

## **NOTE**

### SLAYING “LEVIATHAN” (OR NOT): THE PRACTICAL IMPACT (OR LACK THEREOF) OF A RETURN TO A “TRADITIONAL” NONDELEGATION DOCTRINE

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*Administrative agencies play an integral role in the everyday lives of all Americans. Although it would be impossible to point to a single cause of the administrative state’s growth since the New Deal era, the Supreme Court’s acquiescence in congressional delegation of legislative authority is certainly one part of the equation. Since the early twentieth century, the Supreme Court has employed the so-called “intelligible principle” test to determine when Congress unconstitutionally delegates authority. In the century since the inception of the “intelligible principle” test, however, the Court has stricken down only two statutes as such unconstitutional delegations of legislative authority. For better or worse, this lax approach to delegation has permitted administrative agencies to gain increasingly broad authority.*

*Some believe, however, that a dissent authored by Justice Neil Gorsuch in a recent Supreme Court case, *Gundy v. United States*, marked the beginning of the end for the “intelligible principle” test and, thereby, the modern administrative state. This Note takes on the latter concern. It argues that a return to the traditional view of the nondelegation doctrine advocated by Justice Gorsuch does not compel the unwinding of the modern administrative state. It does so by applying the traditional tests to two modern statutes, both of which have received sustained and recent constitutional doubt under even the permissive “intelligible principle” test. This Note demonstrates that both statutes likely would*

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*survive nondelegation scrutiny under the traditional tests. Taking these statutes as an apt—albeit imperfect—proxy for the administrative state, this Note thus demonstrates that a return to a traditional nondelegation doctrine would not result in the sea-change in administrative law that some have predicted.*

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#### INTRODUCTION

Administrative agencies are an integral part of the modern American legal landscape.<sup>1</sup> For better or worse, the so-called “administrative state” has continued to grow from its inception in the New Deal era forward into the twenty-first century.<sup>2</sup> Today, administrative agencies oversee how we

<sup>1</sup> See, e.g., J. Harvie Wilkinson III, *Assessing the Administrative State*, 32 J.L. & Pol. 239, 243 (2017) (describing the “American regulatory landscape” as a “diverse set of institutions . . . that, together, seem to sprawl over just about every facet of modern life”).

<sup>2</sup> See *id.* at 242–44 (describing the growth of the administrative state from the New Deal era to modern day).

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vote,<sup>3</sup> how we retire,<sup>4</sup> the food we eat,<sup>5</sup> the shows we watch on television,<sup>6</sup> and much more. While one would be hard-pressed to pin down any one entity responsible<sup>7</sup> for the growth of this “fourth branch,” at least part of the credit lies with the judicial branch. Courts repeatedly have played a role in granting increased authority to this new “Leviathan,”<sup>8</sup> tacitly approving of its continued expansion in case after case.

One way in which the judiciary has acquiesced in the administrative state’s growth is through the judiciary’s reluctance to invoke the nondelegation doctrine as one means by which to rein in the authority granted.<sup>9</sup> In 1928, the Supreme Court articulated what has become the modern standard for determining when Congress goes too far in its delegation of authority to administrative agencies—what is referred to as the “intelligible principle” test.<sup>10</sup> On only two occasions since that time, both in 1935, has the Supreme Court stricken down a duly enacted statute on the grounds that the law was an unconstitutional delegation of legislative authority.<sup>11</sup> Since then, the Court has routinely upheld broad delegations of authority to administrative agencies, citing the “intelligible principle” test as a pro-forma step leading to the delegation’s inevitable approval.<sup>12</sup> This has led many who are skeptical of the constitutionality

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<sup>3</sup> 52 U.S.C. § 30106 (Supp. II 2012) (Federal Election Commission).

<sup>4</sup> 42 U.S.C. § 901 (2012) (Social Security Administration).

<sup>5</sup> 21 U.S.C. § 393 (2012) (Food and Drug Administration).

<sup>6</sup> 47 U.S.C. § 151 (2012) (Federal Communications Commission).

<sup>7</sup> Indeed, Congress must legislate, the Executive must act pursuant to that legislation, and the courts must stay out of the way.

<sup>8</sup> This term is frequently used to refer to the administrative state. See e.g., Wilkinson, *supra* note 1, at 242 (referring to the administrative state as an “impersonal leviathan”); Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 *Yale L.J.* 266, 281 (2013) (“[W]e must appreciate the crucial role of the newly expanded federal administrative state—the leviathan—in providing legislative history to the Court.”); Jamison E. Colburn, “Democratic Experimentalism”: A Separation of Powers for Our Time?, 37 *Suffolk U. L. Rev.* 287, 287 (2004); Marek D. Steedman, *Taming Leviathan*, 52 *Tulsa L. Rev.* 621 (2017); David French, *John Roberts Throws the Administrative State a Lifeline*, *Nat’l Rev.* (June 26, 2019), <https://www.nationalreview.com/2019/06/john-roberts-throws-the-administrative-state-a-lifeline/> [<https://perma.cc/B4SX-4GZJ>] (referring to the “federal administrative leviathan”).

<sup>9</sup> Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231, 1240 (1994) (pointing out that it is “not . . . for lack of opportunity” that the Court “has not invalidated a congressional statute on nondelegation grounds since 1935”).

<sup>10</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>11</sup> *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).

<sup>12</sup> See *infra* note 43 (collecting cases in which the Court applied the “intelligible principle” test).

of the increasingly large role agencies play in the government to mourn that the nondelegation doctrine is nothing more than a dead letter.<sup>13</sup>

That hand-wringing aside, the tide is turning on the nondelegation doctrine. A recent dissent by Justice Gorsuch in *Gundy v. United States* served as a strong signal that the nondelegation doctrine may yet have life in it.<sup>14</sup> In his dissent, Justice Gorsuch argues that the “intelligible principle” test is without doctrinal or constitutional mooring and should be put to rest.<sup>15</sup> His dissent also articulates three “traditional tests” that, in his view, represent the true underpinnings of what the nondelegation doctrine ought to be employed to do.<sup>16</sup> With the momentum of an ideologically shifting Court behind him, his dissent sparked hand-wringing of a different sort—over the practical implications of waking the nondelegation doctrine after its nearly century-long slumber.<sup>17</sup> This Note addresses, among other things, those concerns.

To be sure, a single dissenting opinion ordinarily wouldn’t sound the death-knell of a doctrine that has been a staple of constitutional jurisprudence for nearly a century. Nonetheless, it is not difficult to count to five votes in support of Justice Gorsuch’s position in *Gundy*. Chief Justice Roberts and Justice Thomas both joined the dissent, obviously indicating that they endorse its reasoning.<sup>18</sup> Justice Alito concurred in the judgment only.<sup>19</sup> But his vote to uphold the result in *Gundy* was driven by

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<sup>13</sup> See, e.g., Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 404 (2017) (arguing that there is not “much basis for thinking that there was ever a seriously confining nondelegation doctrine as part of the effective constitutional order”); Lawson, *supra* note 9, at 1237–41 (“Thus, the demise of the nondelegation doctrine . . . has encountered no serious real-world legal or political challenges, and none are on the horizon.”).

<sup>14</sup> See generally, *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting) (arguing that the Court should be less deferential to delegations of legislative power).

<sup>15</sup> *Id.* at 2138–40.

<sup>16</sup> *Id.* at 2135–37, 2139.

<sup>17</sup> *Id.* at 2130 (plurality opinion) (“[I]f SORNA’s delegation is unconstitutional, then most of Government is unconstitutional.”); see also Jonathan Hall, Note, *The Gorsuch Test: Gundy v. United States, Limiting the Administrative State, and the Future of Nondelegation*, 70 Duke L.J. 175, 179 (2020) (arguing that adoption of “the Gorsuch test” would have “destabilizing effects”); Ian Millhiser, *Brett Kavanaugh’s Latest Opinion Should Terrify Democrats*, Vox (Nov. 26, 2019), <https://www.vox.com/2019/11/26/20981758/brett-kavanaughs-terrify-democrats-supreme-court-gundy-paul> [<https://perma.cc/DAL6-Z3H4>] (“[Justice] Gorsuch, in other words, would give the Republican-controlled Supreme Court a veto power over all federal regulations.”).

<sup>18</sup> See *Gundy*, 139 S. Ct. at 2131–48 (Gorsuch, J., dissenting).

<sup>19</sup> *Id.* at 2130–31 (Alito, J., concurring in the judgment).

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a desire not to “single out” the statute at issue in *Gundy* “for special treatment.”<sup>20</sup> And if a majority of the Court were willing to engage in a wholesale revision of the nondelegation doctrine, Justice Alito “would support that effort.”<sup>21</sup> Neither Justice Kavanaugh nor Justice Barrett participated in the *Gundy* decision, leaving their views less known. In the time since *Gundy*, however, Justice Kavanaugh has indicated that he agrees with Justice Gorsuch’s position.<sup>22</sup> In a statement respecting the denial of certiorari in a companion case to *Gundy*, Justice Kavanaugh wrote that “Justice Gorsuch’s thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.”<sup>23</sup> Thus, while Justice Gorsuch’s dissent was just that—a dissent—it seems likely that his opinion now carries the support of a majority of the current members on the Court.<sup>24</sup> That reality raises the stakes for what the opinion means for the administrative state, which is what this Note aims to address.

This Note analyzes the constitutional and pragmatic issues implicated by Justice Gorsuch’s opinion. Part I addresses the fundamental principle of separation of powers. That part provides a brief constitutional overview of how the delegation of legislative authority to non-legislative actors implicates that basic constitutional precept. Part II provides a brief overview of the Court’s decision and Justice Gorsuch’s dissent in *Gundy*. Part III explores the constitutional and doctrinal bases for the “traditional tests” Justice Gorsuch articulates in his *Gundy* dissent. That Part, by explaining the constitutional and precedential frameworks for those tests, defends the soundness of Justice Gorsuch’s premise. Part IV then applies the “traditional tests” to two specific statutes, which received nondelegation scrutiny beginning nearly a century ago, and continue to be scrutinized as recently as cases decided within the past year. In its application of the “traditional tests” to these constitutionally dubious statutes, this Note argues that Justice Gorsuch’s proposed “revolution” of nondelegation jurisprudence would not result in the sea-change that some

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari).

<sup>23</sup> *Id.*

<sup>24</sup> This Note does not—nor does it need to in light of the head-counting provided above—take a view on what Justice Barrett’s stance may be on this issue. Even assuming Justice Barrett disagrees with Justice Gorsuch, it seems as though there are now five votes to support his dissenting position.

have predicted. Rather, its analysis shows that the limits these “traditional tests” impose on delegation, while meaningful, are not impossible to satisfy. Indeed, the tests leave Congress ample flexibility to govern effectively without forsaking the boundaries imposed by the separation of powers. At bottom, it demonstrates, in contrast with the plurality’s fears articulated in *Gundy*, that Justice Gorsuch’s traditional nondelegation approach does not compel the alarmist conclusion that “most of Government is unconstitutional.”<sup>25</sup>

#### I. THE NONDELEGATION DOCTRINE AND THE SEPARATION OF POWERS

To begin with, it is important to understand the significance of the fundamental constitutional principle of the separation of powers, and how the nondelegation doctrine implicates that principle. This Part first describes the significance of the separation of powers as it was viewed by the Framers of the Constitution. It then explains why the nondelegation doctrine is a necessary component of that principle. Finally, it provides a brief history of the “intelligible principle” test as it was developed by the Court. Each of these underlies the disagreement between the plurality and dissent in *Gundy* and serves as important foundational material to understand why the nondelegation doctrine matters in the first place.

There is some tension between the constitutional requirements and restrictions placed on Congress to legislate, and the “practical understanding that in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives.”<sup>26</sup> To that end, while Congress’s constitutional mandate prevents it from delegating “powers which are strictly and exclusively legislative,”<sup>27</sup> the Constitution “has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function.”<sup>28</sup> Thus, the principle of separation of powers seems to run into the reality of governing a complex and dynamic society.

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<sup>25</sup> *Gundy*, 139 S. Ct. at 2130.

<sup>26</sup> *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

<sup>27</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

<sup>28</sup> *Yakus v. United States*, 321 U.S. 414, 425 (1944) (alteration in original) (quoting *Curran v. Wallace*, 306 U.S. 1, 15 (1939)).

