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I. Abstract

Before 1930, the nondelegation doctrine was a crucial interpretive tool used by the federal courts to maintain the separation of powers between the legislative branch and the executive branch of the United States Government. The Supreme Court stopped using the nondelegation doctrine in the 1940s and the nondelegation doctrine has remained largely extinct at the federal level since that time. However, recent decisions by the Supreme Court in *Gundy v. United States*, 139 S. Ct. 2116 (2019), *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), and *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), demonstrate that the Court appears to be open to reconsidering the nondelegation doctrine's place within mainstream judicial thought. This article will examine the Supreme Court's historical treatment of the nondelegation doctrine and the current justices' statements on the doctrine to analyze the likelihood of the return of the nondelegation doctrine and potential implications of the doctrine's return, in light of the questions presented by recent cases.

Article I Section 1 of the United States Constitution provides, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."[1] For the first one hundred and fifty years after the Constitution's adoption, this clause was interpreted to serve two functions: 1) to grant Congress exclusive legislative power and 2) to prevent legislative power from being employed by other federal government branches.[2] Yet, the Supreme Court slowly abandoned this interpretation of the Constitution, known as the nondelegation doctrine, in the 1940s in favor of judicial deference to

[1] U.S. CONST. art. 1, § 1.
[2] The Constitution both provides each branch with specific enumerated powers and imposes affirmative limitations that prevent one branch from taking another branch's powers. *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 336-43 (2002).

federal agencies. Since the shift to deference, many in mainstream modern jurisprudence have rejected the nondelegation doctrine as a legitimate legal principle[3] and the nondelegation doctrine generally remains dormant to the present day. However, recent cases like *Gundy v. United States*[4] and *Kisor v. Wilkie*[5] illustrate that the Court could turn away from judicial deference and return to a form of the nondelegation doctrine. If the nondelegation doctrine returns, the doctrine could once again prevent Congress from delegating its rulemaking powers to federal agencies. Under a nondelegation framework, federal agencies could be prohibited from creating the functional equivalent of new law by reinterpreting established statutes and writing new regulations without direct congressional approval.

II. The Historical Treatment of the Nondelegation Doctrine

To see how the nondelegation doctrine could return, an examination of past cases involving delegated rulemaking authority should be considered. The nondelegation doctrine has drastically shrunk from its earliest applications to a rarely applied standard, permitting the delegation of legislative authority to federal agencies when a statute is written ambiguously. Before the early twentieth century, the federal judiciary employed the nondelegation doctrine to invalidate statutes "only when the legislature had ceded power that threatened to undermine the system of checks and balances."[6] In 1825, Chief Justice John Marshall articulated an early standard of the nondelegation doctrine, stating that Congress cannot delegate to other parts of the federal government "powers which are exclusively legislative."[7] The Court continued to routinely rely on this standard when a delegation of authority was egregious.[8] In particular, the Court applied the nondelegation doctrine when an agency enforcement of a law had the effect of reinterpreting legislation.[9] The Court's repeated application of the nondelegation doctrine established a clear boundary between Congress' authority to draft the law and the executive's power to enforce the law.

As the federal administrative state began to increase in size and influence during the late 1930s and early 1940s, one of the Court's last applications of the nondelegation doctrine occurred in *A.L.A. Schechter Poultry Corp. v. United States*.[10] The controversy in *Schechter* arose after

[3] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2364 (2001) ("It is, after all, a commonplace that the nondelegation doctrine is no doctrine at all."); *see also* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) ("In our view there just is no constitutional nondelegation rule, nor has there ever been."). Scholars continue to debate the nondelegation doctrine's existence. *See* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003) (responding to *Interring the Nondelegation Doctrine*); Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. CHI. L. REV. 1331 (2003) (rebutting *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*).

[4] 139 S. Ct. 2116 (2019).

[5] 139 S. Ct. 2400 (2019).

[6] Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 621 (2017).

[7] Wayman v. Southard, 23 U.S. 1, 42 (1825) (holding that the federal court's actions conformed with the nondelegation doctrine since Congress could delegate oversight of court proceedings to the judiciary).

[8] *See* Iuliano & Whittington, *supra* note 6, at 621; *see also* United States v. Dickson, 40 U.S. 141, 161-63 (1841) (holding that the Treasury Department deviated from an act's correct interpretation).

[9] *See* Iuliano & Whittington, *supra* note 6, at 641; *see also* Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of governance ordained by the Constitution.").

