NONDELEGATION'S TWO FACES

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Delegated power is under attack from many sides. From the beginning of the American republic, lawmakers have built institutions with the understanding that they could assign power from one individual or institution to another. This principle has been fundamental to the American system of power in many forms—delegation of legislative, executive, and judicial power—both between branches and within them. Now, this model might be about to transform beyond recognition. Our Supreme Court is feeling its power. Their antidelegation program has many facets. But two have been most prominent in the jurisprudence of the past few years: first, delegation of Article I lawmaking power to administrative agencies and, second, delegation of Article II enforcement power to private litigants. This Article makes the case that the Court's recent moves in these two domains are part of a unified program. They are twin strands in a broad-based effort to limit the scope and reach of delegated authority. Scholars have long been aware of the growth of both prongs of this analysis. But the doctrine is shifting under our feet, taking on new characteristics, and gaining a new coherence that sometimes even crosses the ideological divide between liberal and conservative jurists. As it takes shape, the Court's antidelegation jurisprudence threatens to disrupt some of the basic contours of our system of governance. A well-established regime based on delegation may be forced to bow to an idealized and likely ahistorical vision of the past.

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Introduction

Delegated power is under attack. The Supreme Court has long gestured at limits on delegation. But until very recently, it allowed it to flourish within ill-defined and seldom-tested bounds. Across the landscape of American governance, power is routinely assigned from one individual or institution and given to another. Under the Court's previously permissive regime, a system of power developed which depended on delegation as a fundamental premise. Now, everything might be changing. The current Court's new approach to the separation of powers is not merely a generic formalism. It is a coherent antidelegation program.

In the context of the "nondelegation doctrine," delegated power is most often understood in the context of Executive branch agencies. These institutions have been vested with capacity to make rules with the force of law, both through rulemaking and through agency adjudication. They do not simply "execute" or "enforce" law made by the entities entrusted with lawmaking power under the basic structure of the Constitution. But delegation is far more widespread. It extends, for instance, to the structure of Congress, which delegates aspects of its lawmaking power to committees. And it reaches into the judiciary, a body that makes its own rules and procedures, and has even, at least historically, crafted its own causes of action. Most important of all, aside from delegation to administrative agencies, is delegation to private enforcers. Empowered by congressional enactments, individuals and nongovernmental organizations have been vested with the capacity to bring suits. Through legislation, they are made into avatars of the enforcement power originally vested in the nation's Executive.

Skepticism of this delegation has been building for decades. After a surge of strict constructionism in the 1920s,[1] ebbing after the nondelegation doctrine's "one good year" in 1935,[2] the Court embraced a more permissive approach to structural constitutional law. In the 1970s, however, President Nixon's new appointees introduced a new "formalism" into the Supreme Court's jurisprudence.[3] This formalist spirit has translated into discomfort with institutional arrangements that appear to break with the neat categories mandated by a strict vision of separation of powers. In response, in the 1980s and 1990s, the Supreme Court began to nip at the edges of our delegation state, setting modest limits. But these interventions did little to undercut the basic delegation paradigm.

Now, however, our familiar delegation state seems unstable.[4] The Supreme Court is feeling its power. Mark Lemley recently dubbed these justices the "Imperial Supreme Court"[5]—emboldened to remake long-settled jurisprudence by the ideological affinity of a supermajority. In the face of this new revisionist pose, two of the most fundamental forms

1. *See* Nikolas Bowie & Daphna Renan, *The Separation-Of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2072 (2022) (locating its rise in the jurisprudence and personal philosophies of Chief Justice Taft).

2. *See* Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1207 (2018).

3. *Buckley v. Valeo*, 424 U.S. 1 (1976), was one of the earliest expressions of this new spirit, followed by cases such as *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, 458 U.S. 50 (1982), and *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

4. Note that the Supreme Court began to question one form of what might be considered delegated power in its retrenchment of prior precedent implying rights of action.

5. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).

of delegation appear in danger: first, delegation of Article I lawmaking power to administrative agencies and, second, delegation of Article II enforcement power to private litigants. As a matter of political theory and practical policy, these new moves may have both virtues and vices. But whatever their normative valence, these two lines of cases herald a radical transformation in the nature of American governance.

The new Article I nondelegation jurisprudence began in 2019, with a dissenting opinion in *Gundy v. United States*.[6] In *Gundy*, although a four-justice plurality rejected a challenge to the Sex Offender Registration and Notification Act ("SORNA")—reading the statute narrowly to hold it did not delegate an unconstitutional level of discretion to the Attorney General when it empowered them to decide whether to apply new registration guidelines retrospectively[7]—Justice Gorsuch responded with a pathbreaking dissent. Rejecting decades of Article I nondelegation jurisprudence, he sketched a restrictive test to decide what constitutes unconstitutional delegation of legislative power. No majority has yet embraced Gorsuch's explicit nondelegation doctrine. But another antidelegation approach has developed alongside Gorsuch's *Gundy* program. Rising to prominence in solo opinions by Justice Kavanaugh, the "major questions doctrine" has emerged as a powerful weapon for slashing the scope of delegated authority. Recently, it was accepted by a six-justice majority in *West Virginia v. EPA*, where litigants challenged the powers of the Environmental Protection Agency ("EPA") to regulate greenhouse gas emissions.[8] Although this Article I nondelegation jurisprudence has not yet taken on a stable identity, it is bursting with new strength.[9]

Another line of antidelegation jurisprudence began to emerge three years before *Gundy*—focused on the Article II enforcement power. These innovations have been recognized as novelties in federal courts doctrine. But they have not been understood as a part of a coherent antidelegation program. In *Spokeo Inc. v. Robins* in 2016,[10] the Court put fresh restraints on the standing of private litigants to bring suit under the Fair Credit Reporting Act ("FCRA"), hinting at new limits on the power of Congress to delegate the Executive's enforcement power to private litigants. Then, in 2021, in *TransUnion LLC v. Ramirez*, the Court held that most of the members in a Rule 23 class action did not have standing

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

7. *Id.*

8. West Virginia v. EPA, 142 S. Ct. 2587 (2022).

9. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (invoking the major questions doctrine to invalidate President Biden's student debt relief program, which had authorized the Secretary of Education to cancel large swathes of debt).

10. Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).

to pursue statutory remedies under FCRA when they were incorrectly listed as terrorists and criminals.[11] Justice Kavanaugh wrote for a five-justice majority, rewriting the Court's standing doctrine to require a "concrete" injury with a "close analog" in historical common law and subtly editing out the role that *Spokeo* had left for Congress in articulating new injuries and chains of causation.

This article makes the case that both lines of jurisprudence are part of a single coherent enterprise—a broad-based effort to limit the scope and reach of delegated authority.[12] By implication, the fundamental structure of our government may be forced to bend, or even to break.

We live, as this article contends, in a delegation state. And the Supreme Court's coherent antidelegation program threatens some of our basic choices about how we govern ourselves. As suggested above, the delegation principle runs through our system of government, reaching every branch. Elaborating on the bare outline in the Constitution, the political branches have used delegation to craft our system of administration. Two facets stand out: agencies and private enforcement. Most familiar to discussions of delegation are Congress' grants of discretionary authority to administrative agencies, empowered to regulate and enforce under the statutory schemes that govern their operation. But this article suggests that, in our delegation state, administrative agencies are only half of the picture. For its operation, our regulatory paradigm depends on private enforcement. The litigants who operationalize administration are empowered by another form of delegation, vested by statutes with the power to enforce both personal rights and rights with a more public cast. This is a regime that privileges regulation after the fact over *ex ante* restraints, using *ex post* enforcement as a backstop against a slide into chaos. In America, private enforcement supplements public authority. Delegation is key to all of this, creating much of the power of both private and public agents. The Supreme Court's new jurisprudence may constrict this delegation-based regime from both ends, trimming public administration even as it constricts private enforcement.

Debates about delegation to agencies rarely intersect with arguments about standing. The controversy around nondelegation focuses on the capacity of Congress to empower other entities to *create law*. By contrast, standing limits *who may sue*. But this Article argues the two debates are tightly connected. Both center on the extent to which Congress can transfer core powers outlined in the Constitution to deputies. The familiar nondelegation doctrine represents an Article I

11. TransUnion LLC v. Ramirez, 594 U.S. 413 (2021).

12. With both, the Court appears to be responding to the perception that delegation creates power without accountability.

nondelegation principle, blocking Congress from vesting the Executive with discretion to make law—discretion that, to a significant but contested degree, must remain with the legislature. Standing doctrine, by analogy, can be seen as an Article II nondelegation doctrine, preventing Congress from delegating the Executive's enforcement power and, especially, its prosecutorial discretion to "private attorneys general."

The basic insight that standing is a form of nondelegation is old hat. In recent years, however, much has changed. Although it is similar on the surface, the implications of today's Article II nondelegation are very different. As early as 1992, Justice Scalia expressed worries in the seminal standing case *Lujan v. Defenders of Wildlife* about the delegation of Article II power to private actors.[13] In 2009, Tara Grove made a systematic case that standing might be framed as an Article II nondelegation doctrine.[14] But developments Grove could not have foreseen have transformed the jurisprudential landscape. When she was writing fourteen years ago, the Article I nondelegation doctrine was basically dormant. And the practical effects of her Article II nondelegation doctrine were comparatively limited. There was little threat to an interconnected system of governance based on delegated power. Today, in both domains, the Supreme Court's recent moves portend real limits, threatening to excise key elements of our familiar delegation state. This Court's new formalism amounts to an attempt to unwind our delegation-based regime.

By the conventional account, the Article I nondelegation doctrine has been hibernating for decades, abandoned by justices intimidated by the difficulty of drawing lines between legislative and non-legislative rulemaking. With a few minor caveats,[15] this narrative is accurate. But recent Court decisions give compelling signs the Court is moving in a more restrictive direction. Since 2019, Justice Gorsuch's *Gundy* dissent has been the most prominent opinion. But Justice Kavanaugh also penned opinions advancing his own more robust nondelegation method, which captured the attention of his colleagues and helped inspired Chief Justice Roberts' majority in *West Virginia*. On close reading, Justice Kagan's *Gundy* plurality may represent its own nondelegation approach, although it is cloaked in the language of constitutional avoidance—even if her *West Virginia* dissent reveals her basic commitment to the delegation state. On the whole, the Court seems poised to restrict either the *kind* of discretion that nonlegislative actors may exercise or the manner of *issues* that Congress can hand off to agents.

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13. Lujan v. Defenders of Wildlife, 504 U.S. 555, 604 (1992).

14. Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 J. Con. L. 781 (2009).

15. *See infra* Part II.A.

The story of Article II nondelegation has two acts. Although standing has not conventionally been associated with the Article I nondelegation program, federal courts scholars and judges began to express skepticism of the delegation of Article II "take Care" power in the twentieth century's final decades. In the 1990s, the Supreme Court adopted its first round of nondelegation jurisprudence in the Article II domain, ruling Congress could not give private litigants the discretion to sue if they had no personal stake in the lawsuit. Rebuffing a style of enforcement with roots in English and early American history—which enjoyed a surge of popularity from the 1970s onwards—the Court put sharp limits on private enforcement discretion. In 2016, with *Spokeo*, the Court began its second round of restriction. Five years later in *TransUnion*, the Court affirmed and expanded these novel limits, rejecting the proposition that Congress has power to create private rights without close analogs in history and the common law tradition. The modern Article II nondelegation doctrine had taken flight.

This Article advances three central insights. First and central, is the suggestion that today's nondelegation revival is not confined to the conventional Article I nondelegation doctrine. Instead, developments in modern standing doctrine represent another—and arguably more developed—antidelegation law. Over the decades, scholars have identified multiple forms of nondelegation jurisprudence: Article I and Article II. Even Article III, though some delegations to courts are rarely contested.[16] But no one brings this program together. This Article argues the Court's recent jurisprudence is motivated, at least in part, by a unified antipathy towards both forms of delegated power.[17]

The second core intervention is the corollary to this first claim: it is the background insight that we live in a system of power premised on delegation. It is the principle that underpins both public and private enforcement. Upon reflection, this may seem obvious. But few have captured the fact that the delegation principle ties together so much of the modern state. This is another of this Article's key innovations. Scholars have long

16. Consider the Rules Enabling Act, 28 U.S.C. §§ 2071–77, authorizing the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts.

17. As Adam Cox and Emma Kaufman have recently observed, however, this antipathy may not extend—at least to the same degree—to delegation of *adjudicative* power to the administrative state. Since part of the Court's project is about docket control and, as they contend, "rights erosion"—as much as it is about deregulation—the Court is more amenable to adjudicative aid from the Executive branch. Adam B. Cox & Emma Kaufman, *The Adjudicative State* 28 (working draft) (on file with authors). Judges feel their *own* institutional limitations acutely, even as they refuse to sympathize with the resource and capacity constraints of legislators or executive enforcers.

understood that the administrative state is a construct woven of delegated power. And successive generations in the academy have rediscovered the pervasive role of private enforcement.[18] But the *administrative* state and the so-called "litigation state" are not viewed as two facets of a coherent whole.[19] Just as much of the *de facto* "legislative" power is exercised within Article II institutions, much of the "executive" enforcement power is exercised by private litigants under the auspices of the federal and state courts. From the earliest days of our republic, we have depended on both forms of delegated power. Only by considering them together can we understand a main strategy that generations of political actors have chosen for building our governance paradigm. Both forms of delegation hang together, as do both species of *non*delegation.

Third is the largely novel insight that the antidelegation project may cross the ideological divide. In Justice Kagan's plurality in *Gundy*, she and her colleagues who joined the opinion did not embrace Justice Gorsuch's explicit nondelegation doctrine approach. But even as they batted back his ambitious advance, they showed themselves willing to accept that an underlying nondelegation principle stands beneath the Court's constitutional interpretation. Likewise in *West Virginia*, although Kagan advanced a spirited defense of the need for a delegation state in our modern world, she and her fellow dissenters accepted the legitimacy of some form of major questions doctrine. Their antidelegation jurisprudence appears to be an exercise in setting outer limits. They would allow Congress to build and update a modern state for a modern world, while at the same time policing massive transgressions against what they view as basic principles of America's constitutional order. Deference does not amount to unqualified submission.

Part I articulates fundamental dynamics of the U.S. institutional framework, suggesting the structure of governance is premised on delegation. This system prioritizes regulation after the fact over *ex ante* barriers, using private enforcement to complement and often supersede official action. Delegation is a consistent thread, characteristic of both

18. The scholarship is massive. *See, e.g.*, Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033 (1968); Cass R. Sunstein, *What's Standing After* Lujan*: Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 182 (1992); Stephen B. Burbank & Sean Farhang, Rights and Retrenchment: The Counterrevolution Against Federal Litigation (2017); Paul Sabin, Public Citizens: The Attack on Big Government and the Remaking of American Liberalism (2021); Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 Va. L. Rev. 1483 (2022).

19. A few scholars of complex litigation have explored the role of aggregate litigation as a marginal phenomenon between public and private enforcement. *See* Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. Chi. L. Rev. 603 (2008).

lawmaking and enforcement. From the first years of our republic, the American system has used private enforcement as an expression of public law. Indeed, public law litigation has become so central that some commentators have suggested we live in a "litigation state." But this captures only part of the reality. Our litigation state is one aspect of a broader delegation regime. Aggregate litigation plays a central role, allowing private law to work in tandem with public administration. This part reveals the centrality and complexity of our delegation state—a model now dominant but subject to challenge from two directions.

With Part II, the Article introduces the twin strands of the Supreme Court's nondelegation jurisprudence—the familiar Article I bar on delegation of lawmaking authority and the Article II limit embodied in the Court's standing doctrine. It explains the distinct approaches the Court had articulated in these domains before recent opinions revolutionized both areas of law. Part II.A presents last generation's Article I nondelegation doctrine, asking whether, in contrast with the conventional account, prior opinions may, in fact, have stifled the expansion of limitless delegation. In Part II.B, the Article turns to standing, suggesting that even before *Spokeo*, the Court had turned the standing requirement into a legible Article II nondelegation doctrine. The Court created a form of Article II nondelegation doctrine in *Lujan v. Defenders of Wildlife* and its progeny, in which Congress could not hand over enforcement discretion to private parties to sue when they had not been harmed themselves. Litigation was confined to plaintiffs with injuries specific to themselves.

Part III explains the new nondelegation jurisprudence. With Article I, the justices are experimenting with different models for cabining or eliminating delegation of lawmaking authority, culminating in 2022 with some of the Court's first tangible steps. With standing, the Court made concrete moves in both *Spokeo* and *TransUnion* to make its Article II nondelegation doctrine more explicit and restrictive.

Part III.A asks whether justices from across the ideological spectrum may be embracing antidelegation jurisprudence. Justice Kagan's plurality from *Gundy* restricts delegation via narrow construction, using tools of statutory interpretation to read unacceptable delegations out of borderline statutes. Most famous is Justice Gorsuch's approach from *Gundy*—a categorical approach rooted in formal rules, placing a firm cap on the kind of *discretion* that can be delegated. Recently, the amorphous "major questions" doctrine has taken on increased salience as its own form of nondelegation, limiting the kind of *issues* Congress can delegate to other institutional actors for resolution. But even as six justices found consensus in 2022, they left the doctrine unsettled—full of transformative potential but only partly determined.

In Part III.B, the Article turns to the developments in standing doctrine introduced in *Spokeo* and extended in *TransUnion*. The cases broke apart the two elements of the "injury in fact" prong of the standing inquiry, confirming that, to support standing, a harm must be "concrete," as well as "particularized." This new restriction does not merely drive categories of *litigants* out of court. Instead, it blocks whole categories of *claims*. It is too soon to tell how these opinions will impact the capacities of a regime premised on private enforcement. But the effects might be tremendous—on individual litigation and, perhaps most important for the power and reach of private non-governmental litigation, on aggregation. A brief conclusion follows.

I.
A Regime Based on Delegation

Someone needs to make law, and someone needs to enforce it. In its barest outline, the Constitution vests the power to make laws in Congress,[20] and it tasks the Executive to "take care" that the laws are faithfully executed.[21] Congress has the capacity to pass laws through the Article I, Section 7 process,[22] within the flexible boundaries of the powers enumerated in Section 8.[23] The Executive has both the power and the duty[24] to enforce the laws Congress creates. Beyond these basic structural mandates, political actors have been compelled to make choices about the design of the institutions that make laws and that ensure these laws are followed.

What kind of regime have we built? The framework that has emerged goes far beyond the basic dialectic, with Congress framing the laws and the Executive enforcing them. Instead, the political branches build layers of institutions on top of the basic structure. Congress creates public institutions that help elaborate on the text of statutes with rules and regulations; then it adds a complex constellation of institutions and individuals to help the President take care of enforcement.[25] On the lawmaking side, viewed from one perspective at any rate, executive agencies may make most of the law governing our society.[26] With

20. U.S. Const. art. I.
21. *Id.* art. II, § 3.
22. *Id.* art. I, § 7.
23. *Id.* art. I, § 8.
24. Some scholars assert it is more duty than power. *See, e.g.*, Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. Chi. L. Rev. 653, 670 (1985).
25. All mediated through courts, which help both to enforce and, in a sense, to *make* law as well.
26. As an illustration of the discrepancy between legislation and the agency regulations created as a supposed reflection of the underlying statute, Senator Mike Lee keeps

regard to enforcement, the political branches have designed a system that blends *ex ante* regulation with *ex post* punishment, deputizing both public and private actors as agents.

From the earliest years after the Constitution was ratified, the President has not acted alone.[27] But by the conventional account, Congress began to create the modern administrative state[28] in 1887 with the Interstate Commerce Commission (ICC).[29] In the decades that followed, accelerating during and after the New Deal, Congress established agencies to regulate interstate trade, water and power, communications, exchanges of commodities and securities, public health, and the environment. The dynamics of the regulatory process have ebbed and flowed over the decades,[30] but these changes have done little to assuage the concerns of those worried that executive-made laws are not checked by direct accountability to American voters.[31] These agencies play a role in both lawmaking and enforcement—a delegation of Congress' lawmaking power and an elaboration of the Executive's enforcement power.

Our governance model, as this Part contends, relies on a hybrid of *ex post* and *ex ante* enforcement, with this power delegated to both public and private actors. But the delegation principle holds this whole framework together. Private enforcers join government officials as exponents of public law. Some scholars have argued that this amounts to a

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two towers of paper in his office—one of all the regulations promulgated by administrative agencies, the other of all federal legislation enacted by Congress. In 2013, at 80,000 pages, the first was eleven feet tall; at 800 pages, the second was only the size of a long book. 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, 924 (2020). Much of the Executive's lawmaking also takes place through adjudication. *See* Cox & Kaufman, *supra* note 17.

27. From the first years, for example, the President depended on a cabinet of advisors and their associated personnel.

28. Some commentators trace the first use of the term "administrative state" to DWIGHT WALDO, THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION (1948), but others have pointed to earlier uses. *See, e.g.*, Alasdair Roberts, *Should We Defend the Administrative State?*, 80 PUB. ADMIN. REV. 391, 392 (2020).

29. As a Senate report from 1977 described it, "for close to 100 years Congress chose to exercise the commerce power directly, without the aid of regulatory agencies . . . . By 1887, Congress saw a need for delegating part of the task of regulating commerce." Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461, 467 (1994) (citing 2 SENATE COMM. ON GOVERNMENT OPERATIONS, STUDY ON FEDERAL REGULATION, S. Doc. No. 95-26, 95th Cong., 1st Sess. 1 (1977)).

30. Consider the passage of the Administrative Procedure Act in 1946, efforts at economic deregulation, and the adoption of regulatory impact analysis and White House review through the Office of Information and Regulatory Affairs. *See* Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 DAEDALUS 33, 42 (2021).

31. *See id.*

"litigation state." But this Part concludes that we should not understand the administrative state as fundamentally separate from our various private enforcement schemes. Instead, they together form a "delegation state." Within this delegation state, aggregate litigation allows private causes of action to mutate into something indistinguishable from public administration. Our governance paradigm is not divided by clean lines. *Ex post* and *ex ante*, public and private, administration and aggregate litigation—all are connected by a unitary delegation principle.

A. Ex Post and Ex Ante; Private and Public

Two dichotomies organize the function of our delegation state. First, our system blends regulation before harms take place with regulation after the fact. This *ex post* regulation plays an especially prominent role in the American system, as compared with other modern democracies. Second, both public and private enforcers have been tasked with the responsibilities of governance. Public enforcement can be both *ex ante* and *ex post*, but private enforcers largely act *ex post*.

Despite the size of the administrative leviathan,[32] the United States is often held up as an exemplar of the benefits of a liberalized, *de*regulated economic order.[33] But to a large degree, what distinguishes the American model from many rivals is not an absence of regulation but a choice to regulate after the fact.[34] Instead of restricting market entry, the U.S. system imposes punishment for harmful behavior.[35] This is no unregulated market. Building on a common law tradition inherited from England,[36] the basic regulatory pose is *ex post* rather than *ex ante*, policing deviance with consequences rather than barriers.[37]

This *ex post* approach is by no means consistent, and some domains rely on *ex ante* regulation. Two examples illustrate the role of

32. On the leviathan metaphor for the administrative state, popular among critics of the size of the executive branch, see generally ADRIAN VERMEULE & CASS SUNSTEIN, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2020).

33. Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 377 (2007) ("In all these exchanges over the benefits of a liberalized economic order, the United States is invariably Exhibit A.").

34. *Id.*

35. Of course, there are plenty of counterexamples. Market entry in the United States is not entirely deregulated.

36. *Id.* (noting this form of regulation draws heavily on the common law tradition).

