THE SECOND COMING OF *SCHECHTER POULTRY*, OR SHOULD WE LEAVE IT BURIED?

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I. INTRODUCTION

Could this be the end of government as we know it? That was Justice Kagan's warning in the plurality opinion of *Gundy v. United States*, noting that under the approach of Justice Gorsuch's dissent, "most of Government is unconstitutional."[1] Since that time, the composition of the Supreme Court of the United States has shifted.[2]

More recently, on January 13, 2022, the Supreme Court majority in *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration*[3] ruled that the Occupational Safety and Health Administration (OSHA) did not have the authority under the Occupational Safety and Health Act[4] to issue an emergency temporary standard requiring large employers to implement a mandatory COVID-19 vaccination policy. The per curiam majority based its opinion on the distinction that "[a]lthough COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most."[5] But the bigger threat to government in this case is found in Justice Gorsuch's concurrence, using this opportunity to renew his attacks on agency actions under his interpretation of the "nondelegation doctrine."[6] The nondelegation doctrine is the constitutional doctrine[7] that limits what Congress can delegate to the Executive Branch.[8]

The danger to government as we know it, then, is imminent because the Supreme Court considered *West Virginia v. EPA*[9] and held oral arguments on February 28, 2022.[10] There, states and coal companies challenged the D.C.

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1. Gundy v. United States, 139 S. Ct. 2116, 2130 (2019); *see infra* Part III (discussing the academic response to *Gundy v. United States*).

2. *See generally Current Members*, SUP. CT. OF THE U.S., https://supremecourt.gov/about/biographies.aspx (last visited Sept. 20, 2022) (providing information about the Supreme Court Justice who did not participate in *Gundy*, Associate Justice Kavanaugh, and the replacement of Associate Justice Ginsburg with Associate Justice Coney Barrett).

3. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin. (OSHA), 142 S. Ct. 661, 666–67 (2022) (per curiam).

4. *See* Occupational Safety and Health Act, 29 U.S.C. §§ 655–678; *id.* § 655(c)(1) (listing the emergency temporary standards).

5. *Nat'l Fed'n*, 142 S. Ct. at 665.

6. *Id*. at 668–70 (Gorsuch, J., concurring).

7. The source of the nondelegation doctrine is Article I, Section 1 of the United States Constitution, which states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, § 1.

8. *See* discussion *infra* Part II (discussing nondelegation doctrine jurisprudence). For more on the nondelegation doctrine, see Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 388–405 (2017), and Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 375–99 (2017).

9. West Virginia v. EPA, 142 S. Ct. 2587 (2022).

10. SUP. CT. OF THE U.S., MONTHLY ARGUMENT CALENDAR FEBRUARY 2022 (Feb. 18, 2022), https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalFebruary2022.pdf.

Circuit's vacation of the 2019 Affordable Clean Energy Rule.[11] One of the issues that was expected to be addressed was whether the Clean Air Act's (CAA) delegation of implementation to the Environmental Protection Agency (EPA) violated the nondelegation doctrine.[12] This case gave Justice Gorsuch the opportunity to take his approach to nondelegation from a dissent and a concurrence into the majority.[13]

The nondelegation doctrine has essentially remained dormant[14] since the 1935 case of *A.L.A. Schechter Poultry Corp. v. United States*,[15] which struck down poultry regulations promulgated under the National Industrial Recovery Act (NIRA).[16]

In *Schechter Poultry* and prior cases, the Court applied the Intelligible Principle Test (IPT) to determine whether there was a violation of the nondelegation doctrine.[17] The IPT states that Congress can delegate its power to the Executive as long as it provides an "intelligible principle" to limit executive authority.[18]

However, renewed interest in the nondelegation doctrine emerged as a result of the opinions issued two years ago, including *Gundy*.[19] In his dissent, Justice Gorsuch offered a reformulation of the standard to apply the nondelegation doctrine, which this Article refers to as the Gorsuch Test.[20] Under this reformulation, essentially, Congress can only delegate fact-finding to the Executive—Congress, not the Executive, must make all policy judgments.[21]

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11. Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021), *rev'd and remanded*, 142 S. Ct. 2587 (2022).

12. *See* Ian Millhiser, *A New Supreme Court Case Could Gut the Government's Power to Fight Climate Change*, VOX (Nov. 3, 2021, 10:30 AM), https://www.vox.com/2021/11/3/22758188/climate-change-epa-clean-power-plan-supreme-court.

13. Another approach that the Court could have taken in this case was the "major questions" doctrine. *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting). In his concurrence in *National Federation of Independent Business v. Department of Labor, OSHA*, Justice Gorsuch notes that "the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine." Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring) (per curiam). But he also makes several distinctions between them. *Id.* at 668–70. This Article limits its analysis to the nondelegation doctrine.

14. The doctrine is essentially dormant in the sense that no regulation has been struck down on the basis of the nondelegation doctrine since 1935. *See* discussion *infra* Part II (discussing nondelegation doctrine jurisprudence).

15. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

16. *See* National Industrial Recovery Act, 15 U.S.C. § 703 (1933), *declared unconstitutional by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935).

17. The Intelligible Principle Test (IPT) was announced in *J.W. Hampton, Jr., & Co. v. United States* and also applied in *Panama Refining Co. v. Ryan*. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); Pan. Refin. Co. v. Ryan, 293 U.S. 388, 429–30 (1935). For more on the IPT, see the discussion *infra* Part II (discussing the test in nondelegation doctrine jurisprudence).

18. *J.W. Hampton*, 276 U.S. at 409.

19. *See* Gundy v. United States, 139 S. Ct. 2116 (2019); *see* discussion *infra* Part II (reviewing *Gundy*).

20. *See* discussion *infra* notes 74–78 and accompanying text (elaborating on the Gorsuch Test).

21. *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

This Article argues that the resuscitation of the nondelegation doctrine via the Gorsuch Test is neither necessary nor efficient. While the IPT offers few significant limits on the delegation of congressional authority to a federal administrative agency, there remain significant checks on that administrative agency's action from multiple federal domains: Congress, the federal courts, the Chief Executive and their appointees, and even sometimes other federal administrative agencies. Furthermore, in the American federalist system, other checks remain on the federal administrative agencies' delegated powers from nonfederal sources.[22]

Moreover, application of the nondelegation doctrine, along with its possible extension to nondelegation to nonfederal sources, would violate the efficiencies generated under a system of "optimal federalism."[23] Whatever the policy goals, optimal federalism provides a mechanism to find the most efficient distribution between the domains of governmental power across the axes of governmental branches (Legislative, Judiciary, and Chief Executive and administrative agencies) and the levels of government (federal, state, local, and sometimes regional). Strict nondelegation would block any efficient redistribution of governmental authority. As such, the Gorsuch Test also poses a threat to federalism as we know it.

To demonstrate that revitalization of the nondelegation doctrine under the Gorsuch Test is neither necessary nor efficient, Part VII examines recent regulations of the industry that was the subject matter of *Schechter Poultry*: regulations on poultry processing.[24] This Part examines two changes in poultry production regulation promulgated by the federal agency with primary responsibility, the Food Safety and Inspection Service (FSIS) of the United States Department of Agriculture (USDA).[25] Part VII examines the legislative history of poultry product inspection along with the process of developing these new rules and applies the Gorsuch Test to these changes.[26]

These applications demonstrate both the importance of efficiencies generated by optimal federalism via delegation and the multiple sources of checks on agency authority, even post-delegation. The Gorsuch nondelegation standard takes an oversimplified view of policy formation, implementation, and enforcement and, as a result, does not adequately reflect the complexities of the modern administrative state.

Consequently, revitalization of the nondelegation doctrine under the Gorsuch Test could lead to a *Schechter Poultry* redux that unnecessarily harms not only consumers but also the regulated industries and those who

22. *See infra* Parts II, IV (discussing checks on the government).

23. The Author has written several articles developing the theory of optimal federalism and applying it to environmental policies, health care, and immigration. *See infra* Part V (discussing optimal federalism).

24. *See infra* Part VII (applying the Gorsuch Test to recent regulations).

25. *See infra* Part VII (discussing the changes to poultry-processing regulations).

26. *See infra* Part VII (discussing the background and developments in the poultry-processing industry and applying the Gorsuch Test to these changes).

depend on those industries for their livelihoods. Instead, this Article suggests that the proper approach would be to modify the IPT. This "Modified IPT" would add the requirement that there exist checks and balances on the power of the administrative agency.

The rest of this Article is as follows: Part II begins with a review of Supreme Court jurisprudence on the nondelegation doctrine from 1928 through *Gundy*.[27] Part III examines the recent academic literature on the nondelegation doctrine since *Gundy* along with the literature on optimal federalism.[28] Then, Part V analyzes theoretical issues associated with reinvigorating the nondelegation doctrine.[29]

After that, we apply this analysis in the context of chicken processing, examining the legislative history of poultry inspection along with new regulations promulgated by the FSIS on the Modernization of Poultry Slaughter Inspection (MPSI) and the definition of "roaster."[30] We end by drawing lessons from these examples.[31]

II. JURISPRUDENCE REVIEW

Modern jurisprudence on the nondelegation doctrine began in 1928 with *J.W. Hampton, Jr., & Co. v. United States*.[32] There, the United States Supreme Court had to decide whether the Tariff Act of 1922 was an invalid "delegation to the President of the legislative power."[33] In his opinion, Chief Justice Taft noted that Congress's purpose was to impose "customs duties [to] equal the difference between the cost of producing in a foreign country . . . and the cost of producing . . . in the United States, so that the duties . . . enable domestic producers to compete on terms of equality with foreign producers."[34] Taft noted that:

> [B]ecause of the difficulty in practically determining what that difference is, Congress . . . doubted that the information in its possession was such as to enable it to make the adjustment accurately, and also to have apprehended that with changing conditions the difference might vary in such a way that some readjustments would be necessary.[35]

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27. *See infra* Part II (reviewing nondelegation doctrine jurisprudence).

28. *See infra* Part III (examining academic literature on nondelegation doctrine and optimal federalism).

29. *See infra* Part V (discussing possible dangers of the nondelegation doctrine).

30. *See infra* Parts VI–VII (discussing legislative history, new regulations, and the definition of "roaster").

31. *See infra* Part VIII (listing lessons learned).

32. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

33. *Id.* at 404.

34. *Id.*

35. *Id.* at 404–05.

All of these factors led Congress to delegate to the Executive the power to determine tariff rates. In doing this, it was further noted that the Executive "must make an investigation, and in doing so must give notice to all parties interested and an opportunity to adduce evidence and to be heard."[36] Concerning the constitutionality of the Tariff Act, the Court held that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[37] Because the Court found sufficient direction in the statute, it held that the Tariff Act was constitutional.[38]

Seven years later, the Court found two statutes to be unconstitutional. In January of 1935, in *Panama Refining Co. v. Ryan*,[39] the Court held that § 9(c) of the NIRA was an unconstitutional delegation of congressional power.[40] This Section delegated to the President the "power to interdict the transportation of . . . excess [petroleum] in interstate and foreign commerce."[41] However, Congress gave no guidance to the Executive: "As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."[42] Without such intelligible principle guidance, the Court held that this Section of the NIRA was unconstitutional.[43]

In May of 1935, the Court in *Schechter Poultry* held that § 3 of the NIRA was unconstitutional.[44] In this Section, Congress had delegated to the Executive the power to approve "codes of fair competition."[45] Under this authority, the President had promulgated the Live Poultry Code, and Schechter Poultry had been found in violation of that code.[46] To determine whether § 3 was constitutional, the Court found that the Act

> supplies no standards for any trade, industry, or activity. It does 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 authorizes the making of codes to prescribe them. For that legislative undertaking, [§] 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and

36. *Id.* at 405.
37. *Id.* at 409.
38. *Id.*
39. Pan. Refin. Co. v. Ryan, 293 U.S. 388 (1935).
40. *Id.* at 433.
41. *Id.* at 415.
42. *Id.* at 430.
43. *Id.* at 433.
44. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–42 (1935).
45. *Id.* at 521–22.
46. *Id.* at 519–21.