[10] 295 U.S. 495 (1935).

A.L.A. Schechter Poultry Corporation was convicted for violating the National Industrial Recovery Act.[11] The National Industrial Recovery Act empowered the President to "impose such conditions" and "exemptions" that "[the President] deem[ed] necessary to effectuate the policy herein declared."[12] Based on the unrestricted grant of rulemaking authority, the Court struck down the law because "Congress cannot delegate legislative power to the President to . . . make whatever laws he thinks may be needed or advisable."[13] By requiring that Congress be the originator of laws, the Court reaffirmed the separation of powers: Congress authors the laws, the executive enforces the laws, and the judiciary determines when the wall of separation between the branches has been breached.

After *Schechter*, the Court pivoted from its standard application of the nondelegation doctrine to a steady reliance on judicial deference. When an agency action is challenged, judicial deference generally guides the Court to defer to the agency's interpretation of the statute rather than requiring the agency to enforce the Court's best interpretation of the ambiguous statute.[14] In the 1940s, the Court began regularly deferring to administrative regulations so that agencies would have flexibility to employ their expertise to acts of Congress.[15] Over the next four decades, the Court, under the deference framework, continued to allow administrative agencies to interpret Congressional legislation in a broader sense than the nondelegation doctrine had allowed. Illustrative of this approach is the Court's ruling in *Morton v. Ruiz*,[16] where the Court held that, "[t]he power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[17] This pragmatic "gap" approach to deference is emblematic of the Supreme Court's shift from the nondelegation doctrine to judicial deference in its consideration of agencies' execution of federal law.

Following *Morton*, the contours of deference were not fully delineated until the Court's landmark ruling in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[18] In *Chevron*, the Court more clearly outlined the breadth of judicial deference given to federal agencies. The Court held that if Congressional intent is clear, then the statute is to be enforced according to its unambiguous meaning.[19] The Court further held that if the statute does not have a clearly identifiable meaning, then "the question . . . is whether the agency's answer is based on a

[11] *Id.* at 519.
[12] *Id.* at 523.
[13] *Id.* at 537.
[14] *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) ("[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous.").
[15] *Id.*; *see also* Gray v. Powell, 314 U.S. 402, 412 (1941) (holding that when a delegation "to an administrative body" occurs, that delegation "will be respected" and "left untouched."); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (preserving the delegation since there was sufficient criteria provided to the agency).
[16] 415 U.S. 199 (1974).
[17] *Id.* at 231.
[18] 467 U.S. 837 (1984).
[19] *Id.* at 842. The judicial process of determining if a statute clearly speaks to a policy implementation or if the statute is ambiguous is commonly referred to as step one of the *Chevron* analysis. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) (applying the *Chevron* analysis). If the statute is clear, then the clear meaning is controlling. *Id*. If the statute is ambiguous, then the courts apply step two of the *Chevron* analysis. *Id*.

permissible construction of the statute."[20] Essentially, *Chevron* established that whenever an agency crafts a regulation based on an ambiguous statute, as long as the regulation is reasonably drawn from the statute, then the agency's regulatory action is consistent with the separation of powers. In effect, unlike the nondelegation doctrine, *Chevron* deference provides a limited pathway for Congress to shift part of its rulemaking authority to agencies through ambiguous legislation.

After the establishment of *Chevron* deference, the Court heavily reduced the frequency of its use of traditional statutory interpretation to determine the meaning of law and instead gave significant latitude to the legislative and executive branches in the construction and enforcement of statutes.[21] This application of deference encouraged Congress to create ambiguous statutes filled with vague language.[22] With the Court stepping back from a direct approach to statutory interpretation, the federal agencies applied these vague statutes, which consequently increased the agencies' influence and the size of the administrative state.[23] This broad allowance for deference continued to exist in a largely unchanged form until the early 2000s.[24] However, limits on *Chevron* deference recently began to appear in the cases of *King v. Burwell*[25] and *Michigan v. EPA*.[26]

In *King*, the Court began to restrict the application of deference by reexamining what makes a statute's text ambiguous.[27] *King* required, "the words of a statute must be read in their context" to examine if the interpretation is reasonable.[28] Once statutory analysis is completed, as the Court in *EPA* clarified, "agencies must operate within the bounds of reasonable interpretation."[29] In applying the "reasonable interpretation" standard, the Court found that the EPA had "strayed far beyond" the limits of deference.[30] Through *King* and *EPA*, the Court clarified the limits of judicial deference's ambiguity standard and restricted the applicability of deference. Ultimately, the

