

# “The Buck Stops With Congress”: Why the Nondelegation Doctrine May Be Back with More Bite and What It Means for Tax

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## A. Introduction

Making tax law has traditionally been the domain of Congress.<sup>1</sup> In 2015, however, two scholars proposed "more extensively delegating" tax rulemaking authority by allowing the Treasury Department ("Treasury"), the Federal Reserve, or "a newly created independent authority" to control income tax rates.<sup>2</sup> Why? Broad delegation had "potential policy benefits"<sup>3</sup> and the nondelegation doctrine—a principle preventing Congress from delegating its constitutionally-vested legislative authority to other non-legislative branches and thus the primary doctrine precluding such a grant of tax rate-making power—was at that time moribund or dead.<sup>4</sup> The scholars also reasoned that the task of policing delegations would be inadministrable and the nondelegation doctrine was unnecessary to hold Congress accountable for the laws promulgated under its authority. For these reasons, they concluded, "[t]ax laws, at least in terms of delegation authority, should be treated the same as other laws."

While this proposal may have garnered support ten years ago,<sup>5</sup> times have changed. The Trump Administration is seeking to identify regulations that are "based on unlawful delegations of legislative power" in an effort to "end[] Federal overreach and restor[e] the constitutional separation of powers,"<sup>6</sup> the Supreme Court has rejected an attempt by the Internal Revenue Service ("IRS") to use its delegated authority to rewrite rules for billions of dollars in healthcare tax credits, because the availability of the credits was a major question of "deep 'economic and political significance,'" and after the Court's decision in *Loper Bright Enterprises v. Raimondo*,<sup>8</sup> delegations of authority to agencies such as the IRS and Treasury will come under greater scrutiny as judges seek to interpret every statute's best meaning, "fix the boundaries" of delegated authority, and ensure agencies engage in "reasoned decisionmaking" within those boundaries.<sup>9</sup>

As courts apply *Loper Bright* and police tax rulemaking and delegations with greater force, nondelegation questions are certain to arise. A majority of the Supreme

Court appears willing to reshape the Court's nondelegation jurisprudence<sup>10</sup> and the Court has often advanced nondelegation principles through other means,<sup>11</sup> so a reprisal of the "moribund" nondelegation doctrine seems almost inevitable.

This article considers how the nondelegation doctrine may evolve going forward and what that evolution might mean for tax. In particular, the article traces the history of the nondelegation doctrine and highlights a trend among the justices of the current Supreme Court that suggests the doctrine is due for a revival. The article then considers how Congress's delegations in Code Secs. 482, 1502, and 351(g)(4)<sup>12</sup> would be reviewed under a framework recently proposed by Justice Neil Gorsuch, dissenting in *Gundy v. United States*.<sup>13</sup> Justice Gorsuch's framework is particularly noteworthy because it has attracted the attention of at least four other justices<sup>14</sup> and several lower courts.<sup>15</sup> Irrespective of our own policy views, we conclude that Congress's delegations in Code Secs. 482 and 1502 appear vulnerable to a nondelegation challenge, while the delegation in Code Sec. 351(g)(4), though very broad, is more defensible on nondelegation grounds because it is anchored in definite and precise Congressional directives.

## B. *Loper Bright*—Why the Nondelegation Doctrine May Soon Have Greater Bite

Before discussing *how* the nondelegation doctrine may evolve, we begin by explaining *why*.

Recently, in *Loper Bright*,<sup>16</sup> the Supreme Court considered whether to alter or overrule the *Chevron* doctrine, a longstanding legal framework directing judges to defer to agencies' reasonable interpretations of ambiguous laws.

The key issue in the case was whether the National Marine Fisheries Service ("NMFS") was authorized to pass a rule requiring the commercial fishing industry to pay the salaries of federal observers who were onboard vessels to enforce agency regulations. When the NMFS issued the

rule, commercial fishermen challenged it on grounds that the NMFS's authorizing statute did not allow the agency to create industry-funded monitoring requirements.<sup>17</sup>

After the government prevailed in both a district court and the D.C. Circuit Court of Appeals, the Supreme Court granted certiorari and struck down *Chevron* and the NMFS's monitoring requirement. Chief Justice Roberts, writing for the majority, declared *Chevron* irreconcilable with the Administrative Procedure Act ("APA"),<sup>18</sup> because, although the APA mandates deferential judicial review of agency policymaking and fact-finding,<sup>19</sup> it prescribes no deferential standard for courts to employ in answering questions of law. Thus, "agency interpretations of statutes—like agency interpretations of the Constitution—are not entitled to deference;"<sup>20</sup> instead, courts must "exercise their independent judgment" using their "full interpretive toolkit" to decide whether an agency has acted within its statutory authority.<sup>21</sup>

Aside from the Court's primary holding, the majority hinted at concerns over the *constitutionality* of Congressional delegations, suggesting that future regulatory challenges may implicate the Constitution's separation of powers and other nondelegation principles:

When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to *constitutional* limits. The court fulfills that role by recognizing *constitutional* delegations, "fix[ing] the boundaries of [the] delegated authority," and ensuring the agency has engaged in "reasoned decisionmaking" within those boundaries.<sup>22</sup>

More broadly, the majority also framed the overruling of *Chevron* as a return to constitutional first principles.<sup>23</sup> For example, the majority discussed the judiciary's Article III vested powers and the Framers' expectation that courts would have exclusive authority over the "final interpretation of the laws," free of influence from the political branches.<sup>24</sup> In separate concurrences, Justices Gorsuch and Thomas commented on similar constitutional principles. Justice Gorsuch noted that *Chevron* had undermined important aspects of settled law, including the Constitution's promise of due process; he rejoiced that the Court's decision "return[ed] judges to interpretive rules that have guided federal courts since the Nation's founding."<sup>25</sup> Likewise, Justice Thomas reiterated that the *Chevron* doctrine violated the Constitution's separation of powers by curbing courts' judicial power and expanding

agencies' executive power beyond constitutional limits.<sup>26</sup> By overruling *Chevron*, he noted, the Court restored this aspect of the Constitution.<sup>27</sup>

After *Loper Bright*, judges must employ a wide variety of doctrines and interpretive tools to rein in agency discretion, because the law *requires* them to engage in independent review and employ their full interpretive arsenal. Congress can also be expected to draft more explicit statutory delegations to constrain judicial scrutiny because if a statute's "best meaning" is clear, judges have little interpretive work to do.<sup>28</sup>

The Tax Court recently previewed *Loper Bright's* impact with its unanimous, court-reviewed opinion in *Varian Medical Systems, Inc. & Subsidiaries v. Commissioner*.<sup>29</sup> *Varian* addressed the interaction of Code Secs. 245A and 78, and whether an effective-date mismatch between the two provisions entitled a taxpayer to a deduction under Code Sec. 245A for a dividend it was deemed to have received under Code Sec. 78.

Some brief context is necessary. Code Sec. 245A, originally enacted as part of the Tax Cuts and Jobs Act of 2017 ("TCJA"),<sup>30</sup> allows a domestic corporation a deduction for certain dividends received from foreign subsidiaries and applies to "distributions made after ... December 31, 2017."<sup>31</sup> As in effect before the adoption of the TCJA, Code Sec. 78 provided that, for taxpayers who claimed foreign tax credits, a specified amount "shall be treated for purposes of this title (other than Code Sec. 245) as a dividend received by such domestic corporation from the foreign corporation."<sup>32</sup> Recognizing that Code Sec. 245A might otherwise allow a taxpayer claiming foreign tax credits to deduct a deemed dividend under Code Sec. 78, Congress sought to preclude this result by amending Code Sec. 78 as part of the TCJA. But instead of using Code Sec. 245A's effective date, Congress amended Code Sec. 78 for "taxable years of foreign corporations beginning after December 31, 2017, and ... taxable years of United States shareholders in which or with which such taxable years of foreign corporations end."<sup>33</sup> For taxpayers (like *Varian*) with foreign subsidiaries on fiscal years (*i.e.*, July 1 to June 30), this mismatch created a 6-month window during which Code Sec. 78 dividends were deductible under Code Sec. 245A, because Code Sec. 245A was effective but Congress's corrective amendments to Code Sec. 78 were not.

On cross motions for partial summary judgment, the court concluded in part that *Varian* was entitled to its claimed Code Sec. 245A deduction based on a plain, textual reading of new Code Sec. 245A and revised Code Sec. 78.<sup>34</sup> As relevant for our purposes, the government argued that a revision to Reg. §1.78-1 from June

2019 precluded *Varian* from deducting its Code Sec. 78 dividend, because the revision gave Code Sec. 78 an earlier effective date than Congress provided in its revisions to Code Sec. 78 under the TCJA. In addition, the government argued that even if the court disagreed with Treasury's interpretation in the June 2019 revision, Code Sec. 78 was "at least ambiguous" so Treasury's June 2019 revised effective date was entitled to *Chevron* deference as a permissible reading of the statute. After acknowledging that *Chevron* had been overruled, the court applied *Loper Bright* and recognized that "[a] 'permissible' interpretation of a statute no longer prevails simply because an agency offers it to resolve a perceived ambiguity."<sup>35</sup> Rather, "in cases involving ambiguity, 'instead of declaring a particular party's reading 'permissible' ..., courts [must] use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity."<sup>36</sup>

*Varian* was not a nondelegation case, but the court notably acknowledged that Congress's delegation of rulemaking authority to Treasury under Code Sec. 245A did not change the result, because Treasury's rulemaking was contrary to Congress's unambiguous statutory text:

That Congress delegated certain rulemaking authority to Treasury under section 245A does the Commissioner no good here. This is so because his regulation purports to modify the effective date provision for new section 78, which could hardly have been clearer. In other words, it impermissibly attempts to change an unambiguous provision of the statute. As a result, the regulation falls outside the boundaries of any authority that Congress may have delegated under section 245A or 7805.<sup>37</sup>

As *Loper Bright* is applied by lower courts, scrutiny of agency regulations promises to raise nondelegation questions more broadly, giving the nondelegation doctrine new relevance and potentially greater bite than at any point in the past ninety years.

### C. The Nondelegation Doctrine

The Constitution vests different aspects of the people's sovereign power in distinct branches of government. Article I, section 1, for example, vests Congress with exclusive lawmaking power,<sup>38</sup> and since the Framers believed the most dangerous aspect of the new federal government was its power to enact laws restricting individual liberty,<sup>39</sup> they insisted that any proposed law must be approved by two Houses of Congress (elected at different times and by different constituencies) and

either obtain the President's approval or receive enough support to override the President's veto.<sup>40</sup> Because this structure was carefully planned to protect individual liberties by demanding deliberation<sup>41</sup> and promoting accountability,<sup>42</sup> Congress cannot delegate its lawmaking function in a way that upsets the Framers' constitutional design. Policing the boundaries between permissible and impermissible delegations is the work of the *nondelegation doctrine*.

## 1. Early History and the New Deal Era

The earliest iteration of the nondelegation doctrine dates back to 1825,<sup>43</sup> when Chief Justice Marshall, writing in *Wayman v. Southard*,<sup>44</sup> distinguished between "important subjects, which must be entirely regulated by the legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act ... to fill up the details."<sup>45</sup>

In subsequent years, the Court built on *Wayman's* reasoning and upheld delegations to agencies under a variety of circumstances. For example, in *Marshall Field & Co v. Clark*,<sup>46</sup> the Court upheld a provision of the Tariff Act of 1890, which authorized the President to suspend duty-free status for certain goods upon finding that a country producing and importing the same items into the United States had imposed "reciprocally unequal and unreasonable" tariffs on U.S. goods. The Court reasoned that Congress had merely authorized the President to make factual determinations on which its laws would depend and thus had not delegated its lawmaking authority.<sup>47</sup> In *Union Bridge Co. v. United States*,<sup>48</sup> the Court reviewed a section of the River and Harbor Act, which provided for the removal or alteration of bridges that obstructed navigable waterways only after certain findings by the Secretary of War.<sup>49</sup> When the statute was challenged as an unconstitutional delegation of legislative power, the Court upheld the statute because it empowered the Secretary only to "execute the clearly-expressed will of Congress, and not, in any true sense, [to] exert legislative or judicial power."<sup>50</sup> Similarly, in *United States v. Grimaud*,<sup>51</sup> the Court upheld a portion of the Forest Reserve Act, which authorized the Secretary of Agriculture "to regulate the occupancy and use [of forest reserves] and to preserve the forests from destruction."<sup>52</sup> When citizens who were penalized by the Secretary's regulations challenged them as an unlawful delegation of legislative authority, the Court noted that "[the] violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixe[d] the penalty,"<sup>53</sup> so Congress had not improperly delegated its lawmaking power. In these and

other cases,<sup>54</sup> the Court addressed the fundamental question of whether Congress, by statutory delegation, had abdicated its exclusive lawmaking authority granted by Article I of the Constitution.<sup>55</sup> In all such cases up until 1935, the Court concluded that no legislative abdication had occurred.

In that year, however, the streak ended when the Supreme Court applied the nondelegation doctrine in two cases to invalidate statutory grants of authority under the National Industrial Recovery Act (“NIRA”). First, in *Panama Refining Co. v. Ryan*,<sup>56</sup> the Court reviewed section 9(c) of NIRA, which allowed the President to write a regulation prohibiting oil producers from shipping in interstate commerce any oil produced from a well in excess of state-established production levels. To determine whether section 9 was “an unconstitutional delegation of legislative power,” the Court “look[ed] to the statute” to see whether Congress had “declared a policy” with respect to the President’s prohibition power, “set up a standard for the President’s action” or “required any finding by the President in the exercise of the authority to enact the prohibition.”<sup>57</sup> The Court held the statute unconstitutional because it gave the President “unlimited authority” to act by establishing no governing criteria and requiring no findings as a condition of his action.<sup>58</sup> “If [the statute] were held valid,” the Court noted, “it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function.”<sup>59</sup>

Roughly five months later, in *A.L.A. Schechter Poultry Corp. v. United States*,<sup>60</sup> the Court reviewed section 3 of NIRA, which transferred to the executive branch the authority to approve “codes of fair competition” for slaughterhouses and other industries. As in *Panama Refining Co.*, the Court “look[ed] to the statute to see whether Congress ha[d] overstepped” limitations on its ability to delegate its legislative responsibilities; that is, “whether Congress in authorizing ‘codes of fair competition’ ha[d] itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, ha[d] attempted to transfer that function to others.”<sup>61</sup> Here, too, the Court held the statute unconstitutional, because it was “without precedent”—it “supplie[d] no standards for any trade, industry, or activity” and did not “undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorize[d] the making of codes to prescribe them.”<sup>62</sup> In the Court’s view, the President enjoyed “virtually unfettered” discretion in approving or prescribing codes, and thus enacting laws

for the government of trade and industry throughout the country.<sup>63</sup> Justice Cardozo quipped that if Congress could allow the President to write a new code of fair competition all his own, “anything that Congress may do within the limits of the commerce clause for the betterment of business [could] be done by the President ... by calling it a code. [It was] delegation running riot.”<sup>64</sup>

Since *Panama Refining Co.* and *A.L.A. Schechter Poultry*, the Supreme Court has not applied the nondelegation doctrine to invalidate a single statutory grant of authority to a federal agency. Instead, the doctrine faded into obscurity,<sup>65</sup> primarily due to the “intelligible principle” standard, which first made an appearance in nondelegation case law in the late 1920s.

## 2. The “Intelligible Principle” Standard

Unlike the Court’s traditional nondelegation analysis, which matured over several decades, the “intelligible principle” version of the doctrine emerged seemingly by accident. In *J. W. Hampton, Jr., & Co. v. United States*,<sup>66</sup> the Court reviewed a provision of the Tariff Act of 1922, which empowered the President to adjust duty rates on foreign goods to “equalize” differences between domestic and foreign production costs. Among other things, the Act established criteria for the President to consider and required an investigation by a Tariff Commission before the President could make adjustments.<sup>67</sup> In writing for the majority and upholding the constitutionality of the Tariff Act, Chief Justice Taft compared the President’s delegated authority over duty-rate adjustments to Congress’s use of rate-making bodies in interstate commerce.<sup>68</sup> Taft also acknowledged Congress’s frequent practice of delegating authority:

The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations.<sup>69</sup>

As what seems like casual throw-in *dicta*, Taft then remarked that Congress can delegate lawmaking authority consistent with the Constitution so long as it “lay[s] down by legislative act an *intelligible principle* to which the person or body authorized ... is directed to conform.”<sup>70</sup>

Before *J. W. Hampton*, the Court’s nondelegation analysis had focused on questions grounded in the Constitution: which statutory delegations involved important policy

matters as opposed to merely “details to fill up”? Which delegated functions constituted lawmaking as opposed to simple “fact-finding”? The “intelligible principle” concept lacked such roots and was arguably unnecessary to decide the case at hand.<sup>71</sup> Thus, when *J. W. Hampton* was decided, no one understood the “intelligible principle” concept to alter the Court’s traditional nondelegation analysis—in fact, the Court’s two most significant nondelegation decisions, *Panama Refining Co.* and *A.L.A. Schechter Poultry*,<sup>72</sup> decided just seven years after *J. W. Hampton*, did not turn on the idea of an “intelligible principle” and together mentioned the term just once.

Notwithstanding its questionable origins, the “intelligible principle” standard gained momentum in the 1940s as a means to justify regulations issued under statutory delegations that would have failed the Court’s traditional nondelegation analysis. In *National Broadcasting Co. v. United States*,<sup>73</sup> the Court upheld a portion of the Federal Communications Act of 1934, which authorized the Federal Communications Commission (“FCC”) to issue rules governing programming and chain broadcasting “as public convenience, interest, or necessity require[d].”<sup>74</sup> After the FCC issued a series of regulations to address allegedly harmful networking practices, radio broadcasters sought to enjoin the rules as outside the FCC’s authority, primarily on grounds that the FCC was only authorized to issue rules to address “technical and engineering impediments.”<sup>75</sup> One of the challengers’ arguments was that Congress’s directive to issue regulations in the “public interest” was “so vague and indefinite” that Congress’s delegation of authority was unconstitutional.<sup>76</sup> After reviewing the Act’s delegation provisions<sup>77</sup> and finding no explicit authorization to issue the regulations in question,<sup>78</sup> the Court commented that “[i]t [was] a mistaken assumption that [the Act was] a mere general reference to public welfare without any standard to guide determinations” because “[t]he purpose of the Act, the requirements it impose[d], and the context of the provision in question show[ed] the contrary.”<sup>79</sup> As such, the FCC’s regulations had sufficient guidance from Congress, even without explicit directives.

In *Lichter v. United States*,<sup>80</sup> another example of the “intelligible principle” standard’s low bar, the Court upheld a provision of the War Contracts Renegotiation Act, which authorized executive agencies to define military contractors’ “excessive profits” for purposes of excess profits taxes. Relying on the meaning of “excessive profits” as the term had been used in practice by the relevant agencies, the Court found no issue with the fact that the authorizing statute in question lacked directives or other criteria to limit the agencies’ discretion:

It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program.<sup>81</sup>

Thus, in *Lichter*, as in *National Broadcasting Co.*, the Court seemingly devised its own “intelligible principle.”

In other cases, the Court upheld broad delegations of authority out of apparent necessity where it would arguably have been unreasonable and impracticable to require Congress to prescribe its own rules by statute. In *American Power & Light Co. v. SEC*,<sup>82</sup> for example, the Court reviewed a provision in the Public Utility Holding Company Act of 1935, which directed the Securities and Exchange Commission (“SEC”)

[t]o require by order ... that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system.<sup>83</sup>

When the SEC ordered the dissolution of two companies in a pyramid-like holding company system,<sup>84</sup> the companies challenged the SEC’s authorizing statute as an unconstitutional delegation of legislative authority. The companies’ primary argument was that the statute provided the SEC no “ascertainable standards for guidance” to help carry out its functions.<sup>85</sup> While the Act contained an overarching goal (*i.e.*, ensuring that the corporate structure or continued existence of any company in a particular holding company system does not “unduly or unnecessarily complicate the structure” or “unfairly or inequitably distribute voting power among security holders”), the companies argued that the relevant statutory text was undefined and “legally meaningless,” and thus left the SEC to “use its unlimited whim to determine compliance or non-compliance” with the statute.<sup>86</sup> In rejecting the companies’ arguments and finding no unlawful delegation of authority, the Court first recognized that Congress’s directives derived “meaningful content from the purpose of the Act, its factual background and the statutory context,” and were no less definite than other standards the Court had approved in prior cases.<sup>87</sup> The Court then took a pragmatic approach and acknowledged the “necessity” of delegating rulemaking authority to agencies to manage “complex economic and social problems”:

The judicial approval accorded these “broad” standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems. The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.<sup>88</sup>

Notwithstanding the Court’s deferential decision, it nonetheless established baseline requirements for statutory delegations: Congress must clearly delineate a general policy and meaningfully limit the discretion of the agency tasked with applying it.

### 3. Nondelegation by Other Means

Since the 1940s and continuing today, the Supreme Court has applied the “intelligible principle” standard in a deferential manner that many agree is detached from the nondelegation doctrine’s constitutional roots. Indeed, many commentators argue that the standard provides no *standard* at all.<sup>89</sup> Guided by this approach, which appears even less demanding than the Court’s deferential rational basis review, lower courts have until recently denied the nondelegation doctrine’s application to agency rules promulgated under broad grants of authority.<sup>90</sup>

The nondelegation doctrine has long been considered dead and, to be sure, before July 2024, no court had formally applied it to invalidate a congressional delegation since 1935. Its goals, however, have arguably been advanced by other doctrines and interpretive tools—“[w]hen one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines.”<sup>91</sup> This seems to be what happened with the nondelegation doctrine. The Supreme Court routinely limits improper delegations of legislative power, but it does so using other judicial doctrines and interpretive canons.<sup>92</sup>

Take, for example, the major questions doctrine, which allows agencies to fill in statutory gaps only where “statutory circumstances” indicate that Congress specifically intended to grant the agency such powers,<sup>93</sup> but *not* when the gap concerns “a question of deep ‘economic and political significance’ that is central to the statutory scheme.”<sup>94</sup>

In such a case, the agency’s regulations are invalid. In *West Virginia v. EPA*,<sup>95</sup> for example, the Court rejected an attempt by the Environmental Protection Agency (“EPA”) to devise emissions caps that would materially alter the country’s mix of electricity sources by 2030. The EPA claimed that the Clean Air Act empowered it to restructure the U.S. energy market, but the Court concluded it was “highly unlikely” Congress would have assigned such critical policy decisions to the EPA without an explicit grant of authority.<sup>96</sup> Congress “does not ... hide elephants in mouseholes.”<sup>97</sup> The Court has also relied on the major questions doctrine in other contexts to reject attempts by agencies to regulate millions of small greenhouse gas sources<sup>98</sup> and impose a mandatory COVID-19 vaccine requirement on virtually all employers with at least 100 employees.<sup>99</sup> *FDA v. Brown & Williamson Tobacco Corp.*,<sup>100</sup> provides another meaningful case study. In that case, the Court rejected an attempt by the FDA to regulate tobacco products, because the issue involved significant economic and market consequences, and Congress had not expressly provided the FDA with regulatory authority.<sup>101</sup> To the contrary, Congress had adopted separate legislation regulating tobacco products<sup>102</sup> and expressed a general intent to keep tobacco products on the market.<sup>103</sup> As these cases demonstrate, the major questions doctrine is often applied as a proxy for nondelegation purposes to ensure Congress does not abdicate its legislative role.<sup>104</sup>

The Court also uses the “void for vagueness” doctrine to further nondelegation principles.<sup>105</sup> Vague laws “impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis.”<sup>106</sup> In *United States v. Davis*,<sup>107</sup> the Court reviewed a statute, which authorized heightened criminal penalties for using or carrying a firearm “during and in relation to,” or possessing a firearm “in furtherance of,” any federal “crime of violence or drug trafficking crime.”<sup>108</sup> The statute defined “crime of violence” as a felony “that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”<sup>109</sup> When two defendants who had committed a string of gas station robberies in Texas challenged the law as unconstitutionally vague, the Court agreed and struck the law down because it did not provide fair warning that mandatory heightened penalties would apply to the defendants’ conduct. The Court’s opinion spelled out the constitutional principles underlying the vagueness doctrine:

In our constitutional order, a vague law is no law at all. Only the people’s elected representatives in Congress

have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct.<sup>110</sup>

Like the nondelegation doctrine, both the major questions and the vagueness doctrines protect the Constitution's separation of powers,<sup>111</sup> so challenges to improper legislative delegations are often reframed as major questions or vagueness arguments.<sup>112</sup>

In addition to the major questions and vagueness doctrines, courts employ several other interpretive canons to further nondelegation principles—so-called “nondelegation canons”:<sup>113</sup>

- Agencies are not allowed to apply statutes retroactively unless expressly authorized by Congress.<sup>114</sup>
- Statutes are presumed not to have extraterritorial application (and agencies cannot apply them as such) unless Congress has spoken clearly and exercised deliberate congressional judgment.<sup>115</sup>
- Agencies may not interpret ambiguous provisions so as to preempt state law.<sup>116</sup>
- Agencies are not permitted to waive the sovereign immunity of the United States (and statutory ambiguity cannot be used as a basis for waiver), unless Congress has made such waiver explicit in legislation.<sup>117</sup>
- Exemptions from taxation are narrowly construed, so they must be unambiguously proved and not implied.<sup>118</sup>

As these interpretive canons show, the Court has not abandoned the task of policing improper legislative delegations. In fact, several justices have called to apply the nondelegation doctrine more explicitly and to reprioritize its constitutional roots.