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Nonetheless, the principle of separation of powers was of fundamental significance to the Framers of the Constitution.<sup>29</sup> Fearing that a “mixture” of “legislative, executive, and judiciary” powers would “hav[e] a dangerous tendency” to lead to the “accumulation of power,” the Framers viewed a breakdown in the separation of powers as a significant step towards what “may justly be pronounced the very definition of tyranny.”<sup>30</sup> Thus, the Framers divided the government into a tripartite structure, vesting the powers of the government into “three great provinces—the legislative, executive, and judiciary.”<sup>31</sup> Further, reflected in the Constitution is the notion that these three “departments ought to be separate and distinct.”<sup>32</sup> To be sure, the Framers were, perhaps even primarily, concerned with one branch aggrandizing its power at the expense of another.<sup>33</sup> Nonetheless, one branch shirking its constitutionally-assigned duty also violates the “political maxim” of separation of powers.<sup>34</sup> From here, the principle of nondelegation springs forth.

To be sure, the Constitution does not contain an explicit “nondelegation clause.” Nonetheless, Article I declares that “[a]ll legislative Powers herein granted *shall* be vested in a Congress of the United States.”<sup>35</sup> Congress’s exclusive possession of *all* legislative powers, then, requires that Congress may not delegate to another branch “powers which are strictly and exclusively legislative.”<sup>36</sup> Distinct from delegating the power to make the law, however, is “conferring authority or discretion as to its

<sup>29</sup> See The Federalist No. 47, at 301 (James Madison) (stating that, if the Constitution failed to protect against a breakdown in the separation of powers, “no further arguments would be necessary to inspire a universal reprobation of the system”).

<sup>30</sup> *Id.*

<sup>31</sup> The Federalist No. 37, at 228 (James Madison).

<sup>32</sup> The Federalist No. 47, at 301 (James Madison).

<sup>33</sup> See The Federalist No. 51, at 321–22 (James Madison) (“But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition.”).

<sup>34</sup> The Federalist No. 47, at 301 (James Madison); see also *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (holding that Congress may not constitutionally delegate legislative powers); Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 *Cornell L. Rev.* 1, 8 (1994) (“[T]he abdication of power and its corresponding responsibilities is as serious a problem as aggrandizement.”).

<sup>35</sup> U.S. Const. art. I, § 1 (emphasis added).

<sup>36</sup> *Wayman*, 23 U.S. at 42–43.

execution, to be exercised under and in pursuance of the law.”<sup>37</sup> As Justice Harlan put it, while “[t]he first cannot be done; to the latter no valid objection can be made.”<sup>38</sup> Lurking behind these statements, however, is a question: When does Congress cross the line from appropriately “conferring authority or discretion as to [the law’s] execution”<sup>39</sup> to unconstitutionally delegating “powers which are strictly and exclusively legislative”?<sup>40</sup>

In a 1928 case, *J.W. Hampton, Jr., & Co. v. United States*,<sup>41</sup> the Supreme Court purportedly provided an answer to that question. In *J.W. Hampton*, Chief Justice Taft, speaking for the Court, stated: “If Congress shall lay down by legislative act an intelligible principle to which the [executive official] is directed to conform, such legislative action is not” in violation of the separation of powers.<sup>42</sup> From this language, we get the now oft-invoked “intelligible principle” test as the threshold for determining when Congress violates the nondelegation doctrine.<sup>43</sup> A mere seven years after *J.W. Hampton*, the Court, in two cases heard in the same

<sup>37</sup> *Field v. Clark*, 143 U.S. 649, 693–94 (1892) (quotation omitted).

<sup>38</sup> *Id.* at 694 (quotation omitted).

<sup>39</sup> *Id.* at 693–94 (quotation omitted).

<sup>40</sup> *Wayman*, 23 U.S. at 42–43.

<sup>41</sup> 276 U.S. 394 (1928).

<sup>42</sup> *Id.* at 409.

<sup>43</sup> See, e.g., *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 474 (2001) (“The scope of discretion § 109(b)(1) [of the Clean Air Act] allows is in fact well within the outer limits of our nondelegation precedents.”); *Mistretta v. United States*, 488 U.S. 361, 371–79 (1989) (holding that, “[a]lthough Congress ha[d] delegated significant discretion,” the Court had “no doubt” that the delegation in the sentencing guidelines to the Sentencing Commission was “sufficiently specific and detailed to meet constitutional requirements”); *Loving v. United States*, 517 U.S. 748, 751, 771–74 (1996) (finding “no fault” in the delegation to the President the authority to define aggravating factors that permit the death penalty in military capital cases); *Touby v. United States*, 500 U.S. 160, 162, 165–66 (1991) (discussing the intelligible-principle test and holding that “even if greater congressional specificity” were “required in the criminal context,” legislative delegation of authority to the Attorney General under § 201(h) of the Controlled Substances Act would still pass constitutional muster); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 221 n.7 (1986) (rejecting the assertion that the discretionary authority granted by Multiemployer Pension Plan Amendments Act of 1980 did not constitute “a reasonable means of achieving congressional aims,” and that it provided an “intelligible principle” to guide the delegee); *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976) (stating that 19 U.S.C. § 1862(b), or Section 232 of the Trade Expansion Act, “easily fulfills” the intelligible-principle test); *Lichter v. United States*, 334 U.S. 742, 774–87 (1948) (applying the intelligible-principle test and concluding the purpose and background of the Renegotiation Act established a “sufficient meaning” for the phrase “excessive profits” so as to make the Act “a constitutional definition of administrative authority and not an unconstitutional delegation of legislative power”).

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term, struck down its first and last statutes as unconstitutional delegations of legislative authority.<sup>44</sup> Curiously, however, in the only two instances in which the Court has deemed a statute to be an unconstitutional delegation of legislative authority, *Panama Refining Co. v. Ryan*<sup>45</sup> and *A.L.A. Schechter Poultry Corp. v. United States*,<sup>46</sup> the Court either did not mention the “intelligible principle” language at all,<sup>47</sup> or at least did not rely on the phrase to do the doctrinal heavy-lifting in reaching its conclusion.<sup>48</sup>

With the “intelligible principle” phrase presumably fresh in mind, the Court did not rely on it as the lynchpin to determine that Congress impermissibly had delegated authority. While this perhaps makes continued reliance on the test dubious,<sup>49</sup> that it is relied upon is indisputable.<sup>50</sup> Regardless, Justice Gorsuch’s recent dissent in *Gundy* put the legal community on notice that the “intelligible principle” test’s shelf-life may be running short.<sup>51</sup> As discussed above, given the composition of the different opinions in *Gundy*,<sup>52</sup> and Justice Kavanaugh’s subsequent statement on the dissent’s reasoning,<sup>53</sup> the legal community would be wise to heed the warning.

<sup>44</sup> *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 431–33 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935).

<sup>45</sup> 293 U.S. 388 (1935).

<sup>46</sup> 295 U.S. 495 (1935).

<sup>47</sup> See generally *Schechter Poultry*, 295 U.S. at 519–51 (failing, in its 32-page opinion, to invoke the phrase “intelligible principle”).

<sup>48</sup> See *Panama Refin.*, 293 U.S. at 420–30 (providing the “intelligible principle” language from *J.W. Hampton* as just one of many examples in which “the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend”).

<sup>49</sup> See *Gundy v. United States*, 139 S. Ct. 2116, 2138–40 (2019) (Gorsuch, J., dissenting) (arguing that the “intelligible principle” phrase was used in *J.W. Hampton* as a way of “explain[ing] the operation of [other] traditional tests,” and describing it as a “passing comment” that has been “divorc[ed] . . . from its context,” and an “isolated phrase” that has been “treat[ed] . . . as if it were controlling”).

<sup>50</sup> See *supra* note 43.

<sup>51</sup> See *Gundy*, 139 S. Ct. at 2139–40 (Gorsuch, J., dissenting) (“This mutated version of the ‘intelligible principle’ remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked.”); *id.* at 2131 (Alito, J., concurring in the judgment) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”).

<sup>52</sup> See *supra* notes 18–21 and accompanying text.

<sup>53</sup> See *supra* notes 22–23 and accompanying text.

II. A BRIEF OVERVIEW OF *GUNDY*

The Court in *Gundy* evaluated a challenged delegation of legislative power to the Attorney General in 34 U.S.C. § 20913(d), enacted as part of the Sex Offender Registration and Notification Act (“SORNA” or “Act”).<sup>54</sup> Specifically at issue in *Gundy* was the statute’s retrospective application to individuals convicted of sex offenses prior to SORNA’s adoption.<sup>55</sup> The statute provided the following guidance to the Attorney General as to which sex offenders the Act ought to apply retroactively:

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 any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).<sup>56</sup>

To be sure, this language, at least taken alone, seemingly leaves a great deal of discretion to the Attorney General.<sup>57</sup> That breadth of discretion is made evident by the inconsistent actions taken by different attorneys general under the same statutory framework.<sup>58</sup>

Nonetheless, Justice Kagan, writing for a plurality of the Court, found a much more circumscribed grant of authority to the Attorney General.<sup>59</sup> Interpreting the statute, Justice Kagan stated “[t]he text, considered alongside its context, purpose, and history, makes clear that the Attorney General’s discretion extends only to considering and addressing *feasibility* issues.”<sup>60</sup> According to the plurality, SORNA did not give the Attorney General much discretion at all. Rather, he or she “was to apply SORNA to pre-Act offenders as soon as he [or she] thought it feasible to do so.”<sup>61</sup> Put another way, it was not for the Attorney General to decide

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<sup>54</sup> *Gundy*, 139 S. Ct. at 2121–22 (plurality opinion).

<sup>55</sup> *Id.* at 2122.

<sup>56</sup> 34 U.S.C. § 20913(d) (2012).

<sup>57</sup> *Gundy*, 139 S. Ct. at 2132 (Gorsuch, J., dissenting) (“The breadth of the authority Congress granted to the Attorney General in these few words can only be described as vast.”).

<sup>58</sup> *Id.* (providing examples of how the “pendulum swung” on retroactive application of SORNA depending on who happened to be serving as Attorney General at the time); but see *id.* at 2122 (plurality opinion) (“The final rule, issued in December 2010, reiterated that SORNA applies to all pre-Act offenders. That rule has remained the same to this day.”) (citation omitted).

<sup>59</sup> *Id.* at 2123–24 (plurality opinion).

<sup>60</sup> *Id.* (emphasis added).

<sup>61</sup> *Id.* at 2125.

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whether to apply SORNA to pre-Act offenders—only when and how to so apply it, based on when it became “feasibl[e]” to do so.<sup>62</sup> Construed as such, the plurality faced an “easy”<sup>63</sup> constitutional question, and found the delegation in SORNA to be “well within permissible bounds.”<sup>64</sup>

Performing his own statutory analysis, Justice Gorsuch reached a different conclusion. Contrary to the plurality, he concluded that Congress had not required the Attorney General to apply SORNA retroactively, leaving only questions of feasibility to the Attorney General’s discretion.<sup>65</sup> Rather, Justice Gorsuch concluded that this retroactive application was an area of disagreement within Congress—“a ‘controversial issue with major policy significance and practical ramifications for states.’”<sup>66</sup> Therefore, rather than dealing with the controversy itself, Congress “passed the problem to the Attorney General.”<sup>67</sup> Framed in this way, the delegation seems much more questionable, and certainly much broader, than the delegation being scrutinized by the plurality.<sup>68</sup>

Addressing “whether Congress ha[d] unconstitutionally divested itself of its legislative responsibilities,”<sup>69</sup> Justice Gorsuch turned to three “traditional tests.”<sup>70</sup> In so doing, he relied on language from early

<sup>62</sup> See *id.* at 2129 (reframing the constitutional question as such: “The question becomes: Did Congress make an impermissible delegation when it instructed the Attorney General to apply SORNA’s registration requirements to pre-Act offenders as soon as feasible?”).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2124.

<sup>65</sup> For the plurality’s proposition, see *id.* at 2129. For Justice Gorsuch’s disagreement, see *id.* at 2131–32 (Gorsuch, J., dissenting).

