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## Protecting Climate Change Law from a Revived Nondelegation Doctrine

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# PROTECTING CLIMATE CHANGE LAW FROM A REVIVED NONDELEGATION DOCTRINE

*Andrew Rockett\**

*In an era of political gridlock, a potential revitalization of the nondelegation doctrine threatens the Environmental Protection Agency’s existing framework for regulating greenhouse gas emissions and addressing the urgent threat of climate change. At its apex, the nondelegation doctrine briefly constrained permissible delegations from the legislature to the executive branch after two Supreme Court decisions in 1935. The doctrine has since weakened under the lenient “intelligible principle” standard. That standard today allows the legislative branch to make broad delegations to administrative arms of the executive branch, which then use technological and bureaucratic expertise to clarify, implement, and enforce statutes. The result is today’s administrative state—the federal government’s answer to the demanding complexities of modern society, the expansive duties of the federal government, and intense political gridlock in the legislature. However, with multiple Supreme Court Justices indicating support for reviving a stricter form of the nondelegation doctrine, many key, broad agency delegations are under threat, including the Clean Air Act’s delegation to the Environmental Protection Agency requiring regulation of greenhouse gas emissions. The urgency of the fight against climate change, combined with the political difficulty in passing new legislation, necessitates careful consideration of what revived nondelegation doctrine may require of legislative tasks assigned to the executive. In this note, I analyze the potential threat and its solutions and conclude that a revived nondelegation doctrine poses a substantial threat to the Clean Air Act’s delegation to the EPA. For this reason, intricate constitutional arguments and carefully crafted legislation may both be necessary to preserve the EPA’s ability to regulate greenhouse gas emissions.*

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\* University of Michigan J.D. candidate, 2022. I would like to thank Evan Neustater, Ruth Wu, Matt Piggins, Jonny McKoy, and Rebecca Conway for their critiques and edits on this note. I would additionally like to thank MJEAL’s entire Volume 11 staff for their diligent work editing and cite-checking this note.

## TABLE OF CONTENTS

I.	INTRODUCTION .....	183
	<i>A. Climate change law and the climate crisis .....</i>	183
	<i>B. The nondelegation doctrine.....</i>	185
II.	ANTICIPATING NEW NONDELEGATION DOCTRINE.....	188
	<i>A. Justice Gorsuch's Gundy dissent .....</i>	188
	<i>B. Beyond Gundy.....</i>	191
	<i>C. New nondelegation.....</i>	192
III.	IMPLICATIONS .....	193
	<i>A. Title I's intelligible principle .....</i>	193
	<i>B. Title II's intelligible principle.....</i>	194
	<i>C. Dangerous timing.....</i>	196
IV.	PROTECTING THE CLIMATE CHANGE REGULATORY REGIME FROM REVIVED NONDELEGATION DOCTRINE .....	196
	<i>A. Title I: Whitman's warning .....</i>	197
	<i>B. Title II: Defending Massachusetts v. EPA.....</i>	197
	<i>C. New Legislation.....</i>	200
V.	CONCLUDING REMARKS .....	203

## I. INTRODUCTION

### *A. Climate change law and the climate crisis*

As the climate change threat looms, domestic environmental law has been slow to respond.<sup>1</sup> The federal legislature has not amended the Clean Air Act, the EPA's primary vehicle for greenhouse gas emission regulation, since the early 1990s.<sup>2</sup> Many modern advances in climate change regulation thus rely on older laws and mandates that predate mass awareness of the climate crisis.<sup>3</sup> In particular, Title I and Title II of the Clean Air Act instruct the EPA to regulate emissions from stationary sources and command the EPA to regulate emissions from moving sources such as motor vehicles.<sup>4</sup> Title I mandates that the EPA Administrator set National Ambient Air Quality Standards (NAAQS), "the attainment and maintenance of which . . . are requisite to protect the public health."<sup>5</sup> In a climate change context, the EPA has interpreted this statutory language as extending to stationary source emissions of gases relevant to climate change, such as ozone.<sup>6</sup> The agency uses its Title I grant to regulate emissions from a wide variety of existing and newly made stationary sources.<sup>7</sup> Meanwhile, Title II requires that the EPA regulate "the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>8</sup> Title II is even more essential to the EPA's ability to combat climate change because the EPA interprets Title II of the Clean Air Act to require that it regulate greenhouse gas

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1. THE NEW CLIMATE ECONOMY, UNLOCKING THE INCLUSIVE GROWTH STORY OF THE 21ST CENTURY (2018), <https://newclimateeconomy.report/2018/key-findings/>. The Report proposes that "unless we make a decisive shift [in efforts to address and mitigate climate change], by 2030 we will pass the point by which we can keep global average temperature rise to well below 2 °C." *Id.* at 8.

2. See Clean Air Act, 42 U.S.C. §§ 7401-7671. While the United States has since participated in various conferences and joined cooperative international efforts such as the Paris Agreement, Congress has largely neglected to address climate change through direct legislation.

3. See, e.g., Richard Wiles, *It's 50 years since climate change was first seen. Now time is running out*, THE GUARDIAN (Mar. 15, 2018), <https://www.theguardian.com/commentisfree/2018/mar/15/50-years-climate-change-denial>.

4. 42 U.S.C. §§ 7401-7671q.

5. 42 U.S.C. § 7409(b)(1).

6. See *NAAQS Table*, ENV'T PROTECTION AGENCY, <https://www.epa.gov/criteria-air-pollutants/naaqs-table> (last visited Dec. 26, 2021).

7. *Id.*

8. 42 U.S.C. § 7521(a)(1).

emissions from motor vehicles,<sup>9</sup> which constitute the largest individual source of greenhouse gas emissions.<sup>10</sup>

The EPA's use of the Clean Air Act to regulate motor-vehicle-greenhouse-gas emissions has a controversial history. In 2007, *Massachusetts v. EPA* solidified the EPA's mandate to regulate greenhouse gas emissions, but the Supreme Court narrowly decided the case, with Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer forming a five Justice majority over Chief Justice Roberts and Justices Thomas, Alito, and Scalia.<sup>11</sup> In his dissenting opinion, Chief Justice Roberts extensively argued that the state of Massachusetts lacked standing.<sup>12</sup> A separate dissenting opinion by Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, agreed that the petitioners lacked standing and objected to the majority ruling on its merits. Scalia argued that the EPA Administrator has the discretion to decide when to address air pollutants under the Clean Air Act, writing that the "EPA's interpretation of the discretion conferred by the statutory reference to 'its judgment' is not only reasonable, it is the most natural reading of the text."<sup>13</sup> Scalia additionally believed that the EPA could reasonably conclude that carbon dioxide was not an air pollutant as defined by the Clean Air Act, stating "regulating the buildup of CO<sub>2</sub> and other greenhouse gases in the upper reaches of the atmosphere, which is alleged to be causing global climate change, is not akin to regulating the concentration of some substance that is *polluting the air*."<sup>14</sup>

The window for effective climate change mitigation shrinks every year while political pressure for a federal answer to climate change approaches its zenith.<sup>15</sup> While legislative climate change mitigation efforts have stagnated, various emerging policy efforts such as the Green New Deal or a carbon tax may directly invigorate the federal initiative against climate change in the future.<sup>16</sup> However, with climate change denial still gripping voters nationwide and a legislative branch where the majority party frequently changes, new environmental legislation seems unlikely.<sup>17</sup>

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9. See Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009).

10. See, e.g., *Sources of Greenhouse Gas Emissions*, ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last visited December 26, 2021).

