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Mutually Intelligible Principles?

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Abstract

Are the nondelegation, major questions, and political question doctrines mutually intelligible? This article asks whether there is more than superficial resemblance between the nondelegation, major questions, and political question concepts in Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), an early nondelegation case that has become focal in recent nondelegation and major questions scholarship and*

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jurisprudence. I argue that the nondelegation and political question doctrines do interact conceptually in Wayman*, though not as current proponents of the nondelegation doctrine on the Supreme Court seem to understand it. The major questions doctrine by contrast conscripts the nondelegation concept while overwriting its relationship with elements of the political question doctrine. In* West Virginia v. EPA*, 142 S. Ct. 2587 (2022), Justice Neil Gorsuch and his adherents have, in effect, subverted key aspects of Chief Justice John Marshall's reasoning in* Wayman *while outwardly relying upon it to claim legitimacy. I conclude that faithfully reading* Wayman *urges a political question rationale for lower courts to decline to reach the merits of major questions and nondelegation challenges in the wake of* West Virginia*.*

I. INTRODUCTION

West Virginia v. EPA[1] may signal that the major questions doctrine has absorbed or superseded the nondelegation doctrine. There can be no mistaking the two doctrines' close relationship in the current Supreme Court's view. Though this much is clear, this leaves lower courts with little direction as to what to do with the entangled state of the two doctrines following *West Virginia*. Closely examining the doctrinal origins of the current Court's vision provides an answer that would surely surprise modern proponents of the major questions and nondelegation doctrines: lower courts should hesitate to reach the merits of major questions and nondelegation challenges under a political question rationale.

An early decision by Chief Justice John Marshall, *Wayman v. Southard*,[2] has gained focus in recent nondelegation analyses—not only in *West Virginia*, but also in *Gundy v. United States*,[3] *Jarkesy v. SEC*,[4] and the academic treatments surrounding them. The recent

1. *See generally* West Virginia v. EPA, 142 S. Ct. 2587 (2022) (adopting the major questions doctrine for analyzing congressional grants of authority to administrative agencies).

2. *See generally* Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825) (holding federal courts to not be subject to state legislation and recognizing the power of Congress to regulate court procedure).

3. *See generally* Gundy v. United States, 139 S. Ct. 2116 (2019) (upholding congressional delegation of authority to implement provisions of criminal statute based on feasibility considerations, while relying on statutory interpretation to determine whether Congress has supplied an intelligible principle to guide the delegee).

4. *See generally* Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022) (holding *inter alia* that discretion to bring SEC enforcement actions before either administrative

prominence of *Wayman* is noteworthy in itself, as it received hardly any attention during the last major chapter of the nondelegation debate, around the time of *Whitman v. American Trucking Associations*.[5] It still is only selectively quoted. More holistically, reading *Wayman* points to a political question principle that has escaped attention from scholars and jurists alike.

Nondelegation proponents draw on a remark by Chief Justice Marshall in *Wayman*,[6] concerning whether Congress could delegate to the federal courts to regulate their own procedures.[7] Justice Neil Gorsuch's dissent in *Gundy* exemplifies this, observing with a conspicuous ellipsis that "[a]s Chief Justice Marshall explained, Congress may not 'delegate . . . powers which are strictly and exclusively legislative.'"[8] Justice Gorsuch and the *Gundy* plurality agreed on this point: Justice Elena Kagan's opinion also relied on *Wayman*.[9] While the doctrine did not invalidate the delegation in *Wayman*, it is true that Chief Justice Marshall entertained whether "Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."[10]

Wayman of course was not Chief Justice Marshall's only inquiry into separation of powers. His articulation of a political question doctrine in *Marbury v. Madison*[11] is still better known than his entertaining of a nondelegation concept in *Wayman*, even after vigorous nondelegation debate since *Gundy*. Chief Justice Marshall reasoned in *Marbury*,

> where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing

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tribunals or Article III courts violated the nondelegation doctrine, as a lack of explicit statutory guidance for selecting one forum versus the other failed the intelligible principle standard).

5. *See generally* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (surveying prior nondelegation precedents and their impact on administrative agencies).

6. *See Wayman*, 23 U.S. (10 Wheat.) at 15.

7. For a discussion of *Wayman*'s facts, *see infra* note 52.

8. *Gundy*, 139 S. Ct. at 2133. In another recent example, the Fifth Circuit seized on the same language, albeit without the ellipsis. *See Jarkesy,* 34 F.4th at 460; *see also* discussion *infra* Sections II–III (regarding the ellipsis and elided context matters).

9. *See Gundy*, 139 S. Ct. at 2123 (2019); *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2626–44 (2022) (Kagan, J., dissenting) (making no reference to *Wayman*).

10. *Wayman*, 23 U.S. (10 Wheat.) at 42.

11. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166, 170 (1803) (holding that certain constitutional powers are only politically examinable).

> can be more perfectly clear than that their acts are only politically examinable.[12]

Such discretionary executive acts are nonjusticiable.

Justice Gorsuch returned to *Wayman* in his concurrence in *West Virginia*, with another conspicuous ellipsis. Selectively quoting both the Constitution[13] and *Wayman*, he implied that Chief Justice Marshall had announced a so-called "major questions doctrine" in *Wayman*: "[a]s Chief Justice Marshall put it, this means that 'important subjects . . . must be entirely regulated by the legislature itself,' even if Congress may leave the Executive 'to act under such general provisions to fill up the details.'"[14] Justice Gorsuch would plant the "major questions doctrine" alongside the imagined roots of the nondelegation doctrine, and possibly supplant it.[15]

The nondelegation, major questions, and political question doctrines each concern the judiciary's role in policing separation of powers, yet seem to point in different directions. According to their modern proponents, the nondelegation and major questions doctrines direct the judiciary toward deeper involvement in the relationship between the two other branches. The political question doctrine meanwhile keeps the judiciary on the sidelines. Despite this apparent divergence, they share aspects that resemble one another. The nondelegation doctrine eventually found its "intelligible principle" test in *J.W. Hampton, Jr., & Co. v. U.S.*: "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[16] The political question doctrine for its part turns on a multi-factor analysis, including whether there is "a lack of judicially discoverable and manageable standards for resolving" the case.[17] The current Court, meanwhile, defines a so-called "major question" as one of "great political significance," apparently without regard to whether it is nonjusticiable as a

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12. *Id.* at 166.

13. *See West Virgini*a, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (quoting U.S. CONST. pmbl; *id.* art. I, § 1).

14. *Id.* (quoting *Wayman*, 23 U.S. (10 Wheat) at 43).

15. Justice Gorsuch's citation to *Marshall Field & Co. v. Clark*, should confirm that he imagines a relationship between the major questions and nondelegation doctrines. *See id.* (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)). So should his lengthy footnote reference to scholarship favoring an activist nondelegation doctrine. *See id.* at 2625 n.6.

16. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

17. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

political question.[18] The still forming major questions doctrine considers whether Congress has legislated specifically enough on "important subjects'" before handing off to other branches to '"fill up the details."[19]

This article asks whether there is more than superficial resemblance between these concepts in *Wayman*. Are the nondelegation, major questions, and political question doctrines mutually intelligible? I argue that the nondelegation and political question doctrines do interact conceptually in *Wayman*, though not as current proponents of the nondelegation doctrine as the Supreme Court seem to understand it. The rationales underlying the nondelegation and political question doctrines overlaid one another in *Wayman*. The major questions doctrine by contrast conscripts the nondelegation concept while overwriting its relationship with elements of the political question doctrine. Justice Gorsuch and his adherents have, in effect, subverted key aspects of Chief Justice John Marshall's reasoning in *Wayman* while outwardly relying upon it to claim legitimacy. I conclude that faithfully reading *Wayman* surfaces a political question rationale that encourages lower courts to decline to reach the merits of major questions and nondelegation challenges in the wake of *West Virginia*.

Following this Introduction, Part II discusses how influential scholarship has debated the originalist bona fides of the nondelegation doctrine, while at the same time it has advanced and disputed new formulations of the doctrine reliant on *Wayman*.[20] Part III examines the role of *Wayman* in recent judicial conceptions of the nondelegation doctrine, as well as in shaping the nascent major questions doctrine, which appears likely to subsume the former.[21] Part IV presents a more complete reading of *Wayman* revealing a political question principle embedded in the nondelegation doctrine, including as it informs the major questions doctrine, which urges judicial restraint.[22] Part V concludes.

II. *WAYMAN* IN SCHOLARLY DEBATE FROM NONDELEGATION TO MAJOR

18. *Cf. West Virginia* 142 S. Ct. at 2621 (Gorsuch, J., concurring) (defining the doctrine as one of great political significance, despite it being nonjusticiable as a political question).

19. *Id.* at 2617 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825)).

20. *See* discussion *infra* Section II.

21. *See* discussion *infra* Section III.

22. *See* discussion *infra* Section IV.

QUESTIONS

The relatively sudden consensus over *Wayman* in *Gundy* as the origin of a nondelegation doctrine should not pass unnoticed. When the nondelegation doctrine came before the Court in 2001 in *Whitman*,[23] none of the opinions mentioned *Wayman* even once. Both Justice Antonin Scalia and Justice Clarence Thomas presented *Hampton* as foundational.[24] Why Justice Gorsuch and Justice Kagan converged two decades later from opposite wings of the Court on *Wayman* finds a likely explanation in scholarly debate over whether the nondelegation doctrine has the originalist bona fides its proponents claim.

The consensus over *Wayman* matters because it suggests *which* nondelegation doctrine is currently in play. The nondelegation doctrine has fluctuated between rationales throughout its history at the Supreme Court.[25] Except for outliers *A.L.A. Schechter Poultry Corp. v. United States*[26] and *Panama Refining Co. v. Ryan*,[27] *Hampton*'s "intelligible principle" test has never invalidated an interbranch delegation before the Supreme Court. The current Court appears to be reinventing its nondelegation test in the form of the major questions doctrine,[28] which may preempt *Hampton*'s chance to find effect ever again. If *Wayman* truly remains the foundation, however, unconstitutional interbranch delegations should remain elusive. In contrast with outliers *Schechter Poultry*, *Panama Refining*, and the modern proponents who quote John Locke while envisioning an antique hermetic seal between branches,[29] the nondelegation doctrine of *Wayman* is inherently permissive and restrained. *Wayman* furthermore repeatedly expresses discomfort with the lack of discoverable standards for delineating between the powers of the branches in the absence of direction from Congress. The scholarly debate lays groundwork for

23. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

24. *See id*. at 472; *id.* at 487 (Thomas, J., concurring).

25. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 283–85 (2022); *see also* Andrew J. Ziaja, Note, *Hot Oil and Hot Air: The Development of the Nondelegation Doctrine Through the New Deal, a History 1813–1944*, 35 HASTINGS CONST. L. Q. 921, 924–25 (2008).

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

27. *See generally* Pan. Refin. Co. v. Ryan, 293 U.S. 388 (1935).

28. *See* West Virginia v. EPA, 142 S. Ct 2587, 2634 (2022) (Kagan, J., dissenting) (noting that this is the first time that the major questions doctrine has been invoked).

29. *See, e.g.,* Gundy v. United States, 139 S. Ct. 2116, 2133–34 (2019) (Gorsuch J., dissenting) (quoting JOHN LOCKE, SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION § 141 (1689)).

understanding the relationship between the nondelegation doctrine, major questions doctrine, and the "manageable standards" factor of the political question doctrine.

A. Debate Between *Whitman* and *Gundy*

Shortly before *Gundy* was argued, Keith Whittington and Jason Iuliano empirically refuted the traditional narrative. The nondelegation doctrine's supposed decline from the founding until the New Deal era was a myth, as it had never been a robust constraint on interbranch delegations in the first place.[30] Whittington and Iuliano explained the persistence of the myth as an outgrowth of the pre-New Deal nondelegation jurisprudence's obscurity.[31] The early doctrine developed chiefly in state and lower federal courts.[32] It only infrequently came before the U.S. Supreme Court in the nineteenth and early twentieth centuries, and likewise received infrequent attention from scholars.[33]

Whittington and Iuliano start with *The Cargo of the Brig Aurora v. United States*,[34] the concept's actual first appearance in a Supreme Court decision, yet rightly draw attention to *Wayman*.[35] With the benefit of hindsight, two aspects of the Court's 1813 decision in the *Brig Aurora* should relegate it to the side. First, the delegation at issue involved foreign relations and trade: the Non-Intercourse Act of 1809, which empowered the President to lift embargos against Great Britain and France in the context of their conflict in the Napoleonic Wars.[36] This situated the *Brig Aurora* within what is sometimes called an "independent authority" or "cognate" exception to the nondelegation doctrine that later solidified in 1892 in *Marshall Field & Co. v. Clark* and 1937 in *United States v. Curtiss-Wright Export Corp*.[37] The so-

30. *See* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 380 (2017).

31. *See id.* at 383 ("[T]he U.S. Supreme Court heard relatively few nondelegation cases prior to the New Deal.").

32. *See id.*

33. *See id.*

34. *See id.* at 393; *see also* Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813).

35. *See* Whittington and Iuliano, *supra* note 30, at 395.

36. *See id.* at 393.

37. *See* Marshall Field & Co. v. Clark, 143 U.S. 649 (1892); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936). The exception was also featured in *Pan. Refin. v. Ryan, Co.*, in which the Court sought to establish its limits. *See* Pan. Refin. Co. v. Ryan, 293 U.S. 388 (1935).

called "cognate" exception recognizes that the nondelegation doctrine is at its least restrictive when the delegation concerns an area in which the recipient branch has independent constitutional authority, as with the President's authority over foreign relations and trade.

