ in these future cases. By flipping the analysis from looking at the affirmative power delegated by Congress via statute to instead begin with the rule and consider the enumerated policy considerations laid out in the major rules doctrine, the Court will be able to more clearly delineate rule-making power from law-making power without undoing the entire foundation of the modern administrative apparatus.

To be sure, there are still many issues and concerns about exactly what a pivot such as the major rules doctrine could mean for both agencies and law-makers. The scope of the application of this doctrine, for example, leaves room for subjective discretion in its application. Additionally, the Court switching its analysis to begin with the rule at issue instead of the statute will have implications as to who has standing to bring these hypothetical future claims, and the avenues through which they will make it before the Court. Regardless of the answers to these questions, a subtle change in the Court's analysis such as this will certainly reshape the balance and separations of federal power.