11. See generally *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that the EPA has and should exercise the authority to issue mandatory regulations addressing climate change)

12. *Id.* at 535 (Roberts, C.J., dissenting).

13. *Id.* at 552-53 (Scalia, J., dissenting).

14. *Id.* at 559.

15. See, e.g., Catherine Clifford, *Carbon capture technology has been around for decades — here's why it hasn't taken off*, CNBC (Jan. 31, 2021), <https://www.cnbc.com/2021/01/31/carbon-capture-technology.html>.

16. See generally H.R. Res. 109, 116th Cong. (2019).

17. A survey by the YouGov-Cambridge Globalism Project found that 13% of Americans believe that human activity is not at all responsible for climate change, while 5% did not believe that the climate was changing at all. An additional 13% of respondents answered that they did not know whether the climate was changing or if people were responsible. See, e.g., Oliver Milman and Fiona Harvey, *US is*

### B. *The nondelegation doctrine*

The nondelegation doctrine is, at its core, a constitutional principle asserting that the legislative branch of the federal government cannot delegate its legislative power to other branches of government.<sup>18</sup> The staunchest supporters of the nondelegation doctrine cite the principle of the separation of powers in arguing that the legislative vesting clause of the Constitution is an *exclusive* grant of legislative power that limits the scope of permissible rulemaking from the executive branch.<sup>19</sup> The Supreme Court has only invalidated two statutes for violating the nondelegation doctrine, with both instances arising in 1935 during the New Deal Era's unprecedented federal government expansion. Yet, the nondelegation doctrine has a long, contentious history in American constitutional law.<sup>20</sup> For instance, both the Federalist papers and treatises by political theorist John Locke contemplated the value of nondelegation. In the words of John Locke:

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. . . . And when the people have said, We will submit to rules, and be govern'd by Laws made by such Men, and in such Forms, no Body 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. The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make

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*hotbed of climate change denial, major global survey finds*, THE GUARDIAN (May 8, 2019), <https://www.theguardian.com/environment/2019/may/07/us-hotbed-climate-change-denial-international-poll>. For a comprehensive look at how American beliefs on climate change have shifted over time, but with many still remaining skeptical on the extent of climate change and its human causes, see also Xinran Wang, Anthony Leiserowitz, and Jennifer Marlon, YALE PROGRAM ON CLIMATE CHANGE COMMUNICATION (Mar. 31, 2021), <https://climatecommunication.yale.edu/visualizations-data/americans-climate-views/>.

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

19. See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 2-5 (2014).

20. For instance, Professor Lawson posits that

[t]he nondelegation doctrine, however, is the Energizer Bunny of constitutional law: No matter how many times it gets broken, beaten, or buried, it just keeps on going and going. The D.C. Circuit's decision in *American Trucking* was merely a continuation of a series of attempts by lawyers and judges in the past decade to find some way around the unmistakable import of *Mistretta*. And in turn, the Supreme Court's decision in *American Trucking* was merely a continuation of the Court's decidedly unsympathetic response to these efforts.

Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330 (2002).

Legislators, the Legislative can have no power to transfer their Authority of making laws, and place it in other hands.<sup>21</sup>

Further, James Madison later contemplated in Federalist No. 51 that “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means . . . to resist encroachments of the others.”<sup>22</sup> Thus, although an originalist view may classify delegation less as an encroachment between branches and more a willing grant of power from the legislature to another branch, the same principles against the concentration of power apply. Chief Justice Marshall reflected this when he asserted that Congress is unable to “delegate . . . powers which are strictly and exclusively legislative.”<sup>23</sup>

Still, the Framers acknowledged that total separation of powers is likely impossible.<sup>24</sup> Indeed, many constitutional scholars argue that the Framers never intended to bar the legislature from delegating its legislative power to the other branches.<sup>25</sup> In a modern context, many agree that the nondelegation doctrine would be hugely consequential if revived today, considering the federal government’s extensive reliance on the growing administrative state.<sup>26</sup>

Following the two 1935 Supreme Court decisions that endorsed nondelegation, the Supreme Court quickly began to defer to the lenient “intelligible principle” test when deciding nondelegation questions.<sup>27</sup> Under this test, which first appeared in 1825, so long as Congress provides an “intelligible principle” to guide a statute’s implementation and interpretation, there is no unconstitutional delegation of legislative power.<sup>28</sup> The intelligible principle test enables many considerably vague statutory directives from the legislature.<sup>29</sup> Writing for an eight-Justice majority, Justice Brennan elaborated on the practical justifications for a lenient intelligible principle standard in *Mistretta v United States*:

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21. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 362-63 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

22. THE FEDERALIST NO. 51 (James Madison).

23. *Wayman v. Southard*, 23 U.S. 1, 42 (1825).

24. *See, e.g., id.* at 43 (“But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”).

25. *See id.*

26. For example, Justice Kagan wrote in her majority opinion for *Gundy v. United States* that “if [the Sex Offender Registration and Notification Act]’s delegation is unconstitutional, then most of government is unconstitutional.” 139 S. Ct. 2116, 2130 (2019).

27. *See generally* *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *see also* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

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

29. *Gundy*, 139 S. Ct. at 2129.

Applying this ‘intelligible principle’ test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. Accordingly, this Court has deemed it ‘constitutionally sufficient’ if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.<sup>30</sup>

The Supreme Court continues to resort to the intelligible principle test to answer nondelegation challenges. Furthermore, only a few dissenting or concurring opinions over the last several decades have questioned the constitutionality of the intelligible principle test as applied.<sup>31</sup> To say that the intelligible principle test weakened the nondelegation doctrine post-*Schechter* would be an understatement. In the past several decades, numerous agencies have successfully relied on the test to survive nondelegation challenges to statutes: Justice Kagan noted in her *Gundy* majority that the Supreme Court has allowed legislative demands to regulate in the “public interest,” instructions to set “fair and reasonable” prices, and, in the case of the Clean Air Act, a command to set air quality standards “requisite to protect the public health.”<sup>32</sup>

Notwithstanding this relatively minimal role of the nondelegation doctrine, however, the threat of a new era of the nondelegation doctrine looms large. Justice Neil Gorsuch’s dissenting opinion in *Gundy v. United States* signaled significant Supreme Court support for revising the intelligible principle test to enforce the nondelegation doctrine more strictly.<sup>33</sup> Chief Justice Roberts and Justice Thomas joined Justice Gorsuch’s dissent, while Justice Alito voiced his support for revising the Court’s approach to the nondelegation doctrine in his concurring opinion in the same case.<sup>34</sup> Further, the two newest members of the Court (Justices Kavanaugh and Barrett) are potential supporters of the nondelegation doctrine.<sup>35</sup> The current

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30. 488 U.S. 361, 372-73 (1989).

31. *See, e.g.*, *Indus. Union Dep’t v. Am. Pet. Inst.*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring).

32. *Gundy*, 139 S. Ct. at 2129; *see also* *Whitman v. Am. Trucking*, 531 U.S. 457, 474 (2001) (holding, through Justice Scalia’s majority opinion, that the Clean Air Act’s delegation to the EPA was “well within the outer limits of our nondelegation precedents”).

33. *See* 139 S. Ct. at 2131-48 (Gorsuch, J., dissenting).

34. *See id.* at 2130-31. It is also worth noting that, but for Justice Alito’s concurring opinion, the case would have ended in a 4-4 tie with no opinions released. Justice Alito’s concurrence could thus perhaps be interpreted as an intentional showing of the Supreme Court’s shifting thoughts on nondelegation doctrine.