> expansion described in [§] 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered.[47]

Without any intelligible principle to limit executive power, the Court held that § 3 of the NIRA was "an unconstitutional delegation of legislative power."[48]

While these two cases invalidated important regulations of commerce that were part of the New Deal, two years later in *West Coast Hotel v. Parrish*,[49] the Court upheld Washington state's minimum wage statute. In explaining its decision, the Court held that the liberty protected under the Constitution is not absolute but can be limited by reasonable regulations:

> What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. . . . But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.[50]

In 1989, more than fifty years after *West Coast Hotel*, the Supreme Court decided *Mistretta v. United States*.[51] On appeal, John Mistretta challenged "the constitutionality of the Sentencing Guidelines promulgated by the United States Sentencing Commission,"[52] arguing that the guidelines were established under powers that violated the nondelegation doctrine.[53] To decide this case, the Court applied the IPT established in *J.W. Hampton*.[54] It noted that the Court's intelligible principle "jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[55] It then restated this test as held in *American Power & Light Corp. v. SEC*:

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47. *Id.* at 541–42.
48. *Id.* at 542.
49. W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
50. *Id.* at 391.
51. Mistretta v. United States, 488 U.S. 361, 361 (1989).
52. *Id.* at 362.
53. *Id.* at 371.
54. *Id.* at 372 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
55. *Id.*

"[T]his Court has deemed [delegation] 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'"[56]

Applying the IPT, the Court held that "in creating the Sentencing Commission[,] . . . Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches."[57]

In *Whitman v. American Trucking Ass'ns*,[58] Justice Scalia, writing for the Court, applied the IPT from *American Power & Light* and *Mistretta* to determine whether § 7409(b)(1) of the CAA[59] was an unconstitutional delegation of legislative power.[60] Scalia noted that under the CAA, Congress delineated the general policy to "establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air."[61] It also designated the EPA as the public agency to apply that policy.[62] And furthermore, Congress specified adequate boundaries to this delegated authority, namely that these standards would be (1) limited to "a discrete set of pollutants"; (2) "based on published air quality criteria that reflect the latest scientific knowledge"; and (3) established at a requisite level, where "[r]equisite, in turn, 'mean[s] sufficient, but not more than necessary.'"[63]

Justice Scalia then concluded that the "scope of discretion § [7409](b)(1) allows is in fact well within the outer limits of our nondelegation precedents."[64] In particular, the Court held: "It is therefore not conclusive for delegation purposes that, as respondents argue, ozone and particulate matter are nonthreshold pollutants that inflict a continuum of adverse health effects at any airborne concentration greater than zero, and hence require the EPA to make judgments of degree."[65] This conclusion derived, according to Justice Scalia, from the principle that a "certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action."[66] This Article will hereinafter refer to this principle as the Scalia

56. *Id.* at 372–73 (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)).

57. *Id.* at 412.

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

59. Clean Air Act, 42 U.S.C. §§ 7401–7675 (including § 7409(a), which addresses national primary and secondary ambient air quality standards).

60. *Whitman*, 531 U.S. at 472.

61. *Id.* at 473 (quoting Transcript of Oral Argument at 5, *Whitman*, 531 U.S. 457 (No. 99-1257)).

62. *Id.*

63. *Id.* (quoting Transcript of Oral Argument at 5, *Whitman*, 531 U.S. 457 (No. 99-1257)).

64. *Id.* at 474.

65. *Id.* at 475 (internal quotations omitted).

66. *Id.* (quoting Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)). This principle is echoed in a book review written by then-Judge, now Justice Kavanaugh: "After all, on occasion the relevant constitutional or statutory provision may actually require the judge to consider policy and perform a common law-like function." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120 (2016) (emphasis omitted) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

Principle.

In June of 2019, the Supreme Court announced its decision in *Gundy*.[67] Herman Gundy was charged with violating the registration requirement of the Sex Offender Registration and Notification Act (SORNA).[68] One of the questions presented to the Court was "[w]hether SORNA's delegation of authority to the Attorney General . . . violates the nondelegation doctrine."[69] The plurality opinion held that it did not.[70] Justice Alito concurred in the decision but noted in dicta that

> [i]f a majority of this Court were willing to reconsider the approach [to the nondelegation doctrine] we have taken for the past [eighty-four] years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.[71]

Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented.[72] The dissent told its version of "the story of the evolving intelligible principle doctrine."[73] At the end of the story, Justice Gorsuch stated that the right questions to "determine whether a statute provides an intelligible principle"[74] are as follows:

> A. "Does the statute assign to the [E]xecutive only the responsibility to make factual findings?"[75] (the GT-A)
> B. "Does it set forth the facts that the [E]xecutive must consider and the criteria against which to measure them?"[76] (the GT-B)
> C. "And most importantly, did Congress, and not the Executive Branch, make the policy judgments?"[77] (the GT-C)

Justice Gorsuch then concluded that only after these questions have been appropriately addressed "can we fairly say that a statute contains the kind of intelligible principle the Constitution demands."[78]

The following tables show the differences between the IPT and the Gorsuch Test for determining the constitutionality of congressional

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67. *See* Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (considering whether a delegation of authority violated the nondelegation doctrine).

68. *Id.* at 2122–23.

69. Petition for Writ of Certiorari at 4, *Gundy*, 139 S. Ct. 2116 (No. 17-6086), https://www.scotusblog.com/wp-content/uploads/2018/02/17-6086-petition.pdf.

70. *Gundy*, 139 S. Ct. at 2121.

71. *Id.* at 2131 (Alito, J., concurring).

72. *Id.* (Gorsuch, J., dissenting).

73. *Id.* at 2138 (internal quotations omitted).

74. *Id.* at 2141.

75. *Id.*

76. *Id.*

77. *Id.* This Article will refer to these three questions together, hereinafter, as the Gorsuch Test.

78. *Id.*

delegation.

Intelligible Principle Test		
Delegation is constitutionally sufficient if:		
	IPT-A	Congress clearly delineates the general policy;
	IPT-B	Congress clearly delineates the public agency that is to apply the policy; and
	IPT-C	Congress clearly delineates the boundaries of this delegated authority.

Gorsuch Test		
A statute provides an intelligible principle (and, hence, delegation is constitutionally sufficient) if:		
	GT-A	the statute assigns to the Executive only the responsibility to make factual findings;
	GT-B	the statute sets forth the facts that the Executive must consider and the criteria against which to measure them; and
	GT-C	Congress, and not the Executive Branch, makes the policy judgments.

III. ACADEMIC DEBATE ON *GUNDY* AND NONDELEGATION

Justice Gorsuch's dissent in *Gundy*, along with Justice Alito's dicta, reignited the academic debate about the nondelegation doctrine.[79] The day after the Court announced its holding in *Gundy*, Nicholas Bagley wrote an op-ed in the *New York Times* titled after Justice Kagan's comment in the opinion that "most of government is unconstitutional."[80] Two weeks later, Kristin Hickman wondered: "Will the nondelegation doctrine, long thought dead, be resurrected?"[81]

In *Delegation at the Founding*,[82] Mortenson and Bagley argue that an originalist interpretation of the Constitution would not include a

79. *See id.* at 2131.

80. Nicolas Bagley, *Most of Government Is Unconstitutional*, N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/opinion/sunday/gundy-united-states.html (quoting *Gundy*, 139 S. Ct. at 2130).

81. Kristin E. Hickman, Gundy*, Nondelegation, and Never-Ending Hope*, THE REGUL. REV. (July 8, 2019), https://www.theregreview.org/2019/07/08/hickman-nondelegation/.

82. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021), *cited in* Ilan Wurman, *No Nondelegation at the Founding? Not So Fast*, YALE J. REGUL.: NOTICE & COMMENT (Jan. 5, 2020), https://www.yalejreg.com/nc/no-nondelegation-at-the-founding-not-so-fast-by-ilan-wurman/.

nondelegation doctrine.[83] This is partly because "the Founders saw nothing wrong with delegations as a matter of legal theory."[84] Furthermore, the founders also did not use the nondelegation doctrine in practice:

> The early federal Congresses adopted dozens of laws that broadly empowered executive and judicial actors to adopt binding rules of conduct for private parties on some of the most consequential policy questions of the era, with little if any guidance to direct them. Yet the people who drafted and debated the Constitution virtually never raised objections to delegation as such. . . .[85]

Mortenson and Bagley's article led to a great debate among a number of legal scholars, and Ilan Wurman wrote two responses to this article.[86] In his responses, Wurman argues that "there was a nondelegation doctrine at the Founding"[87] because he finds "significant evidence that the Founding generation believed Congress could not delegate its legislative power."[88] Philip Hamburger argues that "the article's most central historical claims [were] mistaken."[89] Hamburger instead proposes that delegation theory should focus on vesting and executive power.[90] On the other hand, Nicholas Parrillo finds that "early Congresses enacted several broad delegations of administrative rulemaking authority."[91] Parrillo looks in depth at the 1798 Direct Tax, finding that "vesting administrators with discretionary power to make politically charged rules domestically affecting private rights was not alien to the first generation of lawmakers who put the Constitution into practice."[92]

Other scholars offered different perspectives. David Zaring took an empirical view of separation of powers cases.[93] He "collected every separation of powers case heard in the last 20 years by the Supreme Court and the D.C. Circuit" and also analyzed the "1,309 cases in which the Supreme Court reviewed congressional action between 1794 and 2018, 162 [of which] involved a separation of powers challenge. Of those, 41 have been

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83. Mortenson & Bagley, *supra* note 82, at 282.

84. *Id.* at 277.

85. *Id.*

86. Wurman, *supra* note 82; Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

87. Wurman, *supra* note 86, at 1490.

88. *Id.*

89. Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88, 88 (2020), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1292&context=nulr_online.

90. *Id.*

91. Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1288 (2021).

92. *Id.* at 1289.

