Gundy v. United States: A Revival of the Nondelegation Doctrine and an Embrace of Cost-Benefit Analysis in Environmental Rulemaking

*Kerensa Gimre**

After Gundy v. United States, *the Supreme Court is poised to dramatically roll back the power of administrative agencies through a reinvigoration of the nondelegation doctrine. This will substantially restrict the ability of agencies, particularly the Environmental Protection Agency, to promulgate environmental regulations and will render large swaths of the Clean Air Act and Clean Water Act unconstitutional. Cost-benefit analysis may be a useful tool for the Environmental Protection Agency to justify its environmental regulations under a revived nondelegation doctrine, yet increased use of cost-benefit analysis creates new concerns over policing its biases and the separation of power. Despite these concerns, cost-benefit analysis may be the best tool to meet the standards of a more discerning Court under a reinvigorated nondelegation doctrine.*

DOI: https://doi.org/10.15779/Z383R0PT9M

* JD Candidate, University of California, Berkeley School of Law, 2021. Thank you to Professors Dan Farber and Bob Infelise for their feedback in the development of this Note. I would also like to thank Katie Sinclair for her insight and valuable commentary during the writing process. I am eternally grateful to the student editors at *ELQ*, particularly Robbie Newell, Claire Christensen, and Paul Balmer. As always, I would be nowhere without the support and love of my family and partner.

INTRODUCTION

In its 2019 *Gundy v. United States* decision, the Supreme Court revisited its otherwise extraordinarily consistent application of the nondelegation doctrine.[1] While the Court narrowly upheld the statutory delegation of power in *Gundy* as constitutional and consistent with precedent, the case's three opinions threaten the future of administrative agencies and environmental rulemaking. Writing the plurality opinion, and relying heavily on precedent, Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, stated that "if [this] delegation is unconstitutional, then most of Government is unconstitutional."[2] In a dissent riddled with scathing attacks on the administrative state, Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, found *Gundy*'s delegation to far exceed that allowed by the Constitution.[3] Justice Alito, in a concurring opinion, stated his openness to reconsidering the Court's longstanding perspective on the

1. Gundy v. United States, 139 S. Ct. 2116 (2019).
2. *Id.* at 2130.
3. *See id.* at 2131 (Gorsuch, J., dissenting).

nondelegation doctrine.[4] While Justice Kavanaugh was not on the Court to hear or decide *Gundy*, he has since issued a statement respecting denial of certiorari in a factually similar case, endorsed Justice Gorsuch's "thoughtful *Gundy* opinion," and stated that the Court's approach to the nondelegation doctrine "may warrant further consideration in future cases."[5] While *Gundy* preserved the status quo delegation authorities, the dissents and Kavanaugh's signaling show that the Court is on the verge of embarking on a new approach to agency rulemaking and an expansion of nondelegation principles.

If the Court were to follow through, it could dramatically roll back the power of administrative agencies through a reinvigorated nondelegation doctrine. This revived doctrine would devastate the ability of all executive agencies to promulgate regulations, endangering workers, consumers, and the environment, and it would threaten progress on many other issues. However, while Justice Gorsuch's *Gundy* dissent and Justice Kavanaugh's statement in the *Paul v. United States* denial of certiorari signal a revived nondelegation doctrine, neither suggest what new standard the Court will apply in nondelegation cases.[6] Cost-benefit analysis may be a useful tool for agencies to use in validating regulations to survive a new heightened standard of judicial review.

The notion that cost-benefit analysis might save environmental regulations might appear unorthodox. It is usually conservatives, who often oppose environmental regulations, including Justice Kavanaugh[7] and several economic and legal scholars,[8] who argue that proper rulemaking requires cost-benefit analysis. They applaud cost-benefit analysis as an objective, fact-based method of decision making. In contrast, environmentalists often deride the application of cost-benefit analysis, believing that it fails to capture the value of noneconomic goods and environmental services.[9] However, with the Court creeping towards an overhaul of nondelegation doctrine jurisprudence, cost-benefit analysis may be the most effective method to save environmental laws because it provides a clear standard that only requires that agencies find facts and fill up details.[10]

Although cost-benefit analysis may be a useful tool to justify agency action in the face of increased judicial scrutiny, its use also raises separation of powers concerns over policing its biases. Cost-benefit analysis requires choices over

4. *Id.* at 2130–31 (Alito, J., concurring).

5. Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

6. *See Gundy*, 139 S. Ct. at 2116; *Paul*, 140 S. Ct. at 342.

7. *See* White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1258 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part).

8. *See id.* at 1261–62.

9. *See, e.g.*, Lisa Heinzerling, "Lisa Heinzerling Responds to Richard Revesz on Cost-Benefit Analysis," GRIST (May 15, 2008), https://grist.org/article/cost-benefit-environmentalism-an-oxymoron/.

10. *See Gundy*, 139 S. Ct. at 2141.

which values to consider, and how.[11] Both the judiciary and Congress will have to decide how to review cost-benefit analysis for arbitrariness. Ultimately, a reinvigorated nondelegation doctrine and the need for judicial review of cost-benefit analysis result in a dramatic shift of power to the courts.

This Note will show that cost-benefit analysis is likely to be increasingly embraced by the Supreme Court due to the presence of Justice Kavanaugh and a more conservative Court. Further, cost-benefit analysis may actually serve as a useful tool for the Environmental Protection Agency (EPA) to maintain autonomy and justify environmental rulemaking before a more discerning Court. First, this Note will review the history of the nondelegation doctrine and the development and application of the intelligible principle test before describing the three opinions in *Gundy*. Then, this Note will review cost-benefit analysis, the Court's treatment of cost-benefit analysis in past cases focused on environmental rulemaking, and why there is now an opening for increased use of cost-benefit analysis, particularly in the likely event of a renewed approach to the nondelegation doctrine. Finally, this Note will review the impact on environmental laws of requiring cost-benefit analysis, including the difficulty of managing the imputation of bias into cost-benefit analysis, and the implications for the balance of powers amongst the three branches of government.

I. THE NONDELEGATION DOCTRINE

The Supreme Court's jurisprudence grants Congress the ability to delegate significant discretion to the executive branch. This Part will review the history of the nondelegation doctrine, with a focus on the consistency of the Court's approach until the present day. First, this Part will explore the important role of administrative agencies in executing the legislative branch's will. Then, this Part will explore the development of the intelligible principle as well as the broad deference the courts generally grant to administrative agencies, particularly in environmental rulemaking.

A. The Role of Administrative Agencies

Administrative agencies lie at the heart of rulemaking. Since the nation's founding, Congress has delegated significant authority to the executive branch across a wide range of contexts to assist in policy making.[12] For example, pursuant to several delegations of authority from Congress, EPA sets standards for ambient air quality,[13] requires pollution abatement technology on water

11. *See, e.g.*, Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. Chi. L. Rev. 609, 612–13 (2014) (arguing that methodological choices in cost-benefit analysis can be outcome determinative).

12. Gillian Metzger, *1930s Redux The Administrative State Under Siege*, 131 HARV. L. REV. 1, 87–88 (2017).

13. 40 C.F.R. § 50 (2020).

discharges,[14] and promulgates many other key regulations vital for human and environmental health and wellbeing.[15] These delegations are functional and promote increased effectiveness of government, as agencies are more flexible and efficient, and often have greater subject matter expertise than Congress, allowing them to efficiently conduct rulemaking.[16] Some, including Justice Kagan, espouse the importance of administrative agencies in the rulemaking process as avoiding a lengthier legislative process that would require Congress to reach consensus and decide on every small detail.[17] Others, including Justice Gorsuch, argue that efficient government is not a compelling government interest and that law making should be difficult and tedious.[18] It is that tediousness, they argue, that keeps the country from devolving into tyranny.[19] These anti-administrative agency arguments are derived from the separation of powers principles enshrined in the Constitution.

The Constitution serves as the basis for the arguments supporting the nondelegation doctrine. Pursuant to Article I of the Constitution, Congress may not transfer to another branch "powers which are strictly and exclusively legislative."[20] Despite this apparent principle of nondelegation, the Court consistently recognizes that the Constitution does not deny Congress "the necessary resources of flexibility and practicality [that enable it] to perform its function."[21] Congress may obtain "the assistance of its coordinate Branches"—and, in particular, it may confer substantial discretion on executive agencies to implement and enforce laws.[22] Without the ability to delegate that authority, the Court has recognized that Congress cannot do its job in our "increasingly complex society."[23] It is between these two principles, the separation of powers and the reality of modern governance, that the Court rationalizes agency delegations.

B. The Development of Nondelegation Doctrine Jurisprudence and the Intelligible Principle Test

The Court has historically reaffirmed most statutory delegations as constitutional as long as Congress supplied an "intelligible principle" by which the agency can act.[24] The Court has only twice in its history found a

14. 33 U.S.C. §1251 et seq. (1972).

15. *See, e.g.*, Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17 (2020); Asbestos, 40 C.F.R. § 763 (2020).