35. *See* *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari); *see also* Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 265 (2014).

composition of the Court thus renders the nondelegation doctrine more likely than ever to resurface in a stricter form.

## II. ANTICIPATING NEW NONDELEGATION DOCTRINE

By consulting various opinions authored by current Supreme Court Justices in support of revisiting the nondelegation doctrine, it is possible to gauge the Supreme Court's support for tightening the intelligible principle standard and to broadly outline a legal standard upon which a statute would pass constitutional muster under a revived nondelegation doctrine. In particular, Justice Gorsuch's dissent in *Gundy* describes several areas of dissatisfaction with the intelligible principle test as it currently operates while also setting out basic requirements and inquiries for a future replacement to the intelligible principle test.<sup>36</sup>

Because the Supreme Court has undergone significant turnover since the publication of Gorsuch's *Gundy* dissent, a revamped nondelegation doctrine stands a realistic chance of cementing itself in constitutional law for decades to come. That is, Justices Kavanaugh and Barrett have joined the court, with the latter replacing Justice Ginsburg (who signed on to the majority opinion in *Gundy* and accordingly supported the original intelligible principle test).<sup>37</sup> These two Justices, along with the Chief Justice and Justice Thomas (who each joined in Gorsuch's *Gundy* dissent) and Justice Alito (who separately expressed, through his *Gundy* concurrence, a willingness to reanalyze the intelligible principle test), increase the likelihood of a revamping of the nondelegation doctrine by the conservative bloc.<sup>38</sup>

In sum, the *Gundy* dissent seems most likely to form the basis of post-intelligible principle nondelegation doctrine; however, through other written opinions and articles, other members of the Court have discussed the nondelegation doctrine and provided potential hints as to their thoughts on how to constrain the intelligible principle doctrine. Analyzing these sources holistically shows how Justice Gorsuch's proposed *Gundy* framework could influence decisions if it ever does become the law of the land.

### A. Justice Gorsuch's *Gundy* dissent

Taking a fiery stand against the intelligible principle test, Justice Gorsuch's dissent in *Gundy* alerted legal experts across the country of the nondelegation

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36. See 139 S. Ct at 2138-42 (Gorsuch, J., dissenting).

37. See generally *id.*

38. Justice Alito wrote in his one-page concurring opinion in *Gundy* that, since 1935, the Supreme Court has consistently upheld statutory provisions that provide agencies with rulemaking power within "extraordinarily capacious standards," and that it would be "freakish" to isolate the provision at issue in *Gundy* for "special treatment." *Id.* at 2131 (Alito, J., concurring). Justice Alito importantly espoused that "[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would be willing to support that effort." *Id.*

doctrine's potential resurgence.<sup>39</sup> The opinion espouses the constitutional purposes of the nondelegation doctrine, citing many of the sources that appear in the above section on nondelegation, including Locke's treatise and *The Federalist* No. 51. The dissent ultimately attempts to lay out a constitutional test for preventing unconstitutional delegations.<sup>40</sup> Justice Gorsuch further argues that the intelligible principle test has taken on a life of its own that allows several delegations that extend beyond the permissible categories he outlines.<sup>41</sup>

In particular, Justice Gorsuch highlights three categories of permissible, non-legislative delegations that the legislature may constitutionally provide to the executive. First, the legislature may command agencies to "fill up the details" of a statute.<sup>42</sup> Second, it may make the application of a rule depend on executive fact-finding.<sup>43</sup> And third, it may allow other branches to develop non-legislative aspects of statutory application.<sup>44</sup> He concludes with what he believes to be the proper constitutional inquiry for measuring a delegation's constitutionality:

To determine whether a statute provides an intelligible principle, we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.<sup>45</sup>

In the context of *Gundy*, Justice Gorsuch found a nondelegation issue with the Sex Offender Registration and Notification Act's provision toward pre-Act offenders.<sup>46</sup> The Act, also known as SORNA, provided that "[t]he 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."<sup>47</sup> The Act did not

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39. See, e.g., Kathryn E. Kovacs, *Did the Dissent in Gundy v. United States Open Up a Can of Worms?* AMERICAN CONSTITUTION SOCIETY (June 24, 2019), <https://www.acslaw.org/expertforum/did-the-dissent-in-gundy-v-united-states-open-up-a-can-of-worms/>.

40. See generally *Gundy*, 139 S. Ct. at 2133-43 (Gorsuch, J., dissenting).

41. *Id.* at 2139.

42. *Id.* at 2136.

43. *Id.*

44. *Id.* at 2137.

45. *Id.* at 2141.

46. See *id.* at 2143 (outlining way in which Sex Offender Registration and Notification Act gives Attorney General unfettered discretion to make policy judgments, a key indication of a nondelegation issue).

47. Sex Offender Registration and Notification Act, 34 U.S.C. § 20913(d).

meet those standards, as Justice Gorsuch found this delegation to be too vague, especially considering the due process concerns that come with criminal penalties.<sup>48</sup>

Perhaps in response to the majority's own assertion that an expansive nondelegation doctrine would endanger much of our current administrative state and legislative function,<sup>49</sup> Justice Gorsuch argues that revived nondelegation doctrine would not cause immense, radical change to the federal government's current operation.<sup>50</sup> He cites doctrines like the major questions doctrine<sup>51</sup> and negative treatments of vagueness in legislation as current limiting factors on impermissible delegations.<sup>52</sup> Justice Gorsuch also tempers the extent of his argument by stating that the scope of the problems caused by the intelligible principle test can be overstated, citing the impressive flexibility that the legislature can build into laws by conditioning certain duties on executive fact-finding and implicating the president's Article II authority.<sup>53</sup> Nevertheless, many commentators were still alarmed at the contents of Justice Gorsuch's dissent and saw the potential for the nondelegation doctrine to upset the federal government's current balance between legislative lawmaking and executive rulemaking.<sup>54</sup>

Thus, Justice Gorsuch's dissent is a useful reflection on the negative view that multiple members of the Court hold toward the intelligible principle test, and it also may foreshadow future Supreme Court jurisprudence on the issue. It is, however, unable to provide a complete perspective on the issue. While the *Gundy* dissent provides the most relevant framework for future nondelegation law, other members of the Court have provided their comments on the intelligible principle test in recent years. Their thoughts may similarly hint at the future of the nondelegation doctrine.

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48. See *Gundy*, 138 S. Ct. at 2132-33 (Gorsuch, J., dissenting) (noting "[t]he breadth of the authority Congress granted to the Attorney General in these few words can only be described as vast" given "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").

49. *Id.* at 2130.

50. See *id.* at 2145 (noting, in Justice Gorsuch's majority opinion, that "enforcing the Constitution's demands [would not] spell doom for what some call the 'administrative state'").

51. As most recently expressed in *King v. Burwell*, the major questions doctrine assumes that Congress will not delegate to an agency discretion on an extremely important issue (such as climate change or healthcare administration, as was at issue in *King*) without expressly saying as such. 576 U.S. 473 (2015). As is, the major questions doctrine operates as a sort of exception to normal *Chevron* deference, where legislative silence is taken to denote a decision-making delegation to the agency. See generally *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 476 U.S. 837 (1984).

52. See *Gundy*, 138 S. Ct. at 2141 (Gorsuch, J., dissenting).

53. See *id.* at 2140 (Gorsuch, J., dissenting).

54. For example, Professor Kovacs observes that requiring Congress to "make all requisite policy decisions" would "grind regulatory lawmaking to a halt." Kovacs, *supra* note 39.