[20] 467 U.S. at 843. Step two of the *Chevron* analysis requires that an agency regulation be reasonable based on the ambiguous statute's construction and purpose. *See Brand X*, 545 U.S. at 986.
[21] *See* Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, 470 U.S. 116, 124 (1985) (applying deference since the statute lacked an unambiguous standard); *see also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131-33 (1985) (upholding that the regulations drawn from the Clean Water Act because the regulations were reasonable interpretations of the statute); FDIC v. Phila. Gear Corp., 476 U.S. 426, 439 (1986) (holding that deference should be afforded since the interpretation conformed with the congressional purpose).
[22] Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 34-35 (2015).
[23] *See* Iuliano & Whittington, *supra* note 6, at 641. As of 2019, executive agencies had left approximately "175,000 pages" of federal regulations along with potentially "millions of pages of . . . 'sub-regulatory' policy . . . floating around" based on *Chevron*'s deference framework. NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 84 (2019) (internal parenthesis omitted).
[24] *See* United States v. Mead Corp., 533 U.S. 218 (2001) (explaining what agency actions merit *Chevron* deference). Also, during this period, the nondelegation doctrine continued to remain dormant. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 464-71 (2001) (declining to invalidate EPA's regulatory scheme under the nondelegation doctrine since the EPA followed an "intelligible principle").
[25] 576 U.S. 473 (2015).
[26] 576 U.S. 743 (2015).
[27] *King* reconsidered whether "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *King*, 576 U.S. 473, 486 (2015) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).
[28] *King*, 576 U.S. at 497.
[29] *EPA*, 576 U.S. at 751.
[30] *Id.*

historical record indicates that the nondelegation doctrine has remained in judicial hibernation since the 1930's and has been effectively replaced by the Court's modern deference framework.

III. An Analysis of the Justice's Prior Opinions Regarding the Nondelegation Doctrine

Following *King* and *EPA*, the Supreme Court reconsidered judicial deference and the nondelegation doctrine most recently in the case of *Gundy v. United States*.[31] In *Gundy*, the Court considered the constitutionality of the legislative authority delegated to the executive branch under the Sex Offender Registration and Notification Act (SORNA).[32] Under SORNA, the Attorney General determined which criminal penalties would apply to certain groups of sex offenders.[33] After the Attorney General set the penal requirements, improperly registered or unregistered sex offenders could be prosecuted.[34] Unlike previous cases, two factors make *Gundy* significant and indicate that the Court could begin reshaping its nondelegation doctrine jurisprudence.

The first significant factor in *Gundy* is that a majority of the Supreme Court was unable to reach a consensus on the nondelegation doctrine. At the time *Gundy* was heard, Justice Brett Kavanaugh had not been confirmed to the Court to replace Justice Anthony Kennedy.[35] With only eight sitting members, the Court failed to reach a five-member majority opinion in *Gundy*.[36] Instead, Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor joined Justice Elena Kagan's plurality opinion that preserved *Chevron* deference by upholding the Attorney General's interpretation and implementation of the statute.[37] Justice Samuel Alito, writing a separate concurrence, agreed with Justice Kagan's opinion in judgment, but differed *significantly* in reasoning.[38] Separately, Justice Neil Gorsuch dissented, joined by Chief Justice John Roberts and Justice Clarence Thomas.[39] In his dissent, Justice Gorsuch argued for the Court to realign its jurisprudence with the Court's historic treatment of the nondelegation doctrine and to find that the statute improperly delegated power.[40] Thus, *Gundy* resulted in a stalemate on the High Court.