93. *See* David Zaring, *Toward Separation of Powers Realism*, 37 YALE J. REGUL. 708, 708–15 (2020).

successful."[94] He concludes that challenges based on separation of powers "make no real-world difference because of the modest remedies. . . . [I]n the rare case that the doctrines require a remedy, the remedy is almost never what the plaintiff seeks or a constraint on the administrative state. . . ."[95] Zaring's findings are consistent with the results from an article by Keith Whittington and Jason Iuliano published before *Gundy*: *The Myth of the Nondelegation Doctrine*.[96] Whittington and Iuliano first "compiled an original dataset of every federal and state case that involved a nondelegation challenge between 1789 and 1940."[97] Their analysis of these more than 2,000 cases found that "the nondelegation doctrine never actually constrained expansive delegations of power."[98]

Also, Lisa Heinzerling notes the irony that the nondelegation doctrine "is also said to require enforcement by Article III courts, the one part of our government specially designed to be democratically *un*accountable."[99] She recommends that "if the conservative [J]ustices truly do not want to substitute their own views of wise public policy for those of the political branches, they should run, screaming, away from the approach they have suggested for legislative delegations."[100] E.J. Dionne recently echoed these concerns in an opinion published in the *Washington Post*.[101] Dionne quoted then-Senator Joseph Biden's speech from July of 2000: "It is now conservative judges who are supplanting the judgment of the people's representatives and substituting their own for that of the Congress and the [P]resident."[102]

These articles show the significance of the renewed interest in the nondelegation doctrine. While many of these focus on determining the proper "originalist" interpretation of the doctrine, this Article takes a different approach—one that focuses instead on checks and balances in theory and in practice.

IV. CHECKS AND BALANCES

It is true that the IPT announced in *J.W. Hampton* and formulated in *American Power & Light* and *Mistretta* does not place significant limits on

94. *Id.* at 712.

95. *Id.* at 708.

96. Whittington & Iuliano, *supra* note 8.

97. *Id.* at 383.

98. *Id.* at 379.

99. Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENV'T L.J. 379, 379 (2021), https://www.nyuelj.org/wp-content/uploads/2021/10/Heinzerling-Final.pdf.

100. *Id.* at 382.

101. E.J. Dionne, *The Skirmish Is Over a New Justice. The Battle Is Against the Right Wing's Imperial Judiciary*, WASH. POST (Jan. 30, 2022, 8:00 AM), https://www.washingtonpost.com/opinions/2022/01/30/biden-supreme-court-imperial-judiciary-breyer/.

102. *Id.* (internal quotations omitted).

congressional delegation.[103] As discussed above[104] and noted in *Whitman*, the Court has[105]

> found the requisite intelligible principle lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring fair competition.[106]

The Gorsuch Test attempts to reposition these limits, and this Article argues that this repositioning goes too far. The Gorsuch Test is fundamentally about the separation of powers.[107] Each of the three steps of the Gorsuch Test has fully delineated responsibilities, providing a clear separation between the Executive and Legislative Branches.[108]

However, as noted previously by Ilan Wurman, this strict separation is a fiction.[109] Specifically, he notes that a "formalist reading of the Constitution"[110] leads to the fiction that "the nondelegation doctrine[] imagines that Congress does not delegate legislative power to agencies."[111] This recognition is consistent with what Justice Scalia noted in both *Mistretta* and *Whitman*: "[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action."[112] The so-called Scalia Principle notes that, as practiced, there is an inherent mixing of legislative powers with executive and judicial ones.[113]

Instead of maintaining this fiction, Wurman argues that "we ought to accept the delegation of legislative power as a matter of doctrine because doing so can help remedy the undermining of the separation of powers."[114] He finds that the "very essence of American constitutionalism, then, is its particular brand of separation of powers modified by checks and balances."[115]

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103. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409–10 (1928); Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946); Mistretta v. United States, 488 U.S. 361, 371–73 (1989).

104. *See* discussion *supra* Part III (reviewing the history and application of the nondelegation doctrine).

105. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001); *see also* Meaghan Dunigan, Note, *The Intelligible Principle: How It Briefly Lived, Why It Died, and Why It Desperately Needs Revival in Today's Administrative State*, 91 ST. JOHN'S L. REV. 247, 248 (2017) (arguing for a "new three-part standard that would better revitalize the intelligible principle").

106. *Whitman*, 531 U.S. at 474 (internal quotations omitted).

107. *See* Gundy v. United States, 139 S. Ct. 2116, 2135–37 (2019) (Gorsuch, J., dissenting).

108. *Id.*

109. Wurman, *supra* note 8, at 359.

110. *Id.*

111. *Id.*

112. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (citing Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)).

113. *See id.*

114. Wurman, *supra* note 8, at 359; *see* discussion *supra* Part II (discussing jurisprudence review of the nondelegation doctrine).

115. Wurman, *supra* note 8, at 371.

Following Wurman, we argue that strict adherence to separation of powers should not be the principal concern of the nondelegation doctrine. Instead, the principal concern should be that of checks and balances. Underlying the principle of separation of powers is the fundamental threat to liberty when essential governmental powers are concentrated into one body.[116] Separation of these powers is one way to maintain a balance of powers.[117] However, overlapping jurisdictions could be another way to maintain this balance. This is where checks and balances come into play. As James Madison noted in *Federalist No. 51*, "the great security against a gradual concentration of the several powers in the same department[] consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[118]

In particular, even under the IPT, there remain significant checks on an administrative agency's action from multiple federal domains:[119] the federal courts themselves, Congress, the Chief Executive and their appointees, and even sometimes other federal administrative agencies.[120]

We turn first to the checks and balances provided by the federal courts.[121] With respect to the constitutionality of congressional delegation, we argue that the key question for federal courts should be whether the delegation precludes significant checks and balances. The IPT from *American Power & Light* and *Mistretta* is consistent with this focus.[122]

One of the most significant checks on administrative action is the Administrative Procedures Act (APA).[123] Under the APA, courts can overturn administrative actions if it finds that the actions are "arbitrary and capricious."[124] However, to conduct this analysis, courts must have a baseline

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116. *See* THE FEDERALIST NO. 47 (James Madison), https://guides.loc.gov/federalist-papers/text-41-50 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self[-]appointed, or elective, may justly be pronounced the very definition of tyranny."); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, at 126 (1787), https://docsouth.unc.edu/southlit/jefferson/jefferson.html ("All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government.").

117. *See* THE FEDERALIST NO. 48 (James Madison), https://guides.loc.gov/federalist-papers/text-41-50.

118. THE FEDERALIST NO. 51 (James Madison), https://guides.loc.gov/federalist-papers/text-51-60.

119. Note that, under the United States federalist system, there may also be other checks from nonfederal sources such as state and local governments and even sometimes regional authorities (multijurisdictional ones, such as the Great Lakes Compact, addressing a specific policy area).

120. *See* William K. Kelley, *Justice Scalia, the Nondelegation Doctrine, and Constitutional Argument*, 92 NOTRE DAME L. REV. 2107, 2124 (2017) ("Congress quite frequently divides up law execution of the same scheme among multiple actors answerable to different parts of the [E]xecutive [B]ranch.").

121. *See* Am. Power & Light Co. v. SEC, 239 U.S. 90 (1946); Mistretta v. United States, 488 U.S. 361 (1989).

122. *See* discussion *supra* Part II (using the IPT as a judicial check on administrative power).

123. Administrative Procedures Act, 5 U.S.C. §§ 551–559.

124. *See* 5 U.S.C. § 706(2)(a).

to compare to. And this is where the IPT provides the needed information and standards.[125] It identifies the general policy that is the aim of the administrative agency (the IPT-A) and provides the boundaries of the authority delegated to that agency (the IPT-C).[126] When an agency exceeds its authority, courts can overrule such actions.[127] Thus, as long as the IPT is satisfied, courts can still act as a forum for overseeing agency actions.[128] In other words, the IPT gives the appropriate context for determining whether a court can act as an effective check on agency actions and executive power.

In addition to the federal courts' ability to act as a check on delegated agency power when the IPT is satisfied, there are a number of other federal sources of checks to balance an agency's delegated power.[129] The first is Congress itself.[130] In its use of the delegated power, if the agency oversteps Congress's intended boundaries, Congress certainly has the power to pass new legislation to directly override the agency's actions and more explicitly limit the delegated powers.[131]

The President and their appointees also have the power to check agency action.[132] The agency that has been delegated this power is typically headed by a political appointee of the President.[133] The appointee themselves or the President (through political pressure) has the power to act as a restraint on the agency's actions (e.g., by delaying agency actions).[134] In some situations where another agency has overlapping jurisdiction, the other agency may have the power to check the delegated agency's actions via an appeal to the President (if the delegated agency is not independent) or through the court system (if the delegated agency is independent).[135]

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125. *See Mistretta*, 488 U.S. at 372–73 (citing *Am. Power & Light*, 329 U.S. at 105).

126. *Id.*

127. 5 U.S.C. § 706(2)(c).

128. *See id.* (outlining the process for a court to review an agency's action).

129. *See* Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671 *passim* (1992).

130. *See* Bowsher v. Synar, 478 U.S. 714, 733–34 (1986).

131. *See id.* (stating that Congress can control the enactment of a previous law by passing new legislation).

132. *See* U.S. CONST. art. II, § 2, cl. 2; Macey, *supra* note 129, at 698 (noting that some argue the Executive Branch has authority over agencies with appointment power and control of money and staff).

133. *See, e.g.*, Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 J.L. & POL. 483, 489 (1988) (explaining how presidents have delegated supervisory power to trusted individuals).

134. *See id.* at 496 (describing an executive order requiring preparation of a cost-benefit analysis and review before action can be taken).

135. There are not many examples of this. *But see, e.g.*, Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1260 (11th Cir. 2003) (describing the EPA's power to challenge CAA violations in the federal court system); League of Women Voters v. Newby, 963 F.3d 132, 133–35 (D.C. Cir. 2020) (addressing the same principle regarding voter-rights organizations); U.S. Postal Serv. v. Postal Regul. Comm'n, 599 F.3d 705 (D.C. Cir. 2010) (reviewing delegation dispute between postal services and the postal commission). *See* Michael W. Steinberg, *Can EPA Sue Other Federal Agencies?*, 17 ECOL. L.Q. 317, 342 (1990); Michael Herz, United States v. United States*: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 898–99 (1991).

V. THREAT TO OPTIMAL FEDERALISM

In addition to the continued relevance of these multiple federal checks on a delegated agency's power, there is another danger posed by the Gorsuch Test in that it might be applied not just to federal agency delegations but also, by extension, to delegations of federal power to the states. The Gorsuch Test is based on a strict separation of powers, so what does that mean if you replace "the Executive" with "the state"? It would seem that the same rationale would apply; in particular, policy judgments related to federal powers must be exercised solely by Congress under GT-C, not the states. This extension of the Gorsuch Test could lead to severely detrimental consequences.