The second feature of the *Brig Aurora* that should set it aside is the form of authority that the Non-Intercourse Act delegated to the President.[38] The President did not have authorization under the statute to adopt expansive substantive regulations as in *Schechter Poultry*. The President instead could only trigger an event—the lifting of embargoes—based on conditions specified in the Act. In the *Brig Aurora*, the President was to determine whether by "the third day of March next" Great Britain and France had ceased violating the neutral commerce of the United States.[39] The President's discretion was thereby limited to fact-finding. Again, the benefit of hindsight is that starting with the *Brig Aurora*, the Supreme Court has routinely treated such "triggering" delegations almost as though not delegations at all, but rather as a form of "conditional" legislation.[40]

The lone and obvious counterexample of an invalidated "triggering" delegation is *Panama Refining* in 1935, which in fact proves the rule. In *Panama Refining*, Section 9(c) of the National Industrial Recovery Act ("NIRA") permitted the President *inter alia* to implement a ban on the interstate sale of petroleum when, in his discretion, it would effectuate the policies of the Act.[41] According to the Court, the NIRA did not "state whether, or in what circumstances or under what conditions, the President is to" implement the ban.[42] In contrast with the limited fact-finding authority at issue in the *Brig Aurora*, Section 9(c) in *Panama Refining* was only part of the expansive and ultimately doomed NIRA, which the Court further invalidated on nondelegation grounds in *Schechter Poultry*. The majority in *Panama Refining* also drew a vehement dissent from Justice Benjamin Cardozo, foreshadowing the reversal of the Court's reasoning five years later in *Sunshine*

38. *See* Whittington & Iuliano, *supra* note 30, at 393–94.

39. *See Cargo of the Brig Aurora*, 11 U.S. (7 Cranch) at 383.

40. The Court in *Hampton*, for example, explained that when Congress vested the President with the authority to implement legislation "upon a named contingency," he acted "merely in execution of the act of Congress. It was not the making of law. He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 410–11 (1928).

41. *See Pan. Refin. Co.*, 293 U.S. at 414–15 (discussing the National Industrial Recovery Act § 9(c)).

42. *See id.* at 415.

Anthracite Coal Co. v. Akins.[43] *Sunshine Anthracite* returned the Court to its view that Congress did not unlawfully delegate legislative power when granting discretion to the President to execute legislation based on future events.[44] Measured against *Panama Refining*, which still could not survive longer than the Court's next opportunity to abandon it, any case involving a "triggering" delegation as in the *Brig Aurora* would provide a flimsy historical foundation for the doctrine.

It makes sense, then, that Whittington and Iuliano would highlight *Wayman*.[45] It happened to be the next nondelegation case after the *Brig Aurora* to come before the Court, marking the Court's first use of the language of congressional "delegation" of power. More importantly, it involved a different category of legislation in the Process Act of 1789.[46] Whittington and Iuliano describe the delegation at issue in *Wayman* as though it were the Process Act's delegation of "the development of federal civil procedure to the states . . . . [which] were often going to be developed not by legislatures but by judges."[47] While this is partly correct, it was rather delegation to the *federal* judiciary that drew the nondelegation challenge.

Congress adopted the Process Act immediately following the Judiciary Act of 1789, which established the lower federal courts.[48] The Process Act filled the vacuum of federal procedural law by adopting state procedural rules in suits at common law:

> So far as the Process Act adopts the State laws, as regulating the modes of proceeding in suits at common law, the adoption is expressly confined to those in force in September, 1789. The act of Congress does not recognize the authority of any laws of this description which might be afterwards passed by the States. The system, as it then stood, is adopted

43. *See id.* at 433–48 (Cardozo J., dissenting); *see also* Sunshine Anthracite Coal Co. v. Akins, 310 U.S. 381 (1940).

44. *See Sunshine Anthracite Coal Co.*, 310 U.S. at 398. The Court held that the National Bituminous Coal Commission could set maximum coal prices whenever "in the public interest it deems it necessary in order to protect the consumer against unreasonably high prices." *Id.* at 397. Going further, the Court reasoned that delegation was *necessary* to preserve legislative power: "[d]elegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." *Id.* at 398.

45. *See* Whittington & Iuliano, *supra* note 30, at 415 n.238 (choosing *Wayman* as the earliest among examples of cases in which "federal courts have inferred the existence of the nondelegation doctrine").

46. *See id.* at 394 (discussing the Judiciary Act of 1789).

47. *Id.*

48. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 26–27 (1825).

> "subject, however, to such alterations and additions as the said Courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any Circuit or District Court concerning the same."[49]

The Court interpreted this "alterations and additions" language as empowering the "Courts of the Union" to adopt new superseding procedural law "as experience may suggest."[50] This included but was not limited to adopting new state laws, in addition to new federal procedural regulations.[51] This was what prompted the nondelegation challenge, which argued that "if extended beyond the mere regulation of practice in the Court, would be a delegation of legislative authority which Congress can never be supposed to intend, and has not the power to make."[52] The Court expressly permitted the delegation not as one to state legislatures or state courts, but to the "Courts of the Union."[53]

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49. *Id.* at 41.

50. *Id.* at 41–42.

51. *See id.*

52. *Id.* at 42. The dispute in *Wayman* concerned whether the execution by a federal law marshal of a judgment entered in United States District Court should be governed by state or federal procedural law. Plaintiffs argued in favor of federal law, while defendants insisted,

> that Congress has no power over executions issued on judgments obtained by individuals; and that the authority of the States, on this subject, remains unaffected by the constitution. That the government of the Union cannot, by law, regulate the conduct of its officers in the service of executions on judgments rendered in the Federal Courts; but that the State legislatures retain complete authority over them.

Id. at 21; *see also id.* at 48–49 ("The question really adjourned is, whether the laws of Kentucky respecting executions, passed subsequent to the Process Act, are applicable to executions which issue on judgments rendered by the Federal Courts?"). The application of federal procedural law to the acts of the marshal evidently was the "exten[sion] beyond the mere regulation of practice in the Court" to which defendants objected on nondelegation grounds. *Id.* at 42.

53. *Wayman*, 23 U.S. (10 Wheat.) at 41–42. The Court in fact turned the nondelegation argument back on defendants, asking whether the application of *state* law would amount to an unlawful delegation: "If Congress cannot invest the Courts with the power of altering the modes of proceeding of their own officers, in the service of executions issued on their own judgments, how will gentlemen defend a delegation of the same power to the State legislatures? The State assemblies do not constitute a legislative body for the Union. They possess no portion of that legislative power which the constitution vests in Congress, and cannot receive it by delegation." *Id.* at 47–48.

Wayman's distinctions from the *Brig Aurora* illustrate what makes it a more attractive candidate for the nondelegation's historical origins. Whereas the *Brig Aurora* only described the concept indirectly, *Wayman* expressly used the term "delegation."[54] *Wayman* also involved the delegation of rulemaking authority—the power of the judiciary to regulate procedures applicable to execution of its judgments—not merely the conditioning of enforcement on some "triggering" event.[55] *Wayman* nevertheless is unusual as an early Supreme Court nondelegation case, in that it involved a delegation to the judicial rather than the executive branch.

Although none of the opinions in *Whitman* mentioned it, some scholars around that time had taken notice of *Wayman*, well before Whittington and Iuliano and *Gundy*. Shortly after *Whitman*, in 2002 Eric Posner and Adrian Vermeule explicitly bypassed the *Brig Aurora* in favor of *Wayman* as the nondelegation concept's origin, though not in its modern form.[56] Posner and Vermeule posited that *Wayman* "adopts a different theory than the one modern nondelegation proponents have read into it."[57] They emphasize Chief Justice Marshall's categorization between "(1) 'exclusive' powers and (2) powers that Congress may choose either to exercise itself or to delegate to its agents. On this account, the constitutional restriction isn't the modern nondelegation doctrine or any of its variants."[58] There is nothing like any "intelligible principle" inquiry within this framework, as evidenced by the "blank-check delegation of rulemaking authority to the federal courts" upheld in *Wayman*.[59] Although Chief Justice Marshall acknowledged difficulty in drawing the line between the two, only delegations in the first category of "exclusive powers" were forbidden, while Congress could freely delegate within the second category of nonexclusive powers.[60] Posner and Vermeule identify *Field v. Clark* in 1892 as the Supreme Court's first consideration, albeit in dictum, of a

54. *Compare Wayman*, 23 U.S. (10 Wheat.) at 42 (recognizing that Congress may "delegate to others"), *with* The Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813) (holding that Congress may enact legislation, the enforcement of which, may be conditioned on future events).

55. *Wayman*, 23 U.S. (10 Wheat.) at 42.

56. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1737 (2002) (describing the *Brig Aurora* as standing for "no such proposition" as any nondelegation principle).

57. *Id.* at 1739.

58. *Id.* at 1738.

59. *Id.* at 1739.

60. *Id.* at 1738 (quoting *Wayman*, 23 U.S. (10 Wheat.) at 42–43).

modern nondelegation theory turning on the scope of discretion afforded by Congress to the President.[61]

Proponents of an activist nondelegation doctrine have given varying attention to *Wayman* since *Whitman*, though generally also count it as part of the historical foundation. In 2002, Gary Lawson proposed a reading of *Wayman* that echoes in Justice Gorsuch's concurrence in *West Virginia v. EPA*.[62] Lawson claimed that Chief Justice Marshall's "ultimate methodology for resolving delegation issues" turned on what the modern Supreme Court has begun to describe as a "major questions doctrine":

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.[63]

Lawson extrapolated from this "cryptic sentence," as he dubbed it, that Chief Justice Marshall meant to delineate "between legislative power and executive or judicial power" based on whether "the function in question involves 'important subjects' or matters of 'less interest.'"[64] Lawson's effort in this regard was descriptive; he was not in fact advocating that future jurists construct a "major questions doctrine" on this foundation.[65] Lawson described the notion as "pretty lame," contending that "the constitutionality of legislative authorizations to the executive and judicial actors cannot turn on something as ephemeral, and ultimately circular, as a distinction between

61. *See id.* at 1739. Posner and Vermeule also note the development of a modern nondelegation doctrine in the mid-nineteenth century in a dramatically different context from federal interbranch sharing of authority: state referenda and local-option laws. *See id.* Nondelegation in fact continues to be argued in surprising ways in state court disputes between state and local government, which would find no analogue in the federal jurisprudence. *See, e.g.*, City of San Diego's Combined Answer Brief on the Merits to the Opening Briefs of Respondent Pub. Emp. Rels. Bd. and the Real Parties in Interest Unions Brief for Respondent at 27–28, Boling v. Pub. Emp. Rels. Bd., 5 Cal. 5th 898 (2018), (No. S242034), 2017 WL 4618715, at *27–28 (arguing that city could not be bound by the acts of its mayor, purportedly because he had been exercising legislative authority that was nondelegable).

62. *See generally* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002) (discussing the nondelegation principle).

63. *Id.* at 360–61 (quoting *Wayman*, 23 U.S. (10 Wheat.) at 43).

64. *Id.* (quoting *Wayman*, 23 U.S. (10 Wheat.) at 43).

65. *See id.* at 361.

'important subjects' and matters of 'less interest.'"[66] Lawson further suggested that "a rule-of-law devotee like Justice Scalia" would flee from such a test "as a vampire flees garlic."[67] It is therefore truly remarkable that Justice Gorsuch in *West Virginia* explicitly relied on Lawson's 2002 discussion while attempting to anchor the Court's major questions doctrine alongside the nondelegation doctrine in *Wayman*.[68] The surfacing of *Wayman* in Justice Gorsuch's opinions in *Gundy* and *West Virginia* accordingly suggests a shift even within his wing of the Court.

This shift is evident in more recent and rehabilitative treatments, such as when Ronald Cass visited *Wayman* in 2017, on whom Justice Gorsuch also relied in *West Virginia*.[69] Cass presented *Wayman* without any of Lawson's frustration. While Cass recognized that *Wayman* did not provide express grounds for invalidating interbranch delegations, he argued that its "general contours" distill to a test focused on the subject matter of a legislative delegation: "[f]irst, it must consist of discretion on a matter of sufficiently slight importance not to require resolution by Congress. Second, it must convey a discretionary authority that is of the sort reasonably associated with the activity of the body exercising that discretion."[70]

The work of transforming the nondelegation doctrine into Justice Gorsuch's version of the major questions doctrine in *West Virginia* is evident here. Chief Justice Marshall's conjecture as to the existence of "important subjects" in *Wayman* inverted to become a limitation, which Cass expresses in the negative: "matter[s] of sufficiently slight importance."[71] Cass's even more tenuous invention was the idea that *Wayman* required analysis as to whether a delegation was "reasonably associated with the activity of the body exercising that discretion."[72] Nowhere in *Wayman* is there language that could be construed to fit Cass's "reasonably associated" prong. *Wayman* was simply not concerned with whether it was reasonable for Congress to delegate to the judiciary to regulate its procedures, or whether that

66. *Id.* (quoting *Wayman*, 23 U.S. (10 Wheat.) at 43).

67. *Id.*

68. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2624–25 n.6 (2022) (Gorsuch, J., concurring).

69. *See* Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. & PUB. POL'Y 147, 171–73 (2017); *see also West Virginia*, 142 S. Ct. at 2624–25 (Gorsuch, J., concurring).