## D. “The Buck Stops With Congress”—Calls to Reconsider the Supreme Court’s Nondelegation Approach

Since the early 1980s, and especially recently, several Supreme Court justices have signaled a desire to reconsider the Court’s approach to nondelegation questions.

Writing in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,<sup>119</sup> then-Justice William

Rehnquist expressed his belief that the nondelegation doctrine was crucial to ensure “that Congress itself make[s] the critical policy decisions.”<sup>120</sup> In Rehnquist’s words, “[w]hen fundamental policy decisions underlying important legislation ... are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process.”<sup>121</sup> *Industrial Union Department* involved a standard promulgated by the Secretary of Labor to regulate occupational exposure to benzene, a substance which had been shown to cause cancer at high exposure levels. A plurality of the Court held that the Secretary’s standard was invalid, because it had not been proven reasonably necessary or appropriate to provide safe or healthful employment and therefore exceeded the scope of the Secretary’s delegated authority.<sup>122</sup> Justice Rehnquist nonetheless used the occasion to advocate for a renewed focus on the nondelegation doctrine.

The very next term, Justice Rehnquist again raised his nondelegation views in *American Textile Manufacturers Institute, Inc. v. Donovan*,<sup>123</sup> this time joined in dissent by Chief Justice Warren Burger.<sup>124</sup> *American Textile Manufacturers* involved a mandatory nationwide standard that purported to limit occupational exposure to cotton dust. The standard was issued by the Secretary of Labor under the Occupational Safety and Health Act (“OSHA”), which granted the Secretary’s rulemaking authority:

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.<sup>125</sup>

The regulations the Secretary ultimately issued were designed to limit workers’ exposure to cotton dust by (among other things) requiring employers to provide respirators to employees and transfer employees unable to wear respirators to other positions, if available, with no loss of earnings or other employment rights or benefits. The total industrywide cost of compliance was estimated at \$656.5 million.

The cotton industry challenged the Secretary’s standard on several grounds, including that the standard’s “economic feasibility” was not supported by substantial evidence and the wage guarantee requirement was beyond



the Occupational Safety and Health Administration's authority. After a Court of Appeals upheld the standard, the Supreme Court affirmed in part and reversed in part. The Court held that a cost-benefit analysis was unnecessary because Congress had not expressly required one as it had in other similar statutes.<sup>126</sup> The Court also held that the Secretary's determination of economic feasibility was supported by "substantial evidence." According to the Court, the Administration met the substantial evidence test by "explain[ing] the economic impact it projected for the textile industry," and there was "substantial support in the record for its ... findings of economic feasibility for the textile industry."<sup>127</sup> Lastly, the Court invalidated the Secretary's wage guarantee requirement, because OSHA "in no way authorize[d] [the Secretary] to repair general unfairness to employees that [was] unrelated to achievement of health and safety goals."<sup>128</sup>

Justice Rehnquist, dissenting, reiterated his premise from *Industrial Union Department* that Congress must not abdicate its responsibility to make fundamental and difficult policy choices.<sup>129</sup> He believed the standard at issue in *American Textile Manufacturers* involved a "quintessential legislative" policy choice (*i.e.*, "whether and to what extent 'the statistical possibility of future deaths should ... be disregarded in light of the economic costs of preventing those deaths'") that "must be made by the elected representatives of the people, not by nonelected officials in the Executive Branch."<sup>130</sup>

Other justices have since followed Justice Rehnquist's lead. In *Whitman v. American Trucking Ass'n, Inc.*,<sup>131</sup> the Court considered whether the Clean Air Act unlawfully delegated legislative authority to the EPA by instructing the agency to set primary ambient air quality standards "the attainment and maintenance of which ... are requisite to protect the public health" with "an adequate margin of safety."<sup>132</sup> In upholding the delegation, the Court concluded that, at a minimum, the statute required "[the] EPA [to] establish uniform national standards at a level that [was] requisite to protect public health from the adverse effects of [a] pollutant in the ambient air."<sup>133</sup> The statute's limits on the EPA's discretion, the Court noted, were "strikingly similar"<sup>134</sup> to limits it had approved in an earlier case, *Touby v. United States*,<sup>135</sup> where Congress permitted the Attorney General to designate a drug as a controlled substance for purposes of criminal drug enforcement if doing so was "necessary to avoid an imminent hazard to the public safety" based on specified factors, such as the drug's "history and current pattern of abuse."<sup>136</sup> Concurring separately, Justice Thomas questioned the adequacy of the "intelligible

principle" test as a safeguard of the Constitution's separation of powers and expressed willingness to reconsider the Court's nondelegation jurisprudence:

[T]he Constitution does not speak of "intelligible principles." Rather, it speaks in much simpler terms: "All legislative Powers herein granted shall be vested in a Congress." U.S. Const., Art. 1, §1 (emphasis added). I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative."

As it is, none of the parties to this case has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.<sup>137</sup>

In another case, *Department of Transportation v. Ass'n of American Railroads*,<sup>138</sup> Justice Thomas reiterated his belief that the Constitution's separation of powers, not "intelligible principles," should guide the Court's nondelegation analysis. The case required the Court to decide whether Amtrak, technically a private entity, should be allowed joint authority with the Federal Railroad Administration ("FRA") to issue "metrics and standards" addressing passenger railroad services. The Court upheld Amtrak's authorization and treated it as a government entity for a variety of reasons that are not particularly relevant here.<sup>139</sup> Justice Thomas, however, wrote separately because the Court's majority opinion neglected to address critical constitutional questions implicating nondelegation principles and the separation of powers.<sup>140</sup> Thomas's concurrence expanded upon his thoughts from *Whitman* and explained the significance of the Constitution's separation of powers to the Court's nondelegation analysis:

The Framers' dedication to the separation of powers has been well documented, if only half-heartedly honored. *See, e.g., Mistretta v. United States*, 488 U. S. 361, 380-381, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). Most famously, in *The Federalist*, 47, Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than" the separation of

powers. The Federalist No. 47, p. 301 (C. Rossiter ed. 1961). “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced the very definition of tyranny.” *Ibid.*; see also *Perez*, 135 S. Ct., at 1216–1218, 2015 WL 998535, at \*16-17 (opinion of Thomas, J.).

This devotion to the separation of powers is, in part, what supports our enduring conviction that the Vesting Clauses are exclusive and that the branch in which a power is vested may not give it up or otherwise reallocate it. The Framers were concerned not just with the starting allocation, but with the “gradual concentration of the several powers in the same department.” The Federalist No. 51, at 321 (J. Madison). It was this fear that prompted the Framers to build checks and balances into our constitutional structure, so that the branches could defend their powers on an ongoing basis. *Ibid.*; see also *Perez*, 135 S. Ct., at 1216–1217, 2015 WL 998535, at \*16 (opinion of Thomas, J.).

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We have held that the Constitution categorically forbids Congress to delegate its legislative power to any other body, *Whitman*, 531 U. S., at 472, 121 S. Ct. 903, 149 L. Ed. 2d 1, but it has become increasingly clear to me that the test we have applied to distinguish legislative from executive power largely abdicates our duty to enforce that prohibition. Implicitly recognizing that the power to fashion legally binding rules is legislative, we have nevertheless classified rulemaking as executive (or judicial) power when the authorizing statute sets out “an intelligible principle” to guide the rulemaker’s discretion. *Ibid.* Although the Court may never have intended the boundless standard the “intelligible principle” test has become, it is evident that it does not adequately reinforce the Constitution’s allocation of legislative power. I would return to the original understanding of the federal legislative power and require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process.<sup>141</sup>

Thus, from 1980 through 2015, Justices Rehnquist and Thomas advocated for a return to constitutional principles to guide the Court’s nondelegation jurisprudence. Other justices would follow suit.

## E. *Gundy v. United States* and Justice Gorsuch’s Three-Principle Nondelegation Framework

Most significantly and recently, in 2019 Justice Gorsuch issued a dissenting opinion in *Gundy v. United States*,<sup>142</sup> which built upon Justice Rehnquist and Thomas’s reasoning, and highlights a clear ideological divide over the Supreme Court’s approach to future nondelegation questions.

*Gundy* involved the Sex Offender Registration and Notification Act (“SORNA”)<sup>143</sup> and its delegation of authority to the U.S. Attorney General to issue regulations governing individuals convicted of a sex offense before SORNA’s enactment (“pre-Act offenders”). The Act’s authorizing provision gave the Attorney General seemingly limitless discretion:

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter ... and to prescribe rules for the registration of any such sex offenders ....<sup>144</sup>

Under this grant, the Attorney General had issued a rule specifying that SORNA’s registration requirements apply in full to pre-Act offenders. The question before the Court then was whether the statute’s broad delegation of authority to the Attorney General was an unconstitutional delegation of legislative power.

A four-justice plurality<sup>145</sup> upheld the statute based on the Act’s statutory purpose and history, and the Court’s interpretation of SORNA’s authorizing provision to require the Attorney General to “apply SORNA to all pre-Act offenders as soon as feasible.”<sup>146</sup> These factors, according to the plurality, supplied the requisite “intelligible principle” to satisfy the nondelegation doctrine.<sup>147</sup>

But Justice Gorsuch disagreed. He would have invalidated SORNA’s delegation to the Attorney General, because it granted unbounded legislative power to the executive branch to address a controversial issue with major policy significance and practical ramifications.<sup>148</sup> Applying SORNA to all pre-Act offenders by legislative act would have imposed unpopular and costly burdens on states and localities by forcing them to adopt or overhaul their own sex offender registration schemes. Rather than assume its vested lawmaking role, Gorsuch noted, “Congress simply passed the problem to the Attorney General” despite the existence of critical, unresolved policy choices.<sup>149</sup>

After expressing his disagreement with the plurality's decision, Gorsuch discussed the reasoning behind the Constitution's vested powers, including those vested in Congress and the Courts, and their importance for nondelegation purposes. In particular, "the people had vested the power to prescribe rules limiting their liberties in Congress alone [and] [n]o one, not even Congress, had the right to alter that arrangement."<sup>150</sup> And in order to police Congress's lawmaking function, an independent judiciary was critical:

[W]hen 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."<sup>151</sup>

Justice Gorsuch then laid out a three-principle framework, drawing upon guidance from the Framers, for determining "whether Congress has unconstitutionally divested itself of its legislative responsibilities":

First, as long as Congress announces a "controlling general policy" when passing legislation governing private conduct, it may authorize another branch to "fill up the details."<sup>152</sup> In so doing, Congress must set forth standards "sufficiently definite and precise to enable Congress, the courts, and the public to ascertain" whether Congress's guidance has been followed.<sup>153</sup>

Second, once Congress prescribes a rule governing private conduct, it may make the application of that rule depend on executive fact-finding, regardless of how highly consequential the fact-finding may prove to be.<sup>154</sup>

Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities, because, 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.<sup>155</sup>

If a delegation falls within any of these categories, it will presumably pass muster under Justice Gorsuch's understanding of the nondelegation doctrine.

Applying his framework to Congress's delegation in SORNA, Justice Gorsuch first concluded the statute did not announce a "controlling general policy" and leave the Attorney General with only details to fill up.<sup>156</sup> Nor did it provide "'definite and precise' standards" to guide the Attorney General's discretion.<sup>157</sup>

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. In the end, there isn't a single policy decision concerning pre-Act offenders on which Congress even tried to speak, and not a single other case where we have upheld executive authority over matters like these on the ground they constitute mere "details."<sup>158</sup>

Second, the authority Congress delegated in SORNA was not subject to executive fact-finding, even though the statute could easily have been written in such a manner. For example, as in *Touby*,<sup>159</sup> Congress might have required all pre-Act offenders to register, but then permitted the Attorney General to make case-by-case exceptions for those who did not present a threat to public safety comparable to that posed by newly released post-Act offenders. But Congress provided no such rules and instead left the Attorney General broad discretion to make significant policy decisions.<sup>160</sup>

Lastly, SORNA did not involve an area overlapping with functions vested in the executive branch. As Justice Gorsuch noted, 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 the authority delegated under SORNA was not within those powers. Instead, SORNA authorized the Attorney General to "'prescrib[e] the rules by which the duties and rights' of citizens are determined, *a quintessentially legislative power*."<sup>161</sup>

SORNA failed all three parts of Justice Gorsuch's nondelegation framework, and thus would have been an impermissible delegation of legislative authority in Gorsuch's view.

## F. Renewed Focus on Nondelegation Principles

Justice Gorsuch's *Gundy* framework signals a desire to reprioritize the separation of powers principles underlying the Court's traditional nondelegation analysis. Several other Justices also appear willing to revisit and possibly restructure the Court's approach to nondelegation questions. In *Gundy*, Chief Justice Roberts and Justice Thomas joined in Justice Gorsuch's dissent, and Justice Alito, concurring separately in the judgment, expressed a willingness

to “reconsider” the Court’s approach to nondelegation cases.<sup>162</sup> In addition, in a statement regarding the Court’s denial of certiorari in *Paul v. United States*, Justice Kavanaugh acknowledged that “Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine [in *Gundy*] may warrant further consideration in future cases,”<sup>163</sup> because, unlike the Court’s current approach to nondelegation issues, Justice Gorsuch’s approach would not allow Congress to delegate authority to agencies to decide major policy questions, *even if* Congress expressly and specifically delegates such authority.<sup>164</sup> That makes at least five current justices<sup>165</sup> who appear willing to reconsider the Court’s nondelegation jurisprudence.<sup>166</sup>

Appellate courts appear equally inclined to take a fresh and more considered look at nondelegation questions. In *Tiger Lily, LLC v. United States Department of Housing & Urban Development*,<sup>167</sup> the Sixth Circuit Court of Appeals reviewed a decision by the Centers for Disease Control (“CDC”) to impose a nationwide eviction moratorium on rental properties under the Public Health Service Act.<sup>168</sup> The Act authorized the Secretary of Health and Human Services to “make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases.”<sup>169</sup> To carry out and enforce “such regulations,” the Secretary was authorized to “provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and *other measures, as in his judgment may be necessary.*”<sup>170</sup> The court held that the CDC’s actions were outside the scope of Congress’s delegated authority, because Congress clearly prescribed certain actions the CDC could take and an eviction moratorium was not among them.<sup>171</sup> Most notably, the court rejected the government’s argument for an expansive interpretation of Congress’s delegating statute (*i.e.*, that the Secretary was authorized to impose *any* regulation “necessary” to combat communicable diseases), because such a reading “could raise a nondelegation problem” by allowing the CDC to “do anything it can conceive of to prevent the spread of disease.”<sup>172</sup> In the court’s view, the government’s reading would “grant the CDC director near-dictatorial power for the duration of the pandemic, with authority to shut down entire industries as freely as she could ban evictions.”<sup>173</sup> The court also noted that the “unfettered power” the CDC sought to wield would likely require greater guidance than the general authorization in Congress’s delegating statute.<sup>174</sup> In other words, when an agency seeks to exercise a broad grant of authority, Congress’s guidance to the agency should be equally robust.

While the Sixth Circuit’s decision did not rest primarily on nondelegation principles, the court clearly had nondelegation arguments in mind. Writing in concurrence, Judge Thapar expounded on the importance of the nondelegation doctrine as a separation-of-powers safeguard and suggested “breathing new life into the doctrine” to prevent Congress from “announc[ing] vague aspirations and then assign[ing] others the responsibility of adopting legislation to realize its goals.”<sup>175</sup> The Founders placed law-making power with Congress—the people’s representatives—so “[t]he sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow.”<sup>176</sup> As Circuit Judge Thapar recognized, the nondelegation doctrine protects the Founders’ constitutional design and ensures Congress is responsive to the public.

The Eleventh Circuit has also acknowledged nondelegation principles in recent years. In *West Virginia ex rel. Morrissey v. U.S. Department of the Treasury*,<sup>177</sup> the court reviewed the American Rescue Plan Act of 2021,<sup>178</sup> which included a “tax offset” provision that prohibited states from using Rescue Plan funds “to either directly or indirectly offset a reduction in [their] net tax revenue” resulting from a change in law that “reduces any tax.”<sup>179</sup> States were required to certify compliance with the offset provision and the Treasury Secretary was authorized to “issue such regulations as may be necessary or appropriate to carry out [the Act].”<sup>180</sup> The court first recognized that certain aspects of the tax offset provision were unclear. For example, the statute did not provide a standard against which states could assess whether they would reduce (or had reduced) net tax revenue, and the provision did not define the terms “directly or indirectly,” so the states were left guessing as to whether and how they could spend Rescue Plan funds after making tax cuts.<sup>181</sup>

Then, in holding the Act’s offset provision unconstitutional, the court referenced both the major questions and nondelegation doctrines. First, the court noted that Congress likely did not intend Treasury to answer any questions the Rescue Act left open because they implicated questions of deep economic and political significance, and altered the traditional balance of federalism.<sup>182</sup> Congress would have “had to speak in a ‘specific and detailed’ way if it intended to delegate the authority to answer [such questions].”<sup>183</sup> Second, the court held that the Act supplied no “ascertainable condition[s]” for the federal grant at issue, and allowing Treasury to impose such conditions “would be inconsistent with the Constitution’s meticulous separation of powers.”<sup>184</sup> The court reiterated that Congress, not an executive agency, must specify conditions on the use of federal funds, so the ambiguity in the tax offset provision created problems similar to those raised by delegations

lacking an “intelligible principle.”<sup>185</sup> Here too, as in *Tiger Lily, LLC*, the court’s decision did not rely strictly on the nondelegation doctrine, but showed an obvious awareness of the connection between the major questions doctrine (a “nondelegation canon”) and nondelegation principles.<sup>186</sup>

Most recently, the Fifth Circuit applied the nondelegation doctrine in *Consumers’ Research v. FCC*<sup>187</sup> to invalidate a section of the Telecommunications Act of 1996,<sup>188</sup> which authorized the FCC to ensure that “[e]very telecommunications carrier [providing] interstate telecommunications services shall contribute ... [to] mechanisms established by the [FCC] to preserve and advance universal service.”<sup>189</sup> The “mechanism” the FCC established was a “Universal Service Fund” (“USF”) and a private entity, the Universal Service Administrative Company (“USAC”), was tasked with setting the amounts telecommunication carriers were required to contribute to the fund. The amount the USAC set was crucial, because it dictated the size of the universal service contributions levied on telecommunications carriers and, in turn, American telecommunications consumers. Moreover, the court acknowledged that the USAC was subject to very little (if any) oversight by the FCC, which largely “rubber stamped” the USAC’s proposed contribution amounts and had “never made a substantive revision” to the USAC’s proposals prior to the litigation.<sup>190</sup> The result of the FCC’s scheme was a “USAC-fashioned USF Tax.”<sup>191</sup>

After reviewing whether Congress sufficiently instructed the FCC regarding how much it should tax Americans to pay for the USF program, the court held that Congress’s authorizing provisions “suppl[ied] no [intelligible] principle at all.”<sup>192</sup> Those provisions explained that USF funding should be “sufficient ... to preserve and advance universal service”<sup>193</sup> and that telecommunications services “should be available at ... affordable rates.”<sup>194</sup> But, the court noted, the “sufficiency” standard was only useful if the term “universal service” was sufficiently intelligible, and the term was at best amorphous as defined in the Telecommunications Act.<sup>195</sup> As such, Congress’s instruction that the FCC should raise “sufficient” funding was effectively a suggestion that the FCC should “exact as much tax revenue for universal service projects as [the] FCC thinks is good.”<sup>196</sup>

The court identified other infirmities with Congress’s delegation to the FCC. For example, the FCC’s universal service tax was not formally limited by the amounts it disbursed on USF projects, so nothing in Congress’s authorizing statute precluded the FCC from imposing USF taxes to create an endowment to fund its own chosen projects.<sup>197</sup> Congress’s authorizing statute also set out mere “aspirational” principles instead of “inexorable statutory

command[s]” and thus provided no meaningful directives or criteria with which to assess the FCC’s actions.<sup>198</sup> For example, the relevant statute provided that “[e]lementary and secondary schools and classrooms ... and libraries should have access to advanced telecommunications services as described in subsection (h),”<sup>199</sup> but subsection (h) said only that “elementary schools, secondary schools, and libraries” should have access to telecommunications services “for educational purposes at rates less than the amounts charged for similar services to other parties.”<sup>200</sup> Which “similar services”? Which schools and libraries? How much less should they pay? Congress did not specify. Further, even if Congress’s principles were more than aspirational, the court recognized that Congress’s authorizing provisions still would not have meaningfully limited the FCC because those provisions allowed the FCC “to formulate ‘other principles’ so long as it consider[ed] the additional principles to be ‘necessary and appropriate for the protection of the public interest, convenience, and necessity and ... consistent with’” the rest of the relevant statutory context.<sup>201</sup> In other words, the FCC was allowed to “‘roam at will,’ disregarding [Congress’s] enumerated principles altogether when it thinks the ‘public interest’ warrants the journey.”<sup>202</sup>

Most significantly for our purposes, however, the court applied heightened scrutiny to the statute at issue because Congress had “bestowed upon [the] FCC the power to levy taxes.”<sup>203</sup> Unlike delegations implicating the power to impose criminal sentences or conditions on the use of public property, Congress’s broad delegation of taxing authority to the FCC involved the power to convert private property.<sup>204</sup> The breadth of Congress’s delegating statute thus made the USF’s tax “difficult to square”<sup>205</sup> with the Supreme Court’s nondelegation precedents because the scheme was “unlike any delegation the [Supreme] Court has ever blessed.”<sup>206</sup>

Notably, *Consumers’ Research* also involved a second question—whether the FCC’s “subdelegation” of its taxing authority to a private entity, the USAC, violated the Constitution’s legislative vesting clause. The court ultimately concluded that the FCC had impermissibly delegated its taxing power to a private entity by allowing the USAC’s projections to take effect without formal FCC approval (thus giving the USAC the “final say” with respect to the size of the USF tax) and by failing to “independently perform[] its reviewing, analytical and judgmental functions” with respect to the USAC’s universal service contribution amount.<sup>207</sup> As such, the court’s decision rested on a *combination* of Congress’s broad delegation to the FCC and the FCC’s further unauthorized delegation to a private entity.<sup>208</sup> The two-pronged nature of the court’s decision

may muddy any further analysis of the nondelegation doctrine on appeal,<sup>209</sup> but at least one concurring Fifth Circuit judge would have found Congress's delegation to the FCC independently unconstitutional.<sup>210</sup>

## G. What Would a Nondelegation Revival Mean for Tax?

With Justice Gorsuch's nondelegation analysis from *Gundy* garnering support from at least four other current Supreme Court justices and lower courts taking a harder look at nondelegation issues, it seems inevitable that nondelegation principles will soon figure prominently in administrative law jurisprudence. In fact, the Supreme Court recently granted certiorari<sup>211</sup> to resolve a circuit split and decide whether the USF program at issue in *Consumers' Research* violates the nondelegation doctrine. The Court previously declined to consider the issue.<sup>212</sup> Now, however, with disagreement between the Sixth<sup>213</sup> and Eleventh<sup>214</sup> Circuits on one side and the Fifth Circuit<sup>215</sup> on the other, the Court could seize the opportunity to update its approach to nondelegation questions, possibly by adopting Justice Gorsuch's framework from *Gundy*.<sup>216</sup> Any changes to the Court's approach to nondelegation questions could have significant consequences for tax law.

### 1. Tax Lawmaking Is Special

Delegations of tax rulemaking authority could arguably be viewed differently and subject to greater scrutiny than delegations in other contexts.

"[T]axation has always been an exclusively legislative function,"<sup>217</sup> because the Constitution specifically vests Congress, not agencies or another branch, with the power to "lay and collect Taxes"<sup>218</sup> and requires that "[a]ll Bills for raising Revenue shall originate in the House of Representatives."<sup>219</sup> Given this design, it makes sense that both the broad policies and fine details of U.S. tax law have historically been determined by Congress, not agencies.<sup>220</sup>

Proponents of this view will also argue that Congress, an elected body, holds accountability for laws that affect the public's property rights and thus should hold responsibility for enacting such laws.<sup>221</sup> Since "the power to tax involves the power to destroy"<sup>222</sup> and tax laws are one of the primary tools by which society implements a variety of policy goals, it is crucial that Congress—not unelected agencies—makes the key policy decisions behind tax rules. Any other arrangement would "deprive[] the people of the say the [F]ramers intended them to have."<sup>223</sup> This focus on public accountability was central to Justice Gorsuch's dissent in *Gundy*,<sup>224</sup> as well as the Fifth and Sixth Circuits'

analyses in *Consumers' Research*<sup>225</sup> and *Tiger Lily, LLC*,<sup>226</sup> respectively.

Furthermore, as Justice Kavanaugh recognized in his statement on the Court's denial of certiorari in *Paul v. United States*,<sup>227</sup> Justice Gorsuch's approach in *Gundy* would not allow Congress to delegate authority to agencies to decide major policy questions, even if Congress expressly and specifically delegates such authority. The Court has recognized that tax law implicates major questions of "deep 'economic and political significance,'"<sup>228</sup> so tax rulemaking would appear to require Congress's policy judgment under Justice Gorsuch's nondelegation framework.