The second factor in *Gundy* that indicates a possible reconsideration of the nondelegation doctrine is the indication in Justice Alito's concurrence that the Court could reexamine the

[31] 139 S. Ct. 2116 (2019). The Court certified the following question: "[w]hether the Sex Offender Registration and Notification Act's delegation to the Attorney General in 34 U.S.C. § 20913(d) (formerly 42 U.S.C. § 16913(d)) violates the constitutional nondelegation doctrine." Petition for a Writ of Certiorari at i, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086).
[32] 139 S. Ct. 2116, 2121-22 (2019).
[33] *Id.* at 2122.
[34] *Id.*
[35] *Gundy* was argued on October 2, 2018. *See* Mila Sohoni, *Argument Analysis: Justices Grapple with Nondelegation Challenge*, SCOTUSBLOG, (Oct. 3, 2018, 1:33 PM), https://www.scotusblog.com/2018/10/argument-analysis-justices-grapple-with-nondelegation-challenge/. Justice Kavanaugh was sworn in on October 6, 2018. *See* Kristina Peterson & Natalie Andrews, *Senate Votes to Confirm Kavanaugh to the Supreme Court*, WALL ST.STREET. J., (October 6, 2018), https://www.wsj.com/articles/senate-poised-to-confirm-kavanaugh-for-supreme-court-1538834976
[36] 139 S. Ct. at 2120.
[37] *Id.* at 2121.
[38] *Id.* at 2130-31 (Alito, J. concurring).
[39] *Id.* at 2131.
[40] *Id.* at 2144 (Gorsuch, J. dissenting) (stating that "[i]f the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people.").

nondelegation doctrine in the near future. In the opinion, Justice Alito highlighted his openness to the nondelegation doctrine. "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."[41] However, Justice Alito refrained from joining Justice Gorsuch's dissent doctrine since "a majority" of the Court was "not willing to [reconsider the nondelegation doctrine]."[42] Thus, Justice Alito concurred in judgement since "it would be freakish to single out the [SORNA] for special treatment."[43] Though not a direct endorsement of the nondelegation doctrine, by demonstrating his willingness to reexamine the Court's current treatment of the nondelegation doctrine, Justice Alito summarized a position taken by half of the Court in *Gundy*: once a fifth member of the Court is open to reconsidering the nondelegation doctrine, then the nondelegation doctrine could be reestablished.

The recent change in the Court's composition after *Gundy* further indicates that the Court could revitalize the nondelegation doctrine. Since *Gundy*, Justice Kavanagh and Justice Amy Coney Barrett have been confirmed to replace Justice Kennedy and the late Justice Ginsburg, respectively. The confirmations of Justice Kavanagh and Justice Barrett are significant because either Justice could provide the tie-breaking vote necessary to form a majority opinion regarding the nondelegation doctrine. Both Justice Kavanaugh's views and Justice Barrett's views on the nondelegation doctrine and judicial deference are addressed below.

Justice Kavanaugh's views on the nondelegation doctrine indicate an openness to a form of the doctrine returning to prominence. While on the D.C. Circuit, then-Judge Kavanaugh wrote a dissenting opinion on a denial for an en banc hearing in *United States Telecom Ass'n v. FCC*.[44] The controversy in *Telecom Ass'n* stemmed from a 2015 regulatory reclassification granted by the FCC that gave the FCC additional authority to regulate internet providers.[45] In essence, *Telecom Ass'n* centered on whether the statute was genuinely ambiguous and thus would allow the FCC to institute a new "net neutrality rule" on internet providers.

In *Telecom Ass'n*, although the D.C. Circuit denied an en banc hearing, Judge Kavanaugh's dissent indicated his view that the Constitution only grants legislative power to Congress.[46] In addressing what standard should be applied to cases such as *Telecom Ass'n,* Judge Kavanaugh differed from his colleagues' allowance for broad amounts of deference to be granted to federal agencies in their rulemaking activities.[47] Specifically, Judge Kavanaugh stated, "If an agency wants to exercise expansive regulatory authority over some major social or economic activity…an ambiguous grant of statutory authority is not enough. Congress must clearly authorize an agency to take such a major regulatory action."[48] Judge Kavanaugh further argued that a "long-extant statute" like the Communications Act of 1934 should not be employed by agencies to justify new

[41] *Id*. at 2131 (Alito, J. concurring).
[42] *Id.*
[43] *Id*.
[44] 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).
[45] 855 F.3d 381, 393-94 (D.C. Cir. 2017) (Brown, J., dissenting).
[46] *Telecom Ass'n,* 855 F.3d at 418 (Kavanaugh, J., dissenting) ("To protect liberty, the Constitution divides power among the three branches of the National Government. The Constitution vests Congress with the legislative power.").
[47] *Id*. at 419 ("The Executive Branch does not possess a general, free-standing authority to issue binding legal rules. The executive may issue rules only pursuant to and consistent with a grant of authority directly from Congress.").
[48] *Id*. at 422.