The literature on optimal federalism written by the Author notes that there are significant efficiencies in taking advantage of the sharing of policy formation, implementation, and enforcement across different levels of government.[136] Whatever the policy goals are, optimal federalism provides a mechanism to find the most efficient distribution between the domains of governmental power across the axes of governmental branches (Legislative, Judiciary, and Chief Executive and administrative agencies) and levels of government (federal, state, local, and sometimes regional). For example, a comparison of wetlands and endangered species policies using the optimal federalism framework finds that

> economies of scale in enactment mean that there is a clearer need for enacting protection of endangered species at a federal level. The interplay of both economies and diseconomies for implementation suggests that the principal federal role should be to establish baseline protections, while states should be responsible for establishing additional levels of protection and for data collection relevant to protecting species and wetlands. Finally, the presence of significant diseconomies of scale in enforcement suggests that primary responsibility for issuing both species and wetlands permits should lie with the states.[137]

In a similar manner, an examination of Medicaid policies finds that

> the existing division of responsibility between federal and state government is consistent with the relative importance of economies and diseconomies

136. *See* Dale B. Thompson, *Balancing the Benefits and Costs of Health Data Collected by Employer-Sponsored Wellness Programs*, 15 J.L. ECON. POL'Y 141, 155 (2019); Dale B. Thompson, *"Unmistakably Clear" Coercion: Finding a Balance Between Judicial Review of the Spending Power and Optimal Federalism*, 50 SAN DIEGO L. REV. 589, 592 (2013) [hereinafter *"Unmistakably Clear" Coercion*]; Dale B. Thompson, *Immigration Policy Through the Lens of Optimal Federalism*, 2 WM. & MARY POL'Y REV. 236, 237–38 (2011) [hereinafter *Immigration Policy*]; Dale B. Thompson, *Optimal Federalism Across Institutions: Theory and Applications from Environmental and Health Care Policies*, 40 LOY. U. CHI. L.J. 437, 449 (2009) [hereinafter *Optimal Federalism Across Institutions*].

137. *Optimal Federalism Across Institutions*, *supra* note 136, at 480.

> of scale. The primary federal roles of providing financial support and oversight for Medicaid correspond to the principal economies of scale in enactment. Meanwhile, the significant diseconomies of scale in implementation and enforcement lead to state control of contracting with health plans to serve Medicaid populations, enrolling beneficiaries, and collecting encounter data to properly set capitation payments.[138]

Just as the Scalia Principle noted the inherent exercise of federal legislative power in judicial and executive decisions, there is also an inherent exercise of federal power when a state acts on its delegated powers. For example, in the Medicaid waiver program for home-based care,[139] states may develop programs "to meet the needs of people who prefer to get long-term care services and supports in their home or community, rather than in an institutional setting."[140] Extension of the Gorsuch Test to questions of federalism delegation could mean that such a waiver program is not permissible because the state would be exercising some federal power as it made some policy decisions in implementing the waiver. This example demonstrates how an extension of the Gorsuch Test could prevent the achievement of efficiencies that can arise from the use of optimal federalism.[141] The threat of these resulting inefficiencies is another reason not to reinvigorate the nondelegation doctrine through the application of the stricter Gorsuch Test from *Gundy* rather than the IPT from *American Power & Light* and *Mistretta*.

Furthermore, the Gorsuch Test from *Gundy* fails to accommodate the dynamic nature of regulation. Both regulated entities and end users can change and adapt—particularly in the face of technological change. Meanwhile, Congress and other legislative bodies are extremely slow to respond. Instead, we need agencies to make regulatory decisions—and, hence, make policy—because they have the flexibility to adapt. These were the same considerations cited by Chief Justice Taft in announcing the IPT in *J.W. Hampton*.[142]

VI. BACKGROUND FOR POULTRY INSPECTION

One can further illuminate the problems with the application of the Gorsuch Test through the close analysis of a specific regulatory application. Consequently, this Part examines the negative consequences of using the

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138. *Id.* at 480–81.

139. Ctrs. for Medicare & Medicaid Servs., *Home & Community-Based Services: 1915(c)*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/home-community-based-services/home-community-based-services-authorities/home-community-based-services-1915c/index.html (last visited Sept. 20, 2022).

140. *Id.*

141. *See* sources cited *supra* note 136 (noting the efficiencies regarding optimal federalism).

142. *See* discussion *supra* Part III (reviewing nondelegation doctrine jurisprudence).

Gorsuch Test in the context of the current regulatory approach for poultry inspection—the subject matter of *Schechter Poultry*.[143]

A. Regulatory Authority for Poultry Inspection

The current regulatory system for poultry inspection is performed in the context of food safety. The regulatory system for food safety is one of overlapping jurisdictions between different federal agencies, state regulations, and enforcement.[144]

Food safety is the subject of numerous federal statutes related to poultry inspection, including the Poultry Products Inspection Act (PPIA), the Federal Food, Drug, and Cosmetic Act (FFDCA), and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[145] Each of these acts identify the different agencies responsible for their administration and enforcement: the USDA through the FSIS under the PPIA, the Food & Drug Administration (FDA) under the FFDCA, and the EPA under the FIFRA.[146] Notably, the primary agency responsible for poultry inspection is the FSIS.[147]

In addition to these federal agencies, state agencies may also be involved. Similar to water quality regulation,[148] respective state regulatory agencies can undertake the enforcement of regulations on local poultry facilities through a "cooperative agreement with [the] FSIS."[149] Under these agreements, the FSIS "provides up to 50% of the [s]tate's operating funds [for these inspection activities], as well as training and other assistance."[150]

In addition to these governmental bodies, organized industry and consumer interest groups are also involved. Such industry groups include the National Chicken Council (NCC)[151] and the United States Poultry and Egg

143. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

144. *See, e.g.*, 9 C.F.R. §§ 381.185–.187 (2022) (calling for federal cooperation with states and other jurisdictions); 25 TEX. ADMIN. CODE § 221.12(c) (2022) (Tex. Dep't of State Health Servs., Meat and Poultry Inspection) (providing for overlapping regulatory and enforcement authority); OHIO ADMIN. CODE 901:2-3-01 (2022) (same).

145. *See* Poultry Products Inspection Act of 1957, 21 U.S.C. §§ 451–472; Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. §§ 301–399g; Federal Insecticide, Fungicide, and Rodenticide Act of 1947, 21 U.S.C. §§ 136–136y.

146. *See* 9 C.F.R. § 500.0 (2020) (providing that the FSIS may take regulatory action under the PPIA); 21 U.S.C. § 374 (identifying the FDA); 40 C.F.R. § 152.3 (2022) (defining "agency" as the EPA).

147. FOOD & DRUG ADMIN., MEMORANDUM OF UNDERSTANDING 225-85-8400 (1984), https://www.fda.gov/about-fda/domestic-mous/mou-225-85-8400.

148. *See generally* Dale B. Thompson, *Beyond Benefit-Cost Analysis: Institutional Transaction Costs and the Regulation of Water Quality*, 39 NAT. RES. J. 517, 518–19 (1999) (assessing institutional-transaction costs in environmental policies).

149. *State Inspection Programs*, USDA FSIS (Feb. 12, 2016), https://www.fsis.usda.gov/inspection/apply-grant-inspection/state-inspection-programs.

150. *Id.*

151. *See* THE NAT'L CHICKEN COUNCIL, https://www.nationalchickencouncil.org/ (last visited Sept. 20, 2022).

Association,[152] while consumer groups include Consumer Reports[153] and the Consumer Federation of America.[154] With multiple relationships existing between several different regulatory agencies and interest groups, poultry processing serves as a good example to aid in the understanding of the complexities of policymaking under the American federalist system.

B. History of Poultry Inspection

It is helpful to review the history of poultry inspection to better appreciate its regulatory context. The history itself is less than one hundred years old. While the Meat Inspection Act was enacted in 1906, it did not address poultry because, "[a]t that time[,] . . . poultry was a minor meat product, being regarded merely as a Sunday dinner specialty."[155] However, after "an outbreak of avian influenza in New York City"[156] during the 1920s, the USDA's Federal Poultry Inspection Service (FPIS) was created and began inspecting "live poultry at railroad terminals and poultry markets in and around New York City."[157] This was a voluntary program done "under an agreement between the [USDA] and two cooperating agencies—the New York Live Poultry Commission Merchants Association and the Greater New York Live Poultry Chamber of Commerce."[158]

After that, Congress passed the NIRA, and under § 3 of NIRA, Congress gave the President the power to "approve a code or codes of fair competition for the trade or industry."[159] In 1934, President Franklin Roosevelt approved the Live Poultry Code to promote "fair competition for the live poultry industry of the metropolitan area in and about the City of New York."[160] The Live Poultry Code was the subject matter of *Schechter Poultry*, which the Supreme Court found to be an unconstitutional delegation of congressional authority.[161]

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152. *See* U.S. POULTRY & EGG ASS'N, https://www.uspoultry.org/ (last visited Sept. 20, 2022).

153. *See, e.g.*, Rachel Rabkin Peachman, *The Quest for Safer Chicken*, CONSUMER REPS. (Aug. 4, 2021), https://www.consumerreports.org/chicken/the-quest-for-safer-chicken-food-safety/ (urging the USDA to lower the allowable percentage of poultry samples to test positive for salmonella and campylobacter).

154. *See, e.g.*, *Consumer, Food Safety Groups Petition USDA for Action on Poultry Pathogens*, CONSUMER FED'N OF AM. (Jan. 25, 2021), https://consumerfed.org/testimonial/consumer-food-safety-groups-petition-usda-for-action-on-poultry-pathogens/ (petitioning the USDA "to develop enforceable standards to reduce foodborne infections").

155. NAT'L RSCH. COUNCIL, POULTRY INSPECTION: THE BASIS FOR A RISK-ASSESSMENT APPROACH, at 12 (1987), https://nap.nationalacademies.org/read/1009/chapter/1.

156. *Id.*

157. *Id.*

158. *Id.* at 13.

159. National Industrial Recovery Act of 1933, Pub. L. No. 73-67, ch. 90, § 3(a), 48 Stat. 195, 196.

160. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 523 (1935) (quoting Exec. Order No. 6675-A).

161. *See id.* at 523–56.

Although the Court held that the Live Poultry Code was unconstitutional, the USDA continued to provide inspection services, and wartime demand for poultry products[162] led to a significant increase in the importance of the poultry industry.[163] Nonetheless, it was not until 1957 when Congress passed the PPIA.[164] This act required inspection of poultry "intended for interstate commerce" but did not require inspection of poultry intended for intrastate commerce.[165] This left 16% of processed poultry uninspected.[166] Consequently, in 1968 Congress passed the Wholesome Poultry Products Act (WPPA), and its goal "was to bring this uninspected poultry under an inspection program, whether state or federally operated."[167] Since 1968, Congress has passed two minor amendments to the PPIA.[168]

C. Statutory Authority for Poultry Inspection

The current statutory regime for poultry inspection is codified in 21 U.S.C., Chapter 10: Poultry & Poultry Products Inspection (the PPPI Statute).[169] This chapter provides a congressional statement of findings,[170] a congressional declaration of policy,[171] definitions,[172] and authorizes cooperation between federal and state agencies.[173] It also requires the FSIS to conduct both antemortem and postmortem inspections.[174] Furthermore, the chapter gives the FSIS the authority to establish labeling standards, including the determination of "definitions and standards of identity or composition or articles subject to this chapter"[175] along with authority to "promulgate such other rules and regulations as are necessary to carry out the provisions of this chapter."[176] This Section will now examine some of these provisions in more depth, starting with § 452, which reads:

> It is hereby declared to be the policy of the Congress to provide for the inspection of poultry and poultry products and otherwise regulate the processing and distribution of such articles . . . to prevent the movement

162. NAT'L RSCH. COUNCIL, *supra* note 155, at 13.
163. *Id*. at 13–14.
164. Poultry Products Inspection Act of 1957, 21 U.S.C. §§ 451–472.
165. NAT'L RSCH. COUNCIL, *supra* note 155, at 14.
166. *Id.*
167. *Id.*
168. Act of June 30, 1982, Pub. L. No. 97-206, 96 Stat. 136 (amending 21 U.S.C. § 464(c)(3)); Act of Oct. 17, 1984, Pub. L. No. 98-487, 98 Stat. 2264 (amending 21 U.S.C. § 454(c)(2)).
169. *See* Poultry Products Inspection Act of 1957, 21 U.S.C. §§ 451–472.
170. *Id.* § 451 (finding that the poultry products that are the subject matter of this chapter "are either in interstate or foreign commerce or substantially affect such commerce").
171. *Id.* § 452.
172. *Id.* § 453.
173. *Id.* § 454.
174. *Id.* § 455.
175. *Id.* § 457.
176. *Id.* § 463(b).