### 2. Tax Rulemaking Generally

Consistent with the discussion above, Congress passes statutes that establish the Code and the Code itself often includes detailed definitions for key terms, so most delegations of tax rulemaking authority involve filling in the details of provisions whose basic policy design was established by Congress. For example,

- Code Sec. 382(m) authorizes the Secretary to "prescribe such regulations as may be necessary or appropriate to carry out the purposes of [section 382] and section 383, including (but not limited to) regulations—(1) providing for the application of [section 382] and section 383 where an ownership change with respect to the old loss corporation is followed by an ownership change with respect to the new loss corporation, and (2) providing for the application of [section 382] and section 383 in the case of a short taxable year, ... and (5) providing, in the case of any group of corporations described in section 1563(a) (determined by substituting '50 percent' for '80 percent' each place it appears and determined without regard to paragraph (4) thereof), appropriate adjustments to value, built-in gain or loss, and other items so that items are not omitted or taken into account more than once."<sup>229</sup>
- Code Sec. 385(a) authorizes the Secretary to "prescribe such regulations as may be necessary or appropriate to determine whether an interest in a corporation is to be treated ... as stock or indebtedness (or as in part stock and in part indebtedness)."<sup>230</sup> Code Sec. 385(b) then specifies that the regulations "shall set forth factors ... to be taken into account in determining with respect to a particular factual situation whether a debtor-creditor relationship exists [*i.e.*, indebtedness] or a corporation-shareholder relationship exists [*i.e.*, stock or equity]."<sup>231</sup> To guide the Secretary, Code Sec. 385(b) provides several examples of these factors.<sup>232</sup>

- Code Sec. 1275(d) authorizes the Secretary to “prescribe regulations providing that where, by reason of varying rates of interest, put or call options, indefinite maturities, contingent payments, assumptions of debt instruments, or other circumstances, the tax treatment under this subpart (or section 163(e)) does not carry out the purposes of this subpart (or section 163(e)), such treatment shall be modified to the extent appropriate to carry out the purposes of this subpart (or section 163(e)).”<sup>233</sup>

Congress made the key policy decisions underlying each of these Code sections and the Secretary has been left to simply fill in details to implement Congress’s statutory scheme. Indeed, this “fill in the details” role of Treasury and the IRS is arguably rooted in the general regulatory authority provided under Code Sec. 7805(a) to “prescribe all needful rules and regulations for the enforcement of [Code].”<sup>234</sup>

In some cases, however, Congress enacts extremely broad statutory grants of authority with the expectation that Treasury and the IRS will promulgate a multitude of substantive rules. These delegations place Treasury and the IRS in a legislative role, far from merely “filling in administrative details.”

For example, Code Sec. 482 contains one of the Code’s broadest grants of discretionary authority. In just three sentences, Congress empowers the Secretary to provide rules to allocate income, deductions, credits, or allowances and value intangibles in related-party transactions “to prevent evasion of taxes or clearly to reflect ... income.”<sup>235</sup> Key terms and concepts such as the “clear reflection of income” are not defined in the statute, so Treasury has issued extensive regulations under the general grant of rulemaking authority in Code Sec. 7805(a) and assumed full responsibility for Code Sec. 482’s interpretation and enforcement.

Another sweeping grant of authority lies in Code Sec. 1502, which authorizes the Secretary to issue rules governing the consolidated income tax returns of affiliated corporations. Some of these rules override other provisions in the Code itself. Here, too, Treasury has issued regulations that impact virtually all large U.S. corporations and are widely considered to be the longest and most intricate in the entire Code of Federal Regulations.<sup>236</sup>

As a final example, Code Sec. 351(g)(4) provides another broad delegation of rulemaking authority relating to the tax treatment of nonqualified preferred stock. Specifically, the Secretary is authorized to “prescribe such regulations as may be necessary or appropriate to carry out the purposes of [section 351(g)(4)] and sections 354(a)(2)(C), 355(a)(3)(D),

and 356(e)” as well as to “prescribe regulations consistent with the [aforementioned subsections] for the treatment of nonqualified preferred stock under other provisions of [the Code].”<sup>237</sup>

In Code Secs. 482, 1502, and 351(g)(4), Congress presumably decided it would be most efficient and administrable to delegate tax rulemaking authority to agencies. At the same time, however, the Supreme Court has made clear that “the buck stops with Congress” when there are “fundamental policy decisions underlying important legislation” to be made<sup>238</sup> or when rulemaking implicates questions of “deep economic and political significance” that are central to a statutory scheme.<sup>239</sup> In such situations, nondelegation principles prevent Congress from abdicating its tax rulemaking duties by leaving difficult policy issues to the nonelected executive branch.<sup>240</sup>

We note that tax delegations to Treasury and the IRS are not the only way Congress can run afoul of the nondelegation doctrine. “Spurned delegations” can also displace Congress’s lawmaking role.<sup>241</sup> When Congress makes clear by statute that a particular tax benefit or treatment should be available but the Secretary prevents Congress’s desired outcome by failing to implement regulations, taxpayers often argue that the Secretary should not be able to withhold the benefit by delaying to issue regulations. Similarly, when a delegation involves a taxpayer-unfriendly rule, the IRS often argues that courts should find the delegating statute self-executing even absent implementing regulations. In both cases, the courts are typically asked to invoke so-called “phantom regulations” by providing a “best guess at what regulations an agency might have issued.”<sup>242</sup> These decisions arguably threaten the separation of powers by turning judges into policymakers.<sup>243</sup> Interestingly, the tests that the Tax Court and several other courts have applied in situations involving spurned mandatory delegations are reminiscent of the nondelegation doctrine. Under the “whether-how” test, in particular, if a delegating statute relates to “whether” a specified result shall occur, the statute will *not* be self-executing in the absence of regulations, but if the delegation relates merely to “how” that specified result shall occur, the statute *will* be self-executing.<sup>244</sup> Just as the traditional nondelegation doctrine asked whether Congress had delegated lawmaking authority or merely authority to “fill up ... details,”<sup>245</sup> the courts’ prevailing approach with spurned mandatory delegations often asks if the delegation relates to “whether” (implicating a legislative policy choice) or “how” (involving administrative details).

Below we discuss the statutory grants of authority under Code Secs. 482, 1502 and 351(g)(4), and consider how Justice Gorsuch’s three-principle nondelegation framework from *Gundy* might apply to each provision. We note that

there are several provisions in the Code that could be vulnerable on nondelegation grounds,<sup>246</sup> specifically those containing the language “except as provided in regulations ...” or “except to the extent provided in regulations, ....”<sup>247</sup> We do not undertake to discuss all potentially vulnerable Code sections. Nor are we advocating for any particular statute or regulation to be struck down. Rather, we are simply describing how one potential approach the Supreme Court could take to future nondelegation questions would apply to a select few provisions.

### 3. Code Sec. 482 (Transfer Pricing)

#### a. Background

Code Sec. 482, in relevant part, permits the Secretary to re-allocate income and other items among related parties to prevent tax evasion or to clearly reflect income:

In any case of two or more [related parties], the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses.<sup>248</sup>

The statute does not include an explicit grant of rulemaking power, but rather the power to “distribute, apportion, or allocate gross income, deductions, credits, or allowances ...” Arguably, the power to make adjustments to related party tax results includes the power to promulgate regulations defining when such adjustments are appropriate. Nonetheless, the Secretary has invoked Code Sec. 7805(a) as the source of his authority to promulgate regulations under Code Sec. 482,<sup>249</sup> and Code Sec. 7805(a) provides that “the Secretary shall prescribe all needful rules and regulations for the enforcement of [the Code].” Historically, courts (especially the Tax Court) applied different standards of deference to rules promulgated under Code Sec. 7805 (considered “interpretive”) versus specific grants of statutory authority (considered “legislative”),<sup>250</sup> but the Supreme Court abolished this distinction in *Mayo Foundation for Medical Education & Research v. United States*.<sup>251</sup> Today, after *Loper Bright*, it appears to make little to no difference for purposes of deference that Code Sec. 482 regulations are issued under the general grant of rulemaking authority in Code Sec. 7805 rather than a specific grant, as *Loper Bright*’s “best meaning” standard applies to both.<sup>252</sup>

Unlike other Code provisions (such as Code Secs. 1502 and 351(g)(4), discussed *infra*), which direct the Secretary to promulgate rules for a specific purpose, Code Sec. 482 vests Treasury with seemingly unbounded discretion to make adjustments to clearly reflect income or prevent tax evasion. Either alone or in combination with Code Sec. 7805(a), the Secretary can issue rules and regulations however and whenever he desires and without clear statutory directives from Congress to help determine *when* taxes are being evaded or *when* income is not clearly reflected.<sup>253</sup>

For this reason, Code Sec. 482 would appear to implicate nondelegation questions, because courts have held that broad grants of rulemaking authority require greater guidance from Congress than general authorizations.<sup>254</sup> If the Fifth Circuit in *Consumers’ Research* concluded that the Telecommunications Act provided merely “aspirational principles,”<sup>255</sup> how would a court view Code Sec. 482 and the “clear reflection of income” standard? Unlike the provisions at issue in *Consumers’ Research*, which arguably set out definite and mandatory guiding principles,<sup>256</sup> Code Sec. 482 provides simply that the Secretary “may” take certain actions if he determines that adjustments are necessary to “prevent evasion of taxes or clearly to reflect [income].” What makes the Telecommunications Act “aspirational” if Code Sec. 482 is not? Indeed, while the Attorney General’s discretion in *Gundy* was limitless on its face, Code Sec. 482’s grant of discretion to the Secretary is arguably only a step removed.

Below, we briefly trace the history of Code Sec. 482 to provide context regarding its development and broad grant of discretion.

From the earliest iterations of Code Sec. 482, Congress’s primary reasons for its enactment were to (1) prevent tax evasion by the manipulation of transactions between related taxpayers and (2) ensure that the tax liability of such related entities reflects their “true” income (even absent tax evasion motives). Congress’s concern was that parties would set the prices of related-party transactions (“transfer prices”) so as to inflate the income of taxpayers subject to a lower marginal tax rate or increase deductions or credits allowable to taxpayers subject to a higher marginal tax rate.

As relevant for our purposes, Code Sec. 482 dates back to 1921. In that year, Congress enacted Code Sec. 240(d), which generally permitted the Commissioner, in any proper case, to “consolidate the accounts” of related trades or businesses in order to make an accurate distribution or apportionment of their income, deductions or capital.<sup>257</sup> The provision was intended to “prevent the arbitrary



shifting of profits among related businesses, particularly in the case of subsidiary corporations organized as foreign corporations.”<sup>258</sup>

In 1928, Congress enacted Code Sec. 45, a new and more comprehensive provision inspired by Code Sec. 240(d):

In any case of two or more trades or businesses (whether or not incorporated, whether or not organized in the United States, *and whether or not affiliated*) owned or controlled directly or indirectly by the same interests, *the Commissioner is authorized to distribute, apportion, or allocate gross income or deductions between or among such trades or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such trades or businesses.*<sup>259</sup>

Section 45 was intended “to prevent evasion (by the shifting of profits, the making of fictitious sales, and other methods frequently adopted for the purpose of “milking”).”<sup>260</sup> While the statute’s broadened scope provided greater flexibility, it also left many unanswered questions: What should qualify as separate “trades or businesses”? Can one taxable entity be engaged in several trades or businesses? Can the statute be applied more broadly to permit the allocation of income or deductions among controlled taxpayers, whether or not their activities constitute a “trade or business”? What test is to be applied in determining whether such trades or businesses are “owned or controlled” by the same interests? The idea of a “clear reflection of income” in new section 45 was also relatively undefined; indeed, the courts had only recently begun developing the assignment of income doctrine.<sup>261</sup> Congress thus left Treasury and the courts to fill in many important details.

In 1954, Congress renumbered section 45 as Code Sec. 482 and replaced the phrase “the Commissioner is authorized to” with “the Secretary or his delegate may.”<sup>262</sup> These changes were not viewed as substantive<sup>263</sup> and no other material changes were made to Code Sec. 482 between 1954 and 1985.<sup>264</sup>

The first regulations interpreting the predecessor to Code Sec. 482 were issued in 1934, and remained virtually unchanged through repeated reenactments of the revenue laws, including the Internal Revenue Codes of 1939 and 1954.<sup>265</sup> The regulations were framed in very general terms, without attempting to define methods of allocation or the application of such methods to specific transactions. The keynote provided:

The purpose of section 482 is to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer, by determining, according to the standard of an uncontrolled taxpayer, the true taxable income from the property and business of a controlled taxpayer .... The standard to be applied in every case is that of an uncontrolled taxpayer dealing at *arm’s length* with another uncontrolled taxpayer.<sup>266</sup>

Thus, as of 1962, the regulations referenced the standard of an arm’s-length transaction, but never defined it, even though early case law beginning in 1928 made reference to the arm’s-length standard, an arm’s-length price, or arm’s-length dealings,<sup>267</sup> or referred to a test of dealings between “uncontrolled” taxpayers.<sup>268</sup> Generally, the decisions that referenced the arm’s-length standard sought to determine whether the actual price fell within a range of reasonable prices. For example, in *Seminole Flavor Co. v. Commissioner*,<sup>269</sup> the Tax Court ruled (over the IRS’s objection) that the commission paid by a manufacturing corporation to a sister partnership for selling services did “not appear to be out of line with petitioner’s own experience” and on that basis “the transaction would seem to be fair and entitled to classification as an arm’s-length transaction.”<sup>270</sup> The court reasoned that:

Whether any such business agreement would have been entered into by petitioner with total strangers is wholly problematical. Petitioner was not seeking new blood or new capital in its business. It was seeking a solution of its merchandizing difficulties. It is entirely consistent, therefore, that the stockholders of petitioner in creating a new business organization to solve these difficulties would place the control thereof in the people most familiar and intimate with the problem.<sup>271</sup>

In another case, *Polak’s Frutal Works, Inc. v. Commissioner*,<sup>272</sup> the Tax Court ruled that an IRS adjustment to the price paid by an export entity to a related manufacturing corporation was inappropriate because the parties’ pricing was “fair and reasonable” in light of the practices of the business. The court never mentioned the arm’s-length standard, and the IRS later argued that the Tax Court erred as a matter of law because it effectively equated “a reasonable pricing arrangement between related parties with an arm’s-length transaction between unrelated parties.”<sup>273</sup>

In the Congressional deliberations leading to the enactment of the 1962 Revenue Act, an effort was made to amend Code Sec. 482 to add specific allocation rules for intercompany sales of tangible property between

domestic corporations and related foreign entities, using a formula basis applied to taxable income.<sup>274</sup> The Senate Finance Committee ultimately struck the amendment and the Conference Committee agreed, but the Conference Committee noted that the objectives of the proposed amendment could be accomplished through regulations. Accordingly, Treasury was directed to “explore the possibility of developing and promulgating regulations ... which would provide additional guidelines and formulas for the allocation of income and deductions in cases involving foreign income.”<sup>275</sup>

With this directive, Treasury significantly expanded the Code Sec. 482 regulations to define the concept of the arm’s-length transaction and address several other issues. Preliminary regulations were proposed on April 1, 1965, covering a portion of the subject matter, including methods of allocation and the determination of taxable income with respect to loans and advances, performance of services, and use of tangible property.<sup>276</sup> The regulations were re-proposed and extended in August 1966 to cover transfers or the use of intangible property and sales of tangible property.<sup>277</sup> Final regulations were then promulgated on April 16, 1968,<sup>278</sup> except for one section dealing with the arm’s-length charge for services rendered to related entities, which became final on January 22, 1969.<sup>279</sup>

The 1968 regulations gave the Secretary significantly more flexibility in proposing transfer pricing adjustments. Until 1968, Courts often construed Code Sec. 482 literally, such that the Secretary (in making an adjustment) was first required to identify an item of gross income, *etc.*, that was reported as realized (and recognized) by one or more members of a commonly controlled group, and then, if deemed necessary to prevent tax avoidance or clearly to reflect income, to “distribute, apportion, or allocate” such item(s) to reflect each party’s true taxable income.<sup>280</sup> With the 1968 regulations, however, the fact that no income or loss may have been reported as realized by the commonly controlled group or by any of its members no longer determined whether an adjustment was appropriate. Instead, each related-party transaction was subject to examination to determine whether the parties’ terms were equivalent to those that would have been reached by unrelated parties dealing at arm’s length.

The 1968 regulations thus raised a number of entirely new and often controversial concepts. For example, new Reg. §1.482-1(d) set out five “methods of allocation” that could be applied in any case based on the substance of the transaction at issue.<sup>281</sup> Three of the methods (correlative adjustments, offsets, and blocked income) were considered taxpayer-favorable, since they were relief provisions.<sup>282</sup> The remaining two methods (creation of income

and non-recognition transactions) were “ambiguous and controversial” and “require[d] further judicial clarification.”<sup>283</sup> The “creation of income” allocation method, in particular, authorized the Secretary to make allocations in transactions among members of a controlled group “notwithstanding the fact that the ultimate income anticipated from a series of transactions may not be realized, or [would be] realized during a later period.”<sup>284</sup> Commenters noted that Code Sec. 482 itself authorized the Secretary to “distribute, apportion or allocate *gross income* ...”, so the “creation of income” allocation method “appear[ed] to flout the statute and to authorize, at least in some circumstances, the *creation* of gross income, as distinguished from its allocation.”<sup>285</sup> The creation of income rule also abandoned the “consolidation of accounts” principle from the original iteration of Code Sec. 482 in the Revenue Act of 1921.<sup>286</sup>

In addition to new allocation methods, the 1968 regulations contained a series of sections relating to the determination of taxable income. These sections authorized the Secretary to make appropriate allocations “to reflect an arm’s length” result in transactions involving loans or advances, the performance of services, the use of tangible property, the transfer or use of intangibles, and the sale of tangible property.<sup>287</sup> All of these sections introduced new concepts. For example, the section governing sales of tangible property introduced three possible methods for determining an arm’s-length price: the comparable uncontrolled price method, the resale price method, and the cost-plus method.<sup>288</sup> The best method for any particular case was dependent on the nature of the transaction at issue. The cost-plus method, for example, was preferred where a manufacturer sells materials or components to a related entity for further manufacture, assembly, or processing, or where the related entity adds significant value by application of its intangible property prior to resale.<sup>289</sup>

The latest general phase of Code Sec. 482’s development focused on the pricing of high-value intangibles. In the Tax Reform Act of 1986, Congress amended Code Sec. 482 by providing that the income from a transfer or license of intangible property must be “commensurate with the income attributable to the intangible.”<sup>290</sup> The House report accompanying the House version of the 1986 amendment explained the rationale behind the new “commensurate with income” standard:

Many observers have questioned the effectiveness of the “arm’s length” approach of the regulations under section 482. A recurrent problem is the absence of comparable arm’s length transactions between unrelated parties, and the inconsistent results of

attempting to impose an arm's length concept in the absence of comparables.

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The problems are particularly acute in the case of transfers of high-profit potential intangibles. Taxpayers may transfer such intangibles to foreign related corporations or to possession corporations at an early stage, for a relatively low royalty, and take the position that it was not possible at the time of the transfers to predict the subsequent success of the product. Even in the case of a proven high-profit intangible, taxpayers frequently take the position that intercompany royalty rates may appropriately be set on the basis of industry norms for transfers of much less profitable items ....

There are extreme difficulties in determining whether the arm's length transfers between unrelated parties are comparable. The committee thus concludes that it is appropriate to require that the payment made on a transfer of intangibles to a related foreign corporation or possessions corporation be commensurate with the income attributable to the intangible.

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In requiring that payments be commensurate with the income stream, the bill does not intend to mandate the use of the "contract manufacturer" or "cost-plus" methods of allocating income or any other particular method. As under present law, all the facts and circumstances are to be considered in determining what pricing methods are appropriate in cases involving intangible property, including the extent to which the transferee bears real risks with respect to its ability to make a profit from the intangible or, instead, sells products produced with the intangible largely to related parties (which may involve little sales risk or activity) and has a market essentially dependent on, or assured by, such related parties' marketing efforts. However, the profit or income stream generated by or associated with intangible property is to be given primary weight.<sup>291</sup>

The Conference Committee report that accompanied the amendment further explained that "many important and difficult issues are left unresolved by [the] legislation" and the conferees "believe[d] that a comprehensive study of intercompany pricing rules by the Internal Revenue

Service should be conducted and that careful consideration should be given to whether the existing regulations could be modified in any respect."<sup>292</sup>

In response to Congress's suggestion, Treasury and the IRS "reexamined the theory and administration of section 482, with particular attention paid to transfers of intangible property" and issued a lengthy study presenting the agencies' findings and recommendations.<sup>293</sup> Part II of the study discussed the agencies' view that the commensurate with income standard was "fully consistent with the arm's length principle" and "require[d] periodic, and generally prospective, adjustments to transfer prices to reflect significant changes in the income attributable to intangible property."<sup>294</sup> Part III of the study "propos[ed] a methodology for allocating income" in transactions involving high profit intangibles that would utilize a mix of functional analysis (when comparable transactions were available), arm's-length rates of return (when comparable transactions were unavailable), and a profit-split approach (when neither comparable transactions nor arm's-length rates of return could be used to allocate all intangible income).<sup>295</sup>

Despite the apparent breadth of Congress's delegation under Code Sec. 482, the courts have had the opportunity to consider the validity of certain Code Sec. 482 regulations, specifically in the cost sharing context. For example, in *Altera Corp. & Subsidiaries v. Commissioner*,<sup>296</sup> the Tax Court invalidated Reg. §1.482-7(d)(2), which required participants in qualified cost-sharing arrangements ("QCSAs") to share stock-based compensation ("SBC") costs in order to achieve an arm's-length result. The Court concluded that Treasury failed to satisfy the APA's "reasoned decisionmaking" standard, because it did not provide evidentiary support for its belief that unrelated parties would share SBC costs or articulate why all QCSAs should be treated identically, and it failed to respond to significant comments in the rulemaking process.<sup>297</sup> On appeal, the Ninth Circuit reversed the Tax Court and upheld the regulations. Under the historical *Chevron* framework, the court determined that Treasury "reasonably understood [section] 482 as an authorization to require internal allocation methods in the QCSA context, provided that the costs and income allocated [were] proportionate to the economic activity of the related parties."<sup>298</sup> Thus, while Treasury's interpretation may not have been "the only possible interpretation" of Congress's intent, "it prove[d] a reasonable one" and thus was not "arbitrary, capricious, or manifestly contrary to the statute."<sup>299</sup> Although Treasury's regulations were ultimately upheld in *Altera*, the case illustrates that while Treasury's discretion to issue regulations under Code Sec. 482 may be broad, it is not limitless. This takeaway is particularly

important in the aftermath of *Loper Bright* and its overruling of *Chevron* deference.

The Tax Court has also reviewed a nondelegation challenge to Code Sec. 482. In *Foster v. Commissioner*,<sup>300</sup> taxpayers challenged a reallocation of income by the Commissioner under Code Sec. 482 on grounds that the provision was unconstitutional because it “purport[ed] to vest in the Commissioner the discretion to disregard the statutory structure established by Congress for the taxation of corporations without setting forth a meaningful standard to guide [the Commissioner] in the exercise of that discretion.”<sup>301</sup> The court disagreed for two reasons. First, it recognized that Code Sec. 482 did not allow the Commissioner “to reallocate income at his whim,” but instead imposed a “meaningful standard” by requiring the Commissioner first to determine that reallocation was “necessary in order to prevent evasion of taxes or clearly to reflect the income” of two or more related entities.<sup>302</sup> As its second point, the court simply noted that the nondelegation doctrine was “moribund” and had been abandoned by the Supreme Court for all practical purposes.<sup>303</sup>

*Foster*, however, was decided more than 30 years ago. The Supreme Court’s decision to grant certiorari in *FCC v. Consumers’ Research*<sup>304</sup> suggests that the “intelligible principle” standard may soon be reconsidered. If so, Justice Gorsuch’s framework from *Gundy* or any other alternative approach to nondelegation questions adopted by the Court would likely put Code Sec. 482 and other statutes through a much more rigorous test.

As a final point, one might argue that Congress has approved Treasury’s regulations under Code Sec. 482 and adopted its construction of the arm’s-length standard by legislative re-enactment. The theory underlying this argument would be that Treasury issued regulations defining the arm’s-length standard in 1968 and Congress implicitly adopted Treasury’s definition by later amending Code Sec. 482 without overriding Treasury’s interpretation. The Supreme Court reached a similar conclusion in *Cottage Savings Ass’n v. Commissioner*.<sup>305</sup> In *Cottage Savings*, the Court reviewed a transaction by a savings and loan association, which enabled the association to exchange participation interests in “substantially identical” mortgages and realize tax deductible losses without recording book losses. After the Tax Court and Sixth Circuit reached different conclusions as to whether the losses should be tax-deductible, the Supreme Court ultimately ruled in favor of the taxpayer. The IRS argued that the Code (specifically Code Sec. 1001(a)) required properties exchanged to be “materially different” to qualify a transaction as a disposition of property (and thus capable of generating

tax-deductible losses) and contended the taxpayer had failed such a requirement. The primary questions before the Court were thus twofold: (1) whether Code Sec. 1001(a) included a “material difference” requirement, and (2) if so, whether the taxpayer’s exchange of interests in “substantially identical” mortgages met the requirement.<sup>306</sup>

As relevant for our purposes, the Court answered “yes” to the first question,<sup>307</sup> because the IRS had construed the Code to “embody” a “material difference” requirement in regulations issued under Code Sec. 1001(a)<sup>308</sup> and the IRS’s regulations were a reasonable interpretation of the statute under the legislative re-enactment doctrine:

Congress first employed the language that now comprises §1001(a) of the Code in §202(a) of the Revenue Act of 1924 ... that language has remained essentially unchanged through various reenactments. And since 1934, the Commissioner has construed the statutory term “disposition of property” to include a “material difference” requirement. As we have recognized, “Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.”<sup>309</sup>

Even after concluding Code Sec. 1001(a) required a “material difference,” however, the Court held that the taxpayer had satisfied the requirement (and thus was eligible to claim deductions for its tax losses) because the mortgages it exchanged were secured by different properties and embodied legally distinct entitlements.