37. Economic studies demonstrate close links between the absence of entry barriers and the wealth of countries. Simeon Djankov et al., *The Regulation of Entry*, 117 Q. J. ECON. 1 (2002). Nonetheless, political impediments to lowering entry barriers can be steep, and it is often difficult for countries to break free of heavily *ex ante* systems. Issacharoff, *Regulating After the Fact*, *supra* note 33, at 376–77 (describing resistance to removal of entry barriers that advantage particular constituencies).

ex ante enforcement in the U.S. market: the Food and Drug Administration (FDA) and the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[38] Of all the agencies in the U.S. government, the FDA is perhaps closest to the permit-based model of market entry that prevails in Europe and across much of the world.[39] Responding to the concern that market-based solutions, such as reputational harm, will not provide a deterrent sufficient to prevent the exceptional injuries products might inflict on consumers, Congress has vested the FDA with extraordinary regulatory reach.[40] The agency has the power to require drug manufacturers to run products through specific tests before granting licenses for sale.[41] And the FDA imposes strictures on preapproval testing, drug manufacturing, labeling, advertising, and postapproval monitoring for adverse drug reactions—all designed to nip harms in the bud.[42] With the Hart-Scott-Rodino Improvements Act, parties must inform the Federal Trade Commission (FTC) before they undertake particular forms of mergers. If the merger would create a certain level of market concentration, then the parties must notify the FTC and wait before consummating the deal.[43] This law is motivated by an understanding that significant mergers could cause the kind of exceptional market disruption that justifies departure from the presumption against *ex ante* review. Even here, in a framework that includes some *ex ante* regulatory capacity, the statute only requires a waiting period, so if the FTC takes no affirmative steps to block the action, the parties can go forward.[44] This second example highlights the reluctance within the American system to lean into *ex ante* governance.

The Securities and Exchange Commission (SEC) represents the other pole, centered on regulation after the fact. *Ex post* enforcement, coupled with the ability to enlist the private bar to supplement enforcement capacity, permits flexible responses to its fluid regulatory domain.

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38. 15 U.S.C. § 18a (2000).

39. Issacharoff, *Regulating After the Fact*, *supra* note 33, at 378 notes this model operates "in less elegant fashion" outside Europe. Issacharoff highlights both statutes as examples of *ex ante* regulation with the U.S. system.

40. *See generally* Richard A. Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, 1 J. Tort L. 4 (2006) (describing FDA preemption of *ex post* remedies and justifications in the context of premarket approval).

41. *See* Charles D. Kolstad, Thomas S. Ulen & Gary V. Johnson, *Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?*, 80 Am. Econ. Rev. 888, 889 (1990).

42. Gregory C. Jackson, Comment, *Pharmaceutical Product Liability May Be Hazardous to Your Health: A No-Fault Alternative to Concurrent Regulation*, 42 Am. U. L. Rev. 199, 210 (1992).

43. 15 U.S.C. §§ 18a(d)–(e) (2000).

44. Issacharoff, *Regulating After the Fact*, *supra* note 33, at 379.

Although the agency requires standard disclosure and corporate organization, it mostly stays out of the unpredictable securities market.[45] In contrast with the process of bringing a drug to market, to issue an offering or participate in other securities transactions, there is no testing or licensing. Regulators worry that *ex ante* regulations would be underinclusive and "susceptible of easy evasion."[46] This model is premised on the idea that sophisticated parties can internalize risk of liability and thus largely regulate themselves.[47] With access to relevant information to establish liability after the fact—coupled with access to an effective enforcement tribunal—*ex post* remedies can cabin deviant behavior. Private enforcement is a "necessary supplement" to the SEC's work, and it furnishes a "safety valve" that prevents capture of the agency by the industry.[48]

Although private enforcement is key to America's particular *ex post* model, a private enforcement regime is not an absolute prerequisite for an *ex post* regulatory paradigm. As the SEC example illustrates, public and private act as complements in our regulatory framework. Private litigation, as mediated through the courts, supplements governmental capacity—often superseding the need for government enforcement at all. Stable deregulation thrives if interested parties have access to reliable mechanisms for private deterrence.[49] With the SEC, enforcement only takes place after allegations of wrongdoing emerge,[50] and there is not even an assumption the agency will be the primary enforcer.[51] But this arrangement is not foreordained by the choice to privilege *ex post* checking. With criminal law, we reserve enforcement for public

45. *See* KENNETH B. WINER, BROOKE D. CLARKSON & SAMUEL J. WINER, 1 SECURITIES ENFORCEMENT: COUNSELING AND DEFENSE §§ 4.01–4.06 (2023) (noting that SEC investigations tend focus on "financial fraud and accounting," "insider trading," "offerings," and "regulated entities (e.g., broker-dealers, investment advisors)"—that is, *ex post* enforcement of disclosure, fraud, and conflict of interest laws).

46. Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement. A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 156 (1990).

47. Issacharoff, *Regulating After the Fact*, *supra* note 33, at 379–80 (noting punitive damages add to this calculus).

48. Stephen Labaton, *Businesses Seek New Protection on Legal Front*, N.Y. TIMES, Oct. 29, 2006, at Al (quoting law professor and former SEC commissioner Harvey J. Goldschmid).

49. *See generally* BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 99–114 (2019) (noting the utility of litigation as a deterrent that can obviate the perceived need for government interference).

50. Issacharoff, *Regulating After the Fact*, *supra* note 33, at 380.

51. From 2002-2004, for instance, private class actions rendered significantly greater recovery from victims of alleged securities fraud as suits filed by the SEC and the Department of Justice. Howell E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 YALE J. ON REG. 253 (2007).

agencies. Likewise, we can imagine a system in which most civil enforcement happens after the fact, but public actors bring all enforcement actions. But this choice would radically transform the role of public agencies, requiring funding of another order of magnitude. In 2020, the SEC only requested $1.746 billion to oversee $97 trillion in securities trading.[52] A change that would allow exclusive public enforcement at anything close to the level we enjoy today would not be feasible within American political culture. In any case, the present arrangement permits active governance without as much centralized bureaucracy—an arrangement fundamental to the U.S. model.[53]

Political feasibility aside, there are strong arguments that exclusive reliance on *ex post* governmental enforcement is not desirable. Whether with securities markets, consumer protection, or products liability, government enforcement is typically hindered by a number of factors: a dearth of resources; jurisdictional authority that may not reach the full sweep of market-wide harms; lack of contact with localized information about perceived harms; the distance between government institutions and the places harms are centered; and the political interrelatedness and threat of "capture" of government regulators by regulated entities with political access and political capital.[54] Thus, however dynamic and contested it remains, the blend that has developed in the United States may have merit—a hybrid, that is, of *ex ante* and *ex post* enforcement, with the comparatively modest *ex ante* regulation largely in the hands of the government and *ex post* regulation split between public and private enforcers.

Private enforcement has powerful justifications, but it is also subject to troubling criticisms. Beyond its capacity to fill gaps in the capacity of state officials to enforce the law, private enforcement can bring a wide array of citizens into the execution and enforcement of our laws. It facilitates participation and a form of deliberation.[55] This has benefits both in the moral register of democratic theory and from a functional perspective, as a vehicle for the aggregation of information and diverse views. But private enforcement can also be attacked—both as a violation of Article II's vesting of the "take Care" power in the Executive,

52. Kurt Schacht, *The SEC's Budget Shows Just How Outgunned It Is*, HILL (Apr. 13, 2019, 2:00 PM), https://thehill.com/opinion/finance/438651-the-secs-budget-shows-just-how-outgunned-it-is/ [https://perma.cc/VN7X-4HCC].

53. Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 907 (2002).

54. Issacharoff, *Regulating After the Fact*, *supra* note 33, at 380. *See also* Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT'L L.J. 135, 137–42 (1999) (making many of these points in the domain of consumer claims).

55. *See generally* Norris, *supra* note 18.

and as a dangerous invitation of self-interested and ideologically driven non-experts into the governance process.[56]

It is important to underline, moreover, that the practice of private enforcement has no necessary ideological alignment. Although historically, it has often been associated with left-leaning causes—a connection traced, at least in part, to its widespread use by Ralph Nader's public interest movement in the 1960s-80s[57]—private enforcement has no necessary ideological alignment. As the recent controversy surrounding Texas's Senate Bill 8 abortion law shows, lawmakers can invoke it in service of any ideological program.[58] And one of the earliest private enforcement regimes was also one of the most pernicious: the Fugitive Slave Acts of 1793 and 1850 deputized bounty hunters to seek out persons who escaped slavery, using vigilantism in service of a controversial enforcement program.[59]

Whatever the virtues and vices of each private enforcement scheme, the demand for "countervailing power" is strong.[60] In response both to practical needs and to our political culture's abiding distrust for centralized authority, our system has come to depend on private enforcement as a counterpoint to the institutions of the federal and state government. It has evolved from an "idiosyncrasy" into a "mainstay" of the American system of governance.[61]

B. The Centrality of the Delegation Principle

Across these domains—lawmaking and enforcement, *ex ante* and *ex post* regulation, public and private enforcement—there is one consistent thread tying all Congress' choices together whenever it confronts complex social problems: delegation. Delegation, that is, both of Article I legislative power and Article II enforcement power.

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56. *See id.* at 1504, 1508.

57. *See* PAUL SABIN, PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM (2021).

58. *See* Whole Woman's Health v. Jackson, 593 U.S. 30 (2021) (allowing pre-enforcement challenge to go forward in part).

59. *See* Norris, *supra* note 18, at 1492.

60. The seminal account of countervailing power was JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (rev. ed. 1956). More recently, see, e.g., Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546 (2021) (explaining how law facilitates countervailing power for the poor and working class); Catherine L. Fisk, *The Once and Future Countervailing Power of Labor*, 130 YALE L.J.F. 685 (2021) (exploring the role of law in thwarting or facilitating countervailing power in the labor context).

61. *See* David L. Noll & Luke Norris, *Federal Rules of Private Enforcement*, 108 CORNELL L. REV. 1639, 1656–63 (2023).

Congress faces continuous pressure to redress social ills. But legislators often lack access to information about the challenges they are asked to remedy. As one political scientist describes it, lawmakers are often "legislating in the dark."[62] And legislating in ignorance carries risk, since poorly designed statutes may not only fail to address politically salient issues but even exacerbate problems Congress was trying to solve.[63] Many times, legislators punt, betting that political costs of inaction are outweighed by risks of shooting wildly into the void.

Delegation offers another solution, allowing Congress to make comparatively abstract choices about the proper direction for policy and then task an agency with articulating "subsidiary administrative policy within the prescribed statutory framework."[64] This practice risks allegations that Congress is signing away its lawmaking duty. But the delegation of lawmaking power has benefits. In (somewhat unsavory) instrumental terms, it gives legislators a chance to duck responsibility, allowing members of Congress to blame missteps on faceless bureaucrats. But it also has pragmatic benefits. Delegation places the locus of practical lawmaking closer to the ground, allowing the regulatory landscape to reflect a finer-grained and more dynamic understanding of the domain of interest.

But delegation is not confined to law*making*; since the nation's early history, Congress has relied on delegation to help the Executive carry out its duty to "take Care" that the laws are faithfully executed. Many scholars focus on the middle decades of the twentieth century in speaking about the growth of private enforcement, but others note important antecedents that complicate claims of recency. Before discussing this history, it is important to emphasize that with the *enforcement* power, the act of granting authority to an executive agency is not delegation—at least in the same way as delegation of the legislative power to the President's branch. The executive branch is directly tasked with this enforcement power by the Constitution, so when agencies take on some of this role, it should be viewed, at most, as a kind of internal delegation,[65] not raising the kind of constitutional red flags as delegations that cross boundaries

62. *See generally* James M. Curry, Legislating in the Dark: Information and Power in the House of Representatives 3 (2015). *See also* Frank R. Baumgartner & Bryan D. Jones, The Politics of Information: Problem Definition and the Course of Public Policy in America 61–87 (2015).

63. On the implications of good and bad design, see generally Alejandro Camacho & Robert Glicksman, Reorganizing Government: A Functional and Dimensional Framework (2019).

64. Yakus v. United States, 321 U.S. 414, 424–25 (1944).

65. Powers are also "subdelegated" *within* agencies. *See* Jennifer Nou, *Subdelegating Powers*, 117 Colum. L. Rev. 473 (2017).

between legislative, executive, and judicial power. Within the executive branch, responsibility for enforcement is shared among the President, her Department of Justice, and the various executive agencies.[66] But through delegation of enforcement power outside the executive branch, Congress has both allowed and compelled the Executive to share this Take Care power with private individuals and organizations.

C. Private Enforcement as Public Law

Individual litigants play an uncontroversial role in the enforcement scheme. When a person or organization suffers an individualized wrong, creating a cause of action under bodies of common law such as tort and contract with deep roots in history and tradition, no one disputes that such plaintiffs can seek redress in court. Everyone agrees that this, at least, is what courts are for.

But the U.S. enforcement regime also relies on plaintiffs who sue to vindicate public interests less clearly tied to personal stakes.[67] These litigants are referred to, most prominently, as "private attorneys general"—a conceptual framework aligned with what Louis Jaffe labeled the "non-Hohfeldian (or ideological) plaintiff"[68] and what Abram Chayes dubbed "public law litigation."[69] True, the resolution of discrete disputes has traditionally been seen as the basic purpose of private litigation.[70] But no one doubts a lawsuit aimed chiefly at resolving disputes can have secondary implications that advance broader public values.[71] But the extent to which "public law litigation"[72] that is pursued by private agents may seek *only* to further non-individualized interests has long been subject to dispute. The boundaries of this model of litigation lie at the core of the battles about standing explored in Parts II and III.

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66. *See, e.g.*, Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1042 (2013) (noting agencies sometimes bring enforcement actions on their own behalf, but sometimes the Department of Justice takes responsibility for them).

67. *See, e.g.*, Trevor Morrison, *Private Attorneys General and The First Amendment*, 103 MICH. L. REV. 589, 590 (2005).

68. *See* Jaffe, *The Citizen as Litigant in Public Actions*, *supra* note 18, at 1033. Jaffe adapted his term from Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

69. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

70. *See id.* at 1282 ("In our received tradition, the lawsuit is a vehicle for settling disputes between private parties about private rights.").

71. *See, e.g.*, Louis Kaplow, *Private Versus Social Costs in Bringing Suit*, 15 J. LEGAL STUD. 371, 371 n.2 (1986) (noting in private tort litigation, the "private benefits are simply the damage award, whereas social benefits consist of the reduction in accident costs resulting from the deterrence effect of private suits").

72. *See* Chayes, *supra* note 69, at 1284 (describing "public law litigation" as an "emerging model"—an alternative to the "traditional model" of private dispute resolution).

Often, public law litigation targets unlawful government action, but the category captures far more. *Brown v. Board of Education* is often viewed as the prime example, and even as a beginning,[73] of the public-law suit, with the litigation targeting lawless government action and seeking injunctive relief to compel the offending institution to change. In a sense, the government "delegates" the power to police itself. But public law litigation need not be limited to suits challenging government. In fact, suits targeting private actors, inflected with the public interest in ensuring that the landscape of laws is faithfully executed, are more directly relevant to the argument here. Chayes himself pointed out "features of public law litigation" in a variety of domains targeting private actors, highlighting antitrust, environmental management, securities fraud, and consumer protection.[74] Although Chayes and scholars who followed in his footsteps identified a rise in such litigation over the second half of the twentieth century,[75] the historical antecedents reach back centuries.

The phrase "private attorney general" may first have entered the American legal lexicon in 1943,[76] used to describe a dual enforcement scheme with private citizens deputized to litigate alongside government prosecutors. But if this term is read broadly to denote a plaintiff who sues to vindicate public interests beyond their own, its origins stretch far earlier.[77] Anglo-American courts have long allowed suits by those motivated by more than their personal interest.[78]

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73. Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. Rev. 1, 1–2 (1984).

74. *See* Chayes, *supra* note 69, at 1284.

75. Beyond Chayes, see also Burbank & Farhang, *supra* note 18. *Cf.* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 Va. L. Rev. 1131 (2009).

76. *See* Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943) (using the phrase "private Attorney Generals" [sic] for the first time to describe plaintiffs empowered by Congress to "su[e] to prevent action by an officer in violation of his statutory powers," and claiming that granting private actors such authority was permissible "even if the sole purpose is to vindicate the public interest"); *see also* Flast v. Cohen, 392 U.S. 83, 119 n.6 (1968) (Harlan, J., dissenting) (tracing the term "private attorneys-general" to *Associated Industries*).

77. *See* Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255, 302 (1961) ("[T]he public action—an action brought by a private person primarily to vindicate the public interest in the enforcement of public obligations—has long been a feature of our English and American law.").

78. *See* Jaffe, *The Citizen as Litigant in Public Actions*, *supra* note 18, at 1035; *see also* Jaffe, *Standing to Secure Judicial Review: Private Actions*, *supra* note 77, at 302 (1961) ("[T]he public action—an action brought by a private person primarily to vindicate the public interest in the enforcement of public obligations—has long been a feature of our English and American law").

In England and the United States, for instance, *qui tam* actions have long been authorized.[79] These statutes prohibited certain forms of conduct; and they authorized private parties—described as "relators" or "informers"—to bring suit on the government's behalf to enforce the prohibition.[80] *Qui tam* statutes have a history reaching back to fourteenth-century England.[81] The relator shared in any damages or civil penalties the defendant ultimately paid, and critically, these laws did not require that this private enforcer have any link to the suit beyond the right granted in the statute.[82] In the United States, *qui tam* actions have a history traced to the first years after Ratification.[83] A slightly later statute, the 1863

79. *See Flast*, 392 U.S. at 120 (1968) (Harlan, J., dissenting) (including *qui tam* cases in list of cases involving "private attorneys-general"); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1314 (1961) (describing the "private Attorney General" coined by Judge Frank in *Associated Industries* as "akin to the 'relator' of the old prerogative writs and the private person currently permitted by the Attorney General under the English practice to sue in the latter's name"). As the Supreme Court has observed, "Qui tam is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.' The phrase dates from at least the time of Blackstone." Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 768 n.1 (2000) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *160).

80. *See* Priebe & Sons v. United States, 332 U.S. 407, 418 (1947) (Frankfurter, J., dissenting) (describing *qui tam* relators as "the representatives of the public for the purpose of enforcing a policy explicitly formulated by legislation"). Today, "relator" and "informer" actions are often grouped together, but some scholars discuss them separately. *See, e.g.*, Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1394–1409 (1988).

81. *See, e.g.*, The Penalty for Selling Ware at a Fair After it is Ended, 1331, 5 Edw. 3, ch. 5 *in* STATUTES OF THE REALM 266 (reprinted 1993) (1811); *see also Stevens*, 529 U.S. at 775 (noting that, starting in the fourteenth century, "Parliament began enacting statutes that explicitly provided for *qui tam* suits," some of which "allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves").

82. *See Stevens*, 529 U.S. at 775 (noting that the English Parliament began enacting *qui tam* statutes in the fourteenth century, and that some versions "allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves").

83. *Id.* at 776 ("*Qui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution."); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 129 (1998) (Stevens, J., concurring in the judgment) (noting *qui tam* actions are "deeply rooted in our history"); Richard A Bales, *A Constitutional Defense of* Qui Tam, WIS. L. REV. 381, 387 n.37 (2001) (citing *qui tam* statutes from the first Congress and shortly thereafter); Evan Caminker, Comment, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 341–42 (1989) (describing how "the *qui tam* enforcement framework is familiar to our legal tradition," that "*qui tam* actions were routinely authorized by the First and subsequent early Congresses," and that *qui tam* actions were also popular at the state level in early American history); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 296–303 (1989) (exploring early American *qui tam* statutes).

False Claims Act (FCA), is still in use today.[84] It imposes civil liability on people who defraud the government and uses a *qui tam* provision to vest individuals with no other connection to the suit beside the fact that they learned of the infraction with the power to sue on the government's behalf.[85] Like its English precursors, the FCA allows relators to collect a share of the damages and civil penalties if their suit succeeds.[86] By furnishing a financial incentive, the legislature creates a "dual enforcement scheme,"[87] with public officials and private citizens working both in competition and as complements to enforce statutory mandates.

Beyond civil litigation, private parties have at times been empowered to join the government in criminal enforcement. In eighteenth-century England, in a number of American colonies, and in the early years of the new United States,[88] individual plaintiffs joined the state in bringing cases against malefactors—whether or not they had been the target of the criminal conduct in question.[89] This history of *qui tam* actions and private criminal prosecutions leads one commentator to claim we should grant "comparable modern institutions . . . a presumption of legitimacy"[90]—an exhortation belied by the Supreme Court's modern standing doctrine, which places checks on analogous delegations of enforcement authority. Holding these early enforcement mechanisms up against the two generations of standing innovations detailed in Parts II.B and III.B, it becomes evident they are in tension with the Court's new jurisprudence, even if *qui tam* actions still survive. For now, while statutory damage schemes are under attack, as exemplified by *Spokeo* and *TransUnion*, "bounty rights"

84. *See generally* 31 U.S.C. §§ 3729–31 (2000); *see also* Act to prevent and punish Frauds upon the government of the United States, ch. 67, 12 Stat. 696 (1863).

85. Morrison, *supra* note 67, at 600.

86. 31 U.S.C. §§ 3730(a)–(b) (2000).

87. Caminker, *supra* note 83, at 350.

88. *See* Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 801 (2000) (Stevens, J., dissenting) (observing "private prosecutions were commonplace in the 19th century"); *see also Steel Co.,* 523 U.S. at 127–28 (Stevens, J., concurring in the judgment) (discussing the practice); ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA 1800-1880, at 1–2 (1989) ("Private prosecution—one citizen taking another to court without the intervention of the police—was the basis of law enforcement in Philadelphia and an anchor of its legal culture, and this had been so since colonial times."); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 515 (1994) ("[S]cholars have determined that the notion of private prosecutions originated in early common law England, where the legal system primarily relied upon the victim or the victim's relatives or friends to bring a criminal to justice."); *id.* at 518 ("American citizens continued to privately prosecute criminal cases in many locales during the nineteenth century.").

89. *See, e.g.*, STEINBERG, *supra* note 88, at 44–46, 66 (describing how, in nineteenth-century Philadelphia, private criminal prosecutions could be brought by those not subject to personal injury).

90. Morrison, *supra* note 67, at 602.

provided under *qui tam* statutes are still grandfathered in because of their venerable pedigree in history and tradition.

Qui tam suits remain in use in the United States,[91] but in the twentieth century, the "citizen suit" became the most familiar species of private attorney general litigation.[92] Some statutes contained citizen-suit provisions, authorizing private citizens to sue other private actors to enforce legal obligations that do not map directly onto plaintiff's individual rights. The Federal Communications Act of 1934 may be the first statute authorizing such litigation, but the Administrative Procedure Act (APA) made broader provision for congressional endorsement of actions by people authorized to bring suit under a "relevant statute."[93] In 1947, Congress gave companies a private right to pursue claims for economic damages against unions engaged in labor actions prohibited by the new Taft-Hartley Act.[94] But it was in the 1970s that widespread use of such provisions truly began to accelerate.

In books and several related articles, Stephen Burbank and Sean Farhang have argued that, beginning in the 1960s, Congress constructed a "litigation state," using citizen suits to stand in for the perceived failings of the administrative bureaucracy.[95] They suggest that, by the late 1960s, mounting disillusionment among liberals with the capacities and promise of the administrative state drove efforts to circumvent capture of the bureaucracy by pro-business, anti-regulatory forces that were ascendant in that period's Republican party.[96] Liberal public interest groups

91. *See, e.g.*, *Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021*, U.S. Dep't Just. (Feb. 1, 2022), https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year [https://perma.cc/FM2M-VWWY] ("Whistleblowers filed 598 qui tam suits in fiscal year 2021 . . . .").

92. As Professor Morrison notes, the term "private attorney general" is not confined to the citizen suit context. Morrison, *supra* note 67, at 602 n.54. Consider attorneys' fee provisions in federal civil rights laws, which reflect the conception that, although the plaintiff is suing to vindicate their own civil rights, they are also undertaking an action with public interest value. *See* Pamela S. Karlan, *Disarming the Private Attorney General*, U. Ill. L. Rev. 183, 205 (2003) ("Attorney's fees are the fuel that drives the private attorney general engine. Every significant contemporary civil rights statute contains some provision for attorney's fees, and in 1976, Congress passed a comprehensive attorney's fee statute that provides for fees under the most important Reconstruction Era civil rights statutes as well.").

