AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers: Nondelegation of Legislative Powers

**Gundy v. United States**, \_\_\_ U.S. \_\_\_ (2019)

*Herman Gundy was convicted of a sex crime in 2005. One year later, Congress passed the Sex Offender and Registration Act (SORNA). One provision of that measure gave the Attorney General “the authority to specify the application of the [registration] requirements . . . to those sex offenders convicted before he enactment of this [law].” After being released, Gundy was rearrested and convicted for failing to comply with the rules made by the Attorney General for convicted sex offenders. He challenged his conviction on the grounds that the provision from SORNA quoted above unconstitutionally delegated power from Congress to the Attorney General. Both the local district court and Court of Appeals for the Second Circuit ruled that no unconstitutional delegation had taken place. Gundy appealed to the Supreme Court of the United States.*

*The Supreme Court by a 5-3 vote sustained the lower federal courts. Justice Elena Kagan’s plurality opinion maintained that delegations required an “intelligible principle” and that Congress in enacting SORNA had laid down an intelligible principle. How does Kagan understand the intelligible standard? Why does she think Congress laid down an intelligible principle? Does Justice Neil Gorsuch’s dissent dispute Kagan’s understanding of the relevant constitutional text or her understanding of SORNA? Who has the better of the argument? The Supreme Court has not found an unconstitutional delegation since the beginning of the New Deal. Why, in light of this history, are the dissenters attempting to revive the unconstitutional delegation doctrine? Are delegations at present more frequent or more open-ended than in the past? Do the dissenters believe time has demonstrated constitutional flaws with the lack of a meaningful (anti-)delegation doctrine? Do you believe the delegation doctrine is ripe for revival?*

Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I90a2c403933011e99b14f2ee541cf11a) announced the judgment of the Court and delivered an opinion, in which Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I90a2c403933011e99b14f2ee541cf11a), Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I90a2c403933011e99b14f2ee541cf11a), and Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I90a2c403933011e99b14f2ee541cf11a) join.

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Article I of the Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” § 1. Accompanying that assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch “powers which are strictly and exclusively legislative.” But the Constitution does not “deny[ ] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s].” Congress may “obtain[ ] the assistance of its coordinate Branches”—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws. “[I]n our increasingly complex society, replete with ever changing and more technical problems,” this Court has understood that “Congress simply cannot do its job absent an ability to delegate power under broad general directives.” So we have held, time and again, that a statutory delegation is constitutional as long as Congress “lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.” *J. W. Hampton, Jr., & Co. v. United States* (1928).

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. . . Congress meant for SORNA's registration requirements to apply to pre-Act offenders. . . . . But if that was so, why had Congress . . . conditioned the pre-Act offenders' duty to register on a prior “ruling from the Attorney General”? . . . “[I]nstantaneous registration” of pre-Act offenders “might not prove feasible,” or “[a]t least Congress might well have so thought.” . . . On that understanding, the Attorney General's role under [§ 20913(d)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=34USCAS20913&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_5ba1000067d06) was important but limited: It was to apply SORNA to pre-Act offenders as soon as he thought it feasible to do so. . . . The delegation was a stopgap, and nothing more.

. . . . Recall again the delegation provision at issue. Congress gave the Attorney General authority to “specify the applicability” of SORNA's requirements to pre-Act offenders. And in the second half of the same sentence, Congress gave him authority to “prescribe rules for the registration of any such sex offenders ... who are unable to comply with” subsection (b)'s initial registration requirement. What does the delegation in [§ 20913(d)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=34USCAS20913&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_5ba1000067d06) allow the Attorney General to do?

The different answers on offer here reflect competing views of statutory interpretation. . . . Gundy urges us to read [§ 20913(d)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=34USCAS20913&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_5ba1000067d06) to empower the Attorney General to do whatever he wants as to pre-Act offenders: He may make them all register immediately or he may exempt them from registration forever (or he may do anything in between). Gundy bases that argument on the first half of [§ 20913(d)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=34USCAS20913&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_5ba1000067d06), isolated from everything else—from the second half of the same section, from surrounding provisions in SORNA, and from any conception of the statute's history and purpose. [https://i1.next.westlaw.com/StaticContent_45.0.2005/images/v1/flag_yellow_small.png?ignoreDeliveryNewLine](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0fda9f25444a11e18da7c4363d0963b0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=e648bd895b574eeebb7acae3467b5b56&Rank=5&RuleBookModeDisplay=False&contextData=(sc.Search))[Reynolds](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026902888&pubNum=0000780&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) took a different approach (as does the Government here), understanding statutory interpretation as a “holistic endeavor” which determines meaning by looking not to isolated words, but to text in context, along with purpose and history.

. . . . So begin at the beginning, with the “[d]eclaration of purpose” that is SORNA's first sentence. There, Congress announced that “to protect the public,” it was “establish[ing] a comprehensive national system for the registration” of “sex offenders and offenders against children.” . . .  That description could not fit the system SORNA created if the Attorney General could decline, for any reason or no reason at all, to apply SORNA to all pre-Act offenders. After all, for many years after SORNA's enactment, the great majority of sex offenders in the country would be pre-Act offenders. . . .

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The Act's legislative history backs up everything said above by showing that the need to register pre-Act offenders was front and center in Congress's thinking. . . . Recall that Congress designed SORNA to address “loopholes and deficiencies” in existing registration laws. See supra, at ––––. And no problem attracted greater attention than the large number of sex offenders who had slipped the system. . . . Imagine how surprising those Members would have found Gundy's view that they had authorized the Attorney General to exempt the missing “predators” from registering at all.. . . And no Attorney General has used (or, apparently, thought to use) [§ 20913(d)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=34USCAS20913&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_5ba1000067d06) in any more expansive way. . . .