Turning back to Code Sec. 482, an argument based on the “legislative re-enactment” doctrine has superficial appeal. Arguably, the doctrine’s logic suggests that by decades of inaction or a statutory amendment, which alters parts of a statutory regime but leaves others intact, Congress ratifies Treasury’s interpretation of statutory terms or delegated authority and thus essentially adopts such interpretations or delegated authority as a legislative enactment. In the case of Code Sec. 482, by adding the statute’s “commensurate with income” standard in 1986 and later adjusting the definition of “intangible property” as used in the statute in 2017 (by incorporation from amendment to Code Sec. 367(d)), Congress could be argued to have adopted the statute’s existing regulatory regime as law. The same analysis could apply to statutory amendments to Code Sec. 1502, described below.

But any such argument runs up against the foundational principle that Congress and the courts cannot use

the legislative re-enactment doctrine to “end around” the lawmaking process the Framers designed. As discussed *supra*,<sup>310</sup> the formal legislative process is designed to promote deliberation and public accountability, particularly when laws restrict individual liberty or affect personal property. The legislative re-enactment doctrine is an interpretive tool designed to test whether an agency’s construction of a statute is reasonable.<sup>311</sup> It does not relieve Congress of the obligation to follow the process the Framers set out. Concluding otherwise would frustrate the Framers’ intent. Rather, to properly adopt Treasury’s definition of the arm’s-length standard and satisfy the Constitution’s separation of powers as well as the non-delegation doctrine, Congress must enact a law expressly adopting the standard through the legislative process spelled out in the Constitution.

### **b. Applying Justice Gorsuch’s Nondelegation Framework**

How would Justice Gorsuch’s three-principle framework from *Gundy* apply to Code Sec. 482 and the related delegation of rulemaking authority under Code Sec. 7805? We address each of the framework’s principles in turn.

#### **Principle I—Has Congress announced a “controlling general policy” (leaving only details to be filled) and articulated standards “sufficiently definite and precise to enable Congress, the courts, and the public to ascertain” whether Congress’s guidance has been followed?**

Focusing on the first sentence of Code Sec. 482, Congress’s “controlling general policy” is to ensure taxpayers’ filings “clearly reflect income” and to prevent tax evasion among related entities. The legislative history behind section 45, the predecessor of Code Sec. 482, also explains that the statute was intended “to prevent evasion” by the shifting of profits, fictitious sales or other methods frequently adopted for the purpose of “milking.”<sup>312</sup> These statements highlight clear policy goals.

Code Sec. 482, however, faces two other significant nondelegation issues under Justice Gorsuch’s framework: (1) Congress’s delegation of rulemaking authority (under Code Sec. 7805) allows Treasury to do far more than merely “fill up details” and (2) Congress’s directives lack definite and precise standards to allow for an assessment of whether Treasury has followed Congress’s policy goals.

First, as illustrated by the many unanswered questions following the enactment of section 45 in 1928, Congress left Treasury with significant policy issues to resolve, placing Treasury in a critical legislative role. In response, Treasury issued regulations in 1968 that presented entirely new concepts, such as the “creation of income”

allocation method, which contradicted Code Sec. 482’s express terms. The extent of Treasury’s authority under Code Sec. 482 is thus unlike *Union Bridge Co. v. United States*, where the Secretary of War could only “execute the clearly-expressed will of Congress” by determining whether bridges posed an obstruction to navigable waterways,<sup>313</sup> or *United States v. Grimaud*, where the Secretary of Agriculture was authorized in the Forest Reserve Act<sup>314</sup> to issue regulations governing “matter[s] of administrative detail” based on knowledge of the harm posed by overgrazing to different forests or during different seasons.<sup>315</sup> In *Union Bridge Co. v. United States*, *United States v. Grimaud*, and several other cases,<sup>316</sup> agencies simply engaged in fact-finding or issued gap-filling rules in furtherance of definite policies established by Congress. Treasury’s role under Code Sec. 482 is fundamentally different.

Congress’s directives to Treasury under Code Sec. 482 also lack definite and precise standards, making it difficult for the courts and public to assess whether Treasury has followed Congress’s policy goals. While Congress’s guidance in Code Sec. 482 may pass muster under the Court’s prevailing “intelligible principle” analysis, Justice Gorsuch’s nondelegation analysis would require more precision and, frankly, work. In *Gundy*, the plurality concluded that SORNA satisfied the “intelligible” principle test, because the Court construed the statute to direct the Attorney General to “apply SORNA to all pre-Act offenders as soon as feasible.”<sup>317</sup> Other Supreme Court decisions have upheld delegations where Congress authorized the executive to define “excessive profits” earned by military contractors<sup>318</sup> and where agencies were directed to act “as public convenience, interest, or necessity require[d]”<sup>319</sup> or in a manner that was “fair and equitable.”<sup>320</sup> In many of these cases, Congress provided no explicit or specific directives.<sup>321</sup> Code Sec. 482’s directive to the Secretary to make adjustments when necessary “to prevent evasion of taxes or clearly to reflect [income]” combined with the directive in Code Sec. 7805 to “prescribe all needful rules and regulations” is similar to (if not more detailed than) other delegations the Court has approved under the intelligible principle test, so Code Sec. 482 would likely survive a nondelegation challenge under current law.

But Justice Gorsuch’s framework would require Congress to do more. Code Sec. 7805 provides blanket rulemaking authority with no “definite” or “precise” standards to guide Treasury’s rulemaking under Code Sec. 482. And, Code Sec. 482 itself provides that “the Secretary *may* distribute, apportion, or allocate gross income, deductions, credits, or allowances ... if he determines [such adjustments are] *necessary* in order to prevent

evasion of taxes or clearly to reflect ... income ...” Must the Secretary make *any* adjustments? How should the Secretary determine whether an adjustment is “necessary”? What criteria should guide that determination? Should a study be conducted to determine whether particular pricing or allocation methods are most appropriate under certain circumstances? Congress does not specify, leaving the Secretary’s delegated authority without meaningful limits. In *Tiger Lily, LLC*, the Sixth Circuit acknowledged that the government’s expansive reading of the Public Health Service Act would have given the CDC director “near-dictatorial power,” requiring greater guidance than Congress provided when it authorized the Secretary to issue “such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases.”<sup>322</sup> The statutory framework of Code Sec. 482 (and Code Sec. 7805) is remarkably similar to the framework at issue in *Tiger Lily, LLC*, and arguably faces the same problem—given the significance of Treasury’s delegated rulemaking authority, one would expect Congress to have provided more definite or precise directives (*i.e.*, greater authority requires greater guidance).

Another instance where Congress’s directives in Code Sec. 482 lack precision involves the “clear reflection of income” standard. Code Sec. 482 references the standard but does not cross-reference any definitions or provide any criteria to help define how the Secretary should apply it. The “clear reflect[ion] [of] income” standard is often disputed in the accounting method context and Code Sec. 446(b) gives the Secretary discretion to determine case-by-case<sup>323</sup> whether taxpayers have satisfied it:

If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary, does clearly reflect income.<sup>324</sup>

Courts have held that the IRS has broad discretion in determining whether or not an accounting method clearly reflects income. The Tax Court in particular has observed that the “Commissioner’s determination is entitled to more than the usual presumption of correctness”<sup>325</sup> based on the Supreme Court’s statement in *Thor Power Tool Co. v. Commissioner* that the IRS’s interpretation of the clear reflection standard “should not be interfered with unless clearly unlawful.”<sup>326</sup> While the Secretary’s application of the “clear reflection of income” standard may have received deference under Code Sec. 446(b) in the past, the Secretary’s interpretation of the same standard under

Code Sec. 482 (and even Code Sec. 446(b)) should receive no such deference post-*Loper Bright*. More fundamentally, Code Sec. 446(b)’s clear reflection standard concerns mere timing differences in recognizing income while Code Sec. 482 results in permanent differences in taxation, so the case law and principles relevant to Code Sec. 446(b) are not particularly relevant to interpreting Code Sec. 482.

Perhaps most critically, Congress’s directives in Code Sec. 482 never reference the term “arm’s length” nor do they meaningfully limit Treasury’s discretion to define the term. Congress could have attempted to define the “arm’s-length standard” itself or required Treasury to provide a definition, but it did not. The legislative history behind the 1968 regulations is also silent as to any criteria to guide Treasury’s rulemaking. Congress asked Treasury to “*explore the possibility* of developing and promulgating regulations ... which would provide additional guidelines and formulas for the allocation of income and deductions in cases involving foreign income.”<sup>327</sup> Congress’s directives were thus entirely discretionary, as in *Gundy*, where SORNA’s delegation to the Attorney General did not require him to impose registration requirements on pre-Act offenders within a certain time frame or by a date certain, or even to act at all.<sup>328</sup>

On this last point, Congress’s statutory scheme in Code Sec. 482 parallels the Universal Service Fund (“USF”) scheme Congress authorized the FCC to establish in *Consumers’ Research v. FCC*.<sup>329</sup> In that case, the FCC established the USF, which was funded through a tax imposed on telecommunication carriers (the “USF Tax”). The Fifth Circuit struck down Congress’s delegation to the FCC, because it supplied no intelligible principle at all<sup>330</sup> and effectively allowed the FCC to “exact as much tax revenue for [USF] projects as [it] [thought was] good.”<sup>331</sup> Congress’s authorizing statute also failed to limit the USF Tax to an amount based on disbursements for USF projects and allowed the FCC discretion to formulate its own intelligible principles so long as they were considered “necessary and appropriate for the protection of the public interest, convenience, and necessity and ... consistent with” the rest of the relevant statutory context.<sup>332</sup>

Code Sec. 482 arguably shares many of these faults. Like the provision of the Telecommunications Act at issue in *Consumers’ Research*, which did not provide meaningful directives to limit the FCC’s discretion, Code Sec. 482 contains no reference to the arm’s-length standard and sets out mere “aspirational” principles rather than “inexorable statutory command[s],” thus offering no meaningful criteria to guide the Secretary in defining the standard. Like the FCC in *Consumers’ Research*, the Secretary is free to devise whatever methods to allocate income the Secretary

thinks are good, even if they disregard Congress’s authorizing statute. Treasury “‘may roam at will,’ disregarding [Congress’s] enumerated principles altogether when it thinks the [clear reflection of income standard] warrants the journey.”<sup>333</sup>

For these reasons, the first principle in Justice Gorsuch’s framework would appear not to justify Congress’s delegation of rulemaking authority under Code Sec. 482.

The discussion above focuses on the first sentence of Code Sec. 482, enacted in 1928, under which Treasury issued regulations defining the “arm’s-length standard.” Congress’s delegation in the second and third sentences of Code Sec. 482 is relatively more defensible, and would appear likely to satisfy Justice Gorsuch’s framework. Those sentences state:

In the case of any transfer (or license) of intangible property (within the meaning of section 367(d)(4)), the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible. For purposes of this section, the Secretary shall require the valuation of transfers of intangible property (including intangible property transferred with other property or services) on an aggregate basis or the valuation of such a transfer on the basis of the realistic alternatives to such a transfer, if the Secretary determines that such basis is the most reliable means of valuation of such transfers.<sup>334</sup>

When Code Sec. 482 was amended in 1986 to implement the “commensurate with income” standard, Congress’s chosen statutory language indicated a “controlling general policy” to reliably value intangible property. The relevant legislative history further specified that the “commensurate with income” standard was intended to overcome the limits of the arm’s-length principle in situations involving transactions for high profit potential intangibles where few, if any, comparable transactions were available. Congress’s statements of a “controlling general policy” thus left Treasury to perform administrative functions and “fill up the details.”<sup>335</sup>

Furthermore, by specifying that income with respect to transfers or licenses of intangibles shall be “commensurate with income attributable to the intangible,” Congress set out a standard “sufficiently definite and precise to enable Congress, the courts and the public to ascertain” whether Congress’s guidance has been followed.<sup>336</sup> This standard is more precise than other standards the Court has upheld under the intelligible principle test,<sup>337</sup> and would also appear to satisfy Justice

Gorsuch’s framework because it provides definite criteria to guide the Secretary’s actions. Congress’s directions to the Secretary in sentences two and three are also mandatory (“the Secretary *shall* require the valuation of transfers ...”), rather than permissive, as in the statute’s first sentence (“the Secretary *may* distribute, apportion, or allocate ...”), which further limits the Secretary’s discretion. Unlike the Attorney General in *Gundy*, who had considerable discretion to decide how and when, *if ever*, to implement SORNA’s registration requirements for pre-Act offenders, the Secretary does not have unfettered discretion under the second and third sentences of Code Sec. 482.

For these reasons, Congress’s delegation in the second and third sentences of Code Sec. 482 appears more defensible against a nondelegation challenge than Congress’s authorization in the first sentence.

### **Principle II—Has Congress prescribed a rule governing private conduct and made the application of the rule depend on executive fact-finding?**

Congress appears to have prescribed a rule governing private conduct in Code Sec. 482 and made the application of the rule depend on executive fact-finding. Congress articulated that the pricing of related party transactions should clearly reflect income and authorized Treasury to determine, in any given case, whether a “distribution, apportionment, or allocation [was] necessary” to achieve that goal. In practice, however, Treasury has done *far more* with its delegated authority than merely make factual determinations; it has created rules and concepts not contemplated within Code Sec. 482 and has “supplied content without which [section 482] literally could not function.”<sup>338</sup> This may prevent the delegation in Code Sec. 482 from satisfying the second principle in Justice Gorsuch’s framework.

To illustrate the potential problem with Code Sec. 482, take *Whitman v. American Trucking Ass’ns* as an example.<sup>339</sup> In that case, Congress directed the EPA to set ambient air quality standards as required “to protect the public health” “[f]or a discrete set of pollutants” based on “the latest scientific knowledge.”<sup>340</sup> Congress thus prescribed a rule governing private conduct (air quality should meet certain standards to protect public health) and then relied on the EPA to give effect to that rule by applying its own scientific expertise to make factual determinations. Congress did not, however, leave the EPA to make rules based on its own policy judgments. Under Code Sec. 482, Congress prescribed the rule that the results of related-party transactions should clearly

reflect income, but said nothing more, so Treasury made its own policy decisions by defining the “arm’s-length standard” and creating a number of related rules and allocation methods, some of which expressly contradicted the text of Code Sec. 482. Treasury also published a series of rules for determining the “arm’s-length” return in transactions involving loans or advances, the performance of services, the use of tangible property, the transfer or use of intangibles, and the sale of tangible property. The “arm’s-length” standard first appeared in Treasury’s regulations in 1934, but it was never defined and is absent from the statutory text of Code Sec. 482. Thus, when the 1968 regulations were issued, neither Congress nor the courts had undertaken to define the arm’s-length standard. That was solely left to Treasury. Far from mere fact-finding or creating administrative “gap filler” rules, Treasury made substantive policy decisions that materially altered Congress’s statutory scheme.

Congress’s rule in Code Sec. 482 does not rely solely on fact-finding by Treasury, so it would not appear to satisfy the second principle in Justice Gorsuch’s framework.

**Principle III—Has Congress assigned a different branch non-legislative responsibilities that are vested separately in the other branch?**

Lastly, in Code Sec. 482, Congress clearly delegated discretionary tax rulemaking authority to Treasury, not responsibilities that are vested separately in the executive branch under Article II. The authority to issue regulations under Code Sec. 482 allows Treasury to “prescrib[e] the rules by which the duties and rights” of citizens are determined, and is therefore a “quintessentially legislative power.”<sup>341</sup> This situation is unlike *Marshall Field & Co. v. Clark*,<sup>342</sup> where Congress’s authorization of the President to suspend duty-free status for certain goods based on other countries’ trade policies could arguably have been upheld as a delegation of foreign affairs powers, which are separately vested in the President under Article II.

Code Sec. 482 does not delegate powers that are vested in the executive branch under Article II and thus cannot be justified under the third principle in Justice Gorsuch’s framework.

**c. Conclusion**

While the second and third sentences of Code Sec. 482 provide sufficiently “definite and precise” standards to allow Congress, the courts, and the public to assess whether Congress’s directives have been followed, the first sentence of Code Sec. 482 does not appear sufficient. Further, Code Sec. 482 does not depend on executive fact-finding for its application and does not involve a

delegation of responsibilities that are vested separately in the executive branch. For these reasons, the first sentence of Code Sec. 482 appears vulnerable to a nondelegation challenge under Justice Gorsuch’s framework,<sup>343</sup> whereas Code Sec. 482’s second and third sentences are arguably more defensible.

**4. Code Sec. 1502 (Consolidated Returns)**

**a. Background**

Under Code Sec. 1501, all members of an affiliated group of corporations may elect to file a consolidated return.<sup>344</sup> The consolidated return rules provide significant practical advantages and tax benefits, and they impact an overwhelming percentage of U.S. corporate taxpayers. Virtually all large U.S. corporations, as well as the domestic subsidiaries of foreign corporations, elect to report their income as part of a consolidated group for federal income tax purposes. For tax year 2013, for example, the government collected \$287 billion in corporate income taxes<sup>345</sup> and roughly 90% (\$260 billion) was paid by active corporations filing consolidated income tax returns.<sup>346</sup> Thus, any rulemaking concerning consolidated income tax returns has deep economic and political significance.

The consolidated return rules are not just practically significant; they are also immensely complicated and raise a number of technical issues when they interact with the Code’s general rules. Rather than enact a comprehensive regime of statutes relating to consolidated returns, Congress enacted Code Sec. 1502, and in two sentences left Treasury to create one of the most complex sets of tax regulations:<sup>347</sup>

The Secretary shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability. In carrying out the preceding sentence, the Secretary may prescribe rules that are different from the provisions of chapter 1 that would apply if such corporations filed separate returns.<sup>348</sup>

Congress first delegated tax rulemaking authority under Code Sec. 1502 to the Commissioner in the Revenue Act of 1928<sup>349</sup> in response to abuse of the consolidated return



rules by taxpayers seeking to maximize the benefits of their consolidated return elections by following the favorable parts of the regulations and challenging the unfavorable parts. The Senate Finance Committee report accompanying the Act acknowledged “many difficult and complicated problems ... in the administration of the provisions permitting the filing of consolidated returns” and found it “necessary to delegate power to the [C]ommissioner to prescribe regulations legislative in character covering them.”<sup>350</sup> The report also included a detailed description of regulations the Commissioner was expected to prescribe. For example, the Commissioner was expected to issue rules governing the “extent to which gain or loss shall be recognized upon the sale by a member of the affiliated group of stock issued by any other member of the affiliated group or upon the dissolution (whether partial or complete) of a member of the group.”<sup>351</sup>

The consolidated return regulations “are legislative in character and have the force and effect of law.”<sup>352</sup> This is apparent in the last sentence of Code Sec. 1502, added in 2004, which clarifies that the regulations may provide rules different from the Code’s income tax provisions that would apply if an affiliated group had filed separate returns.<sup>353</sup> The consolidated return regulations are thus unique because the Secretary is expressly authorized to override the Code in certain situations.<sup>354</sup> Below are several examples from the consolidated return regulations where the Secretary has chosen to override the Code’s default rules:

- The non-applicability of the exclusionary rule for insolvent debtors under Code Sec. 108(a);<sup>355</sup>
- The override of the regular basis rules of Code Sec. 362;<sup>356</sup>
- The suppression of Code Sec. 304;<sup>357</sup>
- The non-applicability of Code Sec. 357(c);<sup>358</sup>
- The non-applicability of Code Sec. 1031;<sup>359</sup>
- The deferral of application of Code Sec. 165(g);<sup>360</sup>
- The exemption from tax of dividends under Code Sec. 301;<sup>361</sup>
- The non-applicability of Code Sec. 362(e)(2) to inter-company transactions occurring on or after September 17, 2008;<sup>362</sup> and
- The applicability of Code Sec. 1001, subject to modification by the consolidated return regulations.<sup>363</sup>

Even with Congress’s broad grant of authority under Code Sec. 1502, however, there are limitations to the Secretary’s discretion. In *American Standard, Inc. v. United States*,<sup>364</sup> the Federal Court of Claims invalidated a portion of Reg. §1.1502-25, because the regulation required a computation method that was in direct

conflict with the statutory purpose behind a related code provision (Code Sec. 922, the Western Hemisphere trade corporations deduction).<sup>365</sup> In reaching its decision, the court recognized that the basic goal of Code Sec. 1502 was to grant the Secretary “the power to conform the applicable income tax law of the Code to the special, myriad problems resulting from the filing of consolidated income tax returns,” but *not* to “choose a method that imposes a tax on income that would not otherwise be taxed.”<sup>366</sup> Similarly, in *Rite Aid Corp. v. United States*,<sup>367</sup> the Federal Circuit Court of Appeals invalidated Reg. §1.1502-20, which prohibited a corporation electing to file its taxes on a consolidated basis from claiming certain shareholder-level losses that would have been fully allowable had the corporation not filed on a consolidated basis.<sup>368</sup> The court first reasoned that the regulation did not address a problem arising from the consolidated return regime, which was a key limitation in Congress’s authorizing statute (Treasury was allowed “to identify and correct instances of tax avoidance created by the filing of consolidated returns”<sup>369</sup>). The court also concluded that the regulation imposed a tax on income of corporations filing consolidated returns that would not otherwise be taxed under the Code.<sup>370</sup> Because the regulation did “not reflect the tax liability of the consolidated group [and was] manifestly contrary to the statute,” the court held that the regulation exceeded Treasury’s authority and was thus invalid.<sup>371</sup>

Several predecessor cases to *Rite Aid* adopted a similar approach to invalidate other regulations promulgated pursuant to Code Sec. 1502.<sup>372</sup> As with the Tax Court’s decision in *Altera* concerning Code Sec. 482, the decisions above from the Federal Claims Court and Federal Circuit Court of Appeals illustrate that while Treasury enjoys broad discretion to issue requirements for participation in the consolidated return regime, those requirements are subject to important limitations and cannot exceed the boundaries prescribed by Congress.<sup>373</sup>

## b. Applying Justice Gorsuch’s Nondelegation Framework

How would Justice Gorsuch’s three-principle framework apply to Congress’s delegation of rulemaking authority under Code Sec. 1502?

**Principle I—Has Congress announced a “controlling general policy” (leaving only details to be filled) and articulated standards “sufficiently definite and precise to enable Congress, the courts, and the public to ascertain” whether Congress’s guidance has been followed?**

Congress announced a clear “controlling general policy” in Code Sec. 1502 by authorizing the Secretary to provide regulations so that the consolidated returns of affiliated groups “reflect the income-tax liability [of the group] and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability.” The Senate Finance Committee added that the delegation was intended to address “many difficult and complicated problems” in the administration of the consolidated return rules.<sup>374</sup>

Congress’s delegation also appears to leave Treasury with primarily administrative “details to be filled.” To be sure, the consolidated return regulations are reticulated and immensely complicated, but they are all targeted toward administering Congress’s general policy—to clearly reflect affiliated groups’ income tax liabilities and prevent tax evasion. Unlike the regulations, allocation methods, and related concepts Treasury devised under Code Sec. 482, Treasury’s role under Code Sec. 1502 appears much more constrained—Treasury was expected to issue regulations addressing a wide variety of technical issues, including issues resulting from the interaction of the consolidated return rules and the Code’s default rules. To underscore this point, the Senate Finance Committee report accompanying the 1928 Revenue Act explicitly set out expectations for rulemaking relating to the consolidated return provisions of the Code and clearly relied on Treasury to address technical gaps in the rules.<sup>375</sup> The Committee’s “expectations” were also much more detailed and targeted than the “aspirational” directives Treasury received from Congress before issuing the 1968 regulations under Code Sec. 482.<sup>376</sup>

The more significant question under Justice Gorsuch’s framework is whether Congress’s delegation in Code Sec. 1502 includes sufficiently definite and precise standards to guide Treasury’s rulemaking and cabin its discretion. The Court’s current approach to nondelegation questions imposes an exceedingly low bar, so Code Sec. 1502 would likely pass muster under current law. *Touby*, *Whitman*, *Lichter*, *National Broadcasting Co.*, and the plurality’s opinion in *Gundy* all suggest that the Court would interpret Code Sec. 1502 to provide an “intelligible principle.” In *Touby*, for example, the Court upheld a delegation to the Attorney General to designate a drug as a controlled substance for purposes of criminal drug enforcement if doing so was “necessary to avoid an imminent hazard to the public safety.”<sup>377</sup> Similarly, in *Whitman*, the Court found an intelligible principle where Congress’s delegation instructed the EPA to set primary ambient air quality standards “the attainment and maintenance of which ... are

requisite to protect the public health.”<sup>378</sup> These delegations are analogous to Congress’s instruction to the Secretary in Code Sec. 1502 to issue regulations “as he may deem necessary” to help clearly reflect the income tax liability of affiliated groups or prevent tax avoidance.