### B. *Beyond Gundy*

Since the Court decided *Gundy*, Justices Kavanaugh and Barrett have joined the Court, and there is reason to believe that both would entertain a constitutional challenge to the intelligible principle test.<sup>55</sup> In years past, other Justices currently on the Court have expressed interest in revisiting the nondelegation doctrine, thereby shedding some light on their theories of the permissible range of legislative delegation. Justices Kavanaugh, Thomas, and, to a lesser degree, Barrett, have discussed or implicated their views on nondelegation and the intelligible principle test.

First, Justice Kavanaugh indicated his skepticism toward the constitutionality of the current intelligible principle standard in a statement regarding the certiorari denial for *Paul v. United States*.<sup>56</sup> Specifically, Justice 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.”<sup>57</sup> Justice Kavanaugh similarly indicated that Justice Rehnquist raised important questions about nondelegation in his concurring opinion in *Industrial Union Department v. American Petroleum Institute*.<sup>58</sup> Justice Kavanaugh framed his analysis through the major questions doctrine. He stated that, while the Court has not explicitly adopted a nondelegation principle toward major questions of policy, it has limited delegation through the major questions doctrine.<sup>59</sup> He concluded that the current framework might need to be revised.<sup>60</sup> In these ways, Justice Kavanaugh shows significant support for reviving the nondelegation doctrine through his positive comments on Justice Gorsuch’s *Gundy* dissent and his conclusion that the existing framework may require another look.

Second, Justice Thomas’s concurrence in *Whitman v. American Trucking Association* questioned the intelligible principle doctrine’s effectiveness at preventing unconstitutional delegations of legislative power. Here, the majority applied the intelligible principle test to Title I of the Clean Air Act command that the EPA promulgate NAAQS “requisite to protect the public health.”<sup>61</sup> The majority concluded that that directive was not an impermissible delegation of legislative power under the intelligible principle test.<sup>62</sup> Justice Thomas’s short concurrence, however,

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55. See 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari); see also Barrett, *supra* note 35, at 265.

56. See *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari).

57. *Id.* (citing *Gundy v. United States*, 139 S.Ct. 2116, 2131-48 (2019) (Gorsuch, J., dissenting)).

58. *Id.* (citing *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring)).

59. *Id.*

60. *Id.*

61. See *Whitman*, 531 U.S. 457, 465 (2001) (quoting 42 U.S.C. § 7409(b)(1)).

62. *Id.*

noted that, while the statutory language at issue satisfied the requirements of the intelligible principle test, “there are cases in which the principle is intelligible, and yet the significance of the delegated decision is simply too great for the decision to be called anything other than ‘legislative.’”<sup>63</sup> Justice Thomas then concludes the opinion by expressing willingness to scrutinize the existing intelligible principle test against the Constitution’s delegatory restrictions: “[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.”<sup>64</sup> Thus, Justice Thomas’s concurrence emphasizes that the legislative vesting clause of the Constitution places *all* legislative powers with the legislative branch.<sup>65</sup> Notably, however, this language hardly reveals how Justice Thomas would strengthen the intelligible principle test. Nevertheless, by joining Gorsuch’s dissent in *Gundy*, Justice Thomas demonstrated his continued willingness to revisit the question of the nondelegation doctrine, and, as his concurring opinion indicates, particularly toward its application to the Title I mandate of the Clean Air Act.

Third, with only three years of experience on the Seventh Circuit bench before her Supreme Court appointment, Justice Barrett’s views on the nondelegation doctrine are less clear. One piece of Justice Barrett’s scholarship – specifically, an article titled *Suspension and Delegation* – merely reveals her belief that certain congressional delegations are likely subject to judicial review and acknowledges that “the modern nondelegation doctrine imposes few limits upon Congress’s ability to shift policymaking discretion to the Executive.”<sup>66</sup> The article, which explores Congress’s broad delegations to the Executive regarding suspensions of the writ of habeas corpus, otherwise sheds little light on Justice Barrett’s beliefs regarding the nondelegation doctrine. It is nonetheless worth noting she demonstrates skepticism toward some of Congress’s delegations regarding suspension powers.<sup>67</sup>

Altogether, the above materials reveal that several Justices on the Court who agree or seem to agree that the nondelegation doctrine should be reanalyzed have their own distinct interests and points of emphasis on the topic. With an apparent majority of the Court dissatisfied with the intelligible principle doctrine, all of these perspectives may affect the analytical framework that could usurp it.

### C. *New nondelegation*

Given the apparent support of multiple Justices on the bench, Justice Gorsuch’s *Gundy* dissent ultimately lays the groundwork for the most likely successor to the intelligible principle test. Further, Justices Thomas, Kavanaugh, and Gorsuch

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63. *Id.* at 487 (Thomas, J., concurring).

64. *Id.*

65. *Id.*

66. Barrett, *supra* note 35, at 265.

67. *Id.*

have all recently cited the major questions doctrine or a close relative in their nondelegation discussions.<sup>68</sup> One could thus anticipate a focus on major questions in applications of a new nondelegation doctrine. This development could be particularly pertinent for statutes like the Clean Air Act, which grants the EPA the authority to oversee greenhouse gas emissions standards without explicitly mentioning an intention to broadly address climate change.<sup>69</sup>

### III. IMPLICATIONS

Writing for the majority in *Gundy*, Justice Kagan warned that “if SORNA’s delegation is unconstitutional, then most of government is unconstitutional.”<sup>70</sup> Indeed, revived nondelegation doctrine stands to critically upset the existing dynamic between the legislature and the administrative state.<sup>71</sup> That dynamic is essential to the federal government’s efficient operation today.<sup>72</sup> Legislators and agency administrators would have to reassess several established statutory provisions against a new constitutional standard for legislative delegation.<sup>73</sup> The EPA’s operations under the Clean Air Act, and specifically its reliance on Title I and Title II for regulating greenhouse gas emissions from stationary and moving sources, respectively, are no exception. In the following sections, I will analyze the Clean Air Act, Titles I and II, within this framework.

#### *A. Title I’s intelligible principle*

Title I of the Clean Air Act sets up a complex regulatory scheme through which the EPA (1) sets air quality standards (NAAQS) for a variety of pollutants and then (2) coordinates with states to ensure that stationary emission sources follow these standards and advance toward emissions targets.<sup>74</sup> Specifically, § 109(b)(1) of the Act commands the EPA administrator to set air quality standards “the attainment and maintenance of which . . . are requisite to protect the public health” with “an adequate margin of safety.”<sup>75</sup> This statutory delegation to the EPA was the subject of a nondelegation challenge in *Whitman*. Although Title I survived that nondelegation

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68. See *Whitman*, 531 U.S. at 487 (Thomas, J., concurring) (“I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than ‘legislative’”); see also *Paul v. United States*, 140 S. Ct. 342, 342 (Kavanaugh, J., statement respecting denial of certiorari); see also *Gundy v. United States*, 139 S. Ct. 2116, 2141-2142 (2019) (Gorsuch, J., dissenting).

69. See 42 U.S.C. §§ 7401-7671q.

70. *Gundy*, 139 S. Ct. at 2130.

71. *Id.*

72. *Id.*

73. *Id.*

74. 42 U.S.C. §§ 7401-7671q.