<sup>66</sup> *Id.* at 2131–32 (Gorsuch, J., dissenting) (quoting Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 *Geo. Wash. L. Rev.* 993, 1000 (2010)).

<sup>67</sup> *Id.* at 2132.

<sup>68</sup> This exposes what was really at issue in *Gundy*—it was a case that turned on statutory interpretation. See e.g., Aditya Bamzai, *Commentary, Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 *Harv. L. Rev.* 164, 166 (2019) (stating that *Gundy* “turned largely on the plurality’s narrowing construction of a statutory scheme”). The plurality was content to impose a limiting construction to avoid the delegation question, while Justice Gorsuch was willing to take on the broader issue. See also *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting) (“Most everyone, the plurality included, concedes that if SORNA allows the Attorney General as much authority as we have outlined, it would present ‘a nondelegation question.’” (quoting *id.* at 2123–24 (plurality opinion))).

<sup>69</sup> *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).

<sup>70</sup> *Id.* at 2135–39.

nondelegation cases.<sup>71</sup> According to Justice Gorsuch, Congress, within its constitutional bounds, may properly do any of the following:<sup>72</sup> (1) “[A]uthorize another branch to ‘fill up the details’” of a rule, as long as Congress announced the controlling general policy;<sup>73</sup> (2) “[M]ake the application of [a rule governing private conduct] depend on executive fact-finding”;<sup>74</sup> and (3) “[A]ssign the executive and judicial branches certain non-legislative responsibilities.”<sup>75</sup> In addition to the cases in which these “traditional tests” are derived, Justice Gorsuch argued that those are the principles on which the Court actually relied in *Schechter Poultry* and *Panama Refining*, the only two instances in which the Court has deemed a statute to be an unconstitutional delegation of legislative authority.<sup>76</sup> Further, Justice Gorsuch argued that those factors also underpinned the decision *not* to strike down the delegation at issue in *J.W. Hampton*, the case from which courts derive the “intelligible principle” test.<sup>77</sup>

Justice Gorsuch’s opinion in *Gundy* does not advocate for, nor does it necessarily compel,<sup>78</sup> an upheaval of the administrative state, as some may fear.<sup>79</sup> Rather, Justice Gorsuch suggests returning to the “traditional

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<sup>71</sup> See *id.* at 2136–37 (citing both *Wayman v. Southard*, 23 U.S. (10 Wheat.) 31, 43 (1825) and *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813) as articulating these standards). To be sure, it does not seem as though the third category comes explicitly from any one case. See *id.* at 2137. Nonetheless, Justice Gorsuch asserts that both *Wayman* and *Aurora* could have appropriately been decided on these grounds. *Id.* Further, it seems obvious that separation of powers concerns are not implicated when Congress gives another branch discretion over matters properly within the scope of that branch’s powers. See, e.g., David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1260 (1985) (“Legislation that leaves the Executive Branch with discretion does not delegate legislative power where the discretion is to be exercised over matters already within the scope of executive power.”). In other words, nondelegation is implicated only when Congress abdicates its *own* constitutionally assigned power, not when it empowers another branch to act within that branch’s proper sphere.

<sup>72</sup> While the tests are interrelated, the satisfaction of any test is sufficient to insulate a statute from a nondelegation challenge. Which test applies depends on the unique circumstances presented by the delegation at issue in a particular case. See *infra* Part III.

<sup>73</sup> *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (quoting *Wayman*, 23 U.S. at 43).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 2137.

<sup>76</sup> See *id.* at 2137–38 (Gorsuch, J., dissenting).

<sup>77</sup> *Id.* at 2139 (“There’s a good argument, as well, that the statute in *J. W. Hampton* passed muster under the traditional tests.”).

<sup>78</sup> *Id.* at 2145 (“Nor would enforcing the Constitution’s demands spell doom for what some call the ‘administrative state.’ . . . Respecting the separation of powers forecloses no substantive outcomes.”).

<sup>79</sup> See *supra* note 17.

tests,” which were, at least according to Justice Gorsuch, relied upon in *Panama Refining*, *Schechter Poultry*, and *J.W. Hampton*.<sup>80</sup> The objective of this Note is to explore these “traditional tests,” explain their doctrinal and constitutional foundations, and apply them to modern statutes that raise nondelegation concerns. It is an effort to discern whether the plurality in *Gundy* was correct that, if Justice Gorsuch’s position were embraced, “then most of the Government is unconstitutional,”<sup>81</sup> or if there is space in Justice Gorsuch’s approach to nondelegation for Congress to retain “the necessary resources of flexibility and practicality . . . to perform its function.”<sup>82</sup>

### III. THE TRADITIONAL TESTS

The three “traditional tests” that Justice Gorsuch proposes all purport to describe the boundary between those delegations that are constitutionally permissible and those that violate the principle of separation of powers.<sup>83</sup> Should a statute satisfy any of the three tests, that is sufficient for it to survive nondelegation scrutiny (i.e., it need not satisfy all three). Before a proper application of the tests to modern statutes can be done, the historical and doctrinal underpinnings of the tests must first be explained. The purpose of this is two-fold. First, insofar as the goal in reviving these tests is to empower courts to apply them consistent with their historical foundation, it is necessary to understand how they operated in the past. Second, an analysis of the cases articulating the tests serves as an opportunity to analyze briefly the claims made by Justice Gorsuch in his dissent as to how these tests came to be. While a more thorough analysis of that aspect of Justice Gorsuch’s argument is beyond the scope of this Note, a brief overview provides a rudimentary understanding and defense of his position.

#### *A. Fill up the Details*

The first test that Justice Gorsuch puts forth would require a court to ask whether the delegation at issue merely “authorize[s] another branch

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<sup>80</sup> *Gundy*, 139 S. Ct. at 2137–39 (Gorsuch, J., dissenting).

<sup>81</sup> *Id.* at 2130 (plurality opinion) (“[I]f SORNA’s delegation is unconstitutional, then most of Government is unconstitutional.”).

<sup>82</sup> *Yakus v. United States*, 321 U.S. 414, 425 (1944) (alterations in original) (quoting *Currin v. Wallace*, 306 U.S. 1, 15 (1939)).

<sup>83</sup> See Bamzai, *supra* note 68, at 177 (describing Justice Gorsuch’s approach as “a set of formal rules to identify those cases that pose a nondelegation problem”).

to “fill up the details” of its legislation.<sup>84</sup> This test comes straight from *Wayman v. Southard*, where Chief Justice Marshall stated that, in areas in which Congress may properly delegate,<sup>85</sup> it may act by a “general provision” and authorize those acting under such provisions “to fill up the details.”<sup>86</sup> That was reiterated in *Panama Refining*, where the Court stated that Congress “may establish primary standards, devolving upon others the duty to carry out the declared legislative policy.”<sup>87</sup>

Put another way, Congress must lay out a “sufficient primary standard,”<sup>88</sup> leaving to the delegatee nothing more than the “duty to effectuate the legislative policy declared in the statute.”<sup>89</sup> This requires Congress to “legislate[] . . . as far as [is] reasonably practicable, and . . . leave to executive officials the duty of bringing about the result pointed out by the statute.”<sup>90</sup> Conferring this type of authority “does not, in any real sense, invest administrative officials with the power of legislation.”<sup>91</sup>

That, however, only raises the question: What constitutes a sufficient “primary standard” that Congress must have “pointed out by the statute”?<sup>92</sup> In *Red “C” Oil Manufacturing Co. v. Board of Agriculture of North Carolina*, the requirement that regulated lamp oil ought to be “safe, pure and afford a satisfactory light” was sufficient guidance, permitting the Commissioner of Agriculture to determine “what oils would measure up to [those] standards.”<sup>93</sup> Similarly, in *Buttfield v. Stranahan*, the legislative “purpose to exclude the lowest grades of tea” acted as a sufficient guidepost to rein in the discretion granted to the Secretary of

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<sup>84</sup> *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

<sup>85</sup> By this, Chief Justice Marshall meant areas that did not implicate “powers which are strictly and exclusively legislative.” *Wayman*, 23 U.S. at 42–43.

<sup>86</sup> *Id.* at 43. For another early example of the “fill up the details” test, see, e.g., *Hannibal Bridge Co. v. United States*, 221 U.S. 194, 205 (1911) (“All that the act did was to impose upon the Secretary the duty of attending to such details as were necessary in order to carry out the declared policy of the Government.”).

<sup>87</sup> *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 426 (1935) (citing *Wayman*, 23 U.S. at 43)).

<sup>88</sup> See, e.g., *Red “C” Oil Mfg. Co. v. Bd. of Agric. of N.C.*, 222 U.S. 380, 394 (1912) (citations omitted).

<sup>89</sup> *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Red “C” Oil Mfg. Co.*, 222 U.S. at 394.

Treasury.<sup>94</sup> Indeed, the Court in both *Panama Refining* and *Schechter Poultry* was also concerned with this issue of a “primary standard,” providing countervailing points of reference as to what represents constitutionally deficient guideposts.<sup>95</sup>

In addition to a sufficient “primary standard,” Congress must also provide certain “defined limits” within which the Executive is to act so as “to secure the exact effect intended by its acts of legislation.”<sup>96</sup> Congress could not merely state a policy goal and then delegate to the Executive branch the authority to bring about that end by whatever means the agency sees fit, providing no guidance as to how to attain that end. Such an open-ended bestowal of authority would certainly not represent Congress legislating “as far as [is] reasonably practical.”<sup>97</sup> Nor could such discretion fairly be described as empowering the administrator merely to “fill up the details” of the provision.<sup>98</sup> Rather, such open-ended discretion as to the means by which it is to attain the “effect intended” by Congress would “invest administrative officials with the power of legislation.”<sup>99</sup>

<sup>94</sup> *Buttfield*, 192 U.S. at 496; see also *St. Louis, Iron Mountain & S. Ry. Co. v. Taylor*, 210 U.S. 281, 286–87 (1908) (holding that permitting the American Railway Association to set “the standard height of draw bars for freight cars,” which was binding on all railways engaged in interstate commerce, was not an unconstitutional delegation under *Buttfield*, presumably due to the fact that this was a detail that was constrained by the greater purpose, or primary standard, of the legislation—safety).

<sup>95</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935) (“Accordingly, we look to the statute to see . . . whether Congress in authorizing ‘codes of fair competition’ has itself established the standards of legal obligation . . . or, by the failure to enact such standards, has attempted to transfer that function to others.”); *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 426 (1935) (“Moreover, the Congress . . . may establish primary standards, devolving upon others the duty to carry out the declared legislative policy”) (citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

<sup>96</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (citations omitted).

<sup>97</sup> See *Buttfield*, 192 U.S. at 496.

<sup>98</sup> See *Wayman*, 23 U.S. at 43.

<sup>99</sup> See *J.W. Hampton*, 276 U.S. at 406; *Buttfield*, 192 U.S. at 496. To be sure, Congress’s requirement to provide “defined limits” for the Executive cannot be a high bar and remain consistent with the Court’s precedent. For example, in the statute at issue in *Buttfield*, Congress provided that the Secretary of the Treasury was to consider “purity, quality, and fitness for consumption” in making its determination. *Id.* at 494. Further, that statute required the Secretary to appoint a seven-member board of tea “expert[s]” who were to “prepare and submit to [the Secretary] standard samples of tea” and provide recommendations for the “standards of purity, quality, and fitness for consumption” of imported teas. An Act To Prevent the Importation of Impure and Unwholesome Tea, 29 Stat. 604, 605 (1897). Conversely, it is argued here that Congress could not have constitutionally stated a purpose of improving the quality of tea, and then empowered the Secretary to ban all tea of inferior quality, with no exposition as to how the Secretary was to make that determination. While the constraints

Thus, the Court, through these decisions, has at least marked the outer bounds for what constitutes a sufficient primary standard. These decisions provide a background against which legislators may properly delegate to administrators the authority to carry forward legislative purposes, without going so far as to empower those actors to wield legislative authority. According to the Court, the directive to enact “codes of fair competition” is not a sufficient standard,<sup>100</sup> while directives to regulate in regards to safety and quality are sufficiently specific.<sup>101</sup> The delineation between these examples seems clear. The directives that were upheld were specific and gave the administrator some concrete guidance as to what their end goals were to be. On the other hand, the statutes at issue in *Panama Refining* and *Schechter Poultry* were so open-ended, even as to a “primary standard” or purpose that the administrators were to accomplish, as to represent the boundary beyond which Congress constitutionally cannot go.