As a further illustration of the intelligible principle standard’s low bar, *Lichter*, *National Broadcasting Co.*, and *Gundy* demonstrate that the Court’s current approach to nondelegation questions can discern an “intelligible principle” even when the authorizing statute contains no explicit directives or guidance. In *Lichter*, the Court looked to the definition of “excess profits” as used in agency practice to supply an intelligible principle because the statute in question contained no directives or guidance.<sup>379</sup> In *National Broadcasting Co.*, the Court upheld a portion of the FCC Act authorizing the FCC to issue regulations “as public convenience, interest, or necessity require[d]” based primarily on the FCC’s understanding of Congress’s interpretation of the “public interest” and not on any express directives.<sup>380</sup> Similarly, in *Gundy*, the plurality unearthed an “intelligible principle” notwithstanding that Congress’s statutory delegation in SORNA provided no directives and left the Attorney General to make his own policy decisions.<sup>381</sup> As such, Congress’s general policy statements and the legislative history behind Code Sec. 1502 would likely satisfy the Court’s current “intelligible principle” standard.<sup>382</sup>

Whether Code Sec. 1502 would satisfy Justice Gorsuch’s framework is less clear. While Code Sec. 1502 *does* delegate authority to the Secretary to “fill in details” to advance Congress’s policy goals, the extent of the delegated authority and its political and economic impact may create obstacles under Justice Gorsuch’s framework. In *Gundy*, Justice Gorsuch would have held SORNA’s delegation to the Attorney General unconstitutional, in part because it granted unbounded legislative power to the executive to address a controversial issue with major policy significance and practical ramifications.<sup>383</sup> Code Sec. 1502 arguably suffers the same defect. It grants the Secretary undisputed legislative authority to create rules governing consolidated return regulations that impact the vast majority of U.S. corporate taxpayers and domestic subsidiaries of foreign corporations. The operation of the consolidated return rules is thus an issue of deep economic importance implicating major policy questions. And, as Justice Kavanaugh recognized in his statement in *Paul v. United States*,<sup>384</sup> unlike the Court’s current approach to nondelegation issues, the approach advocated by Justice Gorsuch would not allow Congress to delegate authority to agencies to

decide major policy questions, even if Congress expressly and specifically delegates such authority.<sup>385</sup>

As discussed with respect to Code Sec. 482, Code Sec. 1502 may also fall short under Justice Gorsuch's framework, because Congress's directives could be viewed as "aspirational" and imprecise. As noted above,<sup>386</sup> the Fifth Circuit invalidated Congress's delegation of authority to the FCC to administer the USF program, partly because the Telecommunications Act provided mere "aspirational" principles instead of "inexorable statutory command[s]" and thus failed to meaningfully direct the FCC's actions. Code Sec. 1502 contains fewer and less precise directives than the provisions at issue in *Consumers' Research*, so it seems unlikely Code Sec. 1502 would satisfy Justice Gorsuch's framework.<sup>387</sup>

Given the economic, political, financial, and practical significance of the consolidated return regulations and Congress's relatively imprecise and aspirational standards, it is at best questionable whether Congress's broad delegation of legislative authority under Code Sec. 1502 would survive Justice Gorsuch's analysis.<sup>388</sup>

**Principle II—Has Congress prescribed a rule governing private conduct and made the application of the rule depend on executive fact-finding?**

Congress prescribed no rule governing private conduct in Code Sec. 1502. It expressly left that job to the executive branch, as illustrated by the Senate Finance Committee's acknowledgment that Congress "found it necessary to delegate power to the commissioner to prescribe regulations legislative in character covering [the consolidated return regulations]."<sup>389</sup> Even if Congress *had* prescribed a rule governing private conduct in Code Sec. 1502, the application of the rule would not depend solely on executive fact-finding. Unlike the statutes at issue in *Marshall Field & Co. v. Clark*,<sup>390</sup> *Union Bridge Co. v. United States*<sup>391</sup> and *United States v. Grimaud*,<sup>392</sup> Code Sec. 1502 does not authorize Treasury to simply discharge administrative functions or make factual findings to give effect to general rules established by Congress.<sup>393</sup>

Under Justice Gorsuch's framework, this principle would not appear to provide a justification for Congress's delegation under Code Sec. 1502.

**Principle III—Has Congress assigned a different branch non-legislative responsibilities that are vested separately in the other branch?**

Here, too, Code Sec. 1502 would not satisfy Justice Gorsuch's nondelegation framework, because Congress has not delegated responsibilities that are vested separately

in the executive branch. Congress admits that it delegated a legislative function to Treasury and, in any event, the authority to issue regulations under Code Sec. 1502 empowers Treasury to "prescrib[e] the rules by which the duties and rights" of citizens are determined, a "quintessentially legislative power."<sup>394</sup>

**c. Conclusion**

Code Sec. 1502 and its legislative history provide sufficiently "definite and precise" standards to allow Congress, the courts, and the public to assess whether Congress's directives have been followed, so it would appear to satisfy the Court's current approach to non-delegation questions. However, Congress's delegation would face obstacles under Justice Gorsuch's nondelegation framework, because Code Sec. 1502 leaves Treasury with extensive policymaking discretion, not merely "details to fill up," and involves major policy questions that Gorsuch's approach would likely require Congress to decide, not agencies.<sup>395</sup> In addition, Code Sec. 1502 does not depend on executive fact-finding for its application and does not involve a delegation of responsibilities that are vested separately in the executive branch. For these reasons, Code Sec. 1502 appears vulnerable to a nondelegation challenge under Justice Gorsuch's framework.

**5. Code Sec. 351(g)(4) (Nonqualified Preferred Stock as "Boot")**

**a. Background**

Code Sec. 351(g) was added to the Code in 1997<sup>396</sup> as part of a statutory amendment to treat specific types of preferred stock that Congress viewed as being relatively secure as property other than stock (*i.e.*, debt-like and thus "boot") under different Code provisions.<sup>397</sup> The stock in question was termed "non-qualified preferred stock" ("NQPS").

For stock to be considered NQPS under Code Sec. 351(g), it must first be "preferred stock" (*i.e.*, stock that is limited and preferred as to dividends and does not participate in corporate growth to any significant extent<sup>398</sup>) where either (1) the holder of the stock has the right to require the issuer or a related person to redeem or purchase the stock, (2) the issuer or a related person is required to redeem or purchase the stock, (3) the issuer or a related person has the right to redeem or purchase the stock and, as of the issue date, it is more likely than not that such right will be exercised, or (4) the dividend rate on the stock varies in whole or in part (directly or

indirectly) with reference to interest rates, commodity prices, or other similar indices.<sup>399</sup> Congress specified certain limitations and exceptions to these rules. As for the limitations, the first three criteria above “only [apply] if the right or obligation [referenced] therein may be exercised within the 20-year period beginning on the issue date of [the] stock and such right or obligation is not subject to a contingency which, as of the issue date, makes remote the likelihood of the redemption or purchase.”<sup>400</sup> As for the exceptions, a right or obligation will not be treated as described in the first three criteria above if “(I) it may be exercised only upon the death, disability, or mental incompetency of the holder, or (II) in the case of a right or obligation to redeem or purchase stock transferred in connection with the performance of services for the issuer or a related person (and which represents reasonable compensation), it may be exercised only upon the holder’s separation from service from the issuer or a related person.”<sup>401</sup> Once stock is classified as NQPS, it is generally treated as “boot,” which triggers gain recognition for tax purposes in transactions otherwise subject to Code Secs. 351, 354, 355, 356 and 1036.

In the time leading up to Code Sec. 351(g)’s enactment, preferred stock had been “widely used in corporate transactions to afford taxpayers non-recognition treatment, even though the taxpayer[s] [received] relatively secure instruments in exchange for relatively risky instruments.”<sup>402</sup> Congress believed it was appropriate to view such instruments more like debt and thus as taxable consideration when received since the investor had “obtained a more secure form of investment.”<sup>403</sup> The House Committee Report accompanying the 1997 amendment described two instances in which taxpayers received a “secure” type of preferred stock, both illustrating the types of instruments and situations targeted by Code Sec. 351(g).<sup>404</sup> The first example involved “auction rate” preferred stock, which includes a mechanism to reset the stock’s dividend rate so that it tracks interest rate changes over the term of the instrument (thus diminishing any risk that the value of the preferred stock would change if interest rates changed). The second example described a “National Starch Transaction,” based off the 1978 acquisition of National Starch & Chemical Corp. by a subsidiary of Unilever United States, Inc., in which certain shareholders exchanged target company stock for preferred stock in a Code Sec. 351 nonrecognition transaction.

As a result of new Code Sec. 351(g), when a taxpayer exchanged property for preferred stock in certain transactions, “gain but not loss [would be] recognized.”<sup>405</sup> Congress delegated broad authority to Treasury to

prescribe regulations affecting the treatment of NQPS and otherwise work out the details of the new rule:

The Secretary may prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection and sections 354(a)(2)(C), 355(a)(3)(D), and 356(e). The Secretary may also prescribe regulations, consistent with the treatment under this subsection and such sections, for the treatment of nonqualified preferred stock under other provisions of this title.<sup>406</sup>

The Conference Committee noted that Treasury had regulatory authority to “(1) apply installment sale-type rules to [certain] preferred stock ... and (2) prescribe treatment of [certain] preferred stock ... under other provisions of the Code (e.g., Secs. 304, 306, 318, and 368(c)).”<sup>407</sup>

After the 1997 amendment, the tax community understood that Treasury had been granted sweeping authority to prescribe regulations governing the “treatment of NQPS under any provision of the Code.”<sup>408</sup> The community also raised substantive concerns with the amendment:

Once stock is classified as NQPS, it is generally treated as property other than stock for purposes of taxing the recipient of the NQPS in transactions otherwise subject to Sections 351, 354, 355, 356 and 1036, but apparently is treated as stock for all other purposes, including the taxation of other participants to the same transaction. This somewhat schizophrenic approach muddies the waters of subchapter C at a time when it appeared they were on their way to becoming clearer and more straightforward to navigate. Thus, we believe it is important that the Internal Revenue Service (the “Service”) issue guidance to clarify both definitional issues and the scope of applicability of the new NQPS rules.<sup>409</sup>

Since the 1997 amendment to add Code Sec. 351(g), Treasury has not finalized any significant regulations under the authority provided in Code Sec. 351(g)(4). This, however, would not insulate the statute from a nondelegation challenge. In *Whitman*, the Court recognized that “an agency can[not] cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of [Congress’s authorizing] statute.”<sup>410</sup> Similarly, in *Department of Transportation v. Association of American Railroads*,<sup>411</sup> Justice Alito recognized that “it is no antidote” if recipients of illicitly delegated authority opt not to use it, because “[i]t is Congress’s decision to delegate that is unconstitutional.”<sup>412</sup>

## b. Applying Justice Gorsuch’s Nondelegation Framework

How would Justice Gorsuch’s three-principle framework apply to Congress’s delegation of rulemaking authority under Code Sec. 351(g)(4)?

### **Principle I—Has Congress announced a “controlling general policy” (leaving only details to be filled) and articulated standards “sufficiently definite and precise to enable Congress, the courts, and the public to ascertain” whether Congress’s guidance has been followed?**

Congress announced a clear “controlling general policy” at the time Code Sec. 351(g)(4) was enacted. As noted above, Congress explained that preferred stock had been “widely used” to afford taxpayers non-recognition treatment in corporate transactions, even when they received relatively secure instruments in exchange for relatively risky instruments.<sup>413</sup> To address this pattern, a statutory amendment was necessary to treat certain preferred stock received in such exchanges as debt-like “boot,” triggering gain recognition. Congress specified the terms that converted preferred stock into such debt-like boot, and provided statutory exceptions and limitations to clarify when gain would and would not be recognized. Congress then delegated rulemaking authority to Treasury to “fill up the details” in furtherance of this targeted policy, but anchored this delegation in statutory definitions that delineate what stock constitutes debt-like boot, thus providing taxpayers notice of when they could recognize gain in otherwise tax-deferred transactions.

Congress also provided definite and precise standards to guide Treasury’s discretion. In Code Sec. 351(g)(4), Congress clearly limited Treasury’s discretion by specifying that any regulations must be consistent with “this subsection [*i.e.*, 351(g)] and sections 354(a)(2)(C), 355(a)(3)(D), and 356(e).”<sup>414</sup> The Conference Committee Report accompanying the 1997 amendment also specified that Treasury was authorized to “(1) apply installment sale-type rules to [certain] preferred stock ... and (2) prescribe [the] treatment of [certain] preferred stock ... under other provisions of the Code (*e.g.*, Secs. 304, 306, 318, and 368(c)).”<sup>415</sup> Congress’s directives in Code Sec. 351(g)(4) and its legislative history are therefore much more definite and precise than several of the statutes the Court upheld in the earliest days of the nondelegation doctrine. For example, in *Buttfield v. Stranahan*,<sup>416</sup> the Court upheld Congress’s directive to the Treasury Secretary to “fix and establish uniform standards of

purity, quality and fitness for consumption of all kinds of teas imported into the United States.”<sup>417</sup> And in *Yakus v. United States*,<sup>418</sup> the Court upheld a portion of the Emergency Price Control Act of 1942, which authorized an agent of the executive branch to “promulgate regulations fixing prices of commodities which ‘in his judgment will be generally fair and equitable and will effectuate the purposes of this Act.’”<sup>419</sup> Compared to the Court’s past nondelegation precedent, Congress’s authorization in Code Sec. 351(g)(4) contains relatively definite and precise standards.

In addition, Treasury’s role under Code Sec. 351(g)(4) is arguably limited to merely “filling up the details” of Congress’s general policy scheme. Unlike the delegations in Code Secs. 482 and 1502, Congress provided a definite rule in Code Sec. 351(g) (*i.e.*, “nonqualified preferred stock shall be treated as other property” or “boot” for purposes of determining taxable gain<sup>420</sup>), established fairly precise details regarding what constitutes NQPS, and authorized Treasury to issue consistent implementing regulations under Code Sec. 351(g) or other sections of the Code.

Based on the definite and precise standards in Code Sec. 351(g)(4) and the related legislative history, Congress’s delegation would appear to pass muster under the Court’s current approach to nondelegation questions *and* under Justice Gorsuch’s framework. This is not a case like *Gundy*, where Congress delegated authority to the Attorney General to apply SORNA’s registration requirements with complete discretion and no directives. Treasury’s discretion under Code Sec. 351(g)(4) is also much more cabined than the wide discretion sought by the CDC director in *Tiger Lily, LLC* or provided to the FCC in *Consumers’ Research*. In *Tiger Lily, LLC*, the government’s interpretation of Congress’s authorizing statute would have allowed the CDC to exercise “near-dictatorial power” and “do anything it can conceive of to prevent the spread of disease.”<sup>421</sup> And, in *Consumers’ Research*, Congress’s delegation allowed the FCC unfettered discretion to “exact as much tax revenue for universal service projects as [the] FCC [thought was] good.”<sup>422</sup> In those cases, the Sixth and Fifth Circuits, respectively, recognized that the authorizing statutes failed to meaningfully limit the agencies’ discretion and provided no criteria to measure the agencies’ actions. Code Sec. 351(g)(4) imposes guidelines for the Secretary’s exercise of discretion, which though broad, is not unfettered.

For each of these reasons, Code Sec. 351(g)(4) would appear to satisfy the first principle of Justice Gorsuch’s nondelegation framework.

**Principle II—Has Congress prescribed a rule governing private conduct and made the application of the rule depend on executive fact-finding?**

Congress has prescribed a rule governing private conduct in Code Sec. 351(g), which generally treats NQPS as “other property,” triggering taxable gain in certain transactions.<sup>423</sup> The application of Congress’s rule, however, does not depend on executive fact-finding, because Treasury is authorized to issue substantive rules regarding the tax treatment of certain forms of stock. Congress could have drafted a statute that was dependent on executive fact-finding, as in *Touby v. United States*,<sup>424</sup> where the Attorney General was authorized to designate a drug as a controlled substance for purposes of criminal drug enforcement if doing so was “necessary to avoid an imminent hazard to the public safety” based on specified factors.<sup>425</sup> Here, Congress could have conditioned Treasury’s authority to “prescribe regulations ... for the treatment of nonqualified preferred stock under other [Code] provisions” on, for example, a finding by the Secretary that such regulations would not apply to holders who retain meaningful participation in a corporate venture’s prospects.<sup>426</sup> Such an authorization would require Treasury to engage in fact-finding before applying Congress’s NQPS rule and effectively limit Treasury’s discretion. The fact that Congress did not include such a requirement in the statute suggests that this principle in Justice Gorsuch’s framework would not justify Congress’s delegation in Code Sec. 351(g)(4).

**Principle III—Has Congress assigned a different branch non-legislative responsibilities that are vested separately in the other branch?**

Congress’s delegation in Code Sec. 351(g)(4) would also find no justification under the third principle in Justice Gorsuch’s nondelegation framework, because Congress has not delegated responsibilities that are vested separately in the executive branch. This is not a situation involving foreign affairs powers or war powers, where the executive branch has exclusive jurisdiction. If Treasury were to issue regulations concerning the tax treatment of NQPS, it would not be exercising responsibilities vested in the executive branch but would instead be “prescrib[ing] the rules by which the duties and rights’ of citizens are determined,” a “quintessentially legislative” power.<sup>427</sup>

**c. Conclusion**

Code Sec. 351(g)(4) provides sufficiently “definite and precise” standards to guide Treasury’s discretion and allow Congress, the courts, and the public to assess whether Congress’s directives have been followed. The statute

also leaves Treasury with merely “details to fill up” in furtherance of a general policy, unlike the much broader delegations in Code Secs. 482 and 1502. While Code Sec. 351(g)(4) delegates broad rulemaking authority, to be sure, Treasury’s discretion is significantly anchored by limitations in the statutory text and the relevant legislative history. Congress, for example, made sure to specify that Treasury’s regulations concerning the treatment of NQPS for purposes of other Code sections *must be consistent* with the treatment under Code Secs. 351(g) “and sections 354(a)(2)(C), 355(a)(3)(D), and 356(e).”<sup>428</sup> Congress also specified that Treasury’s regulations under Code Sec. 351(g)(4) must be “necessary or appropriate to carry out the purposes” of Code Sec. 351(g) more broadly. As in *National Broadcasting Co. v. United States*,<sup>429</sup> where the Court relied on “[t]he purpose of the Act” among other context clues to supply an intelligible principle,<sup>430</sup> the legislative history of Code Sec. 351(g) provides further anchoring. The Conference Committee report accompanying the 1997 Act noted that Treasury had regulatory authority to “(1) apply installment sale-type rules to [certain] preferred stock ... and (2) prescribe treatment of [certain] preferred stock ... under other provisions of the Code (e.g., Secs. 304, 306, 318, and 368(c)).”<sup>431</sup> The House Committee Report also described two instances in which taxpayers received a “secure” type of preferred stock, giving Treasury an illustration of the types of instruments and transactions targeted by the amendment.<sup>432</sup>

For these reasons, Code Sec. 351(g)(4) would appear to constitute a valid delegation of legislative authority under both the Court’s current approach to nondelegation issues and Justice Gorsuch’s three-principle framework.

**H. Conclusion**

Twenty years ago, Treasury and the IRS considered themselves exempt from the requirements of the APA and general administrative law doctrines,<sup>433</sup> and judicial decisions striking down tax regulations were relatively rare. Today, however, the law and the legal environment have evolved. Treasury and the IRS have capitulated to the APA, the Supreme Court has eliminated any notion of tax exceptions to administrative law doctrines,<sup>434</sup> and the Court’s recent overruling of *Chevron* deference will trigger greater judicial scrutiny of agency rulemaking, as reflected in the Tax Court’s recent decision in *Varian*.<sup>435</sup> And, to counter the heightened scrutiny, Congress will likely intensify its use of explicit statutory delegations to agencies, including Treasury and the IRS.

At the same time, several Supreme Court justices have called for a renewed focus on nondelegation principles and promised to police statutory delegations to agencies, primarily to reprioritize constitutional principles such as the separation of powers. This trend began in 1980, when then-Justice William Rehnquist announced in *Industrial Union Department* that “the buck stops with Congress” when “fundamental policy decisions underlying important legislation” need to be made.<sup>436</sup> Following suit, Justice Thomas later questioned the adequacy of the “intelligible principle” test as a Constitutional safeguard and expressed a willingness to reconsider the Court’s nondelegation jurisprudence,<sup>437</sup> specifically to re-focus on the Constitution’s separation of powers.<sup>438</sup> And, most recently, Justice Gorsuch set forth a three-principle framework for assessing nondelegation questions that could preview the Court’s future approach.<sup>439</sup> Chief Justice Roberts and Justice Thomas joined in Justice Gorsuch’s dissent, and Justices Alito<sup>440</sup> and Kavanaugh<sup>441</sup> have also expressed an interest in reconsidering the Court’s approach to nondelegation questions. With the Supreme Court’s recent grant of certiorari in *FCC v. Consumers’ Research*,<sup>442</sup> the Court now has the opportunity to redefine its approach to nondelegation questions, potentially by adopting Justice Gorsuch’s approach from *Gundy*.

Beyond the Supreme Court, the appellate courts also appear to be taking a more aggressive stance in nondelegation cases, as exhibited by recent decisions from the Sixth, Eleventh, and Fifth Circuits in *Tiger Lily, LLC*,<sup>443</sup> *West Virginia ex rel. Morrissey*,<sup>444</sup> and *Consumers’ Research*,<sup>445</sup> respectively.

If the Supreme Court does, in fact, change its approach to nondelegation questions in any material respect, several of the Code’s broadest delegations of tax rulemaking authority could be vulnerable to nondelegation arguments. As discussed above, Code Secs. 482, 1502, and 351(g)(4) all include broad delegations of authority, and in an area as economically and politically salient as tax, any delegation will be closely scrutinized.

What if Code Sec. 482 or Code Sec. 1502 or both (and the underlying regulations) were invalidated on nondelegation grounds?<sup>446</sup> Code Sec. 482 cases, for example, would presumably be decided based on tax-avoidance rules, the assignment of income doctrine, or similar common law principles. Decisions on these

grounds may not reach different conclusions, but they would create uncertainty. The invalidation of Code Sec. 1502, in contrast, might have a greater practical impact, because taxpayers would have no ability under current law to consolidate income and losses. For this reason, Code Sec. 1502 may be an unlikely target for a nondelegation challenge. In certain situations, however, taxpayers who are disadvantaged under the consolidated return regulations could challenge Code Sec. 1502 on nondelegation grounds as a last resort.

As Justice Gorsuch recognized in *Gundy*, the nondelegation doctrine and its constitutional underpinnings are about *process*,<sup>447</sup> so the remedy for a failed delegation is for Congress to re-do its delegation with greater attention to precision and detail. Given Justice Gorsuch’s principled *Gundy* framework and other justices’ obvious interest in protecting the Constitution’s separation of powers, Congress would do well to adhere to founding principles in drafting statutory delegations. For example, Code Sec. 482 could be re-written to explicitly authorize regulations, acknowledge the arm’s-length principle, and set out comparability factors and allocation methods for Treasury to expand upon with “gap filling” rules. Similarly, Code Sec. 1502 could be re-written to define the “clear reflection of income” standard for purposes of the consolidated return rules or to condition Treasury’s rulemaking on a finding that such rules comport with the “clear reflection of income” standard. In other words, Congress could essentially codify the basic principles and outline of the current regulations under Code Secs. 482 and 1502. Code Sec. 385 might serve as a useful example. In that provision, subsection 385(a) authorizes the Secretary to prescribe regulations “to determine whether an interest in a corporation is to be treated ... as stock or indebtedness.”<sup>448</sup> Subsection 385(b) then requires the Secretary to “set forth factors” to be considered in determining whether a debtor-creditor relationship or a corporation-shareholder relationship exists, and goes even further to set out five illustrative factors to guide the Secretary’s rulemaking.<sup>449</sup> These measures place meaningful limits on Treasury’s discretion and ensure that the buck stops with *Congress*, an elected and accountable body, when critical tax policy decisions are made.<sup>450</sup>

Far from being moribund or dead, the nondelegation doctrine may be back with greater bite and could significantly reshape tax rulemaking in the years ahead.