75. 42 U.S.C. § 7401.

inquiry under the intelligible principle test, it would likely violate a more stringent nondelegation standard. The *Whitman* court decided that the Clean Air Act's Title I requirements for the EPA were specific enough to pass the intelligible principle test but spoke little of the Act's validity beyond that.<sup>76</sup> Indeed, the concurring opinion by Justice Thomas strongly implies that the statute would not be safe from a closer inquiry that directly implicates the constitutionality of the intelligible principle test.<sup>77</sup>

Justice Thomas's concurrence in *Whitman* is especially ominous when considered in the context of a reinvigorated nondelegation doctrine. In it, Justice Thomas laments that "none of the parties . . . examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power."<sup>78</sup> He continues to note that "there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'"<sup>79</sup> This statement is particularly concerning for the EPA because authorization for its current climate change-focused regulation of carbon emissions is dependent on a law that does not expressly mention climate change.<sup>80</sup>

At this moment, climate change is arguably the most pressing issue facing the United States and the world at large. To best prepare the sorts of complex regulatory schemes that might help combat it, the United States needs to make use of its administrative state. Justice Thomas's *Whitman* opinion signals that Title I provides the EPA with the exact sort of vague, inexact guidelines that he believes to be constitutionally suspect under the nondelegation doctrine; if his view became law, the EPA's ability to rely on an issue such as climate change while setting NAAQS would be in jeopardy. While Justice Thomas writes alone in his concurrence, the skeptical language of his opinion combined with the majority's qualifier that Title I's mandate permissibly delegated under the intelligible principle test (without supporting it under a theoretical, more stringent standard that we may soon see) does not bode well for the constitutionality of Title I's delegation to the EPA.

### B. Title II's intelligible principle

Title II of the Clean Air Act provides that the Administrator of the Environmental Protection Agency ("EPA") "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public

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76. See *Whitman*, 531 U.S. 457, 474 (2001).

77. *Id.* at 487 (Thomas, J., concurring).

78. *Id.*

79. *Id.*

80. See Clean Air Act, 42 U.S.C. §§ 7401-7671q.

health or welfare.”<sup>81</sup> While the mandate facially appears quite vague, a past Supreme Court case settled an argument over the proper interpretation of the mandate, ultimately leaving significantly less room for EPA discretion and possibly indirectly insulating the provision from a nondelegation issue.<sup>82</sup>

A key issue in *Massachusetts v. EPA* was whether Title II of the Clean Air Act applies to the EPA’s regulation of carbon emissions from motor vehicles.<sup>83</sup> In this context, an “air pollutant” is “any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air.”<sup>84</sup> The question ultimately hinged upon the word “including” and whether the immediately preceding words, “air pollution agents,” limit it.<sup>85</sup> On the one hand, if “including” limits “air pollution agents,” then the Clean Air Act only defines physical and chemical substances emitted into the air as air pollutants if they are air pollution agents.<sup>86</sup> This, according to Justice Scalia, would destroy the Act’s applicability to carbon emissions due to an atmospheric argument (although the majority contested that the dissent’s argument that carbon emissions could not be considered “air pollution agents” was baseless).<sup>87</sup> On the other hand, if “including” is not so limited, then *any* physical or chemical matter that enters ambient air can be defined as an air pollutant.<sup>88</sup> The majority in *Massachusetts v. EPA* concluded that the latter interpretation was correct, and as such, that emitted carbon is classifiable as an air pollutant.<sup>89</sup> In resolving the question of the proper interpretation of “air pollutant,” stare decisis may serve to protect the EPA’s Title II grant by protecting the original interpretation of the Act that left significantly less discretion with the EPA Administrator.

Despite the Supreme Court’s potential preclusion of the issue in *Massachusetts v. EPA*, the Clean Air Act’s Title II basis as it concerns EPA motor vehicle emissions standards underlies issues raised in Justice Gorsuch’s *Gundy* dissent. That is, even when following the majority’s interpretation of the Act, the Title II grant is still vague and potentially constitutes a major questions problem because, without explicitly mentioning climate change, Title II lays the foundation for a major portion of the federal government’s attempts to mitigate climate change. Thus, while stare decisis may allow the *Massachusetts v. EPA* opinion to protect Title II’s delegation more effectively than *Whitman* does Title I, it still may face challenges under a new nondelegation standard.

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81. *Id.* at § 7521(a)(1).

82. *See Massachusetts v. EPA*, 549 U.S. 497 (2007).

83. *Id.* at 505.

84. 42 U.S.C. § 7602(g).

85. *Massachusetts*, 549 U.S. at 528-29; *id.* at 556 (Scalia J. dissenting).

86. *Id.* at 556-58.

87. *Id.* at 556, 529 n.26.

88. *Id.* at 532.

89. *Id.*

### C. Dangerous timing

Given the urgent need for effective climate change mitigation, the EPA's ability to curtail greenhouse gas emissions may be an essential piece of the United States' ability to combat climate change. In this way, with a decade remaining before the costs from climate change threaten to become truly and unavoidably catastrophic, the potential radical restructuring of the agency-reliant federal government that the nondelegation doctrine threatens comes at what could be the worst possible time.<sup>90</sup> A worst-case scenario where, amidst continued federal inaction, the nondelegation doctrine shuts down the Clean Air Act's application to greenhouse gas emission regulation is dire indeed. That said, even if the nondelegation doctrine does return, this paper next suggests a few potential avenues that may spare the EPA's greenhouse gas regulation mandate from the nondelegation doctrine.

## IV. PROTECTING THE CLIMATE CHANGE REGULATORY REGIME FROM REVIVED NONDELEGATION DOCTRINE

As outlined above, a revamped nondelegation doctrine threatens to extinguish the EPA's current legal mandate for regulating greenhouse gas emissions. This note identifies at least two avenues that may either preserve the EPA's current regulatory mandates or replace them with a new system that complies with the likely requirements of a stricter nondelegation doctrine: constitutional arguments and new legislation.<sup>91</sup> EPA's Title I and Title II mandates are both immensely important to protect. Based on a heightened intelligible principle standard, Title I is likely to fail a post-intelligible-principle-nondelegation test whereas, Title II can be sustained by defending the textual interpretation that drove the original holding in *Massachusetts v. EPA*. However, *both* Titles can be protected by enacting new legislation that specifically tasks the executive branch with regulating greenhouse gas emissions as a response to climate change.<sup>92</sup> No path provides an easy, guaranteed circumvention to a heightened nondelegation doctrine, but the necessity of protecting Title I and II's delegation combined with the sheer reality of modern government's reliance on the administrative state leave few other options.<sup>93</sup>

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90. See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE ("IPCC"), SPECIAL REPORT: *GLOBAL WARMING OF 1.5 °C* (2018), <https://www.ipcc.ch/sr15/chapter/spm/>; see also U.S. GLOB. CHANGE RESEARCH PROGRAM, *FOURTH NATIONAL CLIMATE ASSESSMENT* ("NCA") (2018), <https://nca2018.globalchange.gov/>.

91. See *infra* at Part IV.B.

92. While the requisite legislative guidance, of course, depends on whichever hypothetical form the new nondelegation doctrine assumes, simply ensuring that any new legislation directly mentions the EPA and its responsibility to address climate change by regulating greenhouse gas emissions would potentially satisfy Justice Gorsuch's proposed ruleset in *Gundy*. See 139 S. Ct. 2116, 2136-37 (2019) (Gorsuch, J., dissenting).