93. Sunstein, *What's Standing After* Lujan, *supra* note 18, at 182.

94. Burbank & Farhang, *supra* note 18, at 15.

95. *See id.*; Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment in the Trump Era*, 87 Fordham L. Rev. 37, 38 (2018); Sean Farhang, The Litigation State: Public Regulation and Private Lawsuits in the United States 13, 24 (2010).

96. *See* Burbank & Farhang, *supra* note 18, at 4–16 (providing in-depth discussion of the emergence of the "Litigation State").

gained increasing prominence within the Democratic party coalition, advocating for a state willing to intervene in society and the economy.[97] Divided government became more common after the late 1960s, with Congress usually held by Democrats and the White House more often won by Republicans.[98] In response, these groups advocated for mechanisms of direct enforcement that could not be swayed by presidential influence on the federal bureaucracy. Burbank and Farhang suggest that, by adding private rights of action and statutory fee-shifting provisions to new statutes across the entire domain of social regulation, reformers sought to spur impact litigation and foster the growth of a profitable private bar.[99]

This narrative has some explanatory power, but it does not capture the full picture. Before President Nixon assumed office in 1968, Congress had already built a private enforcement regime into the Civil Rights Act of 1964.[100] But it was not the liberals arguing for this structure. Initially, liberals pressed for a New Deal-style administrative model, patterned on the National Labor Relations Board.[101] But since the Democratic party of the 1960s was divided about civil rights issues, liberals were forced to reach across the aisle to muster a majority. To garner votes from conservative, anti-regulation, but pro-civil rights Republicans, the drafters provided instead for enforcement by private lawsuits.[102] Thus, the strategy of private enforcement to supplement or replace administrative action was nothing new. Subsequently, even during periods of significant Republican legislative power, the private enforcement regime continued to grow.[103]

Nonetheless, in domains such as environmental protection, the 1970s were a watershed. The Clean Air Act was the first statute in this area to authorize citizen suits, and by the early 1990s, Congress had added similar provisions to most federal environmental statutes.[104] These developments coincided with a quiet revolution in standing jurisprudence that Part II.B explores, beginning in the 1970s and culminating

97. *Id.* at 5 (describing an agenda ranging from "nondiscrimination on the bases of race, gender, age, and disability to workplace and product safety, to cleaner air and water, to truth-in-lending and transparent product labeling").

98. Burbank and Farhang note that between the time that Nixon took office in 1969 and the end of the twentieth-century, Democrats controlled one or both chambers of Congress while a Republican sat in the White House 77% of the time. *Id.* at 6.

99. *Id.* at 8.

100. *Id.* at 9.

101. *Id.*

102. *See* Daniel Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History*, 151 U. Pa. L. Rev. 1417, 1487–96 (2003).

103. Burbank & Farhang, *supra* note 18, at 15.

104. Morrison, *supra* note 67, at 603.

in the 1990s. These decades saw the death of what Elizabeth Magill has described as "standing for the public."[105] The majority in *TransUnion* draws this parallel, linking the sea change in standing jurisprudence with the rise of "citizen suits" in the twentieth century.[106]

Federal citizen suit provisions fall into two main models.[107] With both, the statute imposes legal obligations on some regulated entity. Then it provides that these mandates may be enforced either (1) by "any person" (or "any citizen"), or (2) by any person "aggrieved" (or "injured" or "adversely affected"). On its face, the first of these models requires no individualized injury, while the second does. But as will become clear in Part II, the Supreme Court has read even the first model to require that, for a plaintiff to have standing, they must have been injured directly by the challenged conduct.[108] In this way, federal citizen suits differ from the *qui tam* model.

But even though plaintiffs suing as private attorneys general under these statutory schemes must allege injury, the *remedies* might still extend far beyond the modest ambit of their individual harms. Once a citizen-suit plaintiff has established individual injury, Congress has had the capacity to empower them to seek a wide spectrum of remedies with little relation to the redress of their own injury.[109] In fact, under these provisions, plaintiffs often cannot seek money for themselves.[110] Instead, plaintiffs usually seek injunctions or civil penalties that flow directly to the government.[111]

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105. Magill, *supra* note 75, at 1159–82.

106. TransUnion LLC v. Ramirez, 594 U.S. 413, 428 n.1 (2021).

107. For the two models that follow, see Morrison, *supra* note 67, at 603.

108. Note that, although states often *choose* to follow federal justiciability rules, they can adopt different regimes. Thus, as Professor Morrison notes, states can empower citizens to pursue "broad gauged relief" without even the requirement that they must show individualized injury. *Id.* at 604. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1836 (2001).

109. Morrison, *supra* note 67, at 604.

110. Although, as Professor Morrison notes, plaintiffs may be able to extract payment through the settlement process. *Id.* at 604 n.65.

111. *See* Holly Doremus, *Environmental Ethics and Environmental Law: Harmony, Dissonance, Cacophony, or Irrelevance*, 37 U.C. DAVIS. L. REV. 1, 4 (2003) (claiming "in most cases, penalties for violations of environmental laws go to the general treasury, and although citizen suits can result in injunctions halting harmful actions, they cannot produce money damages that might be used to reverse those effects"). Even when plaintiff seeks an injunction with the purpose of remedying their own injury, injunctive relief will, by nature, often confer a broader benefit. An injunction directing a factory to decrease emissions of pollutants, for instance, will benefit not just the individual seeking the order but everyone affected by the pollution. *See generally* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 180 (2003) ("[A] winning effort to stop the disputed conduct (or to compel legally required conduct) would, as a practical matter, redound to the benefit not just of those

Thus, by this point in the early twenty-first century, U.S. lawmakers have constructed a regulatory model premised on widespread participation by non-government actors in the enforcement process. Although the model is subject to a constant drumbeat of criticism[112]—recently, from both right and left[113]—private litigation continues to serve as public law.[114]

D. What Kind of Regime Have We Built? A "Delegation State"

Burbank and Farhang suggest that by legislating a massive apparatus of private enforcement, Congress has constructed a "litigation state." But by highlighting this facet of the regime in isolation, these scholars may obscure a deeper truth about the nature of the government the political branches have built. Responding to the needs of an extended polity[115]—and of an increasingly nationalized market[116]—lawmakers have constructed a regime based on delegation.

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who are parties to the litigation but also to other affected persons who remain on the sidelines."); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 398 (2003) ("[W]here a single plaintiff brings an action for injunctive relief against an institutional actor, the remedy benefits not only the individual plaintiff, but also all other similarly situated individuals.").

112. *See generally* BURBARK & FARHANG, *supra* note 18 (describing failed attempts at "retrenchment" through legislation; attempts to corral litigation through rulemaking; and more successful efforts to use judicial rulings to roll back the "ligation state").

113. Consider the criticism of the S.B. 8 regime. Critics have attempted to distinguish it from other forms of private enforcement. *See, e.g.*, Laura Blockman, Note, *"A Solemn Mockery": Why Texas's Senate Bill 8 Cannot Be Legitimized Through Comparisons to* Qui Tam *and Environmental Protection Statutes*, 77 U. MIA. L. REV. 786, 786–87 (2023).

114. There are strong policy arguments for and against use of private attorneys general to execute public enforcement. Proponents note citizen enforcement can be a cost-effective way to supplement the limited resources of the government; it can help ensure that enforcement is not selective—subject to the whims of the current administration or more long-term political pressures. Opponents cite perversion of incentives by financial or factional incentives that distort the purported altruism of the model; they cite the potential for individuals to free ride on others' efforts, including the government's. Consider *Parklane Hosiery Co. v. Shore*, which, though not a private attorney general case, highlights how a private party can free-ride off agency action for profit. *See generally* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Opponents also note how such litigation encourages cheap settlement, since private attorneys general stand to gain far less than defendants stand to lose; and they cite the need for coordinated and consistent enforcement. *See* Morrison, *supra* note 67, at 608–18 (detailing policy arguments for and against private enforcement).

115. *Cf.* THE FEDERALIST No. 10 (James Madison) (describing a theory of the "extended republic").

116. For the concept of the "national market" applied to litigation, see Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1842 (2006).

As per the conventional account, Congress has delegated to administrative agencies the power to articulate the nation's laws. Congress sets the basic priorities and directions, but then the agencies fill in the details—and far more than the details. At least by some definitions, this "fourth branch" undertakes most of the task of lawmaking in the country, as they promulgate rules with the force and effect of law.[117] As noted above, the agencies' enforcement power should not be viewed as delegation in a strong sense, since prosecution is already a core executive function.

But the private enforcement detailed above should also be viewed as a form of delegation. In tasking individual citizens with the power and the duty to help the Executive "take Care" that the law is faithfully executed, Congress has delegated executive power to an indefinite number of individuals who, armed by statutory causes of action and abetted by courts, are transformed into "citizen executives." Between the delegation of *legislative* power to agencies and the delegation of *executive* power to citizens, we have constructed a state apparatus based on delegation—a "delegation state."

This evolving model has the potential to raise urgent constitutional discomfort, but in recent decades—at least until the past few years—the Supreme Court's response was relatively muted. Perhaps subject to half-legible outer bounds, the borders of permissible delegation have been shrouded in obscurity. The Court limited itself to modest steps to restrict delegations both of lawmaking and enforcement power, although its steps to cabin enforcement power were somewhat more definitive. Our delegation state was left to flourish. But perhaps no more.

E. Coda: Private Law with and as Public Administration

Under the current regime, the lines between private redress and public administration are far from distinct. As noted above, even with individual litigants, private enforcers both complement and compete with public counterparts. But aggregate litigation takes this blurring to another level. These cases break down borders, not only between public and private law, but between enforcement and administration. The judicial process in complex suits creates pores in the boundaries between the administrative state and the courts, turning judges into administrators and courts into de facto agencies. These aggregation mechanisms range from the class action—in effect, a state subsidy that allows private litigants to overcome problems with coordination and bring suits

117. Mostly through nominally "informal" rulemaking and "formal" adjudication.

that might not otherwise be economically or logistically viable[118]—to other mechanisms of varying levels of formality, including quasi-class actions, multidistrict litigation (MDL), and more private aggregations with less assistance from judicial intermediation.[119] These aggregation devices are essential to the function of America's hybrid public-private enforcement regime, creating capacity to bring "negative-value"[120] claims that would not be financially plausible as individual actions and picking up slack from administrative agencies with budgets only a fraction the size that would be required for more comprehensive coverage.

The outcome of aggregate litigation can result in remedies that look like agency action. Writing at the end of the New Deal in 1941, Harry Kalven Jr. and Maurice Rosenfield were some of the first to highlight the institutional dialectic between class actions and agencies.[121] Their core insight was that one central function of the class action is that it can serve as a complement to the administrative state.[122] At times, class actions merely supplement administrative action, multiplying agencies' enforcement capacity and filling in when executive branch employees are unable or unwilling to sue.[123] With securities fraud or price fixing, for instance, the outcome has a "one-shot character," and courts see little need to create ongoing regimes with the enduring nature of administrative agencies.[124] But in other cases, courts and parties use the class settlements[125] to create programs mirroring public administration both in ambitions for continuity and in style of operation. By a kind of alchemy, litigation becomes administration. Courts are suddenly "delegated" an apparently executive task.[126]

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118. *See* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2155–63 (2000) (framing the class action device as a state subsidy for aggregation).

119. *See generally* Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183 (detailing many options and suggesting courts should privilege, or at least create space for, private aggregation when people are able to create nonpublic options to resolve collective disputes).

120. *See* Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, *supra* note 19, at 603.

121. *See generally* Harry Kalven Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

122. *See* Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, *supra* note 19, at 615.

123. Recall, here, the role that private enforcement can play in making sure laws are "faithfully executed" even when the current executive is disinclined to enforce them.

124. *See* Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, *supra* note 19, at 629.

125. Which have attained dominance over trials in the civil system, both in individual litigation and with multiparty disputes. *Id.* at 604.

126. Consider, as an example, the institution created in the wake of the NFL concussion litigation, which had to be designed to last for the whole life of the sixty-five-year

As the Supreme Court has taken steps limiting, although by no means eliminating, the utility of the class action device, litigants have turned to other aggregation tools.[127] With quasi-class actions, bankruptcy, and the centralization and settlement common within MDL proceedings, litigants have looked for mechanisms to fill the void.[128] MDLs have taken on a central role as a medium for resolution. Some commentators point out how the Multidistrict Litigation Statute can itself be viewed as a "[delegation],"[129] transforming courts into de facto, and even to a certain extent de jure, administrators.[130] To a degree, the MDL Statute is a delegation of forms of *judicial* power.[131] But the aggregation mechanism also plays a role in the delegation state more broadly: on the one hand, aggregation facilitates the exercise of private enforcement power; on the other hand, it allows courts to act, in practice, as "delegates" of an administrative power most reminiscent of the executive function.

These few words about aggregate litigation reveal the multidimensionality of our delegation state. It is a construct built by law and practice—by conscious choices and institutional drift. Agency-style class settlements and activist MDL courts show how Congress does not always have to choose between delegation to agencies and to courts. With individual litigation, sometimes public and private enforcers work

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settlement, or the settlement mechanism in the Deepwater Horizon oil spill crisis. *See* Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846, 865 (2017) (noting the efficacy of certain settlements such as *Deepwater Horizon* that came before *NFL Concussion*).

127. The Supreme Court's decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard*, 527 U.S. 815 (1999), are conventionally viewed as critical steps in this development. *See* Troy M. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. Rev. 960, 973–1015 (2012) (detailing impacts of *Amchem* and *Ortiz* and the search for alternatives).

128. Private aggregation is another device, with the intermediation function necessary to overcoming collective action problems performed by private lawyers rather than public employees. *See* Issacharoff, *Private Claims, Aggregate Rights*, *supra* note 119, at 212–13.

129. David L. Noll, *MDL as Public Administration*, 118 Mich. L. Rev. 403, 408 (2019).

130. There is a wide literature noting and exploring relationships between courts and agency implementation of federal regulatory programs. *See, e.g.*, Thomas F. Burke, Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society (2002); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 Pub. Choice 33, 47 (1982); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 Vand. L. Rev. 363 (2010); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 Harv. L. Rev. 1035 (2006); Edward H. Stiglitz, *Delegating for Trust*, 166 U. Pa. L. Rev. 633 (2018).

131. Noll, *supra* note 129, at 437 (explaining the mechanisms of these delegations: to override plaintiffs' choice of forum and the conduct "coordinated or consolidated pretrial proceedings") (citing 28 U.S.C. § 1407(a) (2012)).

in tandem, but with administration via aggregate litigation, the court creates and even, to a degree, *becomes* an agency.

Aggregation pulls everything towards the public domain, whether, as with civil rights suits seeking injunctions, the court is directly concerned with claims that fall more obviously within the public interest ambit, or whether it is treating claims from tort or contract that common law would traditionally have cast as purely individual. In his seminal work on public law litigation, Chayes drew a line between public lawsuits and private, common law litigation. He located the center of his common law category in the autonomous conduct of parties to the dispute.[132] The choice to litigate was initiated and controlled by the parties. And at least in ideal theory, the dispute would not spill beyond the bounds of the dyad. The emergence of a distinct category of public litigation created space for parties to sue to vindicate rights beyond their own.[133] But cases adjudicating mass harms have melted some of the bright lines that distinguish the role courts play in private and public law.[134] The advent of multidistrict coordination and "managerial judging" forces judges to consider impacts of the resolution of common law claims from the perspective of their effects on a broad swath of humanity—both litigants formally joined to the litigation (as full parties, or as represented "quasi-parties" in class actions[135]) and people not formally participating in the case. Even within the delimited universe of, for instance, a bus accident, the controversy is "polycentric," with impacts reaching well beyond the litigants who appear in court to represent the collective.[136]

Thus, we might say aggregate litigation can turn judicial resolution into something akin to legislation. With marquee controversies such as asbestos and opioids, judges are forced to oversee settlements that look more like legislative solutions than traditional judicial resolution. Richard Nagareda details a spectrum, with individual litigation on one side and full-blown public law on the other.[137] Nagareda places class settlements in the middle, neither entirely private nor entirely

132. Chayes, *supra* note 69, at 1285. *See also* Issacharoff, *Private Claims, Aggregate Rights*, *supra* note 119, at 203.

133. *Id.* at 203–04.

134. *Id.* at 204.

135. As Justice O'Connor's opinion in *Devlin v. Scardelletti*, 536 U.S. 1 (2002), makes clear, class members can be parties for some purposes but not for others. "Party" status is not unitary.

136. *See, e.g.*, State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967) (examining a bus accident implicating multiple parties on both sides of the plaintiff-defendant "V," and ruling interpleader was not the proper device for resolving such a mass harm).

137. *See* Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, *supra* note 19, at 631 (depicting this spectrum).

public; not pure contract, nor pure legislation.[138] But aggregate resolution at times appears designed to accomplish the kind of goal conventionally treated by legislatures. When legislatures either refuse or fail to resolve pressing social ills, the lawsuit becomes the vehicle of last resort.[139] In a relatively attenuated sense, then, through legislative and executive abdication, our system has "delegated" this crisis power to individual federal district judges.[140]

II.
Nondelegation's Twin Strands Before 2016

The Part that follows turns to the Supreme Court's response to delegation, first of lawmaking power (Part II.A) and second of enforcement power (Part II.B). As we have seen in the preceding pages, Congress has built a state rooted in delegations. This Part explores the very modest boundaries the Court placed on delegated discretion up through the first decade of the twenty-first century. We find a Court uncomfortable with the apparent constitutional contradictions inherent in the delegation state, but only willing to nip and tuck at its margins.

A. Article I Nondelegation

The nondelegation principle has strong, if by no means unimpeachable, theoretical roots. But dissuaded by the practical difficulties in articulating a line, until the past decade, the Supreme Court has been hesitant to police Congress' capacity to delegate power. Although the Court has often acknowledged the existence of a nondelegation principle, the justices have only ever invoked it to strike down two statutes during a single year.[141]

Since the New Deal, but especially in the past few decades, nondelegation litigation has followed a well-worn pattern.[142] First, a court of

138. *Id.*

139. Consider Judge Polster's reaction to the opioid crisis. He has stated that, forced by the failure of other institutional actors, he felt compelled to try extraordinary measures in an attempt to resolve the crisis. Jef Feeley & Jared S. Hopkins, *Opioid Crisis Point Man Is Cleveland Judge in Midst of Epidemic*, Bloomberg (Jan. 31, 2018) https://www.bloomberg.com/news/articles/2018-01-31/opioid-crisis-point-man-is-cleveland-judge-in-midst-of-epidemic [https://perma.cc/TDS3-MEQU].

140. Checked and guided, to a very limited degree, by the appellate courts in their circuits.

141. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000) ("We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).").

142. *See* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 380 (2017) (detailing the pattern that follows).

appeals invalidates a federal statute on nondelegation grounds.[143] Usually, the Supreme Court grants certiorari, overturning the appellate ruling and affirming the statute as licit.[144] Scholars respond. Some praise the Court for hammering another nail into the part-deceased doctrine's coffin. Others criticize the Court's failure to respect constitutional structure and purported original meaning, and they lament its refusal to cabin the expansion of an ever-growing administrative state. Cycle after cycle, the Court remains largely impervious, maintaining adherence to an underlying nondelegation principle, but almost never invoking it as a functional tool. As Robert Cushman put it in a prescient 1938 article, the Courts seems to prefer "eating its constitutional cake and having it too"—at the same time upholding delegations of legislative power as "vitally necessary to the administration of government" and claiming that "legislative powers cannot be delegated."[145]

That is not to say, however, that the Court's articulation of nondelegation principles has not demarcated some fuzzy outer bounds. It is possible that, aware of the underlying principle, most Congresses have been deterred from extraordinary excess in delegation. Each time delegation questions arose, successive courts ducked contemporary controversies. But the justices sometimes sought to articulate lines to guide future behavior, using the specific case or controversy as a context for a form of advisory practice.[146] These hortatory opinions coalesced into consistent standards over time, with the nineteenth century "fill up the details" test giving way to the "intelligible principle" standard from *J.W. Hampton, Jr. & Co. v. United States*. This purports to set outer bounds but does not clearly limit congressional choice. Thus, current doctrine contains limiting language without giving a clear sense of what would cross the line.[147]

In the late twentieth century, as we will see, some justices experimented with ways to cabin delegation, not by limiting what Congress *can* do, but by forcing legislators to state their intentions clearly (and thus, in practice, limiting the breadth and ambiguity of delegated power). A nondelegation principle has loomed over constitutional discourse for

143. *See, e.g.*, Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1038 (D.C. Cir. 1999) (holding that the EPA read the Clean Air Act unlawfully when it promulgated [air quality standards] that "involve[d] an unconstitutional delegation of [legislative] power").

144. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) (holding "[t]he scope of discretion [the Clean Air Act provision in question] allows is in fact well within the outer limits of our nondelegation precedents").

145. Robert E. Cushman, *The Constitutional Status of the Independent Regulatory Commissions*, 24 CORNELL L.Q. 13, 27 (1938).

146. Courts often sneak covert advisory opinions into controlling decisions, articulating more than the controlling rationale to guide future behavior.

147. Except to the extent that the cases from 1935 can still guide analysis.

most of the nation's history. But if anything, by casting a long rhetorical shadow, the doctrine has served more as a political check than as a legal limit on the shape of government.

1. Constitutional Foundations

Although the Constitution contains no explicit provision enshrining the principle of separation of powers, the text delineates distinct functional powers that can be characterized as legislative,[148] executive,[149] or judicial,[150] and it vests those powers either in distinct bodies or in individuals. To some degree, the document permits departures from this pristine separation of powers model, furnishing an "invitation to struggle" [151] over the control of government policy. But these exceptions are spelled out in the text.[152] Since the Constitution provides each branch with an inalienable core of power, commentators have derived an implicit principle against delegation from the basic structure.

Supporters of a nondelegation principle appeal to various arguments. Some concerns rest in the idea of separation of powers. Placing the power to make the laws and the power to enforce them in the same hands might present a threat to liberty.[153] Beyond the initial moment of framing, this argument suggests that each generation must be blocked from concentrating powers that had initially been divided. The separation of powers rationale merges with due process concerns. If legislators leave commands ill-defined, this indeterminacy delegates discretion to the ad hoc whim of executive and judicial agents.[154] Others claim the lawmaking function must remain in the hands of a representative assembly, suggesting any attempt to transfer all, and even some, of that power to a less

148. *See, e.g.*, U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States.").

149. *See, e.g.*, *id.* art. II, § 1 (placing "[t]he executive Power" in the hands of the President).

150. *See, e.g.*, *id.* art. III, § 1 (vesting "[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

151. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 201 (Randall W. Bland et al. eds., 5th rev. ed. 1984).

152. Consider, for instance, how the President is given a share in the legislative power through the prerogative of the veto, U.S. CONST. art. I, § 7, and the Senate's right to advise and consent to appointment of executive officers and judges. *Id.* art. II, § 2.

153. This is a core principle of liberal constitutional theory. Consider Montesquieu's maxim that "[w]hen the legislative and executive power are united in the same person, or in the same body of magistracy, there can be then no liberty." BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 202 (David Wallace Carrithers ed., Thomas Nugent trans., 1977) (1748).

154. *See* Whittington & Iuliano, *supra* note 142, at 390.

accountable or less representative institution should be viewed as illicit.[155] Moreover, the common law maxim that *delegata potestas non potest delegari* ("delegated power cannot be delegated") is often cited to support the proposition that agents entrusted with authority must exercise the trust themselves. They must refrain from further delegating that power "to a stranger, whose ability and integrity might not be known to the principal, or, if known, might not be selected by him for such a purpose."[156] This has been framed as a matter of "constitutional supremacy"—a mandate that neither the government, nor its component parts, can change the basic structure of offices and powers laid out in the constitutional text.[157]

Skeptics object, pointing to the implausibility of a judicially enforced nondelegation principle and suggesting any limit should be political rather than constitutional.[158] Others accept the existence of a nondelegation principle in theory, even as they define it out of existence by framing every statutory grant of authority to the executive branch as executive power.[159] Since the New Deal, at the latest,[160] these skeptics have triumphed in practice.