16. Metzger, *supra* note 12, at 86.

17. *Id.*

18. *Id.* at 87; *see also* Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

19. Metzger, *supra* note 12, at 86; *see also Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

20. Wayman v. Southard, 23 U.S. 1, 42–43 (1825).

21. Yakus v. United States, 321 U.S. 414, 425 (1944) (quoting Currin v. Wallace, 306 U.S. 1, 15 (1939)).

22. Mistretta v. United States, 488 U.S. 361, 372 (1989).

23. *Id.*

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

congressional delegation of power to be unconstitutional, and both instances were in 1935.[25] This was an unusual period in the Court's history, as it grappled with an expansion of administrative agencies under President Franklin D. Roosevelt, Roosevelt's threats to pack the Court, the Great Depression, and a constitutional battle over New Deal programs.[26] The National Industrial Recovery Act (NIRA) was one of Roosevelt's most controversial programs,[27] favored by big business because it suspended antitrust laws and relied on industry-developed business codes.[28] Under NIRA, the president could "impose such conditions . . . for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest."[29] As NIRA expanded the scope of governmental economic regulation, taxes increased, and labor protections grew, NIRA quickly became disfavored.[30] Its terms were successfully attacked on constitutional grounds.[31]

In *A.L.A. Schechter Poultry Corp. v. United States*, the Supreme Court invalidated the Live Poultry Act enacted by the president pursuant to NIRA.[32] Under NIRA, Congress delegated authority to the president to "approve codes of fair competition" applied to one or more trade associations.[33] With this authority, the president enacted the Live Poultry Code and set general labor provisions.[34] The Court found these provisions, challenged on separation of powers and nondelegation grounds, to be unconstitutional, as section 3 of NIRA granted the president "virtually unfettered" discretion to set laws for commercial and industrial activity in the nation in direct violation of Article I.[35] NIRA unconstitutionally extended to the president discretion to enact "all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country."[36] To pass constitutional muster, Congress could have referenced preexisting common law of fair competition that would supply guidance on policy questions or announce rules contingent on executive factfinding.[37]

---

25. Gundy v. United States, 139 S. Ct. 2116, 2129 (2019); *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

26. Victor B. Flatt, *The "Benefits" of Non-Delegation Using the Non-Delegation Doctrine to Bring More Rigor to Benefit-Cost Analysis*, 15 WM. & MARY BILL RTS. J. 1087, 1093 (2007); *see also* Metzger, *supra* note 12, at 6, 88.

27. Pub. L. No. 73-67, 48 Stat. 195 (1933) (repealed 1966).

28. Metzger, *supra* note 12, at 52.

29. *A.L.A. Schechter*, 295 U.S. at 523 (quoting National Industrial Recovery Act, Pub. L. No. 73-67, § 3, 48 Stat. 195 (1933) (repealed 1966)).

30. Metzger, *supra* note 12, at 53.

31. *Id.* at 54.

32. *A.L.A. Schechter*, 295 U.S. at 523–24.

33. *Id.* at 521–22.

34. *Id.* at 523–24.

35. *Id*. at 539.

36. *Id.*

37. Gundy v. United States, 139 S. Ct. 2116, 2137–38 (2019) (Gorsuch, J., dissenting).

The other case from 1935, *Panama Refining Co. v. Ryan*, also questioned a delegation of power under NIRA.[38] Under section 9(c) of NIRA, the president could prohibit the transportation of petroleum interstate.[39] Pursuant to this authority, and in consultation with the Secretary of the Interior, the president promulgated the Petroleum Code, setting quotas on the amount of petroleum to be produced in a state.[40] Panama Refining challenged the Petroleum Code as an unconstitutional delegation of power from Congress, and the Court agreed.[41] Congress failed to provide, in the statute, the conditions under which the president could prohibit transportation of oil.[42] For the delegation to be constitutional, Congress should have included a restriction on when the president could or could not act. Congress declared no policy, established no standard, laid down no rule, required no ascertainment of existence of facts, and did not merely ask the executive to fill up the details.[43] There was no principle to guide what the president might decide to prohibit, and there was no framework sufficiently defined by the legislature.[44]

The *Panama* and *Schechter* decisions are often interpreted as anomalies in the Supreme Court's jurisprudence, situated at a unique time in the Roosevelt administration's dramatic expansion of executive power.[45] Except for these two cases in 1935, the Court consistently allows quite broad delegations of legislative power. A test for an "intelligible principle" evolved out of *J. W. Hampton, Jr., & Co. v. United States*, where the Court found that while Congress cannot delegate legislative power, Congress can lay down general rules, or an "intelligible principle to guide the delegee's exercise of authority" under which a delegation of legislative power is constitutional.[46] The intelligible principle concept has been interpreted broadly by the Court, allowing authorizations for agencies to set "fair and equitable" prices,[47] "just and reasonable" rates,[48] and air quality standards "requisite to protect the public health."[49]

---

38. Panama Ref. Co. v. Ryan, 293 U.S. 388, 388 (1935).

39. *Id.* at 407–08.

40. *Id.* at 410.

41. *Id.* at 415 (finding that NIRA "does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in Section 9(c) thus declares no policy as to the transportation of the excess production. [This section] gives to the President an unlimited authority to determine the policy.").

42. *Id.*

43. Gundy v. United States, 139 S. Ct. 2116, 2138 (2019) (Gorsuch, J., dissenting).

44. *Id.*

45. Flatt, *supra* note 26, at 1093.

46. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); *see also* Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90, 105 (1946) (finding that a delegation is permissible if Congress clarifies "the general policy" that must be pursued and the "boundaries of this delegated authority").

47. Yakus v. United States, 321 U.S. 414, 423 (1944).

48. Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 600 (1944).

49. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001).

More recently, Justice Scalia, writing for the majority in *Whitman v. American Trucking Ass'ns*, seemingly lowered the level of detail required for a rule to pass the intelligible principle test and guide constitutional delegations of power.[50] The *Whitman* case highlights the range of the intelligible principle doctrine and demonstrates the importance of deference to agencies, particularly in environmental rulemaking.

At issue in *Whitman* was EPA's authority to promulgate air quality standards under the Clean Air Act, pursuant to a delegation from Congress.[51] Under the Clean Air Act, Congress delegated power to EPA to establish uniform national standards for certain pollutants at levels that are "requisite" to protect public health, where "requisite" means "sufficient, but not more than necessary."[52] Pursuant to this delegation of authority, EPA promulgated national ambient air quality standards, including the standards regulating ozone and particulate matter.[53]

The issues at the center of *Whitman* concerned a delegation from Congress that required EPA to set air quality standards "requisite to protect the public health" and whether this was a sufficiently intelligible principle to uphold that delegation.[54] The Court had approved similarly expansive language in prior cases. For example, in *Touby v. United States*, the Court allowed the attorney general to designate a drug as a controlled substance if doing so was "necessary to avoid an imminent hazard to public safety."[55] Similarly, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, the Court upheld a provision requiring the Occupational Safety and Health Administration to set the standard that most adequately assures, "to the extent feasible, on the basis of the best available evidence," that no employee will suffer any impairment of health.[56] Consistent with its precedent, the Court in *Whitman*, in an opinion by Justice Scalia, held that "requisite to protect the public health" was a sufficiently intelligible principle to guide agency action and hence constitutional. Further, Justice Scalia argued, the delegation fit well within the Court's prior allowances.[57]

Justice Scalia was extraordinarily deferential in his *Whitman* majority opinion, stating that the Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that

50. *See id.*

51. *Id.*

52. *Id.* at 473 (quoting Transcript of Oral Argument at 5, Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001) (No. 88-1257)).

53. *See id.*

54. *Id.*

55. Touby v. United States, 500 U.S. 160, 163 (1991).

56. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980).

57. *Whitman*, 531 U.S. at 475–76. Justice Scalia argued that *Panama* and *Schechter* conferred "authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Id.* at 474.

can be left to those executing or applying the law."[58] This hinted at an expansive ability of Congress to delegate rulemaking power to agencies but was an opinion which seems at odds with today's conservative Court. Justice Scalia distinguished the delegation in *Whitman* from the delegations in *Panama* and *Schechter*, which provided no limits or guidance.[59] He argued that a requirement that EPA set air quality standards at a level "requisite, that is, not lower or higher than is necessary to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent."[60] After *Whitman*, it is difficult to imagine the Court finding any guidance from Congress as insufficient to meet the "intelligible principle" test that constrains agency action.

The most prescient part of *Whitman* arises in Justice Thomas's concurrence. Although Justice Thomas concurred with Justice Scalia's opinion in *Whitman*, he wrote separately to note that he would be willing to reconsider the Court's approach to the nondelegation doctrine in a future case, stating that the Court had strayed too far from the "Founders' understanding of separation of powers."[61] Justice Thomas argued that the intelligible principle test is inappropriate since there is no basis for it in the Constitution and the test does not "prevent all cessions of legislative power," pointing to cases with intelligible principles but where the delegated decisions are so great that the actions are essentially still legislative.[62] This concurrence hinted strongly at future opinions from the Court and provided the basis for Justice Gorsuch's dissent and Justice Alito's concurrence in *Gundy*.