"major rules" that affect areas of "economic and political significance."[49] Rather, Judge Kavanaugh articulated a two-part test to apply in such situations: 1) Whether the regulation is a "major rule?" and 2) whether Congress "clearly authorized" the agency to issue the rule?[50] Overall, Justice Kavanaugh's major rules test demonstrates his understanding of how deference to federal agencies should be approached.

In addition to his D.C. Circuit Court opinions, Justice Kavanaugh has also expressed a significant interest in the nondelegation doctrine while on the Supreme Court. In a statement regarding the denial of certiorari in *Paul v. United States*,[51] Justice Kavanaugh elaborated on his view of the legal question that was presented in the case of *Gundy*.[52] Writing about *Paul*, which, like *Gundy*, addressed the SORNA,[53] Justice Kavanaugh stated that nondelegation may "warrant further consideration."[54] Justice Kavanaugh went on to say that Justice Gorsuch's dissent in *Gundy* and restrictions on congressional delegations of legislative authority could be reexamined by the Court.[55] Justice Kavanaugh's comments on the denial of certiorari demonstrate his consistent interest in a reconsideration of the nondelegation doctrine. Based on his statements on both the D.C. Circuit and the Supreme Court, Justice Kavanaugh has indicated a willingness to reconsider the return of the nondelegation doctrine in a modern context.

Like Justice Kavanaugh, Justice Barrett also addressed the nondelegation doctrine prior to her time on the Court and appears open to the nondelegation doctrine. Although Justice Barrett has not yet heard a case at the Supreme Court directly dealing with the nondelegation doctrine, she briefly addressed the doctrine in an article written during her time as a law professor.[56] Specifically, then-Professor Barrett examined the delegation of congressional authority granted to the president to suspend *habeas corpus* in a national emergency.[57] Professor Barrett, summarizing the constitutional underpinnings of the "'suspension by delegation' model" that controls suspension of *habeas corpus*, stated that "the modern nondelegation doctrine imposes few limits upon Congress's ability to shift policymaking discretion to the Executive."[58] While the limits on delegations are few, Professor Barrett also recognized that when disputes over the amount of delegation between the branches occur, defining the limits "between the branches is a traditional judicial task."[59] Professor Barrett's understanding of the nondelegation doctrine holds that judicial deference is not absolute. Rather, Professor Barrett argued that the nondelegation doctrine, while limited in its application, is still an applicable judicial doctrine in the modern era.[60]

After defining the nondelegation doctrine's general limits, then-Professor Barrett went on to note that the nondelegation doctrine can more definitely restrict executive action when a

[49] *Id*. at 423-24.
[50] *Id.*
[51] 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring).
[52] *Id.*
[53] United States v. Paul, 718 Fed. Appx. 360 (6th Cir., 2017).
[54] 140 S. Ct. 342 (Kavanaugh, J., concurring).
[55] *Id*.
[56] Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251 (2014).
[57] *Id.*
[58] *Id*. at 265
[59] *Id.*
[60] *See Id.* at 321 ("Despite its leniency, the nondelegation doctrine does not maintain that Congress can change the constitutional allocation of power by shifting the sum of its power in a particular area to the Executive.").

citizen's "fundamental rights" are implicated.[61] Professor Barrett argued that "[t]he Constitution's wariness of executive power," and "the relatively exacting approach taken to statutes affecting fundamental rights, support a more demanding application of the nondelegation doctrine."[62] Professor Barrett also argued that different weights could be assigned to the nondelegation doctrine based on the kind of rights implicated in each case.[63] To make her point, Professor Barrett cited the Supreme Court's own reluctance to answer "whether 'something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions' because 'regulations of this sort pose a heightened risk to individual liberty.'"[64] Overall, Justice Barrett considers the nondelegation doctrine as an available tool of statutory interpretation that can be applied in limited contexts, even under the Court's current *Chevron* deference framework.[65]

When each of the nine Justices' positions on the nondelegation doctrine's recent treatment is considered, the Court appears open to reconsidering the nondelegation doctrine. Currently, four of the nine Justices have either written or joined an opinion calling for the nondelegation doctrine to either be reconsidered in the future[66] or reinstituted to limit agency rulemaking authority over criminal penalties.[67] Additionally, Justice Barrett prior to joining the Supreme Court[68] and Justice Kavanaugh during his time on both the D.C. Circuit[69] and while on the Supreme Court[70] have also stated that the Court could apply a form of the nondelegation doctrine. Based upon these statements, six Justices have indicated that they are open to considering a future case with a claim arising under the nondelegation doctrine, two more Justices than necessary to grant certiorari under the traditional Rule of Four.[71] With the current Court's composition in view, an analysis of the Court's recent precedent related to the nondelegation doctrine should also be considered in assessing the future of the nondelegation doctrine.