> or sale [of] poultry products which are adulterated or misbranded. It is the intent of Congress that when poultry and poultry products are condemned because of disease, the reason for condemnation in such instances shall be supported by scientific fact, information, or criteria, and such condemnation under this chapter shall be achieved through uniform inspection standards and uniform applications thereof.[177]

Section 453(g) defines "adulterated" poultry as poultry that

- contains any poisonous or deleterious substance;
- contains an unsafe pesticide chemical or unsafe food or color additive;
- consists of any filthy, putrid, or decomposed substance; or
- did not die by slaughter.[178]

Reviewing these Sections, there are a few notable things. First, they provide a general standard and sources of authority,[179] but they do not specify exactly how to make decisions. Second, there is no mention of economic considerations nor worker safety.[180] Third, § 455 requires inspection but does not say how it is done.[181] Moreover, these Sections provide some definitions but leave many other key terms undefined; in particular, § 453 does not mention "roaster" nor "broiler."[182] These observations will play a key role in our analysis under the Gorsuch Test.[183]

VII. APPLICATION OF THE GORSUCH TEST TO RECENT REGULATORY CHANGES IN POULTRY INSPECTION

With these foundations in the regulatory framework, history, and statutory context, we now closely analyze two recent regulatory changes to poultry inspection. With these changes, we examine whether they would be permitted under the Gorsuch Test.

A. Modernization of Poultry Slaughter Inspection

From 2012 to 2015, the FSIS engaged in regulatory processes to adopt a new rule about the poultry inspection system.[184] This rule focused on

177. *Id.* § 452.
178. *Id.* § 453(g).
179. *See id.* §§ 451–473 (providing general guidelines of poultry inspection).
180. *See id.*
181. *See id.* § 455.
182. *See id.* § 453.
183. *See infra* Part VII (applying the Gorsuch Test to recent regulations).
184. *See* Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49566 (Aug. 21, 2014) (codified at 9 C.F.R. pt. 381).

changes to the postmortem inspection of poultry.[185] This Part will first describe the rule and its rationale and then closely examine the process the FSIS undertook in adopting this rule.[186] This Part then assesses the constitutionality of these changes under the Gorsuch Test's standards.[187]

Prior to this rule, postmortem inspection focused on examination of carcasses.[188] Federal or state agency inspectors would "observe the carcass exterior[,] open the body cavity[,] and examine inner surfaces and organs."[189] The inspector would then instruct a company employee trimmer on how to dispose of each carcass, such as "plucking feathers, trimming bruises, [and] moving condemned birds from the shackles into condemned cans."[190] This process was "designed to ensure that each bird is free from readily apparent disease[,] . . . that it is not badly bruised or otherwise damaged, and that it did not die from any cause other than slaughter."[191] This process is known as traditional inspection.[192] Inspection of chicken carcasses involved four agency inspectors[193] plus at least one employee trimmer for each inspector. Under this system, maximum line speed is sixty-four Birds-Per-Minute (BPM).[194]

However, there were two significant problems with this process.[195] First, the process was inconsistent with "the proper roles of industry and inspection personnel" because it assigned to the FSIS "online inspectors responsibility for sorting acceptable product from unacceptable product, finding defects, identifying corrective actions, and solving production control problems."[196] Second, this process was inefficient for improving food safety because it required the FSIS "to allocate significant inspection personnel resources towards inspection activities to detect defects and conditions that present minimal food safety risks, thus limiting the resources available for more important food safety-related inspection activities."[197] Microbiological

185. *See id.*

186. *See infra* Section VII.A.1 (discussing the FSIS's process of adopting the new rule).

187. *See infra* Section VII.A.2 (discussing the constitutionality of the NPIS's rule per the Gorsuch Test).

188. NAT'L RSCH. COUNCIL, *supra* note 155, at v–vi, 10–11.

189. *Id.* at 16.

190. *Id.* at 18.

191. *Id.* at 16–17.

192. Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4408 (proposed Jan. 27, 2012) (codified at 9 C.F.R. pts. 381, 500); *see also* NAT'L RSCH. COUNCIL, *supra* note 155, at 20 (discussing different inspection methods).

193. Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49566 (Aug. 21, 2014) (codified at 9 C.F.R. pt. 381).

194. *Id.*

195. These criticisms also apply to modified inspection procedures for chicken carcasses known as the Streamline Inspection System (SIS) and the New Line Speed Inspection System (NELS). *See* Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4408 (proposed Jan. 27, 2012) (codified at 9 C.F.R. pts. 381, 500).

196. *Id.*

197. *Id.*

diseases such as salmonella, e. coli, and campylobacter, which are not detected by visual inspection, present more significant risks to food safety.[198]

1. The Process of Issuing Rules for a New System for Poultry Inspection

In January of 2012, the FSIS proposed a new rule, called the Modernization of Poultry Slaughter Inspection,[199] with a new process for inspection: the New Poultry Slaughter Inspection System (NPSIS).[200] Under the NPSIS, facility personnel were now responsible for sorting carcasses and removing unacceptable ones.[201] The NPSIS only allowed one Carcass Inspector (CI) per line[202] but now called for an offline Verification Inspector (VI) to conduct enteric pathogen and fecal contamination inspections.[203] While using fewer inspectors, this new process would also allow accelerated line speeds with a new maximum of 140 BPM under the final rule.[204] Furthermore, with facility personnel now responsible for sorting carcasses, businesses could adopt new technologies, such as spectral imaging, for these tasks.[205]

After publishing the proposed rule, consumer and industry interest groups submitted comments on the proposal.[206] These comments included the following:

a. Why does FSIS believe that it is preferable for plant employees to sort carcasses?

. . . .

b. Is there any guarantee that FSIS inspectors would be performing more food safety-related activities under the proposed new inspection system?

. . . .

c. Will establishment employees need to look inside the bird as part of their sorting responsibilities?

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198. *See* Peachman, *supra* note 153.

199. Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4408 (proposed Jan. 27, 2012) (codified at 9 C.F.R. pts. 381, 500).

200. Under the MPSI Final Rule, the title and abbreviation were changed to New Poultry Inspection System and NPIS. *See* Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49566 (Aug. 21, 2014) (codified at 9 C.F.R. pt. 381).

201. Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4408 (proposed Jan. 27, 2012) (codified at 9 C.F.R. pts. 381, 500).

202. *Id.*

203. *Id.* at 4414.

204. Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49566 (Aug. 21, 2014) (codified at 9 C.F.R. pt. 381).

205. For a discussion of these techniques, see Anastasia Falkovskaya & Aoife Gowen, *Literature Review: Spectral Imaging Applied to Poultry Products*, 99 POULTRY SCI. 3709 *passim* (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7597839/.

206. Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 24873 (codified at 9 C.F.R. pts. 381, 500) (comment period extended Apr. 26, 2012).

> . . . .
> d. How does the proposed rule address other consumer protection (OCP) issues, such as digestive tract contents found on products, that may affect internal parts of the carcass?
> . . . .
> e. What was the basis for the baseline sampling numbers presented in the preamble to the proposed rule (74 FR 4442)?
> . . . .
> f. Why is FSIS not mandating a frequency for testing?
> . . . .
> g. Why did the Agency propose two points for microbiological testing instead of three?
> . . . .
> h. Did the Agency consider the effects of faster line speeds on worker safety?
> . . . .
> i. How were the line speeds referenced in the proposed rule determined?
> . . . .
> j. What would the parameters for faster or slower line speeds be?[207]

Some of these comments and the FSIS's responses to them are related to scientific evidence mentioned directly in the PPPI Statute.[208] For example, in response to comment (c), the FSIS replied: "Septicemic/toxemic birds exhibit signs on the outside of the carcass, so there is no need to look at the viscera."[209] Similarly, the response to comment (d) notes that "[t]here is a difference between fecal material and ingesta as digestive tract contents. We have no evidence to show that ingesta carries the same microbes as fecal contamination."[210]

On the other hand, most comments and responses call for a balancing of interests in the particular choices made by the FSIS.[211] For example, the responses to comments (a) and (b) address the efficiency-based reasoning that underlies the reallocation of inspection services under this proposed rule.[212] In response to comment (a), the FSIS stated:

> Under the existing inspection systems, on-line inspectors conduct activities that do not have a direct impact on public health. If the proposal is finalized, and the establishment conducts sorting activities, the only birds presented to the carcass inspector (CI) would be those that are likely to pass

207. *Id.* at 24874–76 (lettering inserted).
208. *See id.*; Poultry Products Inspection Act of 1957, 21 U.S.C. §§ 451–472.
209. Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 24873, 24874 (codified at 9 C.F.R. pts. 381, 500) (comment period extended Apr. 26, 2012).
210. *Id.*
211. *See id.*
212. *See id.*

> inspection. Therefore, the CI will be able to focus on food safety-related activities, such as verifying that carcasses affected by septicemia or toxemia or contaminated with visible fecal material do not enter the chiller.[213]

In response to comment (b), the FSIS stated:

> Yes, generally inspectors would be performing more food safety-related activities. There are three important aspects of the proposed rule that would allow FSIS inspectors to conduct more food safety-related activities. First, because the on-line CI would not be responsible for sorting carcasses for quality-related defects, the amount of time that the CI spends focusing on food safety-related activities would increase. Second, under the proposed new inspection system, the offline verification inspector (VI) would primarily conduct food safety-related activities, such as verifying compliance with HACCP and sanitation SOP requirements and collecting product samples. Third, because FSIS considers contamination by enteric pathogens and fecal contamination to be hazards that are reasonably likely to occur, FSIS is proposing to require that all establishments that slaughter poultry have written programs to address sanitary dressing procedures, and that, at a minimum, these procedures include microbiological testing at pre-chill and post-chill to monitor process control.[214]

The responses to comments (e) and (g) are based on economic analyses of tradeoffs between costs and effectiveness.[215] The FSIS stated in response to comment (e): "The estimates for sampling come from the economic analysis and reflect what we estimate to be the amount of sampling that plants would conduct if the proposed rule is adopted by the Agency."[216] The FSIS stated in response to comment (g):

> FSIS had considered requiring testing at three points in the process, i.e., re-hang, prechill and post-chill. . . . In the preamble to the proposed rule, the Agency explained that it considered requiring a third verification test at the re-hang position to monitor the incoming load of pathogens but tentatively decided that it was not necessary to impose the additional costs that would be associated with testing at this point. . . .[217]

In their response to comment (h), the FSIS balanced impacts on worker safety and pledged to coordinate with another federal agency in the development of this rule: The "FSIS did consider potential effects on safety. The [FSIS] is prepared to address worker safety within the bounds of its regulatory authority and will coordinate with the [OSHA]