70. Cass, *supra* note 69, at 160.

71. *Id.*

72. *Id.*

delegation was unreasonably broad based on the judiciary's function. Chief Justice Marshall's framework of "important subjects" versus those of "less interest" aimed at describing the inexact nature of the line between purely legislative power and forms of "blended" power.[73]

Justice Gorsuch's reliance in *West Virginia* on both Cass alongside Lawson provides a roadmap for retracing *Wayman*'s route from obscurity in *Whitman*.[74] Within Justice Gorsuch's wing of the Court, *Wayman* has appreciated in value from "pretty lame" in Lawson's eyes to Cass's "important subjects" test. Treatments like Lawson's and Cass's share with Justice Gorsuch's in *Gundy* and *West Virginia* that they give no attention to key aspects of Chief Justice Marshall's reasoning. As discussed in Section IV, what they miss is that *Wayman* points to a political question principle embedded in Chief Justice Marshall's understanding of the nondelegation inquiry.[75]

B. Debate Since *Gundy*

Debate since *Gundy* has generated dueling articles over the originalist bona fides of the nondelegation doctrine. Christine Chabot's 2021 historical investigation into the practice of delegation at the Founding responds to Justice Gorsuch's claim in *Gundy* that the long-standing intelligible principle test has "'no basis in the original meaning of the Constitution' or 'in history.'"[76] Chabot counters that Justice Gorsuch's claim rooted in "deficient accounts of Founding-era history," and that the historical record does not support his "formalist conceptions" of a "two-tiered" nondelegation doctrine distinguishing between private and public matters.[77] Michael Rappaport represents the "two-tiered" trend. He argues that eighteenth-century English views translated into a nondelegation doctrine at the Founding that categorically prohibited delegations coercively affecting private rights, as opposed to public matters as to which Congress could more

73. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43–46 (1825).

74. See *West Virginia*, 142 S. Ct. at 2625 n.6 (Gorsuch, J., concurring).

75. *See* discussion *infra* Section IV.

76. Christine Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 106 (2021) (quoting Gundy v. United States,, 139 S. Ct. 2116, 2139 (Gorsuch, J., dissenting)) (surveying the key literature inspired by Justice Gorsuch's *Gundy* dissent).

77. *Id.* at 106–07.

freely delegate.[78] Chabot challenges this view, defending the intelligible principle test as the formulation that "aligns most closely" with the Founders' understanding.[79] Her evidence focuses on public matters—debt and intellectual property rights—"that figures such as Hamilton, Madison, and Jefferson regarded as some of the most important questions facing our fledgling Republic."[80] That they debated nondelegation in reference to these public matters undermines the "two-tier" theory; both private and public matters occupied the same "tier."[81] The Framers furthermore generously delegated in these areas, refuting the claim that Congress must "resolve all important policy questions in legislation."[82] The historical record provides no basis for abandoning the intelligible principle analysis, Chabot argues.[83]

Nicholas Parrillo additionally refutes Rappaport's "two-tier" theory, with his research into early federal property tax law that granted tax officers broad discretion to valuate properties and adjust tax burdens according to policy considerations.[84] Parrillo's almost book-length study[85] is an uncommon work of legal and historical scholarship that fluently engages jurisprudential[86] and political developments alongside quantitative analysis.[87] Parrillo focuses as much on the legislative process[88] as on implementation of the federal tax program in the field over time.[89] The result is a tactile depiction of a 1790s federal tax regime that depended on local variation through administrative discretion, and that "achieved wide, enduring, bipartisan

78. *See* Chabot, *supra* note 76, at 107–08 (discussing Michael B. Rappaport, *A Two Tiered and Categorical Approach to the Nondelegation Doctrine*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 195–232 (Peter J. Walison & John Yoo eds., 2022)).

79. *See* Chabot, *supra* note 76, at 112.

80. *See id.*

81. *See id*. at 108–12

82. *See id.* at 112, 154.

83. *See id.* at 112.

84. *See id.* at 107–08 (comparing the arguments made by Nicholas R. Parrillo and Michael Rappaport); *see also* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L. J. 1288, 1302 (2021)).

85. *See generally* Parrillo, *supra* note 84 (discussing the importance of the public rights delegations during the 1790s federal tax regime).

86. *See id.* at 1417–29 (analyzing various potential avenues for judicial review of administrative actions alongside political developments).

87. *See id.* at 1384.

88. *See id.* at 1401–05.

89. *See id.* at 1439–55.

acceptance from 1798 onward."[90] The widespread acceptance of delegated discretion over essentially private rights matters in the 1790s federal tax regime severely undercuts the claim that private rights delegations occupied a "tier" above public rights delegations in importance.

Particularly relevant to this discussion is Julian Davis Mortenson and Nicholas Bagley's claim that "[t]here was no nondelegation doctrine at the Founding,"[91] together with Ilan Wurman's response centering on *Wayman*. These two articles with dueling titles appear to have emerged as the key vehicles for importing the scholarly debate into the courts. Justice Kagan and Justice Gorsuch indeed set Mortenson and Bagley against Wurman in their opinions in *West Virginia*.[92]

In 2021, Mortenson and Bagley expanded Whittington and Iuliano's focus on early nondelegation jurisprudence to include the Founders' understanding of interbranch delegation and sharing of powers.[93] They summarize that the Founders saw no inherent conflict with the constitutional design:

> The Founders would have said that agencies absolutely wield legislative power to the extent they declare binding rules that Congress could have enacted as legislation. At the same time, the Founders would have said—indeed, they did say—that such rulemaking also constitutes an exercise of the executive power to the extent it is authorized by statute. It isn't one or the other; it's both. And on the dominant understanding at the Founding, there was no separation-of-powers problem either way.[94]

This view animated *Wayman*'s recognition that "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."[95] This is not to say the Founders lacked concern regarding "consolidated power," rather they were satisfied that mechanisms for "reversion or control" of delegated authority would preserve "the principles of self-government" and the constitutional

90. *See id.* at 1455.

91. *See* Mortenson & Bagley, *supra* note 25, at 367.

92. *See generally* West Virginia v. EPA, 142 S. Ct. 2587, 2626–44 (2022) (Kagan, J., dissenting); *id.* at 2615–26 (Gorsuch, J., concurring).

93. *See* Mortenson & Bagley, *supra* note 25, at 280 n.12.

94. *Id*. at 331–32.

95. *Id.* at 283 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

order.[96] With such mechanisms in place, the Founders were content for the political process to run its course.[97]

Among Mortenson and Bagley's many valuable contributions is their interrogation of Justice Gorsuch's misreading of John Locke in his *Gundy* dissent. Invoking Locke, Justice Gorsuch cast *Wayman* as though it categorically forbade interbranch sharing of powers: "[t]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others."[98] Justice Gorsuch presented this Locke quotation to bridge *Wayman*'s recognition that Congress may not delegate "powers which are strictly and exclusively legislative" with the claim that the legislative and executive branches sharing *any* lawmaking power would be anathema to the constitutional design.[99] Justice Gorsuch only selectively quoted *Wayman*, however, eliding its clarification that "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."[100]

Mortenson and Bagley explain Justice Gorsuch's even more fundamental mistake as misunderstanding Locke in his historical context. Though Locke was engaged at the time in a debate over the limits of legislative power, he was not commenting on anything resembling the modern nondelegation doctrine.[101] Locke instead was among of a "small handful of writers" advocating for an "anti-alienation principle" in reference to whether Parliament could renounce its authority, return it to the King, and thereby end popular self-governance.[102] Locke worried that Parliament would "transfer" its legislative authority in the sense of permanent alienation of property, as understood in the seventeenth century.[103] "Delegation," by contrast, meant temporarily conferring authority to an agent.[104] While the Lockean anti-alienation concern did make its way into the Framers' arguments, it did so only sparsely.[105] In practical terms, neither the Framers nor the early

96. *See id.* at 292, 311–12.

97. *See id.* at 367.

98. Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (quoting LOCKE, *supra* note 29, § 141).

99. *See id.* at 2123 (majority opinion) (quoting *Wayman*, 23 U.S. (10 Wheat.) at 43).

100. *Wayman*, 23 U.S. (10 Wheat.) at 43.

101. *See* Mortenson & Bagley, *supra* note 25, at 307–08.

102. *See id.* at 307–09.

103. *Id.* at 307–08.

104. *Id.* at 308.

105. *See id.* at 312.

Court ever took seriously that Congress could relinquish its "full and complete legislative authority."[106]

Ilan Wurman responded directly in 2021, attempting to salvage the originalist project of discovering a robust nondelegation doctrine at the Founding.[107] Wurman concerns himself most with Mortenson and Bagley—his title parallels theirs—though he also devotes significant attention to Parrillo and Chabot.[108] Wurman's defense emphasizes how much the originalist nondelegation project has evolved since *Whitman*.

At the time of *Whitman*, proponents of a muscular nondelegation jurisprudence simply took for granted that the doctrine existed as they imagined it at the Founding. The "traditional narrative" was that later Courts abandoned it; the originalists needed only to retrieve it.[109] There is no mistaking that the nondelegation debate launched by *Whitman* was over a jurisprudential doctrine.[110] The explicit point was to reinvigorate a supposedly bygone judicial tool that could—in courts, via litigation—restrain the administrative state. Whittington and Iuliano then debunked the "traditional narrative" of a robust judicial nondelegation doctrine patrolling the courts since the Founding until the New Deal era. Since Whittington and Iuliano's exhaustive data leave little room to claim the courts ever gave it much force, the debate has moved on to what the Framers were reading at the time, what they thought about it, and how it influenced early legislation.[111] Here, too, the originalist project has stumbled, running into Mortenson and Bagley, Parrillo, and Chabot, who show a more permissive understanding at the Founding than the originalists anticipated.[112]

Wurman's defense is remarkably tepid. He does not argue that the historical record unequivocally supports the originalist

106. *See id.* at 313 (quoting Nat'l Bank v. Cnty. of Yankton, 101 U.S. 129, 133 (1880) (holding that Congress retained complete legislative authority over territorial legislatures as "political subdivisions" of the United States)).

107. *See generally* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L. J. 1490 (2021) (arguing that there was a nondelegation doctrine at the Founding).

108. *See id.* at 1494.

109. *See id.* at 1493; *see also* Mortenson & Bagley, *supra* note 25, at 279.

110. *See* Whitman v. Am. Trucking Ass'ns., 531 U.S. 457, 472–74 (2001).

111. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2133–34 (2019) (Gorsuch, J., dissenting) (discussing the framers' intentions in the creation of a system of separation of powers).

112. *See, e.g.*, Chabot, *supra* note 76, at 107–08 (discussing new research on congressional legislative delegations under the new Constitution); *see also* Parrillo, *supra* note 84, at 1313 (finding the federal board of tax commissioners of 1814–1815 had "sweeping rulemaking powers").

proposition—that originalists have truly been originalist all along as they claim. He instead shifts the terms of the debate,[113] claiming that "Mortenson and Bagley, Parrillo, and Chabot [do not] necessarily refute the proposition that Congress cannot delegate decisions involving private rights. Certainly, none refutes the proposition that Congress must decide all 'important subjects,' leaving only matters of administrative detail to the Executive."[114] The claim is no longer about reviving what once was, but rather about whether the nascent doctrine that nondelegation proponents envision today can be reconciled with the historical record.

Wurman concedes, at least, that the historical record does not unequivocally buttress originalist claims.[115] He insists that "[t]he historical record is sufficiently robust that we can in fact draw confident historical conclusions, even if there is disagreement over those conclusions."[116] Though he writes in reference to legislative debates over a delegation to the Executive to determine the routing of postal service roads, "history is messy—not to mention that the reporters recorded the representatives' remarks in shorthand. Yet it is certainly possible, even sensible, to take these statements for the proposition that many believed Congress could not delegate away its power."[117] Some members of Congress possibly believed in a nondelegation doctrine, as far as we can tell from the shorthand—is this the kind of "confident historical conclusion" he means? Wurman also comes near to recognizing that Parrillo's work on early tax law may preclude the "private conduct" branch of current nondelegation theory, but pulls back.[118] "That some originalists might be wrong about their particular test for nondelegation does not prove that there were no limits on delegation at all," he spins.[119]

This illustrates a feature of Wurman's discourse, throughout which he tries to flip the burden. Wurman seems to understand his task as merely to disprove Mortenson and Bagley's thesis that there was "no nondelegation doctrine at the Founding."[120] Justice Gorsuch

113. *See* Wurman, *supra* note 107, at 1498–1500 (discussing the debate over nondelegation and originalism).

114. *Id.* at 1494 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

115. *See id.* at 1494–97 (stating that historical records do not conclusively strengthen the argument of non-delegation powers).

116. *Id.* at 1501.

117. *Id.* at 1510.

118. *See id*. at 1554, 1556.

119. *Id.* at 1554.