### B. Conditional Fact-Finding

The second “traditional test” that Justice Gorsuch brings forth finds its foundation in *The Cargo of the Brig Aurora v. United States*.<sup>102</sup> In that case the Court upheld a statute in which Congress made the revival of the law, which had since expired, contingent upon a presidential proclamation to be made once certain facts had been ascertained by the President.<sup>103</sup> The Court upheld the statute, stating that there was “no

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provided in the Act at issue in *Buttfield* were admittedly not severe, they nonetheless confined the authority of the Secretary to some extent.

<sup>100</sup> See *Schechter Poultry*, 295 U.S. at 530, 541–42 (stating that the relevant provision of the Act represents an unconstitutional delegation of authority in part because it “supplies no standards”).

<sup>101</sup> See, e.g., *Red “C” Oil Mfg. Co. v. Bd. of Agric. of N.C.*, 222 U.S. 380, 394 (1912); *Buttfield*, 192 U.S. at 496; *St. Louis, Iron Mountain & S. Ry. Co.*, 210 U.S. 281, 287 (1908).

<sup>102</sup> 11 U.S. (7 Cranch) 382 (1813). Many early cases employed the “conditional fact-finding” test. See, e.g., *Miller v. Mayor of New York*, 109 U.S. 385, 394 (1883) (“The efficiency of an act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate.” (citing *South Carolina v. Georgia*, 93 U.S. 4, 13 (1876))); *Field v. Clark*, 143 U.S. 649, 694 (1892) (“The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.”) (quoting *Locke’s Appeal*, 72 Pa. 491, 498 (1873)).

<sup>103</sup> See *Aurora*, 11 U.S. at 386 (argument of Joseph R. Ingersoll) (stating that making the revival of a law contingent on the President’s proclamation is the equivalent of giving “that

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sufficient reason[] why the legislature should not exercise its discretion . . . either expressly or conditionally.”<sup>104</sup> In essence, because Congress had laid out a specific law, and the discretion it granted to the President was based on the finding of fact (namely, whether Great Britain had ceased to violate the neutral commerce of the United States),<sup>105</sup> it did not represent a constitutionally-problematic delegation of legislative power.

Almost a century later, in *Union Bridge Co. v. United States*, the Court reaffirmed that point.<sup>106</sup> In that case the Court endorsed the notion that Congress may “delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends.”<sup>107</sup> The delegation at issue there involved Congress conferring the Secretary of War with the discretion to determine when “any railroad or other bridge . . . constructed[] over any of the navigable waterways . . . is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise.”<sup>108</sup> Once the Secretary made that determination, he was empowered to require the structure’s removal or alteration to promote free navigation.<sup>109</sup> This type of delegation, the Court held, “[i]n no substantial, just sense . . . confer[s] . . . powers strictly legislative or judicial in their nature, or which must be exclusively exercised by Congress or by the

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proclamation the force of law”); see also *Union Bridge Co. v. United States*, 204 U.S. 364, 378 (1907) (describing both the statute at issue and the Court’s analysis in *Aurora*).

<sup>104</sup> *Aurora*, 11 U.S. at 388.

<sup>105</sup> See *Field v. Clark*, 143 U.S. 649, 682–83 (1892) (describing the statute at issue in *Aurora*).

<sup>106</sup> 204 U.S. 364, 387 (1907); see also, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407 (1928) (“Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive.”); *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 426 (1935) (“[A]uthorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed, have constantly been sustained.”); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935) (“[T]he Constitution has never been regarded as denying to Congress the [ability to] . . . leav[e] to selected instrumentalities . . . the determination of facts to which the policy as declared by the legislature is to apply.”) (citing *Panama Refin.*, 293 U.S. at 421).

<sup>107</sup> *Union Bridge Co.*, 204 U.S. at 387.

<sup>108</sup> *Id.* at 366 (quoting *An Act Making Appropriations for the Construction, Repair, and Preservation of Certain Public Works on Rivers and Harbors, and for Other Purposes*, 30 Stat. 1121, 1153–54 (1899)).

<sup>109</sup> *Id.*

courts.”<sup>110</sup> Because Congress had provided a “general rule” and delegated only the responsibilities “of ascertaining what particular cases came within the rule” and subsequently “enforc[ing] the rule in such cases,” the Court determined this type of delegation to be constitutionally permissible.<sup>111</sup>

The two counter points remain the same. *Schechter Poultry* and *Panama Refining* both acknowledged the appropriateness of delegation contingent upon a finding of fact but nonetheless found a violation of the nondelegation doctrine.<sup>112</sup> However, while the statute at issue in *Panama Refining* did not “require any finding . . . as a condition of [regulatory] action,”<sup>113</sup> the same cannot be said for the statute scrutinized by the Court in *Schechter Poultry*.<sup>114</sup> That statute did place conditional requirements on the President prior to exercising his discretion.<sup>115</sup> Those conditional findings were so ill-defined, however, that the Court described them as “really but a statement of an opinion as to the general effect” that the proposed regulations would have.<sup>116</sup> In reality, Congress had not required any *factual* finding, but left the discretion of what was good policy in the hands of the President and called that policy determination a “finding.” Such a pretextual “finding” of “fact” was insufficient to rein in the discretion left to the President under the statutory regime, and the statute thus breached the separation of powers.<sup>117</sup>

Synthesizing these cases brings forth a relatively clear standard to guide Congress. On the one hand, if Congress provides a rule and permits an administrator to do no more than discern when that rule is implicated and act accordingly, there are no constitutional issues.<sup>118</sup> If, however, Congress fails to require the administrator to condition their action upon

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<sup>110</sup> Id. at 385.

<sup>111</sup> Id. at 386–88.

<sup>112</sup> See *supra* note 95 (citing to the Court’s discussion of conditional fact finding in both *Schechter Poultry* and *Panama Refining*).

<sup>113</sup> *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 415 (1935).

<sup>114</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538 (1935) (describing the three “findings” that the President was required to make under the Recovery Act in order to exercise his discretion: (1) find that the proposed trade or industrial code did not inequitably restrict admission to membership in industrial associations; (2) that the proposed code did not promote monopolies; and (3) that the proposed code would “tend to effectuate the policy of” the Act (quoting National Industrial Recovery Act, Pub. L. No. 73-67 § 3, 48 Stat. 195, 196 (1933))).

<sup>115</sup> Id.

<sup>116</sup> Id.

<sup>117</sup> Id. at 537–42.

<sup>118</sup> See, e.g., *Union Bridge Co. v. United States*, 204 U.S. 364, 386–88 (1907).

a finding of fact,<sup>119</sup> or fails to identify with specificity upon what the administrator must condition its action,<sup>120</sup> the legislation may face nondelegation problems. Additionally, conditioning the administrator’s action upon a finding of fact certainly is not a necessary condition to save a statute from a nondelegation challenge.<sup>121</sup> Such conditioning is but one way to rein in the discretion given to an administrator. While it seems that Congress may, at least as a practical matter,<sup>122</sup> be *required* to lay down a “primary standard,” it appears as though conditioning agency action in furtherance of that express policy goal upon the finding of some fact is one way to further curtail the delegation, but may not be necessary in all cases.<sup>123</sup>

### C. Assigning Certain Non-Legislative Responsibilities

The final “traditional test” that Justice Gorsuch puts forward—that “Congress may assign the executive and judicial branches certain non-legislative responsibilities”<sup>124</sup>—has a less clear doctrinal foundation.<sup>125</sup> It is not, however, without constitutional support and there are indications in the case law that such a consideration has played a significant role in other separation-of-powers cases, even if those cases did not invoke the nondelegation doctrine directly.<sup>126</sup>

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<sup>119</sup> See *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 415 (1935).

<sup>120</sup> See *Schechter Poultry*, 295 U.S. at 538.

<sup>121</sup> For example, the statute at issue in *Buttfield* required only that the Secretary of Treasury act with the purpose of excluding the lowest quality of tea. While it could conceivably be argued that this finding of quality constituted a finding of fact, that is not how the Court approached the statute. *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904) (finding the statute to simply provide the Secretary of the Treasury with the necessary standard to “effectuate the legislative policy declared in the statute”).

<sup>122</sup> Indeed, it is hard to imagine how Congress would condition an action upon the finding of fact if there were no declared policy. For example, in *Union Bridge*, what facts would have been relevant to the Secretary of War in determining which bridges must be removed or altered if the policy of promoting the free travel upon navigable waters was not clearly stated? See *Union Bridge*, 204 U.S. at 366.

<sup>123</sup> This conclusion is bolstered by the fact that the Court in *Union Bridge* also determined that Congress had previously laid down a “general rule” that the administrator was acting within. See *id.* at 386.

<sup>124</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2137 (Gorsuch, J., dissenting).

<sup>125</sup> See *id.* (citing no direct authority for this proposition).

<sup>126</sup> See, e.g., *Loving v. United States*, 517 U.S. 748, 768 (1996) (“And it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority.”).

As Justice Gorsuch points out, there are times in which “Congress’s legislative authority . . . overlaps with authority the Constitution separately vests in another branch.”<sup>127</sup> It therefore makes sense that Congress would be permitted to delegate more freely in areas where another branch concurrently possesses authority. For example, in *United States v. Curtiss-Wright Export Corp.*, the Court found an important distinction between an “authority vested in the President by an exertion of legislative power” alone, and such delegation “plus the . . . exclusive power of the President as the sole organ of the federal government in the field of international relations.”<sup>128</sup> In that case, the Court determined that, because the President operates “as the sole organ of the federal government in the field of international relations,” it would be unwise to require Congress “to lay down narrowly definite standards by which the President is to be governed.”<sup>129</sup> To put it differently, the normal rules for delegation simply do not apply when Congress is bestowing discretion upon the executive within an area already within the purview of executive authority.

Indeed, it could be argued that a congressional assignment of certain non-legislative responsibilities is not a delegation of *legislative* authority at all, but rather Congress granting “discretion . . . over matters already within the scope of executive [or judicial] power.”<sup>130</sup> In areas such as war powers and foreign affairs, for example, Congress may enact a statute to declare war but it does not delegate legislative power “because the President’s power derives from article II rather than article I.”<sup>131</sup>

Further, *Aurora, Clark*,<sup>132</sup> and *Wayman*, although all decided on different grounds, could have been decided on these “inherent-powers”

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<sup>127</sup> *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”).

<sup>128</sup> 299 U.S. 304, 319–20 (1936); see also *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring in the judgment) (explaining that, when the President acts within an area of executive discretion and in accordance with an express or implied congressional authorization, “his authority is at its maximum” and such an act in accordance with a congressional delegation would be afforded “the widest latitude of judicial interpretation”).

<sup>129</sup> *Curtiss-Wright*, 299 U.S. at 319–22.

<sup>130</sup> See Schoenbrod, *supra* note 71, at 1260.

<sup>131</sup> *Id.* at 1260–61.

<sup>132</sup> *Field v. Clark*, 143 U.S. 649 (1892).

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grounds.<sup>133</sup> *Aurora* involved a delegation of foreign-affairs powers;<sup>134</sup> *Clark* dealt with “trade and commerce with other nations”;<sup>135</sup> and *Wayman* upheld a delegation to the judiciary to “empower the Courts . . . to regulate their practice” in a way that also could have been “done by Congress.”<sup>136</sup> Each of these is an area in which Congress possesses concurrent authority with either the executive or the judiciary, and thus the delegations at issue were simply conferrals of authority already within the delegees’ purview.

Finally, and significantly, *Schechter Poultry* and *Panama Refining* certainly could *not* be described as delegating powers inherent in the executive (nor, quite obviously, the judiciary). The statutory delegations at issue in those cases involved nothing more than rulemaking—a distinctly and quintessentially legislative task.<sup>137</sup> Thus, because the two cases in which the delegation was deemed unconstitutional did not involve assigning certain, non-legislative responsibilities, neither case undermines the assertion that such delegations are constitutionally appropriate.