93. See *supra* at Part I.A.

### A. Title I: *Whitman's warning*

The narrow scope of the holding in *Whitman* – that the delegated authority passes constitutional muster under the intelligible principle test – suggests that principles like *stare decisis* are unlikely to protect Title I's delegation once the intelligible principle test no longer screens delegations. Perhaps counterintuitively, the narrow scope seems to *harm* rather than *justify* Title I's delegation due to *Whitman's* repeated specification that Title I permissibly delegates under the intelligible principle standard.<sup>94</sup> As discussed earlier, Justice Thomas's concurrence shows that intelligible principles such as those in Title I of the Clean Air Act are almost certainly what Supreme Court Justices had in mind when calling for a revised nondelegation doctrine.<sup>95</sup> So long as the Supreme Court is potentially compelled to revisit and revive the nondelegation doctrine, the prospects for defending Title I's delegation on constitutional grounds appear slim.

The vulnerability of the EPA's Title I NAAQS regime can, however, be remedied with an alternative solution discussed below: either (1) via an amendment to the Clean Air Act or (2) entirely new legislation specifying the EPA's role in addressing climate change.<sup>96</sup> Although these options each carry their unique strengths and difficulties, they may be the only routes to effective protection (or even enhancement) of the current NAAQS regime.

### B. Title II: *Defending Massachusetts v. EPA*

As an initial matter, should the nondelegation doctrine be strengthened beyond the intelligible principle standard, constitutionally defending the EPA's current mobile source greenhouse gas regulation framework in conformance with the new nondelegation doctrine may be necessary.<sup>97</sup> Should Title II's grant to the EPA come under nondelegation scrutiny, reasserting the interpretation of the Clean Air Act that carried the day in *Massachusetts v. EPA* can diminish the possibility of a finding of an impermissible delegation because that case held that (1) the Clean Air Act required the EPA to determine whether greenhouse gases contribute to climate change, (2) an endangerment finding would mandate the EPA to regulate greenhouse gas emissions, and (3) the Act constrained the Agency's discretion to "pursue other priorities of the Administrator or the President" instead of reaching a decision on whether it needed to regulate moving source greenhouse gas emissions.<sup>98</sup> In short, the holding endorsed a reading of the Act that greatly limited the scope of discretion within Title II's grant.

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94. 531 U.S. 457, 474 (2001).

95. *See supra* at 14-15.

96. *See infra* at 26-29.

97. *See infra* at 27-31 for a discussion of difficulties in passing new legislation.

98. 549 U.S. 497, 533-34 (2007).

The majority in *Massachusetts v. EPA* interpreted the Clean Air Act to compel the EPA to determine whether greenhouse gases are “air pollutants” endangering the public health and to regulate motor vehicles emitting greenhouse gases accordingly.<sup>99</sup> In a nondelegation context, when the majority held that the Clean Air Act compelled the EPA to determine whether greenhouse gas emissions endangered public health and to regulate greenhouse gas emissions accordingly, it read the Clean Air Act in a way that limited the EPA’s decision-making abilities under its Title II grant.<sup>100</sup> Under this interpretation, the Clean Air Act provides the EPA with more than just an intelligible principle for defining and regulating greenhouse gas emissions from motor vehicles: it provides an explicit command to classify greenhouse gases as air pollutants and, if necessary, to regulate them as such.<sup>101</sup>

The textual arguments underlying *Massachusetts v. EPA* could be newly consequential if the nondelegation doctrine were revived and strengthened. In particular, the proper definition of a “pollutant” under the Clean Air Act came under contention when *Massachusetts v. EPA* was first before the Court, along with the scope of the EPA Administrator’s discretion and obligations toward greenhouse gases if they were indeed pollutants.<sup>102</sup> The dissent by Justice Scalia discussed above argued that carbon emissions could not be considered pollutants within the definition laid out in the Act.<sup>103</sup> The Act defines an “air pollutant” as “any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air.”<sup>104</sup> As already discussed, the dissent argued that “including” necessarily dictated that “any physical, chemical . . . substance” must first be an “air pollution agent or combination of such agents” before falling within the scope of the act, and that carbon emissions were arguably not “air pollution agents.”<sup>105</sup> Justice Scalia additionally noted that “[a]s the Court recognizes, the statute condition[s] the exercise of EPA’s authority on its formation of a ‘judgment’ . . . There is no dispute that the Administrator has made no such judgment in this case.”<sup>106</sup> Under the dissent’s argument, the EPA Administrator would have the discretion to classify or not classify greenhouse gas emissions as air pollutants, along with significant leeway in assessing whether or not to even issue a judgment on an air pollutant.<sup>107</sup> The majority, meanwhile, wrote that “[t]he Clean Air Act’s sweeping definition of ‘air pollutant’ includes ‘any air pollution agent or

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99. *Id.*

100. *Id.*

101. *Id.* at 529.

102. *Id.* at 529, 532-33.

103. *See id.* at 559-60 (Scalia, J., dissenting).

104. 42 U.S.C. § 7602(g).

105. *See Massachusetts*, 549 U.S. at 556-58 (Scalia, J., dissenting).

106. *Id.* at 552 (Scalia, J., dissenting); *see generally id.* at 549-560

107. *See id.* at 550 (quoting 42 U.S.C. § 7602(g)).

combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air' . . . The statute is unambiguous."<sup>108</sup> The dissent's view reads the statute to place considerably more discretion in the hands of the agency than the majority does.<sup>109</sup>

A nondelegation challenge could potentially aim to revisit this very controversy; if the statute were read to grant such immense latitude to the EPA (especially without even mentioning climate change), the statute would potentially fail a nondelegation challenge under a regime similar to the one outlined in Justice Gorsuch's *Gundy* dissent.<sup>110</sup> Accordingly, even if the dissent's interpretation from *Massachusetts v. EPA* ever did take hold, one could potentially still defend the provision by arguing that it simply made statutory application dependent on executive fact-finding, a constitutionally permissible delegation according to the *Gundy* dissent.<sup>111</sup> One caveat, however, is that vagueness (e.g. the lack of statutory guidance as to the proper definition of an "air pollution agent") and the potential for a stricter nondelegation doctrine to operate in tandem with major questions doctrine may still ultimately fell the provision – the Clean Air Act does not mention climate change and, as a result, it comes off as potentially vague as applied to greenhouse gas regulation, and potentially runs afoul of the major questions doctrine.<sup>112</sup>

Notably, two compelling angles to determine the proper scope of the Clean Air Act's "including" and the decision that the EPA Administrator must make and act on their decision are *stare decisis* and the constitutional avoidance canon. *Stare decisis*, the central legal principle of determining case outcomes in accordance with precedent weighs in favor of preserving the majority's interpretation from *Massachusetts v. EPA* (although, it would also weigh in favor of preserving the intelligible principle test). Simply put, the Court generally only overrules its precedent in highly compelling scenarios.<sup>113</sup> Here, it would be difficult to say that *stare decisis* renders *Massachusetts v. EPA* moot: in fact, even Justice Scalia conceded in his *Massachusetts v. EPA* dissent that the majority's interpretation of the text at issue ("including") was a fair reading of the statute.<sup>114</sup> As Justice Kagan elaborated in *Kimble v. Marvel Entertainment*, before overturning settled precedent, the Court has in the past required a "special justification" beyond a simple belief that the precedent is wrong.<sup>115</sup> *Stare decisis* is additionally even stronger when the precedent interprets a statute, as *Massachusetts v. EPA* does, because "critics of our

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108. *Id.* at 528-29.

109. *See id.*

110. *See* 42 U.S.C. §§ 7401-7671q; *see supra* at 11.

111. *Gundy*, 139 S. Ct. 2116, 2129 (2019).

112. *See* 42 U.S.C. §§ 7401-7671q.

113. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455-56 (2015).

114. *Massachusetts v. EPA*, 549 U.S. 497, 557 (2007) (Scalia, J., dissenting).

