AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Nondelegation of Legislative Powers

**Paul v. United States, 140 S.Ct. 342** (2019)

*Ronald Paul was convicted of rape. He was subsequently convicted for failing to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA). Paul appealed his conviction on the ground that SORNA was unconstitutionally vague and had other constitutional flaws. The Court of Appeals for the Sixth Circuit. Paul appealed to the Supreme Court of the United States.*

 *The Supreme Court unanimously denied certiorari. During the previous term, the justices in* Gundy v. United States *(2019) had sustained SORNA as a constitutional delegation of power from Congress to the executive branch. Justice Kavanaugh, while not disputing the denial of certiorari in* Paul*, took the opportunity to suggest that he was looking for opportunities to reverse* Gundy*. Is* Gundy *long for the world? How would Kavanaugh replace* Gundy*? What would be the consequences of invigorating the delegation doctrine? Why are conservatives for invigoration and liberals opposed?*

Statement of Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I60b1a45aef5611e9adfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I60b1a45aef5611e9adfea82903531a62) respecting the denial of certiorari.

. . . . Justice GORSUCH's scholarly analysis of the Constitution's nondelegation doctrine in his [*Gundy*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048519603&originatingDoc=I60b1a45aef5611e9adfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *v. United States* (2019)dissent may warrant further consideration in future cases. Justice GORSUCH's opinion built on views expressed by then-Justice Rehnquist some 40 years ago in *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, (1980). In that case, Justice Rehnquist opined that major national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch.

In the wake of Justice Rehnquist's opinion, the Court has not adopted a nondelegation principle for major questions. But the Court has applied a closely related statutory interpretation doctrine: In order for an executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce.

The opinions of Justice Rehnquist and Justice GORSUCH would not allow that second category—congressional delegations to agencies of authority to decide major policy questions—even if Congress expressly and specifically delegates that authority. Under their approach, Congress could delegate to agencies the authority to decide less-major or fill-up-the-details decisions.

Like Justice Rehnquist's opinion 40 years ago, Justice GORSUCH's thoughtful [*Gundy*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048519603&originatingDoc=I60b1a45aef5611e9adfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))opinion raised important points that may warrant further consideration in future cases.