213. *Id.*
214. *Id*.
215. *See id.*
216. *Id.*
217. *Id.* at 24875.

as the regulatory process moves forward."[218]

And finally, the responses to comments (i) and (j) reflect the FSIS's policy determinations based on their experiences.[219] In response to comment (i), the FSIS stated: "The line speeds were based on our experience under [the HAPPC-Based Inspection Models Project (HIMP)]. We are interested in comments and data on the proposed line speeds."[220] The FSIS stated in response to comment (j):

> The on-line inspector would be authorized to stop the line to prevent adulterated carcasses from entering the chiller. The [Inspector-in-Charge (IIC)] would be authorized to slow the line. This is the same as in current HIMP and non-HIMP establishments. The on-line CI and offline VI would communicate and inform the IIC if they observe excessive food safety or non-food safety-related defects, and the IIC would assess the need to reduce the line speed or take other appropriate measures.[221]

In addition to receiving these comments, the FSIS also held a public meeting in March 2012 with its advisory committee, which included representatives from consumer and industry interest groups.[222] At that meeting, consumer groups requested an extension of the comment period, and the FSIS extended it for an additional month (to May 29, 2012).[223]

More than two years later, on August 21, 2014, the FSIS issued its final rule.[224] This final rule formalized the requirements for a poultry-processing facility to operate under the NPIS.[225] These requirements included sorting by facility personnel, the use of one CI and one VI per line, the maintenance of records "to document that the products resulting from their slaughter operations meet the definition of ready-to-cook (RTC) poultry,"[226] and a maximum line speed of 140 BPM.[227] However, the final rule decided that adopting the NPIS was voluntary—meaning facilities could remain under their existing inspection system: "[E]stablishments may choose to operate under the NPIS or may continue to operate under their current inspection system, i.e., SIS, [New Line Speed Inspection System (NELS)], [New Turkey Inspection System (NTIS)], or Traditional Inspection."[228] The FSIS hoped that facilities would adopt the NPIS both because it would allow greater line

218. *Id*.
219. *See id.* at 24876.
220. *Id.*
221. *Id*.
222. Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49566, 49569 (Aug. 21, 2014) (codified at 9 C.F.R. pt. 381).
223. *Id.*
224. *Id.* at 49566.
225. *See id.*
226. *Id.* at 49567.
227. *Id.*
228. *Id.* at 49566.

speeds[229] and because the NPIS facilities would "have greater control over their lines and greater flexibility over their production process."[230] To help facilities adopt this new system, the FSIS issued a compliance guideline in June of 2015.[231]

2. Application of the Gorsuch Test to the NPIS Rule

This Section examines the NPIS rule under the Gorsuch Test to assess whether the rule represents an unconstitutional delegation of congressional authority. Recall that the Gorsuch Test has three requirements:

> A. Does the statute assign to the [E]xecutive only the responsibility to make factual findings?
> B. Does it set forth the facts that the [E]xecutive must consider and the criteria against which to measure them?
> C. And most importantly, did Congress, and not the Executive Branch, make the policy judgments?[232]

Would the NPIS rule promulgated under the PPPI Statute satisfy each one of these requirements?

Turning to GT-A, the PPPI Statute authorizes the FSIS to conduct inspections[233] and "promulgate such other rules and regulations as are necessary."[234] Would this authority be inconsistent with GT-A's limitation that the Executive only has the authority to "make factual findings"? In other words, are agencies prohibited from issuing any rules and regulations? Perhaps this is not what Justice Gorsuch intended here. Instead, perhaps what was intended was something like: "Would the Executive have only the responsibility to take actions based on factual findings and to issue rules and regulations based only on and pertaining only to factual findings?" In other words, while the inspections themselves would be factual findings, would they be conducted based on rules that themselves were based solely on the statute supplemented solely by the FSIS's factual findings? If so, then satisfaction of GT-A depends on the same issues addressed in GT-B and GT-C.[235]

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229. Compared to NELS, NTIS, and Traditional Inspection. *Id.* at 49567. Maximum line speed under this final rule for SIS would be the same: 140 BPM. *Id.*

230. *Id.*

231. FSIS, FSIS COMPLIANCE GUIDELINE: MODERNIZATION OF POULTRY SLAUGHTER INSPECTION, MICROBIOLOGICAL SAMPLING OF RAW POULTRY JUNE 2015 (2015), https://www.fsis.usda.gov/sites/default/files/import/Microbiological-Testing-Raw-Poultry.pdf.

232. Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (lettering added).

233. *See* 21 U.S.C. § 455.

234. *Id.* § 463(b).

235. *See Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

Concerning GT-B, the statute denotes certain facts and criteria that the Executive must consider and measure.[236] Inspections under the statute should be designed to stop the sale of "poultry products which are adulterated."[237] And it then gives a specific definition for "adulterated" pertaining to factual considerations regarding whether the poultry contains any poisonous substance or any unsafe chemicals or additives; whether it is made up of "any filthy, putrid, or decomposed substance"; or whether it was poultry that had "died otherwise than by slaughter."[238] Furthermore, the statute identifies specific criteria that the agency must use in determining whether poultry is adulterated: "[T]he reason . . . shall be supported by scientific fact, information, or criteria."[239] Consequently, it seems that the PPPI Statute would satisfy GT-B.

The thrust of most of the Gorsuch Test analysis is found in GT-C.[240] Here, the question becomes whether the FSIS, in promulgating the NPIS rule, adhered strictly to the facts and criteria specifically authorized in the PPPI Statute. Otherwise, the FSIS would have engaged in policy judgments instead of Congress. Our above analysis of the comments and responses shows that in some aspects, the FSIS did adhere to the specified facts and criteria but that for many more, the FSIS used unspecified criteria and made specific policy judgments of its own.[241]

In particular, the FSIS's responses to comments (c) and (d) were based on its evaluation of scientific evidence.[242] However, its responses to comments (a), (b), (e), and (g) were based on inspection efficiencies and economic analyses of costs and effectiveness.[243] Nowhere in the PPPI Statute did Congress authorize the consideration of efficiency and economic factors.[244] The response to comment (h) was based on concerns for worker safety, which again is not part of the PPPI Statute, though it is true that worker safety is the subject of the federal Occupational Safety and Health Act of 1970.[245] Furthermore, the responses to comments (i) and (j) reflected the

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236. 21 U.S.C. § 452.

237. *Id.*

238. *Id.* § 453(g)(3), (5).

239. *Id.* § 452.

240. *See Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

241. *See supra* Section VII.A.1 (discussing the poultry inspection system rule and responses to the rule).

242. Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 24873, 24874 (codified at 9 C.F.R. pts. 381, 500) (comment period extended Apr. 26, 2012).

243. *Id.* at 24874–75.

244. *See id.* However, there are executive orders requiring benefit–cost analysis. *See, e.g.*, Exec. Order No. 12,291, 3 C.F.R. pt. 127 (1981) (increasing agency accountability and providing presidential oversight for regulatory process); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (showing that Congress did not permit consideration of economic or efficiency factors, but the executive orders did).

245. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678. It should be noted that Congress authorized the OSHA to oversee the administration of this Act. *See id.* § 656.

FSIS's policy judgments based on its own experiences.[246]

It should also be noted that in moving from the proposed rule to the final rule, the FSIS changed its applicability from replacing SIS, NELS, and NTIS[247]—thereby mandating the NPIS for all of those facilities—and allowing those facilities to voluntarily adopt the NPIS or keep their existing system.[248] This decision was a policy choice made by the FSIS and not supported by the plain language of § 452, which requires "uniform inspection standards and uniform applications thereof."[249]

Consequently, with the FSIS making several policy decisions itself, part C of the Gorsuch Test fails in this instance.[250] If the Gorsuch Test was the standard for determining the constitutionality of congressional delegation, then the Court could find that the MPSI rule is unconstitutional.

B. Defining and Redefining the Meaning of "Roaster"

One case that is sometimes covered in a first-year contracts course is *Frigaliment Importing Co. v. B.N.S. International Sales Corp*.[251] In this case, Judge Friendly begins his opinion: "The issue is, what is chicken?"[252] On first reading, this statement seems both comical and absurd because everyone knows what a chicken is, right? However, as students dig deeper into the case, they realize that there can be different interpretations of common terms and that in drafting contracts, precision is essential in defining the terms of a contract to ensure there is a true "meeting of the minds." Similar issues arise in the regulation of labeling poultry, as further described in this Section.

1. Initial Definition of "Roaster"

Recall that nowhere in the PPIA, the WPPA, nor in any of their amendments (i.e., collectively nowhere in the PPPI Statute) was the term "roaster" defined.[253] Instead, the PPPI Statute authorizes the Secretary of the Department of Agriculture, via the FSIS, "whenever he determines such action is necessary for the protection of the public, may prescribe . . . definitions and standards of identity or composition or articles subject to this

246. Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 24873, 24874–75 (codified at 9 C.F.R. pts. 381, 500) (comment period extended Apr. 26, 2012).

247. Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4408, 4408 (proposed Jan. 27, 2012) (codified at 9 C.F.R. pt. 381).

248. Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49566, 49566 (Aug. 21, 2014) (codified at 9 C.F.R. pt. 381).

249. 21 U.S.C. § 452.

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

251. Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960).

252. *Id.* at 117.

253. *See* discussion *supra* Section VI.C (discussing statutory authority for poultry inspections).

chapter."[254] Consequently, in 1972, the Department of Agriculture published its Poultry Products Inspection Regulations.[255] Included in these regulations was a definition for "roaster": "A roaster is a young chicken (usually 3 to 5 months of age), of either sex, that is tender-meated with soft, pliable, smooth-textured skin and breastbone cartilage that may be somewhat less flexible than that of a broiler or fryer."[256]

2. First Attempt to Redefine "Roaster"

In 2003, the FSIS published a proposed rule to change several definitions for classes of poultry.[257] One of these changes sought to redefine "roaster" from "3 to 5 months to less than 12 weeks."[258] The FSIS cited technological advances as the reason for making these changes:

> After examining current poultry production methods and reviewing the poultry classes defined in 9 CFR 381.170, FSIS and [the USDA's Agricultural Marketing Service] determined that a number of poultry class definitions did not reflect today's poultry characteristics nor current industry practices. Advancements in breeding and husbandry have generally shortened the period of time required for birds to attain market-ready weights. For example, today broilers 3.5 to 4.5 pounds in weight can be produced in less than 10 weeks, and are frequently produced in 6 to 8 weeks. Thirty years ago, it took 12 to 13 weeks to produce birds with the physical characteristics of broilers. Given these findings, FSIS and AMS determined that the poultry class definitions need to be revised to more accurately and clearly describe poultry being marketed today and to ensure that the labels for poultry products are truthful and non-misleading.[259]

The FSIS further explained that these definitional changes were necessary to protect consumers who rely on the terms used on the labels when deciding what poultry to buy:

> [The] FSIS is concerned with the truthful presentation of the characteristics of poultry products because consumers rely on product labels when making purchasing decisions. The age of the bird affects the tenderness of the meat and the smoothness of skin, thus dictating the

254. 21 U.S.C. § 457(b).

255. *See* Poultry Products Inspection Regulations, 37 Fed. Reg. 9706 (May 16, 1972) (codified at 9 C.F.R. pt. 381).