In sum, the final traditional test that Justice Gorsuch brings forth explains an intuitive point. When Congress assigns “certain non-legislative responsibilities” upon the executive or judicial branch, it is not really *delegating* legislative authority, and there is, therefore, no constitutional delegation problem.<sup>138</sup> Applying this test, then, requires an inquiry into the type of power Congress has delegated, and whether that legislation implicates powers inherent in article II of the Constitution or elsewhere.<sup>139</sup> If Congress merely grants “discretion . . . over matters

<sup>133</sup> Id. at 1262–63; *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) (“*Wayman* itself might be explained by the same principle as applied to the judiciary: Even in the absence of any statute, courts have the power under Article III ‘to regulate their practice.’”) (citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

<sup>134</sup> The statute at issue in this case was about a trade embargo against the British. See *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 382–83 (1813).

<sup>135</sup> *Clark*, 143 U.S. 649, 691 (1892).

<sup>136</sup> *Wayman*, 23 U.S. at 43 (1825). As Justice Gorsuch notes in his dissent, courts possess this power under Article III, regardless of statutory authorization. *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

<sup>137</sup> See *The Federalist* No. 78, at 465 (Alexander Hamilton) (“The legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated.”).

<sup>138</sup> *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

<sup>139</sup> See Schoenbrod, *supra* note 71, at 1260–61.

already within the scope” of another branch’s power, it is not really a delegation of legislative authority at all.<sup>140</sup>

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As stated above, Justice Gorsuch’s *Gundy* dissent argued that there are three tests that have traditionally been used to determine when Congress delegates beyond what is constitutionally appropriate. Upon further analysis, it seems as though Justice Gorsuch’s assertion is descriptively accurate, at least insofar as that analysis is limited to the Court’s pre-1950s jurisprudence.<sup>141</sup> Each of the three tests is constitutionally sound and can be traced to the Court’s traditional separation-of-powers cases. In the next Part, this Note will apply these three tests to statutes previously upheld under modern nondelegation scrutiny to discern how those delegations may fare if challenged on the basis of these traditional tests, as opposed to the intelligible-principle test, in the future.

#### IV. MODERN STATUTES ANALYZED UNDER THE TRADITIONAL TESTS

Justice Gorsuch’s dissent, perhaps unsurprisingly, has sparked renewed litigation over the nondelegation doctrine. Rejuvenated litigants are picking up on what is perceived to be low-hanging nondelegation fruit and attempting to capitalize on the anticipated doctrinal shift. Insofar as Justice Gorsuch’s approach exiles “most of Government” into the realm of unconstitutionality,<sup>142</sup> these recent challenges ought to provide good fodder to put that claim to the test.<sup>143</sup>

This Part does just that. It takes two specific statutes—Section 901 of the Family Smoking Prevention and Tobacco Control Act (“TCA”) and

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<sup>140</sup> *Id.* at 1260.

<sup>141</sup> Or, in other words, the point at which the “intelligible-principle” test got its legs. See *supra* note 43 (citing cases, beginning in 1948, when the Court began earnestly applying the “intelligible principle” test).

<sup>142</sup> *Gundy*, 139 S. Ct. at 2130 (“[I]f SORNA’s delegation is unconstitutional, then most of Government is unconstitutional.”).

<sup>143</sup> It bears mentioning that any selection of statutes would be an imperfect proxy for the administrative state as a whole (as would any individual field). The purpose of this Note is not to prove that every statute that delegates authority to an administrative agency would be upheld under the traditional tests. Rather, it is intended to show that even these broad delegations are likely constitutional under the traditional tests, indicating that much of the administrative state would fare similarly. While a statute-by-statute analysis might be productive, such an analysis is beyond the scope of this Note. Thus, the selected statutes are apt, if imperfect, vessels by which to gauge the impact of Justice Gorsuch’s dissent.

Section 232 of the Trade Expansion Act of 1962—both of which have been litigated recently and applies the “traditional tests” that may be implicated in each. The litigants in those cases, at least, view them as vulnerable under a reinvigorated nondelegation doctrine. Moreover, the courts that have heard nondelegation challenges have, to varying degrees, noted the potentially shifting landscape. The Fifth Circuit, for example, at least recognized the potential delegation issue in the TCA but refused to “read tea leaves” to predict how the Court might address it under a revitalized nondelegation doctrine.<sup>144</sup> Going further, the Court of International Trade expressly called into question the constitutionality of the delegation to the President in Section 232 of the Trade Expansion Act.<sup>145</sup> At least one judge on that panel was convinced that Section 232 violates the nondelegation doctrine, and would have held as much but for binding precedent that held otherwise.<sup>146</sup> Insofar as Justice Gorsuch’s position in *Gundy* dooms “most of Government” as unconstitutional, then, these statutes ought to be among the easiest to place beyond the contours of his three tests and into the realm of unconstitutionality. As the analysis below shows, however, such a conclusion is anything but foregone.

*A. Section 901 of the Family Smoking Prevention and Tobacco Control Act*

The Fifth Circuit recently addressed a nondelegation challenge to the TCA,<sup>147</sup> an amendment to the Food, Drug, and Cosmetic Act.<sup>148</sup> Big Time Vapes, a “small-business manufacturer and retailer of e-liquids,”<sup>149</sup> sued the FDA after it promulgated a rule bringing Big Time Vapes’s product within the TCA’s regulatory framework.<sup>150</sup> Among other claims, Big

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<sup>144</sup> Big Time Vapes, Inc. v. FDA, 963 F.3d 436, 447 (5th Cir. 2020) (internal quotation marks and citation omitted), petition for cert. filed, (U.S. Dec. 28, 2020) (No. 20-850).

<sup>145</sup> Am. Inst. for Int’l Steel v. United States, 376 F. Supp. 3d 1335, 1344 (Ct. Int’l Trade 2019) (stating that Section 232 “invite[s] the President to regulate commerce by way of means reserved for Congress”).

<sup>146</sup> Id. at 1346–52 (Katzmann, J., concurring dubitante).

<sup>147</sup> 21 U.S.C. § 387a–1 *et seq.* (2018); Pub. L. No. 111-31, 123 Stat. 1776, 1784 (2009).

<sup>148</sup> 21 U.S.C. § 301, *et seq.* (2018); Pub. L. No. 75-717, 52 Stat. 1040 (1938); see *Big Time Vapes*, 963 F.3d at 438.

<sup>149</sup> *Big Time Vapes*, 963 F.3d at 440. An “e-liquid” is a liquid mixture that is used in electronic vaping products. The liquid is aerosolized by the vaping device and inhaled by the user. See *id.* at 439 n.11.

<sup>150</sup> Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. 28,974, 28,974–75 (May 10, 2016).

Time Vapes asserted that the TCA violated the nondelegation doctrine.<sup>151</sup> The Fifth Circuit began its review of the relevant caselaw with an observation: “The Court has found only two delegations to be unconstitutional. Ever.”<sup>152</sup> The panel then stated that TCA’s delegation of authority “parallel[ed]” that of SORNA, looked to the controlling majority from *Gundy*,<sup>153</sup> and unsurprisingly determined that “[t]hose votes compel[led]” the same result for the TCA.<sup>154</sup> In a nod to *Gundy*’s dissenters, though, the panel ended its opinion by stating that “[t]he Court might well decide . . . to reexamine or revive the nondelegation doctrine. But we are not supposed to read tea leaves to predict where it might end up.”<sup>155</sup> Because reading tea leaves is, in contrast, the purpose of this Note, the TCA serves as an apt starting point to test the impact of Justice Gorsuch’s position.

### 1. The Statute

The Supreme Court’s landmark *FDA v. Brown & Williamson Tobacco Corp.* decision held that the FDA lacked the authority to regulate tobacco as a “drug.”<sup>156</sup> After that decision, Congress passed the TCA, which grants the Secretary of Health and Human Services the authority to regulate tobacco products.<sup>157</sup> Section 901 of the TCA also grants the Secretary authority to determine which tobacco products are so regulated.<sup>158</sup> Specifically, it states that the TCA “shall apply to all cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco and to any other tobacco products that the Secretary by regulation deems to be subject to this subchapter.”<sup>159</sup>

And all those that manufacture “a tobacco product”—as determined by the Secretary—are “tobacco product manufacturer[s],” and therefore subject to the TCA.<sup>160</sup> For example, the manufacturer must submit to the Secretary a litany of health information and data.<sup>161</sup> It also must annually

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<sup>151</sup> *Big Time Vapes*, 963 F.3d at 438–440.

<sup>152</sup> *Id.* at 446.

<sup>153</sup> The plurality opinion, plus Justice Alito’s concurrence.

<sup>154</sup> *Big Time Vapes*, 963 F.3d. at 447.

<sup>155</sup> *Id.* (cleaned up).

<sup>156</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26 (2000).

<sup>157</sup> 21 U.S.C. § 387 *et seq.* (2018).

<sup>158</sup> *Id.* § 387a(b).

<sup>159</sup> *Id.* (emphasis added).

<sup>160</sup> *Id.* § 387(20).

<sup>161</sup> *Id.* § 387d.

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register and submit to regular inspections.<sup>162</sup> A manufacturer must seek premarket review for any “new tobacco product” that they seek to introduce into the marketplace.<sup>163</sup> And, as a final example, they face myriad restrictions on how to market their products, such as age restrictions, health warnings, and advertising constraints.<sup>164</sup>

Congress defined “tobacco product” as “any product made or derived from tobacco that is intended for human consumption.”<sup>165</sup> And in 2016, the FDA promulgated a rule extending its power to the farthest reaches the statutory scheme permitted, deeming “all products meeting the statutory definition of ‘tobacco product’ . . . to be subject to FDA’s tobacco product authorities under [the TCA].”<sup>166</sup> It then interpreted and applied that rule such that previously unregulated manufacturers in the vaping industry, like Big Time Vapes, were brought within the TCA’s regulatory ambit.<sup>167</sup>

## 2. Section 901 Analyzed Under the Traditional Tests

As stated above, Section 901 leaves to the Secretary discretion to determine which “tobacco products” he or she has the authority to regulate.<sup>168</sup> To be sure, Congress itself applied the TCA to “cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco.”<sup>169</sup> But it left all other tobacco products to be brought within TCA’s regulations—or not—at the Secretary’s discretion.<sup>170</sup> In *Big Time Vapes*, the plaintiffs argued, to that end, that Congress left “cigars, hookah, pipe tobacco, [vaping products], and all other tobacco products unregulated and punted the question whether to extend the TCA to the Secretary, *without providing any parameters or guidance whatsoever.*”<sup>171</sup> Thus, the

<sup>162</sup> *Id.* § 387e(b), (g).

<sup>163</sup> *Id.* § 387j(a)(1)–(2), (c)(1)(A).

<sup>164</sup> *Id.* § 387f(d), (a), 387c(a)(8)(B)(i).

<sup>165</sup> *Id.* § 321(rr)(1).

<sup>166</sup> Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. 28,974, at 28,976 (May 10, 2016).

<sup>167</sup> *Id.*

<sup>168</sup> 21 U.S.C. § 387a(b) (2018).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Appellants’ Principal Brief at 45, *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436 (5th Cir. 2020) (No. 19-60921), 2020 WL 957184 (emphasis added), petition for cert. filed, (U.S. Dec. 18, 2020) (No. 20-850).

appellants argued, not only does the statute lack an intelligible principle, it “incorporates *no* principle” at all.<sup>172</sup>

That argument, when paired with the belief that Justice Gorsuch’s tests compel the inevitable unwinding of delegation generally, at least place the statute on tenuous grounds should the intelligible-principle test fall away. Certainly, if Justice Gorsuch’s approach makes “most of Government . . . unconstitutional,” this one ought to be easy pickings.<sup>173</sup> To be sure, the statute cannot be defended on grounds that it delegates contingent on fact-finding. Nor can it withstand scrutiny under the third traditional test—it delegates quintessentially legislative authority. Even still, Section 901 is defensible on the grounds that Congress provided a sufficient primary purpose and left to the Secretary nothing more than to “fill up the details.”<sup>174</sup>

As stated above, to satisfy that “traditional test,” Congress must provide a “sufficient primary standard.”<sup>175</sup> That means that it leaves to the executive no more than the “duty to effectuate the legislative policy declared in the statute.”<sup>176</sup> And that’s exactly what Congress did in the TCA. Section 3 of the TCA—aptly named “PURPOSE”—states the policy goals of the TCA.<sup>177</sup> In that Section, Congress explained that, among other aims, the TCA was enacted to “address issues of particular concern to public health officials, especially the use of tobacco by young people and dependence on tobacco.”<sup>178</sup> It provides other aims of the statute, such as to “continue to permit the sale of tobacco products to

<sup>172</sup> *Id.* at 58.