IV. The Future of the Nondelegation Doctrine in Light of Recent Rulings

[61] *Id*. at 319.
[62] *Id*.
[63] *Id*. at 319 n.286 ("If the scale can slide down in areas in which the Constitution renders the Executive particularly powerful, it might slide up in areas in which the Constitution's allocation of authority reflects particular wariness of executive power.").
[64] *Id*. at 319 n.286 (citing Touby v. United States, 500 U.S. 160 (1991)). In *Touby*, the Court held that "we need not resolve" if more than an intelligible principle is required when individual liberty is implicated "today." 500 U.S. 160, 166 (1991).
[65] During her time on the Seventh Circuit, then-Judge Barrett reviewed agency action in light of a *Chevron* deference framework consistent with Supreme Court and Seventh Circuit precedent. *See* Cook Cty. v. Wolf, 962 F.3d 208, 234 (7th Cir., 2020) (J., Barrett, dissenting). Of note, a May 15, 2021, search on LexisNexis for cases involving "Amy Coney Barrett" and "nondelegation," produced zero results.
[66] *See Gundy*, 139 S. Ct. at 2130-31 (Alito, J. concurring).
[67] *Id*. at 2144 (Gorsuch, J. dissenting).
[68] *See* Barrett, *supra* note 56.
[69] *Telecom Ass'n*, 855 F.3d at 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).
[70] *Paul*, 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring).
[71] *See* Ira P. Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four – Or Is It Five*, 36 SUFFOLK U. L. REV. 1, 12-14 (2002) (discussing the Court's use of the Rule of Four that requires four Justices to vote in favor of hearing a case on the merits to grant a cert petition). *See* Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923 (2020) for additional insight into the likelihood of the Court reconsidering the nondelegation doctrine.

Recently, the Supreme Court has decided administrative agency cases largely by relying on traditional principles of statutory interpretation rather than deferring to agencies under *Chevron*.[72] An example of the Court's application of statutory interpretation principles to determine the correct meaning of a statute rather than applying *Chevron* deference can be observed in the case of *County of Maui v. Hawai'i Wildlife Fund*.[73] The point of contention in *County of Maui* centered around whether water treatment facilities should fall under the Clean Water Act's regulations as a "direct discharge" to navigable waters or whether the facilities' pollutants should only fall under state and local regulations.[74]

Although *County of Maui* appeared to present the Court with a case ripe for the reconsideration of *Chevron* deference, the Court did not address the underlying separation of powers issue created by the current framework for legislative and executive rulemaking authority in the application of statutes. Instead, throughout briefing and oral argument, the issue of what the statute meant by a direct conveyance garnered the majority of the Court's attention.[75] In the majority opinion written by Justice Breyer, the Court rejected the Ninth Circuit's ruling and adopted a "middle ground" approach to the interpretation of the Clean Water Act that relied upon the Court's traditional statutory interpretation principles.[76] Essentially, the Court held that the agencies application of the statute was permissible since the congressional intent to reduce pollution that would ultimately flow into navigable waters would be achieved.[77] Specifically, the Court held that it would be permissible for the EPA to regulate the "functional equivalent of a direct discharge" because the statute required the EPA to regulate direct discharges.[78] Overall, *County of Maui* reaffirmed the Court's use of statutory interpretation principles and avoided the application of judicial deference principles.[79] However, *County of Maui* left open the question of whether deference should be followed by the Court in the future or whether a stricter type of statutory interpretation could become the controlling standard.