256. *Id.* at 9738; *see also* 9 C.F.R. § 381.170(a)(1)(iii).

257. *See* Classes of Poultry, 68 Fed. Reg. 55902 (proposed Sept. 29, 2003) (codified at 9 C.F.R. pt. 381).

258. *Id.*

259. *Id.*

> cooking method to use for maximum flavor and tenderness. Poultry meat from young birds is more tender than that from older birds. Young birds are suitable for all cooking methods, especially broiling, barbecuing, roasting, and frying. Less tender, mature birds are most suitable for moist-heat cooking, such as stewing and baking, and may be preferred for use in soups, casseroles, salads, and sandwiches.[260]

This reasoning is consistent with the statutory purposes noted in § 457(b): "[S]uch action is necessary for the protection of the public."[261]

The FSIS received comments on these proposed changes and in 2009, filed a supplemental notice of proposed rulemaking.[262] The purpose of this supplemental notice was to further change the proposed new definition for "roaster."[263] This supplemental notice was necessary because "[a]fter the comment period closed, [the] AMS provided [the] FSIS with data that suggest that [the] FSIS should include a RTC carcass weight in the definition of roaster and change the proposed weeks of age in that definition."[264] As a result, the FSIS proposed the following as the new definition (as an update to the 1972 definition): "[A] young chicken from 8 to 12 weeks of age, of either sex, with a [RTC] carcass weight of 5 pounds or more, that is tender-meated with soft, pliable, smooth-textured skin and breastbone cartilage that is somewhat less flexible than that of a broiler or fryer."[265]

In 2011, the FSIS issued a final rule (with an effective date of January 1, 2014) redefining "roaster."[266] This new definition was consistent—i.e., same age and weight ranges—with the definition provided in the supplemental notice of proposed rulemaking.[267]

3. Industry Interest Group Initiates Further Redefinition of "Roaster"

On November 18, 2013 (before the effective date of the new final rule for the definition of "roaster"), the National Chicken Council (NCC) filed the Petition to Amend Regulations for the Definition and Standard of Identity for "Roaster."[268] The NCC requested that the definition of "roaster" be further amended to the following: "[Y]oung chicken (less than 12 weeks of age) of

260. *Id.*
261. 21 U.S.C. § 457(b).
262. *See* Classes of Poultry, 74 Fed. Reg. 33374 (proposed July 13, 2009) (codified at 9 C.F.R. pt. 381).
263. *Id.*
264. *Id.* (internal quotations omitted).
265. *Id.* at 33375.
266. Classes of Poultry, 76 Fed. Reg. 68058 (Nov. 3, 2011) (codified at 9 C.F.R. pt. 381).
267. *Id.* at 68064.
268. Letter from Michael J. Brown, President, Nat'l Chicken Council, to Alfred V. Almanza, Adm'r, FSIS, at 1 (Nov. 18, 2013), https://www.fsis.usda.gov/sites/default/files/media_file/2020-07/Petition-National-Chicken-Council.pdf.

either sex, with a [RTC] carcass weight of 5.5 pounds or more, that is tender-meated with soft, pliable, smooth-textured skin and breastbone cartilage that may be somewhat less flexible than that of a broiler, or fryer."[269]

In its petition, the NCC offered a number of reasons for these changes. One was the continuing pace of technological change in this industry:

> The genetic improvements in chickens have continued over the years and decades at a *somewhat remarkable rate*. Geneticists forecast further improvements in weight gains, days-to-market, over-all plumpness, and quality of tomorrow's chicken. Over recent decades, improved breeding and poultry management techniques have resulted in chickens marketed as "roasters" reaching marketability about one day earlier each year. It is *reasonable to expect these types of advancements to continue for the foreseeable future*.[270]

The NCC also noted the inefficiencies that would result unless the definition was changed yet again along with higher prices and less appropriate options for consumers:

> Requiring "roasters" or "roaster chickens" to be grown to a minimum of 8 weeks will result in a *less-than-optimum use of feed and related resources*, housing, growout labor/management, and other necessary inputs as companies unnecessarily prolong the grow-out period to comply with the time-to-market threshold. Permitting "roasters" or "roaster chickens" to be produced in a *more efficient manner will allow consumers of this product a more affordable option and a weight-range more acceptable* to their current standard of reference.[271]

The NCC then provided data based on a survey of poultry processor members that demonstrated the extremely negative consequences that could result if the definition was not changed:

> NCC further estimates, based on a survey of processor members who produce or process these types of chickens, that *if the new rule becomes effective less than [ten] percent of the 2012 volume of this type of chicken will be made available to the market*. The primary reason for the expected very significant decrease in "roasters/roasting chickens" is the basic fact that there will be a *very measurable increase in the cost of growing a chicken* to a minimum of 8 weeks, and the resulting size of the chicken at that age would be a weight that few current purchasers would find

269. *Id.* (internal quotations omitted).
270. *Id.* at 2 (emphasis added).
271. *Id.* (emphasis added).

> acceptable. In short, the new rule will severely disrupt the "roaster/roasting chicken" market that consumers have understood and enjoyed for decades.[272]

In July of 2014, the FSIS granted the NCC's petition.[273] The FSIS explained:

> After reviewing the available information, FSIS, in consultation with AMS, has concluded that the data show that chickens younger than [eight] weeks are consistently reaching higher average dressed weights in shorter periods of time, and that the marketplace data showed a difference in price between birds marketed as "broilers," and birds marketed as "roasters."[274]

Subsequently, in 2015, the FSIS published a notice of proposed rulemaking to adopt the NCC's definition of "roaster."[275] Then, in 2016, the FSIS published another new final rule with the NCC's proposed definition of "roaster."[276]

C. Application of the Gorsuch Test to the Redefinition of "Roaster"

This Section examines the FSIS's redefinition of "roaster" under the Gorsuch Test to assess whether it represents an unconstitutional delegation of congressional authority. Recall that the Gorsuch Test has three requirements:

> A. Does the statute assign to the [E]xecutive only the responsibility to make factual findings?
> B. Does it set forth the facts that the [E]xecutive must consider and the criteria against which to measure them?
> C. And most importantly, did Congress, and not the Executive Branch, make the policy judgments?[277]

Would the redefinition of "roaster" promulgated under the PPPI Statute satisfy each one of these requirements?

Concerning the GT-A, recall that the PPPI Statute authorizes the FSIS to prescribe "definitions and standards of identity."[278] "Prescribe" is defined

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272. *Id.* at 3 (emphasis added).

273. Letter from Rachel A. Edelstein, Assistant Adm'r, FSIS, to Michael J. Brown, President, Nat'l Chicken Council, at 1 (July 23, 2014), https://www.fsis.usda.gov/sites/default/files/media_file/2020-07/NCC-FSIS-Response-72314.pdf.

274. *Id.* at 2.

275. Classes of Poultry, 80 Fed. Reg. 50228 (proposed Aug. 13, 2015) (codified at 9 C.F.R. pt. 381).

276. Classes of Poultry, 81 Fed. Reg. 21706 (Apr. 13, 2016) (codified at 9 C.F.R. pt. 381).

277. Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (lettering added).

278. 21 U.S.C. § 457(b).

as "to lay down" a rule.[279] Is "making an official rule" the same as "making factual findings?"[280] This Section argues that the two are not equivalent because making a rule is a matter of making policy as opposed to making a factual finding. Consequently, this redefinition of "roaster" fails the GT-A.

Next, this Section argues that the redefinition of "roaster" also fails the GT-B. The only guidance offered by the statute with respect to definitions is that it tells the FSIS to do so "whenever [it] determines such action is necessary for the protection of the public."[281] This guidance fails to specify the facts that should be considered by the FSIS.[282] Also, while it does state a criterion for this action—that it should be "necessary for the protection of the public"—this criterion itself is overly vague because it fails to offer any context for what "necessary" means.[283] Consequently, the redefining of "roaster" also fails the GT-B.[284]

Turning to the GT-C: did Congress, not the FSIS, make the policy judgments in redefining "roaster"? As noted in the discussion of the GT-A, in defining "roaster," the FSIS is fundamentally making a policy judgment.[285] Furthermore, the reasoning that the FSIS used in redefining "roaster" was based on policy judgments.[286] As the FSIS itself noted in its 2003 proposed rule, there were several reasons why the definition of "roaster" needed to be updated from its 1972 formulation.[287] These included not only technological advances but also the need to protect consumers who "rely on product labels when making purchasing decisions."[288]

Additionally, the reasons offered by the NCC in its 2013 petition to update the definition of "roaster" were also policy based.[289] They again pointed to technological improvements occurring "at a somewhat remarkable rate,"[290] but they also stressed the economic impacts on both poultry processors and consumers.[291] In granting the NCC's petition, the FSIS again referred to these technological and economic impacts.[292] Therefore, it is apparent that in issuing its rules to change the definition of "roaster," the FSIS made policy judgments to protect both producers and consumers.

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279. *Prescribe*, MERRIAM-WEBSTER (2021) (11th ed. 2020).
280. *See Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).
281. 21 U.S.C. § 457(b).
282. *See id.*
283. *Id.*
284. *See Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).
285. *See supra* Part III (discussing *Gundy* and the Gorsuch Test).
286. *See supra* Section VII.B.2 (describing the FSIS's process for redefining "roaster").
287. *See generally* Classes of Poultry, 68 Fed. Reg. 55902 (proposed Sept. 29, 2003) (codified at 9 C.F.R. pt. 381) (stating multiple reasons for updating the definition of "roaster").
288. *Id.* at 55902.
289. Letter from Michael J. Brown to Alfred V. Almanza, *supra* note 268.
290. *Id.* at 2.
291. *Id.* at 2–3.
292. Letter from Rachel A. Edelstein to Michael J. Brown, *supra* note 273.

Thus, in the case of the FSIS's redefinition of "roaster," each requirement of the Gorsuch Test fails. Just as with the MPSI rule, if the Gorsuch Test was the standard for determining the constitutionality of congressional delegation, then the redefinition of "roaster" would also be unconstitutional.

VIII. LESSONS FROM CHICKENS: INCLUDING A MODIFIED IPT

The two regulatory changes in poultry processing, as discussed in Part VII, provide good examples of why Congress sometimes intentionally leaves important gaps for agencies to fill.[293] One might think that Congress could directly do something as simple as defining a type of chicken. However, whether it is something as seemingly obvious as the definition of "roaster" or something more complex, such as inspection methods and line speeds, it is obvious that these matters depend critically on evolving technological change and scientific understanding.

For roasters, continuing technological changes and improved management techniques have allowed poultry producers to meet the market needs for roaster chickens at a significantly quicker rate.[294] As a result, even before the new definition of "roaster" went into effect, the industry called for yet another redefinition of "roaster."[295] Meanwhile, while earlier inspection systems mostly targeted visible qualities, our improved understanding of the health issues from poultry production led to a new focus on salmonella, e. coli, and campylobacter.[296] To protect against enteric pathogen and fecal contamination, it was important to create an entirely new position in the inspection process—that of the VI.[297]

The FSIS made both of these changes with minimal statutory guidance.[298] The only guidance for the redefinition of "roaster" was that it was "necessary for the protection of the public."[299] There was more guidance for the change in inspection processes because the PPPI Statute had defined "adulterated" as including instances where the poultry "contains any poisonous or deleterious substance which may render it injurious to health," and the new scientific knowledge about these threats therefore specifically authorized action by the FSIS.[300] But even in this instance, the statute provided no guidance as to how this goal was to be achieved, leaving the

293. *See supra* Part VII (discussing changes to the poultry process).