<sup>173</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019).

<sup>174</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

<sup>175</sup> See, e.g., *Red “C” Oil Mfg. Co. v. Bd. of Agric. of N.C.*, 222 U.S. 380, 394 (1912) (citations omitted).

<sup>176</sup> *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904).

<sup>177</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 3, 123 Stat. 1776, 1781–82 (2009). While not codified at 21 U.S.C. § 387 *et seq.*, the Fifth Circuit in *Big Time Vapes* nonetheless relied on it to discern a congressional purpose. As the court put it, “Section 3 is part of the positive law that ran the gauntlet of bicameralism and presentment. That’s a far cry from ‘the sort of unenacted legislative history that often is neither truly legislative nor truly historical.’” *Big Time Vapes*, 963 F.3d at 444 n.24 (cleaned up) (quoting *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting)). The distinction between statutory and legislative history is beyond the scope of this Note. Suffice it to say, when Congress enacts a statute by bicameralism and presentment, the entirety of that statute is fair game. See *Loos*, 139 S. Ct. at 906 (Gorsuch, J. dissenting) (describing statutory history as “the record of enacted changes Congress made to the relevant statutory text over time, the sort of textual evidence everyone agrees can sometimes shed light on meaning”).

<sup>178</sup> § 3(2), 123 Stat. at 1781.

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adults,” but the overarching purpose is clear: public health.<sup>179</sup> To that end, Congress “authorize[d] the [FDA] to set national standards controlling the manufacture of tobacco products.”<sup>180</sup>

The question remains whether that stated purpose is sufficiently clear, such that “Congress legislated on the subject as far as was reasonably practicable” and left nothing more than “the duty of bringing about the result pointed out by the statute.”<sup>181</sup> And the answer must be yes. Compare it, for example, to the standard upheld by the Court in *Red “C” Oil*.<sup>182</sup> There, the legislature left to the Board of Agriculture the determination as to which oils were “safe, pure and afford a satisfactory light.”<sup>183</sup> There is no principled distinction between that delegation of authority and the delegation given to the FDA in the TCA. The FDA is effectively charged with balancing (1) the continued sale of tobacco products to those who want them, against (2) enforcing quality control and public health standards. That is the same as the administrator in *Red “C” Oil*, which was charged with balancing (1) the continued sale of oil to those that wanted it, against (2) enforcing quality control and safety standards. If that purpose was sufficiently clear to survive delegation scrutiny under the “traditional tests”—and it was—it compels the same result in the context of the TCA.

That is, however, where the analysis begins, not where it ends. It seems self-evident that Congress may lay down a sufficiently clear purpose, and, if no guidance as to how to achieve that purpose is provided, may nonetheless unconstitutionally delegate authority.<sup>184</sup> The subsequent question that must be asked, then, is whether in Section 901 of the TCA

<sup>179</sup> § 3(5)–(9), 123 Stat. at 1782.

<sup>180</sup> § 3(3), 123 Stat. at 1782.

<sup>181</sup> *Butfield*, 192 U.S. at 496.

<sup>182</sup> *Red “C” Oil Mfg. Co. v. Bd. of Agric. of N.C.*, 222 U.S. 380 (1912).

<sup>183</sup> *Id.* at 394.

<sup>184</sup> See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (stating that it is “frequently necessary to use officers of the Executive Branch, *within defined limits*”) (emphasis added). To be sure, Congress could express a clear purpose but provide no guidance on how the delegatee was to achieve that purpose. Such a delegation, while it may contain a “sufficient primary standard” would almost certainly be an unconstitutional delegation of legislative authority. For example, suppose Congress passed a law to combat homelessness. In that hypothetical law, there are three sections: The first section creates a “Homelessness Commission”; the second section instructs the Homelessness Commission to “by the year 2024, reduce homelessness in America by 98%, by whatever means the Commission deems appropriate”; and the third section defines “homelessness.” The purpose here is exceptionally clear, and yet it is uncontroversial that providing *no* guidance as to how to achieve that purpose would be constitutionally problematic.

Congress provides “defined limits” for the delegate to act within, such that “the *exact effect* intended by its acts of legislation” will be accomplished.<sup>185</sup> That issue, as it pertained to Section 315 of the Tariff Act of 1922<sup>186</sup>—a statute that delegated to the President the authority to investigate and impose tariffs on imported goods—was grappled with by the lower court in *J.W. Hampton*.<sup>187</sup> A brief exposition of that case, then, is illustrative of how a court may analyze the TCA.<sup>188</sup>

In that earlier litigation, counsel argued that, even if Congress had announced a sufficiently clear purpose in Section 315, “that purpose is impossible of accomplishment” because, in part, “the language . . . is so broad and general as to leave [the President] such latitude [so as to amount to] purely legislative power.”<sup>189</sup> Notably, the court did not dispute the premise of that argument.<sup>190</sup> Rather, the court went through the provisions of Section 315 and concluded that Congress provided defined limits sufficient to rein in any excess discretion.<sup>191</sup> The court noted that Section 315 “requires the President, before proceeding to make a change in the dutiable rate of an article, to make . . . findings of fact.”<sup>192</sup> Those findings included determining the principal competing country, the cost of production for domestic producers, and the cost of production for the foreign competitors.<sup>193</sup> The President then was required to determine the amount of increase or decrease “necessary to equalize such difference.”<sup>194</sup> Thus, while the factors used to make such a determination were conceded to grant the President “very broad latitude,” the court determined that, due to the factual findings required on the front end, the President was afforded “no discretion” in the act of changing the dutiable rate.<sup>195</sup>

A review of the TCA leads to the same conclusion. “First, and critically, Congress enacted a controlling definition of ‘tobacco

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<sup>185</sup> *Id.* (emphasis added).

<sup>186</sup> Tariff Act of 1922, ch. 356, § 315, 42 Stat. 858, 941–43 (1922).

<sup>187</sup> See *Hampton, Jr., & Co. v. United States*, 14 Ct. Cust. App. 350, 361–67, T.D. 42030 (1927).

<sup>188</sup> It is illustrative because Justice Gorsuch stated that the statute at issue in *J.W. Hampton* likely “passed muster under the traditional tests.” *Gundy v. United States*, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting).

<sup>189</sup> *Hampton, Jr., & Co.*, 14 Ct. Cust. App. at 362.

<sup>190</sup> *Id.* at 361–63.

<sup>191</sup> *Id.* at 362.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 361–62.

<sup>194</sup> *Id.* at 362.

<sup>195</sup> *Id.*

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product.”<sup>196</sup> Additionally, in Section 901, Congress provided four products that must be subject to the TCA—another important restriction on the discretion left to the Secretary.<sup>197</sup> Finally, Congress provided nearly all of the regulatory decisions to be made under the TCA itself. For example, nearly all the requirements that attach to a tobacco manufacturer are prescribed by statute, such as the data they must submit,<sup>198</sup> which products they must register,<sup>199</sup> and the premarket authorization process.<sup>200</sup> Congress left to the Secretary only the “finishing touches”<sup>201</sup>—namely, determining which entities are to be covered.<sup>202</sup> That final step—constrained by the statutory definition of tobacco product and the enacted legislative purpose—leaves to the Secretary no more discretion than was left to the President in Section 315. Thus, because the TCA provides a sufficiently clear purpose and defined limits by which to accomplish that purpose, it survives scrutiny under the traditional tests.

*B. Section 232 of the Trade Expansion Act of 1962*

Another statute that has been subjected to recent nondelegation scrutiny is Section 232 of the Trade Expansion Act of 1962.<sup>203</sup> That statute was recently litigated and upheld in *American Institute for International Steel v. United States*.<sup>204</sup> Although recognizing that the court was bound by precedent, one of the judges wrote separately, concurring *dubitante*, to note his skepticism that Section 232’s delegation passes constitutional muster.<sup>205</sup> Although the Court denied AIIS’s petition for certiorari, it is likely that delegation questions will continue to

<sup>196</sup> *Big Time Vapes, Inc. v. FDA* 963 F.3d 436, 445 (5th Cir. 2020) (citing 21 U.S.C. § 321(rr)(1)), petition for cert. filed, (U.S. Dec. 18, 2020) (No. 20-850).

<sup>197</sup> 21 U.S.C. § 387a(b) (2018) (subjecting all cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco to TCA regulation).

<sup>198</sup> *Id.* § 387d(a).

<sup>199</sup> *Id.* § 387e(i)(1).

<sup>200</sup> *Id.* § 387j(a)–(c).

<sup>201</sup> *Big Time Vapes*, 963 F.3d at 446.

<sup>202</sup> 21 U.S.C. § 387a(b).

<sup>203</sup> 19 U.S.C. § 1862 (2018).

<sup>204</sup> 376 F. Supp. 3d 1335, 1337, 1345 (Ct. Int’l Trade 2019), *cert. denied*, 141 S. Ct. 133 (June 22, 2020) (No. 19-1117).

<sup>205</sup> *Id.* at 1346–47 (Katzmann, J., concurring *dubitante*) (“While acknowledging the binding force of [*Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976)], with the benefit of the fullness of time and the clarifying understanding borne of recent actions, I have grave doubts.”).

surround Section 232 tariffs.<sup>206</sup> Thus, it serves as another apt vessel by which to assess Justice Gorsuch's assertions from *Gundy*.

### 1. The Statute

Section 232 of the Trade Expansion Act of 1962 is currently codified at 19 U.S.C. § 1862.<sup>207</sup> Section 1862(b) of the Act authorizes the Secretary of Commerce to perform an investigation, prompted “[u]pon request of the head of any department or agency, upon application of an interested party” or on the Secretary’s own determination, “to determine the effects on the national security of imports” of an identified article.<sup>208</sup> Within 270 days of initiating the investigation, the Secretary must submit a report to the President with the findings of the investigation and a recommendation for presidential action or inaction.<sup>209</sup> If the Secretary determines, based on the investigation, that the subject article “is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President” in the report.<sup>210</sup>

If the Secretary finds that an item is being imported “in such quantities or under such circumstances as to threaten to impair the national security,” the President has 90 days to act.<sup>211</sup> If the President agrees with the Secretary’s determination, he or she is charged with “determin[ing] the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.”<sup>212</sup> The President is then empowered to take such action within 15 days of that determination and must inform Congress of his or her determination within 30 days, explaining why the President did or did not act.<sup>213</sup> The

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<sup>206</sup> This statute has been the focus of much criticism for the breadth of discretion it confers on the President. See, e.g., Paul Bettencourt, Note, “Essentially Limitless”: Restraining Administrative Overreach Under Section 232, 17 *Geo. J.L. Pub. Pol’y* 711, 726–27 (2019) (analyzing Section 232 under a nondelegation framework, using the *AIIS* case as an example, but claiming that challenging the statute on a nondelegation basis would be “unlikely to succeed” unless “the Court revisits its jurisprudence”).

<sup>207</sup> 19 U.S.C. § 1862 (2018).

<sup>208</sup> *Id.* § 1862(b)(1)(A).

<sup>209</sup> *Id.* § 1862(b)(3)(A).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* § 1862(c)(1)(A).

<sup>212</sup> *Id.* § 1862(c)(1)(A)(ii).

<sup>213</sup> *Id.* § 1862(c)(1)(B), (c)(2).

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Act also contains factors that the Secretary and President “shall” consider in their determination, without, however, “excluding other relevant factors.”<sup>214</sup> Those mandatory factors include, among others, the “domestic production needed for projected national defense requirements” and “the capacity of domestic industries to meet such requirements.”<sup>215</sup> Importantly, one of those factors permits the Secretary and President to evaluate “whether [a] weakening of our internal economy may impair the national security.”<sup>216</sup>

The Trump administration brought Section 232 to the forefront. During his tenure, the President utilized Section 232 to impose tariffs of 25% on imported steel<sup>217</sup> and 10% on imported aluminum.<sup>218</sup> The source of renewed consternation over Section 232 stems from the administration’s relatively liberal use<sup>219</sup> of the tariffs in ways that arguably do not implicate national security.<sup>220</sup> Rather, critics of the policy argue, the national

<sup>214</sup> Id. § 1862(d).