II. *GUNDY V. UNITED STATES* SIGNALS THE COURT'S SHIFT TOWARD A REINVIGORATED NONDELEGATION DOCTRINE

In *Gundy v. United States*, the Supreme Court again revisited the nondelegation doctrine. While the majority of the Court ultimately affirmed the delegation in the challenged statute as constitutional, the dissent and concurrence demonstrate increasing interest in reviving the nondelegation doctrine. This Part will begin with a brief description of the case, followed by a description of Justice Kagan's opinion, which upholds the challenged delegation of power as consistent with nearly a century of precedent. Justice Alito's concurrence will be briefly mentioned before delving into Justice Gorsuch's dissent. Justice Kavanaugh was not on the Court to hear the case and did not participate in the decision, which was rendered by only eight Justices. The three opinions in *Gundy* indicate that the new nine-member Court may be on the verge of dramatically

58. *Id.* at 474 (quoting Mistretta v. United States, 488 U.S. 361, 416 (Scalia, J., dissenting)).
59. *Id.*
60. *Id.* at 475–76.
61. *Id.* at 487.
62. *Id.*

changing its approach to the nondelegation doctrine, with significant impacts on administrative agencies.

In *Gundy*, the Supreme Court evaluated the constitutionality of the Sex Offender Registration and Notification Act (SORNA).[63] SORNA attempts to unify the federal and state patchwork of sex offender registration systems and, specifically, requires more types of sex offenders to register than did previous registration systems.[64] Under SORNA, a sex offender must register before they complete the prison sentence that gave rise to the registration requirement.[65] However, some individuals may have completed a sentence of imprisonment before the enactment of SORNA (they are defined as "pre-Act offenders") and are thus unable to comply with rule.[66] In cases of pre-Act offenders, SORNA authorizes the attorney general to specify how the Act would apply and "to prescribe rules for [their] registration."[67] Under the authority delegated by SORNA, the attorney general issued a final rule in December 2010, establishing that SORNA's registration requirements apply to all pre-Act offenders.[68]

One of these pre-Act offenders, Herman Gundy, was convicted of failing to register under SORNA's requirements and filed suit, claiming that Congress unconstitutionally delegated legislative power to the attorney general.[69] The district court and the Second Circuit rejected Gundy's claim and found that the attorney general's authority to "specify the applicability" of SORNA's registration requirements to pre-Act offenders was a constitutional delegation of power, consistent with the intelligible principle test and the Court's longstanding jurisprudence on nondelegation.[70]

A. Justice Kagan's Plurality Opinion and Justice Alito's Concurrence Uphold the Status Quo of the Nondelegation Doctrine

Justice Kagan's plurality opinion represented deference to decades of precedent on the nondelegation doctrine. Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, upheld the Court's nondelegation doctrine precedent, holding that, in the context of the Court's past jurisprudence, Congress's delegation to the attorney general easily passes constitutional muster.[71] Justice Kagan relied heavily on the concept of stare decisis, quoting several of the Court's previous findings on the scope of permitted delegations of power and relying on the "Court's long-established law" to guide the analysis.[72]

63. Gundy v. United States, 139 S. Ct. 2116, 2122 (2019).
64. Reynolds v. United States, 565 U.S. 432, 435 (2012).
65. 34 U.S.C. § 20913(b) (2018).
66. *Id.* § 20913(d).
67. *Id.*
68. *Gundy*, 139 S. Ct. at 2122.
69. *Id.*
70. *Id.*
71. *Id.* at 2129.
72. *Id.* at 2130; *see also* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001); Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90 (1946).

From there, Justice Kagan applied a two-part test to determine if the delegation was constitutional.[73]

In Justice Kagan's view, the Court's longstanding test to determine if a delegation is constitutional contains two parts. First, the Court must use statutory interpretation to determine what power is delegated.[74] Statutory interpretation is important both in determining what task is delegated and what instructions were provided by Congress.[75] The Court's statutory interpretation then determines if the law sufficiently guides executive discretion within the limitations set in Article I.[76] The second step asks the Court to determine if the delegation is constitutional by considering if Congress provided an "intelligible principle" to guide the decision maker.[77]

In applying the two-part test and performing a statutory interpretation of the delegation at issue in SORNA, Justice Kagan found that there was no delegation question because "Section 20913(d)'s delegation falls well within permissible bounds," and the attorney general's discretion is limited to "considering and addressing feasibility issues" in applying SORNA registration requirements to pre-Act offenders.[78] She also noted that executive officials are often delegated the power to make judgments about feasibility, as that standard is "ubiquitous" across the U.S. Code.[79] Further, because the delegation of authority was temporary and related to administrative issues, her concerns over delegation were limited.[80] In instructing the attorney general to apply SORNA's registration requirements to pre-Act offenders as soon as feasible, Congress did not make an impermissible delegation"[u]nder this Court's long-established law."[81]

The most compelling part of Justice Kagan's opinion is her warning that "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional."[82] Finding the delegation in SORNA to be unconstitutional would have devastating consequences for administrative agencies and eliminate most of the duties they are expected to perform. To avoid this outcome and warn a future Court away from a reinvigorated nondelegation doctrine, Justice Kagan reinforced the importance of congressional reliance on the executive branch and administrative agencies to implement Congress's legislative programs. In a call to stare decisis, she reinforced the Court's "long time recognition" of the importance of delegation, finding that Congress would be unable to perform its legislative duties without the power to delegate.[83] She concluded with an

73. *See Gundy*, 139 S. Ct. at 2119.
74. *See id.*
75. *Gundy*, 139 S. Ct. at 2119.
76. *See id.*
77. *See id.*
78. *Id.* at 2124.
79. *Id.* at 2130.
80. *Id.*
81. *Id.* at 2129.
82. *Id.* at 2130.
83. *Id.* (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).

endorsement of the Court's longstanding precedent, stating, "It is wisdom and humility alike that this Court has always upheld such 'necessities of government.'"[84]

Justice Alito concurred with Justice Kagan's plurality opinion, finding SORNA's delegation of power to be constitutional and consistent with the Court's previous eighty-four years of jurisprudence, yet he signaled an interest in changing the Court's position on the nondelegation doctrine.[85] He did not join Justice Kagan's statutory analysis, and he wrote separately to state that he would be willing to reconsider the Court's approach to the nondelegation doctrine in an appropriate case.[86]

Based on Justice Alito's apparent eagerness to consider overturning nondelegation doctrine precedent, it is unclear why he did not join Justice Gorsuch's dissent in *Gundy*. It may simply be because a split four-four decision would not have made much difference. Alternatively, it could indicate that although Justice Alito desires a reinvigorated nondelegation doctrine, he may advocate for a different standard than that proposed by Justice Gorsuch.

B. Justice Gorsuch's Dissent Invites a Revival of the Nondelegation Doctrine

Justice Gorsuch, in his dissent, laid out the case for why the Court should reconsider the nondelegation doctrine.[87] This Subpart will discuss the key themes of Justice Gorsuch's dissent, including his different approach to the statutory interpretation of SORNA, his general frustration with the administrative state, and his belief that the "intelligible principle" test is unconstitutional.[88] This Subpart will then discuss Justice Gorsuch's proposed new standard, based on Chief Justice Marshall's opinion in *Wayman v. Southard*[89] and Justice Rehnquist's opinion in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,[90] to determine if a delegation passes constitutional muster.

1. Gundy Shows the Importance of Statutory Interpretation in Nondelegation Inquiries

Justice Gorsuch's dissent is partially based on a difference of interpretation of the terms of SORNA. Justice Kagan interpreted SORNA as requiring the attorney general to impose registration requirements on pre-Act offenders and

84. *Id.* (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).
85. *Id.* at 2130–31 (Alito, J., concurring).
86. *Id.*
87. *See id.* at 2131–48 (Gorsuch, J., dissenting).
88. *See id.*
89. Wayman v. Southard, 23 U.S. 1, 20–50 (1825).
90. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 671–88 (1980) (Rehnquist, J., concurring).

merely define the time at which, and how, pre-Act offenders must register.[91] Justice Gorsuch, however, found Congress essentially let the attorney general write the rules for the entire sex offender population and granted the attorney general significant discretion as to whether to impose SORNA registration requirements on pre-Act offenders.[92] As a result of their differences in statutory interpretation, Justice Kagan found that no nondelegation question arose, yet Justice Gorsuch found that SORNA granted unconstrained power to the attorney general to legislate and write policy, a clear infringement of Article I of the Constitution.[93] This stark difference demonstrates the importance of statutory interpretation to nondelegation inquiries.