## ENDNOTES

- <sup>1</sup> *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340 (1974) (“Taxation is a legislative function, and Congress ... is the sole organ for levying taxes ....”); see also MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 334 (2020) (noting that domestic taxation is “especially central to the legislative branch”).
- <sup>2</sup> James R. Hines Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 238-39, 274 (2015).
- <sup>3</sup> *Id.* at 235; see also *id.* at 255 (“Treasury could experiment with tailoring the tax credit in different ways in different years, or for different activities during the same years, to identify the most effective method of encouraging research. An executive agency charged by Congress with trying to stimulate research might be more willing than Congress itself to experiment with alternative approaches despite hostile reactions from some affected taxpayers, understanding that some approaches will be unsuccessful, but persisting with the experiments in the belief that they improve tax policy in the long run.”).
- <sup>4</sup> *Id.* at 268; see also *Foster v. Comm’r*, 80 T.C. 34, 142 (1983) (finding the nondelegation doctrine was moribund and had effectively been abandoned by the U.S. Supreme Court), *aff’d in part, vacated in part*, 756 F.2d 1430 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). At the time, constitutional scholars and Supreme Court justices alike seemed to agree that the doctrine no longer had any bite. See, e.g., *Fed. Power Comm’n v. New England Power Co.*, 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring in the result) (“The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930’s, has been virtually abandoned by the Court for all practical purposes ....”); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 132-33 (1980); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) (“In our view there just is no constitutional nondelegation rule, nor has there ever been.”).
- <sup>5</sup> See, e.g., David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 266 (2013) (noting that broad delegations had become “foundational governmental practice”); F. Andrew Hessick & Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. 163, 170 (2013) (“Congress frequently delegates its power and regularly confers on administrative agencies the power to develop policy through rulemaking.”).
- <sup>6</sup> *Ensuring Lawful Governance and Implementing the President’s ‘Department of Government Efficiency’ Deregulatory Initiative*, Executive Order dated February 19, 2025.
- <sup>7</sup> *King v. Burwell*, 576 U.S. 473, 474, 486 (2015) (citation omitted).
- <sup>8</sup> 144 S. Ct. 2244 (2024).
- <sup>9</sup> *Id.* at 2263.
- <sup>10</sup> See Sections D, E, and F.
- <sup>11</sup> See Section C.3.
- <sup>12</sup> Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C. (“Code”), in effect at all relevant times, and regulation references are to the Code of Federal Regulations, Title 26 (“Reg.”), in effect at all relevant times.
- <sup>13</sup> 588 U.S. 128, 149 (2019) (Gorsuch, J., dissenting).
- <sup>14</sup> See Section F.
- <sup>15</sup> See, e.g., *Consumers’ Rsch. v. FCC*, 109 F.4th 743 (5th Cir. 2024) (citing and/or quoting Justice Gorsuch’s *Gundy* dissent *eight times* in the course of invalidating an agency delegation on nondelegation grounds), *cert. granted*, No. 24-354, 2024 WL 4864036 (U.S. Nov. 22, 2024), and *cert. granted sub nom. Shlb Coal. v. Consumers’ Rsch.*, No. 24-422, 2024 WL 4864037 (U.S. Nov. 22, 2024); *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 773 n.1 (6th Cir. 2023) (Nalbandian, J., dissenting) (acknowledging Justice Gorsuch’s call in *Gundy* for a reconsideration of the Court’s approach to nondelegation questions), *rehearing en banc denied*, No. 22-3772, 2023 WL 8947131 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2490 (2024); *Guedes v. Bureau of Alcohol*, 66 F.4th 1019, 1030-31 (D.C. Cir. 2023) (Walker, J., dissenting) (citing Justice Gorsuch’s *Gundy* dissent in support of the proposition that the Constitution’s “[separation of powers] safeguards are not what they used to be”), *cert. granted, judgment vacated*, 144 S. Ct. 2676 (2024); *Tiger Lily, LLC v. U.S. Dep’t of Hous. & Urb. Dev.*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring) (“The constitutional design is frustrated if ‘Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.’” (quoting Justice Gorsuch’s *Gundy* dissent)).
- <sup>16</sup> 144 S. Ct. 2244 (2024). For purposes of simplicity, this article does not discuss *Loper Bright*’s sister case, *Relentless, Inc. v. Department of Commerce*. The two cases share similar facts, the same legal issues, and were addressed together by the Supreme Court.
- <sup>17</sup> See Brief for Petitioners, *Loper Bright Enters. v. Raimondo*, No. 22-451, 2023 WL 4666165, at \*47-51 (U.S. July 17, 2023).
- <sup>18</sup> *Loper Bright Enters.*, 144 S. Ct. at 2265 (“*Chevron* defies the command of the APA that ‘the reviewing court’—not the agency whose action it reviews—is to ‘decide all relevant questions of law’ and ‘interpret ... statutory provisions.’” (quoting APA, 5 U.S.C. §706)); see 5 U.S.C. §706 (specifying that courts, not agencies, will decide “all relevant questions of law” arising on review of agency action (emphasis added)); THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (envisioning that “interpretation of the laws” would be “the proper and peculiar province of the courts”); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).
- <sup>19</sup> See 5 U.S.C. §§706(2)(A), (E).
- <sup>20</sup> *Loper Bright Enters.*, 144 S. Ct. at 2261.
- <sup>21</sup> *Id.* at 2271, 2273.
- <sup>22</sup> *Id.* at 2263 (emphasis added) (citations omitted).
- <sup>23</sup> *Id.* at 2257-60 (discussing the judiciary’s historical role as adjudicator of “‘cases’ and ‘controversies,’” and final interpreter of the laws, as well as limited exceptions warranting deference to the Executive Branch).
- <sup>24</sup> *Id.* at 2257 (citing THE FEDERALIST NO. 78, at 522, 525 (Alexander Hamilton)).
- <sup>25</sup> *Id.* at 2275, 2284-85 (Gorsuch, J., concurring).
- <sup>26</sup> *Id.* at 2274 (Thomas, J., concurring).
- <sup>27</sup> *Id.* at 2275.
- <sup>28</sup> The Code already contains explicit delegations of tax rulemaking authority, so this is nothing new for tax purposes, but any explicit delegations must still satisfy the Constitution and the APA. See, e.g., Code Sec. 245A(g) (“The Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the provisions of this section, including regulations for the treatment of United States shareholders owning stock of a specified 10 percent owned foreign corporation through a partnership.”); Code Sec. 382(m) (providing a detailed list of topics to be addressed in regulations); Code Sec. 385(a) (“The Secretary is authorized to prescribe such regulations as may be necessary or appropriate to determine whether an interest in a corporation is to be treated for purposes of this title as stock or indebtedness (or as in part stock and in part indebtedness).”); Code Sec. 951A(d)(4) (“The Secretary shall issue such regulations or other guidance as the Secretary determines appropriate to prevent the avoidance of the purposes of this subsection, including regulations or other guidance which provide for the treatment of property if—(A) such property is transferred, or held, temporarily, or (B) the avoidance of the purposes of this paragraph is a factor in the transfer or holding of such property.”); Code Sec. 1275(d) (“The Secretary may prescribe regulations providing that where, by reason of varying rates of interest, put or call options, indefinite maturities, contingent payments, assumptions of debt instruments, or other circumstances, the tax treatment under this subpart (or section 163(e)) does not carry out the purposes of this subpart (or section 163(e)), such treatment shall be modified to the extent appropriate to carry out the purposes of this subpart (or section 163(e)).”).
- <sup>29</sup> 163 T.C. No. 4 (2024). The appellate courts have also applied *Loper Bright* in tax cases. For example, in *Memorial Hermann Accountable Care Organization v. Commissioner*, 120 F.4th 215 (5th Cir. 2024), the Fifth Circuit, citing *Loper Bright*, concluded it was “no longer ... required to provide ‘*Chevron* deference’ to the Treasury’s interpretation of §501(c)(4),” although Treasury’s interpretation could be considered, *id.* at 219. The case required the court to decide the appropriate standard to apply for purposes of determining Memorial Hermann Accountable



Care Organization's tax-exempt status under Code Sec. 501(c)(4).

- <sup>30</sup> Pub. L. No. 115-97, 131 Stat. 2054 (2017).
- <sup>31</sup> TCJA §14101(f), 131 Stat. at 2192.
- <sup>32</sup> See 26 U.S.C. §78 (1976).
- <sup>33</sup> TCJA §14301(d), 131 Stat. at 2225.
- <sup>34</sup> *Varian*, 163 T.C. No. 4, at 14 (“[S]ection 78 provides that Varian must treat the amount to which section 78 applies as a dividend received from its foreign subsidiaries for all relevant purposes of the Code, and section 245A(a) provides a deduction for the foreign-source portion of any dividend received from such subsidiaries. The obvious conclusion is that section 245A and section 78, read together, authorize Varian to deduct its section 78 dividend for the 2018 Year. And no other provision in effect for that year disallows the deduction. Rather, we agree with Varian that the disparate effective dates for new section 245A and the amendments to section 78 resulted in a gap period in which its section 78 dividend qualified for a deduction under section 245A.”).
- <sup>35</sup> *Id.* at 29 (quoting *Loper Bright Enters.*, 144 S. Ct. at 2266, 2273).
- <sup>36</sup> *Id.* (quoting *Loper Bright Enters.*, 144 S. Ct. at 2266).
- <sup>37</sup> *Id.* at 31.
- <sup>38</sup> “The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others.” JOHN LOCKE, SECOND TREATISE OF GOVERNMENT sec. 141 (1690), <https://www.gutenberg.org/files/7370/7370-h/7370-h.htm>.
- <sup>39</sup> THE FEDERALIST NO. 48, at 309-12 (James Madison).
- <sup>40</sup> U.S. CONST. art. I, §7.
- <sup>41</sup> The Framers effected a drawn-out lawmaking process not only limited the government’s ability to restrict fundamental freedoms, but also promoted deliberation and safeguarded unpopular minorities from the tyranny of the majority. See generally THE FEDERALIST NO. 73 (Alexander Hamilton), No. 51 (James Madison).
- <sup>42</sup> See *Tiger Lily, LLC v. U.S. Dep’t of Hous. & Urb. Dev.*, 5 F.4th 666, 675 (6th Cir. 2021) (Thapar, J., concurring) (“Congressional bureaucracy leaves the law-making power with the people’s representatives—right where the Founders put it. Regardless of who came up with the idea, [t]he sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow.” (quoting *Gundy v. United States*, 588 U.S. 139, 155 (2019) (Gorsuch, J., dissenting))).
- <sup>43</sup> Some scholars argue the doctrine originated in *The Cargo of the Brig Aurora v. United States*, in which a litigant first asserted an argument on nondelegation grounds. See 11 U.S. (7 Cranch) 382, 387 (1813) (responding to a claim that Congress delegated too much authority to the President by noting that “[t]he legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact,

upon which the law should go into effect.”); see also, e.g., Gary Lawson, Delegation and Original Meaning, 88 VA. L. REV. 327, 363-64 (2002) (associating the nondelegation doctrine with *The Brig Aurora*); Aaron Gordon, Nondelegation, 12 N.Y.U. J.L. & LIBERTY 718, 751 (2019) (identifying *The Brig Aurora* as the first nondelegation case).

- <sup>44</sup> 23 U.S. (10 Wheat.) 1 (1825).
- <sup>45</sup> *Id.* at 43.
- <sup>46</sup> 143 U.S. 649 (1892).
- <sup>47</sup> “The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government.” *Id.* at 694 (quoting *Pennsylvania. ex rel. McClain v. Locke*, 72 Pa. 491 (1873)).
- <sup>48</sup> 204 U.S. 364 (1907).
- <sup>49</sup> *Id.* at 386.
- <sup>50</sup> *Id.*
- <sup>51</sup> 220 U.S. 506 (1911).
- <sup>52</sup> *Id.* at 522.
- <sup>53</sup> *Id.*
- <sup>54</sup> See, e.g., *In re Kollock*, 165 U.S. 526, 536 (1897) (upholding delegation where the authorized acts were “merely in the discharge of an administrative function”); *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904) (upholding delegation where Congress had set “a primary standard” by statute); *Interstate Com. Comm’n v. Goodrich Transit Co.*, 224 U.S. 194, 214 (1912) (upholding delegation where Congress had “laid down the general rules of action under which [the authorized agency] shall proceed”).
- <sup>55</sup> *Grimaud*, 220 U.S. at 517 (“It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations.”).
- <sup>56</sup> 293 U.S. 388 (1935).
- <sup>57</sup> *Id.* at 414-15.
- <sup>58</sup> *Id.* at 415.
- <sup>59</sup> *Id.* at 430.
- <sup>60</sup> 295 U.S. 495 (1935).
- <sup>61</sup> *Id.* at 530.
- <sup>62</sup> *Id.* at 541.
- <sup>63</sup> *Id.* at 542.
- <sup>64</sup> *Id.* at 553 (Cardozo, J., concurring).
- <sup>65</sup> The realpolitik view may argue that the Supreme Court’s reluctance to overrule federal statutes during the New Deal Era was primarily a result of political influence. In 1937, in response to several Supreme Court decisions striking down New Deal laws, the FDR Administration proposed “Court reform” to “pack” the Court with judges supportive of New Deal policies. The Administration’s proposed legislation included pension incentives designed to induce older, anti-New Deal justices to retire, and a new rule, which would create a new Supreme Court seat alongside any justice over age seventy (six of the nine justices then were) who chose not to retire. Within weeks after the Administration’s proposals, the Court changed its approach to New Deal legislation (the so-called “switch in time that saved nine”) and announced broader

constitutional interpretations of federal and state legislative powers. See John Q. Barrett, *Attribution Time: Cal Tinney’s 1937 Quip, “A Switch in Time’ll Save Nine”*, 73 OKLA. L. REV. 229 (2021). The Court’s “switch in time,” however, does not explain the disappearance of the nondelegation doctrine for the rest of the twentieth century. Most importantly, the fact that the “switch in time” had such a profound jurisprudential impact underscores the importance of the Court’s composition, which could soon play a key role in a revival of the nondelegation doctrine. See Section F.

- <sup>66</sup> 276 U.S. 394 (1928).
- <sup>67</sup> *Id.* at 400-03. The Act was intended to secure revenue and enable domestic producers to compete with foreign producers in U.S. markets. *Id.* at 404.
- <sup>68</sup> *Id.* at 409.
- <sup>69</sup> *Id.* at 406-07 (collecting cases).
- <sup>70</sup> *Id.* at 409 (emphasis added).
- <sup>71</sup> The statute in question called for a rigorous factual determination of economic costs based on several factors, see *id.* at 404-05, and thus arguably satisfied the Court’s traditional nondelegation test because it empowered the President to make factual determinations but did not “invest [him] with the power of legislation,” see *Marshall Field & Co.*, 143 U.S. at 692-93; accord *J.W. Hampton*, 276 U.S. at 410.
- <sup>72</sup> See *Panama Refining Co.*, 293 U.S. 388; *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495.
- <sup>73</sup> 319 U.S. 190 (1943).
- <sup>74</sup> *Id.* at 214-15.
- <sup>75</sup> *Id.* at 208-10, 217.
- <sup>76</sup> *Id.* at 225-26.
- <sup>77</sup> *Id.* at 217 (“The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303(g) provides that the Commission shall ‘generally encourage the larger and more effective use of radio in the public interest’; subsection (i) gives the Commission specific ‘authority to make special regulations applicable to radio stations engaged in chain broadcasting’; and subsection (r) empowers it to adopt ‘such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.’”).
- <sup>78</sup> *Id.* at 218-19 (“True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest.”).
- <sup>79</sup> *Id.* at 226 (quoting *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932)).
- <sup>80</sup> 334 U.S. 742 (1948).
- <sup>81</sup> *Id.* at 785.
- <sup>82</sup> 329 U.S. 90 (1946).
- <sup>83</sup> *Id.* at 97.
- <sup>84</sup> *Id.* at 95-96.
- <sup>85</sup> *Id.* at 104.
- <sup>86</sup> *Id.*

- <sup>87</sup> *Id.* 104-05 (citing *N.Y. Cent. Sec. Corp.*, 287 U.S. at 24-25, *Yakus v. United States*, 321 U.S. 414, 419-27 (1944), and the cases cited therein).
- <sup>88</sup> *Id.* at 105 (citing *Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940)).
- <sup>89</sup> *Mistretta v. United States*, 488 U.S. 361, 415-17 (1989) (Scalia, J., dissenting); *ELV*, *supra* note 4, at 132 (“[B]y refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic”); *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 34 (D.C. Cir. 2008) (Brown, J., dissenting) (dissenting from a decision upholding a section of the Indian Reorganization Act, which delegated authority to the Secretary of the Interior to obtain land “for Indians,” because “the majority ... conjure[d] standards and limits from thin air to construct a supposed intelligible principle”) (collecting cases); David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1231 (1985) (“[T]he [intelligible principle] test has become so ephemeral and elastic as to lose its meaning.”); Bernard Schwartz, *Of Administrators and Philosopher-Kings: The Republic, the Laws, and Delegations of Power*, 72 N.W. U.L. REV. 443, 446 (1977) (“[T]he requirement of defined standards has ... become all but a vestigial euphemism”); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 378 (2014) (“[T]he notion of an ‘intelligible principle’ sets a ludicrously low standard for what Congress must supply”); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 138-139 (1995); Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROB., No. 3, pp. 46, 50-51 (Summer 1976); Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1127-28, & n.33 (1977).
- <sup>90</sup> See, e.g., *United States v. Mingo*, 964 F.3d 134, 138-39 (2d Cir. 2020) (upholding as a valid delegation of authority a provision of the Sex Offenders Registration and Notification Act, which permitted the Secretary of Defense to specify what military offenses constitute sex offenses under the Act); *Mich. Gambling Opposition*, 525 F.3d at 30-31, 33 (upholding delegation of authority to obtain land “for Indians” under section 5 of the Indian Reorganization Act, because facially the delegation was no broader than other statutes, which the Supreme Court has upheld, that direct agencies to act in the “public interest” or in a way that is “fair and equitable”).
- <sup>91</sup> *Gundy v. United States*, 588 U.S. 128, 166-67 (2019) (Gorsuch, J., dissenting).
- <sup>92</sup> See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).
- <sup>93</sup> *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).
- <sup>94</sup> *Burwell*, 576 U.S. at 485-86 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000))).
- <sup>95</sup> 597 U.S. 697 (2022).
- <sup>96</sup> *Id.* at 729-30 (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994)).
- <sup>97</sup> *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001).
- <sup>98</sup> *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).
- <sup>99</sup> *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. 109, 117 (2022); see *id.* (“We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.” (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (per curiam))).
- <sup>100</sup> 529 U.S. 120 (2000).
- <sup>101</sup> *Id.* at 159-60.
- <sup>102</sup> *Id.* at 137.
- <sup>103</sup> *Id.* at 139.
- <sup>104</sup> Interestingly, if challenges to delegations increase after *Loper Bright*, courts may initially enforce the major questions doctrine more vigorously as opposed to applying the nondelégation doctrine, particularly absent a Supreme Court decision applying or at least embracing the latter. For example, the Sixth Circuit recently granted a request to stay a rule issued by the FCC that would “classif[y] broadband Internet providers as common carriers subject to heightened regulatory requirements under Title II of the Communications Act of 1934.” *In re MCP No. 185*, No. 24-7000, 2024 WL 3650468, at \*1 (6th Cir. Aug. 1, 2024) (per curiam). The court reasoned that a stay was warranted, because the rule implicated a major question and the FCC had failed to satisfy the high bar for imposing such regulations, so the petitioners challenging the rule were likely to succeed on the merits. *Id.* at \*3. While the Sixth Circuit’s stay decision was grounded in the major questions doctrine, it had the effect of preventing an unlawful delegation of legislative power.
- <sup>105</sup> See, e.g., *United States v. Davis*, 588 U.S. 445 (2019) (holding 18 U.S.C. §924(c) unconstitutionally vague, because the statute’s definition of “crime of violence” did not provide defendants fair warning that mandatory, heightened penalties would apply to their conduct); *Sessions v. Dimaya*, 584 U.S. 148 (2018) (plurality opinion) (holding unconstitutionally vague the residual clause of 18 U.S.C. §16, which defined a “crime of violence” for purposes of many federal statutes); *Johnson v. United States*, 576 U.S. 591 (2015) (invalidating on vagueness grounds the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e), which defined a “violent felony” to include offenses that presented a “serious potential risk of physical injury to another”).
- <sup>106</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); see also *Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (1983) (“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.” (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876))).
- <sup>107</sup> 588 U.S. 445 (2019).
- <sup>108</sup> 18 U.S.C. §924(c)(1)(A).
- <sup>109</sup> *Id.* §924(c)(3)(B).
- <sup>110</sup> *Davis*, 588 U.S. at 447-48.
- <sup>111</sup> See, e.g., *id.* at 451 (“Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers.” (citing *Sessions*, 584 U.S. at 156 (plurality opinion))); see also *Sessions*, 584 U.S. at 181 (Gorsuch, J. concurring in part and concurring in the judgment) (“Although today’s vagueness doctrine owes much to the guarantee of fair notice embodied in the Due Process Clause, it would be a mistake to overlook the doctrine’s equal debt to the separation of powers.”).
- <sup>112</sup> Taking the vagueness doctrine as an example, a statute lacking “sufficiently definite and precise” standards “to enable Congress, the courts, and the public to ascertain” whether Congress’s guidance has been followed creates both delegation issues and provides impermissibly vague guidance to affected citizens. *Yakus*, 321 U.S. at 426; see also, e.g., *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting) (“[T]he insertion into §6(b)(5) [of OSHA, 29 U.S.C. §655(b)(5),] of the words ‘to the extent feasible’ rendered what had been a clear, if somewhat unrealistic, statute into one so vague and precatory as to be an unconstitutional delegation of legislative authority to the Executive Branch.”).
- <sup>113</sup> See Sunstein, *supra* note 93, at 316.
- <sup>114</sup> See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).
- <sup>115</sup> See, e.g., *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (noting the presumption that congressional legislation primarily concerns domestic matters).
- <sup>116</sup> See *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 590 U.S. 604, 621-22 (2020) (“Congress [must] enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.”); see also *Tiger Lily, LLC v. U.S. Dep’t of Hous. & Urb. Dev.*, 5 F.4th 666, 671 (6th Cir. 2021) (“Agencies cannot discover in a broadly worded statute authority to supersede state landlord-tenant law.”); *Nat’l Ass’n of Reg. Util. Comm’rs v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989) (“[T]he FCC may preempt inconsistent state regulation so long as it can show that the state regulation negates a valid federal policy.”).
- <sup>117</sup> See *U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 615 (1992).
- <sup>118</sup> See *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988); *U.S. Trust Co. of N.Y. v. Helvering*, 307 U.S. 57, 60 (1939).
- <sup>119</sup> 448 U.S. 607 (1980) (plurality opinion).
- <sup>120</sup> *Id.* at 687 (Rehnquist, J., concurring).
- <sup>121</sup> *Id.*
- <sup>122</sup> *Id.* at 653-59.
- <sup>123</sup> 452 U.S. 490 (1981).
- <sup>124</sup> See *id.* at 543-48 (Rehnquist, J., dissenting, joined by Burger, C.J.).
- <sup>125</sup> 29 U.S.C. §655(b)(5) (emphasis added).
- <sup>126</sup> See *Am. Textile Mfrs.*, 452 U.S. at 510 (“When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated

- such intent on the face of the statute.” (quoting and discussing Flood Control Act of 1936, 33 U.S.C. §701a; Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. §1347(b)).
- <sup>127</sup> *Id.* at 536 (ellipsis in original) (citation omitted).
- <sup>128</sup> *Id.* at 540.
- <sup>129</sup> *Id.* at 547 (Rehnquist, J., dissenting).
- <sup>130</sup> *Id.* (ellipsis in original) (citation omitted).
- <sup>131</sup> 531 U.S. 457 (2001).
- <sup>132</sup> 42 U.S.C. §7409(b)(1).
- <sup>133</sup> *Whitman*, 531 U.S. at 473 (first alteration in original) (citation omitted).
- <sup>134</sup> *Id.*
- <sup>135</sup> 500 U.S. 160 (1991).
- <sup>136</sup> *Id.* at 163, 166 (citations omitted).
- <sup>137</sup> *Whitman*, 531 U.S. at 487 (Thomas, J., concurring).
- <sup>138</sup> 575 U.S. 43 (2015).
- <sup>139</sup> *See id.* at 45-46, 50-55.
- <sup>140</sup> *See id.* at 66-68 (Thomas, J., concurring).
- <sup>141</sup> *Id.* at 74, 77.
- <sup>142</sup> 588 U.S. 128, 149-79 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.).
- <sup>143</sup> 34 U.S.C. §§20911-20932.
- <sup>144</sup> 34 U.S.C. §20913(d).
- <sup>145</sup> Justice Kavanaugh took no part in the consideration or decision of the case and Justice Alito concurred only in the judgment.
- <sup>146</sup> *Gundy*, 588 U.S. at 136 (plurality opinion).
- <sup>147</sup> *Id.* at 135-36.
- <sup>148</sup> *See id.* at 149 (Gorsuch, J., dissenting) (“The Constitution promises that only the people’s elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation’s chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?”).
- <sup>149</sup> *Id.* at 150. *But see Indus. Union Dep’t, AFL-CIO*, 448 U.S. at 687 (Rehnquist, J., concurring) (“When fundamental policy decisions underlying important legislation... are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process.”).
- <sup>150</sup> *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting).
- <sup>151</sup> *Id.* at 156-57 (ellipsis and second alteration in original) (citation omitted).
- <sup>152</sup> *Id.* at 157-58; *see, e.g., Wayman*, 23 U.S. at 41-43 (upholding a statute instructing federal courts to borrow state-court procedural rules, but allowing them to make certain “alterations and additions,” because Congress had announced a controlling general policy and left the federal courts to do no more than fill up details); *accord Buttfield*, 192 U.S. at 496; *Grimaud*, 220 U.S. at 522; *Goodrich Transit Co.*, 224 U.S. at 215.
- <sup>153</sup> *Yakus*, 321 U.S. at 426.
- <sup>154</sup> In 1869, for example, Congress made the construction of the Brooklyn Bridge depend on a finding by the Secretary of War that the bridge wouldn’t interfere with navigation of the East River. The Court held that Congress “did not abdicate any of its authority” but instead “simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the [S]ecretary of [W]ar as an agent to ascertain that fact.” *Miller v. Mayor of New York*, 109 U.S. 385, 393 (1883).
- <sup>155</sup> Foreign-affairs-related statutes are an example of this type of permissible lawmaking, because foreign affairs powers are constitutionally vested in the executive branch under Article II. *See United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-20 (1936) (explaining that Congress may delegate more broadly in the foreign affairs context because “the President [is] the sole organ of the federal government in the field of international relations”).
- <sup>156</sup> *See Gundy*, 588 U.S. at 169 (Gorsuch, J., dissenting).
- <sup>157</sup> *Id.* at 168-69 (citation omitted).
- <sup>158</sup> *Id.* at 169.
- <sup>159</sup> *See Touby*, 500 U.S. at 166.
- <sup>160</sup> *Gundy*, 588 U.S. at 170 (Gorsuch, J., dissenting).
- <sup>161</sup> *Id.* at 171 (emphasis added) (citation omitted).
- <sup>162</sup> *Id.* at 149 (Alito, J., concurring) (“If a majority of this Court were willing to reconsider the approach [to nondelegation arguments] we have taken for the past 84 years, I would support that effort.”).
- <sup>163</sup> *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J.) (statement regarding denial of cert.).
- <sup>164</sup> *Id.*
- <sup>165</sup> *See Allstates Refractory Contractors, LLC v. Su*, 144 S. Ct. 2490, 2491 (2024) (Thomas, J., dissenting from denial of cert.) (“At least five Justices have already expressed an interest in reconsidering this Court’s approach to Congress’s delegations of legislative power.” (collecting cases)).
- <sup>166</sup> Justice Amy Coney Barrett, who joined the Court after *Gundy*, has also expressed skepticism about certain delegations to the executive branch. *See Amy Coney Barrett, Suspension and Delegation*, 99 CORNELL L. REV. 251 (2014); *see also e.g., Lorenzo d’Aubert & Eric Halliday, Amy Coney Barrett on National Security Law*, LAWFARE (Oct. 20, 2020, 4:16 PM), <https://www.lawfareblog.com/amy-coney-barrett-national-security-law> [<https://perma.cc/G88X-W5BP>] (speculating about Justice Barrett’s position on the nondelegation doctrine); Jonathan H. Adler, *Amy Coney Barrett’s “Suspension and Delegation,”* REASON: VOLOKH CONSPIRACY (Oct. 18, 2020, 7:32 PM), <https://reason.com/volokh/2020/10/18/amy-coney-barretts-suspension-and-delegation/> [<https://perma.cc/KU99-AKGB>] (same).
- <sup>167</sup> 5 F.4th 666 (6th Cir. 2021).
- <sup>168</sup> Ch. 373, 58 Stat. 682 (1944) (codified as amended at 42 U.S.C. §§201-300mm-64).
- <sup>169</sup> 42 U.S.C. §264(a).
- <sup>170</sup> *Id.* (emphasis added).
- <sup>171</sup> *Tiger Lily, LLC*, 5 F.4th at 671.
- <sup>172</sup> *Id.* at 672.
- <sup>173</sup> *Id.*
- <sup>174</sup> *Id.*
- <sup>175</sup> *Id.* at 674 (Thapar, J., concurring). Two years later, Judge Nalbandian expressed similar nondelegation views in dissent in *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755 (6th Cir. 2023), *reh’g en banc denied*, No. 22-3772, 2023 WL 8947131 (6th Cir. Dec. 20, 2023), *cert. denied*, 144 S. Ct. 2490 (2024), noting that the federal courts should end the trend of “tiptoe[ing] around the idea that an act of Congress could be invalidated as an unconstitutional delegation of legislative power.” *Id.* at 769 (Nalbandian, J., dissenting).
- <sup>176</sup> *Tiger Lily, LLC*, 5 F.4th at 675 (Thapar, J., concurring) (quoting *Gundy*, 588 U.S. at 155 (Gorsuch, J., dissenting)).
- <sup>177</sup> 59 F.4th 1124, *reh’g en banc denied*, 82 F.4th 1068 (11th Cir. 2023).
- <sup>178</sup> Pub. L. No. 117-2, 135 Stat. 4 (codified as amended in scattered sections of 15, 26, 29, and 42 U.S.C.).
- <sup>179</sup> *West Virginia ex rel. Morrissey*, 59 F.4th at 1131-32 (alteration in original) (citation omitted).
- <sup>180</sup> *Id.* at 1146 (alteration in original) (citation omitted).
- <sup>181</sup> *Id.* at 1144.
- <sup>182</sup> *Id.* at 1146.
- <sup>183</sup> *Id.* at 1147 (citation omitted).
- <sup>184</sup> *Id.* (citation omitted).
- <sup>185</sup> *Id.* at 1147-48.
- <sup>186</sup> *See* Section C.3.
- <sup>187</sup> 109 F.4th 743 (5th Cir. 2024), (*en banc*), *cert. granted*, No. 24-354, 2024 WL 4864036, and *cert. granted*, No. 24-422, 2024 WL 4864037 (U.S. Nov. 22, 2024).
- <sup>188</sup> Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.).
- <sup>189</sup> *Consumers’ Rsch.*, 109 F.4th at 756 (first alteration in original) (citation omitted).
- <sup>190</sup> *Id.* at 750.
- <sup>191</sup> *Id.* at 748, 756.
- <sup>192</sup> *Id.* at 760.
- <sup>193</sup> 47 U.S.C. §254(d), *held unconstitutional by Consumers’ Rsch. v. FCC*, 109 F.4th 743.
- <sup>194</sup> 47 U.S.C. §254(b)(1), *held unconstitutional by Consumers’ Rsch. v. FCC*, 109 F.4th 743.
- <sup>195</sup> *Consumers’ Rsch.*, 109 F.4th at 760; *see* 47 U.S.C. §254(c)(1) (defining “[u]niversal service” as “an evolving level of telecommunications services that the Commission shall establish periodically” by determining what telecommunications services are “essential to education, public health, or public safety”; are “subscribed to by a substantial majority of residential customers”; are “deployed ... by telecommunications carriers”; or are otherwise “consistent with the public interest, convenience, and necessity”), *held unconstitutional by Consumers’ Rsch. v. FCC*, 109 F.4th 743.
- <sup>196</sup> *Consumers’ Rsch.*, 109 F.4th at 760.
- <sup>197</sup> *Id.*
- <sup>198</sup> *Id.* (alteration in original) (citation omitted).
- <sup>199</sup> 47 U.S.C. §254(b)(6), *held unconstitutional by Consumers’ Rsch. v. FCC*, 109 F.4th 743.
- <sup>200</sup> 47 U.S.C. §254(h)(1)(B), *held unconstitutional by Consumers’ Rsch. v. FCC*, 109 F.4th 743.
- <sup>201</sup> *Consumers’ Rsch.*, 109 F.4th at 760-61 (citation omitted).
- <sup>202</sup> *Id.* at 761 (citations omitted).
- <sup>203</sup> *Id.* at 758.
- <sup>204</sup> *Id.* at 767.
- <sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 763.

<sup>207</sup> *Id.* at 771.

<sup>208</sup> *Id.* at 767 (“[W]e need not hold the agency action before us unconstitutional on [nondelegation grounds] alone because the unprecedented nature of the delegation combined with other factors is enough to hold it unlawful”).

<sup>209</sup> See *infra* note 211.

<sup>210</sup> See *Consumers’ Rsch.*, 109 F.4th at 786 (Elrod, J., concurring) (“I would go one step further and address the lawfulness of each individual delegation. For the reasons explained in the majority’s thorough opinion, Congress’s delegation of legislative power to the FCC and the FCC’s delegation of the taxing power to a private entity each individually contravene the separation of powers principle that undergirds our Constitutional Republic.”).

<sup>211</sup> *FCC v. Consumers’ Rsch.*, No. 24-354, 2024 WL 4864036 (U.S. Nov. 22, 2024); *SHLB Coal. v. Consumers’ Rsch.*, No. 24-422, 2024 WL 4864037 (U.S. Nov. 22, 2024). See, e.g., Christopher Cole, High Court To Review Legality of FCC’s Subsidy Fees, LAW360 (Nov. 22, 2024), [https://www.law360.com/appellate/articles/2260947?nl\\_pr=55a0f953-0ee9-47d3-9219-a43d977a2dd0&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=appellate&utm\\_content=2260947&read\\_main=1&nlsidx=0&nlaidx=0](https://www.law360.com/appellate/articles/2260947?nl_pr=55a0f953-0ee9-47d3-9219-a43d977a2dd0&utm_source=newsletter&utm_medium=email&utm_campaign=appellate&utm_content=2260947&read_main=1&nlsidx=0&nlaidx=0).

<sup>212</sup> Christopher Cole, *High Court Won’t Review FCC’s Universal Service Fund*, LAW360 (June 10, 2024), <https://www.law360.com/articles/1844711/high-court-won-t-review-fcc-s-universal-service-fund>.

<sup>213</sup> See *Consumers’ Rsch. v. FCC*, 67 F.4th 773, 797 (6th Cir. 2023) (denying a challenge to the FCC’s Universal Service Fund program on nondelegation grounds because “Congress provided the FCC with a detailed statutory framework regarding universal service,” which “contain[ed] an intelligible principle because it offer[ed] nuanced guidance and delimited discretion to the FCC”), *reh’g en banc denied*, No. 21-3886, 2023 WL 3807406 (6th Cir., May 30, 2023), *cert. denied*, 144 S. Ct. 2628 (2024).

<sup>214</sup> See *Consumers’ Rsch. v. FCC*, 88 F.4th 917, 923-24, 928 (11th Cir. 2023) (upholding FCC’s Universal Service Fund program against a nondelegation challenge, because Congress provided both “general principles” and “limiting principles” to guide the FCC’s discretion), *cert. denied*, 144 S. Ct. 2629 (2024).

<sup>215</sup> *Consumers’ Rsch. v. FCC*, 109 F.4th 743 (5th Cir. 2024) (*en banc*) (discussed *supra*), *cert. granted*, No. 24-354, 2024 WL 4864036, and *cert. granted*, No. 24-422, 2024 WL 4864037 (U.S. Nov. 22, 2024).

<sup>216</sup> In addition to the nondelegation issues, the Court has asked the parties to address an additional question: “Whether th[e] case is moot in light of the challengers’ failure to seek preliminary relief before the Fifth Circuit.” *FCC v. Consumers’ Rsch.*, No. 24-354, 2024 WL 4864036, at \*1 (U.S. Nov. 22, 2024); *accord SHLB Coal. v. Consumers’ Rsch.*, No. 24-422, 2024 WL 4864037, at \*1 (U.S. Nov. 22, 2024). As such, it is possible

the Court will not need to address the nondelegation doctrine.

<sup>217</sup> *Consumers’ Rsch.*, 109 F.4th at 767.

<sup>218</sup> U.S. CONST. art. I, §8, cl. 1.

<sup>219</sup> *Id.* art. I, §7, cl. 1.

<sup>220</sup> See DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS* 196–203 tbl. 8.2 (1999) (empirical study finding that tax legislation from 1947 through 1992 granted less policy and implementation discretion to agencies than laws passed in any of 50+ other areas of federal policy).

<sup>221</sup> The Constitution’s separation of powers is one of the most important safeguards of individual liberty, including the Lockean rights of life, liberty, and property. See THE FEDERALIST No. 47, at 301 (“No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than [the separation of powers] .... The accumulation of all powers, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced the very definition of tyranny.”); see also *Gundy v. United States*, 588 U.S. 128, 156 (2019) (Gorsuch, J., dissenting) (“[E]nforcing 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.”).

<sup>222</sup> *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

<sup>223</sup> *Tiger Lily, LLC*, 5 F.4th at 674 (Thapar, J., concurring).

<sup>224</sup> See *Gundy*, 588 U.S. at 155-56 (Gorsuch, J., dissenting) (“[B]y directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow. If Congress could pass off its legislative power to the executive branch, the “[v]esting [c]auses, and indeed the entire structure of the Constitution,” would ‘make no sense.’ Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President. And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice.” (alterations in original) (footnotes and citations omitted)).

<sup>225</sup> See *Consumers’ Rsch.*, 109 F.4th at 759 (“Overly broad delegations ... obscure accountability: When elected representatives shirk hard choices, constituents do not know whom to hold accountable for government action.” (citing *Gundy*, 588 U.S. at 156 (Gorsuch, J., dissenting))).

<sup>226</sup> See *Tiger Lily, LLC*, 5 F.4th at 674 (Thapar, J., concurring) (“Of the three branches, Congress

is the most responsive to the will of the people. And the Founders designed it that way for a reason: Congress wields the formidable power of ‘prescrib[ing] the rules by which the duties and rights of every citizen are to be regulated.’ ... If legislators misused this power, the people could respond, and respond swiftly.” (citation omitted)).

<sup>227</sup> 140 S. Ct. 342, 342 (2019) (Kavanaugh, J.) (statement regarding denial of cert.).

<sup>228</sup> *Burwell*, 576 U.S. at 485-86 (citation omitted).

<sup>229</sup> Code Sec. 382(m).

<sup>230</sup> Code Sec. 385(a).

<sup>231</sup> Code Sec. 385(b).

<sup>232</sup> See Code Secs. 385(b)(1)–(5).

<sup>233</sup> Code Sec. 1275(d).

<sup>234</sup> Code Sec. 7805(a).

<sup>235</sup> Code Sec. 482.

<sup>236</sup> See Code Sec. 1502.

<sup>237</sup> Code Sec. 351(g)(4).

<sup>238</sup> *Indus. Union Dep’t, AFL-CIO*, 448 U.S. at 687 (Rehnquist, J., concurring).

<sup>239</sup> *Burwell*, 576 U.S. at 474.

<sup>240</sup> See *Indus. Union Dep’t, AFL-CIO*, 448 U.S. at 687 (Rehnquist, J., concurring) (“When fundamental policy decisions underlying important legislation ... are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process.”); see also *Tiger Lily, LLC*, 5 F.4th at 674 (Thapar, J., concurring) (“The constitutional design is frustrated if ‘Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.’” (quoting *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting))).

<sup>241</sup> See generally Phillip Gall, *Phantom Tax Regulations: The Curse of Spurned Delegations*, 56 TAX LAW. 413 (2003).

<sup>242</sup> *15 West 17th St. LLC v. Comm’r*, 147 T.C. 557, 588 (2016) (Holmes, J., concurring).

<sup>243</sup> *Id.* at 590-91 (Holmes, J., concurring) (“When Congress tells an agency that it shall issue regulations, it is a command to the agency, and not a court, to issue regulations .... When we hold a Code section that tells the Secretary to issue regulations to be self-executing, we arrogate to ourselves what belongs to the Secretary. It is simply not up to us to act as an agency.”) (emphasis in original); see also *Francisco v. Comm’r*, 119 T.C. 317, 336 (2002) (Foley, J., dissenting) (The role of the courts “is to interpret, not make, the law,” and “this Court cannot divine what rules the Secretary would promulgate.”), *aff’d*, 370 F.3d 1228 (D.C. Cir. 2004).

<sup>244</sup> Amandeep S. Grewal, *Substance Over Form? Phantom Regulations and The Internal Revenue Code*, 7 Hous. Bus. & Tax L.J. 42, 55-59 (2006).

<sup>245</sup> See *Wayman*, 23 U.S. at 43.

<sup>246</sup> One in particular is Code Sec. 446(b), which shares many similarities with Code Sec. 482. Both provisions further the same policy goal and authorize the Secretary to make adjustments so that taxpayers’ returns or accounting methods clearly reflect income, and the standards courts employ in cases involving the IRS’s

discretion under Code Sec. 446(b) are similar to the standards employed in cases evaluating allocations proposed under Code Sec. 482. We do not undertake a full analysis of Code Sec. 446(b) in this article.

<sup>247</sup> These provisions would appear to let Treasury override Congress's statutory rule and thus exercise important legislative rulemaking powers; that is, decide the "whether" as opposed to the "how." See, e.g., Code Sec. 199A(g)(5)(A) (iv); Code Sec. 355(e)(3)(A), (B); Code Sec. 367(a) (2), (3).

<sup>248</sup> Code Sec. 482.

<sup>249</sup> See *Altera Corp. v. Comm'r*, 145 T.C. 91, 116-17 (2015) (noting that the regulation in question was issued under the general grant of Code Sec. 7805), *rev'd on other grounds*, 926 F.3d 1061 (9th Cir. 2019); see also, e.g., T.D. 9738, 80 Fed. Reg. 55,538-55,543 (Sept. 16, 2015) (listing Code Sec. 7805 as authority for final and temporary regulations under Code Sec. 482 to clarify the coordination of the transfer pricing rules with other Code provisions); T.D. 9568, 76 Fed. Reg. 80,082-80,136 (Dec. 22, 2011) (listing Code Sec. 7805 as authority for final regulations regarding methods to determine taxable income in connection with a cost sharing arrangement under Code Sec. 482); T.D. 9456, 74 Fed. Reg. 38,830-38,876 (Aug. 4, 2009) (listing Code Sec. 7805 as authority for amendments to regulations under Code Sec. 482 concerning the treatment of services, the allocation of income and deductions from intangible property, and stewardship expenses).

<sup>250</sup> See *Swallows Holding, Ltd. v. Comm'r*, 126 T.C. 96, 129-30 (2006), *vacated*, 515 F.3d 162 (3d Cir. 2008).

<sup>251</sup> 562 U.S. 44, 56-57 (2011).

<sup>252</sup> Code Sec. 7805(a) may have its own nondelegation issues beyond the scope of this article, because it permits the Secretary to issue rules however and whenever necessary for the enforcement of the Code. In *West Virginia ex rel. Morrissey*, 59 F.4th 1124 (11th Cir. 2023), the Eleventh Circuit invalidated Congress's delegation of authority to Treasury to "issue such regulations as may be necessary or appropriate to carry out [the American Rescue Plan Act]," see *id.* at 1146 (alteration in original) (citation omitted), because the statute used "catchall delegation language" that the Supreme Court had "held to be insufficient to delegate major questions," *id.* at 1147 (citing *Burwell*, 576 U.S. at 485-86). Arguably, Congress's general delegation in Code Sec. 7805(a) faces a similar problem.

<sup>253</sup> Code Sec. 482 is also an amalgamation of key themes and principles of tax law, including tax-avoidance principles, the assignment of income doctrine, and the clear reflection of income standard. In any particular situation, it is unclear which of the statute's underlying themes or principles is being applied. Given this imprecision, Code Sec. 482 is often subordinate to its underlying policies as a diagnostic tool. For example, Code Sec. 61(a) and the assignment of income doctrine, although vague, at least provide substantive rules for determining what is taxable and to whom.

<sup>254</sup> *Tiger Lily, LLC*, 5 F.4th at 672 (concluding that the "unfettered power" the CDC sought to wield would likely require greater guidance than the general authorization in Congress's delegating statute).

<sup>255</sup> *Consumers' Rsch.*, 109 F.4th at 760.

<sup>256</sup> For example, the statute provides that telecommunications services "should" be "available at just, reasonable, and affordable rates"; accessible "in all regions of the Nation"; and available to "low-income consumers and those in rural, insular, and high cost areas" at rates "reasonably comparable to rates charged for similar services in urban areas." Code Secs. 254(b)(1)-(3) (emphasis added). The statute further provides that "[e]lementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services." *Id.* §254(b)(6) (emphasis added).

<sup>257</sup> Revenue Act of 1921, ch. 136, §240(d), 42 Stat. 260; Revenue Act of 1924, ch. 234, §240(d), 43 Stat. 288; Revenue Act of 1926, ch. 27, §240(f), 44 Stat. 46.

<sup>258</sup> S. Rep. No. 67-275 (1921), *reprinted in* 1939-1 (Part 2) C.B. 181, 195.

<sup>259</sup> Revenue Act of 1928, ch. 852, §45, 45 Stat. 806 (1928) (emphases added).

<sup>260</sup> See H.R. Rep. No. 70-2 (1927), *reprinted in* 1939-1 (Part 2) C.B. 384, 395.

<sup>261</sup> See, e.g., *Lucas v. Earl*, 281 U.S. 111 (1930).

<sup>262</sup> See Pub. L. No. 83-591, §482, 68A Stat. 162 (1954).

<sup>263</sup> See H.R. Rep. No. 83-1337 at A165 (1954). The House Report stated simply with respect to Code Sec. 482: "This section corresponds to §45 of the 1939 Code. No substantive changes have been made."

<sup>264</sup> In 1986, Congress added the second sentence of Code Sec. 482, which created a "commensurate with income" test for intangibles, as part of the Tax Reform Act of 1986. See Pub. L. No. 99-514, §1231(e)(1), 100 Stat. 2085, 2563 (1986). Congress further updated Code Sec. 482 in 2017 by adding the third (and final) sentence to elaborate on the Secretary's authority over the valuation of transfers of intangible property. See Pub. L. No. 115-97, §14221(b)(2), 131 Stat. 2054, 2219 (2017).

<sup>265</sup> See, e.g., Reg. 118, §39.45-1 (1953), the last published regulations under the Int. Rev. Code of 1939, and Reg. §1.482-1(a)-(c), adopted by T.D. 6595, 1962-1 Cum. Bull. 49.

<sup>266</sup> Reg. §1.482-1(b) (1962) (emphasis added).

<sup>267</sup> See, e.g., *Asiatic Petroleum Co. v. Comm'r*, 31 B.T.A. 1152, 1159 (1935) (explicitly stating in an international §45 case that a sale from a U.S. corporation to a related foreign corporation, "even if not open to the charge of 'fictitious', clearly was not an arm's length transaction"), *aff'd*, 79 F.2d 234 (2d Cir. 1935), *cert. denied*, 296 U.S. 645 (1935); *G.U.R. Co. v. Comm'r*, 41 B.T.A. 223, 226 (1940) (holding that a transaction involving the purchase of stock from a sister corporation at an inflated price and its subsequent sale at a large artificial loss was "no arm's length transaction"), *aff'd*, 117 F.2d 187 (7th Cir. 1941); *Me. Cent. Transp. Co. v. Comm'r*, 42 B.T.A. 350, 354 (1940) (sustaining the IRS's denial under former §45

of a deduction of profits paid by a subsidiary to parent pursuant to a contract because the terms of the contract "were not agreed to by parties with adverse interests dealing at arm's length"); *Raymond Pearson Motor Co. v. Comm'r*, T.C. Memo 1955-260, *rev'd and rem'd*, 246 F.2d 509 (5th Cir. 1957) (finding transaction between two corporations and a related partnership as not being "at arm's length"); *V & M Homes, Inc. v. Comm'r*, 28 T.C. 1121, 1125 (1957) (upholding IRS allocation under former §45 because agreements between three related entities would not "have been entered into in arm's-length negotiations between unrelated organizations"), *aff'd per curiam*, 263 F.2d 837 (6th Cir. 1959); *Idaho Livestock Auction, Inc. v. United States*, 187 F. Supp. 875, 878 (D. Idaho 1960) (holding that the IRS could not allocate income of partnership to a sister corporation where they were not shams and all dealings between them were "conducted at arms length").

<sup>268</sup> See, e.g., *Koppers Co. v. Comm'r*, 2 T.C. 152, 157 (1943) (in finding that a parent corporation properly recognized gain resulting from the purchase from public bondholders at market prices of bonds issued by its wholly owned subsidiary, court noted that "[n]othing ... was taken from [the parent] or conveyed to it over and above what would have passed between petitioner and an uncontrolled corporation in a similar transaction"), *acq.*, 1943 C.B. 14; *Hamburgers York Rd., Inc. v. Comm'r*, 41 T.C. 821, 835 (1964) (considering whether a corporation did not deal with a sister corporation "at arm's length, as one uncontrolled corporation would have dealt with another uncontrolled corporation"), *acq.*, 1965-2 C.B. 5; *W. Braun Co. v. Comm'r*, T.C. Memo 1967-66 (in determining "whether section 482 may be applied, the primary question is whether transactions between taxpayers owned and controlled by the same interests are carried out on the same basis as similar transactions would be carried out between uncontrolled entities"), *rev'd and rem'd*, 396 F.2d 264 (2d Cir. 1968).

<sup>269</sup> 4 T.C. 1215 (1945), *acq.*, 1945 C.B. 6, and *nonacq.*, 1972-2 C.B. 4.

<sup>270</sup> *Id.* at 1233.

<sup>271</sup> *Id.* at 1233-34.

<sup>272</sup> 21 T.C. 953 (1954), *acq.*, 1955-2 C.B. 8, and *acq. withdrawn, nonacq.*, 1972-2 C.B. 4.

<sup>273</sup> Action on Decision, 1972 AOD LEXIS 328, at \*2 (Feb. 14, 1972).

<sup>274</sup> H.R. 10650, 87th Cong. §6 (2d Sess. 1962); H.R. Rep. No. 87-1447, at 28-30 (1962).

<sup>275</sup> H.R. Rep. No. 87-2508, at 19 (1962).

<sup>276</sup> Proposed Reg. §1.482-1(d) and §1.482-2(a)-(c), 20 Fed. Reg. 4256 (1955).

<sup>277</sup> Proposed Reg. §1.482-1(d) and §1.482-2, 31 Fed. Reg. 10294 (1966).

<sup>278</sup> Reg. §1.482-1(d) and §1.482-2, 33 Fed. Reg. 5848 (1968).

<sup>279</sup> Reg. §1.482-2(b)(3) and (7), 34 Fed. Reg. 933 (1969).