120. *See id.* at 1494–99.

launched this phase in the debate, however, by claiming in *Gundy* that the intelligible principle test reflected "an understanding of the Constitution at war with its text and history."[121] Arguing the triple negative that there was *not no nondelegation doctrine* at the Founding obviously does not demonstrate Justice Gorsuch's claim that two-and-a-half centuries of judicial practice have been "at war . . . with history."[122] Wurman similarly seems to lower the bar for originalism, suggesting it is enough for "originalist work [to be] possible" and for its proponents to make "valid claims," as opposed to substantiating its self-image as *the* authoritative mode of judicial interpretation.[123]

Wurman's response to Mortenson and Bagley regarding the influence of John Locke on the Founders is another related example of his inclination to flip the burden. Recall Mortenson and Bagley's explanation that Justice Gorsuch and other nondelegation proponents have taken their favored Locke quotation out of its historical context, whose specific anti-alienation concerns, reflected in its use of the terms "transfer" versus "delegation," only sparsely influenced the Framers' debates.[124] Wurman's counter is that—however Locke understood them—the Framers did not recognize a distinction between these terms, using them interchangeably.[125] Mortenson and Bagley and Wurman could both be right, *arguendo*, a possibility Wurman allows.[126] Locke could have understood the terms one way, while the Framers could have understood them another. In that case, Locke could not have been as influential in shaping a nondelegation doctrine at the Founding as Justice Gorsuch and Wurman claim. It was Justice Gorsuch who turned attention to Locke in an effort to expand *Wayman* into a categorical framework for prohibiting interbranch sharing of power.[127] Even if there is only a lack of clarity in the relationship between Locke and the Framers' debates regarding early delegations, as

121. *See* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

122. *See id.*

123. *See* Wurman, *supra* note 107, at 1498–99.

124. *See* Mortenson & Bagley, *supra* note 25, at 307–12.

125. *See* Wurman, *supra* note 107, at 1521.

126. *See id.* at 1522. To cast doubt on Mortenson and Bagley's sustained contextual analysis, Wurman unconvincingly plucks only a single isolated example of Locke using the term "transfer" in a manner Wurman contends equates with "delegation." *See id.* at 1518–21.

127. *See Gundy*, 139 S. Ct. at 2133–34 (Gorsuch, J., dissenting) (quoting Wayman v. Southard 23 U.S. (10 Wheat.) 1, 42–43 (1825)).

Wurman allows, then Locke fails to bridge the gap between *Wayman* and the theories of modern nondelegation proponents.

Wurman still attempts to build a historical case for a judicial nondelegation doctrine, despite what he admits is a contested record. He is strikingly direct in this regard, proclaiming that "scholars will continue to debate, but judges have enough information at their disposal to make legitimate judgments about reviving a more robust nondelegation doctrine."[128] It is a jarring claim, as Wurman has no response at all to Whittington and Iuliano's empirical refutation that there is no robust judicial nondelegation doctrine to revive; he mentions their study not once. He hangs this part of his case on *Wayman*, reiterating the familiar language,[129] while burying the more creative theorizing in a footnote.[130] There he writes, "Chief Justice Marshall's dictum in *Wayman* has been referred to as an 'important subjects' theory of nondelegation. This theory is largely consistent with the view that Congress cannot delegate questions involving private rights, but it also could diverge in some ways."[131] Wurman then later concludes matter-of-factly that "[p]rivate rights and conduct are undoubtedly more

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128. Wurman, *supra* note 107, at 1556. This reflects yet a further downgrading of originalism, requiring only 'legitimate judgments' about history to substantiate sweeping jurisprudential changes in course. Leading into this, Wurman writes:

> It is worth reiterating that most of the historical record is available for inspection. The political thinkers influential on the Founding generation are well known, as are their writings. The scholars recently (and not so recently) writing in the nondelegation field have uncovered and discussed the relevant early legislation and the various debates surrounding them. Perhaps more evidence will be uncovered, but the amount of such evidence will be nothing like the amount of evidence already available. The question is rather about whose interpretation of the evidence is best.

Id. This may call to mind Marc Bloch's essential reflection on historiography, *The Historian's Craft*: "The variety of historical evidence is nearly infinite. Everything that man says or writes, everything that he makes, everything he touches can and ought to teach us about him. It is curious to note how many people, unacquainted with our work, underestimate the true extent of its possibilities." *See* MARC BLOCH, THE HISTORIAN'S CRAFT, 66 (1953).

129. *See* Wurman, *supra* note 107, at 1516–18 (emphasis omitted) (quoting *Wayman*, 23 U.S. (10 Wheat.) at 42–43) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative," and that there is a line "which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.").

130. *See id.* at 1494 n.8.

131. *Id.*

important than official conduct or public privileges . . . ."[132] This attenuated reading of *Wayman* forecasts Wurman's own "modest proposal" for courts to "fashion[] a workable nondelegation doctrine . . . ."[133] Wurman asserts that private-rights delegations should be measured by whether "the regulation of private rights is expressly authorized; the category of conduct that is covered by the delegation is narrow (passenger limits, passing ships, mandatory vaccinations, business closures); and the standards are at least relatively precise in context (safety, peace, and order)."[134]

Chief Justice Marshall did not discuss any distinction between private rights versus public matters in *Wayman*, however, though he could have. *Wayman* arguably permitted a delegation involving both an "important subject" and private rights according to Wurman's schema—the rules applicable to the seizure and disposal of private property in execution of civil judgments.[135] Chief Justice Marshall explained:

> The execution [in dispute] orders the officer to make the sum mentioned in the writ out of the goods and chattels of the debtor. This is completely a legislative provision, which leaves the officer to exercise his discretion respecting the notice. That the legislature may transfer this discretion [sic] to the Courts, and enable them to make rules for its regulation, will not, we presume, be questioned. . . . The power given to the Court to vary the mode of proceeding in this particular, is a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution. To vary the terms on which a sale is to be made, and declare whether it shall be on credit, or for ready money, is certainly a more important exercise of the power of regulating the conduct of the officer, but is one of the same principle.[136]

Chief Justice Marshall's use of the phrase "important exercise" may reflect looseness in his earlier description of "important subjects";

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132. *Id.* at 1556.

133. *Id.* at 1554–55.

134. *Id.* at 1555.

135. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 44 (1825) (observing "the writ is entirely silent with respect to the notice; with respect to the disposition which the officer is to make of the property between the seizure and sale; and, probably, with respect to several other circumstances which occur in obeying its mandate. These are provided for in the Process Act.").

136. *Id.* at 44–45.

perhaps it is a mistake to read too much into either. If there is commonality between an "important exercise" and "important subject" in *Wayman*, though, then any *Wayman*-based "nondelegation principle for major questions" would rest on infirm ground; *Wayman* permitted a delegation Chief Justice Marshall saw as pertaining to an "important exercise" of regulatory power. Even if Chief Justice Marshall did not intend overlap between "important exercises" and "important subjects," despite appearances, this passage from *Wayman* still casts doubt on Wurman's framework. Wurman's conception of private rights as very often constituting "important subjects," surely must encompass rules applicable to the seizure and disposal of private property to satisfy civil judgments. Chief Justice Marshall found "the great outlines"[137] of the Procedure Act sufficient to channel the discretion of the federal courts to regulate the "important exercise" of that power. However, Congress did not need to exhaustively legislate for Chief Justice Marshall to permit the delegation. Wurman's attempt to redeem the "two-tier" private rights theory of nondelegation is indeed too big an elephant to find refuge in *Wayman.*[138]

Among these recent treatments, Mortenson and Bagley come closest to hitting on *Wayman*'s political question rationale. Recall their observation that the Founders were content for the political process to run its course[139] so long as Congress supplied mechanisms for "reversion or control" of delegated authority.[140] As discussed further in Sections III and IV, this parallels the intelligible principle rationale that coalesced following the New Deal in *Yakus v. United States*,[141] which asks whether Congress supplied justiciable standards to guide courts in policing its delegations. This also echoes Chief Justice Marshall's hesitance to involve the judiciary in policing interbranch delegations in the absence of manageable statutory standards.

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137. *Id*. at 45. This "great outlines" theory of permissible delegation might suggest a modern discretion-based understanding earlier than some scholars have thought. *See*, *e.g.*, Posner & Vermeule, *supra* note 56, at 1739 (identifying Marshall Field Co. v. Clark, 143 U.S. 649 (1892) as the Supreme Court's first consideration, albeit in dictum, of a modern nondelegation theory turning on the scope of discretion afforded by Congress to the President).

138. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

139. *See* Mortenson & Bagley, *supra* note 25, at 367.

140. *Id.* at 312–13.

141. *See* Yakus v. United States, 321 U.S. 414, 426 (1944) ("Only if we could say that there is an absence of standards for the guidance of the Administrator's action … would we be justified in overriding its choice of means for effecting its declared purpose ….").

III. FOLLOWING WAYMAN FROM GUNDY THROUGH JARKESY AND WEST VIRGINIA

In her study of delegations at the Founding, which supports maintaining the intelligible principle test, Chabot's insight was not only historical. Writing between *Gundy* and *West Virginia*, she mapped where Justice Gorsuch and his adherents now appear to be taking the nondelegation doctrine. She noted that "in the wake of *Gundy*, it is doubtful that the intelligible principle requirement will continue to draw a majority of the Court."[142] At the time, she was uncertain whether the Court would adopt the "two-tier" theory, distinguishing between private and public matters, or else adopt a "nondelegation principle for major questions."[143] Chabot commented that Justice Gorsuch did not need to choose between the two options in *Gundy*, given its facts.[144] Following *West Virginia* and developments in the Fifth Circuit Court of Appeals, it seems possible the Court may try to keep both options in play, although the major questions framework is clearly dominant. This section examines where the *Gundy* plurality left the nondelegation doctrine before examining developments in nondelegation advocacy since then, in the decisions of the Fifth Circuit in *Jarkesy v. Securities and Exchange Commission*[145] and the Supreme Court in *West Virginia*.

A. *Gundy v. United States*

The *Gundy* plurality opinion may bookend the Court's intelligible principle jurisprudence for the foreseeable future. Probably not anticipating how many law review pages the word "transfer" would consume a few years later, Justice Kagan began, "[t]he nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."[146] Under the Sex Offender Registration and Notification Act ("SORNA"), *Gundy* involved the establishment of a common federal sex offender registry to close "loopholes and deficiencies" in state registries that "had allowed over 100,000 (about 20% of the total) to escape registration."[147] To close one such

142. Chabot, *supra* note 76, at 104–05.

143. *See id.* at 105 (quoting Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J. respecting the denial of certiorari)).

144. *See id.* at 106.

145. *See generally* Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022).

146. Gundy v. United States, 139 S. Ct. 2116, 2121 (2019).

147. *Id.* (citing H.R. REP. No. 109–218, pt. 1, at 23–24, 26 (2005) (enacted)).

loophole, SORNA sought to sweep all "pre-Act offenders" into the federal registry.[148] Rather than directly require all pre-Act offenders to register, SORNA delegated to the Attorney General "to specify the applicability" and "to prescribe rules" implementing the registration requirement.[149] The Attorney General then issued rules "specifying that SORNA's registration requirements apply in full to" pre-Act offenders.[150] This arrangement drew the nondelegation challenge, on the claim that SORNA granted the Attorney General unbounded discretion to require pre-Act offenders "to register, or not, as she sees fit, and to change her policy for any reason and at any time."[151]

Justice Kagan's opinion takes the overall shape of a traditional intelligible principle analysis. Her formulation of the intelligible principle test classically echoed *Hampton*: "[t]he constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides."[152] Justice Kagan recalls that the Court had already interpreted SORNA in a previous case to narrowly "require the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible."[153] This satisfied the Court that the Attorney General's discretion was not unbounded, as it "extend[ed] only to considering and addressing feasibility issues."[154] SORNA therefore implied no unconstitutional delegation.[155]

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148. *See id*. at 2122 ("Many [pre-Act offenders] were unregistered at the time of SORNA's enactment, either because pre-existing law did not cover them or because they had successfully evaded that law (so were 'lost' to the system).").

149. *See id.* (quoting 34 U.S.C. § 20913(d)).

150. *Id.*

151. *Id.* at 2123 (quoting Brief for Petitioner at 42, *Gundy*, 139 S. Ct. 2116 (2019) (No. 17-6086)).

152. *Id.* (first citing Whitman v. Am. Trucking Ass'ns., Inc., 531 U.S. 457, 473 (2001); and then citing Am. Power & Light Co. v. SEC, 329 U.S. 90, 104–05 (1946)).

153. *Id.* (citing Reynolds v. United States, 565 U.S. 432, 442–43 (2012)). The issue in *Reynolds* was whether SORNA's requirements "applied of their own force to pre-Act offenders or instead applied only once the Attorney General said they did. We read the statute as adopting the latter approach." *Id.* at 2124.

154. *See id.* at 2123–24.

155. *See id.* at 2130. In so holding, Justice Kagan observed the stakes were the Court to fashion a new nondelegation doctrine, as Justice Gorsuch advocated in his dissent: "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs. . . . 'Congress simply cannot do its job absent an ability to delegate power under broad general directives.'" *Id.* at 2130 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)). Justice Kagan could have further

Had this been the extent of Justice Kagan's opinion, *Gundy* would stand as a run-of-the-mill intelligible principle analysis, but compromises with the Court's new direction show through. This is evident in Justice Kagan's citation to *Wayman*. For all the reasons throughout this discussion, *Wayman* is a natural reference for scholars and jurists—whether nondelegation maximalists or minimalists—looking to pinpoint the Court's earliest discussion of a nondelegation theory. Were the intelligible principle test likely to survive, however, there would have been no reason to engage *Wayman* in *Gundy*. Much like *Whitman*,[156] the Court would have instead simply relied on *Hampton* as foundational and continued to apply the settled intelligible principle analysis as it consistently had since at least *Yakus v. United States*.[157] Justice Kagan's two-step approach first interpreting the statute before questioning whether it sufficiently cabins administrative discretion indeed parallels *Yakus*'s focus on whether the statute supplies a justiciable standard.[158] She fully answered the constitutional question under a traditional intelligible principle reading by construing SORNA to limit the Attorney General's discretion to feasibility considerations.[159]

Wayman would only enter the picture because of nondelegation advocates' effort to place an "important questions" version of the doctrine at the Founding, as developed in the debate since *Whitman*. Justice Gorsuch's dissent, as noted throughout this discussion, anchors itself in the "important questions" reading of *Wayman*,[160] casting it as an expression of the "traditional tests."[161] The "important questions" rationale in fact also makes a possible cameo in Justice Kagan's opinion, in her concluding justification of the Court's ruling: "as compared

noted Chief Justice Marshall's approval of delegations bounded by "great outlines marked out by the legislature in directed the execution." Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 45 (1825).