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155. This was at the core of English political theorist John Locke's maxim that the legislature "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" and the people cannot "be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them." JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 141 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690). Late-nineteenth century jurist Thomas Cooley referred to this principle when he asserted that "[t]his high prerogative has been intrusted to [the legislature's] own wisdom, judgment, and patriotism, and not to those of other persons." THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES 97 (1880).

156. JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 13 (1839).

157. *See, e.g.*, SOTIRIOS A. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 37 (1975).

158. Justice Robert Jackson thought it "perfectly obvious" that the Framers had provided for a "large measure of delegation," since delegation was necessary for governance. ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 92–93 (1941). Among many others, see also Louis L. Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COLUM. L. REV. 359, 359 (1947) (calling delegation of "lawmaking" power the "dynamo of modern government"); Whittington & Iuliano, *supra* note 142, at 392 (arguing from a political science perspective the basic division of powers in the Constitution "posed no bar to the expansive delegation of legislative powers to the executive," and suggesting any putative prohibition on delegations of legislative power "'has been demolished by constitutional logic drawn from John Marshall'" opining that the power of Congress was plenary and that limits on delegation in the U.S. system are "'political, not constitutional, in character'") (citing John P. Roche, *Distribution of Powers*, *in* 3 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 300, 305–07 (David L. Sills ed., 1968)).

159. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002).

160. *Cf.* Whittington & Iuliano, *supra* note 142, at 384 (arguing, against conventional wisdom, that there had never been a robust nondelegation principle in operation, even if

2. Contested Original Understanding

Recent indications by Supreme Court justices that they may be open to changing their position on delegation doctrine have prompted a festival of new scholarship on delegation (or its absence) at the Founding. Many of these studies attempt to use the originalist methodology in favor with many members of the current Court to upset prior assumptions about the nondelegation doctrine's originalist bona fides.[161] This debate roves across a variety of European and American sources from before the ratification of the Constitution.[162] Opponents of the nondelegation doctrine point out that early Congresses made many delegations of power to administrators, only providing minimal guidance about how that power should be exercised.[163] Meanwhile, proponents attempt to create space for a strong nondelegation doctrine by placing these early examples into limiting categories.[164]

In the first years after ratification, Congress began creating departments and agencies, and in the process of designing the institutions of the government, the legislature employed broad delegations to enact rules. One statute allowed the Executive to design and implement military pensions "under such regulations as the President of the United States may direct."[165] Another allowed the President to fix pay for all

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it was not abandoned as explicitly until after the New Deal). *But see* Joseph Postell, *The Nondelegation Doctrine After* Gundy, 13 N.Y.U. J. L. & Liberty 280, 303 (2020) (rejecting the logic in the Whittington and Iuliano article, and suggesting evidence points to a "robust" nondelegation principle before the New Deal, certainly in the states and likely at the federal level).

161. Justice Gorsuch's *Gundy* dissent asserts, without qualification, that "the framers" believed Congress could not delegate to the executive branch "the power to adopt generally applicable rules of conduct governing future actions by private persons." Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

162. *See, e.g.*, Phillip Hamburger, Is Administrative Law Unlawful? (2014); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021); Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490 (2021).

163. This line of scholarship began with James Hart, The Ordinance Making Powers of the President of the United States 72–89 (1925) and evolved from there. *See, e.g.*, Mortenson & Bagley, *supra* note 162, at 282 (dismissing the existence of a nondelegation principle without qualification); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 Ga. L. Rev. 81, 88 (2020) (suggesting a low constitutional bar for delegations); Nicholas R. Parillo, *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 (2021) (presenting a more complex narrative that nonetheless leaves space for most delegations).

164. These include (1) foreign affairs and (2) voluntary transactions, government services, privileges, and benefits, as opposed to coercive regulation of private rights and conduct. *See, e.g.*, Hamburger, *supra* note 162, at 86; Wurman, *supra* note 162, at 1545.

165. An Act Providing for the Payment of the Invalid Pensioners of the United States, ch. 24, 1 Stat. 95 (1789).

those wounded or disabled in battle.[166] But the Court heard no challenges to these delegations for over two decades, leaving space for more than twenty years of practice to develop without judicial oversight.[167]

3. Nondelegation Before 1935: Towards an "Intelligible Principle" Standard

Eventually, the justices were compelled to engage with one of these delegations. Congress passed a law granting the President discretion to lift an embargo if either France or Britain stopped violating neutral rights of American merchants caught in the crossfire of their war.[168] When customs officials seized the cargo of the brig Aurora for breaking the embargo, the owner sued in federal court. He claimed Congress had impermissibly "transfer[red] the legislative power to the President" and given the President's proclamation "the force of a law."[169] Counsel raised the nondelegation issue, but the Court deflected this claim.[170] Instead, the Court framed the issue as one of conditional lawmaking, giving its blessing to legislation that responded to presidential factfinding.[171] Legislation conditional on executive factfinding will appear later as one of the categories embraced in Justice Gorsuch's *Gundy* dissent. In this first delegation challenge, then, the Marshall Court ducked the potential problem of excess delegation of lawmaking authority.[172]

In the 1820s, the Court finally confronted the nondelegation issue more directly. Chief Justice Marshall's opinion in *Wayman v. Southard* represents an acknowledgement of the difficulties inherent in judicial policing of congressional delegations.[173] This case did not deal directly with

166. Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 719 (1969) ("[T]he President [can] fix the pay, not more than prescribed maxima, for military personnel wounded or disabled in the line of duty."); *see also* An Act for Regulating the Military Establishment of the United States, ch. 10, 1 Stat. 119, 121 (1790) (providing that wounded military personnel "shall be placed on the list of the invalids of the United States, at such rate of pay, and under such regulations as shall be directed by the President of the United States . . . .").

167. Note the tendency of the justices to steer clear of the kind of controversy that might undermine their fledgling authority. *Cf.* Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2 (2020) (explaining this judicial statesmanship in early Court politics).

168. Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 383 (1813).

169. *Id.* at 386.

170. Whittington & Iuliano, *supra* note 142, at 393–94.

171. *Id.* at 394.

172. In like manner, the Court evaded the nondelegation issue when resolving a constitutional challenge to congressional antipiracy statutes, although counsel argued Congress was obligated to define the crime itself. *See* United States v. Smith, 18 U.S. (5 Wheat.) 153, 158 (1820).

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

congressional delegations to executive agencies, but the Chief Justice articulated principles that cut across the delegation domain. The challenge arose from the Judiciary Act of 1789, which allowed federal courts to piggyback on judicial procedures developed in their home states—in effect, a delegation of the development of federal civil procedure to judges in state courts in place of federal legislators. Marshall acknowledged there was some line.[174] But this answered little, since it left a question about what powers might not be "strictly and exclusively legislative" in a manner that would allow Congress to choose to employ others to exercise them.[175] Unwilling to engage in the "delicate and difficult inquiry" required to sketch a "precise boundary" between permissible and impermissible delegations,[176] Marshall was satisfied with recognizing that "the maker of the law may commit something to the discretion of the other departments" and that the delegation at issue was well-designed for the contemporary national interest.[177] At times, the recipients of delegated power would need to be able to "fill up the details"[178]—a phrase that will become important in Gorsuch's *Gundy* framework.[179]

For most of the nineteenth century, the Court did little to clarify the line between proper and improper delegation, and it was only in that century's last decade that the Court made a substantial intervention. In the Gilded Age, federal and state governments experimented with novel regulatory schemes that muddied customary boundaries between legislative, executive, and judicial power.[180] Although these conditions almost certainly drove the Court to engage with the issue, it was not a case about the growing administrative state that furnished grounds for the next major nondelegation case. Instead, it was the Tariff Act of 1890, authorizing the President, by proclamation, to trigger higher duty rates when countries refused to engage in reciprocal free trade with the United States.[181] In *Field v. Clark*, the Court granted deference to the delegation based on a long practice of Congress conferring latitude with respect to trade and commerce on the President.[182]

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174. Marshall wrote that Congress could not "delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative." *Id.* at 42.
175. *Id.* at 42–43.
176. *Id.* at 46.
177. *Id.* at 45–46.
178. *Id.* at 43.
179. *See also* Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 61–62 (1825) (confirming the Marshall Court's willingness both to articulate a nondelegation principle and to shy away from applying it in practice).
180. *See* Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017 (1988) (describing the regulatory schemes).
181. Field v. Clark, 143 U.S. 649, 692–93 (1892).
182. *Id.* at 683–89.

But the *Field* Court took a stronger stand as to the underlying antidelegation norm, setting up a standard that could guide future behavior even as it dodged the controversy at hand. Justice Harlan explained that the principle that "[C]ongress cannot delegate legislative power to the [P]resident is . . . universally recognized as vital to the integrity and maintenance of the system of government ordained by the [C]onstitution."[183] And the Court was ready to draw a more explicit line separating permissible and impermissible delegations. The opinion focused on the site of "discretion."[184] Whatever institutional actor was making the choices was acting as "lawmaker." If Congress merely detailed conditions under which various statutory mandates would come into effect and specified an agent to decide whether the conditions were met, this would not be considered lawmaking in the relevant sense.[185]

The Court backed into a more general statement about nondelegation in the administrative state in the context of a Fourteenth Amendment due process case, but it began a cascade of cases in which the Court built up a very permissive nondelegation standard. This controversy arose as a challenge to a state mine regulation,[186] granting discretion to an official to examine each mine "as often *as he may deem it necessary and proper*."[187] Such discretion would only be a problem, the Court held in *St. Louis Consolidated Coal Company*, if the inspectors abused it.[188] In explaining its standard, the Court suggested that it seemed "obviously necessary" that such a fact-specific task should be determined "by some executive officer" who had the required "practical knowledge" to make this kind of determination.[189]

Case after case, the Court crafted a standard under which almost any action could be considered "nonlegislative," so long as the government officials confined themselves "within the field covered by the statute."[190] An overarching principle holds these cases together: if an action seems "impracticable for Congress" to undertake, then the legislature can delegate it as an "administrative function[]."[191]

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183. *Id.* at 692.
184. *Id.* at 693–94 (citing earlier state court decisions articulating an analogous standard).
185. *Id.*
186. St. Louis Consol. Coal Co. v. Illinois, 185 U.S. 203, 204–06 (1902).
187. *Id.* at 208 (emphasis in original).
188. *Id.* at 209–10.
189. *Id.* at 211; *see also* Douglas v. Noble, 261 U.S. 165, 169–70 (1923) (holding dentistry licensing standards can be delegated to an administrative board).
190. United States v. Grimaud, 220 U.S. 506, 518 (1911).
191. *See* United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 83–85 (1932) (affirming the power of the FDA to determine "reasonable variations" from the mandate that the amount of goods in a package be "plainly and conspicuously marked").

In *J.W. Hampton, Jr. & Co. v. United States*, Chief Justice Taft attempted to promote a clearer metric for evaluating legislative delegations, and he articulated a standard that has guided courts' analysis until now. Evaluating "flexible tariff provision" authorizing the President to adjust duties on imported goods to erase gaps between U.S. production costs and rates in competing foreign markets, the Court reasoned Congress would have trouble with the practical administration of such a rulemaking regime, and thus, it was reasonable to delegate the power to a tariff commission.[192]

Taft made a strong endorsement of a basic nondelegation principle, but then proceeded to sap it of most of its active force. Acknowledging that "[*delegata*] *potestas non potest delegari*," Taft affirmed it would be "a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President."[193] In deciding whether the legislature had exceeded the proper bounds, courts needed to consider "common sense and the inherent necessities of the governmental coordination."[194] Congress merely needs to "lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform"; then, "such legislative action is not a forbidden delegation of legislative power."[195] Later opinions built up a test from *Hampton*'s language, upholding laws as long as they created an "intelligible principle" for the agency to follow as it made policy.[196]

4. Nondelegation Doctrine's "One Good Year?" The Living Doctrine and Its (Mostly) Death

Cass Sunstein famously wrote that the nondelegation doctrine has had "one good year."[197] Only in 1935, in *Panama Refining Co. v. Ryan*[198] and *A.L.A. Schechter Poultry Corp. v. United States*,[199] has any version of the nondelegation doctrine formed the basis for striking down a federal statute.[200] Both cases treated provisions of the National Industrial Recovery Act (NIRA) of 1933, one of the first legislative moves in

192. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 404–05 (1928).
193. *Id.* at 405–06.
194. *Id.* at 406.
195. *Id.* at 409.
196. *See, e.g.*, Lichter v. United States, 334 U.S. 742, 785 (1948) (using *Hampton*'s intelligible principle test to confirm that "[i]t is not necessary that Congress supply administrative officials with a specific formula for their guidance").
197. *See* Sunstein, *Nondelegation Canons*, *supra* note 141, at 322.
198. Pan. Refin. Co. v. Ryan, 293 U.S. 388 (1935).
199. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
200. Note that during the nineteenth century, one sample shows that state courts invalidated eighteen percent of statutes they encountered on nondelegation grounds. *See* Whittington & Iuliano, *supra* note 142, at 426.

President Roosevelt's New Deal program—a statute that provided an unprecedented, sweeping mandate for the President to regulate industry for fair wages and prices.[201] In confronting the statute, the Court claimed it was applying the same standards it customarily employed in nondelegation cases.[202] Prior Courts had always acknowledged there must be *some* limits on the ability of the legislature to hand off its lawmaking power to the executive.[203] Here, the Court believed the early New Deal legislative experiments had taken novel steps across that line, setting up "no requirement, no definition of circumstances and conditions in which" the President should act or refrain from acting.[204] Congress had made no policy in the NIRA. Instead, it had handed over discretion to the President to write law about a specified subject matter. This, the Court believed, went too far. But the Court did not overrule prior cases, or even recognize doctrinal discontinuity.

After the 1937 "switch in time," the Court returned to its pre-1935 habits, upholding statutes under versions of *Hampton*'s intelligible principle standard. But the Court did not explicitly repudiate the 1935 diptych. Although the Court never again rejected a statute on nondelegation grounds, it specifically distinguished its rulings from that year's cases. When evaluating the Tobacco Inspection Act of 1935, for instance, the Court drew an explicit contrast with the NIRA, claiming this "is not a case where [as in the NIRA] Congress has attempted to abdicate, or to transfer to others, the essential legislative functions with which it is vested by the Constitution."[205] The emphasis certainly changed, with the Court warning that, if the judiciary imposed a constant burden on Congress of "filling in the details" of policy, then it would cripple "the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues."[206] It may be, however, that with its 1935 decisions, the Court placed an anchor on legislative creativity,

201. The statute was recognized at once as an unprecedent delegation—an effort to reshape the relationship between Congress and the President. *See* Forrest Revere Black, *National Industrial Recovery Act and the Delegation of Legislative Power to the President*, 19 CORNELL L.Q. 389, 390 (1933–1934).

202. *See Pan. Ref.*, 293 U.S. at 430 (noting "the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend . . . [and where] Congress has declared no policy, has established no standard, [and] has laid down no rule," the legislation goes beyond the scope of permissible delegation); *see also A.L.A. Schechter*, 295 U.S. at 541 (holding a provision is unprecedented under prior delegation decisions because it provides no rules of conduct or standards for operating).

203. *Pan. Ref.*, 293 U.S. at 430.

204. *Id.*

205. Currin v. Wallace, 306 U.S. 1, 15 (1939).

206. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940).

hindering the wildest experiments with delegation by providing evidence that the Court, if sufficiently provoked, *might* step in.

Nonetheless, delegations slipped through that seemed suspiciously close to the laws struck down in *Schechter* and *Panama Refining*, and the Court never did a coherent job integrating these two cases into its active test.[207] In the post-1937 caselaw, the Court mentioned *Hampton* without necessarily invoking its "intelligible principle" language,[208] often citing the need for some "guiding principle" coupled with a need to "fill up the details."[209] Thus, the Court did little to police the line it started to draw in 1935, creating the impression among modern observers that, in spite of the lack of direct repudiation, the cases have "effectively become a dead letter."[210] Contemporary commentators agreed. Student editors of the 1941 *Cornell Law Review Quarterly* noted that, although courts "still pay lip service to the doctrine of the non-delegability of legislative powers, expansion of the operations of government has been accompanied by expansion of the limits of permissible delegation of legislative power to administrative bodies."[211] It is impossible to gauge the true impacts of the 1935 cases on future Congressional behavior, and whether, without the presence of the opinions in the doctrine, the Court would

207. *See* Jonathan Hall, *The Gorsuch Test:* Gundy v. United States*, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, 188 (2020) (noting similarities between the Tobacco Inspection Act, the Agricultural Adjustment Act of 1938, and the Agricultural Marketing Agreement Act of 1937 as compared with the NIRA provisions the Court struck down).

208. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 426 (1944) (holding that the delegation of congressional power is valid so long as prescribed standards are "sufficiently definite and precise" to determine "whether the will of Congress has been obeyed").

209. *See, e.g.*, Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266, 276 (1933) (affirming Congress's delegation to the Federal Radio Commission "to exercise the administrative judgment essential in applying legislative standards to a host of instances"); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932) ("The proviso does not delegate legislative power, but confers administrative functions entirely valid within principles established by numerous decisions of this court . . . .").

210. Hall, *supra* note 207, at 189. For instances of later cases upholding laws of similar scope as NIRA, *see Currin*, 306 U.S. at 6 (holding constitutional the Tobacco Inspection Act of 1935, which authorized the "Secretary of Agriculture . . . to investigate the handling, inspection and marketing of tobacco and to establish standards by which its type, grade, size, condition, or other characteristics may be determined"); Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Connally, 337 F. Supp. 737, 762 (D.D.C. 1971) ("Given a legislative enactment, there have not been any Supreme Court rulings holding statutes unconstitutional for excessive delegation of legislative power since the *Panama Refining* and *Schechter* cases invalidated provisions of the National Industrial Recovery Act of 1933."); *see also* Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 839 n.214 (1997) ("The Court has not struck down a statute on nondelegation grounds since the New Deal. Instead, the Court has upheld a variety of open-ended statutes over nondelegation challenges.") (citations omitted).

211. *Notes and Comments*, 26 CORNELL L.Q. 699, 699 (1940–1941).

have been presented with more venturesome delegation schemes that the justices would have felt compelled to strike down.

5. Permissive Delegation and Its Discontents

In recent decades, the pattern of upholding broad delegations has persisted, even as opponents inside and outside the judiciary have contested the status quo. *Mistretta v. United States* furnishes a useful example of this tension.[212] The Court confronted a challenge to the power created under the Sentencing Reform Act of 1984 for the Sentencing Commission to issue guidelines that become binding on all persons convicted in the federal court system.[213] Although the law granted the agency far-reaching power and expansive discretion, an eight-justice majority held that the statute articulated an intelligible principle sufficient to constrain the exercise of arbitrary will.[214] But even as the majority permitted the delegation, Justice Scalia objected. He emphasized that prior doctrine had focused on the "*degree* of generality contained in the authorization."[215] By contrast, the Commission's powers were themselves a "pure delegation of legislative power."[216] He implied that, although agency actors could exercise mixed powers at the boundary between legislation and execution, if the Executive were tasked with the unqualified capacity to make law, this crossed a line. Notably, Scalia did not advocate for a new nondelegation test for most cases, or invoke his customary originalism, suggesting instead that courts might not be capable of readily policing the boundary.[217]

A 2001 case both reveals the overwhelming prevalence of permissive delegation jurisprudence and shows the seeds of today's discontents. It was the same Justice Scalia who, twelve years after *Mistretta*, penned the unanimous opinion in *Whitman v. American Trucking Associations*, permitting a broad delegation of authority to the Environmental Protection Agency (EPA).[218] Under the Clean Air Act's section 109(b)(1), the agency has the duty to set primary ambient air quality standards to "'protect the public health' with 'an adequate margin of safety.'"[219] In spite of the breadth of the delegation, Scalia chose to embrace decades of precedent, noting (if with some reluctance) that the

212. Mistretta v. United States, 488 U.S. 361 (1989).
213. *Id.* at 367–68.
214. *Id.* at 379.
215. *Id.* at 419 (Scalia, J., dissenting).
216. *Id.* at 420 (Scalia, J., dissenting).
217. *See* Chabot, *supra* note 163, at 102.
218. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).
219. *Id.* at 476.

Court has "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."[220]

In spite of the unanimity of the *Whitman* opinion, Justice Thomas wrote separately to suggest that "[o]n a future day . . . I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[221] Scholars immediately responded, beginning to fashion both structuralist[222] and originalist[223] arguments to dismantle the pro-delegation consensus. This new wave of scholarship proved popular among certain judges, especially a book by Phillip Hamburger from 2014 that made the case that modern administrative law should be seen as an "extralegal" expression of "absolute power."[224] In a 2015 concurrence, Justice Thomas cited Hamburger to suggest "[w]e should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power."[225] That same year, then-Circuit Judge Gorsuch echoed these sentiments in a dissent from a denial of rehearing en banc.[226] Gorsuch sketched a contrast between "most traditional delegation tests" and the twentieth-century intelligible principle standard[227]—a distinction partially, but not entirely, reflected in the doctrinal record. He argued that delegation "run riot" was "inimical to the people's liberty and our constitutional design."[228]

6. Not a Doctrine but a Canon: Constitutional Avoidance as Pressure Against Delegation

In *Mistretta*, the Court explained that "[i]n recent years, our application of the nondelegation doctrine principally has been limited to the

220. *Id.* at 474–75.
221. *Id.* at 487 (Thomas, J., concurring).
222. *See, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 395 n.263 (2002) ("I am more inclined to view [key constitutional] terms as having an 'essentialist' meaning that does not depend on historical usage.").
223. Professors Larry Alexander and Saikrishna Prakash began to gather evidence for the assertion that the nondelegation doctrine has been there from the start. Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1305 (2003).
224. HAMBURGER, *supra* note 162, at 6.
225. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 86 (2015) (Thomas, J., concurring in the judgment).
226. *See* United States v. Nichols, 784 F.3d 666, 670 & n.2 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc) (citing to both Lawson and Hamburger).
227. *Id.* at 672.
228. *Id.* at 677.

interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."[229] This quote hints at an important reality. Even as the Court has consistently refused to use a full form of the nondelegation doctrine to strike down statutes, the principle regularly guides its reading of statutes. Usually without explicitly saying so, the Court lets itself be guided by nondelegation principles, accepting some of the broadest delegations only when Congress has made its intention entirely clear in its statutory text. This canon of construction helped give birth to the now-popular major questions doctrine, which will make another appearance in Part III in three distinct forms—the most robust of which can be viewed as a full-throated nondelegation doctrine of its own.

The *Benzene* case is often cited as paradigmatic of the canon-based approach.[230] Here, the Occupational Health and Safety Administration (OSHA) argued that, as long as its regulatory choices did not exceed the limits of "feasibility," it could regulate workplace risks at will, even if litigants could make no showing these risks were significant. A quick glance at the text of the relevant statute seemed to support OSHA's conclusion,[231] since the words suggested a zero-impairment mandate that would have allowed (or perhaps required) that the agency oversee *all* plausible risks. In a plurality opinion, ruling that the agency had to show that the risks it seeks to regulate are "significant," Justice Stevens linked reasoning from the familiar nondelegation doctrine with the canon of constitutional avoidance. If, as the government was trying to claim, the statute allowed regulation of any risk, no matter how insignificant, the delegation would be so "sweeping" it "might be unconstitutional."[232] Thus, the Court ought to prefer a "construction of the statute that avoids this kind of open-ended grant."[233] Justice Stevens wrote that without a "clear mandate in the Act," it would be unreasonable to assume Congress intended to give the Secretary such "unprecedented power over American industry."[234]

229. Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989).
230. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. ("*Benzene*"), 448 U.S. 607 (1980).
231. "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that *no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life*." 29 U.S.C. § 655(b)(5) (2012) (emphasis added).
232. *Benzene*, 448 U.S. at 646 (citations omitted).
233. *Id.*
234. *Id.* at 645.