294. *See* Letter from Michael J. Brown to Alfred V. Almanza, *supra* note 268.

295. *Id.* at 3.

296. *See* 21 U.S.C. § 457(g)(1).

297. *See* Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4408, 4414 (proposed Jan. 27, 2012) (codified at 9 C.F.R. pts. 381, 500).

298. *See* 21 U.S.C. § 457(b).

299. *Id.*

300. *Id.* § 453(g)(1).

determination of the means to the agency.[301] It is possible that the initial statute could have defined "roaster" and that a later statute could have revised that definition. But that is not what was done.[302] Why? It is because the regulatory system is working as it should be.

Through these examples, it is apparent that agencies in charge of promulgating and enforcing regulations continue to be restrained by relevant interest groups due to opportunities via the "notice and comment" process or by petitioning the agency directly. Consumer interest groups, such as Consumer Reports, have raised the issue of salmonella, e. coli, and campylobacter, and the FSIS has responded to these concerns with the NPIS.[303] Via a petition, the NCC—an industry interest group—was able to get the FSIS to redefine "roaster" yet again.[304]

In addition to agencies' responsiveness to affected interest groups, another benefit is that these changes are efficiently made—as the literature on optimal federalism notes, it is efficient to let those closest to the action make the decisions.[305] In this case, the FSIS's experience in developing these revised regulations, in addition to their experience working with poultry-processing facilities in enforcing these regulations, means that the FSIS already has the embedded knowledge needed to draft new rules. This is in contrast to having a congressional committee conduct research to learn the same information.

Meanwhile, all of these changes are, in their essence, policy choices. Shifting the responsibilities of personnel conducting an inspection is a policy choice, as is changing the speed of the line.[306] Likewise, changing the definition of "roaster" is a policy choice.[307] These changes are done to achieve policy objectives, including the protection of human health, cost-effectiveness, and meeting the needs of the market.[308] Moreover, they are not done simply as the result of an agency's factual determination.

The problem is not having an agency make policy choices. Rather, it is whether the statute provides basic foundations for review and whether impacted parties have avenues of appeal. The same consumer and industry interest groups could have gone to Congress to amend the PPPI Statute. However, these groups probably noticed that, even after *Schechter Poultry*,

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301. Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49566 (Aug. 21, 2014) (codified at 9 C.F.R. pt. 381).

302. *See* Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49566 (Aug. 21, 2014) (codified at 9 C.F.R. pt. 381).

303. *See* Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4408, 4408 (proposed Jan. 27, 2012) (codified at 9 C.F.R. pts. 381, 500).

304. *See* Letter from Rachel A. Edelstein to Michael J. Brown, *supra* note 273.

305. *See* Heinzerling, *supra* note 99.

306. *See supra* Section VII.A (describing the modernization of poultry inspections).

307. *See supra* Section VII.B (describing the modernization of poultry inspections).

308. *See* Act of June 30, 1982, Pub. L. No. 97-206, 96 Stat. 136; Act of Oct. 17, 1984, Pub. L. No. 87-487, 98 Stat. 2264.

it took Congress more than twenty years to pass the PPIA.[309] There is a good reason that, other than minor amendments in 1982 and 1984, the PPPI Statute has not had a significant amendment in more than fifty years.[310] And that is because, through the regulatory framework created by the PPPI Statute, they have sufficient opportunities to convince the FSIS to make needed regulatory changes.

These lessons demonstrate how applying the Gorsuch Test is inappropriate to determine the constitutionality of congressional delegation to an agency.[311] The Gorsuch Test fails to appreciate the complexities and efficiencies of the modern administrative state. In focusing on a strict separation of powers, this thinking ignores the continuing checks and balances that other state governments and the federal government provide and that also impact interest groups.[312] Given the need for changes in regulatory rules because of technological innovations, advances in scientific information, and shifts in market forces, the Gorsuch Test's requirement that the legislature make these policy-choice changes would lead to significant delays, unnecessarily harming consumers, regulated industries, and those who depend on such industries for their livelihoods.

Further, it is important that the Court not see itself as the sole check on administrative agency power. Instead, the Court should be cautious before using its power in this manner due to its lack of electoral accountability. This caution was a significant part of Justice Scalia's approach to nondelegation—as William Kelley noted: "When Justice Scalia believed that the Constitution, properly understood, left a decision to the realm of discretionary judgment rather than the application of a legal rule, he was a fierce proponent of the Court's staying the hand of judicial power and deferring to the outcome of the political process."[313]

Instead of misbalancing constitutional powers by granting itself inordinate powers through the adoption of the Gorsuch Test, the Court should either follow stare decisis[314] and continue to uphold the IPT as restated in *American Power & Light* and as applied in *Mistretta* and *Whitman* or make a small modification to this test.[315] As this Article argues that the availability of checks and balances should be the primary consideration of the

309. *Schechter Poultry* was decided in 1935, but the PPIA was not passed until 1957. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Poultry Products Inspection Act of 1957, 21 U.S.C. §§ 451–472.

310. The last major amendment was the WPPA of 1968. Wholesome Poultry Products Act, Pub. L. No. 90-492, 82 Stat. 791 (1968).

311. *See supra* Part VII (applying the Gorsuch Test to the recent changes in poultry inspections).

312. *See supra* Part IV (explaining the checks and balances among the branches of government).

313. Kelley, *supra* note 120, at 2107.

314. For an analysis of Justice Scalia's approach to originalism and stare decisis via an "avoidance mechanism," see Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1930 (2017).

315. *See supra* Part II (providing a discussion on the IPT).

nondelegation doctrine, such a modification should include the requirement of checking an agency's power—beyond Congress's opportunity to reexamine the issue. The resulting Modified IPT (the Modified IPT) would thus be stated as follows:

Modified IPT		
Delegation by Congress to the Executive is constitutionally sufficient if:		
	Modified IPT-A	Congress clearly delineates the general policy;
	Modified IPT-B	Congress clearly delineates the public agency which is to apply it;
	Modified IPT-C	Congress clearly delineates the boundaries of this delegated authority; and
	Modified IPT-D	*Some check (beyond the opportunity to have Congress reexamine the issue) is available to balance the power of the delegated executive.* [This requirement is the difference between the IPT and the Modified IPT.]

This Modified IPT would allow administrative agencies to make adaptations to rules due to technological changes, advances in scientific information, and changes in market forces while also protecting the interests of liberty via robust checks and balances.

IX. CONCLUSION

In the end, the Gorsuch Test is anti-consumer, anti-business, and contrary to the Scalia Principle.[316] It would end up significantly harming social welfare and is only justified by an out-of-touch and impractical devotion to a strict separation of powers. Social welfare and the interests of liberty can be better protected by continuing to use the IPT (or its slightly modified version, the Modified IPT) to assess the constitutionality of congressional delegation rather than adopting the Gorsuch Test.

This Article reminds us that even when Congress delegates the power to make policy judgments to an administrative agency, as long as the IPT is satisfied, significant checks and balances on that agency's power remain in place. The Scalia Principle states that a "certain degree of discretion, and thus of lawmaking, inheres in most executive . . . action."[317] Therefore, while most executive actions involve some degree of policymaking, the interests of

316. *See* discussion of the Scalia Principle, *supra* Part IV (recognizing an inherent mixing of legislative powers with executive and judicial powers).

317. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001) (quoting Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)).

liberty can still be protected through these remaining checks and balances.[318]

Furthermore, by enabling the distribution of policymaking to extend to administrative agencies (and even the states), we are able to capture significant efficiencies as noted by the literature on optimal federalism.[319] This redistribution enables policy decisions to be made by those with more specialized skills and knowledge and those that are more directly connected to the complexities and information needed to shape effective policies because the policies sometimes need to be adapted to local conditions.[320] Thus, the adoption of the Gorsuch Test would eradicate the efficiencies of optimal federalism.[321]

The threat to these efficiencies is demonstrated by our analysis of two poultry processing regulatory changes.[322] With the promulgation of the MPSI regulations, the FSIS created a new inspection system—the NPIS—that allowed increased line speeds, which would lower costs for the industry, and reassigned agency inspection staff to address the more threatening health risks resulting from enteric pathogen and fecal contamination.[323] The FSIS also changed the definition of "roaster" twice.[324] Both of these changes were in response to advances in technology and scientific knowledge and were done to address policy considerations of health protection, efficiencies in production and inspection costs, and concerns about higher market prices for consumers.[325] While these changes involved the direct participation of industry and consumer interest groups and would nonetheless benefit both, because the FSIS was making policy judgments, both of these regulatory changes would be unconstitutional under the Gorsuch Test.[326]

As a result, the resuscitation of the nondelegation doctrine by adopting the Gorsuch Test is neither necessary nor efficient.[327] We are no longer in the world of *Schechter Poultry* where no guidance whatsoever was given to the delegated agency.[328] But, when the IPT is satisfied, other federal and state governmental actors, along with the participation of impacted interest groups, can exercise effective checks on an agency's delegated powers, thereby maintaining the proper balance of constitutional powers.[329] Moreover,

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318. *See supra* Part IV (discussing the Scalia Principle).

319. *See supra* note 136 and accompanying text (discussing the benefits of optimal federalism).

320. *See supra* notes 137–40 and accompanying text (applying the optimal federalism framework to wetlands, endangered species, and Medicaid policies).

321. *See supra* note 139–41 and accompanying text (hypothesizing that a Medicaid waiver program may not be allowed under the Gorsuch Test).

322. *See supra* Parts VII–VIII (explaining two poultry-processing regulatory changes).

323. *See supra* Section VII.A (explaining the effects of the NPIS).

324. *See supra* Section VII.B (reviewing the process followed to change the definition of "roaster").

325. *See supra* Part VII (discussing the rationale behind the changes implemented by the FSIS).

326. *See supra* Part VII (applying the Gorsuch Test to both poultry regulatory changes).

327. *See supra* Part II (considering modern jurisprudence on the nondelegation doctrine).

328. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 *passim* (1935).

329. *See supra* Part IV (explaining the maintenance of the proper balance of constitutional powers through satisfaction of the IPT).

continuing these delegations to agencies is necessary to achieve the efficiencies of optimal federalism.[330]

As the Supreme Court considered in *West Virginia*, this Article suggests that it should either continue to apply the IPT or extend this test to reflect the Modified IPT.[331] Before it adopts any reformulation of the standard for nondelegation, the Court should consider how its reformulation would apply to the two examples offered here concerning poultry processing.[332] Adhering to a strict separation of powers may seem to be a virtuous pursuit, but doing so would harm industries and consumers and would cut off the efficiencies of optimal federalism.[333]

330. *See supra* notes 136–38 and accompanying text (discussing benefits of optimal federalism).
331. *See supra* Part VII (considering the options of applying either the IPT or the Modified IPT).
332. *See supra* Part VII (applying the Gorsuch Test to both regulatory changes to poultry processing).
333. *See supra* notes 136–38 and accompanying text (discussing benefits of optimal federalism).