156. *See generally Whitman*, 531 U.S. 457.

157. *See* Yakus v. United States, 321 U.S. 414, 426 (1944).

158. *See Gundy*, 139 S. Ct. at 2123 (holding "a nondelegation inquiry always begins (and often almost ends) with statutory interpretation . . . . And indeed, once a court interprets the statute, it may find that the constitutional question all but answers itself."); *see also Yakus*, 321 U.S. at 426 (holding "[o]nly if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means….").

159. *See Gundy*, 139 S. Ct. at 2129.

160. *See id.* at 2136 (Gorsuch, J., dissenting) (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

161. *Id.* at 2139.

to the delegations we have upheld in the past, [SORNA] is distinctly small bore. It falls well within constitutional bounds."[162] The character of the delegated authority as either "large" or "small" does not factor into the traditional intelligible principle test, however; neither does it factor into Justice Kagan's actual reasoning paralleling *Yakus*. The "small bore" comment may have been incidental. Though it seems more likely brought on by Justice Gorsuch's dissent, who reacts as though the phrase sounds in the "important questions" theory.[163] It is likewise tempting to read it and *Wayman*'s reemergence as a window into the Court's deliberations, perhaps even reflecting some momentary compromise to secure Justice Alito's concurrence.

B. *Jarkesy v. SEC*

While *Gundy* left the traditional nondelegation analysis intact but under strain, in *Jarkesy v. SEC*[164] the Fifth Circuit pushed the intelligible principle test in unfamiliar and inscrutable directions. *Jarkesy* may still illuminate how the future courts and litigants might try to bridge toward a private-rights conception of nondelegation. The case involved an SEC fraud prosecution of a hedge fund manager and the investment advisory firm he had hired.[165] The alleged fraud included misrepresentations regarding the hedge fund's operations and assets, to increase the fees the manager and the advisory firm could charge investors.[166] The Dodd-Frank Wall Street Reform and Consumer Protection Act permitted the SEC to bring enforcement actions either in District Court, or before SEC administrative tribunals.[167] This arrangement drew challenges under the Seventh Amendment right to a jury trial, as well as the nondelegation doctrine.[168]

Writing for the majority, Judge Jennifer Elrod found constitutional violations under the Seventh Amendment right to a jury trial in parallel with the nondelegation doctrine.[169] The Seventh Amendment

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162. *Id.* at 2130 (majority opinion).

163. *See id.* at 2145 (Gorsuch, J., dissenting).

164. *See generally* Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022).

165. *See id.* at 450.

166. *See id.*

167. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

168. *See Jarkesy*, 34 F.4th at 451. Petitioners also raised and the Fifth Circuit found a third constitutional violation, not relevant here, on the grounds that the "statutory removal restrictions on SEC ALJs violate Article II." *Id.*

169. *See id.*

inquiry turned on whether prosecution before an administrative tribunal implicated public versus private rights at common law—the "public-rights doctrine" of administrative adjudication.[170] Engaging the public-rights doctrine, Judge Elrod determined that SEC enforcement actions involve common-law private rights necessitating a jury trial.[171] This conclusion merged with Judge Elrod's nondelegation analysis, demonstrating a potential trajectory for the nondelegation doctrine.

The public-rights doctrine took shape in *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, in which the Supreme Court specified when Congress may assign adjudication to administrative agencies where a jury trial is not available.[172] The Court held that "[t]he Seventh Amendment was declaratory of the existing law [in 1791], for it required only that jury trial in suits at common law was to be 'preserved.' It thus did not purport to require a jury trial where none was required before."[173] The Court determined that "suits [not] at common law" were those "in which 'public rights' are being litigated e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact . . . ."[174] The Seventh Amendment permitted in such cases "assigning the fact-finding function and initial adjudication to an administrative forum . . . ."[175] About a decade later in *Granfinanciera, S.A. v. Nordberg,*[176] the Court then expanded this ruling, holding that the Seventh Amendment right to a jury trial also applied to "rights that are analogous to common-law causes of action

170. *See id* at 453.

171. *See id.* at 458–59. Though not relevant here, Judge Elrod also concluded that limiting SEC enforcement actions to jury trials would be "consistent and compatible with the statutory scheme" because the statutory scheme already included jury trials as an option. *See id.* at 456, 459 (referencing generally Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)).

172. *See generally* Atlas Roofing Co., Inc. v. Occupational Safety and Health Rev. Comm'n, 430 U.S. 442 (1977). *Atlas Roofing* concerned the Occupational Safety and Health Act, which permitted agents of the Secretary of Labor to seek civil penalties before administrative tribunals against employers responsible for unsafe working conditions, even if no worker had suffered an injury. *See id.* at 445–46. Congress's creation in the Occupational Safety and Health Act of a new cause of action—through which the federal government could seek penalties for statutory violations even without any work injury—was "unknown to the common law," so it did not violate the Seventh Amendment to assign it to administrative adjudication. *Id.* at 461.

173. *Id.* at 459.

174. *Id.* at 449–50.

175. *Id.* at 450.

176. *See generally Granfinanciera, S.A.*, 492 U.S. 33.

ordinarily decided in English law courts in the late 18th century . . . ."[177] Under this reading, a right to a jury trial would attach even when government was not party to a case, so long as the statutory right involved was "not closely intertwined with a federal regulatory program . . . [and] neither belongs to nor exists against the Federal Government."[178]

Judge Elrod's inquiry as to whether the SEC's enforcement action arose from private rights at common law merits separate attention beyond what is possible in this discussion.[179] She frames the inquiry as "inherently historical . . . . That means we must consider whether the form of the action—whether brought by the government or by a private entity—is historically judicial, or if it reflects the sorts of issues which courts of law did not traditionally decide."[180] Despite this framing, however, her examination of the history is thinly superficial. In brief, she concludes that "fraud claims, including the securities-fraud claims here, are quintessentially about the redress of private harms" because they arose at eighteenth-century English common law.[181] She looks only to Blackstone's *Commentaries* to conclude that "the securities statutes at play in this case created causes of action that reflect common-law fraud actions."[182] Civil fraud actions existed in

177. *Id.* at 42. *Granfinanciera* arose under the bankruptcy code, a markedly different context from *Atlas Roofing*: "The question presented [was] whether a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in a bankruptcy to recover an allegedly fraudulent monetary transfer." *Id.* at 36. The trustee in *Granfinanciera* sued to recover funds from the allegedly fraudulent recipient in District Court, which referred the proceedings to Bankruptcy Court where a jury trial was not available. *See id.* In finding the jury trial right attached, the Supreme Court noted that there was no dispute that suits to recovery fraudulent conveyances "were often brought at law in late 18th-century England." *Id.* at 43. The rather arcane dispute instead centered on whether such suits were also tried in courts of equity at the time. *See id.* Sounding in equity would have exempted it from the Seventh Amendment's protection of the right to a jury trial in "suits at common law." *Id.* at 43–44.

178. *See id.* at 54.

179. *See* Jarkesy v. SEC, 34 F.4th 446, 458–59 (5th Cir. 2022)..

180. *Id.* at 458.

181. *See id.* at 458–59.

182. *Id.* at 453–55 (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *42 (1765)). This mode of argument—selectively plucking references deep from English history—raises numerous objections. To illustrate just one line of criticism, Judge Elrod does not ask what historical relationship English courts have recognized, if any, between common law fraud actions and securities regulation enforcement in the United Kingdom, or whether English jurists since Blackstone might possess the insight needed to correctly interpret the legal history of their country. *See id.* It would be historically anomalous if the modern right to a jury trial in the United States and the United Kingdom largely harmonize with one another, yet antique

eighteenth-century English common law, according to Blackstone; SEC enforcement actions also involve fraud; SEC enforcement actions therefore involve eighteenth-century English common law rights, she reasons.[183] While she considers the Supreme Court's use of "common-law principles to interpret fraud and misrepresentation under securities statutes," she does not rigorously investigate whether eighteenth-century English common law fraud actions in fact are entwined with twenty-first century United States securities regulation enforcement.[184] She buttresses this cursory historical argument by citing *Tull v. United States* for the proposition that "actions seeking civil penalties [as in the case of SEC enforcement actions] are akin to special types of actions in debt from early in our nation's history which were distinctly legal claims."[185] As the dissent counters, however, *Tull* did not concern administrative adjudication; it also neither engaged with nor informs the public-rights doctrine.[186] Judge Elrod sidesteps this inconvenient distinction to conclude that the Seventh Amendment right to a jury therefore attaches to SEC enforcement actions.

Judge Elrod reached the nondelegation doctrine as an alternative holding, though a closely related one.[187] Mirroring Justice Gorsuch's dissent in *Gundy*, she invokes the familiar passages from *Wayman* and Locke.[188] While she ostensibly relies on the intelligible principle test, her framing of the inquiry lacks root in the case law, cheekily citing Adrian Vermeule instead:

> The two questions we must address, then, are (1) whether Congress has delegated power to the agency that would be legislative power but-for an intelligible principle to guide its use and, if it has, (2) whether it has provided an intelligible

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English common law limits securities regulation enforcement actions only in the United States. For a further example of similarly objectionable historical reasoning, see *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

183. *See Jarkesy*, 34 F.4th at 453–54.

184. *See id.* at 455. In *Granfinanciera*, the Supreme Court referenced nine cases under 1790s English common law to interpret causes of action under the Bankruptcy Code. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 43 (1989) (quoting Schoenthal v. Irving Trust Co., 287 U.S. 92, 94 (1932)).

185. *See Jarkesy*, 34 F.4th at 454 (citing Tull v. United States, 481 U.S. 412, 418–19 (1987)).

186. *See id.* at 473 (Davis, J., dissenting).

187. *See id.* at 459 n.9 (majority opinion) (observing that Fifth Circuit rules permit alternative rulings to be binding precedent and not dictum).

188. *See id.* at 460; *see also* Gundy v. United States, 139 S. Ct. 2116, 2133–36 (2019) (Gorsuch, J. dissenting).

> principle such that the agency exercises only executive power.[189]

This convoluted framing seems rhetorical, in dialogue with Vermeule, rather than intended to be workable.[190] The power Congress delegates to administrative agencies is legislative with or without an intelligible principle. Congress has no other kind of power, apart perhaps from its roles in the budgetary process, impeachment proceedings, and other areas of overlapping powers. When the delegation occurs without an intelligible principle in an area where interbranch powers do not already inherently overlap, it is unconstitutional *because* the delegated power is legislative and courts cannot discern the boundaries of the delegation[191] As Chief Justice Marshall recognized in *Wayman,* "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."[192]

Judge Elrod nonetheless held that the Dodd-Frank Act unlawfully delegated legislative authority to the SEC to determine in its discretion whether to proceed in District Court as opposed to its own administrative tribunals.[193] This entailed discretion, she reasoned, over "which defendants should receive *certain legal processes* (those accompanying Article III proceedings) and which should not."[194] Despite her characterization of this as an alternative holding, what actually seems to underpin her analysis is her earlier holding that the Seventh Amendment mandates jury trials for SEC enforcement actions. Judge Elrod expressly relies on the Seventh Amendment public-rights jurisprudence to determine that the "ability to determine which subjects of [the SEC's] enforcement actions are entitled to Article III proceedings with a jury trial, and which are not . . . ." is "legislative

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189. *Jarkesy*, 34 F.4th at 461 (citing Adrian Vermeule, Book Review, 93 TEX. L. REV. 1547, 1558 (2015) (reviewing PHILLIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014)). Her reading of Adrian Vermeule's commentary provides no support for her framing either. Vermeule's contention is that no power actually relocates between branches when Congress adequately bounds executive discretion, not that the presence of an intelligible principle determines the character of the power as either legislative or executive. *See id.* When the executive branch acts within the scope of a legislative delegation, Congress still retains and is capable of revoking its power.

190. *See id.* at 461–63. Judge Elrod's own opinion, in fact, does not even attempt to analyze the second prong, asking whether the intelligible principle is sufficient to ensure the agency exercises only executive power.

191. *See, e.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); Yakus v. United States, 321 U.S. 414, 426 (1944).

192. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

193. *See Jarkesy*, 34 F.4th at 461–62.

194. *Id.* at 462.

power."[195] If there is no Seventh Amendment right to a jury trial in SEC enforcement actions because they concern public rights—as opposed to private rights, as Judge Elrod held—then concerns about which cases receive which legal processes should lose salience. In particular, Judge Elrod rejected the SEC's claim that the Dodd-Frank Act gave it only prosecutorial discretion specifically on the basis that it could choose not merely "whether to bring enforcement actions in the first place," or in which constitutionally equivalent forums, but between constitutionally *inequivalent* forums.[196]

After finding that a constitutional right was at stake, it should be no surprise that Judge Elrod found the Dodd-Frank Act to fail to articulate an intelligible principle.[197] No matter how specifically it limits executive discretion, a statute that authorizes the executive branch to commit an independent constitutional violation could not survive scrutiny. The dissent's discussion of *United States v. Batchelder*[198] and related cases demonstrates why the Seventh Amendment right is essential to the majority's intelligible principle reasoning. As the dissent observed:

> If the Government's prosecutorial authority to decide between two criminal statutes that provide for different sentencing ranges for essentially the same conduct does not violate the nondelegation doctrine [as in *Batchelder*], then surely the SEC's authority to decide between two forums that provide different legal processes does not violate the nondelegation doctrine.[199]

To evade this precedent, which Judge Elrod does not once acknowledge, the majority needed to frame the SEC's discretion under the Dodd-Frank Act as to decide between not only different legal

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195. *Id.* at 461 (first citing Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909); then citing Atlas Roofing Co., Inc. v. Occupational Safety and Health Rev. Comm'n, 430 U.S. 442, 455 (1977); and then citing Crowell v. Benson, 285 U.S. 22, 50 (1932)).

