**Constitutional Law I**

**Professor Mike Ramsey**

**Spring 2022**

**Supplemental Reading #4 (*Gundy v. United States, Gorsuch dissent*)**

**SUPREME COURT OF THE UNITED STATES**

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**No. 17–6086**

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**HERMAN AVERY GUNDY, PETITIONER v. UNITED STATES**

**on writ of certiorari to the United States Court of Appeals for the Second Circuit**

**Decided June 20, 2019.[[1]](#footnote-1)**

[Gundy, a convicted sex offender, challenged the constitutionality of the federal Sex Offender Registration and Notification Act (SORNA), as applied to him, on the ground that it delegated legislative power to the Attorney General with respect to notification requirements for sex offenders.]

[JUSTICE KAGAN, joined by Justices Ginsburg, Breyer and Sotomayor, concluded that the challenged statute contained an “intelligible principle” under *Whitman* and rejected Gundy’s challenge.]

[Justice Kavanaugh did not participate as he was not confirmed as Justice until after the case was argued.]

JUSTICE ALITO, concurring in the judgment.

The Constitution confers on Congress certain “legislative [p]owers,” Art. I, §1, and does not permit Congress to delegate them to another branch of the Government. See *Whitman* v. American Trucking Assns., Inc., [531 U.S. 457](https://supreme.justia.com/cases/federal/us/531/457/), 472 (2001). Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards. See ibid.

If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.

Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.

JUSTICE GORSUCH, with whom The Chief Justice and Justice Thomas join, dissenting.

The Constitution promises that only the people’s elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation’s chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?

Today, a plurality of an eight-member Court endorses this extraconstitutional arrangement but resolves nothing. Working from an understanding of the Constitution at war with its text and history, the plurality reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing off so much power to the Attorney General. But Justice Alito supplies the fifth vote for today’s judgment and he does not join either the plurality’s constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait.

I

For individuals convicted of sex offenses after Congress adopted the Sex Offender Registration and Notification Act (SORNA) in 2006, the statute offers detailed instructions. It requires them “to provide state governments with (and to update) information, such as names and current addresses, for inclusion on state and federal sex offender registries.” The law divides offenders into three tiers based on the seriousness of their crimes: Some must register for 15 years, others for 25 years, and still others for life. The statute proceeds to set registration deadlines: Offenders sentenced to prison must register before they’re released, while others must register within three business days after sentencing. The statute explains when and how offenders must update their registrations. And the statute specifies particular penalties for failing to comply with its commands. On and on the statute goes for more than 20 pages of the U. S. Code.

But what about those convicted of sex offenses before the Act’s adoption? At the time of SORNA’s enactment, the nation’s population of sex offenders exceeded 500,000, and Congress concluded that something had to be done about these “pre-Act” offenders too. But it seems Congress couldn’t agree what that should be. The treatment of pre-Act offenders proved a “controversial issue with major policy significance and practical ramifications for states.” Among other things, applying SORNA immediately to this group threatened to impose unpopular and costly burdens on States and localities by forcing them to adopt or overhaul their own sex offender registration schemes. So Congress simply passed the problem to the Attorney General. For all half-million pre-Act offenders, the law says only this, in 34 U. S. C. §20913(d):

“The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offender.”

Yes, that’s it. The breadth of the authority Congress granted to the Attorney General in these few words can only be described as vast. As the Department of Justice itself has acknowledged, SORNA “does not require the Attorney General” to impose registration requirements on pre-Act offenders “within a certain time frame or by a date certain; it does not require him to act at all.” If the Attorney General does choose to act, he can require all pre-Act offenders to register, or he can “require some but not all to register.” For those he requires to register, the Attorney General may impose “some but not all of [SORNA’s] registration requirements,” as he pleases. And he is free to change his mind on any of these matters “at any given time or over the course of different [political] administrations.” Congress thus gave the Attorney General free rein to write the rules for virtually the entire existing sex offender population in this country—a situation that promised to persist for years or decades until pre-Act offenders passed away or fulfilled the terms of their registration obligations and post-Act offenders came to predominate.