While the Court did not address the future of deference in *County of Maui*, the Court appeared open to placing limitations on deference doctrines in *Kisor v. Wilkie*[80] and *Little Sisters*

[72] The Court last clearly deferred to an agency under *Chevron* in 2016 in Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131 (2016) (ruling that Congress left an ambiguous gap that allowed the agency to issue reasonable rules under *Chevron*). Since then, the Court has declined to defer to agencies under *Chevron* in cases like Smith v. Berryhill, 139 S. Ct. 1765 (2019) (holding that there was no disagreement between the government and Smith that the statute was unambiguous), Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017) (holding that the plain meaning of the statute was unambiguous making *Chevon* inapplicable) and Dig. Realty Tr., Inc. v. Somers, 138, S. Ct. 767 (2018) (ruling that Congress had clearly spoken on the issue foreclosing the option of *Chevron* deference).
[73] 140 S. Ct. 1462 (2020).
[74] Cnty. of Maui v. Hawai'i Wildlife Fund, 140 S. Ct. 1462, 1470 (2020).
[75] *See* Brief for Petitioner County of Maui v. Hawai'i Wildlife Fund, 140 S. Ct. 1462 (No. 18-260), Brief for Respondent County of Maui v. Hawai'i Wildlife Fund, 140 S. Ct. 1462 (No. 18-260), Transcript of Oral Argument at 75, County of Maui v. Hawai'i Wildlife Fund, 140 S. Ct. 1462 (2020) (No. 18-260).
[76] 140 S. Ct. at 1468.
[77] *Id*. at 1476.
[78] *Id*.
[79] The Court noted that *Chevron* deference was not applied in this case because "to follow EPA's reading would open a loophole allowing easy evasion of the statutory provision's basic purposes. Such an interpretation is neither persuasive nor reasonable." *Id*. at 1474.
[80] 139 S. Ct. 2400 (2019).

of the Poor Saints Peter & Paul Home v. Pennsylvania.[81] In *Kisor*, the Court addressed the doctrine of *Auer* deference by considering the Department of Veterans Affairs' reinterpretation of existing executive regulations.[82] Justice Kagan, writing for the majority in *Kisor*, placed expanded guidance for and restrictions on deference's application to the Executive branch's reinterpretation of regulations.[83] The Court held deference can only apply "if a regulation is genuinely ambiguous" and is not just a more preferable interpretation for the agency's policy interest.[84] Further, the Court held that deference does not regularly permit new administrative interpretations of regulations.[85] Simply, the Court's ruling in *Kisor* has "cabined" the extent of deference's reach so that is tamed but holds enough force to be useful when necessary.[86]

Adding to the majority's view that deference needed to be restrained, Justice Gorsuch's concurrence indicates that the Court's opinion in *Kisor* not only limited deference but made deference unusable.[87] Based upon the extensive limitations, Justice Gorsuch stated that there would be little difference between keeping deference on "life support" in its "zombiefied" state, as the majority outlined, and overturning the doctrine entirely.[88] Effectively, *Kisor* indicated that although deference has not been entirely overturned, the doctrine has been significantly confined to a much more limited role in administrative law as the Court has placed greater weight on the separation of powers between Congress and executive agencies.

As the Court has limited the scope of deference in recent years, the question of whether deference should be replaced by the pre-1940 nondelegation doctrine or another modern form of the nondelegation doctrine still remains unanswered. For example, in *Little Sisters of the Poor*, the Court examined the issue of an agency's authority to grant exceptions to agency regulations in the context of an exception to the Affordable Care Act's contraceptive mandate.[89] While the Court did find that the agency's exception to the statute was valid, the Court was explicit that a nondelegation claim had not been raised on appeal.[90] The Court made clear: "No party has pressed a constitutional challenge to the breadth of the delegation involved here. Cf. *Gundy v. United States*, 588 U. S. ___, 139 S. Ct. 2116, 204 L. Ed. 2d 522 (2019). The only question we face today is what the plain language of the statute authorizes."[91] By citing to *Gundy*, the Court appeared to acknowledge that the issue of the nondelegation doctrine's future is unresolved and that the Court is open to hearing arguments about the application of the nondelegation in a future case. While *Kisor* and *Little*

[81] 140 S. Ct. 2367 (2020).
[82] 139 S. Ct. 2400, 2408 (2019). Although related to *Chevron* deference that is applied when Congress delegates regulatory authority to executive agencies, *Auer* deference is distinct because it is applied to the interpretation and reinterpretation of already established agency regulations. *See, e.g.,* Auer v. Robbins, 519 U.S. 452, 461 (1997) (upholding the agency interpretation as a permissible "creature of the Secretary's own regulations" since "his interpretation of [the regulation] is, under our jurisprudence, controlling."). However, since *Chevron* deference and *Auer* deference are similar in their constitutional foundations, the Court's opinion in *Kisor* indicates a continued interest in potentially partially abandoning deference.
[83] 139 S. Ct. at 2410-18.
[84] *Id.* at 2415.
[85] *Id.* at 2418.
[86] *Id.*
[87] *Id.* at 2425 (J., Gorsuch, concurring).
[88] *Id.*
[89] 140 S. Ct. at 2372-73.
[90] *Id.* at 2382.
[91] *Id.*