196. *Id.* at 462. The dissent similarly points out that the majority misplaces its reliance on *Crowell v. Benson*, which held "that 'the mode of determining' public rights cases 'is completely within congressional control.' *Crowell* did not state that Congress cannot authorize that a case involving public rights may be determined in either of two ways." *Id.* at 473 (Davis, J. dissenting) (quoting *Crowell*, 285 U.S. at 50)).

197. *See id.* at 462 (majority opinion).

198. *See generally* United States v. Batchelder, 442 U.S. 114 (1979).

199. *Jarkesy*, 34 F.4th at 474 (Davis, J., dissenting) (first citing Heckler v. Chaney, 470 U.S. 821, 832 (1985); and then citing SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)).

processes, but between a constitutional legal process and an unconstitutional one.

Jarkesy is an unruly opinion suggestive that nondelegation proponents' playbook is still a work in progress.[200] Its effort to link the nondelegation doctrine with a private rights jurisprudence is clear, at least. This should recall Michael Rappaport's "two-tiered" theory and Ilan Wurman's efforts to harmonize it with an "important subjects" conception of nondelegation.[201] Wurman's claim that "[p]rivate rights and conduct are undoubtedly more important than official conduct or public privileges,"[202] and therefore nondelegable, reverberates in Judge Elrod's analysis. Judge Elrod indeed cites Wurman while briefly taking stock of the debate since *Gundy*.[203] Nondelegation advocates will undoubtedly follow the script by attempting to tie their claims to individually held constitutional rights, which in some cases may give them two bites at the apple. If litigants cannot concretely enough establish independent constitutional injuries at the hands of federal agencies, nondelegation proponents on the bench may inappropriately offer them a second more forgiving chance under either a private rights or important subjects theory of nondelegation.

C. *West Virginia v. EPA*

Any account of *West Virginia v. EPA*[204] has to begin with the fact that it was only debatably justiciable. In 2015, the Environmental Protection Agency adopted a set of regulations under the Clean Air Act called the Clean Power Plan.[205] The Obama Administration developed the Clean Power Plan in service of the EPA's mandate to regulate greenhouse gasses as a form of air pollution.[206] It established a cap-

200. The Fifth Circuit's recent denial of rehearing en banc in a divided 10-6 decision reflects that the panel's analysis remains subject to on-going dispute, with a potential for review in the Supreme Court. *See* Jarkesy v. SEC, 51 F.4th 644, 644–45 (5th Cir. 2022) (per curiam). Staking out the opposing view, the six dissenting judges issued an opinion endorsing and summarizing the dissent from the panel majority opinion. *See id.* at 645–647 (Haynes, J., dissenting).

201. *See supra* text accompanying notes 77–90 (discussing Rappaport, *supra* note 78, at 195–96); *see supra* text accompanying notes 107–119 (discussing Wurman, *supra* note 107, at 1556).

202. *See* Wurman, *supra* note 107, at 1556.

203. *See Jarkesy*, 34 F.4th at 461 n.13 (citing generally *id.*).

204. *See generally* West Virginia v. EPA, 142 S. Ct. 2587 (2022).

205. *See id.* at 2627 (Kagan, J., dissenting).

206. *See id.*; *see also* Massachusetts v. EPA, 549 U.S. 497, 532 (2007) (holding that greenhouse gases are an air pollutant within the meaning of the Clean Air Act).

and-trade system whose economic constraints would incentivize companies to shift "electricity generation from higher emitting sources to lower emitting ones—more specifically, from coal-fired to natural-gas-fired sources, and from both to renewable sources like solar and wind."[207] The Supreme Court immediately stayed implementation of the Clean Power Plan while challenges to it proceeded in the lower courts, however, so it never really took effect.[208] The Trump Administration repealed it altogether.[209] Rather than reinstituting it, the Biden Administration then started to replace it with a new rulemaking.[210]

Chief Justice Roberts found for the majority that it was still justiciable, despite recognizing that "the Clean Power Plan never went into effect"—first because of its own stay, then because of policy changes imposed by *two* subsequent Presidential administrations.[211] The Government's mistake was to "vigorously defend[]" the Clean Power Plan's legality, suggesting to Chief Justice Roberts that it harbored intentions of reinstituting it if only the Court would permit it.[212] This possibility of repetition rendered it justiciable, according to Chief Justice Roberts.[213] While Justice Kagan acknowledged that traditional mootness analysis may be too stringent to preclude reaching the merits, she more aptly characterized the Court's ruling as:

> [A]n advisory opinion on the proper scope of the new rule [the Biden Administration's] EPA is considering. That new rule will be subject anyway to immediate, pre-enforcement judicial review. But this Court could not wait—even to see

207. *West Virginia*, 142 S. Ct. at 2627 (Kagan, J., dissenting) (citing *West Virginia*, 142 S. Ct. at 2593 (majority opinion)). To really understand the EPA's efforts to regulate greenhouse gasses requires substantive technical expertise in energy regulation, electricity generation, cap-and-trade market dynamics, and climate science that few lawyers—myself especially—possess independently, let alone in combination. Analyses of *West Virginia* from that asymptotically small community would be urgently welcomed. The high-level summaries presented by the Court's multiple opinions in *West Virginia* are nevertheless sufficient, I am told, for non-technical readerships to grapple with the case's implications for administrative law.

208. *See id*. at 2627 (Kagan, J., dissenting).

209. *See id*.

210. *See id.* at 2628.

211. *See id.* at 2604 (majority opinion).

212. *See id.* at 2607 (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719 (2007)).

213. *See id.*

> what the new rule says—to constrain EPA's efforts to address climate change.[214]

Justice Kagan is undoubtedly right that prudential considerations would stay another Court's hand while a coordinate branch is in mid-process of formulating policy.[215] The Roberts Court instead did not hesitate to grab hold of "decisions of vast economic and political significance."[216]

Searching for the root of the phrase "major questions" in any way that could relate to a "doctrine" in the Court's jurisprudence is beleaguering and unsatisfying.[217] In *West Virginia,* Chief Justice Roberts[218] and Justice Gorsuch[219] both included the Court's own very recent opinions as part of the foundation. Justice Gorsuch in fact emphasizes

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214. *Id.* at 2628 (Kagan, J., dissenting).

215. *Cf.* Baker v. Carr, 369 U.S. 186 (1962) (finding that apportionment cases are justiciable and federal courts have the right to intervene in such cases).

216. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022) (quoting Repeal of the Clean Power Plan, 84 Fed. Reg. 32520 (Jul. 8, 2019) (to be codified at 40 C.F.R. pt. 60), and Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

217. For example, in *Paul v. United States,* Justice Kavanaugh observed in fact that "the Court has not adopted a nondelegation principle for major questions." *See, e.g.*, Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J. respecting the denial of certiorari). He instead proposed a more permissive version of the major questions inquiry as a "statutory interpretation doctrine," rather than a constitutional one. *Id.* He did not see the Constitution as prohibiting administrative agencies from deciding major policy questions, so long as Congress "expressly and specifically delegate[s] to [them] the authority" to do so. *Id.* Justice Kavanaugh's formulation may resemble Chief Justice Roberts's version of the major questions doctrine in *West Virginia* more than it does Justice Gorsuch's theory openly advocating a merger with a constitutional nondelegation doctrine. None of the opinions in *West Virginia* explicitly take up Justice Kavanaugh's reading in *Paul*, however, so how it factors into the doctrine that results from *West Virginia* remains uncertain. Justice Kavanaugh nevertheless presented the same body of citations in *Paul* that forms the main trunk of both Chief Justice Roberts's and Justice Gorsuch's opinions in *West Virginia*. *See id.* (first citing *Util. Air Regul. Grp.,* 573 U.S. 302; then citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); then citing MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994); and then citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)). For a survey of this terrain, see Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

218. *See West Virginia*, 142 S. Ct. at 2608, 2613 (first citing Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 141 S. Ct. 2485 (2021) (per curiam); then citing Nat'l Fed'n of Indep. Bus. v. Occupational Safety and Health Admin., 142 S. Ct. 661 (2022) (per curiam); and then citing Kisor v. Wilkie, 139 S. Ct 2400 (2019)).

219. *See id.* at 2617, 2620 (Gorsuch, J., concurring) (first citing Gundy v. United States, 139 S. Ct. 2116 (2019); then citing *Ala. Assn. of Realtors*, 141 S. Ct. 2485; and then citing *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. 661).

his own opinions in those recent cases.[220] Except for Justice Gorsuch's dissent in *Gundy*[221] and Justice Gorsuch's concurrence in *National Federation of Independent Business v. Occupational Safety and Health Administration*, which relies solely on his own dissent in *Gundy* to claim that "we sometimes call this the major questions doctrine,"[222] the phrase appears in none of those opinions. Neither does it appear in only slightly less recent decisions also receiving emphasis,[223] nor in slightly older decisions still.[224] Where it does appear is in *FDA v. Brown & Williamson Tobacco Corp.*,[225] which anchors the majority opinion in *West Virginia*,[226] and which Justice Kagan identifies as "[t]he key case."[227]

Its footing is still weak in *Brown & Williamson*, appearing in the majority's misuse of a 1986 law review article by Justice Stephen Breyer,[228] who authored the dissent.[229] While *Chevron*[230] deference was still developing, and while he was sitting on the First Circuit Court of Appeals, Justice Breyer described the circumstances in which courts would then defer to an agency's statutory interpretation in the *Administrative Law Review*.[231] He observed two lines of cases. First, courts would defer when an agency possessed expertise and institutional knowledge that positions them better than the court to "make the statute work" as Congress intended.[232] Second, courts would defer when Congress either explicitly or implicitly delegates interpretive

220. *See id.* at 2617–21 (first citing *Gundy,* 139 S. Ct. at 2135–37 (Gorsuch, J., dissenting); and then citing *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667–68 (Gorsuch, J. concurring)).

221. *See Gundy*, 139 S. Ct. at 2131–48 (Gorsuch, J., dissenting).

222. *See Nat'l Fed'n of Indep. Bus.*, 142 S. Ct at 667 (Gorsuch, J., concurring) (citing *id.* at 2141).

223. *See West Virginia*, 142 S. Ct. at 2609–10 (first citing King v. Burwell, 576 U.S. 473, 486 (2015); then citing *Util. Air Regul. Grp.*, 573 U.S. at 324; and then citing Gonzales v. Oregon, 546 U.S. 243, 267–68 (2006)).

224. *See id.* at 2609 (citing MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229 (1994)).

225. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

226. *See West Virginia*, 142 S. Ct. at 2608–09 (citing *Brown & Williamson Tobacco Corp.,* 529 U.S. at 159–60).

227. *See id.* at 2634 (Kagan, J., dissenting) (citing *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133–43).

228. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 159 (quoting Breyer, *supra* note 217, at 370).

229. *See id.* at 161–92 (Breyer, J., dissenting).

230. *See generally* Chevron, U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

231. *See* Breyer, *supra* note 217, at 368.

232. *See id.*

authority to an agency, as indicated by the "practical features of the particular circumstance . . . in terms of the need for fair and efficient administration of that statute in light of its substantive purpose. . . ."[233] Summarizing these lines, Justice Breyer concluded that:

> [C]ourts will defer more when the agency has special expertise that it can bring to bear on the legal question. Is the particular question one that the agency or the court is more likely to answer correctly? Does the question, for example, concern common law or constitutional law, or does it concern matters of agency administration? *A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.* [234]

If a court did not defer, it would proceed to interpret the statute itself to discern Congress's intent.[235] Justice Breyer argued against efforts to subvert agency interpretations altogether by requiring independent judicial review of agency statutes, however.[236] He also cautioned against "automatically accepting the agency's interpretation of a statute."[237] He instead favored contextual determinations based on

> what "makes sense" in the particular litigation, in light of the basic statute and its purposes. No particular, or single simple judicial formula can capture or take into account the varying responses, called for by different circumstances, and the need to promote a "proper," harmonious, effective or workable agency-court relationship.[238]

This case-by-case outlook is polar opposite to arguing for *any* doctrine or test, "major questions doctrine" or otherwise.