…

These unbounded policy choices have profound consequences for the people they affect. Take our case. Before SORNA’s enactment, Herman Gundy pleaded guilty in 2005 to a sexual offense. After his release from prison five years later, he was arrested again, this time for failing to register as a sex offender according to the rules the Attorney General had then prescribed for pre-Act offenders. As a result, Mr. Gundy faced an additional 10-year prison term—10 years more than if the Attorney General had, in his discretion, chosen to write the rules differently.

II

A

Our founding document begins by declaring that “We the People . . . ordain and establish this Constitution.” At the time, that was a radical claim, an assertion that sovereignty belongs not to a person or institution or class but to the whole of the people. From that premise, the Constitution proceeded to vest the authority to exercise different aspects of the people’s sovereign power in distinct entities. In Article I, the Constitution entrusted all of the federal government’s legislative power to Congress. In Article II, it assigned the executive power to the President. And in Article III, it gave independent judges the task of applying the laws to cases and controversies.

To the framers, each of these vested powers had a distinct content. When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to “prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,” or the power to “prescribe general rules for the government of society.”

The framers understood, too, that it would frustrate “the system of government ordained by the Constitution” if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals. Through the Constitution, after all, the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement. As Chief Justice Marshall explained, Congress may not “delegate . . . powers which are strictly and exclusively legislative.” Or as John Locke, one of the thinkers who most influenced the framers’ understanding of the separation of powers, described it:

“The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorised to make laws for them.”

Why did the framers insist on this particular arrangement? They believed the new federal government’s most dangerous power was the power to enact laws restricting the people’s liberty. An “excess of law-making” was, in their words, one of “the diseases to which our governments are most liable.” To address that tendency, the framers went to great lengths to make lawmaking difficult. In Article I, by far the longest part of the Constitution, the framers insisted that any proposed law must win the approval of two Houses of Congress—elected at different times, by different constituencies, and for different terms in office—and either secure the President’s approval or obtain enough support to override his veto. Some occasionally complain about Article I’s detailed and arduous processes for new legislation, but to the framers these were bulwarks of liberty.

Nor was the point only to limit the government’s capacity to restrict the people’s freedoms. Article I’s detailed processes for new laws were also designed to promote deliberation. “The oftener the measure is brought under examination,” Hamilton explained, “the greater the diversity in the situations of those who are to examine it,” and “the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest.”

Other purposes animated the framers’ design as well. Because men are not angels and majorities can threaten minority rights, the framers insisted on a legislature composed of different bodies subject to different electorates as a means of ensuring that any new law would have to secure the approval of a supermajority of the people’s representatives. This, in turn, assured minorities that their votes would often decide the fate of proposed legislation. Indeed, some even thought a Bill of Rights would prove unnecessary in light of the Constitution’s design; in their view, sound structures forcing “[a]mbition [to] . . . counteract ambition” would do more than written promises to guard unpopular minorities from the tyranny of the majority. Restricting the task of legislating to one branch characterized by difficult and deliberative processes was also designed to promote fair notice and the rule of law, ensuring the people would be subject to a relatively stable and predictable set of rules. And by directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow.

If Congress could pass off its legislative power to the executive branch, the “[v]esting [c]lauses, and indeed the entire structure of the Constitution,” would “make no sense.” Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President. And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice. Accountability would suffer too. Legislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue. In turn, the executive might point to Congress as the source of the problem. These opportunities for finger-pointing might prove temptingly advantageous for the politicians involved, but they would also threaten to “‘disguise . . . responsibility for . . . the decisions.’”

The framers warned us against permitting consequences like these. As Madison explained, “[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.” The framers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn’t be trusted to self-policing by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch. Besides, enforcing the separation of powers isn’t about protecting institutional prerogatives or governmental turf. It’s about respecting the people’s sovereign choice to vest the legislative power in Congress alone. And it’s about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law. So when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed. Indeed, the framers afforded us independence from the political branches in large part to encourage exactly this kind of “fortitude . . . to do [our] duty as faithful guardians of the Constitution.”