Sisters of the Poor are clear that nondelegation has not yet returned to its pre-1940 position, these cases indicate that the Court is prepared to address the underlying conflict between judicial deference and the nondelegation doctrine in a future decision. Such a future decision could lead to an even greater reduction in the Court's acceptance of Congressional delegation of rulemaking authority. In sum, the Court's recent cases have established that the nondelegation doctrine may not remain a judicial artifact in perpetuity but that it could return to more frequent use in the near future.

V. Potential Implications of a Revitalization of the Nondelegation Doctrine

If the Supreme Court revives the nondelegation doctrine, the revived doctrine will have a seismic impact on the federal government's regulatory scheme. Although the Court has not indicated which, if any version of the nondelegation doctrine it would apply, if the Court voted to resurrect the pre-1940 nondelegation doctrine or adopt a modern standard like the "major rules" version of the nondelegation doctrine that Justice Kavanaugh has suggested, there would be significant ramifications for future Congressional legislation and the administrative state's ability to engage in agency rulemaking.[92] Such a ruling by the Supreme Court could allow regulations to be overturned as improperly exceeding the authority of federal agencies.[93] This type of limitation on agency authority could require Congress to write more specific laws to address major political or economic issues. Additionally, this potential return of the nondelegation doctrine would reestablish the Judicial branch as the branch of government with primary authority over the interpretation of law. Overall, by reinstating the nondelegation doctrine, the Supreme Court could potentially force a partial restructuring of the way Congress currently writes laws and limit the deference given to a federal agency's interpretation of statutes or regulations.

In conclusion, although the nondelegation doctrine has been largely set aside by the Court for almost eighty-five years, *Gundy* and other recent cases indicate that the ongoing debate over the doctrine's future in America's administrative law system could result in the Court revitalizing the nondelegation doctrine. In light of this debate, the Court has been presented with an opportunity, with the confirmation of a tiebreaking fifth vote in either Justice Kavanaugh or Justice Barrett, to address this important question in a future case: will the Court require strict statutory

[92] Even though the Justice's prior statements indicate their general views of the nondelegation doctrine, which standard or test the Court would rely upon to apply the nondelegation doctrine remains unclear. For examples of how the Court could potentially seek to apply the nondelegation doctrine *see*, Walker *supra* note 71 (outlining how the Court could take measured steps to erode undemocratic legislative delegations based on the Court's composition following Justice Kavanaugh's appointment to the Supreme Court); *see also* Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 1017 (2018) (exploring the application of the nondelegation doctrine to "narrower delegations" of legislative authority); Cody Ray Milner, *Into the Multiverse: Replacing the Intelligible Principle Standard with a Modern Multi-Theory of Nondelegation*, 28 GEO. MASON L. REV. 395 (2020) (proposing a tripart categorization of nondelegation claims depending on the breadth and nature of the delegation); Michael Sebring, *The Major Rules Doctrine: How Justice Brett Kavanaugh's Novel Doctrine Can Bridge the Gap between the Chevron and Nondelegation Doctrines*, 12 N.Y.U. J. L. & LIBERTY 189 (2018) (analyzing the workability of the major rules doctrine and the major rules doctrine's transfer of policy making authority from politically unaccountable federal officials to politically accountable elected officials).

[93] For example, Justice Kagan, writing for the Court in *Gundy*, noted the widespread ramifications of a revitalized nondelegation doctrine on the federal government. Gundy v. United States, 139 S. Ct. at 2130 ("Indeed, 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.").

interpretation and reinstitute the nondelegation doctrine? If the nine current Justices maintain their previously expressed views on deference doctrines and the nondelegation doctrine, then the Supreme Court could soon hand down a majority ruling in favor of the nondelegation doctrine in a future decision. If the Court issues such a decision, then the structure and influence of the administrative state's rulemaking authority would be fundamentally lessened. Overall, based on the Court's recent treatment of judicial deference and the nondelegation doctrine, further attention should be given to the potential reemergence of the nondelegation doctrine due to the major ramifications such a ruling would have upon Congress's ability to delegate through statutes to federal agencies.