<sup>280</sup> See *Smith-Bridgman & Co. v. Comm'r*, 16 T.C. 287, 293 (1951) (holding that Code Sec. 482 does not authorize "the creation of income out of a transaction where no income was realized by any of the commonly controlled businesses"),

- abrogated by *Fegan v. Comm'r*, 71 T.C. 791 (1979); see also *Tennessee-Arkansas Gravel Co. v. Comm'r*, 112 F.2d 508 (6th Cir. 1940); *Laster v. Comm'r*, 43 B.T.A. 159, 175-177 (1940), acq., 1954-1 Cum. Bull. 5, and *aff'd in part, rev'd in part on other grounds*, 128 F.2d 4 (5th Cir. 1942); *Epsen Lithographers, Inc. v. O'Malley*, 67 F. Supp. 181 (D. Neb. 1946); *Texsun Supply Corp. v. Comm'r*, 17 T.C. 433, 443-45 (1951), acq., 1951-1 Cum. Bull. 3.
- <sup>281</sup> The methods were correlative adjustments, offsets, creation of income, non-recognition transactions, and blocked income. Reg. §1.482-1(d)(2)-(6) (1968).
- <sup>282</sup> Thomas E. Jenks, *Treasury Regulations Under Section 482*, 23 TAX LAW. 279, 281-82 (1969).
- <sup>283</sup> *Id.* at 282.
- <sup>284</sup> Reg. §1.482-1(d)(4) (1968).
- <sup>285</sup> Jenks, *supra* note 282, at 286.
- <sup>286</sup> The "creation of income" allocation method generated significant debate among the tax community. See Thomas E. Jenks, *The "Creation of Income" Doctrine: A Comment on the Proposed Section 482 Regulations*, 43 TAXES 486 (1965); Michael Waris Jr., *What's New in Section 482? The Proposed Regulations – First Installment*, 43 TAXES 614, 616 (1965); Richard G. Cohen, *Section 482: Treasury's Efforts to Teach an Old Dog Some New Tricks*, 43 TAXES 835, 838 (1965); Chester C. Hilinski, *New 482 Regs Decrease Latitude of Agents*, 23 J. TAX'N 102, 104 (1965); Arthur J. Rothkopf, *Current Developments in the Field of International Tax Affairs*, 44 TAXES 87, 91 (1966); Peter Miller, *Proposals for Amelioration of Section 482 Allocations Affecting U.S. Taxpayers with Foreign Affiliates*, 44 TAXES 209, 244 (1966); James S. Eustice, *Tax Problems Arising From Transactions Between Affiliated or Controlled Corporations*, 23 TAX L. REV. 451, 489 (1968).
- <sup>287</sup> Regs. §§1.482-2(a)-(e) (1968).
- <sup>288</sup> Reg. §1.482-2(e)(1)(ii) (1968).
- <sup>289</sup> Reg. §1.482-2(e)(1)(iii) (1968).
- <sup>290</sup> Tax Reform Act of 1986, Pub. L. No. 99-514, §1231(e)(1), 100 Stat. 2085, 2562.
- <sup>291</sup> H.R. Rep. No. 99-426, at 423-26 (1985), 1986-3 C.B. (Vol. 2) 1, 423-26.
- <sup>292</sup> H.R. Rep. No. 99-841 (Vol. II), at II-638 (1986) (Conf. Rep.), 1986-3 C.B. (Vol. 4) 1, 638.
- <sup>293</sup> *A Study of Intercompany Pricing under Section 482 of the Code US Internal Revenue Service*, Notice 88-123, 1988 IRB LEXIS 3758, 1988-2 C.B. 458.
- <sup>294</sup> *Id.* at \*2-3.
- <sup>295</sup> This article does not undertake a complete review of the regulations under Code Sec. 482 after 1986.
- <sup>296</sup> 145 T.C. 91 (2015), *rev'd*, 926 F.3d 1061 (9th Cir. 2019).
- <sup>297</sup> *Id.* at 133-34.
- <sup>298</sup> *Altera Corp. & Subsidiaries v. Comm'r*, 926 F.3d 1061, 1078 (9th Cir. 2019).
- <sup>299</sup> *Id.* (citation omitted).
- <sup>300</sup> 80 T.C. 34.
- <sup>301</sup> *Id.* at 141.
- <sup>302</sup> *Id.* at 141-42 (citation omitted).
- <sup>303</sup> *Id.* at 142.
- <sup>304</sup> See *supra* note 211.
- <sup>305</sup> 499 U.S. 554 (1991).
- <sup>306</sup> *Id.* at 560.
- <sup>307</sup> *Id.* at 560-62.
- <sup>308</sup> "Except as otherwise provided ... the gain or loss realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent, is treated as income or as loss sustained." Reg. §1.1001-1 (emphasis added).
- <sup>309</sup> *Cottage Sav.*, 499 U.S. at 561 (citations omitted).
- <sup>310</sup> See Section C.
- <sup>311</sup> See *Cottage Sav.*, 499 U.S. at 560-61 (applying the legislative re-enactment doctrine to uphold Treasury's construction of Code Sec. 1001(a) to include a "material difference" requirement).
- <sup>312</sup> See H.R. Rep. No. 70-2 (1927), *reprinted in* 1939-1 (Part 2) C.B. 384, 395.
- <sup>313</sup> 204 U.S. at 386.
- <sup>314</sup> The Forest Reserve Act authorized the Secretary of Agriculture to "regulate the occupancy and use [of forest reserves] and to preserve the forests from destruction." 220 U.S. at 522.
- <sup>315</sup> *Id.* at 516.
- <sup>316</sup> See, e.g., *In re Kollock*, 165 U.S. at 536 (upholding delegation where the authorized acts were "merely in the discharge of an administrative function"); *Buttfield*, 192 U.S. at 496 (upholding delegation where Congress had set a "primary standard" by statute); *Goodrich Transit Co.*, 224 U.S. at 214 (upholding delegation where Congress had "laid down the general rules of action under which [the authorized agency] shall proceed").
- <sup>317</sup> *Gundy*, 588 U.S. at 135-36.
- <sup>318</sup> *Lichter*, 334 U.S. at 785 (citation omitted).
- <sup>319</sup> *Nat'l Broad. Co.*, 319 U.S. at 214-15 (citation omitted).
- <sup>320</sup> *Yakus*, 321 U.S. at 420; see also *Whitman*, 531 U.S. at 473-75 (same).
- <sup>321</sup> See, e.g., *Lichter*, 334 U.S. at 785; *Nat'l Broad. Co.*, 319 U.S. at 218.
- <sup>322</sup> *Tiger Lily, LLC*, 5 F.4th at 672 (citation omitted).
- <sup>323</sup> *Ford Motor Co. v. Comm'r*, 102 T.C. 87, 91-92 (1994) ("The issue of whether the taxpayer's method of accounting clearly reflects income is a question of fact to be determined on a case-by-case basis.") (citations omitted), *aff'd*, 71 F.3d 209 (6th Cir. 1995).
- <sup>324</sup> Code Sec. 446(b). The regulations under Code Sec. 446(b) further elaborate that an accounting method will ordinarily be regarded as clearly reflecting income if it "reflects the consistent application of generally accepted accounting principles in a particular trade or business in accordance with accepted conditions or practices in that trade or business" and all items of gross income and expense are treated consistently from year to year. Reg. §1.446-1(a)(2).
- <sup>325</sup> *Ansley-Sheppard-Burgess Co. v. Comm'r*, 104 T.C. 367, 370 (1995).
- <sup>326</sup> 439 U.S. 522, 532 (1979) (quoting *Lucas v. Am. Code Co.*, 280 U.S. 445, 449 (1930)).
- <sup>327</sup> H.R. Rep. No. 87-2508, at 19 (1962).
- <sup>328</sup> *Gundy*, 588 U.S. at 151 (Gorsuch, J., dissenting).
- <sup>329</sup> 109 F.4th 743.
- <sup>330</sup> *Id.* at 760.
- <sup>331</sup> *Id.*
- <sup>332</sup> *Id.* at 761 (alteration in original) (citation omitted).
- <sup>333</sup> *Id.* at 761 (citations omitted).
- <sup>334</sup> Code Sec. 482.
- <sup>335</sup> See *id.* (directing the Secretary to "require the valuation of transfers of intangible property").
- <sup>336</sup> *Yakus*, 321 U.S. at 426.
- <sup>337</sup> In *Touby v. United States*, for example, the Court upheld a statute authorizing the Attorney General to schedule certain drugs as controlled substances "where necessary to avoid an imminent hazard to the public safety," 500 U.S. at 163 (citation omitted), and in *Whitman v. American Trucking Ass'ns*, the Court upheld Congress's delegation to the EPA to set primary ambient air quality standards "the attainment and maintenance of which ... are requisite to protect the public health," 531 U.S. at 472 (citation omitted).
- <sup>338</sup> *Kentucky v. Yellen*, 54 F.4th 325, 354 (6th Cir. 2022).
- <sup>339</sup> 531 U.S. 457.
- <sup>340</sup> *Id.* at 473 (alteration in original) (citation omitted).
- <sup>341</sup> *Gundy*, 588 U.S. at 171 (Gorsuch, J., dissenting) (alteration in original) (citation omitted); see also *Am. Textile Mfrs. Inst., Inc.*, 452 U.S. at 547 (Rehnquist, J., dissenting).
- <sup>342</sup> 143 U.S. 649.
- <sup>343</sup> Some may argue that Congress's broad delegation under Code Sec. 482 may be justified by a rule of necessity, as articulated in *American Power & Light Co.* 329 U.S. at 105. Even in situations of "[n]ecessity," however, the Court has recognized that Congress must clearly delineate a general policy, identify the public agency which is to apply it, and set boundaries to cabin the public agency's discretion. See *id.* Code Sec. 482 appears to fail the last and arguably most important requirement.
- <sup>344</sup> An "affiliated group" includes corporations that are related through a common parent corporation that owns at least 80 percent (in terms of voting power and value) of the subsidiary's stock. Code Sec. 1504.
- <sup>345</sup> Federal Tax Revenues by Source, 1934-2018, TAX FOUND., <https://taxfoundation.org/data/all/federal/federal-tax-revenue-source-1934-2018/> (last visited Sept. 5, 2024).
- <sup>346</sup> See SOI Tax Stats – Corporation Data by Type of Tax Return, IRS, [https://www.irs.gov/statistics/soi-tax-stats-corporation-data-by-type-of-return#\\_consolidated](https://www.irs.gov/statistics/soi-tax-stats-corporation-data-by-type-of-return#_consolidated) (last visited Sept. 5, 2024).
- <sup>347</sup> The consolidated return regulations run from Reg. §1.1502-0 through Reg. §1.1502-100.
- <sup>348</sup> Code Sec. 1502.
- <sup>349</sup> Revenue Act of 1928, ch. 852, §45 Stat. 806, 15 (1928).
- <sup>350</sup> *Id.*
- <sup>351</sup> *Id.* Among the other regulations the commissioner was expected to prescribe were regulations governing (1) the basis of property (including property included in inventory) acquired during the period of affiliation by a member of the affiliated group, including the basis of such property after affiliation; (2) the extent to which and the manner in which net losses sustained by a corporation before

it became a member of the group shall be deducted in the consolidated return; and the extent to which and the manner in which net losses sustained during the period for which the consolidated return is filed shall be deducted in any taxable year after the affiliation is terminated in whole or in part; (3) the extent to which and the manner in which gain or loss is to be recognized, upon the withdrawal of one or more corporations from the group, by reason of transactions occurring during the period of affiliation; and (4) that the corporations filing the consolidated return must designate one of their members as the agent for the group. *Id.*

<sup>352</sup> *Union Elec. Co. of Mo. v. United States*, 305 F.2d 850, 854 (Ct. Cl. 1962).

<sup>353</sup> See Code Sec. 1502 (last sentence), added by the 2004 American Jobs Creation Act of 2004 (AJCA), Pub. L. No. 108-357, §844(a), 118 Stat. 1600. This amendment was a response to *Rite Aid Corp. v. United States*, 255 F.3d 1357 (Fed. Cir. 2001).

<sup>354</sup> See Rev. Rul. 76-430 for the IRS's position regarding the "override" capacity of the consolidated return regulations.

<sup>355</sup> See Reg. §1.1502-13(g)(3)(i)(B).

<sup>356</sup> See Reg. §1.1502-31(b)(2).

<sup>357</sup> See Reg. §1.1502-80(b).

<sup>358</sup> See Reg. §1.1502-80(d).

<sup>359</sup> See Reg. §1.1502-80(f).

<sup>360</sup> See Reg. §1.1502-80(c).

<sup>361</sup> See Reg. §1.1502-32(b)(3)(ii).

<sup>362</sup> See Reg. §1.1502-80(h).

<sup>363</sup> See Reg. §1.1502-80(a)(1) ("[I]n a recognition transaction otherwise subject to section 1001, for example, the rules of section 1001 continue to apply, but may be modified by the intercompany transaction regulations under §1.1502-13.").

<sup>364</sup> See 602 F.2d 256 (Ct. Cl. 1979).

<sup>365</sup> See *id.* at 266. Two other cases dealt with the same general issue (*i.e.*, the allocation of income and loss within a consolidated group for purposes of computation of a deduction allowed under prior law by the Code for Western Hemisphere Trading Corporations). See *Union Carbide Corp. v. United States*, 612 F.2d 558 (Ct. Cl. 1979); *Allied Corp. v. United States*, 685 F. 2d 396 (Ct. Cl. 1982).

<sup>366</sup> *Am. Standard, Inc.*, 602 F.2d at 261.

<sup>367</sup> 255 F.3d 1357 (Fed. Cir. 2001).

<sup>368</sup> See *id.* at 1358.

<sup>369</sup> *Id.* at 1359.

<sup>370</sup> See *id.*

<sup>371</sup> *Id.* at 1360.

<sup>372</sup> See *Comm'r v. Gen. Mach. Corp.*, 95 F.2d 759, 761 (6th Cir. 1938) (invalidating a consolidated return regulation because it exceeded Treasury's grant of statutory authority, noting "[t]he authority of the Commissioner to make regulations is admittedly broad ... [t]his does not mean ... that there is power in the Commissioner to amend the statute or to require surrender of any part of the statutory privilege as a condition to the grant of permission to file a consolidated return"); *Joseph Weidenhoff, Inc. v. Comm'r*, 32 T.C. 1222, 1242 (1959) (The consolidated return

statute "does not give [Treasury] authority to prescribe a regulation which will in practical application to a particular taxpayer or group of taxpayers impose a tax on income that would not otherwise be taxed (by limiting the excess profits credit) simply because the taxpayers exercise the privilege of filing consolidated returns, unless it is to prevent tax avoidance").

<sup>373</sup> Following the *Rite Aid* decision, Congress enacted legislation providing that Treasury is permitted under Code Sec. 1502 to issue regulations to override the Code's default rules and provide for different treatment of consolidated and nonconsolidated taxpayers. See American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418, 1600. However, the legislative history emphasized that Treasury's exercise of its regulatory authority under Code Sec. 1502 still must comport with the principle of clear reflection of income. See H.R. Rep. No. 108-548, pt. 1 (2004); Staff of J. Comm. on Tax'n, 108th Cong., General Explanation of Tax Legislation Enacted in the 108th Congress 415 (Comm. Print 2005) ("The Secretary may promulgate consolidated return regulations to change the application of a tax code provision to members of a consolidated group, provided that such regulations are necessary to clearly reflect the income tax liability of the group and each corporation in the group, both during and after the period of affiliation." (emphasis added)).

<sup>374</sup> S. Rep. No. 70-960, at 15 (1928).

<sup>375</sup> See *Marshall Field & Co.*, 143 U.S. 649.

<sup>376</sup> In the period leading up to the 1968 regulations under Code Sec. 482, Treasury was directed to "explore the possibility of developing and promulgating regulations ... which would provide additional guidelines and formulas for the allocation of income and deductions in cases involving foreign income." H.R. Rep. No. 87-2508, at 19 (1962).

<sup>377</sup> *Touby*, 500 U.S. at 163 (citation omitted).

<sup>378</sup> *Whitman*, 531 U.S. at 472 (citation omitted).

<sup>379</sup> *Lichter*, 334 U.S. at 785 ("It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program.").

<sup>380</sup> *Nat'l Broad. Co.*, 319 U.S. at 218-21.

<sup>381</sup> See *Gundy*, 588 U.S. at 151, 173-74 (Gorsuch, J., dissenting).

<sup>382</sup> The Court could also uphold Congress's delegation in Code Sec. 1502 under the rule of necessity articulated in *American Power & Light Co.* 329 U.S. at 105. Even in situations of "[n]ecessity," however, Congress must clearly delineate a general policy, identify the public agency which is to apply it, and set boundaries to cabin the public agency's discretion. See *id.*

<sup>383</sup> *Gundy*, 588 U.S. 128, 149 (Gorsuch, J., dissenting).

<sup>384</sup> 140 S. Ct. 342, 342 (2019) (Kavanaugh, J.) (statement regarding denial of cert.).

<sup>385</sup> See *id.* ("The opinions of Justice Rehnquist and Justice Gorsuch would not allow ... congressional

delegations to agencies of authority to decide major policy questions[,] even if Congress expressly and specifically delegates that authority. Under their approach, Congress could delegate to agencies the authority to decide less-major or fill-up-the-details decisions.").

<sup>386</sup> See Section F, discussing *Consumers' Rsch.*, 109 F.4th 743.

<sup>387</sup> Compare Code Sec. 1502's directive that the Secretary "shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations ... may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability" with the Telecommunications Act's directive that telecommunications services "should" be "available at just, reasonable, and affordable rates"; accessible "in all regions of the Nation"; and available to "low-income consumers and those in rural, insular, and high cost areas" at rates "reasonably comparable to rates charged for similar services in urban areas." 47 U.S.C. §§254(b)(1)-(3) (emphasis added).

<sup>388</sup> In *Tiger Lily, LLC*, the Sixth Circuit recognized that broader grants of discretion require greater guidance from Congress than grants of less or more limited discretion. 5 F.4th at 672. Applying a similar approach to Code Sec. 1502, the extent of Congress's guidance both in the statutory text and legislative history would need to be weighed against the economic and political significance of the consolidated return regulations.

<sup>389</sup> S. Rep. No. 70-960, at 15 (1928).

<sup>390</sup> 143 U.S. 649 (1892).

<sup>391</sup> 204 U.S. 364 (1907).

<sup>392</sup> 220 U.S. 506 (1911).

<sup>393</sup> See *In re Kollock*, 165 U.S. at 536 (upholding delegation where the authorized acts were "merely in the discharge of an administrative function"); *Buttfield*, 192 U.S. at 496 (upholding delegation where Congress had set a "primary standard" by statute); *Goodrich Transit Co.*, 224 U.S. at 214 (upholding delegation where Congress had "laid down the general rules of action under which [the authorized agency] shall proceed").

<sup>394</sup> *Gundy*, 588 U.S. at 171 (Gorsuch, J., dissenting) (alteration in original) (citation omitted); see also *Am. Textile Mfrs. Inst., Inc.*, 452 U.S. at 547 (Rehnquist, J., dissenting).

<sup>395</sup> See *Paul*, 140 S. Ct. at 342 (Kavanaugh, J.) (statement regarding denial of cert.).

<sup>396</sup> Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §1014(a), 111 Stat. 788.

<sup>397</sup> H.R. Rep. No. 105-220 (1997); see also S. Rep. No. 105-33 (1997).

<sup>398</sup> Code Sec. 351(g)(3)(A).

<sup>399</sup> Code Sec. 351(g)(2)(A).

<sup>400</sup> Code Sec. 351(g)(2)(B).

<sup>401</sup> Code Sec. 351(g)(2)(C)(i). The first of these exceptions does not apply, however, if the

stock relinquished in the exchange, or the stock acquired in the exchange is in—“(I) a corporation if any class of stock in such corporation or a related party is readily tradable on an established securities market or otherwise, or (II) any other corporation if such exchange is part of a transaction or series of transactions in which such corporation is to become a corporation described in subclause (I).” Code Sec. 351(g)(2)(C)(ii).

<sup>402</sup> S. Rep. No. 105-33, at 150 (1997).

<sup>403</sup> *Id.*

<sup>404</sup> H.R. Rep. No. 105-148, at 472-73 (1997).

<sup>405</sup> *Id.* at 472.

<sup>406</sup> Code Sec. 351(g)(4). Treasury’s regulations would apply to transactions completed after June 8, 1997.

<sup>407</sup> H.R. Rep. No. 105-220, at 544 (1997); S. Rep. No. 105-33, at 152 (1997).

<sup>408</sup> N.Y.S. Bar Ass’n, Tax Section, Report No. 925, *Report on Recently Enacted Nonqualified Preferred Stock Provisions*, at 3 (Mar. 31, 1998).

<sup>409</sup> *Id.* (internal citations omitted).

<sup>410</sup> *Whitman*, 531 U.S. at 472.

<sup>411</sup> 575 U.S. 43 (2015).

<sup>412</sup> *Id.* at 62 (Alito, J., concurring) (quoting *Ass’n of Am. R.R. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 674 (D.C. Cir. 2013), *vacated*, 575 U.S. 43 (2015)).

<sup>413</sup> S. Rep. No. 105-33, at 150 (1997).

<sup>414</sup> Code Sec. 351(g)(4).

<sup>415</sup> H.R. Rep. No. 105-220, at 544 (1997); S. Rep. No. 105-33, at 152 (1997).

<sup>416</sup> 192 U.S. 470 (1904).

<sup>417</sup> *Id.* at 494 (citation omitted).

<sup>418</sup> 321 U.S. 414 (1944).

<sup>419</sup> *Id.* at 420 (citation omitted).

<sup>420</sup> Code Sec. 351(g)(1)(B)(ii).

<sup>421</sup> *Tiger Lily, LLC*, 5 F.4th at 672.

<sup>422</sup> *Consumers’ Rsch.*, 109 F.4th at 760.

<sup>423</sup> H.R. Rep. No. 105-220 (1997); *see also* S. Rep. No. 105-33 (1997).

<sup>424</sup> 500 U.S. 160 (1991).

<sup>425</sup> *Id.* at 163.

<sup>426</sup> Indeed, this was one of the concerns shared by the New York State Bar Association Tax Section in the months after Code Sec. 351(g) was enacted: “Critical to the application of new Section 351(g) and related provisions is the definition of ‘preferred stock’ as “stock which is limited and preferred as to dividends and does not participate in corporate growth to any significant extent.’ ... We believe that standard should be applied in an economically realistic fashion, taking into account all related facts and circumstances, to prevent the application of the new statutory provision to cases in which holders retain a meaningful participation in the corporate venture’s prospects.” N.Y.S. Bar Ass’n, Tax Section, Report No. 925, *Report on Recently Enacted Nonqualified Preferred Stock Provisions*, at 4 (Mar. 31, 1998).

<sup>427</sup> *Gundy*, 588 U.S. at 170-71 (Gorsuch, J., dissenting) (citation omitted); *see also Am. Textile Mfrs. Inst., Inc.*, 452 U.S. at 547 (Rehnquist, J., dissenting).

<sup>428</sup> Code Sec. 351(g)(4).

<sup>429</sup> 319 U.S. 190 (1943).

<sup>430</sup> *Id.* at 226.

<sup>431</sup> H.R. Rep. No. 105-220, at 544 (1997); S. Rep. No. 105-33, at 152 (1997).

<sup>432</sup> H.R. Rep. No. 105-148, at 472-73 (1997).

<sup>433</sup> *See, e.g.*, Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1541 (2006) (describing “a perception of tax exceptionalism ...”); Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 515-26 (2011) (cataloguing IRS-specific precedents that departed from general administrative law doctrines).

<sup>434</sup> *See Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44 (2011).

<sup>435</sup> *Varian*, 163 T.C. No. 4.

<sup>436</sup> *Indus. Union Dep’t, AFL-CIO*, 448 U.S. at 687 (Rehnquist, J., concurring).

<sup>437</sup> *Whitman*, 531 U.S. at 487 (Thomas, J., concurring).

<sup>438</sup> *Dep’t of Transp. v. Ass’n of Am. R.R.*, 575 U.S. 43, 74-77 (2015) (Thomas, J., concurring).

<sup>439</sup> *Gundy*, 588 U.S. at 157-59 (Gorsuch, J., dissenting).

<sup>440</sup> *Id.* at 149 (Alito, J., concurring).

<sup>441</sup> *Paul*, 140 S. Ct. at 342 (Kavanaugh, J.) (statement regarding denial of cert.).

<sup>442</sup> *See supra* note 211.

<sup>443</sup> 5 F.4th 666.

<sup>444</sup> 59 F.4th 1124.

<sup>445</sup> 109 F.4th 743.

<sup>446</sup> Code Secs. 482 and 1502 have been in effect for extended periods of time (Code Sec. 1502, for example, has been in place for 96 years), so it is fair to question whether a court would be willing to invalidate either statute and the regulations thereunder, even if directed to do so by the nondelegation doctrine or another principle. We do not undertake to answer this question here, but would invite further analysis and commentary in the future.

<sup>447</sup> *See Gundy*, 588 U.S. at 172-73 (Gorsuch, J., dissenting) (“The separation of powers ... is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation’s course on policy questions ....” (emphasis added)).

<sup>448</sup> Code Sec. 385(a).

<sup>449</sup> *See* Code Secs. 385(b)(1)–(5).

<sup>450</sup> Congress may also try to retroactively apply its revision to any invalidated tax statute, but any retroactive application beyond one year may test the bounds of Due Process limitations. *See United States v. Carlton*, 512 U.S. 26, 38 (1994) (O’Connor, J., concurring) (considering whether the retroactive application of an amendment to a tax statute violated Due Process and concluding that “[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise ... serious constitutional questions”).

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