Writing for the majority in *Brown & Williamson*, Justice O'Connor borrowed only the italicized portion of Justice Breyer's article above to assert that "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation [of interpretive authority]," as *Chevron* deference may

233. *Id.* at 370.
234. *Id.* (emphasis added).
235. *See id.* at 379.
236. *See id.* at 381–82.
237. *Id.* at 380.
238. *Id.* at 381.

otherwise favor.[239] Describing it as "hardly an ordinary case," Justice O'Connor rejected the FDA's assertion of jurisdiction to regulate tobacco products based on its interpretation of its authorizing statute:

> Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.[240]

Justice O'Connor then directly interpreted the statute, rejecting that Congress could have intended to "delegate a decision of such economic and political significance to an agency in so cryptic a fashion" as to imply the delegation solely in its use of vague terminology.[241]

Justice Breyer's dissent leaves no doubt that Justice O'Connor had mischaracterized his earlier scholarship, and that he had not intended to curtail the development of *Chevron* deference. Citing *Chevron*, he observed, "[c]ourts ordinarily reverse an agency interpretation of this kind only if Congress has clearly answered the interpretive question or if the agency's interpretation is unreasonable."[242] He sharply undercut the meaning Justice O'Connor—and now Chief Justice Roberts and Justice Gorsuch—ascribed to his "major questions" observation in his 1986 law review article, as though a broad delegation gave "reason to hesitate"[243]:

> That Congress would grant the FDA such broad jurisdictional authority should surprise no one. In 1938 [at the enactment of the FDA's organic statute], the President and much of Congress believed that federal administrative agencies needed broad authority and would exercise that

239. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (quoting Breyer, *supra* note 217, at 370).

240. *Id.* at 159–60.

241. *Id.* at 160.

242. *Id.* at 170–71 (Breyer, J., dissenting) (citing Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 842–43 (1984)).

243. *See id.* at 159 (majority opinion) (citing Breyer, *supra* note 217, at 370).

> authority wisely—a view embodied in much Second New Deal legislation. . . .
>
> Nor is it surprising that such a statutory delegation of power could lead after many years to an assertion of jurisdiction that the 1938 legislators might not have expected. Such a possibility is inherent in the very nature of a broad delegation.[244]

Broad delegations were clearly permissible, in Justice Breyer's view.[245]

The role of scientific learning in Justice Breyer's reasoning importantly explains why. As his 1986 article explained, Congress is free to task administrative agencies with "mak[ing] the statute work."[246] The FDA's statute authorized it to regulate drugs, defined as "articles (other than food) intended to affect the structure or any function of the body . . . ."[247] According to Justice Breyer, this clearly included tobacco products "in the literal sense of these words."[248] Further, "the statute's basic purpose" was "the protection of public health."[249] Although prevailing understandings in 1938 did not classify tobacco products as drugs threatening public health,[250] by the time of *Brown & Williamson* in 2000 the scientific consensus was abundantly clear that they most certainly were.[251] Incorporating evolving scientific understanding into federal drug policy was one of Congress's core objectives in granting the FDA broad authority in its deliberately broad statutory language.[252] Doing so better served its statutory purpose of protecting public health than any workable legislative alternative.[253] Rather than questioning whether the statute left "major questions" to the agency to answer, the "language and purpose" of the statute were

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244. *Id.* at 165–66 (Breyer, J., dissenting) (citing Gray v. Powell, 314 U.S. 402, 411–12 (1941)).

245. *See id.* at 165.

246. *See* Breyer, *supra* note 217, at 368.

247. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 161 (Breyer, J., dissenting) (quoting 21 U.S.C. § 321(g)(1)(C)).

248. *Id.* at 162 (quoting 21 U.S.C. § 321(g)(1)(C)).

249. *Id*.

250. *See id.* at 186–88.

251. *See id.* at 188.

252. *See id.* at 165–66.

253. *See id.*

"the most important indicia of statutory meaning" in Justice Breyer's approach.[254]

Justice Breyer therefore of course dissented from Chief Justice Roberts's claim—grounded ultimately in the misuse of his 1986 scholarship—that *West Virginia* was "a major questions case" that gave "every reason to 'hesitate before concluding that Congress' meant to confer on the EPA the authority it claims under Section 111(d) [of the Clean Air Act]."[255] In Chief Justice Roberts's hands, the "major questions" concept bores a wide hole into what was left of *Chevron* deference. But it is just the wide end of a funnel. Courts will undoubtedly use the expansive reach of "economic and political significance" to scoop in more and more administrative activity; who would admit to suing over a "minor question," let alone granting one certiorari? The narrow, working end of the funnel, which rejects the kind of holistic statutory interpretation Justice Breyer has advocated, is Chief Justice Roberts's severely constrained requirement that the administrative agency show "clear congressional authorization" to overcome the Court's "skepticism."[256] It is not enough to identify "a merely plausible textual basis for the agency action . . . ."[257] Though the majority opinion does not directly engage the nondelegation case law, this seems to overturn the "intelligible principle" test *sub silentio*. Chief Justice Roberts might respond that the Court has not wholly overturned 80 years of its nondelegation precedent, as its *West Virginia* holding applies only to "certain extraordinary cases."[258] It would be hard to take such a claim seriously, however, given that the other end of the funnel is so wide.

The work Chief Justice Roberts does quietly, Justice Gorsuch does stridently. In his concurrence, the major questions doctrine distills to that "administrative agencies must be able to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance."[259] The connection with Justice Gorsuch's nondelegation advocacy could not be more explicit, as he roots the major questions doctrine in trodden quotations from

254. *See id.* at 163.
255. West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022) (quoting *id.* at 159–60).
256. *Id.* at 2614 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).
257. *Id.* at 2609.
258. *Id.*
259. *Id.* at 2616 (Gorsuch, J., concurring) (citation omitted).

Wayman and *Field*,[260] which he uses as bookends to one of his multiple references to his own dissent in *Gundy.*[261] Quoting his usual favorites from *Wayman*, the major questions doctrine "means that 'important subjects . . . must be entirely regulated by the legislature itself,' even if Congress may leave the Executive 'to act under such general provisions to fill up the details.'"[262]

In a revealing passage, Justice Gorsuch suggests an even tighter link, claiming that the major questions doctrine has been with us since 1970 *in the form of the nondelegation doctrine.*[263] He writes:

> [S]ince 1970, the major questions doctrine soon took on special importance . . . . In the years that followed, the Court routinely enforced "the nondelegation doctrine" through "the interpretation of statutory texts, and, more particularly, [by] giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." (citation omitted) In fact, this Court applied the major questions doctrine in "all corners of the administrative state . . . . "[264]

The hinge in this passage is reference to Justice Harry Blackmun's observation in *Mistretta v. United States* that "our [recent] application of the nondelegation doctrine principally has been limited to the

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260. *See id.* at 2617 (first quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825); and then quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892)).

261. *See id.* (citing Gundy v. United States, 139 S. Ct. 2116, 2135–37 (2019) (Gorsuch J., dissenting)).

262. *Id.* (quoting *Wayman*, 23 U.S. (10 Wheat.) at 42–43).

263. *Id.* at 2619. It is very unclear how Justice Gorsuch's historical claim that the major questions doctrine has always existed in the form of the nondelegation doctrine reconciles with Justice Kavanaugh's observation in *Paul v. United States* that "the Court has not adopted a nondelegation principle for major questions." *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J. respecting the denial of certiorari).

264. *West Virginia*, 142 S. Ct. at 2619 (Gorsuch, J., concurring) (first quoting Indus. Union Dep't. AFL–CIO v. Am. Petroleum Inst., 448 U.S. 607, 645 (1980) (plurality opinion); then quoting Mistretta v. United States, 448 U.S. 361, 373 n.7 (1989); then quoting *West Virginia*, 142 S. Ct. at 2608 (majority opinion); then citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000); then citing Gonzales v. Oregon, 546 U.S. 243, 267 (2006); then citing Util. Air Regul. Grp. v. EPA 573 U.S. 302, 324 (2014); then citing Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2488–89 (2021) (per curiam); and then citing Nat'l Fed'n of Indep. Bus. v. Occupational Safety and Health Admin., 142 S. Ct. 661, 665 (2022) (per curiam)). I have elided explanatory language and quotations, as well as supporting citations, to aid reading. The major-questions/nondelegation/major-questions structure of this passage is entirely faithful to the original.

interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."[265] The pivot appears to work for Justice Gorsuch because he says that the major questions and nondelegation doctrines function as versions of the same "clear-statement" rule he would find in Article I's Vesting Clause.[266] Justice Gorsuch's "clear-statement" rule would empower the Court to invalidate delegations when they sound in unclear statutory language. *Mistretta* explicitly rejects the application of a "clear-statement" formulation, however, instead treating the nondelegation doctrine as a principle guiding statutory interpretation so as to avoid constitutional questions.[267]

It should be clear why repackaging the nondelegation doctrine as the major questions doctrine or some supposedly deeper-rooted "clear-statement" rule would be attractive to Justice Gorsuch. His historical claims in *Gundy* have been the focus of intense academic criticism, as discussed *supra* in Section II.B.[268] After defensively acknowledging some of that criticism,[269] repackaging the nondelegation doctrine as something else lets him widen the goal posts. The new historical claim is that "our law is full of clear-statement rules and has been since the founding."[270] Another cottage industry of law review articles is sure to result. For his part, Justice Gorsuch makes that claim without citation.[271] He oddly pinpoints the first appearance of his "clear-statement" version of the major questions doctrine in 1897, outside even his moved goalposts.[272]

Justice Kagan's dissent calls out this dizzying maneuvering as an abandonment of textualism. She says, "[t]he current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."[273] Justice Gorsuch

265. *Mistretta*, 488 U.S. at 373 n.7 (first citing *Indus. Union Dep't. AFL–CIO*, 448 U.S. at 646; and then citing Nat'l Cable Television Ass'n. v. United States, 415 U.S. 336, 342 (1974)).

266. *See West Virginia*, 142 S. Ct. at 2619–20, 2625 (Gorsuch, J., concurring).

267. *See Mistretta*, 488 U.S. at 373 n.7 (first citing *Indus. Union Dep't. AFL–CIO*, 448 U.S. at 646; and then citing *Nat'l Cable Television Ass'n*., 415 U.S. at 342).

268. *See* discussion *supra* Section II.B.

269. *See West Virginia*, 142 S. Ct. at 2624–25 n.6 (Gorsuch, J., concurring) (discussing the criticisms in Justice Kagan's dissent).

270. *Id.* at 2625.

271. *See id*.

272. *See id.* at 2619.

273. *Id.* at 2641 (Kagan, J., dissenting).

"concludes that the Clean Air Act does not clearly enough authorize EPA's Plan without ever citing the statutory text."[274] She also chastises the majority and concurrence as imprudent. She relies on Justice Scalia's dissent in *Mistretta*, in a passage that hints at Section IV of this discussion below.[275] Justice Scalia wrote that Congress was

> better equipped to inform itself of the necessities of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political . . . it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.[276]

Justice Scalia in fact made this point even more forcefully in *Mistretta*, echoing Mortenson and Bagley's interpretation of Locke, discussed *supra*, couching early conceptions of nondelegation concerns in anti-alienation terms: "Our Members of Congress could not, *even if they wished*, vote all power to the President and adjourn *sine die*. But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts."[277] The implication is that nondelegation may find enforcement mechanisms within our constitutional design, just none which are justiciable in the courts. As Justice Kagan summarized, courts thus should defer to Congress "within extremely broad limits" when analyzing delegations, particularly because "Congress knows what mix of legislative and administrative action conduces to good policy. Courts should be modest."[278] As discussed below, Chief Justice Marshall would no doubt agree.[279]

IV. A MORE FAITHFUL READING OF *WAYMAN*

The discussion to this point has been a prelude to some modest restoration work, in a sense. Reappearing since *Gundy*, *Wayman* is

274. *Id.* at 2641 n.8.

275. *See id.* at 2643 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)); *see also* discussion *infra* Section IV.

276. *Id.* (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

277. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting) (first emphasis added).

278. *West Virginia*, 142 S. Ct. at 2643 (Kagan, J., dissenting).

279. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825) (observing courts will not assert the boundaries of legislative power "unnecessarily," because it "is a subject of delicate and difficult inquiry."); *see also* discussion *infra* Section IV.

like an old house that has been renovated too hastily. Its showier features have been cut apart and patched back together too many times, out of context. Key structural elements have gone ignored. If *Wayman* truly is the origin of a major questions or nondelegation doctrine, or whatever the proponents of an underlying "clear-statement" rule embedded in Article I decide to call it next time, then its text deserves a more complete reading than it has received thus far in the scholarship and jurisprudence. What is missing in accounts of *Wayman* is that it points to a political question principle of the nondelegation doctrine, very much like the one suggested by Justice Scalia in *Mistretta*. This political question formulation of the nondelegation doctrine is consonant with the Court's post-New Deal nondelegation jurisprudence. It also harmonizes with the "manageable standards" prong of the current political question analysis.[280]

Scholars and jurists looking to *Wayman*'s conception of separation of powers could do better than the worn "important subjects" phrase peppering *Gundy* and *West Virginia.*[281] In its context, that language is bookended by, seemingly ignored, but essential reasoning. It helps to start with the latter bookend, which was Chief Justice Marshall's conclusion:

> The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is *a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily*.[282]

Except for a footnote in Posner and Vermeule, *supra*, this language from *Wayman* appears to have gone unnoticed by the scholarly and juridical treatments referenced in this discussion.[283]

Modern jurists might take this as an admonishment: Do not venture into defining each branch's powers unless you truly must, as it is easy to get wrong. There is in fact a lack of manageable standards, as

> *[t]he line has not been exactly drawn* which separates those important subjects, which must be entirely regulated by the

280. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

281. *See Wayman*, 23 U.S. (10 Wheat.) at 46; Gundy v. United States, 139 S. Ct. 2116, 2136 (Gorsuch, J., dissenting).

282. *Wayman*, 23 U.S. (10 Wheat.) at 46 (emphasis added).

283. *See* Posner & Vermeule, *supra* note 56, at 1738 n.69.

> legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.[284]

This is core to Justice Scalia's point in *Mistretta*, where he observed that the scope of a delegation "is not an element readily enforceable by the courts."[285] Had Chief Justice Marshall gone on to try to define the line, then nondelegation proponents like Justice Gorsuch might have better reason to claim that modern readers should focus on "important subjects" and "fill up the details." But that is not what Chief Justice Marshall did.

When Chief Justice Marshall said "a Court will not enter unnecessarily" into defining the line, it was not only a broad statement of methodology but a description of his actual reasoning.[286] Chief Justice Marshall avoided defining the line between legislative and judicial power by finding the delegation at issue—to regulate the execution of writs—to involve a properly "blended" form of power:

> A general superintendence over this subject seems to be properly within the judicial province, and has been always so considered. It is, undoubtedly, proper for the legislature to prescribe the manner in which these ministerial offices shall be performed, and this duty will never be devolved[287] on any other department without urgent reasons. But, in the mode of obeying the mandate of a writ issuing from a Court, so much of that which may done by the judiciary, under the authority of the legislature, seems to be blended with that for which the legislature must expressly and directly provide, that there is some difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its Courts.[288]

Chief Justice Marshall was content to leave "the exact limits" ambiguous, beginning his analysis—the other forgotten bookend—with the observation that "Congress may certainly delegate to others, powers

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284. *Wayman*, 23 U.S. (10 Wheat.) at 43 (emphasis added).

285. Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

286. *See Wayman*, 23 U.S. (10 Wheat.) at 46.

287. *Id.* at 45–46. It may be fair to debate whether the Chief Justice's singular use of "devolve" here, while he elsewhere uses "transfer" or "delegate", refers to delegation in the first instance, or to sub-delegation from one "ministerial office[]" to another.

288. *Id.*

which the legislature may rightfully exercise itself."[289] Since Chief Justice Marshall had determined the delegated power to be "blended" in nature, it was unnecessary to enter into the "delicate and difficult inquiry" of teasing out what "the legislature must expressly and directly provide . . . ."[290] The ultimate conclusion of his nondelegation inquiry was that the Court should stay out of it.

The Chief Justice neutralized the constitutional question by deciding the case on a question of statutory interpretation and federalism, rather than nondelegation. He defined the decisive question as "whether the laws of Kentucky respecting executions, passed subsequent to the Process Act, are applicable to executions which issue on judgments rendered by the Federal Courts?"[291] Chief Justice Marshall had already concluded:

> So far as the Process Act adopts the State laws, as regulating the modes of proceeding in suits at common law, the adoption is expressly confined to those in force in September 1789. The act of Congress does not recognise the authority of any laws of this description which might be afterwards passed by the States.[292]

He also concluded, as a matter of statutory construction, that "[t]he 34th section [of the Judiciary Act of 1789, which imported state substantive common law as federal decisional law] . . . has no application to the practice of the Court, or to the conduct of its officer, in the service of an execution."[293] Whether Kentucky had its own inherent authority to regulate federal court procedure was "a waste of argument" that had "not been advanced by counsel in this case, and will, probably, never be advanced.[294] Even if Congress could not have delegated authority to the federal courts to regulate their own procedure, the outcome would stand, as "the State legislatures do not possess that power."[295]

Chief Justice Marshall's modest textualism and judicial restraint in *Wayman* parallels Justice Kagan's dissent in *West Virginia*. Faced with a separation of powers argument where there was inherent

289. *Id.* at 43.
290. *Id.* at 46.
291. *Id.* at 48–49.
292. *Id.* at 41.
293. *Id.* at 26.
294. *Id.* at 49.
295. *See id.* at 50.

ambiguity, he turned instead to Congress, interpreting its enactments to avoid the constitutional question. As Justice Kagan admonished in *West Virginia*, in ignoring the text of the Clean Air Act, the Court had "substitute[d] its own ideas about delegations for Congress's. And that means the Court substitute[d] its own ideas about policymaking for Congress's."[296] Chief Justice Marshall's textualism in *Wayman* also parallels his approach to separation of powers in *Marbury v. Madison*.[297] In *Marbury*, the challenge to executive discretion—the decision of the Secretary of State whether to deliver the President's appointment letter—could only have been justiciable as a result of legislation conferring a remedy.[298] The presence or lack of statutory language was the lynchpin to whether the Court could have reviewed executive discretion.[299]

This traditional reliance on statutory language as a predicate to policing the relationship between branches reemerged in the Court's nondelegation decisions following the aberrational New Deal era.[300] Until it seems in *West Virginia*, the Supreme Court had relied on *Yakus v. United States*[301] for its insight into the intelligible principle test essentially continuously; rarely a year went by without citing it since 1944. *Yakus* concerned a delegation to a Price Administrator to stabilize inflation during the Second World War, which afforded the power to set prices based on the Administrator's interpretation of normal market conditions.[302] Even this broad discretion satisfied the Court under *Hampton*'s intelligible principle test, holding:

> Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.[303]

Chief Justice Marshall's clear discomfort in *Wayman* with the "delicate and difficult inquiry" of policing interbranch delegations in the

296. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2643 (2022) (Kagan, J., dissent).

297. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

298. *See id.* at 166, 173.

299. *See id.* at 166. The Court of course exercised even greater restraint, deciding the case on its lack of jurisdiction over the dispute. *See id.* at 180.

300. *See* Ziaja, *supra* note 25, at 962–63.

301. *See generally* Yakus v. United States, 321 U.S. 414, 421 (1944).

302. *See id.* at 421.

303. *Id.* at 426.

absence of manageable standards resonates here.[304] The Court's focus in *Yakus* turned to whether Congress had, in effect, drawn the line for the Court between power it reserved to itself and the power it delegated.[305] Without congressionally supplied standards, nondelegation challenges call on courts to police the discretion of the other branches in the abstract, which Chief Justice Marshall studiously avoided in *Marbury*[306] and *Wayman*,[307] and which Justice Scalia deemed a political question in *Mistretta*.[308] The nondelegation inquiry since *Yakus* can be understood, accordingly, as asking whether Congress has given courts enough direction to avoid the political question of policing the discretion of any of the branches in the abstract, and instead to remain in their preferred lane of textual interpretation.

This understanding of the intelligible principle inquiry harmonizes with the Court's recent treatment of the "manageable standards" prong of the political question doctrine. In *Rucho v. Common Cause*,[309] the Court considered challenges to congressional districting maps in North Carolina and Maryland on the grounds that they resulted in partisan imbalances in each state's congressional delegations.[310] In the case of North Carolina, this resulted in a greater share of congressional seats going to Republicans, while in Maryland a greater share went to Democrats.[311] Chief Justice Roberts, writing for the majority, recognized from the start that the districting maps were "highly partisan, by any measure."[312] The majority nevertheless declined to overturn the districting maps given a lack of manageable standards, exclusively relying *Baker v. Carr*'s second prong.[313]

The Court "conclude[d] that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the

304. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

305. *See Yakus*, 321 U.S. at 426. The *Yakus* rationale was not entirely new, moreover, also appearing in earlier cases. *See, e.g.*, Mulford v. Smith, 307 U.S. 38, 50 (1938).

306. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

307. *See Wayman*, 23 U.S. (10 Wheat.) at 46.

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

309. *See generally* Rucho v. Common Cause, 139 S. Ct. 2484 (2019); *see also* Scott Dodson, *Article III and the Political Question Doctrine*, 116 NW. U. L. REV. 681, 682–702 (2021) (providing an overview of the political question doctrine up to *Rucho*).

310. *See Rucho*, 139 S. Ct. at 2491.

311. *See id.* at 2491–92.

312. *Id.* at 2491.

313. *Id.* at 2494 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions."[314] While the Court reasoned that it could adjudicate voting rights claims on equal protection grounds, "[t]he same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly." [315] Chief Justice Roberts rejected Justice Kagan's dissenting proposal to measure each state's districting map against its "median map" as a baseline, because "it would return us to the 'original unanswerable question (How much political motivation and effect is too much?).'"[316]

As a corollary, if the Constitution contained any "objective measure" for how much delegated discretion was "too much," or how important a subject was "too important," Chief Justice Marshall could have said so in *Wayman*, yet he obviously struggled to identify judicially administrable standards. He ultimately did not identify any, because the Constitution does not identify any. The Constitution does not delineate between degrees of delegated discretion, or degrees of a subject's importance. Chief Justice Marshall was clear as a result that courts should avoid "unnecessarily"[317] attempting to segregate each branch's powers in the abstract, as "the line has not been exactly drawn"[318] and "there is some difficulty in discerning the exact limits" of their power.[319]

A more complete reading of *Wayman* points, in sum, to a very different and more restrained approach to nondelegation than the major questions formulation of *West Virginia*. Following *Wayman* would mean first attempting to resolve the dispute through statutory construction to avoid any separation of powers question; Chief Justice Marshall decided *Wayman* on grounds of statutory interpretation and federalism, not separation of powers.[320] Courts would then look to whether the authority at issue was to any degree already shared between branches; Chief Justice Marshall was tolerant of ambiguity because the legislature and judiciary each had authority over court

314. *Id.* at 2506–07.

315. *Id.* at 2501.

316. *Id.* at 2505 (quoting Vieth v. Jubelirer, 541 U.S. 267, 296–97 (2004) (plurality opinion)).

317. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

318. *Id.* at 43.

319. *Id.* at 46.

320. *See id.* at 48–49.

procedure,[321] and "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."[322] If the authority at issue was not to any degree "blended," courts would finally ask whether the statute supplied justiciable standards—"great outlines marked out by the legislature"[323]—to police the boundaries of the delegation; the lack of such standards discouraged Chief Justice Marshall from opining in *Wayman.* The standards for evaluating executive discretion that Chief Justice Marshall sought after in *Marbury* are essentially what he also found lacking in *Wayman.* They are further what the intelligible principle analysis has demanded, at least since *Yakus*, so as to avoid opining on political questions. Yet while faithful to *Wayman*, this modest reading could hardly be further from the new direction that nondelegation proponents have begun to outline in *Gundy*, *Jarkesy*, and *West Virginia*.

V. CONCLUSION

Justice Gorsuch's *NFIB* concurrence tried to explain the relationship between the nondelegation and major questions doctrine in an incongruent way that in retrospect, following *West Virginia*, should mark the Court's departure from *Wayman* and its traditional nondelegation jurisprudence. It should also confirm the uneasiness of lower courts hesitating to follow the activist script. He suggested a continuing role for the nondelegation doctrine in "preventing Congress from intentionally delegating its legislative powers to unelected officials," whereas the major questions doctrine prevents "unintentional, oblique, or otherwise unlikely delegations of the legislative power."[324] This heuristic effort to distinguish between intentional and unintentional delegations, and likewise between Justice Gorsuch's conceptions of the nondelegation and major questions doctrines, does not stand up to careful thought. If a delegation is to satisfy the "clear statement" requirement under the major questions doctrine, it must have been intentional,[325] yet the nondelegation doctrine prevents Congress from delegating legislative power *intentionally*, according to Justice

321. *See id*. at 46.

322. *Id.* at 43.

323. *Id.* at 45.

324. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. Occupational Safety and Health Admin., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

325. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2622–23 (2022) (Gorsuch, J., concurring).

Gorsuch.[326] No interbranch delegation apparently could satisfy this framework. Both failing and satisfying Justice Gorsuch's "clear statement" rule would reach the same result. This is a nondelegation doctrine without principle.

A nondelegation doctrine that categorically prohibits intentional delegations of legislative authority would be wholly unfamiliar to *Wayman*. Chief Justice Marshall was clear that "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."[327] Nondelegation proponents have overlooked Chief Justice Marshall's tolerance for properly "blended"[328] power and his intolerance for abstractly opining on the precise boundaries between the branches. The Constitution does not provide manageable standards for judging the scope of delegated discretion in areas involving properly "blended"[329] authority. In other cases, Chief Justice Marshall suggested that "great outlines"[330] in the delegating statute suffice. In search of a more muscular alternative to the intelligible principle test of *Hampton* and *Yakus*, nondelegation proponents have begun highlighting the phrases "important subjects" and "fill up the details" as though they provide manageable standards.[331] However, Chief Justice Marshall found that specific line not to have "been exactly drawn." [332]

Courts will surely struggle to draw that line under the new major questions framework. If the scope of a delegation "is not an element readily enforceable by the courts,"[333] and "[h]ow much political motivation and effect is too much" in drawing electoral maps is an "unanswerable question,"[334] it makes little sense that courts could discern matters of "vast economic and political significance"[335] without stumbling into political questions. As Chief Justice Marshall's difficulty with the question in *Wayman* demonstrates, the Founders did not answer in the Constitution how major is "too major." To be sure, courts

326. *See Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

327. *Wayman*, 23 U. S. (10 Wheat.) at 43.

328. *See id*. at 46.

329. *See id.*

330. *See id.* at 45.

331. *See id.* at 43.

332. *See id.*

333. Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

334. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2505 (2019) (plurality opinion) (quoting Vieth v. Jubelirer, 541 U.S. 267, 296–97 (2004)).

335. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022) (first quoting Repeal of the Clean Power Plan, 84 Fed. Reg. 32520 (Jul. 8, 2019) (to be codified at 40 C.F.R. pt. 60); and then quoting Util. Air Reg. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

aligned with the Fifth Circuit's drift in *Jarkesy* will eagerly opine on a question's "majorness" while continuing to also level an unprincipled nondelegation doctrine at every awaited target. Courts attuned to a more complete reading of *Wayman*, together with its historical context, will instead hesitate to overreach.