<sup>215</sup> Id.

<sup>216</sup> Id. This is significant because it empowers the President to effectively conflate “economy” with “security.”

<sup>217</sup> Proclamation No. 9705, 83 Fed. Reg. 11,625, at 11,626 (Mar. 8, 2018).

<sup>218</sup> Proclamation No. 9704, 83 Fed. Reg. 11,619, at 11,620 (Mar. 8, 2018).

<sup>219</sup> Prior to the Trump administration, a President acted pursuant to Section 232 on six occasions, the last of which occurred in 1986. See Rachel F. Fefer et al., Cong. Rsch. Serv., Section 232 Investigations: Overview and Issues for Congress 4, App. B (2020). In contrast, under the Trump administration there were five investigations. Id. at app. B. Two of those investigations resulted in the imposition of tariffs, two are still in process, and one seemingly expired with no action due to a missed deadline. See id. at App. B. (providing a table of Section 232 investigations dating back to 1963); see also David Lawder, Trump Can No Longer Impose ‘Section 232’ Auto Tariffs After Missing Deadline: Experts, Reuters (Nov. 19, 2019), <https://www.reuters.com/article/us-usa-trade-autos/trump-can-no-longer-impose-section-232-auto-tariffs-after-missing-deadline-experts-idUSKBN1XT0TK> [<https://perma.cc/D5QY-X7ZX>] (stating that the statutory deadline for the Section 232 investigation being used to impose tariffs on foreign-made cars and auto parts passed with no action, forfeiting the administration’s opportunity to utilize such tariffs).

<sup>220</sup> See Fefer, *supra* note 219, at 7 (noting that in his Memo on proposed Section 232 tariffs, Secretary of Defense James Mattis, while agreeing that “imports of foreign steel and aluminum based on unfair trading practices impair the national security,” ultimately disagreed with the President’s broad-brushed imposition of tariffs in this instance, as “U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production”) (quoting Letter from James N. Mattis, Secretary of Defense, to Wilbur L. Ross Jr., Secretary of Commerce (2018), [https://www.commerce.gov/sites/default/files/department\\_of\\_defense\\_memo\\_response\\_to\\_steel\\_and\\_aluminum\\_policy\\_recommendations.pdf](https://www.commerce.gov/sites/default/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf) [<https://perma.cc/M2FB-U63M>]; see also Editorial Board, The National Security Tariff Ruse, Wall St. J. (Mar. 12, 2018), <https://www.wsj.com/articles/the-national-security-tariff-ruse-1520897310> [<https://perma.cc/V9UP-VYCY>] (describing the Trump administration’s use of Section 232 to justify tariffs as “dubious,” because “[n]ot even the Pentagon buys” the notion

security justifications were used as a pretextual basis to pursue other policy goals.<sup>221</sup> Included in this recent use of Section 232 is the presence of an exclusion regime, which permits parties to “request exclusions for items that are not ‘produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality.’”<sup>222</sup> Further stoking discontentment over the administration’s imposition of the tariffs was the perception that this exclusion regime was “neither transparent nor objective,” and was being used to favor certain companies, granting them “improper influence”<sup>223</sup> and permitting the administration to “pick winners and losers.”<sup>224</sup> It is against this backdrop that much of the recent litigation surrounding Section 232 is laid.

## 2. Relevant Case Law Interpreting Section 232

The Supreme Court analyzed Section 232 tariffs in *Federal Energy Administration v. Algonquin SNG, Inc.*, holding, under the intelligible-principle test, that the Act did not impermissibly delegate legislative authority to the executive branch.<sup>225</sup> At issue in that case was President Ford’s action to impose licensing fees on imported oil, premised on the judgment that “it [was] necessary and consistent with the national security to further discourage importation into the United States of petroleum,

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“that steel and aluminum imports make the U.S. military vulnerable”); John Brinkley, *Trump’s National Security Tariffs Have Nothing To Do with National Security*, *Forbes* (Mar. 12, 2018), <https://www.forbes.com/sites/johnbrinkley/2018/03/12/trumps-national-security-tariffs-have-nothing-to-do-with-national-security/?sh=197f0c6e706c> [https://perma.cc/WZE3-AYNP] (arguing that “[t]he national security argument [on behalf of the tariffs] is a sham and everyone knows it,” as “[n]ot even Defense Secretary James Mattis bought it”).

<sup>221</sup> See Brinkley, *supra* note 220 (“It’s obvious that [the President] used the national security argument as a pretense for something he wanted to do, but for which he had no other legal justification.”).

<sup>222</sup> See Fefer, *supra* note 219, at 12 (quoting Requirements for Submissions Requesting Exclusions from the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel into the United States and Adjusting Imports of Aluminum into the United States, 83 Fed. Reg. 12,106 (Mar. 19, 2018)).

<sup>223</sup> Andrea Shalal, *U.S. Handling of Tariffs Raises Appearance of ‘Improper Influence’: Watchdog*, *Reuters* (Oct. 30, 2019) (quotation omitted), <https://www.reuters.com/article/us-usa-trade-steel/u-s-handling-of-tariffs-raises-appearance-of-improper-influence-watchdog-idUSKBN1X92KP?feedType=RSS&feedName=topNews> [https://perma.cc/5XPA-33J6].

<sup>224</sup> Fefer, *supra* note 219, at 12–15; see also Shalal, *supra* note 223 (explaining that the Commerce Department’s inspector general found a lack of transparency surrounding the Trump Administration’s tariff policy).

<sup>225</sup> 426 U.S. 548, 558–60 (1976).

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petroleum products, and related products.”<sup>226</sup> The Court of Appeals in that case limited the breadth of the statute, apparently avoiding any potential delegation challenges,<sup>227</sup> holding that the challenged programs utilized by Presidents Nixon and Ford went beyond what Congress authorized them to do.<sup>228</sup> According to the D.C. Circuit, the statute only authorized the President to “adjust imports to protect national security through direct mechanisms.”<sup>229</sup> The Supreme Court disagreed, holding that the Act authorized the licensing fee scheme utilized by the President.<sup>230</sup> In so holding, the Court explicitly stated that the Act “easily fulfills [the intelligible principle] test.”<sup>231</sup>

To be sure, the Court in *Algonquin* did not seem to take the delegation claim seriously. The Court, in its 22-page opinion, dedicated about 350 words to the issue of potential “improper delegation.”<sup>232</sup> Speaking largely in conclusory fashion, the Court deemed that the President’s action was confined by “clear preconditions” and was “far from unbounded.”<sup>233</sup> Thus, according to the Court, it did not require any further attention. It is curious, however, that the Court did not take note of the fact that the “clear preconditions” constraining the President were simply the subjective determinations of another member of the *executive* branch.<sup>234</sup> That is clearly distinct from conditioning the President’s action on a finding of fact, as whatever “threaten[s] to impair the national security” is not a purely factual determination.<sup>235</sup>

One could similarly question the Court’s conclusion that “the leeway that the statute gives the President in deciding what action to take . . . is far from unbounded.”<sup>236</sup> The Court pointed to the fact that “[t]he President

<sup>226</sup> Proclamation No. 4341, 40 Fed. Reg. 3965, 3966 (Jan. 27, 1975); see also *Algonquin*, 426 U.S. at 554–55 (observing that President Ford’s Proclamation targeted the importation of petroleum and derivative products on the basis of national security concerns).

<sup>227</sup> *Algonquin SNG, Inc. v. Fed. Energy Admin.*, 518 F.2d 1051, 1062 (D.C. Cir. 1975) (“[W]e do not say that Congress cannot constitutionally delegate, accompanied by an intelligible standard, such authority to the President; we merely find that they have not done so by this statute. We reach no conclusion on any delegation issue raised by the parties.”).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Algonquin*, 426 U.S. at 570–71.

<sup>231</sup> *Id.* at 559.

<sup>232</sup> *Id.* at 558–60.

<sup>233</sup> *Id.* at 559.

<sup>234</sup> 19 U.S.C. § 1862(b) (2018) (preconditioning the President’s action on the determination of the Secretary of Commerce).

<sup>235</sup> *Id.* § 1862(a).

<sup>236</sup> *Algonquin*, 426 U.S. at 559.

can act only to the extent ‘he deems necessary to adjust the imports of such article . . . so that such imports will not threaten to impair the national security.’”<sup>237</sup> It is not at all clear, however, that such a requirement acts as a constraint on action at all. Constraining an actor by whatever the actor herself “deems necessary” is hardly a meaningful restriction. To be sure, the factors listed in Section 1862(d) provide somewhat of a meaningful check,<sup>238</sup> but even those are quite malleable.<sup>239</sup> The discretion conferred on the President, then, may not be entirely “unbounded,” but it is not, after all, all that “far from” it.<sup>240</sup> At the very least, the Court in *Algonquin* could have taken the delegation claim more seriously and provided a meaningful analysis for its conclusions.

These deficiencies were highlighted in the recent case before the Court of International Trade, *American Institute for International Steel v. United States*.<sup>241</sup> There, the court discussed “concerns” as to the “flexibility” bestowed on the President by Section 232, and the President’s ability “to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach.”<sup>242</sup> Nonetheless, the court quickly concluded that “such concerns are beyond this court’s power to address, given the Supreme Court’s decision in *Algonquin*.”<sup>243</sup> Nonetheless, one member of the three-judge panel, Judge Gary Katzmann,<sup>244</sup> wrote separately to “set forth [his] concerns” in greater detail.<sup>245</sup>

The question, as framed by Judge Katzmann, was: “Does section 232, in violation of the separation of powers, transfer to the President, in his virtually unbridled discretion, the power to impose taxes and duties that is fundamentally reserved to Congress by the Constitution?”<sup>246</sup> Judge

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<sup>237</sup> Id. (quoting 19 U.S.C. § 1862(b)).

<sup>238</sup> Id.

<sup>239</sup> See 19 U.S.C. § 1862(d) (providing, among other factors, that the President should, “without excluding other relevant factors” consider factors such as “unemployment,” “effects resulting from the displacement of any domestic products by excessive imports,” and “the investment, exploration, and development necessary to assure” growth of domestic industries pertinent to national security).

<sup>240</sup> See *Algonquin*, 426 U.S. at 559.

<sup>241</sup> 376 F. Supp. 3d 1335 (Ct. Int’l Trade 2019).

<sup>242</sup> Id. at 1344–45.

<sup>243</sup> Id. at 1345 (citation omitted).

<sup>244</sup> Not to be confused with Second Circuit Senior Judge Robert Katzmann.

<sup>245</sup> *Am. Inst. for Int’l Steel*, 376 F. Supp. at 1347 (Katzmann, J., concurring dubitante).

<sup>246</sup> Id. at 1346. Judge Katzmann previously concluded that the power at issue, imposing duties and tariffs, “is a core legislative function.” Id.

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Katzmann first reviewed *Aurora*, *Field*, and *J.W. Hampton*, and concluded that each statute at issue in those cases did not represent an unconstitutional delegation of power “because they provided ascertainable standards to guide the President.”<sup>247</sup> Applying the same “intelligible principle” test to Section 232, and reaching a different conclusion than the Court in *Algonquin*, Judge Katzmann stated that the Act “provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress.”<sup>248</sup> Thus, according to Judge Katzmann, “it is difficult to escape the conclusion that the statute has permitted the transfer of power to the President in violation of the separation of powers.”<sup>249</sup>

### 3. Section 232 Analyzed Under the Traditional Tests

On its face, it may seem as though any close call under the “intelligible principle” standard would be an easy one under Justice Gorsuch’s apparently more stringent nondelegation analysis.<sup>250</sup> It seems evident, based on Judge Katzmann’s concurrence and the majority’s opinion in *American Institute for International Steel*, that Section 232 presents such a close call under the “intelligible principle” analysis.<sup>251</sup> Even still, analysis of the statute under Justice Gorsuch’s “traditional tests” is anything but a foregone conclusion. First, there is at least an argument that the Act is appropriate as it conditions the President’s actions on a

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<sup>247</sup> Id. at 1351–52.