In his interpretation, Justice Gorsuch found SORNA unconstitutionally delegates legislative power to the attorney general because of the scope of impact on individuals and the discretion granted to the attorney general to make law.[94] Because he found SORNA granted the attorney general the authority to "prescrib[e] the rules by which the duties and rights" of citizens are determined, the attorney general was granted a "quintessentially legislative power," according to the definition used by Justice Gorsuch.[95] Under Justice Gorsuch's interpretation of SORNA, the attorney general could write a criminal code that fit his or her own policy choices.[96] This power, to Justice Gorsuch, was an unconstitutional delegation of legislative authority by Congress.[97]

2. Unconstitutionality of the Intelligible Principle Test and Frustration with the Administrative State

In his dissent, Justice Gorsuch expressed considerable discontent over the breadth of decisions delegated to administrative agencies. He relied on the premise that the framers of the Constitution wanted to make lawmaking difficult, stating that the "detailed and arduous process" for new legislation enshrined in Article I is a "bulwark[] of liberty" that promotes deliberation.[98] He cited Madison's Federalist No. 47—"there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."[99] The Court's duty, in Justice Gorsuch's mind, is to respect "the people's sovereign choice to vest the legislative power in Congress alone."[100]

For this reason, questions of delegation are particularly important to Justice Gorsuch. The Court must strive to make sure that Congress is not granting an

91. *Gundy*, 138 S. Ct. at 2124.
92. *Id.* at 2132 (Gorsuch, J., dissenting).
93. *See id.*
94. *Id.* at 2143 (finding "[SORNA] gave the Attorney General unfettered discretion to decide which requirements to impose on which pre-Act offenders.").
95. *Id.* at 2144 (quoting The Federalist No. 78, at 465 (Alexander Hamilton)).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 2135 (quoting The Federalist No. 47, at 302 (James Madison)).
100. *Id.*

"unbounded policy choice" to a single person or announcing "vague aspirations," particularly if there could be profound consequences.[101] The federal government's most dangerous power, he claims, is the restriction of people's liberty.[102] To Justice Gorsuch, letting a single person make the laws, without the deliberation of Congress, fundamentally restricts people's liberty, results in too many laws, and leads to a lack of government accountability.[103] This view colored his opinion in *Gundy* and informs his approach to the nondelegation doctrine.

Justice Gorsuch further argued that the intelligible principle standard has no basis in the "original meaning of the Constitution, in history, or even in the decision from which it was plucked," believing that courts abuse the standard to permit delegations of legislative power that on any other conceivable account should be held unconstitutional.[104] Echoing Justice Thomas's concurrence in *Whitman,* Justice Gorsuch rejected the history of the intelligible principle test as applied to the Court's jurisprudence on the nondelegation doctrine. Justice Gorsuch stated that the nondelegation doctrine died "by association" with "now-discredited substantive due process decisions" of the 1930s Supreme Court.[105] According to Justice Gorsuch, the "intelligible principle" doctrine, as evolved from *J. W. Hampton, Jr., & Co. v. United States*, was never intended by Chief Justice Taft, the author of the *Hampton* opinion, to be used as a test of the constitutionality of statutory delegation.[106] The intelligible principle test is "gibberish" and rests on "misunderst[ood] historical foundations."[107] According to Justice Gorsuch, a statutory delegation is constitutional only if (1) the statute assigns to the executive only the responsibility to make factual findings; (2) the statute sets forth the facts that the executive must consider and the criteria against which to measure them; and (3) Congress, not the executive branch, makes the policy judgments.[108] This test is consistent with allowing the executive branch to find a significant number of facts, where that factfinding can require "intricate calculations."[109]

3. Proposed Standard for the Constitutionality of Delegation

In addition to the difference of interpretation in the terms of SORNA and his view of government tyranny that influences his dissent, Justice Gorsuch also proposes a new standard to determine the constitutionality of a delegation of

101. *Id.* at 2133.
102. *Id.* at 2134
103. *Id.*
104. *Id.* at 2139.
105. *Id.* at 2138.
106. *Id.* at 2139.
107. *Id.* at 2139–40.
108. *Id.* at 2136–37.
109. *Id.* at 2139.

power, arguing for a rejection of the intelligible principle test.[110] Justice Gorsuch notes that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to "fill up the details"—the standard for a nondelegation inquiry adopted by Chief Justice Marshall in *Wayman v. Southard*.[111] According to Justice Gorsuch, that standard requires Congress to set "sufficiently definite and precise" terms to make it clear to Congress, the courts, and the public when an agency has overstepped a congressional delegation.[112]

According to Justice Gorsuch's interpretation, SORNA does not fit into any of these constitutional delegations of power. Justice Gorsuch expressed particular concern that SORNA leaves the attorney general with more than "details to fill up," as SORNA forces the attorney general to make his or her own policy decisions.[113] This, in Gorsuch's view, is fundamentally at odds with the Constitution, which requires that Congress "assemble a social consensus before choosing our nation's course on policy questions."[114]

According to Justice Gorsuch, the delegation in SORNA does not meet his "filling up the details" test. It is difficult to determine exactly what type of delegation would satisfy Justice Gorsuch and merely "fill up details." Unfortunately, Justice Gorsuch does not shine much light on what qualifies as a detail, claiming himself that it is "difficult to discern."[115] He admits that Congress "may always authorize executive branch officials to fill in even a large number of details," potentially leaving open the door for Congress to delegate significant factfinding.[116] He states that factfinding that triggers the generally applicable rule of conduct specified in a statute is an example of "filling up the details."[117] Justice Gorsuch finds that this standard allows Congress to delegate to executive branch officials the ability to find facts to trigger the "generally applicable rule of conduct specified in a statute," to exercise nonlegislative powers, and to study and recommend legislative language.[118]

While Justice Kavanaugh was not on the Court to hear or decide *Gundy*, he signaled his openness to Justice Gorsuch's approach when he issued a statement respecting the denial of certiorari in a factually similar case.[119] In his statement, he endorsed Justice Gorsuch's "thoughtful *Gundy* opinion" and stated that the Court's approach to the nondelegation doctrine "may warrant further

110. *Id.*
111. *Id.* at 2136; *see also* Wayman v. Southard, 23 U.S. 1 (1825).
112. Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (quoting Yakus v. United States, 321 U.S. 414, 426 (1944)).
113. *Id.* at 2143.
114. *Id.* at 2145.
115. *Id.* at 2143.
116. *Id.* at 2145.
117. *Id.*
118. *Id.*
119. Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

consideration in future cases."[120] Justice Kavanaugh's statement indicates a majority of the Court is willing to consider a new test of nondelegation and that at least four members support Justice Gorsuch's "fill up the details" standard. With the recent appointment of Justice Amy Coney Barrett to the bench, the Court has a solid 6-3 conservative majority that may further accelerate the Court's reconsideration of the nondelegation doctrine.

It is clear that adoption of Justice Gorsuch's proposed test, which asks whether Congress delegated to an agency only the ability to "fill up the details" and "find facts," would result in a significant restriction of Congress's power to delegate rulemaking functions to agencies. This new test could severely reduce the size of agencies by immediately declaring most of their delegated functions unconstitutional.

III. COST-BENEFIT ANALYSIS AS A POTENTIAL TOOL TO SATISFY JUSTICE GORSUCH'S NONDELEGATION STANDARD

Based on the new makeup of the nine-member Supreme Court, Justice Gorsuch's dissent in *Gundy*, Justice Alito's concurrence, and Justice Kavanaugh's endorsement of Gorsuch's *Gundy* dissent in the *Paul* denial of certiorari, it is likely the Court will rewrite its approach to the nondelegation doctrine. It is unclear what new test of constitutionality the Court will impose to replace the "intelligible principle" test in issues of nondelegation. Justice Gorsuch's dissent in *Gundy* provides a few clues. According to his *Gundy* dissent, Congress can fill up the details by finding facts. These facts can be "significant" in number, require "intricate calculations," and be used to "trigger the applicable rule of conduct specified in a statute."[121]

If the Court wants to restrict agency action to factfinding, under Justice Gorsuch's proposed test in *Gundy*, cost-benefit analysis may be a tool for agencies to maintain their regulatory autonomy in an era of enhanced judicial scrutiny. There is some evidence that cost-benefit analysis may be compelling to the Court as a method of limiting agency discretion in the promulgation of rules. The reinvigorated nondelegation doctrine could invite an enhanced role for cost-benefit analysis in agency rulemaking.[122]

This Part will first provide a brief description of cost-benefit analysis before analyzing how it fits within the context of Justice Gorsuch's dissent in *Gundy*. Then, this Part will briefly review the Court's embrace of cost-benefit analysis in environmental rulemaking.

120. *Id.*

121. Gundy v. United States, 139 S. Ct. 2116, 2130 (2019).

122. *See* C. Boyden Gray, *The Search for an Intelligible Principle*: *Cost-Benefit Analysis and the Nondelegation Doctrine*, 6 TEX. REV. L. & POL. 1, 46–47 (2001); Flatt, *supra* note 26, at 1095, 1099.

A. Cost-Benefit Analysis in the Context of Justice Gorsuch's Heightened Nondelegation Standard

As recognized by the Supreme Court in multiple nondelegation opinions, broad grants of power to administrative agencies are necessary for government efficiency and efficacy.[123] Although Congress must make critical policy decisions,[124] there is an important role for the executive branch in helping Congress make these policy decisions. Cost-benefit analysis could provide the additional check on administrative power that the new Court desires.[125]

Cost-benefit analysis attempts to calculate the costs and benefits of a particular action, with the goal of choosing an action that most efficiently expends resources: the most benefit, for the least cost.[126] There are three components of a cost-benefit analysis: quantification (estimating the result in number form of a regulation); monetization (what the monetary benefit or cost is per result); and aggregation (where the monetary benefits and costs are aggregated over time and space and appropriately discounted).[127] Costs and benefits of a proposed action are quantified and monetized using established economics methodology. Decision makers use cost-benefit analysis to decide between different regulatory alternatives because cost-benefit analysis provides a common measure of cost, which allows the regulators to choose the alternative that maximizes net benefits.[128] Cost-benefit analysis is entrenched in the administrative state, with all presidents since President Carter issuing executive orders requiring a cost-benefit analysis in agency action unless Congress directs otherwise.[129] Cost-benefit analysis is widespread but highly critiqued because there are intangibles and important costs and benefits that are difficult to value.[130]

---

123. Flatt, *supra* note 26, at 1094.

124. *Id.* at 1096.