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In that context, the delegation in SORNA easily passes muster. . . The statute conveyed Congress's policy that the Attorney General require pre-Act offenders to register as soon as feasible. Under the law, the feasibility issues he could address were administrative—and, more specifically, transitional—in nature. . . . By stating its demand for a “comprehensive” registration system and by defining the “sex offenders” required to register to include pre-Act offenders, Congress conveyed that the Attorney General had only temporary authority. . . . That statutory authority, as compared to the delegations we have upheld in the past, is distinctly small-bore. It falls well within constitutional bounds.[4](https://1.next.westlaw.com/Document/I90a2c403933011e99b14f2ee541cf11a/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740350000016bc3810c028bb9241f%3FNav%3DCASE%26fragmentIdentifier%3DI90a2c403933011e99b14f2ee541cf11a%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=afd05066487f0c802dbfb1ce26e968f6&list=CASE&rank=5&sessionScopeId=d2022e7aabaaefb502820d258ef60e0aa623e2e389644d92d61930cf9e1d6a36&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00052048519603)

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Justice KAVANAUGH took no part in the consideration or decision of this case.

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I90a2c403933011e99b14f2ee541cf11a), concurring in the judgment.

. . . . [S]ince 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards. 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.

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I90a2c403933011e99b14f2ee541cf11a), with whom THE CHIEF JUSTICE and Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I90a2c403933011e99b14f2ee541cf11a) join, dissenting.

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. . . . 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.”. . . Unsurprisingly, different Attorneys General have exercised their discretion in different ways. For six months after SORNA's enactment, Attorney General Gonzales left past offenders alone. Then the pendulum swung the other direction when the Department of Justice issued an interim rule requiring pre-Act offenders to follow all the same rules as post-Act offenders. A year later, Attorney General Mukasey issued more new guidelines, this time directing the States to register some but not all past offenders.[14](https://1.next.westlaw.com/Document/I90a2c403933011e99b14f2ee541cf11a/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740350000016bc3810c028bb9241f%3FNav%3DCASE%26fragmentIdentifier%3DI90a2c403933011e99b14f2ee541cf11a%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=afd05066487f0c802dbfb1ce26e968f6&list=CASE&rank=5&sessionScopeId=d2022e7aabaaefb502820d258ef60e0aa623e2e389644d92d61930cf9e1d6a36&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00192048519603) Three years after that, Attorney General Holder required the States to register only those pre-Act offenders convicted of a new felony after SORNA's enactment.

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. . . . 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. . . . As Chief Justice Marshall explained, Congress may not “delegate ... powers which are strictly and exclusively legislative.” . . .

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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. . . . To address that tendency, the framers went to great lengths to make lawmaking difficult. . . . 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. . . . 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. . . . 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.

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. . . . 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.”

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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.” . . . Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding. . . . 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.”. . .

. . . Th[e] mutated version of the “intelligible principle” remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked. Judges and scholars representing a wide and diverse range of views have condemned it as resting on “misunderst[ood] historical foundations.” They have explained, too, that it has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional. . . .

. . . . 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.

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It's hard to see how SORNA leaves the Attorney General with only details to fill up. . . . 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. The Attorney General may choose which pre-Act offenders to subject to the Act. And he is free to change his mind at any point or over the course of different political administrations. . . . Nor can SORNA be described as an example of conditional legislation subject to executive fact-finding. . . . [I]t gave the Attorney General unfettered discretion to decide which requirements to impose on which pre-Act offenders. . . .

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.

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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. What is more, Congress is hardly bereft of options to accomplish all it might wish to achieve. It may always authorize executive branch officials to fill in even a large number of details, to find facts that trigger the generally applicable rule of conduct specified in a statute, or to exercise non-legislative powers. Congress can also commission agencies or other experts to study and recommend legislative language. Respecting the separation of powers forecloses no substantive outcomes. It only requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution.

. . . . [T]he feasibility standard is a figment of the government's (very recent) imagination. The only provision addressing pre-Act offenders, [§ 20913(d)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=34USCAS20913&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_5ba1000067d06), says nothing about feasibility. And the omission can hardly be excused as some oversight: No one doubts that Congress knows exactly how to write a feasibility standard into law when it wishes.. . . . Besides, even if we were to pretend that [§ 20901](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=34USCAS20901&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) amounted to a directive telling the Attorney General to establish a “comprehensive national system” for pre-Act offenders, the plurality reads too much into the word “comprehensive.” Comprehensive coverage does not mean coverage to the maximum extent feasible. “Comprehensive” means “having the attribute of comprising or including much; of large content or scope,” “[i]nclusive of; embracing,” or “[c]ontaining much in small compass; compendious.” So, for example, a criminal justice system may be called “comprehensive” even though many crimes go unpursued. . . . .

. . . . To say that pre-Act sex offenders fall within the definition of “sex offenders” is merely a truism: Yes, of course, these people have already been convicted of sex offenses under state law. But whether these individuals are also subject to federal registration requirements is a different question entirely. And as we have seen, the only part of the statute that speaks to pre-Act sex offenders—[§ 20913(d)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=34USCAS20913&originatingDoc=I90a2c403933011e99b14f2ee541cf11a&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_5ba1000067d06)—makes plain that they are not automatically subject to all the Act's terms but are left to their fate at the hands of the Attorney General. . . .

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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.”