<sup>248</sup> Id. at 1352.

<sup>249</sup> Id.

<sup>250</sup> Certainly, those who would claim that Justice Gorsuch’s position makes “most of Government . . . unconstitutional” would seem to agree with this statement. See *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (plurality opinion).

<sup>251</sup> See *Am. Inst. for Int’l. Steel*, 376 F. Supp. 3d at 1344–45 (majority opinion) (concluding that although, among other concerns, Section 232 “bestow[s] flexibility on the President and seem[s] to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach,” “such concerns are beyond this court’s power to address, given the Supreme Court’s decision in *Algonquin*”); see also id. at 1352 (Katzmann, J., concurring dubitante) (“[I]t is difficult to escape the conclusion that [Section 232] has permitted the transfer of power to the President in violation of the separation of powers.”). The conclusion that Section 232 presents a nondelegation “close call” is not undercut by the cursory analysis provided by the Court in *Algonquin*. To be sure, the Court there stated that Section 232 “easily fulfills” the intelligible-principle test. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976). That statement notwithstanding, as stated above, the Court did not meaningfully analyze the delegation claim in *Algonquin*. See *supra* Subsection IV.B.ii.

finding of fact.<sup>252</sup> Additionally, Section 232 represents a unique confluence of legislative and executive duties—a fact largely overlooked by Judge Katzmman’s opinion.<sup>253</sup> On the one hand, it involves “the power to impose duties[, which] is a core legislative function.”<sup>254</sup> On the other hand, however, it is centrally focused on “national security.”<sup>255</sup> National security implicates “international relations,” which is within the “exclusive power of the President.”<sup>256</sup> Thus, the statute could be defended on the grounds that it is assigning certain non-legislative responsibilities.<sup>257</sup>

First, it seems clear that Section 232 limits the President’s action based on a condition precedent: whether an article is being imported “in such quantities or under such circumstances as to threaten to impair the national security.”<sup>258</sup> It is less clear, however, whether this condition precedent is a sufficiently *factual* determination, as opposed to a policy determination. While a purely factual determination would face no delegation issues, a policy determination would be an improper delegation.<sup>259</sup> To be sure, a finding that something “threaten[s] to impair the national security”<sup>260</sup> seemingly permits much greater discretion (therefore making it less objective or fact-bound) than those conditions that the Court faced in its early cases articulating this principle.<sup>261</sup> Further,

<sup>252</sup> See supra Section III.B.

<sup>253</sup> Cf. *Am. Inst. for Int’l. Steel*, 376 F. Supp. 3d at 1352 (Katzmann, J., concurring dubitante) (providing brief recognition of “the flexibility that can be allowed the President in the conduct of foreign affairs”).

<sup>254</sup> *Id.* at 1346 (Katzmann, J., concurring dubitante).

<sup>255</sup> 19 U.S.C. § 1862(a) (2018).

<sup>256</sup> See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

<sup>257</sup> See supra Section III.C.

<sup>258</sup> 19 U.S.C. § 1862(c)(1)(A). Indeed, the Court in *Algonquin* stated as much. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976) (“[Section 232] establishes clear preconditions to Presidential action.”).

<sup>259</sup> Compare *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538 (1935) (holding that the conditions precedent to presidential action in the Recovery Act were more appropriately described as “a statement of an opinion as to the general effect” that the proposed regulations would have) with *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 382–83, 388–89 (1813) (holding that delegating the authority to the President to reinstate a law based on the factual determination of Great Britain’s ceasing to violate the neutral commerce of the United States was constitutionally permissible).

<sup>260</sup> 19 U.S.C. § 1862(c)(1)(A).

<sup>261</sup> See, e.g., *Aurora*, 11 U.S. at 382, 387–89 (reviewing the statutory scheme that “ma[d]e the revival of an act depend upon a future event”); *Union Bridge Co. v. United States*, 204 U.S. 364, 366–67 (1907) (requiring a finding of “an unreasonable obstruction to the free navigation” of navigable waters).

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it is not clear that the Section 232 finding is any more constrained than that which was deemed insufficient in *Schechter Poultry*.<sup>262</sup>

The Secretary and President are constrained in Section 232 by which factors to consider in the “national security” determination, such as the requirement to consider “national defense requirements” and “the capacity of domestic industries to meet such requirements.”<sup>263</sup> In *Schechter Poultry*, as described in Section III.B, the President’s action under the Recovery Act was conditioned upon findings that the proposed code (1) “no[t] inequitably restrict[.]” membership in trade associations; (2) not promote monopolies; and (3) would “tend to effectuate the policy” of the Act.<sup>264</sup> There, the Court deemed that these findings left “virtually untouched the field of policy” contemplated by the Act.<sup>265</sup> Section 232 is distinguishable from the Recovery Act in that the factual finding—a threat to national security—is distinct from the policies enacted to remedy that problem: economic measures.<sup>266</sup> Meanwhile, in *Schechter Poultry*, the conditioned findings were all intertwined with the overall policy: economic recovery.<sup>267</sup>

Even still, while the national security finding is distinct from the insufficient finding required by the Recovery Act in *Schechter*, that does not make the finding any more “factual” or effectively constraining. That is due to a simple truth: “national security is a malleable concept.”<sup>268</sup> The term is difficult to define and is rarely given a definition when invoked.<sup>269</sup> Even when the term is given a definition, that definition is often little more than “an amorphous description, open to wide interpretation.”<sup>270</sup> The ultimate determination as to what “threaten[s] to impair the national security” is, therefore, at least arguably too broad and malleable to be

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<sup>262</sup> See supra note 114 (listing the precedent findings the President was required to make under the Recovery Act at issue in *Schechter Poultry*).

<sup>263</sup> 19 U.S.C. § 1862(d).

<sup>264</sup> *Schechter Poultry*, 295 U.S. at 538 (citations omitted).

<sup>265</sup> *Id.*

<sup>266</sup> See 19 U.S.C. § 1862(a), (b), (c).

<sup>267</sup> *Schechter Poultry*, 295 U.S. at 538.

<sup>268</sup> *Meshal v. Higginbotham*, 804 F.3d 417, 443 (D.C. Cir. 2015) (Pillard, J., dissenting).

<sup>269</sup> See, e.g., Laura K. Donohue, *The Limits of National Security*, 48 *Am. Crim. L. Rev.* 1573, 1577–87 (2011) (providing an in-depth analysis of how to best define “national security”).

<sup>270</sup> *Id.* at 1580.

properly labeled a “factual” inquiry.<sup>271</sup> Thus, it seems as though whether the delegation in this instance will survive scrutiny under the traditional tests will turn on *to whom* the delegation is granted, rather than on the limits placed upon that delegation. Specifically, is it providing the President with “discretion . . . over matters already within the scope of executive power?”<sup>272</sup>

The field of “international relations” falls within the “plenary and exclusive power of the President.”<sup>273</sup> Even still, while “national security” may implicate foreign affairs, it is clear that “national security” does not fall within the *exclusive* powers of the President.<sup>274</sup> Rather, Congress and the President exercise national security powers concurrently.<sup>275</sup> A finding of concurrent authority, however, obviously does not *remove* that power from the Executive for the purposes of delegation. In fact, Justice Gorsuch’s test explicitly points to areas of concurrent authority, areas where “Congress’s legislative authority . . . overlaps with authority the Constitution separately vests in another branch.”<sup>276</sup> While the exact contours of executive authority are unclear,<sup>277</sup> it is non-controversial that the Executive carries significant authority in the arena of national security.<sup>278</sup>

<sup>271</sup> 19 U.S.C. § 1862(a); see also, Bettencourt, *supra* note 206, at 715 (noting the “broad discretion” granted to the “executive branch’s interpretation of ‘national security’” under Section 232) (citation omitted).

<sup>272</sup> See Schoenbrod, *supra* note 71, at 1260.

<sup>273</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936).

<sup>274</sup> See, e.g., Abraham D. Sofaer, *Presidential Power and National Security*, 37 *Presidential Stud. Q.* 101, 120 (2007) (“The Constitution allocates powers over national security to all the branches that enable each to affect national policy.”); Schoenbrod, *supra* note 71, at 1260–61 (describing the confluence of executive and legislative power in the “war and foreign affairs” context).

<sup>275</sup> Sofaer, *supra* note 274, at 120. For example, Congress holds the power to declare war, U.S. Const. art. I, § 8, while the President, as Commander in Chief, exercises simultaneous military and national security powers. U.S. Const. art. II, § 2.

<sup>276</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence.”).

<sup>277</sup> To be sure, an analysis of executive powers is a topic of ongoing debate and is well beyond the scope of this Note. See, e.g., Sofaer, *supra* note 274, at 120–22 (explaining the debate over those powers which are exercised exclusively by the President and which powers are shared with other branches).

<sup>278</sup> *Id.* at 120.

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To be sure, the “Power To lay and collect . . . Duties” is an exclusively legislative authority.<sup>279</sup> Nonetheless, once the President’s authority to act in the interest of national security is conceded, the Section 232 delegation must be upheld under Justice Gorsuch’s approach. In Section 232, Congress is not empowering the President to impose tariffs for the sake of imposing tariffs, which would be a usurpation of Congress’s role. Rather, Congress is empowering the President to use the tariff authority as one means by which to act in the interest of national security. The *primary* delegation is that of national security power, not tariff authority. Thus, while the statute’s grant of authority is broad and the conditioning of Presidential action is questionable at best, because Congress is empowering the President to act “over matters already within the scope of executive power,”<sup>280</sup> it is constitutionally permissible under Justice Gorsuch’s *Gundy* standard.<sup>281</sup>

## CONCLUSION

Justice Gorsuch’s *Gundy* dissent has made waves in the legal community, as it signals the beginnings of a potential unraveling of the administrative state that has defined much of American life in the 20th and 21st centuries. Justice Gorsuch made clear, however, that, at least in his view, his approach did not “spell doom for what some call the ‘administrative state.’”<sup>282</sup> The veracity of that claim has been put to task above to determine the practical impact that a return to the tests articulated in the Court’s early nondelegation cases would have on the federal bureaucracy. To be sure, the tests are at least moderately more restrictive than the toothless “intelligible principle” test, and statutes that have been upheld under that standard may face increased scrutiny under a reinvigorated approach. Nonetheless, the alarmist concerns articulated in

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<sup>279</sup> U.S. Const. art. I, § 8; see also *Am. Inst. for Int’l Steel v. United States*, 376 F. Supp. 3d 1335, 1346 (Ct. Int’l Trade 2019) (Katzmann, J., concurring dubitante) (“[T]he power to impose duties is a core legislative function.”).

<sup>280</sup> Schoenbrod, *supra* note 71, at 1260.

<sup>281</sup> This, clearly, does not require a finding that the administration’s actions under Section 232 discussed previously are permissible. Those actions remain subject to challenge on the grounds that the President has stepped beyond the bounds of Section 232 and is not acting in the interest of national security. That analysis encompasses an entirely different set of questions and is not addressed by this Note.

<sup>282</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting).

the wake of the decision largely are without merit—applying the traditional tests does not unwind “most of Government” as we know it.<sup>283</sup>

The traditional approach to which Justice Gorsuch advocates returning is not some hyper-restrictive, formalist approach that prohibits Congress from delegating authority in any and all circumstances. Rather, it is a recognition that the principle of separation of powers places meaningful boundaries on the respective branches of government. In light of that recognition, it is an articulation of a meaningful approach to discern when those boundaries are breached. Nonetheless, as displayed above, there is ample space within those tests to provide “Congress the necessary resources of flexibility and practicality . . . to perform its function.”<sup>284</sup> Insofar as the primary critique of Justice Gorsuch’s position is that it makes inevitable the unwinding of the administrative state, that criticism simply does not hold water.

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<sup>283</sup> *Id.* at 2130 (plurality opinion).

<sup>284</sup> *Yakus v. United States*, 321 U.S. 414, 425 (1944) (alterations in original) (quoting *Currin v. Wallace*, 306 U.S. 1, 15 (1939)).