125. *Id.* at 1099.

126. *Id.* at 1087.

127. Benjamin Minhao Chen, *What's in a Number Arguing about Cost-Benefit Analysis in Administrative Law*, 22 LEWIS & CLARK L. REV. 923, 929 (2018).

128. OFFICE OF MGMT. & BUDGET, CIRCULAR A-4 (2003).

129. Flatt, *supra* note 26, at 1088. This wide acceptance has disgruntled some scholars who believe that executive orders have "entrenched a formal mechanism for the White House to delay, revise, or even reject an administrative agency's rule if it yields less benefits than costs." Chen, *supra* note 127, at 924. Others argue that even though cost-benefit analysis has been demanded through executive orders and the White House Office of Information and Regulatory Affairs, it is unwise to accept it in rulemaking because of the intangibles that are impossible to value. *See* Amy Sinden, *Supreme Court Remains Skeptical of the "Cost-Benefit State,"* REG. REV. (Sept. 26, 2016), https://www.theregreview.org/2016/09/26/sinden-cost-benefit-state/ (finding that "[a]t its most formal, [cost-benefit analysis] requires quantifying and monetizing all of the social costs and benefits of a regulation and a host of incrementally varying alternatives, discounting these cost and benefits to present value, and finding the point where the marginal cost curve intersects the marginal benefits curve so as to maximize net benefits. This is the kind of [cost-benefit analysis] contemplated by the executive orders adopted by Presidents Bill Clinton and Obama and typically demanded by the White House Office of Information and Regulatory Affairs (OIRA). It is also the kind that has generated enormous controversy for decades because it requires putting a dollar value on intangibles—good health and a clean environment—that are impossible to measure in monetary terms.").

130. Flatt, *supra* note 26, at 1089.

For example, what is the economic value of an individual's life, the economic benefit of a panoramic view, or the economic cost of a risk of an exposure to lead? Over time, cost-benefit analysis methods have improved to include monetized estimates of noneconomic costs and benefits.[131] This evolution has expanded the scope and applicability of cost-benefit analysis.

Cost-benefit analysis may be used to satisfy Justice Gorsuch's test in *Gundy*. It is clear that Justice Gorsuch believes the intelligible principle standard is in itself unconstitutional, and he is emphatic in his dissent that agencies are limited to making factual findings.[132] Instead, Congress could require a factual finding of costs and benefits of a proposed regulation or a factual finding that a proposed agency regulation passes a cost-benefit analysis, which in turn would limit an agency's ability to promulgate regulations that exceed its scope of delegated power. Cost-benefit analysis may therefore meet Justice Gorsuch's requirements of "filling up the details" and finding facts.

Moreover, agencies justifying their actions through cost-benefit analysis also meet Justice Gorsuch's desire for transparency and accountability. When agencies have to cost-benefit justify their actions, that is possibly a standard that is "'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed."[133] Since Gorsuch believes that Congress can delegate to executive branch officials the ability to find facts to trigger the "generally applicable rule of conduct specified in a statute," to exercise nonlegislative powers, and to study and recommend legislative language, agency regulations that satisfy a cost-benefit analysis fit clearly in this nexus.[134]

B. The Supreme Court's Embrace of Cost-Benefit Analysis in Environmental Rulemaking

The Court has, at times, been reluctant to require the consideration of costs and benefits in agency rulemaking when congressional intent is unclear, but that trend is shifting.[135] There is some evidence that requiring cost-benefit analysis may be increasingly compelling to the Court, and it has shown more willingness to embrace cost considerations and read them into congressional delegations. In a recent decision, the Court held that a requirement that an agency find a regulation to be "appropriate and necessary" required a consideration of cost.[136] Yet in *Whitman*, the Court held that when Congress wants an agency to consider

131. *Id.*

132. Gundy v. United States, 139 S. Ct. 2116, 2141 (2019).

133. *Id.* at 2136.

134. *Id.* at 2141. For an argument that Court-imposed cost consideration is a form of a nondelegation canon, see Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1, 21 (2017); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 & n.5 (2000).

135. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001); Michigan v. EPA, 135 S. Ct. 2699 (2015).

136. *Michigan*, 135 S. Ct. at 2707.

cost in promulgating rules, Congress will expressly state such intention.[137] Because Congress is not always explicit in its intent as to whether agencies should measure costs and benefits, the Court is often left to resolve litigation over the use of cost-benefit analysis through statutory interpretation.[138] The D.C. Circuit often pushes further than the Supreme Court, "requiring (and not merely permitting) the consideration *and* quantification of costs."[139]

While the Court sometimes calls for an explicit designation from Congress to require cost-benefit analysis, the Court has recently trended toward reading in a cost-benefit analysis requirement. In one of the first cases to consider the use of cost-benefit analysis, the Court refused to read in a cost-benefit analysis requirement. In *American Textile Manufacturers Institute, Inc. v. Donovan* (*Cotton Dust*), Congress directed the secretary of labor to regulate cotton dust "to the extent feasible" under the Occupational Safety and Health Act.[140] According to the Court, history confirmed that through the "feasible" standard, the Court intended to impose costs, however significant, when necessary to protect worker health.[141] The use of cost-benefit analysis would eliminate "to the extent feasible" requirements and violate clear congressional intent.[142]

In the more recent case of *Entergy Corp. v. Riverkeeper*, the Court upheld EPA's use of cost-benefit analysis. In *Riverkeeper*, Congress directed EPA under the Clean Water Act to determine the best available control technology to control water pollution.[143] The Court found that if Congress intended to mandate the greatest feasible reduction in water pollution, it could have used plain language to do so, but requiring the "best" technology allowed the agency to use cost-benefit analysis to determine best technology under a certain standard.[144] This standard does not require the maximization of benefits but requires that those benefits are produced most efficiently.[145] *Riverkeeper* was the first time the Court upheld EPA's use of cost-benefit analysis.[146] While Justices Scalia and Breyer suggested that formal cost-benefit analysis might not be allowed without direction from Congress, they also suggested that EPA could read an ambiguous statute to allow informal cost-benefit analysis.[147] Further, the decision in *Riverkeeper* is striking because the relevant statutory provision of the Clean Water Act never even mentions "cost"; it only refers to the best available control

137. *See Whitman*, 531 U.S. at 462–63.
138. Chen, *supra* note 127, at 925.
139. *Id.* at 926 (emphasis in original).
140. Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 492 (1981).
141. *Id.* at 511.
142. *Id.*
143. Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 213 (2009).
144. *Id.* at 219.
145. *Id.*
146. Sinden, *supra* note 129.
147. *Id.*

technology.[148] According to scholars Jonathan Masur and Eric Posner, the Supreme Court's holding that a statute that does not mention cost still requires a consideration of costs, and a finding that those costs do not significantly exceed benefits, represents a major shift from its position in *Whitman* or *Cotton Dust*.[149] In *Whitman*, Justice Scalia, writing for the Court, held that Congress would be explicit when it wants an agency to consider costs.[150] But fourteen years later, in *Michigan v. EPA*, Justice Scalia, again writing for the Court, held that EPA interpreted the Clean Air Act unreasonably when it deemed cost irrelevant to the decision to regulate power plants.[151] His position on cost-benefit analysis had evolved significantly since the *Whitman* opinion. In *Michigan*, EPA argued that other provisions of the Clean Air Act explicitly required the consideration of cost, but the section at issue did not.[152] Justice Scalia stated that "it is unreasonable to infer that, by expressly making cost relevant to other decisions, the Act implicitly makes cost irrelevant to the appropriateness of regulating power plants."[153] This shift demonstrates the Supreme Court's evolution from its findings in the *Cotton Dust* and *Whitman* cases, where the Court had been willing to read in a cost-benefit analysis requirement.

Furthermore, in *Michigan*, Justice Scalia deviated from his earlier opinions and argued that environmental regulations must pass a cost-benefit analysis. Justice Scalia wrote that it would not be rational or appropriate to "impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."[154] He tried to distinguish *Michigan* from *Whitman*, arguing that *Whitman*'s standard of "requisite to protect the public health" is a consideration of health and safety, not cost.[155] In *Whitman*, he refused to read in an authorization to consider cost because Congress had not expressly granted a consideration of cost.[156] To contrast this finding with *Michigan*, he stated that the standard in *Michigan*—"appropriate and necessary"—is more comprehensive and "plainly subsumes consideration of cost," despite a lack of an explicit grant from Congress to consider cost.[157] Going even further, Justice Scalia clarified that no regulation would be appropriate if it did significantly more harm than good.[158]

It may be difficult to reconcile Justice Scalia's opinions in *Michigan* and *Whitman* because the requirement of a cost consideration hinges on the terms

148. Jonathan Masur & Eric. A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 975 (2018).
149. *Id.*
150. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 462–63 (2001).
151. Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015).
152. *Id.* at 2708–09.
153. *Id.* at 2709.
154. *Id.* at 2707.
155. *Id.* at 2709.
156. *Id.*
157. *Id.*
158. *Id.*

"requisite to protect the public health" (does not require cost consideration) and "appropriate and necessary" (requires consideration of cost). But the trend over time shows the increasing willingness of the Court (or at least, conservative Justices like Scalia) to read in a cost-benefit analysis when Congress requires an agency to regulate as "appropriate."