In the *Benzene* case we can see hints of two possible principles concerning the level of delegation and the clarity with which Congress must delegate. First, it suggests Congress *cannot* delegate beyond a certain level. But we can assert with more confidence that it stands for the canon-like proposition that "an agency may not assert such broad authority over American workplaces unless Congress has unambiguously granted it that authority."[235] Thus, *Benzene* and its progeny[236] create pressure against the kind of broad discretion that many proponents of a robust nondelegation doctrine fear. To a degree, as will become clear below, Justice Kagan's *Gundy* plurality is a nondelegation canon holding, offering a restrictive reading of a statute in order to protect the law from allegations of excess and restrict its application to prevent an unwarranted excess of delegated discretion.

This is not so much a hard limit on what Congress *can* do, but pressure against delegating half-consciously. In sum, as it existed up until the past few years, the "American nondelegation doctrine," to pick up on language from Cass Sunstein, has been "flourishing."[237] But it has not been a true *non*delegation doctrine. Such an approach does not force courts to draw arbitrary lines as they struggle to answer the "singularly difficult question: *how much discretion is too much?*"[238] Instead, it drives Congress to draft clearly if it wants its delegates making important decisions. This accomplishes some of the more subtle aims of the nondelegation doctrine: hindering Congress from shirking responsibility, requiring the legislature rather than the executive to make the most central policy decisions, and, at least arguably, safeguarding liberty.[239]

But in any real sense, this pre-*Gundy* jurisprudence had no chance of limiting the size and reach of a regime built on delegations. This Article I nondelegation doctrine did not prevent delegation of rulemaking discretion that is closely akin to the Article I power. That is to say, Congress has still been able to choose to give away its lawmaking discretion. If recent opinions are a harbinger of real change, however, this system of amorphous outer bounds and canon-based pressures may be about to constrict dramatically. A doctrine that was largely stuck has suddenly become dynamic.

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235. *See* Sunstein, *The American Nondelegation Doctrine*, *supra* note 2, at 1202.
236. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (forbidding an agency from seizing on ambiguity in statutory text to aggrandize its power in a sufficiently major and transformative way to constitute a "major question").
237. Sunstein, *The American Nondelegation Doctrine*, *supra* note 2, at 1182 (emphasis in original).
238. *Id.*
239. *Id.*

B. Standing: A First Round of Article II Nondelegation

In contrast with the Article I nondelegation doctrine, standing has been functioning as an Article II nondelegation doctrine for decades.[240] These limits on delegation have been modest, however, leaving space for a regime to flourish rooted in delegation of the enforcement power to private parties. In a wave of cases beginning in the 1970s, the Court began to articulate these delegation limits, suggesting plaintiffs cannot enforce a private right of action without direct impact. Plaintiffs were forced to prove the challenged conduct affected them directly. In the language of the Court, it had to be an "injury in fact" that was "particularized" to the plaintiff. These cases opened a gap between statutory rights and standing, establishing the principle that Congress does not have unbounded discretion to delegate enforcement power and, especially, enforcement discretion to private attorneys general. Standing had already evolved into a limit on the use of private litigation as a pure substitute for public law enforced by public officials.

Until *Spokeo* and *TransUnion*, however, the limitations imposed by standing doctrine focused on the types of *plaintiffs* rather than the types of *injuries*.[241] Standing represented a restriction, that is, on *who* Congress could authorize to sue. It was not a restraint on the kind of *harm* Congress could label injurious and, thus, make subject to a cause of action.[242] Thus, the prior incarnation of this Article II nondelegation doctrine did more to limit who could be part of the private enforcement regime than what kinds of harms the regime could govern.

1. Foundations and Origins

Article III extends the "Judicial Power" to certain specified "Cases" and "Controversies."[243] By the original understanding, "cases" encompassed both civil and criminal disputes, but "controversies"

240. *See* Grove, *supra* note 14.

241. *See* Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 MINN. L. REV. 1211, 1220 (2021) (highlighting this distinction in the aftermath of *Spokeo*).

242. The Court hinted there may be such restrictions, but it did not articulate what these limits were. *See id.* at 1224.

243. U.S. CONST. art. III, § 2 ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.").

were only civil.[244] The constitutional text does not advert specifically to "standing," to a "personal stake," or to "injury in fact." It is plausible to suggest, however, that there is no such thing as a "case" or "controversy" without a cause of action.[245] Additional requirements require an investigation of history and practice.

An explicit doctrine of Article III standing appeared relatively late. The Supreme Court did not describe "standing" as a limitation on the exercise of Article III power until 1944,[246] and the Court made few references to the doctrine before the 1970s. Before 1920, the inquiry about whether the Court had power to hear a particular case focused on the presence or absence of a cause of action, whether conferred by Congress or by common law.[247] Even if, by some lights, a potential litigant had suffered an "injury in fact," this had no bearing on the justiciability inquiry. As noted in Part I, both English and American practice allowed actions by such plaintiffs as *qui tam* relators and informers, who had not suffered injuries specific to themselves.

From the origins of standing doctrine through the beginning of the 1970s, the presence or absence of a legal injury governed the inquiry. The conceptual foundation began to be laid in the 1920s and 1930s, as proponents of the emerging regulatory state sought to protect its fledgling institutions from private interference.[248] Justices Brandeis and Frankfurter, seeking to insulate progressive and New Deal legislation from judicial attack, helped to construct a range of mechanisms to limit judicial intervention. Justiciability doctrines were key.[249] A requirement closely akin to standing played a prominent role, blocking attempts by citizens to invalidate democratic outcomes who could not show that they had a right to challenge the enactments.[250] Notably, these

244. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431–32 (1793); Sunstein, *What's Standing After* Lujan*: Of Citizen Suits, "Injuries," and Article III*, *supra* note 18, at 168.

245. *Id.* at 168–69.

246. Stark v. Wickard, 321 U.S. 288, 302, 308 (1944) (referring to "standing to sue" as related to "financial interest").

247. Sunstein, *What's Standing After* Lujan*: Of Citizen Suits, "Injuries," and Article III*, *supra* note 18, at 170. *But see* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (suggesting standing doctrine may have deeper historical roots).

248. *See* Winter, *supra* note 80, at 1452–57 (1988) (tracing connections between the New Deal and development of standing doctrine).

249. *See* Switchmen's Union v. Nat'l Mediation Bd., 320 U.S. 297 (1943) (reviewability); FCC v. CBS, 311 U.S. 132 (1940) (same); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) (reviewability and ripeness).

250. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 154–55 (1951) (Frankfurter, J., concurring); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341–45 (1936) (Brandeis, J., concurring); Fairchild v. Hughes, 258 U.S. 126, 129–30 (1922); *see also* Wilson v. Shaw, 204 U.S. 24, 30–31 (1907) (rejecting a suit to enjoin

early opinions cut off litigation because plaintiffs lacked a legal right, suggesting that no private litigant has a right to sue if the law had not conferred the right to do so. These trends continued under the Administrative Procedure Act (APA), which codified categories under which plaintiffs could challenge administrative action. Again, injury in fact was not necessary or sufficient,[251] and the inquiry turned on harm as framed under law. It was only in 1970, in the *Data Processing* case, that the Court began trading pure reliance on legal injury for a new injury in fact test.[252] Ironically, as much as this injury in fact requirement is now used to constrict standing, this move took place in the context of an attempt to liberalize standing doctrine.[253]

2. Can Congress Create Statutory Rights?

After *Data Processing*, the Court had access to the new "injury in fact" language, but this novel formulation introduced decades of doubt as to the capacity of law to create injury. The Court's jurisprudence in the modern era of standing since 1970 contains two competing propositions.[254] First, some of the Court's cases suggested that because the content of an injury is shaped by law, Congress has control over the boundaries of what counts as injury. But second, certain cases gave the impression that some congressional attempts to create injuries might be unconstitutional.

The first proposition rests on the intuition that legislatures create rights, and invasions of these rights create injuries. Although no private person has standing to litigate over misuses of a plot of public land, the moment the legislature divides the area into private holdings, each owner can sue intruders.[255] As standing doctrine evolved after 1970, the

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payments by the government for construction of the Panama Canal, since plaintiff demonstrated no interest and such relief "would be an exercise of judicial power which . . . is novel and extraordinary").

251. Sunstein, *What's Standing After* Lujan*: Of Citizen Suits, "Injuries," and Article III*, *supra* note 18, at 182.

252. *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970) ("The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact . . . ."). The novel test adopted in *Data Processing* was applied in *Barlow v. Collins*, 397 U.S. 159, 164 (1970), which was decided on the same day. This injury in fact language had roots in a treatise by administrative law expert Kenneth Culp Davis, relying on the APA's "adversely affected or aggrieved" language to suggest that someone thus affected suffers an "injury in fact." 3 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.02, at 211–13 (1958).

253. *See* Magill, *supra* note 75, at 1162 (noting the Court viewed its new inquiry as a liberalization).

254. William Baude describes these propositions "unoriginally" as "Proposition A and Proposition B." William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 199 (2016).

255. *See* Woolhandler & Nelson, *supra* note 247, at 693–94 (suggesting this example).

Supreme Court reaffirmed that legal rights can ground standing, even in the absence of a common law analog. *Trafficante v. Metropolitan Life Insurance* furnishes an early example.[256] The Court found two tenants had standing to challenge discriminatory rental practices by their landlord.[257] Clearly, the tenants had not themselves been barred from residence, but they wanted to live in racially diverse conditions. No such right would have existed at common law, but the Court ruled that the governing statutory framework furnished a right to bring a claim. True, there were other possible injuries,[258] but the majority spent little time on these other possible harms (which might not themselves have existed in the absence of the statute). And four justices penned a separate opinion to underline the Court's reliance on the statutory right created by the Civil Rights Act of 1968. Without the statute, as they took care to emphasize, there would be no case or controversy.[259]

Havens Realty v. Coleman brought this proposition clearly into the holding of a majority opinion,[260] establishing that as long as a plaintiff could show a specific personal connection to the statutory violation, Congress could grant a novel right. Sylvia Coleman was an African American "tester" of the Fair Housing Act, who had been falsely informed, allegedly because of her race, that no apartments were available for rent.[261] Although she had no plans to rent from the building in question, the Court still found she had standing to sue, since there had been an injury to her statutory right to truthful and nondiscriminatory information.[262] Assuming, for the moment, that the facts were as alleged, they were sufficient to constitute the "specific injury" that would satisfy Article III's "injury in fact" requirement.[263] This holding affirmed prior dicta, which had suggested that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute"[264] or that "[t]he actual or threatened injury required

256. Trafficante v. Metro. Life Ins., 409 U.S. 205 (1972).
257. *Id.* at 207.
258. The Court noted the loss of "social benefits," "missed business and professional advantages," and the "embarrassment and economic damage . . . from being 'stigmatized' as residents of a 'white ghetto.'" *Id.* at 208.
259. "Absent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioners' complaint in this case presented a case or controversy within the jurisdiction of the District Court under Art. III of the Constitution. But with that statute purporting to give all those who are authorized to complain to the agency the right also to sue in court, I would sustain the statute." *Id.* at 212 (White, J., concurring).
260. Havens Realty v. Coleman, 455 U.S. 363 (1982).
261. *Id.* at 374.
262. *Id.* at 373 ("Congress has thus conferred on all 'persons' a legal right to truthful information about available housing.").
263. *Id.* at 374 (citations omitted).
264. Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1972), subsequently quoted in O'Shea v. Littleton, 414 U.S. 488, 493 n.2 (1973).

by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[265]

This principle has been applied beyond the civil rights domain. With competitor standing, the Court noted in *Hardin v. Kentucky Utilities* that it had held, time and again, that the "economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business."[266] But since legislatures can create rights, they can choose to protect certain competitive interests by granting standing to sue without a showing of special harm.[267] Moreover, the distinction between *FEC v. Akins*[268] and *United States v. Richardson*[269] with regard to demands for public information shows the influence of the presence or absence of a statutory right. In *Akins*, there was a statute designed specifically to protect individuals from the harm of "failing to receive particular information about campaign-related activities,"[270] but in *Richardson*, failing to receive particular information in an unprotected domain (CIA expenditures) had not been protected by legislative action.[271] The presence or absence of the statutory right made all the difference.

The second proposition—that there is some Article III floor on Congress' capacity to make rights via statutes—stands in uncomfortable tension with the first. *Lujan v. Defenders of Wildlife* is the most famous case in this vein,[272] viewed as a turning point at the time[273] and since perceived as a strong statement against the capacity of private litigants to "stand for the public."[274] Justice Scalia wrote an opinion

265. Warth v. Seldin, 422 U.S. 490, 500 (1975) (quoting *Linda R.S.*, 410 U.S. at 617 n.3).

266. Hardin v. Ky. Utils., 390 U.S. 1, 5–6 (1967) (citing R.R. Co. v. Ellerman, 105 U.S. 166 (1882); Ala. Power v. Ickes, 302 U.S. 464 (1938); Tenn. Power v. Tenn. Valley Auth., 306 U.S. 118 (1939); Perkins v. Lukens Steel, 310 U.S. 113 (1940)).

267. Hardin, 390 U.S. at 6 (citing Chi. Junction Case, 264 U.S. 258 (1924); Alton R.R. v. United States, 315 U.S. 15, 19 (1942); Chicago v. Atchison, Topeka & Santa Fe R.R., 357 U.S. 77, 83 (1958)).

268. FEC v. Akins, 524 U.S. 11 (1998).

269. United States v. Richardson, 418 U.S. 166 (1974).

270. *Akins*, 524 U.S. at 22.

271. *Richardson*, 418 U.S. at 175. Baude, *supra* note 254, at 203 notes such logic "presumably supports standing in cases under the Freedom of Information Act (FOIA), where individuals may request information from the government and sue if it is denied."

272. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Baude, *supra* note 254, at 204.

273. *See, e.g.*, Sunstein, *What's Standing After* Lujan*: Of Citizen Suits, "Injuries," and Article III*, *supra* note 18; Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1171 (1993).

274. *See* Magill, *supra* note 75, at 1181 (suggesting the *Lujan* was the final death of the capacity of individual plaintiffs to invoke "standing for the public").

denying standing to a group of environmentalists whose members tried to challenge a regulation promulgated under the Endangered Species Act.[275] Dismissing theories of standing that were rooted in members' future capacity to see or study various animals as "pure speculation and fantasy,"[276] the Court turned to the issue of whether Congress had created and could create a procedural right that would support standing.[277]

Lujan placed stark limits on the citizen suit. Assuming for the purposes of the litigation that the statute actually created such a procedural right, the majority denied its invasion could support standing. The plaintiff him or herself must be the "object of the action (or foregone action) at issue" for standing to exist.[278] Holding that it would violate separation of powers to "permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts,"[279] the Court placed a hard cap on Congress' capacity to delegate enforcement capacity to private individuals. No direct injury, no lawsuit.

Returning to the question sixteen years later in *Summers v. Earth Island Institute*, the Court made it explicit that there was a hard floor on Congress' capacity to make rights. In *Summers*, another environmental group challenged a procedural defect in an agency regulation.[280] As in *Lujan*, the Court included language in the opinion about the concreteness prong, concluding that "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."[281] This language might be read as a precursor to the Court's moves in *Spokeo* and *TransUnion*, although the Court did not clearly split the "concreteness" and "particularity" prongs of injury in fact or imbue either term with limits beyond the semantic bounds of the words themselves. But the Court specifically denied the right of Congress to drill beneath the

275. 16 U.S.C. § 1536(a)(2). The regulation interpreted section 7(a)(2), requiring interagency consultation to avoid harm to endangered and threatened species, to apply only to actions taken in the United States or on the high seas. *See* Baude, *supra* note 254, at 204.

276. *Lujan*, 504 U.S. at 567.

277. The D.C. Circuit accepted this argument, summarized as follows: "because § 7(a)(2) requires interagency consultation, the citizen-suit provision [16 U.S.C. § 1540(g)] creates a procedural right to consultation in all persons—so that anyone can file suit in federal court to challenge the Secretary's (or presumably any other official's) failure to follow the assertedly correct consultative procedure, notwithstanding his or her inability to allege any discrete injury flowing from that failure." *Id.* at 572.

278. *Id.* at 561.

279. *Id.* at 577.

280. Summers v. Earth Island Inst., 555 U.S. 488 (2009).

281. *Id.* at 496.

injury requirement's "hard floor."[282] "It makes no difference," as the Court made clear, whether "the procedural right has been accorded by Congress" or not.[283] If the individual litigant does not suffer an injury specific to herself, Congress cannot create a right to sue.[284]

But even in this line of cases, the Court took care not to endorse a wholesale rejection of the first proposition that Congress has (at least a high measure of) control over the creation of rights. For instance, Justice Scalia's majority opinion in *Lujan* stressed that "Nothing in this contradicts the principal that 'the injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing."'"[285] Congress was still empowered to take "concrete, *de facto* injuries that were previously inadequate in law" and "elevat[e] [them] to the status of legally cognizable injuries."[286]

Justice Kennedy, who joined the *Lujan* majority, also chose to write separately to underline and expand this point, articulating the case's standard in a manner that sets it directly at odds with the Court's future moves in *Spokeo* and, especially, in *TransUnion*. Acknowledging that government programs both were becoming, and implicitly *should* become, "more complex and far reaching," he cautioned that "we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition."[287] Congress, he suggested, "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." Likely recognizing the ambiguities hiding in the majority's position, he took care to write into the record that "I do not read the Court's opinion to suggest a contrary view."[288]

Under the *Lujan* line, then, Congress could still make rights. But this right-making power had limits—limits that checked the legislature's capacity to hand off enforcement authority to private individuals. Especially after 1992, standing was starting to play a channeling function for delegation of Article II power. Congress could still delegate the enforcement of novel rights to individuals who suffered what courts defined as "real" harms, creating space for society to redefine what it meant for a person to be "injured." But by preventing the legislature

282. *Id.* at 497.
283. *Id.*
284. *See, e.g.*, Raines v. Byrd, 521 U.S. 811 (1997) (furnishing another example of rejection of statutorily created rights).
285. Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (quoting *Warth* and *Linda R.S.*).
286. *Id.*
287. *Id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment).
288. *Id.*

from investing private individuals with the power to sue without outstanding personal stakes, the Court stopped Congress from delegating the state's duty and power to stand for the public. Without a special personal interest, no individual would be allowed to step forward as a champion of collective rights.

3. An Article II Nondelegation Doctrine Before Spokeo*?*

Tara Grove made the case in 2009 that the contemporary standing canon already served as an Article II nondelegation doctrine, rooted in the perceived need to cabin discretion in private enforcement. She suggested that the Executive branch is rightly tasked with broad prosecutorial discretion.[289] However imperfect, there are legal and political constraints that restrain abusive enforcement by its officers.[290] Thus, the Executive has wide latitude to sue without specific injury, with the branch's Article III standing defined with reference to its *duty* to "take Care that the Laws be faithfully executed."[291] This duty creates an implication that the Executive must have authority to bring suit in federal court to make sure that federal laws are obeyed.[292] Private parties have no analogous duty and, thus, no attendant right. Further, they are not subject to the same legal and political constraints. Consequently, Grove proposed that courts use standing doctrine as a response to the possibility for the misuse of free will by unaccountable private delegates.

Before *Spokeo*, the Court's standing doctrine already prevented Congress from delegating the Executive's prosecutorial *discretion* to private enforcers. This Article II nondelegation doctrine tells us Congress cannot confer unbridled discretion on private parties as to when and whom to sue. For individuals with no official mandate, Congress should not be able to sign over the authority to rove the country in search of injuries to prosecute.[293] Instead, private parties are compelled to allege "something more than a common concern for obedience to law."[294] This principle had roots in early standing doctrine. But, as Grove fails to point out,[295] it only

289. Grove, *supra* note 14, at 796–97.
290. *Id.* at 797–802.
291. U.S. CONST. art. II, § 3.
292. Grove, *supra* note 14, at 795.
293. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 469, 486–87 (1982) (expressing particular concern with the fact that plaintiffs came from Washington, D.C. and were challenging a property transaction in Pennsylvania and that they only knew about the supposedly unconstitutional property transfer as a result of a "news release").
294. L. Singer & Sons v. Union Pac. R.R. Co., 311 U.S. 295, 304 (1940) (an early articulation of this maxim).
295. Her focus is not historical.

took hold during the 1970s revolution in standing doctrine detailed above. *Sierra Club v. Morton* was the first articulation of this point after *Data Processing*, with the Court rejecting the assertion that an environmental organization had standing to challenge permits for wilderness development as a mere consequence of its special interest in the subject matter.[296] *Lujan* confirmed that this limitation on private enforcement was constitutional,[297] rather, for instance, than merely prudential.

Stepping beyond Grove's framework, the pre-*Spokeo* standing model appears to have reflected an intuition about the proper place of courts in American society. Congress was not permitted to delegate discretion to private parties to usurp the role properly reserved for officials chosen by the formal channels of U.S. democracy. In an intuition radically belied by the modern practice of aggregate litigation, courts should not serve as fora for the private capture of public functions. Instead, the Article II nondelegation doctrine tells us the judicial system was created to provide a "day in court" for litigants who had experienced personalized wrongs[298]—a matter of redress rather than societal improvement. Private litigation should be nothing less,[299] but this nondelegation paradigm also suggests that it should also be nothing more.

Within the confines of the pre-*Spokeo* cases, private enforcement was left to flourish. Yes, the Supreme Court had created an active, if limited, Article II nondelegation doctrine. Purportedly, the doctrine set limits. But in practice, it appears to have had little impact on the scope and reach of private enforcement as a tool of governance. Most of the harms Congress tries to capture with its private enforcement schemes can be policed by plaintiffs with an individual stake. Thus, after *Lujan*, even as the paradigmatic citizen suits were forced back,[300] Congress continued delegating enforcement power of rights to individual

296. Sierra Club v. Morton, 405 U.S. 727, 738 (1972).

297. Grove, *supra* note 14, at 803.

298. Consider the Court's hesitancy in aggregate litigation practice to depart too far from the "day in court" ideal. *See generally* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286 (2013) (noting, also, tensions between the day in court ideal and capacity for litigation to address important public goods).

299. Some scholars and judges are willing to accept trial procedures that are less than "A+." *See, e.g.*, Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 Emory L.J. 293, 326 (2014); Hilao v. Est. of Ferdinand Marcos, 103 F.3d 789, 793 (9th Cir. 1996) (accepting as sufficient jury instructions at the damages phase of a trial instructing jury to consider evidence from the liability phase). But note that the Supreme Court has not been as amenable to such second-class procedure.

300. Elizabeth Magill suggests the Court's erasure of a doctrine permitting "standing for the public" may have been a reaction to the growth of such citizen suits in the 1960s and 1970s. Magill, *supra* note 75, at 1199. *See also* Sunstein, *What's Standing After* Lujan*: Of*

plaintiffs. As Part I made clear, aggregation plays a large role, helping private litigation create outsized impacts that rival legislation in their magnitude. Our "delegation state" depends, more than ever, on private suits to pursue public goods.

III.
The Two Parts of Today's Nondelegation Renaissance

A. Article I Delegation's Three Forms

Are we all nondelegationists[301] now?[302] The splintered opinion in *Gundy v. United States*[303] inspired fevered speculation about the future of the nondelegation doctrine, as commentators wondered whether the Court might be ready to reinvigorate a mostly moribund legal framework. Most of the attention has understandably focused on Justice Gorsuch's dissent and Justice Alito's concurrence-in-nothing-but-judgment. Gorsuch articulated a new and potentially much stricter nondelegation test designed to replace the intelligible principle framework, while Alito expressed openness to a reexamination of the nondelegation doctrine "[i] f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years."[304] Even the plurality can be read as a step towards more rigorous nondelegation. Although Justice Kagan's opinion upheld the provision under consideration, read carefully, it also represents an articulation of a more modest antidelegation program.