115. *Kimble*, 576 U.S. at 455.

ruling can take their objections across the street, and Congress can correct any mistake.”<sup>116</sup>

The canon of constitutional avoidance, however, works in a more nuanced fashion. Constitutional avoidance dictates that when deciding between two potential statutory interpretations where one interpretation renders a statute unconstitutional, and the other does not, that the Court should favor the constitutional interpretation.<sup>117</sup> Applied to *Massachusetts v. EPA*, even though that case did not arise under a nondelegation question, its holding could still mitigate any potential nondelegation issue through the constitutional avoidance canon. This is true because, in a nondelegation context, where Justice Scalia’s reading would potentially result in an impermissible delegation to the EPA, the constitutional avoidance canon suggests that the Court should endorse the original interpretation, which may stand a chance at surviving a revived nondelegation doctrine.<sup>118</sup> Even if Chief Justice Roberts, Justices Thomas and Alito (the active Court members who joined Justice Scalia’s dissent), and any other members of the Court believed that the dissenting interpretation in *Massachusetts v. EPA* was correct, the constitutional avoidance canon asserts that they should defer to the permissible, narrower reading of the statute espoused by the majority. The majority opinion limits agency discretion compared to the dissent and, consequentially, limits any potential nondelegation violation.<sup>119</sup>

Thus, a stricter nondelegation doctrine appears unlikely to legitimately threaten Title II’s current mandate for the EPA. Unlike Title I’s thin defense at the hands of the narrow holding of *Whitman*, *Massachusetts v. EPA* settled on a textual interpretation that may be enough to preclude most nondelegation challenges.

### C. New Legislation

New legislation offers an opportunity to erase nondelegation issues in climate change law. Specifically, a new law could address nondelegation issues by either affirming and explicitly specifying the EPA’s existing duties regarding climate change or by creating an entirely new framework for mitigating climate change. The biggest challenge, however, is that new legislation is challenging to design, pass, and protect.<sup>120</sup> Nevertheless, considering the complexities of climate change and the extensive mitigation efforts necessary, new legislation may be a necessity before long,

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116. *Id.* at 456.

117. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).

118. *See supra* at 24.

119. *See generally Massachusetts v. EPA*, 549 U.S. 497 (2007).

120. *See generally, e.g.*, Andrew Rudalevige, *Why does Congress have such a hard time passing laws? Let’s blame the Constitution*, WASHINGTON POST (July 11, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/11/why-does-congress-have-such-a-hard-time-passing-laws-lets-blame-the-constitution/>.

regardless of the nondelegation doctrine's potential to resurface and invalidate key mandates of the Clean Air Act.

Due to the pressing nature of climate change, some may view the immense challenge in passing new legislation as an inviable route for addressing nondelegation concerns. To achieve peak efficacy, however, any new legislation must consider and preemptively meet the threshold requirements imposed by a stricter nondelegation doctrine. Such considerations are necessary whether that legislation simply affirms the EPA's mandates to regulate greenhouse gas emissions or installs an entirely different network for combatting climate change. If written correctly, new legislation can put any potential nondelegation issue to rest before the Supreme Court allows it to be raised, but new legislation as a solution is challenging to implement and vulnerable to partisan nullification.<sup>121</sup>

Given the significant social and economic implications of carbon emission regulation, any legislative reform aimed at mitigating climate change risks severe frustration if forced to comport with nondelegation principles. A new nondelegation doctrine in line with the doctrine outlined in Justice Gorsuch's *Gundy* dissent may limit legislators' ability to provide flexibility and decision-making power to the EPA.<sup>122</sup> Ambitious, open-ended legislative commands such as Title I's "requisite to protect the public health" may be too vague to pass a nondelegation challenge against a harsher standard than the intelligible principle test.<sup>123</sup> However, if legislators are cognizant of the potential issues that a stricter nondelegation standard may carry for legislation, they can take a few steps to protect any new bills focused on fighting climate change. First, any new legislation focused on limiting climate change should clearly state the EPA's assigned task: to mitigate the effects of climate change by whatever measures the bill specifically provides for. The problem, however, is that crafting specific goals, standards, and implementation plans against the pressured backdrop of a legislative calendar may be more challenging than tasking the expert-driven EPA with determining such goals and standards.<sup>124</sup> As mentioned earlier, proposed efforts such as the Green New Deal, which would seek to address several climate change-adjacent issues including systemic racism and the increasing wealth gap, would be logistically near-impossible for the legislature to craft without significant reliance on the executive branch and agencies to design and implement expansive systemic reforms.<sup>125</sup> In this regard, the legislature could potentially find success in focusing on more simple, widely applicable climate change-focused statutes that would be easier for a legislature to design while affording maximum administrative flexibility, which in turn could promote both legislative effectiveness and optimal EPA operation. Such a set-up could lessen the legislative burden by

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121. *Id.*

122. *See Gundy*, 139 S. Ct. 2116, 2136-37 (2019) (Gorsuch, J., dissenting).

123. *Id.*

124. *See, e.g., Rudalevige, supra* note 120.

125. H.R. Res. 109, 116th Cong. (2019).

reducing the required specificity of the legislation and enable the EPA to easily adapt its regulatory regime with up-to-date science and improved technological possibilities.

Further, a revived nondelegation doctrine will make nearly all future legislation, not just climate legislation, more difficult and time-consuming for members of Congress to prepare, consider, and vote on.<sup>126</sup> Such a constraint is highly relevant, even more so when considered in addition to a stricter nondelegation standard's potential to render several statutes with vague intelligible principles vulnerable to constitutional challenges.<sup>127</sup> All members of Congress, especially those members of the House of Representatives who serve two-year terms and are constantly balancing the duties of their job with reelection efforts, would have to reorient their legislative efforts while trying to represent their district in a new and confusing era of legislation.<sup>128</sup>

Finally, a new bill would likely face many traditional barriers that consistently get in the way of climate change legislation and legislation in general. Many members of Congress encourage and practice climate change denial regularly.<sup>129</sup> Even members of a minority party can subject a bill to various procedural hang-ups, such as the filibuster.<sup>130</sup> Other methods can prevent legislation from ever receiving proper consideration, as recently demonstrated with the Green New Deal Resolution in 2019, where the resolution was rushed to a vote in the Senate without opportunity for hearings or expert testimony.<sup>131</sup> New legislation aimed at

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126. See, e.g., Rudalevige, *supra* note 120.

127. See *Gundy*, 139 S. Ct. at 2130.

128. See, e.g., Kovacs, *supra* note 39.

129. This point is well illustrated by stunts such as Senator Jim Inhofe brandishing a snowball on the Senate floor in 2015 during a speech questioning the validity of science behind climate change. See *Sen. Jim Inhofe denies climate change, tosses snow ball in Congress*, CBS NEWS (Feb. 26, 2015), <https://www.cbsnews.com/news/sen-jim-ihofe-climate-change-is-not-real-because-here-is-a-snowball/>. Senator Inhofe's climate science denial is far from an outlier – a 2019 article found that 130 members of the 116th Congress had at some point expressed doubt toward or outright denied climate change. See Ellen Cranley, *These are the 130 current members of Congress who have doubted or denied climate change*, BUSINESS INSIDER (Apr. 29, 2019), <https://www.businessinsider.com/climate-change-and-republicans-congress-global-warming-2019-2>.

130. See generally Tim Lau, *The Filibuster, Explained*, BRENNAN CENTER FOR JUSTICE (Apr. 26, 2021), <https://www.brennancenter.org/our-work/research-reports/filibuster-explained>.