In line with that tradition, Justice Kavanaugh's pre-Supreme Court positions expressed support for cost-benefit analysis. In *White Stallion Energy Center v. EPA*, the D.C. Circuit precursor to *Michigan*, then-Judge Kavanaugh cited to language from Justices Breyer and Kagan, and economics and legal scholars Cass Sunstein, Richard Revesz, and Michael Livermore, in arguing for the importance of considering cost in regulatory decision making.[159] In his opinion, Kavanaugh argued for the consideration of cost as a central component of regulatory analysis, with particular importance in environmental regulation.[160] He cited to three decades of presidential administrations, all of which made cost-benefit analysis an "integral" component of the executive branch's regulations.[161] Judge Kavanaugh acknowledged that cost-benefit analysis is not immune from political interference, finding that "different agency heads, and different Presidents, may assess and weigh certain benefits and costs differently depending on their overarching philosophies."[162] He recognized that Congress may even choose to direct administrative agencies to not consider costs in rulemaking, if Congress so wished.[163] Kavanaugh further argued that EPA consideration of the costs and the benefits was insufficient because the EPA thought it was irrelevant to the determination of "appropriateness" if benefits outweigh costs.[164] Judge Kavanaugh believed, as did Justice Scalia, that a decision of "appropriateness" both "naturally and traditionally includes consideration of all the relevant factors [including cost]."[165]

While Justice Kavanaugh and other members of the Supreme Court seem increasingly willing to read in a requirement of cost-benefit analysis to justify agency action, some scholars believe that the Court is unlikely to embrace cost-benefit analysis. Amy Sinden argues that the Court has held an anti-cost-benefit analysis presumption from the 1980s to the 2000s, citing to the *Michigan* decision, where the Court held that while agencies should consider costs, they may decide how to account for such costs.[166] She believes that both liberal and

159. White Stallion Energy Ctr., LLC v. EPA, 748 F.3d. 1222, 1261–62 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part).

160. *Id.*

161. *Id.*

162. *Id.* at 1262–63.

163. *Id.* at 1262.

164. *Id.* at 1263.

165. *Id.* at 1266; *see also id.* (finding that "before we assess the merits of any cost-benefit balancing [which would be reviewed under a "deferential arbitrary and capricious standards of review"], this statutory scheme requires that we first ensure that EPA has actually considered the costs.").

166. Amy Sinden, *A "Cost-Benefit State"? Reports of Its Birth Have Been Greatly Exaggerated*, 46 ENVTL. L. REP. 10933, 10934 (2016).

conservative Justices are sufficiently skeptical about formal cost-benefit analysis and would be unwilling to fully embrace it as a requirement.[167] Adrian Vermeule agrees, reading a different finding into *Michigan v. EPA* and arguing that the opinion "explicitly disavowed any requirement that costs and benefits must be quantified."[168] According to the Supreme Court's longstanding jurisprudence, Congress must clearly mandate agency use of quantified cost-benefit analysis.[169] Benjamin Chen disagrees, finding that advocates of cost-benefit analysis hailed Justice Scalia's acknowledgement [in *Michigan*] that "[o]ne would not say that is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits" as marking the coming of age of the cost-benefit state.[170]

However, this debate over whether the Court is willing to embrace cost-benefit analysis exists because the Court has been wildly inconsistent. Justices, particularly the conservative-leaning, have been hesitant to require formal cost-benefit analysis yet also willing to read cost consideration into ambiguous statutes.[171] The recent trend from *Cotton Dust* and *Whitman* to *Riverkeeper* and *Michigan* shows, however, that the Court may be increasingly willing to adopt formal cost-benefit analysis, particularly as the Court itself becomes more conservative.[172] Further, the support for formal cost-benefit analysis seems to have garnered majority support on the bench. Justice Kagan authored the dissent in *Michigan*, which went further than the majority in suggesting that agencies are required to weigh costs and benefits unless explicitly directed not to by Congress.[173] The liberal Justices who dissented in *Michigan v. EPA*, generally considered to be less willing to accept a full embrace of cost-benefit analysis, were willing to do so in that case, indicating this trend towards the Court's acceptance of cost-benefit analysis.[174]

Regardless of how eager the Supreme Court is to require cost-benefit analysis in agency decisions, the tool of cost-benefit analysis still fits neatly in Justice Gorsuch's proposed framework in *Gundy* for appropriate agency action. As the Court will likely reconsider its approach to the nondelegation doctrine, cost-benefit analysis is a potential tool to withstand heightened judicial review of agency action. Administrative agencies, particularly EPA, have engaged in

167. *Id.* at 10957.

168. Adrian Vermeule, *Does Michigan v. EPA Require Cost-Benefit Analysis?*, YALE J. ON REG. (Feb. 6, 2017), https://www.yalejreg.com/nc/does-michigan-v-epa-require-cost-benefit-analysis-by-adrian-vermeule/.

169. *Id.*

170. Chen, *supra* note 127, at 927.

171. See, for example, the evolution of the requirement for cost-benefit analysis in the opinions of conservative Justices between Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001); Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009); Michigan v. EPA, 135 S. Ct. 2699 (2015).

172. *See* Masur & Posner, *supra* note 148, at 973 (finding that "there is reason to believe that the Court thinks—or will soon think—that a formal [cost-benefit analysis] is required").

173. *Id.* at 976.

174. *Id.*

cost-benefit analysis for decades, and requiring that agency-promulgated regulations pass a cost-benefit analysis would not be too disruptive to agency practice.[175] Adopting this requirement would allow the Court to reign in excessive agency action by providing an easy test for determining if an agency has acted in excess of a congressional delegation of authority: Does the agency action pass a cost-benefit analysis, as directed by Congress for the agency to act? Further, calculating costs and benefits is a factfinding exercise properly suited for agencies under Justice Gorsuch's requirements in *Gundy*.[176] Agencies can exercise discretion as to which costs and benefits they consider, and how, but Congress allows agencies to only take certain prescribed actions if they find that benefits are greater than costs—a factual finding that meets the potential standard from Justice Gorsuch. This standard constrains agency action to factfinding and posits that an agency does not exceed a congressional delegation if the agency acts the way Congress prescribed and that the action passes a cost-benefit analysis. Cost-benefit analysis is thus a potential tool for agencies to meet a higher nondelegation standard that only allows factfinding by agencies.

IV. THE IMPACT ON ENVIRONMENTAL REGULATIONS OF REQUIRING AGENCY ACTIONS TO BE JUSTIFIED BY COST-BENEFIT ANALYSIS

Cost-benefit analysis is often criticized as a "manipulation of policy making."[177] This manipulation has positive or negative consequences for environmental regulation, depending on the decision maker and their sympathies. As in any scientific analysis, there are difficult methodological choices, and the decisions made in a cost-benefit analysis can be outcome determinative.[178] For example, the choice of which costs and benefits to consider or how to monetize or whether to include non-economic costs and benefits can predetermine the outcome of a cost-benefit analysis. Further, the uncertainties present in any cost-benefit analysis can also impact the outcome of the analysis.[179] Some evidence suggests that cost-benefit analysis leads to an overestimation of environmental costs because of the bias of decision makers who desire the result that stems from exaggerated costs.[180] Concerns about the imputation of bias into cost-benefit analysis are valid.[181] If the Supreme Court requires agency actions to be cost-benefit justified in order to pass a new test of constitutionality under a revived nondelegation doctrine, there could be fewer environmental regulations as a result.

---

175. Livermore, *supra* note 11, at 613–14.

176. *See* Gundy v. United States, 139 S. Ct. 2116 (Gorsuch, J., dissenting).

177. Flatt, *supra* note 26, at 1100–01.

178. *See* Livermore, *supra* note 11, at 612–13.

179. Flatt, *supra* note 26, at 1089 (arguing that cost-benefit analysis "can be used illegitimately to produce a pre-determined outcome, favored by a particular group or ideology, that may not actually be cost-beneficial but can be justified because of measurement uncertainties").

180. *Id.* at 1099.

181. *Id.*

Recent decisions suggest the Court may be willing to adopt cost-benefit analysis as a nondelegation canon.[182] Cost-benefit analysis may be the most useful tool for EPA to justify environmental regulations to the more discerning Court, but the increased use of cost-benefit analysis should not be endorsed blindly. This Part will briefly discuss why EPA is uniquely situated to perform cost-benefit analysis and how bias enters into cost-benefit analysis, and then it will demonstrate these concerns with a recent case example.