Dissenting in *West Virginia v. EPA*, however, Kagan made clear she is convinced of the basic value of our delegation state. She may be a kind of nondelegationist, but her doctrinal convictions carry modest practical implications. By contrast, her six colleagues in the majority seem less persuaded of the necessity of today's delegation-based regime, at least in its present form.

Reading the signals from *Gundy*, paired with indications in opinions from Justice Kavanaugh and the most recent entry by Justice Roberts in *West Virginia*, it seems possible, and perhaps even likely, that decades of permissive delegation may be coming to a close. In *Gundy*, Justice

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Citizen Suits, "Injuries," and Article III, *supra* note 18, at 165 (suggesting *Lujan* put an end to the citizen suit, at least in the form that had become popular in preceding decades).

301. This perhaps slightly derogatory label was coined by Kevin Arlyck. Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 Notre Dame L. Rev. 243, 247 (2021).

302. This phrasing harks back to Justice Kagan's well-known comment at the Antonin Scalia Lecture series at Harvard in 2015, "we're all textualists now." Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YouTube at 08:29 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/59K9-BC33].

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

304. *Id.* at 2130 (Alito, J., concurring in judgment).

Gorsuch penned the dissent that launched a thousand articles, inspiring scholarly broadsides in support and opposition to the program he laid out in his opinion. And the stakes may be high. As Justice Kagan wrote in the *Gundy* plurality, rejecting a challenge to the Sex Offender Registration and Notification Act, if "SORNA's delegation is unconstitutional," then so is "most of Government—dependent as Congress is on the need to give discretion to executive officials to implement its programs."[305] Many commentators expect a sea change in the Court's nondelegation jurisprudence,[306] either elated or terrified by the current composition of the Court.

But the trajectory of the new jurisprudence is by no means set. The current Court might follow many roads, both with its doctrine and with the application of whatever doctrinal framework takes hold. Even after the Court's recent holding in *West Virginia*, proponents of administrative power might still hope that the Court will not "pull the trigger."[307] As with the Commerce Clause in the 1990s, the Court might hand down a few symbolic opinions, but refrain from invalidating many laws of importance—a "*Lopez* moment" for the nondelegation doctrine.[308] Even some of Justice Gorsuch's originalist allies suggest that a reinvigorated nondelegation doctrine need not prevent rulemaking by delegates.[309] Nonetheless, many commentators anticipate a radical shift.[310]

Recent opinions offer three models. Justice Kagan's plurality opinion in *Gundy* is the most modest, purporting to follow the line of "intelligible principle" cases building on the test from *Hampton*, but adopting a narrowing construction of the statute to read impermissible discretion out of the text. Under this approach, judges would take Congress' handiwork and essentially rewrite statutes so that they fit within permissible bounds. This is a nondelegation canon approach, rooted in constitutional avoidance. It is premised on the assumption that there are kinds

305. *Id.* at 2130.

306. *See, e.g.*, Walker, *supra* note 26 (arguing the current Court, led by Justice Kavanaugh, will rewrite nondelegation jurisprudence and movement towards the stringency of *Schechter Poultry*).

307. For this language, see Mortenson & Bagley, *supra* note 162, at 288.

308. Gerard Magliocca described it as "The Coming *Lopez* Moment for Non-Delegation." Gerard Magliocca, *The Coming Lopez Moment for Non-Delegation*, PrawfsBlawg (June 21, 2019), https://prawfsblawg.blogs.com/prawfsblawg/2019/06/the-coming-lopez-moment-for-non-delegation.html [https://perma.cc/C4AD-9CGQ] (analogizing to *United States v. Lopez*, 514 U.S. 549 (1995), which invalidated a federal statute banning guns in school zones on the ground that Congress had exceeded its power under the Commerce Clause for the first time in nearly sixty years).

309. *See* Wurman, *supra* note 162, at 1502.

310. Mortenson and Bagley suggest that, if proponents of nondelegation are right, no act of rulemaking would be constitutional. Mortenson & Bagley, *supra* note 162, at 288.

of discretion that would be legislative, that Congress is not permitted to delegate these kinds of discretion, and that it is within the province of the judges to massage text so that it conforms to this standard.

Justice Gorsuch's approach has garnered the most attention. In his *Gundy* dissent, he offers a categorical approach rooted in formal rules. He limits the legislature to three circumstances in which it can authorize agents to make decisions, and by enumerating three permissible categories, he seeks to articulate a hard cap on the capacity to delegate. For the moment, Gorsuch's *Gundy* dissent stands as the strongest articulation of the nondelegation principle, still waiting for a majority ready to take it up.

For the moment, a third approach appears most broadly popular: a muscular reinterpretation of the "major questions doctrine." Justice Kavanaugh started to articulate this methodology in a concurrence to a denial of certiorari in *Paul v. United States*,[311] harking back to a dissent from a denial of rehearing en banc he wrote when he was a judge on the D.C. Circuit.[312] Although Kavanaugh wrote that he endorsed Gorsuch's *Gundy* dissent, he has also adverted to a different approach—a prohibition on the delegation of "major questions"—that may depart, both in theory and in practice, from his colleague's framework. His is not so much a limit on the style of discretion, but on the kind of *question* Congress can hand off to an agent. Now, a six-justice majority endorsed a version of this position—superficially more modest, but perhaps in practice just as far reaching. In concurrence, Justice Gorsuch worked to make the Chief Justice's test into what amounts to full nondelegation doctrine—if framed in the "clear statement" terms of the major question canon—but he only won Justice Alito to his cause. For now, ambiguity remains the supreme law of the land.

1. Gundy *and the Plurality's Narrowing Construction*

Gundy addressed the question whether SORNA's grant of discretion to the Attorney General to apply its registration requirement retroactively should be seen as a violation of Article I's limits on the delegation of the legislative power vested in Congress.[313] Both Justice Kagan's plurality and Justice Gorsuch's dissent began from the shared assumption that Article I prohibits Congress from delegating "legislative power" to another branch. And notably, both presupposed that this bar must prevent Congress from adopting laws without instructions that are sufficient to curtail the Executive's discretion to make choices that are qualitatively *legislative*.

311. Paul v. United States, 140 S. Ct. 342, 342 (2019).
312. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017).
313. Gundy v. United States, 139 S. Ct. 2116 (2019).

Although the plain terms of the statute at issue in *Gundy* suggest a broader reading, Justice Kagan chose to opt for a less plausible interpretation of the text to avoid the implication that it gave legislative discretion to an executive actor. SORNA requires a "sex offender"—defined in the statute as "an individual who was convicted of" enumerated criminal offenses[314]—to register in each state where they reside, work, or study.[315] The offender must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement"[316] or, with offenders not sentenced to prison, "not later than [three] business days after being sentenced."[317] Some offenders had been sentenced before SORNA's enactment, however, so the statute vested the Attorney General with the authority "to specify the applicability of the requirements of this subchapter" to such sex offenders and to "prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with" that statute's general registration requirement.[318]

Gundy was just such an offender—convicted before the enactment of the provision.[319] The Attorney General chose to promulgate a regulation to apply SORNA's general registration requirements in full to "sex offenders convicted of the offense for which registration is required prior to the enactment of that Act."[320] Read in isolation, section 20913(d) seemed to hand over discretion to the Attorney General to make SORNA's registration requirements retroactive, which could result in criminal penalties for sex offenders who failed to comply with the regulation.[321] But Justice Kagan's plurality opinion sought a principle

314. 34 U.S.C. § 20911(1) (Supp. V 2017); *see id.* § 20911(5)(A) (noting offenses must involve "a sexual act or sexual contact," *id.* § 20911(5)(A)(i), or be "against a minor," *id.* § 20911(5)(A)(ii)).

315. *Id.* §§ 20913, 20914; *see also id.* §§ 20915, 20918 (mandating sex offenders keep registration current and report in person to a law enforcement office for a period of time ranging from fifteen years to life, depending on the severity of the crime and the offender's history of recidivism).

316. *Id.* § 20913(b)(1).

317. *Id.* § 20913(b)(2).

318. *Id.* § 20913(d).

319. Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).

320. 28 C.F.R. § 72.3 (2018). The Attorney General released an interim rule in 2007 and a final rule in 2010. Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8897 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72) (specifying that SORNA's "requirements . . . apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act"); Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81,849 (Dec. 29, 2010) (codified at 28 C.F.R. pt. 72) (finalizing requirement).

321. As the plurality characterized Gundy's suggestion: "Gundy urges us to read § 20913(d) to empower the Attorney General to do whatever he wants as to pre-Act

that would guide the Attorney General's discretion to apply the statute retroactively. She purported to discover a requirement that the Attorney General must "apply SORNA to all pre-Act Offenders as soon as feasible."[322] Although this phrase appeared nowhere in the statutory text, Kagan distilled the requirement from precedent, statutory context, and legislative history.[323] But Justice Gorsuch made a plausible case in his dissent that "the feasibility standard is a figment of the government's (very recent) imagination."[324]

Interpretive details aside, the plurality's approach provides the Attorney General with less discretion than the broad wording of the statute would otherwise suggest. Although Justice Kagan did not explicitly invoke constitutional avoidance, the spirit of the canon runs through her opinion.[325] Note, here, how this approach collides with other canons of construction, such as the rule of lenity, as the Attorney General is prevented from choosing *not* to apply the registration requirement, with its attendant possibility of criminal liability.[326] Kagan purports to follow the Court's "intelligible principle" approach—a line of doctrine known for its permissive acceptance of basically any delegation.[327] But even as she worked within that framework, she imposed stark limits on the capacity of Congress to delegate certain kinds of choices.

Essentially, the plurality opinion can be taken to stand for the proposition that courts ought to read statutes to take nondelegation worries off the table. That is to say, they should basically rewrite them. This places a cap on delegated discretion. But it is a limitation only partially directed at congressional drafters. Their statutes will not fall as such. But executive actors will not be able to exercise the full extent of discretion contained in the statutory text. Notice the analogy, here, to the *Lujan* line of standing cases, capping the kind of *discretion* that can be delegated, but not limiting the range of issues that this more limited

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offenders: He may make them all register immediately or he may exempt them from registration forever (or he may do anything in between)." *Gundy*, 139 S. Ct. at 2126.

322. *Id.* at 2123 (citing Reynolds v. United States, 565 U.S. 432, 442–43 (2012)).

323. *See* Aditya Bamzai, *Delegation and Interpretive Discretion*: Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 171–72 (2019).

324. *Gundy*, 139 S. Ct. at 2146 (Gorsuch, J., dissenting). *See* Bamzai, *supra* note 323, at 172–73 (explaining the problems with the plurality's reading).

325. Bamzai, *supra* note 323, at 174.

326. *Cf.* Bamzai, *supra* note 323, at 174 (noting that Kagan's reading prevents a more lenient policy choice by the Attorney General).

327. *Cf.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (observing that the only two cases to fail the "intelligible principle" test were one in which the statute provided "literally no guidance for the exercise of discretion" and one in which the statute "conferred authority to regulate the entire economy on the basis of no more precise a standard" than "fair competition").

discretion might reach. Contrast this, on the one hand, with the "major questions" approach detailed below and with the limitations imposed in *Spokeo* and *TransUnion* addressed in Part III.B.

2. Gorsuch: Rejecting the "Intelligible Principle" and Building a New Framework

Gundy was briefed and argued on the question of whether the disputed provision of SORNA had an intelligible principle, and only one amicus raised a question that this framework should govern resolution of the dispute.[328] But Justice Gorsuch dismissed the "intelligible principle" test as an unintentional detour—a phrasing Chief Justice Taft had never intended as more than a reflection of more restrictive caselaw that came before.[329] Appealing to the importance of nondelegation as a bulwark of liberty against the dangers of excessive and arbitrary lawmaking,[330] Justice Gorsuch used *Gundy* as a vehicle to propose a novel test, and Justice Thomas and Chief Justice Roberts endorsed his framework.

Gorsuch suggested three principles to help the Court decide "whether Congress has unconstitutionally divested itself of its legislative responsibilities."[331] First, evoking language from the early case *Wayman v. Southard*,[332] he allowed that Congress could authorize another branch to "fill up the details," as long as Congress "makes the policy decisions."[333] Second, drawing on the Court's first major nondelegation case, Gorsuch suggested Congress can prescribe a rule governing private conduct but then "may make the application of that rule depend on executive fact-finding."[334] Third, and least relevant to the inquiry about delegation of "legislative" power, he permitted that "Congress may assign the executive and judicial branches certain nonlegislative responsibilities."[335]

The first of Gorsuch's principles seems most clearly intended to replace the intelligible principle standard, laying down a line that is more stringent than the intelligible principle test for what constitutes

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328. Hall, *supra* note 207, at 194.
329. *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting) (suggesting the statute at issue in *Hampton* might even have passed muster under prior tests).
330. *Id.* at 2132 (Gorsuch, J., dissenting).
331. *Id.* at 2135 (Gorsuch, J., dissenting).
332. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).
333. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).
334. *See* Hall, *supra* note 207, at 181 (crediting Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813) as the first nondelegation case); *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (citing *Cargo of the Brig Aurora*, 11 U.S. (7 Cranch) at 388).
335. *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

excess discretion. Congress must make any policy decision itself and cannot leave this discretion with the agency. This test self-consciously builds on what Gorsuch perceives as a more stringent standard from the nineteenth century. He cites three examples of what might be considered filling up the details, including ordering federal courts to follow state rules but allowing them to make alterations, giving the duty to design a tax stamp to the Internal Revenue Service commissioner, and vesting the Secretary of Agriculture with the discretion to adopt rules regulating the use of public forests to avoid destruction.[336] Gorsuch's opinion seems to imply that the intelligible principle test might have done this same work, but that it must be rejected because of how it has been applied. Congress cannot hand over discretion on questions of policy, whether major or minor. Executive agents can only be granted choice about *how* they will carry out congressional will rather what policy they will choose to carry out.

With his second principle, Gorsuch allows that at times Congress would be forced to make conditional law. This idea was at the heart of several of the Court's early nondelegation cases,[337] so it has long pedigree in precedent reaching close to ratification. But this approach presupposes a clear line between presidential "factfinding" and presidential "policymaking." Without a well-articulated theory distinguishing factfinding from policymaking, the principle has little interpretive utility.[338] At its root, however, this principle seems to suggest Congress must frame this kind of grant of discretion in the following terms: If X conditions obtain in the world, then do Y; but if W conditions obtain, then do Z. Under this strand of his test, there should be little room for bureaucratic creativity. Congress, presumably, must make all relevant policy decisions in advance.

Gorsuch's third principle seems like an attempt to acknowledge the murkiness of the boundary between legislative and non-legislative responsibilities. With the understanding that "Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch,"[339] Gorsuch creates space for Congress to grant discretion by statute if the Executive can already claim such discretion as a consequence of inherent powers.[340]

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336. *Id.* at 2136 (Gorsuch, J., dissenting).

337. *See* Bamzai, *supra* note 323, at 182–83.

338. *Id.* at 184 (pointing out the SORNA example at issue in *Gundy* was itself does not clear under this standard).

339. *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

340. Other potential constitutional problems aside, this might create space for statutes recognizing and channeling broad discretion in, for instance, the war and emergency power domains.

In contrast with the plurality, Gorsuch's test would act as a firm bar on many statutory delegations. To some degree, the real difference between the opinions may lie in the rigor of the standard of review they bring to the same constitutional question: How should the Court interpret the requirement, accepted by all the justices, that Congress must keep control of the "legislative Power" by making the laws that govern the country?[341] But they approach laws in different terms. Justice Kagan's approach would effect nondelegation via judicial rewriting, squeezing discretion out of statutes with interpretive games. With Gorsuch's approach, laws would fall.

3. Nondelegation of Major Questions

It appears Justice Kavanaugh bears some responsibility for the rise of a third and, at least for the moment, most broadly accepted form of antidelegation jurisprudence: a muscular expansion of the so-called "major questions doctrine." Kavanaugh planted seeds, which appeared to gain traction with his colleagues in the recent *Vaccine Mandate* litigation.[342] Then, in 2022, a newly empowered major questions doctrine won a commanding supermajority in the litigation surrounding the Clean Power Plan in *West Virginia v. EPA*, holding that regulation of existing power plants under section 7411(d) of Title 42 of the U.S. Code was a "major question," and, under that paradigm, Congress did not grant the EPA authority to regulate emissions from existing plants based on generation shifting mechanisms.[343]

Now, the major questions doctrine clearly appears stronger. But it remains as unsettled as ever. In his majority opinion, Justice Roberts put forward an apparent compromise, purportedly rooted in past precedent, and not explicitly framed as an exercise of *non*delegation jurisprudence. Justice Gorsuch, clearly dissatisfied with the majority's obfuscation, advanced a version of major questions premised on the validity of nondelegation values. His approach would operate, in practice, as a nondelegation doctrine. But he convinced only Justice Alito to join his opinion. Dissenting, Justice Kagan worked to diffuse the doctrine's transformative potential, accepting the basic validity of some form of major questions doctrine even as she challenged its applicability to the case at hand. With Gorsuch's explicit nondelegation approach in *Gundy*, laws would fall. As *West Virginia* shows, however, the major questions doctrine can crush broad mandates into impotence. As Roberts' apparently

341. *See* Bamzai, *supra* note 323, at 185.
342. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety and Health Admin., 595 U.S. 109, 122 (2022) (Gorsuch, J., concurring).
343. West Virginia v. EPA, 142 S. Ct. 2587 (2022).

temperate majority opinion illustrates, especially when held up against the critique advanced in Kagan's dissent, a lot turns on how the justices apply their doctrinal tools. For now, the doctrine remains unsettled. But it is full of potential—both latent and already actualized—to claw back a large measure of administrative power.

Justice Kavanaugh had not yet joined the Court when his colleagues heard argument in *Gundy*, so he was unable to join the opinion. But in opinions of his own, he began to signal interest in bringing new vigor to nondelegation jurisprudence. In *Paul v. United States*, in a statement accompanying a per curiam denial of certiorari, Kavanaugh wrote that Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."[344] In spite of his expressed interest in further exploring Gorsuch's position from *Gundy*, however, both his *Paul* statement and his opinion as a D.C. Circuit judge in *U.S. Telecom Association v. FCC* show that Kavanaugh had a different test in mind.[345] He seemed interested in grounding his nondelegation approach in an expansion of the "major questions" doctrine, preventing Congress from delegating discretion on matters of sufficient magnitude. This is a bar on the kind of *question* that Congress can empower an agent to answer rather than a limit on the kind of *discretion* that the agent can exercise. Soon, Kavanaugh's approach started gaining support from his colleagues. Concurring in the *Vaccine Mandate* case, for instance, Justice Gorsuch signaled his willingness to follow Justice Kavanaugh in drawing nondelegation and major question jurisprudence together.[346]

The phrase "major questions doctrine" can have many meanings, but Kavanaugh's version was stronger than its predecessors. Cass Sunstein articulated two versions of the major questions doctrine that previously operated in the caselaw, both grounded in nondelegation values and both putting pressure on the framework of *Chevron* deference.[347] The "weak" version of the doctrine is a "carve-out" from *Chevron* when the agency and the court confront a question of particular importance.[348] In such circumstances, *Chevron* does not apply and courts abandon their usual deference to agency interpretations of their governing statutes.[349]

344. Paul v. United States, 140 S. Ct. 342, 342 (2019).
345. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017).
346. *NFIB*, 595 U.S. at 124 (Gorsuch, J., concurring).
347. Cass Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 475 (2021).
348. *Id.* at 477. *See also* Kevin O. Leske, *Major Questions About the Major Questions Doctrine*, 5 MICH. J. ENV'T & ADMIN. L. 476, 496–97 (2016).
349. Sunstein, *supra* note 347, at 477.

By contrast, Sunstein's "strong" version is a clear statement principle.[350] If an agency tries to assert important new powers, relying on ambiguous language, courts will rule *against* them. Instead of a mere absence of deference, leaving courts to make their own best interpretation, this form of the doctrine instructs courts that agencies should always lose in such circumstances.[351] But Kavanaugh would take the doctrine even further.

In *Paul*, Kavanaugh implied that, for major questions, Congress cannot delegate discretion to agencies at all. Rooting his extension in then-Justice Rehnquist's concurrence in the *Benzene* case, Kavanaugh suggested that "major national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch."[352] Even as he self-consciously bent the meaning of the major question precedent, he invoked it as support for this revisionist reading.[353] Justice Gorsuch endorsed Kavanaugh's blurring in the *Vaccine Mandate* case, claiming that "[w]hichever the doctrine [nondelegation or major question], the point is the same."[354]

While he was still a circuit judge, Kavanaugh had articulated a test to determine which questions were sufficiently "major" that they deserved special treatment. In *U.S. Telecom Association v. FCC*, he specified four factors for distinguishing major questions: first, the sum of money at issue for regulated entities; second, the degree of the impact on the economy; third, the number of people touched by regulation; and fourth, the level of attention Congress and the public directed at the matter.[355] In articulating this test, he acknowledged it would need

350. *Id.* A clear statement principle compels Congress to "express itself clearly when it wishes to adopt a policy that presses against a favored constitutional value." John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 401 (2010).

351. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (describing EPA's reading of the rule as unreasonable because it would enlarge EPA's regulatory authority in a transformative manner without a clear congressional mandate).

352. Paul v. United States, 140 S. Ct. 342, 342 (2019) (citing *Benzene*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring in judgment)).

353. *See, e.g.*, *Util. Air Regul. Grp.*, 573 U.S. at 324; FDA v. Brown & Williamson Tobacco Corp., 529 U. S. 120, 120 (2000) (". . . we believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products"); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 239 (1994) ("Since an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear") (citation omitted); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of a statute's daily administration") (citations omitted).

354. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety and Health Admin., 595 U.S. 109, 125 (2022) (Gorsuch, J., concurring).

355. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 422-23 (D.C. Cir. 2017).

to have "a 'know it when you see it' quality"—with "close cases" and "debates at the margins."[356]

Thus, Kavanaugh did not call for a hard line. Instead, his approach leaves judges to determine which issues are so important that the legislature needs to decide them. What, Kavanaugh seemed to ask, would it be undemocratic for the people's representatives to abdicate? There may be questions so important to the core interests of the polity that they cannot be shielded from direct electoral accountability.

But then Kavanaugh joined Roberts' majority opinion in *West Virginia*, which, at least on the surface, reads more like Sunstein's "strong" clear statement principle than Kavanaugh's "nondelegation of major questions." Near the end of his opinion, in fact, Roberts left an explicit signal of his reluctance to break with the Court's long acceptance of the basic need for a "delegation state." He wrote that a decision of this magnitude requires "clear *delegation*" if Congress hopes to confer this kind of capacity on an Executive branch agency.[357]

In applying this clear statement rule, however, Roberts' analysis prompts a pressing question: can broad discretion, in fact, be "delegated" if the Court wields its clear statement weapon with such vigor? Roberts calls for more than a "plausible textual basis" for the agency's action.[358] Instead, he asks for "clear congressional authorization."[359] On this same page, Roberts plants a telling reference, citing Kavanaugh's dissent from denial of re-hearing *en banc* in *U.S. Telecom*,[360] implicitly signaling the alliance of his new approach with Kavanaugh's nondelegation-friendly reading of the major questions precedent. At least as far as the dissent is concerned, "[r]arely has a statutory provision so clearly applied" as the section at issue here. Even allowing that the dissent might be exaggerating for effect, Justice Kagan's shock at the stringency of Roberts' supposedly conventional clear statement principle shows how close his test may come, in practice, to the nondelegation of major questions Kavanaugh started to articulate in prior opinions. The fact Kavanaugh joined without comment may be further evidence of this affinity.

Roberts frames his enterprise as one of "statutory construction,"[361] but his analysis leaves questions as to what method he endorses instead. He allows that, under the major questions doctrine, the "approach . . .