131. The Green New Deal Resolution was a fourteen-page document calling for recognition of a need for sweeping reforms in the interest of mitigating detrimental climate change and environmental injustice. H.R. Res. 109, 116th Cong. (2019). The resolution failed in the Senate by a voting margin of 0-57. Dino Grandoni and Felicia Sonmez, *Senate defeats Green New Deal, as Democrats call vote a 'sham'*, WASHINGTON POST (Mar. 26, 2019), [https://www.washingtonpost.com/powerpost/green-new-deal-on-track-to-senate-defeat-as-democrats-call-vote-a-sham/2019/03/26/834f3e5e-4fdd-11e9-a3f7-78b7525a8d5f\\_story.html](https://www.washingtonpost.com/powerpost/green-new-deal-on-track-to-senate-defeat-as-democrats-call-vote-a-sham/2019/03/26/834f3e5e-4fdd-11e9-a3f7-78b7525a8d5f_story.html). Forty-three Democratic senators, among them those who introduced the resolution in the Senate, voted “present” in order to protest the bill being quickly brought to a vote without hearings or expert testimony. *Id.* Some members of Congress called the process a “rush” and a “sham.” See, e.g., Alexandria Ocasio-Cortez (@AOC), TWITTER (March 26, 2019, 6:13 PM), <https://twitter.com/aoc/status/1110666127644991493?lang=en>; see also Dino Grandoni and Felicia

addressing climate change will almost certainly face immense opposition regardless of the intelligible principle test's status, but a more stringent nondelegation test may frustrate legislative efforts further.<sup>132</sup>

As alluded to earlier, new legislation could initially bypass some of these obstacles by simply restating and affirming the emissions regulation systems already in place, removing any potential question of an unconstitutional delegation. Such an action would at least be capable of preserving existing governmental structures for climate change mitigation, although structural preservation alone appears unlikely to be enough to reach some of the potential emissions reductions targets detailed by the IPCC.<sup>133</sup>

Regardless of the necessity of new legislation as a solution to protecting the Clean Air Act's functions and to mitigating climate change at large, a Congress interested in passing new legislation to combat climate change will have to consider the viability of its proposals against the nondelegation doctrine.

## V. CONCLUDING REMARKS

The nondelegation doctrine is, for now, a momentary blip in American constitutional history. Its erosion was arguably a prerequisite for an efficient federal government.<sup>134</sup> Over eight decades later, the nondelegation doctrine threatens to resurface and reshape the federal government as we know it.<sup>135</sup> Indeed, many contemporary federal functions and statutory regimes would potentially be unconstitutional under a stricter nondelegation standard.<sup>136</sup> While much more is at stake than the EPA's ability to regulate greenhouse gas emissions, the calamitous, looming threat of climate change renders the EPA's mandate among the most crucial to protect.<sup>137</sup>

The clash between the nondelegation doctrine and the EPA's framework for regulating carbon emissions could be inevitable if the Supreme Court does significantly restrict the intelligible principle test. With motor vehicle emissions,

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Sonmez, *Senate defeats Green New Deal, as Democrats call vote a 'sham'*, WASHINGTON POST (Mar. 26, 2019), [https://www.washingtonpost.com/powerpost/green-new-deal-on-track-to-senate-defeat-as-democrats-call-vote-a-sham/2019/03/26/834f3e5e-4fdd-11e9-a3f7-78b7525a8d5f\\_story.html](https://www.washingtonpost.com/powerpost/green-new-deal-on-track-to-senate-defeat-as-democrats-call-vote-a-sham/2019/03/26/834f3e5e-4fdd-11e9-a3f7-78b7525a8d5f_story.html).

132. See Cranley, *supra* note 131.; see *supra* at 16-17.

133. See, e.g., IPCC, *supra* note 90 ("Pathways limiting global warming to 1.5°C with no or limited overshoot would require rapid and far-reaching transitions in energy, land, urban and infrastructure"); see also NCA, *supra* note 90.

134. See *supra* at Part I.B.

135. See, e.g., Kovacs, *supra* note 39.

136. See generally Gundy, 139 S. Ct. at 2130. *But see*, Andrew Coan, *Eight Futures of the Nondelegation Doctrine*, 2020 WIS. L. REV. 141 (2020) (using the "Judicial Capacity Model" to suggest that the Supreme Court's low volume of cases will largely limit its ability to affect any sweeping revolution in Constitutional law through nondelegation doctrine).

137. See, e.g., IPCC, *supra* note 90; see also NCA, *supra* note 90.

preserving the Clean Air Act's mandate that the EPA regulate such emissions likely rests on preserving the Supreme Court's most recent statutory interpretation on the issue, but even that may not be enough. Future legislative efforts will have to carefully balance efficiency and constitutionality in deciding what work and goals to specify clearly, and what work and goals to leave for the administrator. To avoid critical damage to the fight against climate change, preemptive thinking and successful political action will likely be necessary for the near future.<sup>138</sup>

It is always challenging to predict how the federal government will respond to critical problems. With the urgency of climate change and the potential necessity of severe mitigation measures, projecting the federal response only becomes more difficult amidst increasing political disorder and calls for significant changes to the federal government. In recent months, high-ranking United States government officials have proposed reforms, including potential Supreme Court expansion<sup>139</sup> or term limitation for Justices.<sup>140</sup> Growing support for granting statehood, and thus federal senate seats, to places like Washington D.C.<sup>141</sup> or Puerto Rico, may fundamentally alter an ongoing partisan battleground and greatly influence what sorts of climate legislation are viable. The Supreme Court may decide not to radically reform the intelligible principle test after all, reducing the danger to existing federal statutes, or, even if it does, the Clean Air Act may never find itself the subject of new judicial scrutiny.<sup>142</sup> The predictive value of projected changes to constitutional doctrine and assessments of the difficulties in passing legislation are only valid so long as the background assumptions and conditions belying those projections continue to exist.

With no end in sight, the battle against climate change has been hard-fought and without many victories. If strengthened beyond the intelligible principle standard, the nondelegation doctrine may nullify some of the most significant victories at a time where each loss is more devastating than the last. Careful constitutional arguments, deliberate legislation, and other creative measures provide a limited opportunity to prevent, undo, or respond to the potential harm that that nondelegation doctrine stands to inflict on the EPA's current emissions regulation regime.

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138. See, e.g., IPCC, *supra* note 90 ("Pathways that limit global warming to 1.5°C with no or limited overshoot show clear emission reductions by 2030." The IPCC further notes, with medium confidence, that "[p]athways reflecting current nationally stated mitigation ambition until 2030 are broadly consistent with cost-effective pathways that result in a global warming of about 3°C by 2100, with warming continuing afterwards.).

139. See, e.g., Charles Davis, *AOC considering impeachment, Schumer weighing Supreme Court expansion in wake of Mitch McConnell's 'blatant, nasty hypocrisy'*, BUSINESS INSIDER (Sep. 21, 2020), [https://www.businessinsider.com/aoc-schumer-unite-to-condemn-mitch-mcconnells-blatant-nasty-hypocrisy-2020-9?utm\\_source=copy-link&utm\\_medium=referral&utm\\_content=topbar](https://www.businessinsider.com/aoc-schumer-unite-to-condemn-mitch-mcconnells-blatant-nasty-hypocrisy-2020-9?utm_source=copy-link&utm_medium=referral&utm_content=topbar).

140. See, e.g., Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Cong. (2020).

141. See, e.g., Washington, D.C. Admission Act, H.R. 51, 116th Cong. (2020).

142. See generally Coan, *supra* note 136.