A. EPA's Unique Role as a Cost-Benefit Agency

Cost-benefit analysis could work to the benefit of agencies because new cost-benefit methodologies are better at quantifying the costs and benefits of environmental action. Environmentalists should be confident in new cost-benefit methodology that considers benefits that are harder to monetize, including the value of a statistical life and other intangibles, such as the value of clean air or water.[183] Further, cost-benefit analysis does not always underestimate benefits relative to costs in environmental regulation.[184] EPA has expended considerable resources on the development of cost-benefit analysis methodology[185] and has used cost-benefit analysis to justify its promulgated regulations for decades. Moreover, EPA has had considerable influence over the design of cost-benefit analysis methodology, particularly as applied to environmental costs and benefits.[186] As a result, EPA is uniquely equipped to perform cost-benefit analyses. Cost-benefit analysis has been used to successfully defend environmental regulation, including the monetary estimates of benefits from air quality regulations of over $1 trillion per year.[187] Several environmental regulations from the Obama administration, including the Obama-era Clean Water Rule, are justified under a cost-benefit analysis.[188] This yields consequences for the potential repeal of these rules: If the Trump administration wants to repeal these rules under a regulatory repeal by EPA, these repeals would not be justified under cost-benefit analysis.[189]

B. The Bias of Decision Makers in the Repeal of the Obama-Era Clean Water Rule and the Implications for an Embrace of Cost-Benefit Analysis

Decisions regarding the handling of uncertainties or which costs and benefits to consider, and how, can easily be exploited by the entity performing a

182. *See* Sunstein, *supra* note 134, at 2.
183. *See* Livermore, *supra* note 11, at 610.
184. Masur & Posner, *supra* note 148, at 947.
185. Livermore, *supra* note 11, at 624.
186. *Id.* at 613–14.
187. *Id.* at 611.
188. Masur & Posner, *supra* note 148, at 946.
189. *Id.*

cost-benefit analysis. As a result, it can be difficult to separate politics (partisan, group, or individual) from cost-benefit analysis methodology.[190] This is clear in the recent battle over the Clean Water Rule.

The recent litigation over the Obama-era Clean Water Rule shows how agencies can manipulate cost-benefit analysis to obtain politically motivated results. The Obama-era Clean Water Rule, or Waters of the United States Rule, redefined which kinds of wetlands and waterways are protected by the Clean Water Act.[191] Likely for political reasons, the Trump administration sought to repeal the Clean Water Rule.[192] In September 2019, the Trump administration finalized its repeal of the Obama-era Clean Water Rule with an updated cost-benefit analysis.[193] The updated analysis claimed to be more robust because it predicted states' regulatory response to the repeal of the Obama-era Clean Water Rule.[194] These predictions were in turn slammed by critics, who claimed that the Trump administration used spurious assumptions about states to predict regulatory behavior.[195] A previous economic analysis conducted by the Trump administration in respect to a new definition of what waters were protected by the Clean Water Act was criticized for similar errors.[196] The Trump administration's analyses of the Clean Water Act used different (and incorrect) methodology than the Obama administration to arrive at completely opposite results on the question of whether benefits exceed costs, allowing the Trump administration to argue for a cost-justified repeal of protections for wetlands and waterways.[197] This result was politically motivated and predetermined by choices made in the cost-benefit analysis methodology used by the Trump administration.

However, courts retain significant power to review cost-benefit analyses under the arbitrary and capricious standard and may be able to monitor agencies for politically motivated analyses, such as these.[198] The Trump administration's reliance on a fundamentally flawed economic analysis in repealing the Clean Water Rule should be struck down by a reviewing court for being arbitrary and

190. Flatt, *supra* note 26, at 1090–91 (arguing that "legitimate benefit-cost analysis assumes that an agency can make an objective benefit-cost determination given specific facts or apply the process in a way that is value neutral").

191. Clean Water Rule, 80 Fed. Reg. 37,053 (June 29, 2015) (rule no longer in effect).

192. Ariel Wittenberg, *Clean Water Act Economic Analysis Could Undermine Trump Rule Repeal*, E&E NEWS (Oct. 30, 2019), https://www.eenews.net/stories/1061417555.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*; For another example of the Trump administration using a flawed economic analysis to support the repeal of Obama-era regulations (in this case a reversal of the progressive automobile standards), see Antonio M. Bento et al., *Flawed Analyses of U.S. Auto Fuel Economy Standards*, 362 SCI. 1119 (2018).

198. *See* Wittenberg, *supra* note 192; Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2018) (allowing a reviewing court to set aside any agency action found to be arbitrary and capricious, an abuse of discretion, or contrary to the rule of law).

capricious. Several cases are currently pending in federal courts around the country.[199]

Cost-benefit analysis may be the only judicially acceptable method to save laws like the Clean Air Act and the Clean Water Act, which are at risk under a heightened nondelegation standard and a more conservative Supreme Court.[200] Yet, because of the inherent intangibles associated with cost-benefit analysis, particularly in valuing environmental goods and services, environmentalists should remain cautious about a full embrace of formal cost-benefit analysis. As an example of these difficulties, between October 2002 and September 2012, in over three-quarters of its cost-benefit analyses of economically significant rules, EPA was unable to quantify "whole categories of benefits that the agency itself describes as 'important,' 'significant,' or 'substantial.'"[201] Some scholars have argued that formal cost-benefit analysis will never be able to support a finding that a regulation does "more harm than good" because of the significant data needs and scientific understanding that would be required in order to fully quantify harms and benefits.[202]

While environmentalists should support the development and research of comprehensive and unbiased cost-benefit methodology, because of valid concerns of bias in cost-benefit analysis methodology, environmentalists should make sure that the Supreme Court and Congress are careful not to grant too much power to administrative agencies to determine their own cost-benefit analysis methodologies.

V. SEPARATION OF POWER

A reinvigorated nondelegation doctrine and the increased acceptance of cost-benefit analysis will each serve to benefit the other. Cost-benefit analysis can be used to validate regulation under the nondelegation doctrine, and a revived nondelegation doctrine could address concerns over bias in the application of cost-benefit analysis because principles and best practices will develop to guide courts in determining if an agency has gone too far.[203] Conversely, a revived nondelegation doctrine could address many of the concerns about an agency's use of cost-benefit analysis, allowing Congress to define the role of cost-benefit analysis through its legislative directives to agencies and in its statutory delegations of power.[204] The nondelegation doctrine should be used "as a canon

199. *See, e.g.*, S.C. Coastal Conservation League v. Wheeler, No. 2-18-cv-330-DCN, 2018 U.S. Dist. LEXIS 79881 (D.S.C. May 11, 2018), *appeal filed*, Nos. 18-1988(l), 19-1136, U.S. App. LEXIS 7064 (4th Cir. Mar. 8, 2019); Colorado v. EPA, 445 F. Supp. 3d 1295 (2020), *appeal filed* No. 20-1238 (10th Cir. July 16, 2020).

200. *See* Gundy v. United States, 138 S. Ct. 2116, 2130 (2019) (explaining that "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional").

201. Sinden, *supra* note 166, at 10936 n.38.

202. *Id*. at 10951.

203. Flatt, *supra* note 26, at 1099, 1101.

204. *Id.* at 1095.

of construction" and would be consistent with the cost-benefit analysis and risk management that the president has directed agencies to do for decades.[205] In a way, this process creates a positive feedback loop between a revived nondelegation doctrine and increased use of cost-benefit analysis; the impacts on agency autonomy and judicial overreach will be forced to balance out.

If the Supreme Court chooses to rely on cost-benefit analysis in agency rulemaking in an attempt to constrain agency power under a revival of the nondelegation doctrine, then the Court should be prepared for the consequences. There should and will remain opportunities for Congress and the judiciary to exert considerable control over cost-benefit analysis methodology, such as ensuring that cost-benefit analyses are conducted in a manner that is not arbitrary and capricious and not politically motivated or outcome determinative. However, the Court should be careful to not exert too much control over the development of cost-benefit methodology, as this could risk the imposition of the Court's own biases. This balance of power is vital. As demonstrated by the Trump administration's economic analysis of the Obama-era Clean Water Rule, the application of cost-benefit analysis can be outcome determinative based on political motivations and can have dramatic implications for environmental protection.[206] The Court should be careful to not enter into the realm of policy making but should be objective about striking down cost-benefit analyses that clearly violate best practices.

This Part will describe the appropriate roles for each of the three branches in the context of guiding and reviewing cost-benefit analysis.

A. Cost-Benefit Analysis and the Legislature

If Congress is required to provide substantial guidance on "large or important issues" in order to avoid a violation of the nondelegation doctrine, Congress may have to provide significant input on cost-benefit analysis methodology.[207] A future Court may call for Congress to determine what values must be considered or how they are to be weighed in cost-benefit analysis so that an agency's subsequent regulation does not violate the nondelegation doctrine. This situation is problematic, since it ignores valuable agency expertise and

205. Gray, *supra* note 122, at 46–47.

206. *See, e.g.*, Wittenberg, *supra* note 192; Bento et al., *supra* note 197, at 1121.