356. *Id.* at 423 (Kavanaugh, J., dissenting).
357. West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (emphasis added).
358. *Id.* at 2609.
359. *Id.*
360. *Id.* (citing *U.S. Telecom Ass'n*, 855 F. 3d at 419 (Kavanaugh, J., dissenting from denial of re-hearing en banc)).
361. *West Virginia*, 142 S. Ct. at 2607.

is distinct" from "routine statutory interpretation."[362] Then he points to three features that tell against granting the agency the power it claims. He highlights the "vague language," complains that the power was discovered late in the life of a "long-extant" statute, and he notes that Congress "conspicuously and repeatedly declined" to enact the kind of program the agency then chose to implement.[363]

As the dissent complains, this method strays far from the ordinary tenets of textualism[364]; instead, Roberts allows the "gloss" of history to trump text. Justice Frankfurter was famous for advancing a "historical gloss" approach to *constitutional* interpretation in his concurring opinion in the *Steel Seizure Case*,[365] allowing practice to inflect the meaning of text. In fact, Roberts quotes Frankfurter's opinion in a different case,[366] where the father of historical gloss applied a similar approach to the reading of statutes.[367] This is a highly *anti*textualist approach, relying on the history surrounding legislation, including post-enactment practice, not even codified legislative history. Once the Court decides a decision is a "major question," it opens an ill-defined and infinitely malleable universe of interpretive tools that can be deployed to block agencies from taking advantage of statutory delegations as reservoirs of discretion.

The *West Virginia* majority leaves pressing questions about what kind of statement Congress would need to make to count as "clear congressional authorization" to regulate in a domain the Court decides is a "major question." Adopting a strong reading, for instance, the opinion might even be taken to stand for the proposition that Congress *cannot* delegate in broad terms on important questions. Sweeping language would not suffice as a "clear statement." A clear statement rule would begin to look a lot like a substantive bar on delegation in policy domains of a certain importance or magnitude. In these arenas, Congress would be compelled to write the rule itself if it hoped to regulate at all, recasting the agency as something closer to a pure enforcer with only the kinds of discretion inevitably left over under Gorsuch's *Gundy* nondelegation test. To be clear, the opinion does not *say* this. Instead, it leaves plenty of space for judicial discretion and for evolution of the major question canon across cases.

362. *Id.* at 2609.
363. *Id.* at 2610.
364. *Id.* at 2641 (Kagan, J., dissenting) (describing the majority's major questions doctrine as a "get-out-of-text-free" card).
365. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593–628 (1952) (Frankfurter, J., concurring). *See also* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411, 418–19, n.17 (2012).
366. FTC v. Bunte Brothers, Inc., 312 U. S. 349, 352 (1941).
367. *West Virginia*, 142 S. Ct. at 2610.

One of the most basic moves the *West Virginia* case makes—but also one of its most important—is to tie together the major questions doctrine as an "identifiable body of law."[368] Kagan's dissent says this is new. Beforehand, the major questions doctrine was just one tool among many that could be deployed to unpack the import of statutory language. Now, however, once a case is labeled a "major questions" case, it enters a new domain. This is a world, as we just saw, where ordinary textualist principles may soften in response to the perceived import and magnitude of the issue in play. Once we enter this world, Frankfurter's ghost can rise; practice and tradition can trump dictionaries and text. Labeling has power. The availability of this convenient new category may powerfully inflect the landscape of interpretive possibilities.

Justice Gorsuch's *West Virginia* concurrence roots his approach far more explicitly in nondelegation values. Echoing the majority, Gorsuch describes the major questions doctrine as a "clear-statement" rule.[369] But he deploys conceptual jiu-jitsu to make this interpretive principle into a vehicle for importing nondelegation jurisprudence into the Court's opinions. Clear statement principles are designed to make sure institutional actors interpret statutes in line with underlying constitutional principles. And the justification for the major questions doctrine lies in the fundamental nondelegation principle woven into the basic fabric of the Constitution. These values, Gorsuch claims, are embodied in the Court's nondelegation cases, both early nineteenth century precursors such as *Wayman v. Southard*[370] and his own recent (dissenting!) opinion in *Gundy*.[371] The nondelegation doctrine he articulated in *Gundy* becomes the root value of the major questions doctrine.

Then, his *Gundy* dissent is also cast as precedent for his version of the major questions doctrine—an exercise in creative intertextuality designed to elevate both his 2019 dissent and this 2022 concurrence closer to the status of constitutional canon. In *Gundy*, Gorsuch mentioned the major questions doctrine in a single paragraph, as an example of nondelegation principles alive in today's doctrine. Foreshadowing his approach in *West Virginia*, in *Gundy* Gorsuch suggested the major questions doctrine was only "*nominally* a canon of statutory construction."[372] Instead, he framed it as an exception to the usual rule that "an agency can fill in statutory gaps."[373] There, Gorsuch flagged the major questions

368. *Id.* at 2609.
369. *Id.* at 2616 (Gorsuch, J., concurring).
370. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825).
371. *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring).
372. Gundy v. United States, 139 S.Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).
373. *Id.* at 2141.

doctrine as an example of *sub silentio* nondelegation. Now, we see him inducting his own dissent into the major questions canon. As precedent, this nondelegation case serves as a guide for how we should read and deploy the major questions device.

For Gorsuch, major questions jurisprudence is an exercise in the enforcement of the nondelegation doctrine. The doctrine developed, as Gorsuch suggests, beginning in the late 1890s, in response to the explosive growth of the administrative state.[374] Across the twentieth century, the Court "routinely enforced" the nondelegation doctrine through the interpretation of statutory text.[375] Narrow construction allowed the Court to refrain from striking down statutes that might otherwise have been considered unconstitutional.[376] A so-called clear-statement rule becomes a mean of constitutional avoidance. Because Congress *cannot* delegate certain forms of discretion, the Court will read statutes to say that they *have* not tried to engage in such impermissible delegation.

Where the majority gave little direction as to how future courts should determine when to apply their major questions canon, Gorsuch tried to distill coherent guidance from precedent, while acknowledging his list "may not be exclusive."[377] First, if it is a matter of "great political significance," it must be decided by Congress, not an agency.[378] In accord with the majority, and in tension with his usual textualist proclivities, Justice Gorsuch embraced the use of the history of bills "considered and rejected" by Congress.[379] Second, issues affecting a "significant portion of the economy" require clear congressional authorization.[380] And third, if concerns impinge on a "particular domain of state law," this can signal "majorness"—analysis which overlaps with considerations under the allegedly related federalism canon.[381]

Gorsuch also tried to offer metrics to help future courts evaluate what "qualifies as a clear congressional statement authorizing an agency's action."[382] The first consideration is obligatory. A court must begin with the statutory text, viewed from the perspective of the overall scheme.[383] "Oblique" or "elliptical" language will not suffice.[384] By contrast, his

374. *West Virginia*, 142 S. Ct. at 2619 (Gorsuch, J., concurring).
375. *Id.* (Gorsuch, J., concurring).
376. *Id.* (Gorsuch, J., concurring).
377. *Id.* at 2621 (Gorsuch, J., concurring).
378. *Id.* (Gorsuch, J., concurring).
379. *Id.* (Gorsuch, J., concurring).
380. *Id.* (Gorsuch, J., concurring).
381. *Id.* (Gorsuch, J., concurring).
382. *Id.* at 2622 (Gorsuch, J., concurring).
383. *Id.* (Gorsuch, J., concurring).
384. *Id.* (Gorsuch, J., concurring).

second, third, and fourth considerations are discretionary. A court may consider the age and the focus of the statute in relation to the problem that the agency seeks to address in the moment.[385] It may "examine the agency's past interpretations of the relevant statute."[386] Finally, skepticism may be warranted when a court notices a gap between an agency's challenged action and its congressionally assigned mission and expertise.[387]

This test would place restrictive constraints on Congress' capacity to delegate sweeping capacity to agencies to respond to new challenges. The first factor would itself be enough to constitute a clear statement rule. By including the other three, Gorsuch piles on impediments. In asking courts to consider age, he implies discretion may be time-barred, requiring Congress to renew grants of authority in response to each fresh set of new circumstances. With his suggestion to consider past interpretations of the relevant statute, Gorsuch implies an agency may be able to lock itself in to its preliminary reading. Gorsuch's final factor helps seal agencies into narrow policy lanes, barred from ranging across the issue space.

Under Gorsuch's two tests, a court can basically choose what counts as a major question, and then it can constrict an agency's choices down to the most basic level of discretion required for any agent to carry out its assigned tasks. This major questions approach becomes a doctrine barring delegation of any form of discretion a court deems improperly ambitious.

In the face of this concerted assault on the delegation principle, Justice Kagan felt compelled, in her *West Virginia* dissent, to defend the need for delegation in modern government. Both at the moment it passes a statute and, increasingly, as time passes post-enactment, Congress cannot have sufficient knowledge to grasp the regulatory needs in each specific domain.[388] As even Justice Scalia came to realize, the Court ought to largely stand aside, leaving it to Congress to decide how much discretion is necessary.[389] For Kagan, today's delegation state finds justification in both its necessity and its impressive outcomes. Administrative delegations have helped to "build a modern Nation."[390]

Much as Kagan subscribed to a comparatively muted antidelegation principle in her *Gundy* plurality, here, in dissent, she accepts the basic validity of some form of a major questions doctrine. The battle between the Court's ideological wings is not over the basic identity

385. *Id.* at 2623 (Gorsuch, J., concurring).
386. *Id.* (Gorsuch, J., concurring).
387. *Id.* (Gorsuch, J., concurring).
388. *Id.* at 2642 (Kagan, J., dissenting).
389. *Id.* at 2643 (Kagan, J., dissenting).
390. *Id.* (Kagan, J., dissenting).

of the pieces on the playing field. Instead, it seems to revolve around the capacities and implications of each element. Kagan would embrace Sunstein's first and weaker major questions principle, withdrawing *Chevron* deference if an agency strayed beyond the obvious reach of the statutory text and its central areas of expertise. No fit—either with text or with agency capacity—then no deference.

She tries to root her approach in more conventional textualism, questioning the need for a different interpretive toolkit in the face of special issues. A court should begin with text, with dictionaries and other similar tools deployed to explicate its meaning.[391] Then, as ever, judges should turn to its context amidst other provisions. To the extent congressional intent matters, it is the will of the *enacting* Congress that governs, not the choices of subsequent Congress which never made their intention manifest through a completed expression of the Article I, section 7 process.[392] All the major questions doctrine does is to remove the court from the *abnormal* universe of *Chevron* deference and back into the universe of ordinary textualism.

But for now, neither Kagan's "weak" reading nor Gorsuch's non-delegation-doctrine-in-all-but-name are controlling law. Instead, we are left with ambiguity. We have a major questions doctrine endorsed by a supermajority, which can operate as a nondelegation doctrine, but leaves space for courts to stay out—when they want to.

4. What is the New Nondelegation?

A year ago, it seemed possible this all might amount to nothing. But with a cohort of justices ready to reframe nondelegation jurisprudence, we see the Court struggling to articulate real new limits. A clear supermajority seems ready to embrace a de facto practice of selective nondelegation, while Justice Gorsuch seems eager to distill this practice in more sweeping theory. Across the ideological divide, the justices appear united in the belief that there are limits. Congress cannot give away its "legislative" power. But they are divided as to how the Court should police those limits. It may be a difficult collective action problem to muster a majority behind one lasting test.

But as Justice Gorsuch's concurrence in the *Vaccine Mandate* case indicates, the motivation to cabin delegation may be sufficient to gather consensus behind one position or the other—maybe even behind two at once. As the *West Virginia* opinion helped to illustrate, even the more ambitious antidelegationists are willing to sign their names to stepwise

391. *See id.* at 2629–30 (Kagan, J., dissenting).
392. *Id.* at 2641 (Kagan, J., dissenting).

advances. Perhaps over times, majorities will appear to support some version of Gorsuch's tripartite framework *and* Justice Kavanaugh's prohibition on the delegation of major questions. The two tests need not be incompatible, since there can be simultaneous limits on the kind of discretion Congress can give its agents and on the issues the legislature can outsource. There is a world, then, in which the Court embraces both doctrines, placing restraints on legislative delegation from multiple directions. For now, we have a six-justice majority behind an ambiguous approximation of Kavanaugh's approach, occupying the liminal space between Sunstein's "strong" reading of prior precedent and Kavanaugh's more ambitious extension.

These moves may unwind the administrative state as we know it,[393] or they might not. Some observers, even those who embrace a nondelegation renaissance, suggest even a reinvigorated nondelegation doctrine need not portend the end of modern government. After all, the historical materials that Gorsuch canvasses—now elaborated by a generation of scholars in the wake of his dissent—show how Congress created many thriving institutional arrangements even during Gorsuch's nineteenth-century golden era.[394]

There are many possibilities. The delegation state might die or be radically weakened. Executive discretion might change dramatically, while leaving space for administrative capacity that ultimately equals the current arrangement. Or many of today's delegations still might be lawful, read as legitimate instances of "filling up the details" without such a "major" impact on society that Congress needs to make all the choices itself.

B. Standing: No New Rights

Article I nondelegation jurisprudence now lives partly in dissents and concurrences, still waiting for a majority to write it into blackletter law, but the Court's Article II nondelegation project has already taken a second round of doctrinal steps in cases from 2016 and 2021—*Spokeo,*

393. *See, e.g.*, Mortenson & Bagley, *supra* note 162, at 288 (arguing that in the world Gorsuch is building, no act of rulemaking would be constitutional); Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 11 (1994) (suggesting "[u]nder a pure formalist approach, most, if not all, of the administrative state is unconstitutional" since agency "rulemaking and adjudication"—central features of modern administrative agencies—are "inconsistent with the formalist model."); HAMBURGER, *supra* note 162 (suggesting most, if not all, of the administrative state is unlawful).

394. *See e.g.*, Wurman, *supra* note 162, at 1502 (suggesting the history revealed by the new generation of nondelegation historians creates space for certain kinds of rulemaking and executive discretion that would allow a modern government to flourish).

Inc. v. Robins[395] and *TransUnion LLC v. Ramirez*.[396] *Lujan* opened space between statutory rights and standing, planting "seeds of uncertainty"[397] that set up the recent standing dyad. Opinions from the *Lujan* line used the language of "concreteness" and "particularity." By enumerating these elements, cases like *Lujan* introduced a subtle suggestion that these two elements of the "injury in fact" test may have different content that must be satisfied using distinct standards.[398] But it was not until *Spokeo* and *TransUnion* that the Court began to give content and contour to the familiar rhetoric of the standing test.[399]

Before *Spokeo* and *TransUnion*, the "injury in fact" prong of the standing inquiry asked for an analysis of whether the plaintiff had a specific and individualized stake. But in these two recent cases, the Court gave the concreteness element new meaning. Now, Congress cannot grant a would-be plaintiff a private right to sue if that cause of action has no close analog in common law or history. *Lujan* and its progeny shut certain *plaintiffs* out of court, but now, the Court has foreclosed whole categories of *claims*.

The magnitude of this shift may be momentous, both limiting the capacity of Congress to deputize private enforcers beyond the courts' most traditional domains and retooling the balance between legislative and judicial power to define the reach of litigation. As Justice Thomas put it in his *TransUnion* dissent—revisited below as a road not (yet?) taken: "No matter if the right is personal or if the legislature deems the right worthy of legal protection, legislatures are constitutionally unable to offer the protection of the federal courts for anything other than money, bodily integrity, and anything else that this Court thinks looks close enough to rights existing at common law."[400] Never before, as Thomas emphasized, had the Court found legal injury "*inherently* insufficient to support standing."[401] Nor had it held that the legislature was constitutionally precluded from creating rights. But now, "courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention."[402]

395. Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).
396. TransUnion LLC v. Ramirez, 594 U.S. 413 (2021).
397. Bennett, *supra* note 241, at 1221.
398. *See id.* at 1223.
399. *Cf. id.* at 1220 (noting after *Spokeo* that "although the rhetoric of concreteness is not new, its contours as a doctrinal requirement distinct from the requirement of particularization are").
400. *TransUnion*, 594 U.S. at 453 (Thomas, J., dissenting).
401. *Id.* at 454 (Thomas, J., dissenting).
402. *Id.* (Thomas, J., dissenting).

Although the Court purported to rest its holding on separation of powers,[403] Justice Kagan emphasized in her own dissent in *TransUnion* that the majority's approach transformed standing from a doctrine of judicial modesty to one of judicial aggrandizement.[404] As Erwin Chemerinsky pointed out in an essay reacting to the opinion, the majority's separation of powers rationale may be backwards. The majority rests its logic on the "unstated assumption" that, by restricting standing, the Court is inherently serving separation of powers by curtailing the role of the judiciary.[405] But this presupposes a certain vision of judicial modesty—a vulnerable premise that less judicial review is inherently more deferential.[406]

With such an assertion of the authority to bar expansion of the judicial role, the Court is making a strong statement about limits. It is suggesting that there are restrictions on the kind of recourse litigation can provide—no recourse, that is, beyond some "platonic class" of real injuries.[407] And by implication, the Court is insisting Congress cannot deputize the judicial system—through plaintiffs or through courts—to enforce legal interests beyond this historicized domain. Enforcement of novel harms is for the government. Or for no one.

1. Spokeo*'s Confusions*

Spokeo introduced a distinction within the inquiry about "injury in fact" between "concrete" and "particularized." But it created more uncertainties than it resolved. On the one hand, the case suggested limits to Congress's power to create new rights. But on the other, it purported to preserve a role for Congress in defining the boundaries of legitimate injury. By leaving this tension unresolved, the Court gave little guidance to lower courts, creating pressure for the high Court to resolve the issue more definitively. This confusion helped lead to the clearer, and commensurately more radical, move in *TransUnion*.

The facts of the *Spokeo* case highlighted the tension between statutory, procedural rights and the intuitive bounds of what *feels* like an injury that courts are supposed to address. In the Fair Credit Reporting Act (FRCA), Congress enacted a requirement that credit reporting agencies "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the

403. *Id.* at 429.
404. *Id.* at 461 (Kagan, J., dissenting).
405. Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. Rev. Online 269, 290–91 (2021).
406. *Id.* at 291.
407. *See* Baude, *supra* note 254, at 229–30 (noting Justice Thomas' *Spokeo* concurrence clarifies this move).

report relates."[408] It also created a cause of action if the reporting agencies willfully violated these requirements with respect to an individual consumer, allowing this plaintiff to claim $100-$1,000 in statutory damages.[409] Spokeo, Inc. owned and operated a "people search engine" that offered reports containing personal information about individuals.[410] Thomas Robins disputed the accuracy of his profile, citing incorrect information about his employment, his marital status, and whether he had children.[411] Alleging a willful violation of the statute, Mr. Robins brought suit.[412] As one commentator emphasizes in his treatment of the case, it was "a little hard to say" what injury the plaintiff had actually suffered.[413] The profile cast Mr. Robins as richer and more educated, and it gave him a fictive spouse and children. These infelicities might easily be read as good and, at very least, do not seem evidently bad.[414]

In what might be seen as a pathbreaking move, despite the statutory violation, the district court refused to find injury or standing,[415] teeing up the Supreme Court's novel ruling. But the Ninth Circuit followed prior caselaw in finding standing.[416] Recognizing the limits imposed by the *Lujan* line, the circuit court noted that "[o]f course, the Constitution limits the power of Congress to confer standing."[417] But since the injury was his and not someone else's, and particular to him rather than collective, those limits were irrelevant to the case at hand.[418] Because of their individualized nature, Congress could elevate these harms "to the status of legally cognizable injuries."[419]

Rejecting the Ninth Circuit's reading of the *Lujan* model, Justice Alito's majority opinion gave "concrete" new meaning. Notably, the Court did not yet reject Congress power to create novel rights that can support standing. Alito quoted Justice Kennedy's *Lujan* concurrence to the effect that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where

408. 15 U.S.C. § 1681(e).
409. 15 U.S.C. § 1681(n).
410. Spokeo, Inc. v. Robins, 578 U.S. 330, 333 (2016).
411. *Id.* at 336.
412. *Id.*
413. Baude, *supra* note 254, at 212.
414. *Id.* at 213.
415. *See* Robins v. Spokeo, Inc., No CV10-05306 ODW AGRx, 2011 WL 11562151, at *1 (C.D. Cal. Sept 19, 2011) (order correcting prior ruling and finding moot motion for certification) ("Mere violation of the Fair Credit Reporting Act does not confer Article III standing, moreover, where no injury in fact is properly pled. Otherwise, federal courts will be inundated by web surfers' endless complaints.").
416. Robins v. Spokeo, Inc., 742 F.3d 409, 412 (9th Cir. 2014).
417. *Id.* at 413.
418. *Id.* at 413–14.
419. *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992)).

none existed before."[420] But for the first time, the Court broke apart "concrete" from "particularized." Alito wrote that "[f]or an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way,'"[421] finding that Robins met this condition. But the personalized nature of the complaint was only sufficient to demonstrate it was particularized: "Concreteness . . . is quite different from particularization."[422] The Court ruled that a "concrete" injury must be "*de facto*; that is, it must actually exist."[423]

But the Court did little to clarify the details of this new separate inquiry, contenting itself with loose language about history and the judgment of Congress.[424] Although the harm had to be "real" and not "abstract," a concrete harm did not necessarily need to be "tangible."[425] Noting that the "case-or-controversy" requirement is rooted in historical practice, the majority instructed courts to "consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[426] But the Court gave little guidance about how to reconcile this historical inquiry with Congress' role in defining harms.

2. TransUnion*: Cutting Out Congress with an Article II Nondelegation Doctrine 2.0*

Spokeo made it more likely that injuries will satisfy Article III's concreteness requirement if they have a close analog to a harm at common law,[427] but *TransUnion* made clear that a complaining party *must* be able to invoke this kind of parallel. Even going into the *TransUnion* argument, parties had already been put on notice that this investigation would be central, and thus, the litigants fought the case on this point.[428]

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420. Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) (quoting *Lujan*, 504 U.S. at 580).
421. *Id.* at 339.
422. *Id.* at 340.
423. *Id.* (quotations omitted).
424. *Id.* at 340 (noting "both history and the judgment of Congress play important roles").
425. *Id.* (citing "free speech" and "free exercise" as potential intangible injuries).
426. *Id.* at 341.
427. This was the ground on which advocates fought as *TransUnion* made its way to the Supreme Court. *See* Brief for Respondent at 22, TransUnion LLC v. Ramirez, 594 U.S. 413 (2021) (No 20-297) (arguing that intangible injury suffered by plaintiffs was "sufficiently concrete" and that there does noted to be "additional concrete harm").
428. *See id.* at 24 (noting that the question represented a dispute about whether to characterize the harm as a mere division of information into two envelopes versus an act of labeling an innocent victim as a terrorist). In the wake of *Spokeo*, it still seemed there might be space to use the individualized nature of the harm to obviate separation of powers concerns, since Article III standing was founded on separation of powers and

But the *TransUnion* majority confirmed that this historicizing inquiry would now be the key battleground, and the logic of the opinion confirms that this analysis may prove restrictive.

In *TransUnion*, the Court again heard a challenge under FCRA. The defendant is a credit reporting agency that gathers personal and financial information about individuals, compiling them into consumer reports it sells to entities that request information about individual customers' credit status.[429] TransUnion offered an add-on product called OFAC Name Screen Alert, using a third-party software to compare the subject's name to a list of known terrorists, drug traffickers, and other serious criminals.[430] When Sergio Ramirez visited a car dealership in 2013, his credit check triggered an OFAC advisory alert.[431] Lawyers brought a class action on behalf of Ramirez and 8,185 individuals with OFAC alerts in their credit files, suing TransUnion under FCRA for its failure to use reasonable procedures to make sure class members' credit files were accurate.[432] With some of the class, TransUnion had shared the misleading reports with third parties, but the majority of plaintiffs did not have their false files disseminated.[433]

In a five-to-four decision, the Supreme Court ruled that the latter, larger group had no standing to sue, rooting its definition of the "concreteness" inquiry in the requirement that any actionable injury must bear a "close relationship" to harms traditionally recognized as a basis for suit in American courts.[434] "No . . . harm," as Justice Kavanaugh put it, "no standing."[435] At the foundation of this inquiry stood a principle in accord with the *Lujan* line. Citing an article by then-Judge Scalia, Kavanaugh wrote that plaintiffs must be able to sufficiently answer the question: "What's it to you?"[436] But even if this question sounded more like the pre-*TransUnion* definition of "injury in fact," Kavanaugh went on to clarify that the inquiry now had another dimension. A court must

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was designed to prevent the judicial process from being used to usurp the powers of the political branches. Arguably, there was no usurpation when a plaintiff sues under a cause of action Congress creates specifically *for that individual*. *Id.* at 33. Note how in the prior line of cases the inquiry turned on the individualized nature of the harm. After *TransUnion*, this is no longer the case.