B

Accepting, then, that we have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities, the question follows: What’s the test? Madison acknowledged that “no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary.” Chief Justice Marshall agreed that policing the separation of powers “is a subject of delicate and difficult inquiry.” Still, the framers took this responsibility seriously and offered us important guiding principles.

First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to “fill up the details.”

In Wayman v. Southard, this Court upheld a statute that instructed the federal courts to borrow state-court procedural rules but allowed them to make certain “alterations and additions.” Writing for the Court, Chief Justice Marshall distinguished between those “important subjects, which must be entirely regulated by the legislature itself,” and “those of less interest, in which a general provision may be made, and power given to those who are to act . . . to fill up the details.” The Court upheld the statute before it because Congress had announced the controlling general policy when it ordered federal courts to follow state procedures, and the residual authority to make “alterations and additions” did no more than permit courts to fill up the details.

…

Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding. Here, too, the power extended to the executive may prove highly consequential. …

Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities. While the Constitution vests all federal legislative power in Congress alone, Congress’s legislative authority sometimes overlaps with authority the Constitution separately vests in another branch. So, for example, when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if “the discretion is to be exercised over matters already within the scope of executive power.” …

C

Before the 1930s, federal statutes granting authority to the executive were comparatively modest and usually easily upheld. But then the federal government began to grow explosively. And with the proliferation of new executive programs came new questions about the scope of congressional delegations. Twice the Court responded by striking down statutes for violating the separation of powers [in A. L. A. Schechter Poultry Corp. v. United States and  Panama Refining Co. v. Ryan]…

[Justice Gorsuch then reviewed the rise of the “intelligible principle” doctrine.]

III

A

Returning to SORNA with this understanding of our charge in hand, problems quickly emerge. Start with this one: It’s hard to see how SORNA leaves the Attorney General with only details to fill up. Of course, what qualifies as a detail can sometimes be difficult to discern and, as we’ve seen, this Court has upheld statutes that allow federal agencies to resolve even highly consequential details so long as Congress prescribes the rule governing private conduct. But it’s hard to see how the statute before us could be described as leaving the Attorney General with only details to dispatch. … SORNA leaves the Attorney General free to impose on 500,000 pre-Act offenders all of the statute’s requirements, some of them, or none of them. …

Nor can SORNA be described as an example of conditional legislation subject to executive fact-finding. …

Finally, SORNA does not involve an area of overlapping authority with the executive. Congress may assign the President broad authority regarding the conduct of foreign affairs or other matters where he enjoys his own inherent Article II powers. But SORNA stands far afield from any of that. It gives the Attorney General the authority to “prescrib[e] the rules by which the duties and rights” of citizens are determined, a quintessentially legislative power.

…

The statute here also sounds all the alarms the founders left for us. Because Congress could not achieve the consensus necessary to resolve the hard problems associated with SORNA’s application to pre-Act offenders, it passed the potato to the Attorney General. And freed from the need to assemble a broad supermajority for his views, the Attorney General did not hesitate to apply the statute retroactively to a politically unpopular minority. …

It would be easy enough to let this case go. After all, sex offenders are one of the most disfavored groups in our society. But the rule that prevents Congress from giving the executive carte blanche to write laws for sex offenders is the same rule that protects everyone else. …

Nor would enforcing the Constitution’s demands spell doom for what some call the “administrative state.” The separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government. Instead, it is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation’s course on policy questions like those implicated by SORNA. …

In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation’s chief prosecutor the power to write his own criminal code. That is delegation running riot.

*[Note: Justice Kavanaugh’s writings suggest that he would be sympathetic to Justice Gorsuch’s arguments. Counting Justice Alito (see above), that would make five votes for considering a new approach to the non-delegation doctrine: The Chief Justice, Thomas, Alito, Gorsuch and Kavanaugh.]*

1. This opinion has been edited for purposes of space and readability. Deletions are indicated by ellipses; alterations are indicated by square brackets. Material deletions are accompanied by explanatory notes. Footnotes have been omitted without notation. [↑](#footnote-ref-1)