207. Flatt, *supra* note 26, at 1099 (arguing that "the Court in *American Trucking* [*Whitman*], in reiterating the reach of the non-delegation doctrine, noted that Congress must provide 'substantial guidance' on large or important issues (such as regulations that affect the national economy). If we take this statement at face value, and assume that life, death, and human well-being must be the most important issues of all, it seems that an agency cannot simply be making benefit-cost decisions on these issues without significant input from Congress about what values must be considered or how they are to be valued and weighed.").

forces Congress to make scientific judgments with which it is not as qualified to engage.[208]

Simultaneously, Congress must be able to make important policy judgments that can inform the cost-benefit methodology conducted by an agency. Some scholars argue that Congress should create "best practices" for cost-benefit analysis in order to guide courts in determining if an agency has crossed the line into policy making.[209]

Despite the fact that, under Justice Gorsuch's standard, Congress may have to "set forth the facts that the executive must consider and the criteria against which to measure them," Congress will need to rely on the expertise and work already done by agencies, particularly EPA, to develop cost-benefit analysis methodology to determine what criteria need to be considered in any case.[210] Congress does not have the expertise to decide on the best criteria, but its policy priorities should guide this process. Since the choice of cost-benefit methodology can be outcome determinative, some congressional oversight into the development of methodology is needed. This oversight could include directions of which variables must be considered, or how, in a valid cost-benefit analysis. As a result, the Court would be wrong to neglect its role in this process and place all of the power to determine cost-benefit methodology in the hands of Congress or solely in the hands of agencies. However, agencies, particularly EPA, need to be able to continually improve their cost-benefit analysis methodologies, especially as they gather new information and valuation methods for noneconomic or intangible benefits. Being overly constrained by congressional decisions over what factors should be considered, or how they should be considered, would result in ineffective regulations that do not serve congressional intent.

B. Cost-Benefit Analysis and the Executive Branch

From the agency perspective, cost-benefit analysis may serve as a useful tool to meet a heightened nondelegation standard, which seems inevitable from the new Supreme Court. Because EPA has designed cost-benefit analysis methodology and justified regulations on a cost basis, EPA has exerted significant discretion in terms of how the methodology of cost-benefit analysis has developed.[211] EPA, through its history and design of cost-benefit analysis methodology, has created "important pathways" to affect the outcomes of particular rulemakings, as well as the basic principles for costs and benefits.[212]

208. *See* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 675 (Rehnquist, J., concurring); *see also* Flatt, *supra* note 26, at 1094.

209. Flatt, *supra* note 26, at 1101.

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

211. Livermore, *supra* note 11, at 610, 685.

212. *Id.* at 688.

Further, agencies' use of cost-benefit analysis to survive a heightened standard of review under the nondelegation doctrine may ironically serve to promote agency independence and autonomy for promulgating regulations.[213] While some are concerned that the use of cost-benefit analysis means agencies are controlled by Congress or the judiciary, cost-benefit analysis "helps preserve agency autonomy in the face of oversight," particularly because of how cost-benefit analysis methodology has developed and is currently used in environmental decision making.[214] It could be argued that the Court in *Michigan* affirmed that "the choice of decision-making methods, including the decision whether or not to quantify costs, lies within the reasonable discretion of the agency."[215] This language could indicate that the Court believes the choice of methodology lies within the agency, preserving significant power within the agency over the development of cost-benefit analysis methodology.[216]

Ironically for a judiciary that wants increased oversight of the administrative state, the ease with which cost-benefit analyses can be manipulated by the user may allow agencies some leeway to justify their regulations. For this reason, the Court should be vigilant against the potential biases of the executive and its agencies that increased use of cost-benefit analysis could invite into the rulemaking process.

C. Cost-Benefit Analysis and the Judiciary

The use of cost-benefit analysis offers many benefits for the Supreme Court. For example, it may eliminate some concern around statutory interpretation. As evidenced by the *Gundy* plurality and dissent, statutory interpretation plays an important role in determining if a statutory delegation of authority is unconstitutional.[217] There are significant disagreements in interpreting statutes that have a substantial impact on the determination of a violation of the nondelegation doctrine, resulting in very different outcomes by different Justices analyzing the same text. By requiring that agency-promulgated regulations pass a cost-benefit analysis, a lot of disagreements over statutory interpretations may be resolved. It is much easier to determine, on the basis of a cost-benefit analysis, whether an agency exceeded its rulemaking power.[218] Yet if the Court is going

213. *Id.* at 684–85; *see also* Masur & Posner, *supra* note 148, at 981.

214. Livermore, *supra* note 11, at 609.

215. Vermeule, *supra* note 168.

216. Although, because of the significant influence that EPA has already exerted over the development of cost-benefit analysis methodology, Justice Gorsuch may find that it is impossible for Congress to merely delegate factfinding. Since methodology can be outcome determinative, relying on an agency's chosen methodology may exceed the limits of an agency's authority under a revived nondelegation doctrine.

217. *Compare* Gundy v. United States, 139 S. Ct. 2116 (2019) (Gorsuch, J., dissent), *with id.* (majority opinion).

218. Environmental rulemaking raises complex questions about valuation choices and the inclusion of non-market goods in cost-benefit analyses. These questions are more difficult to answer and should remain outside the scope of the Court's inquiry into agency rulemaking.

to require cost-benefit analysis to justify agency rulemaking, the Court should be wary of the potential influence of bias from the agency.

Simultaneously, the Supreme Court should be apprehensive to intervene in the application of cost-benefit analysis because it risks imposing its own biases.[219] As the Court has reiterated in multiple nondelegation cases, there are "certain estimates [that] require judgment calls that the regulator is in a better position to make than a court is."[220] Courts are not well positioned to second-guess "substantive determinations" and valuations made by experts in cost-benefit analysis.[221] Even if a court disagrees with the judgment call made by the regulator, the court should recognize that the regulator had to make a difficult judgment call between "conflicting academic studies, and a court may properly conclude that the regulator's judgment is reasonable, even if the court does not share it."[222]

While courts should not substantively review cost-benefit analyses because doing so is beyond their area of expertise and risks upsetting the balance and separation of power enshrined in the Constitution,[223] courts should correct "valuation errors" in cost-benefit analyses, as demonstrated by the Fifth Circuit decision in *Corrosion Proof Fittings v. EPA*, where that court found that EPA's cost-benefit analysis was defective.[224] Further, the Supreme Court should be willing to review cost-benefit analyses for politically motivated fundamental flaws that could result in arbitrary and capricious rulemaking. Under *Michigan*, a court may find that failing to consider costs and benefits appropriately, or failing to maximize the cost-benefit ratio, constitutes arbitrary agency action and is therefore unlawful.[225] Nowhere is it clearer that the courts still have a role to play in limiting bias than in the recent instances of the Trump administration's highly spurious economic analyses of the Obama-era Clean Water Rule.[226] If the Court opts to require cost-benefit analysis in agency actions, the Court must be prepared to police explicit political biases in these analyses.

Finally, despite the pathways to manage this shift, the Supreme Court should still be cautious about its approach to a revived nondelegation doctrine and a call for formal cost-benefit analysis. Although Justice Gorsuch claims the purpose of the nondelegation doctrine is to restore legislative power to Congress, by removing Congress's power to delegate to agencies and essentially telling

219. Flatt, *supra* note 26, at 1100.

220. Masur & Posner, *supra* note 148, at 941.

221. *Id.* at 942; *see also* Sunstein, *supra* note 134, at 21–22 (arguing that an agency cannot be arbitrary in what it considers in a cost-benefit analysis, but the judiciary should be highly deferential to methodological choices).

222. Masur & Posner, *supra* note 148, at 941.

223. *Id.* at 981 (arguing that courts have a role to play in correcting valuation errors by regulatory agencies and that agencies should have to offer more than "boilerplate" explanations for their valuations).

224. *Id.* at 955 (arguing that the Fifth Circuit decision "should be celebrated as a high water-mark of judicial rationality").

225. Sunstein, *supra* note 134, at 16.

226. *See* Wittenberg, *supra* note 192.

Congress how it can or cannot regulate, the Court is entering the realm of legislation and threatening the separation of powers, while potentially making it impossible for agencies to act.

CONCLUSION

Based on Justice Gorsuch's dissent in *Gundy v. United States* and the new composition of the Supreme Court, it seems inevitable that the Court will reshape its application of the nondelegation doctrine.[227] As cautioned by Justice Kagan in *Gundy*, a new test for nondelegation could make most of government unconstitutional, threatening the bite of the Clean Water Act and the Clean Air Act and the ability of EPA to promulgate environmental regulations.[228] Because of EPA's superior expertise in environmental science and regulatory issues, it is essential that Congress is able to delegate authority in order for EPA to adequately respond to issues as they arise.

However, if the Court is set on reviving the nondelegation doctrine, agencies may find that cost-benefit analysis may be a useful tool to support environmental regulations and satisfy the Court's increased oversight. While environmental groups may have some legitimate concerns about using cost-benefit analysis, the methodology is constantly improving, particularly through EPA's efforts. Additionally, as new methods arise to consider noneconomic benefits, EPA has shown that it is able to cost-justify significant environmental regulations.[229] It would be naïve to conclude, however, that these results are independent of politics or the desires of the executive branch.

Increased use of cost-benefit analysis under a revival of the nondelegation doctrine creates substantial concerns over the balance and separation of power amongst the three branches of government and the proper forum for rulemaking. The Supreme Court should be hesitant to intervene in the development of cost-benefit analysis methodology since that could risk the imposition of the Court's own biases. At the same time, the Court should be willing to strike down clearly biased cost-benefit analyses. Congress could create best practices for cost-benefit analysis methodology, relying substantially on the work already done by EPA, in order to create a robust system that will help the courts determine if an agency-promulgated regulation exceeds its delegated authority.

227. *See generally* Gundy v. United States, 139 S. Ct. 2116 (2019) (Gorsuch, J., dissenting).
228. *Id.* at 2130.
229. Masur & Posner, *supra* note 148, at 946.