429. TransUnion LLC v. Ramirez, 594 U.S. 413, 419 (2021).

430. *Id.* at 419–20.

431. *Id.* at 420.

432. *Id.* at 421.

433. *Id.*

434. *Id.* at 417 (enumerating "physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm").

435. *Id.*

436. *Id.* at 423 (citing Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983)).

ask whether plaintiffs can point to a "close historical or common-law analogue" for the injury they allege.[437] Plaintiffs need not identify an "*exact* duplicate in American history and tradition," but courts have no license to "loosen Article III based on contemporary, evolving belief."[438]

Even as the majority took note of *Spokeo*'s nod to Congress' role in the process of defining rights, it cabined this role to the point of impotence. Yes, courts have to accord "due respect" for Congress' legislative choice to grant a plaintiff a cause of action to sue over a defendant's violation of a statutory prohibition or obligation.[439] But even though Congress has the capacity to "elevate" harms that actually "exist" in the real world, it cannot use its legislative capacity to "transform something that is not remotely harmful into something that is."[440] Under this framework, Congress can build causes of action to guide litigation of traditionally recognized harm, but they cannot create private enforcement regimes for behavior not traditionally captured under the purview of Anglo-American courts. Statutory *damages* used to create the kind of "concrete" financial stake that would be sufficient to support standing, so long as the plaintiff's harm resided within a statute's "zone of interest."[441] But now Congress can no longer create the concrete stake.

Kavanaugh's language gives strong implications he embraces standing as an Article II nondelegation doctrine. Federal courts, as the opinion clarifies, exist to resolve the rights of individuals.[442] A regime where Congress was free to "authorize *unharmed* plaintiffs" to sue defendants who breach federal law would not only violate Article III.[443] It would also "infringe" on the Article II power vested in the executive branch.[444] Citing a law review article by then-litigator and adjunct professor John Roberts, Kavanaugh allowed that courts must accept the "displacement of the democratically elected branches [by private litigants and courts] when necessary to decide an actual case."[445] But this displacement must be the exception rather than the rule. Kavanaugh notes private plaintiffs are not accountable to the people or charged with

437. *Id.* at 424.
438. *Id.* at 424–25.
439. *Id.* at 425.
440. *Id.* at 426 (Judge Sutton helped build this interpretation on top of *Spokeo*'s foundation in *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018) (citing Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).
441. *See* Brief for Respondent at 34, TransUnion LLC v. Ramirez, 594 U.S. 413 (2021) (No 20-297).
442. *TransUnion*, 594 U.S. at 424.
443. *Id.* at 429 (emphasis in original).
444. *Id.*
445. John Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1224 (1993).

the duty to enforce general compliance with regulatory law,[446] implying it is improper for Congress to delegate enforcement discretion to private parties. This is a limitation on courts as well as on plaintiffs. Federal courts do not "possess a roving commission to publicly opine on every legal question," nor can they issue "advisory opinions."[447] For the five justices in the *TransUnion* majority, courts are only there for individual plaintiffs—litigating on their own behalf and suing in traditional domains of judicial competence. It does not matter whether it would be more "efficient" for individuals and courts to take on this role.[448] Congress cannot delegate the Executive's enforcement power to individuals, nor can it sweep the judiciary into this delegation project.

It is important to take a moment to distinguish the novel moves in the *TransUnion* majority's nondelegation project from the preexisting Article II nondelegation doctrine outlined by Tara Grove seven years before *Spokeo* in 2009. Like Grove, Kavanaugh is concerned with unaccountable private discretion. Individual litigation is there to provide redress for personalized wrongs. But Kavanaugh adds a radical twist to Grove's model. Before *TransUnion*, Congress could delegate enforcement *power* to private individuals in essentially any domain, so long as the harm that Congress articulated had a direct and individualized impact. Kavanaugh's opinion cuts out entire domains of harm from this kind of delegation, leaving it to the federal government to enforce its own laws without aid from private deputies.

Under Kavanaugh's model, with private litigants, courts are there to provide redress, not to further the Executive's enforcement goals. Note the contrast with the role of government as litigant. Generalized grievances are perfectly acceptable when brought by the United States rather than private parties.[449] But by vitiating the capacity to delegate enforcement power to private deputies, *TransUnion*'s new version of the Article II nondelegation doctrine may have impacts that are much more extreme. Recall that before the *Spokeo-TransUnion* dyad, enforcement merely required a proper plaintiff. Now, whole categories of *claims* are left to the government alone—at least to the extent it has the resources and capacity to enforce novel domains of harm. By extension, this Article II nondelegation doctrine may discourage *enforcement* altogether instead

446. *TransUnion*, 594 U.S. at 429.
447. *Id.* at 423–24.
448. *Id.* at 429–31 (citing *INS v. Chadha*, 462 U.S. 919, 944 (1983) as a statement that efficiency arguments cannot overcome constitutional strictures).
449. *Cf.* Morrison, *supra* note 67, at 627 (noting "'generalized grievances' fall within the federal judicial power when brought by the United States itself, but not when brought by private plaintiffs").

of merely restricting discretion to those with sufficient interest to underpin legitimacy. Maybe *TransUnion* can stand for an assertion that private litigation cannot be a delegation of public power at all—just its own *non*public phenomenon.[450]

3. Justice Thomas's Alternative

In both cases, Justice Thomas wrote separately—in *Spokeo* in concurrence and in *TransUnion* in dissent—experimenting with an alternative answer to the question about when Congress has power to create novel rights.[451] For Thomas, standing should properly be an inquiry into who is the "proper party" to a given lawsuit—no proper party, no lawsuit.[452] Under this theory, Thomas' Article II nondelegation framework is much more limited than that of his colleagues in the majority.

But who this proper party is depends on whether the suit seeks to vindicate public or private rights. Public rights are owed "to the whole community, considered as a community, in its social aggregate capacity."[453] These include "free navigation of waterways, passage on public highways, and general compliance with regulatory law."[454] In such cases, the government is the paradigmatic litigant.[455] But private individuals can also be allowed to sue if they have suffered "special damage" that separates them from the undifferentiated public.[456] Private rights, by contrast, belong "to individuals, considered as individuals."[457] These include "rights of personal security (including security of reputation), property rights, and contract rights."[458] With these rights, it does not matter what damage the rightsholder suffered, so nominal damages and trespass without injury were considered sufficient to establish a right to sue.[459]

Justice Thomas's focus on this distinction led him to conclude that Congress can confer the right to sue without injury when the right is privately held, but with public rights, there must be something more. In *TransUnion*, Thomas began by noting that courts have jurisdiction over

450. *Qui tam* litigation is an exception. But this historical idiosyncrasy may or may not be long for this world.

451. His model built on two academic articles: Woolhandler & Nelson, *supra* note 247, at 689 and F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 281 (2008).

452. *See* Baude, *supra* note 254, at 228.

453. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 345 (2016) (Thomas, J., concurring).

454. *See* Woolhandler & Nelson, *supra* note 247, at 693.

455. Hessick, *supra* note 450, at 278–80.

456. Woolhandler & Nelson, *supra* note 247, at 702.

457. *Spokeo*, 578 U.S. at 344 (Thomas, J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *5).

458. *Id.*

459. Baude, *supra* note 254, at 228–29.

all cases in law and equity which arise under the laws of the United States, leading to a pressing obligation to exercise this mandate.[460] But this jurisdiction requires that an individual is "assert[ing] his or her own rights."[461] With private rights, only legal injury (*injuria*) is required.[462] But with public rights, this legal injury must be coupled with a more definite form of damage (*damnum*).[463] This distinction, he suggested, went back to the First Congress, which created new private rights through statutes for novel harms.[464] He attacked the distinction between "injury in fact" and "injury in law" as a modern invention—not introduced until 1970 and, thus, entitled to no historical deference.[465]

For Thomas, then, Congress is free to delegate enforcement power to private individuals suing to redress particularized injuries to themselves. Although there may be subtle differences in practice, his approach loosely tracks the pre-*Spokeo* Article II nondelegation doctrine. His approach would work to cabin private prosecutorial discretion, but it would refrain from blocking Congress from creating forms of redress for novel but private harms. Thomas also has an implicit theory of litigation. Like the majority, he appears to believe that litigation is for private redress. But he does not subscribe to a vision of the purview of injury that is frozen in time at Ratification. Thus, Thomas' courts may not welcome the delegation of enforcement power. But to the extent such delegation is necessary to ensure there is redress for new private harms, he is willing to allow it.

4. Aggregation and the Power and Reach of Private Enforcement

The new standing jurisprudence, initiated in *Spokeo* and confirmed and extended in *TransUnion*, puts pressure on the use of private litigation as public enforcement. As noted in Part I, aggregate litigation has the ability to extend the capacity and scope of the individual suit, granting these actions an impact that extends beyond the parties at bar—giving private actions a reach that can rival legislation.

TransUnion's doctrine puts pressure on this model of aggregation-as-public-law from two directions. First, the case reaffirms that *every* class member must have Article III standing in order to recover individual damages, and it clarifies that plaintiffs "must demonstrate standing for each claim that they press and for each form of relief that they

460. TransUnion LLC v. Ramirez, 594 U.S. 413, 443 (2021) (Thomas, J., dissenting).
461. *Id.* at 446.
462. *Id.* at 447.
463. *Id.*
464. *Id.* (citing the novel right for copyright holders to sue).
465. *Id.* at 450–51.

seek."[466] By affirming that this standing inquiry must extend beyond the named plaintiff, the Court places pressure on the capacity for class actions to serve a deterrent function and for Rule 23 litigation to easily attain the range and influence of public law. This places a drag on the ease of mass certification, lessens the reach of the case, and may diminish the ease of certifying a broad class that can help litigants bargain for global peace. But this first pressure point is a matter of degree, not of kind.

The second pressure point may have a massive impact: by contrast with the first, it restricts the kind of claims aggregation can reach at all. As the preceding section explained, the Court has placed new and potentially strict limits not only on the kind of plaintiff that can bring suit, but on the kind of claim judges may allow through the courthouse door. Thus, it limits the areas that mass litigation can touch as an auxiliary or a proxy for public enforcement. Before, if a proper plaintiff, along with a well-defined class, brought the case into court, the court was not limited by the kinds of claims accepted within a judge-made domain of traditional private law. Now, as with litigation by individuals, aggregate litigation may not be able to touch vast areas of harm.[467] Thus, even if aggregate suits retain the same *caliber* of power—still able to resolve claims for large numbers of plaintiffs and to create meaningful liability for defendants—Congress and the public will not be able to depend on private delegates to enforce novel harms.

TransUnion's impact on aggregate litigation shows the tension between two incompatible visions of judicial deference. Aggregate litigation can be an incredibly powerful tool, allowing litigants and courts to use private suits to rival the might and reach of the federal executive. From the perspective of the *TransUnion* majority, then, putting limits on the reach of judicial power looks like deference to the other branches. At the same time, however, the new standing doctrine places restrictions on the capacity of the political branches to *choose* the style of enforcement—to make the decision, for instance, that public resources will never be adequate to the task of satisfactory enforcement or that capital, whether financial or political, is better spent on other tasks. But here, formalism and pragmatism are ships passing in the night. From one perspective, courts are courts, and no arguments from efficiency should be able to transform them into something they were not designed

466. *Id.* at 431.

467. Note, however, this particular development is likely not to have direct impact on class actions concerning common law harms rooted, for instance, in tort or contract. These claims may, however, be hindered by *other* doctrinal developments.

to be.[468] From the other, it seems absurd for the courts to presume they know better than Congress how to engage in institutional design.[469]

Conclusion

In recent years, then, the Supreme Court has made moves that portend limits to a regime built on delegation. But the impacts of these developments are only beginning to take shape. As noted above, some commentators expect radical transformations, while others dismiss both fears and hopes of massive change as overblown. How courts develop the doctrines from here[470]—and how political actors and private litigants respond to this judicial guidance—will have profound implications for the nature of our institutional model.

Justice Gorsuch wrote in his *Gundy* dissent that "[w]hen one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines."[471] His point was that even as the nondelegation doctrine has slept, courts have taken regular steps to "rein in" Congress' efforts to delegate legislative power.[472] But just as the impulse to *restrain* delegation has flowed into other doctrinal channels, so too might the impulse to delegate. Both with lawmaking and with enforcement, the capacity of the political branches is subject to inevitable limits. Formal doctrines aside, it is possible, though far from certain, that there may continue to be overwhelming pressure to use delegation to accomplish governance goals, whatever doctrinal barriers the Court puts in the way. Legislators only have so much time; the Executive only has so many resources—for both Congress and the President, political capital is finite.

These pressures aside, the Court's next round of decisions will define what the Article I nondelegation doctrine does in the coming decades. If Justice Gorsuch has his way, he may be able to change the kind of legislative choice that can be delegated. With a few well-placed rulings, the emerging majority on the Court might be able to restrict new

468. *See, e.g. id.* at 429–30 (citing *INS v. Chadha*, 462 U.S. 919, 944 (1983), for the proposition that "'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.'").

469. The line may not even be a pure distinction between formalism and pragmatism. Instead, the dispute may be more about the locus of supremacy when it comes to the choices about what is proper and what is legal.

470. The reception by lower courts will also have a major impact.

471. Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting).

472. *Id.* (highlighting the major questions doctrine and the jurisprudence surrounding vagueness).

grants of open-ended discretion. One by one, they may even take existing delegations off the books. Meanwhile, an approach tracking Justice Kagan's in her *Gundy* plurality may use narrowing constructions to read the breadth out of many delegations that toe the line in terms of their vagueness and breadth. We may get rulemaking that looks less "legislative," even as its quantity and reach remain approximately the same as they are today. Then again, we may just get *less* rulemaking altogether. Occasional protestations aside, this is the point of the movement for Article I nondelegation: less rulemaking, fewer restraints, less government interference with the private ordering of the world.

Until a few months ago, most of the discussion of Article I nondelegation was still hypothetical. Justice Gorsuch has still not mustered a majority for his categorical, formal bar on the kind of discretion that can be delegated. But Justice Kavanaugh's hard cap on the kind of *issue* that Congress can outsource seems to have captured a majority. The supposition was first supported by the outcome in the *Vaccine Mandate* case. Then, *West Virginia* affirmed its acceptance by six of the Court's nine justices. Thus, a version of this muscular major questions doctrine has arrived in blackletter law. It is still phrased as nothing but a clear statement rule, however, and the majority studiously avoided Justice Gorsuch's attempt to remodel the major questions doctrine into a full nondelegation doctrine by another name. And Justice Kagan's approach in *Gundy* may also be read as precedential, since it was in fact used to resolve the case, using narrowing construction to read potentially excessive delegations out of a statute.[473] The walls may be closing already, squeezing the broadest delegations out of existence—if not by striking down whole statutes, then by crushing them into relative impotence.

Article II nondelegation may be even more advanced than its Article I counterpart. Through two generations of increasingly restrictive standing jurisprudence, it has established a bastion in our formal law. But even as the doctrine has shifted, at least so far, our private enforcement regime has continued to thrive—always changing, but never quiescent. To invoke the hydraulic metaphor again,[474] the impulse to use courts both for enforcement and redress may flow around barriers, always seeking new channels.

In this vein, the Court's new standing moves may have paradoxical outcomes. In his *TransUnion* dissent, Justice Thomas notes the decision

473. Although this was, of course, a plurality rather than strictly a majority opinion.

474. This metaphor has also been usefully developed with respect to money in politics. *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999).

may be little more than a "pyrrhic victory" for defendants.[475] Citing an article by Thomas Bennett, Justice Thomas explains that, since the Court does not prohibit Congress from *creating* statutory rights, but "simply holds that *federal* courts lack jurisdiction to hear some of these cases," state courts with different justiciability rules can still hear and resolve these federal claims.[476] Instead of eliminating the private enforcement regime, the Court's new antidelegation jurisprudence may merely distort it. Whereas the 2005 Class Action Fairness Act federalized state class action practice, resulting in a kind of "federal common law" of state claims,[477] *TransUnion* might paradoxically have an opposite result. In a sense, the Supreme Court has "stripped" its *own* jurisdiction. Since the move is constitutional, rather than merely "prudential," Congress cannot give it back. Now, a state common law of federal rights may develop, fragmented into dozens of separate regimes. In part of the country, Congress' novel statutory rights may be unenforceable, while analogous litigation thrives in other jurisdictions, imposing costs on both litigants and courts.

As the evolution of the practice of aggregate litigation shows, we seem to have a hunger to find ways to use the courts to perpetuate enforcement. Even as the Supreme Court restricted the use of class actions in the 1990s, for instance, private litigants and lower court judges found ways to circumvent the new barriers by experimenting with alternative forms of aggregation, at times even ignoring the Supreme Court's dictates.[478] Driven by desperate plaintiffs and creative lawyers, the hydraulic pressure to litigate—both to seek redress and to enforce via private law—continues to seek new channels.[479] By some metrics, in fact, today's opioids MDL may be the largest manifestation of private enforcement in the history of American courts.[480]

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475. TransUnion LLC v. Ramirez, 594 U.S. 413, 459 n.9 (2021) (Thomas, J., dissenting).

476. *Id.* (emphasis added) (citing Bennett, *supra* note 241). On different justiciability rules in state courts, see generally Hershkoff, *supra* note 108.

477. On this phenomenon, see generally Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. Rev. 600 (2020); David Marcus, Erie*, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 Wm. & Mary L. Rev. 1247 (2007).

478. The Seventh Circuit, led by sometimes-obstreperous Judge Posner, is known for its disregard for some of the Supreme Court's Rule 23 precedents.

479. *See, e.g.*, McKenzie, *supra* note 127 (describing bankruptcy and other methods); Noll, *supra* note 129 (highlighting MDL practice); Issacharoff & Cabraser, *supra* note 126, at 846–47 (describing the new "participatory class action" as a way around the Court's Rule 23 restrictions).

480. *See* Sara Randazzo, *Opioid-Addiction Litigation Heads to Complex Trial*, Wall St. J. (Oct. 20, 2019, 6:16 PM), https://www.wsj.com/articles/opioid-addiction-litigation-heads-for-complex-trial-11571609814 [https://perma.cc/4DRX-TV7U]

This discussion of the doctrinal back and forth about aggregation compels us to consider whether standing is the Supreme Court's only tool to cabin delegation of private enforcement power. The answer is clearly no. But in a sense, it is also yes. Note, for instance, the "front-loading" that has taken place in the Rule 23 context, in which the Supreme Court has driven more and more of the analysis about the propriety of class litigation to the certification stage, and within the certification decision,[481] has pressed the inquiry into the preliminary Rule 23(a) requirements.[482] Or consider the Supreme Court's moves regarding the allocation of attorneys' fees or the nature and magnitude of damages—both part of what Professors Burbank and Farhang have described as the Court's attempt to "retrench" the "litigation state."[483] But standing is the tip of the spear. All these other doctrinal areas in which the Court curtailed private enforcement power restrict either the litigation process or its financial feasibility. Standing, by contrast, gets at the very right to bring suit, cutting off litigants—and, after *TransUnion*, cutting off claims.

And since it is rooted in Article III, the Court's standing decisions cannot be changed, except by Article V amendment. Standing is not just about what Congress *has* done, but about what it *can* do at the limits of its power.

If the motivation for the nondelegation impulse is individual liberty, why not prefer *private* ordering? As Part I made clear, by placing enforcement power in the hands of private litigants, Congress is displacing demands for higher levels of state authority and state capacity. In articulating a "conservative case for class actions," Brian Fitzpatrick makes a version of this point, arguing small-government conservatives should embrace class actions as a mechanism for deterrence, since the alternative is precisely the kind of top-down control that is anathema to the libertarian mentality.[484] But perhaps the purpose is not merely less *public* ordering. Maybe the fundamental drive behind these antidelegation moves is the impulse against ordering as such.

In the contemporary United States, we have a system that is *de*regulated. But it is not *un*regulated. Returning again to the argument of Part I, our country has made institutional design choices that privilege *ex post* enforcement over *ex ante* barriers and that supplement and

(describing the opioids MDL as "the largest and most complex civil case in the nation's history").

481. *See, e.g.*, General Tel. Co. v. Falcon, 457 U.S. 147, 147–48 (1982).

482. *See, e.g.*, Wal-mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

483. *See generally* BURBANK & FARHANG, *supra* note 18.

484. FITZPATRICK, *supra* note 49.

supplant public administration with private enforcement. The market benefits from these low barriers, allowing investment and market entry that is not hampered by too many gateway requirements. But this is not a choice to live without law.

Taken together, however, the twin strands of contemporary nondelegation jurisprudence seem to embrace a muted form of anti-law mentality. Or at least a resistance to new forms of law that depart from comfortable models with roots in the deep past.[485] There may be challenges both to the rule of law and to the capacity for redress in a world where delegation is clipped from both ends. A forceful Article I nondelegation doctrine might rein in the capacity and reach of public regulators that are already under-empowered when compared to economic peer nations in, for instance, the European Union. But the Article II nondelegation jurisprudence may represent an even more fundamental challenge to the American regulatory mode—premised on the choice of *ex post*, private enforcement.

Without this backstop, where does this leave us? The alternatives seem relatively unpalatable. On the one hand, this approach leaves space for a minimalist state incapable of responding to the social problems that confront its citizenry[486]—precisely the model of governance that the New Deal revolution sought so desperately to escape. On the other, this antidelegation philosophy does not rule out highly centralized state power, where the legislature makes all the decisions from the center, leaving little discretion in the hands of its agents to respond to local variation and the churn of events. Under *TransUnion*, we can have an anti-federalist's paradise, or their nightmare.

There is a strand of yearning, both in Justice Gorsuch's *Gundy* dissent and in Justice Kavanaugh's *TransUnion* majority, for an idealized vision of the past. Gorsuch's examples appeal to a time before the administrative state began to gain its modern scope. Delegations from this period were licit, since they did not permit the kind of centralized power that has offended anti-federalists since the earliest battles

485. Consider, as an analog, the Court's decades-long antipathy for innovations in international law and the novel compulsions of multinational treaties. *See, e.g.*, Medellín v. Texas, 552 U.S. 491 (2008) (holding that, even when a treaty constitutes an international commitment, it should not be treated as binding domestic law unless it is implemented by an act of Congress or contains language making it "self-executing" on ratification).

486. *Cf.* Morrison, *supra* note 67, at 628 ("Thus, the Court's preference for public over private enforcement also seems to reflect a preference for—or at least a willingness to tolerate—less robust regulation. The Court's various moves against private enforcement, in other words, may be best understood as fundamentally *anti-regulatory*.") (emphasis in original).

between Hamilton and Jefferson splintered Washington's cabinet. In *TransUnion*, Kavanaugh's image of private litigation is a time capsule, limiting courts and plaintiffs to the kinds of claims that would have been accepted at Ratification. From this perspective, through the federal government and its private deputies, "delegation run riot"[487] has inflated the government, distorting it into something unrecognizable. In response, the Court's new cases seem to stand athwart history, yelling "Stop!"[488]

487. *See* United States v. Nichols, 784 F.3d 666, 677 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc).

488. *Cf.* William F. Buckley, *Our Mission Statement*, NAT'L REV. (Nov. 19, 1955, 1:00 PM), https://www.nationalreview.com/1955/11/our-mission-statement-william-f-buckley-jr/ [https://perma.cc/8A62-W982].