Advocates of congressional reform should look across First Street from the Capitol for a new ally: Supreme Court Justice Neil Gorsuch.

No, Gorsuch has not taken up the cause of changing how Congress works. In recent years, however, he has become known for arguing for stricter enforcement of the non-delegation doctrine—the constitutional principle that states Congress may not delegate its core legislative authority to any other person, body, or branch of government. This doctrine is important because although the framers envisioned Congress as being the foremost branch under the Constitution, power has been shifting steadily and inexorably toward the executive branch. Much of the blame for this development lies with Congress itself.

The last time the Supreme Court ruled legislation unconstitutional on the grounds that it violated the non-delegation doctrine was in 1935, during Franklin Roosevelt’s rollout of the New Deal. Eighty-four years later, Justice Gorsuch penned a dissent arguing for taking that doctrine seriously again, and the Court may now have a majority willing to do so. Those who believe Congress should be the beating heart of the federal government would rightly cheer a change in how the Court decides non-delegation cases.

The justices, however, have reason to resist reshaping the federal government or reconfiguring the balance of power among its branches.

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What’s more, strengthening the non-delegation doctrine is not a panacea for what ails our legislative branch. Rather than waiting for a Court majority to come around to Gorsuch’s view, Congress should heed his dissent.

**History of non-delegation**

The American notion of non-delegation can be traced to 17th-century English philosopher John Locke. According to the second of his *Two Treatises of Government*, a delegation of legislative authority to executive or judicial entities violated the trust the people reposed in the legislature:

> The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. … The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.

In Locke’s understanding, the legislature’s lawmaking power is merely on loan to it from the people, and therefore the legislature does not have the authority to transfer that power to others. Such a move would be tantamount to *creating* legislators, a power the people did not bestow upon the legislature. Any so-called “laws” made by non-legislators are thus illegitimate, since the people did not deem them legislators with the authority to exercise lawmaking power.

Locke described the non-delegation principle as one of the “bounds” set upon the legislature by the people. In his telling, such bounds are not merely artifacts of structural design, like the U.S. Congress’s bicameral configuration or the different modes of electing representatives and senators. Rather, this and other bounds are determined by “the law of God and nature,” as they are a manifestation of reason. In Lockean political theory, then, keeping the legislative power in the hands of the legislature is non-negotiable.

Locke, of course, had significant influence on the Constitutional Convention of 1787, where the delegates discussed the separation of powers extensively. The prospect of Congress delegating its core legislative
powers to others did not appear to concern the framers much, and they said little about it at the convention. On June 1, 1787, the delegates treated the issue briefly within a discussion on the powers of the executive. As the delegates debated whether the executive should consist of a single official or multiple persons, James Madison suggested that they first define the powers of the executive. He recorded in his notes:

He [Madison himself] accordingly moved . . . that after the words “that a national Executive ought to be instituted” there be inserted the words following viz. “with power to carry into effect the national laws, to appoint to offices in cases not otherwise provided for, and to execute such other powers ‘not Legislative nor Judiciary in their nature,’ as may from time to time be delegated by the national Legislature.” The words “not legislative nor judiciary in their nature” were added to the proposed amendment in consequence of a suggestion by Genl. Pinkney [sic] that improper powers might otherwise be delegated.

As Madison indicates, General Charles Cotesworth Pinckney foresaw the possibility that in allotting additional authority to the executive, the legislature might try to delegate core legislative or judicial authorities to the executive that rightly belonged to either itself or the judiciary. By adding the phrase “not legislative nor judiciary in their nature,” General Pinckney hoped to draw an explicit line between legitimate and illegitimate delegations of authority.

Though this particular phrasing did not make it into the U.S. Constitution, its absence should not be interpreted as supporting the idea that Congress may delegate its legislative power to the other two branches. The only recorded objection to the amendment came from Mr. Charles Pinckney (General Pinckney’s first cousin, once removed), who moved that Madison’s entire amendment—not simply General Pinckney’s addition to it—be stricken from the text, since the Constitution already supplied the executive with the power the amendment purported to furnish it. In other words, he objected to Madison’s amendment not because it limited delegations of legislative or judicial powers, but because it was redundant.

The delegates may have had little more to say about non-delegation at the convention, but the Supreme Court took up the subject early
on. *Wayman v. Southard*, decided in 1825, involved Congress’s authority to set the rules of procedure in federal courts. The Process Act of 1792 had permitted courts to change rules of procedure, and the defendant argued that this was an unconstitutional delegation of legislative authority. In his opinion for the Court, Chief Justice John Marshall wrote that “powers which are strictly and exclusively legislative” in nature may not be delegated. He offered no explanation for the statement, however, suggesting that there was no question on the point. At the same time, he acknowledged that other powers Congress could “rightfully exercise itself” may be delegated to the executive or judiciary branches.

After drawing this distinction, Marshall highlighted the problem it raised: It is not always clear which are the “important subjects” that must be the object of legislation and which are of “less interest,” and therefore may be left to non-legislators. Rather than attempting to offer a distinguishing principle, he noted only that it was “a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.” Thus *Wayman* upheld the principle of non-delegation while allowing Congress some ill-defined leeway to grant discretion to non-legislative officials.

A little over a century after *Wayman*, the Court decided another case that has become important for its treatment of non-delegation. *J. W. Hampton, Jr. & Company v. United States*, decided in 1928, tested the constitutionality of a section of the Tariff Act of 1922, which Congress had passed to protect American businesses against cheaper imports. The law allowed the president to raise or lower tariffs—within limits that Congress had specified—if he found that certain items had different foreign and domestic production costs. The plaintiff argued that allowing the president to make such decisions represented an unconstitutional delegation of legislative and taxation authority from the legislature to the executive.

The Court, under Chief Justice William Howard Taft—the only former president to serve on the Supreme Court after leaving the White House—upheld the law, noting that Congress had set the tariff rates and that the president was merely carrying out the law when he ascertained a particular fact (i.e., that there existed differences in production costs for certain items). More broadly, though, the Court sketched out the contours of a non-delegation principle:
Our federal Constitution and state constitutions of this country divide the governmental power into three branches... and in carrying out that constitutional division into three branches it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch.... This is not to say that the three branches are not coordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches.... In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination.

In this passage, the Court verifies that Congress is forbidden from delegating legislative authority to the other branches. Such actions, it emphasizes, would constitute a “breach of the national fundamental law.” At the same time, the majority acknowledges that because federal power is exercised jointly, not separately, each branch may “invoke the action” of the others to achieve its ends. Thus, while Congress may not delegate legislative authority to executive or judicial actors, the Court recognized that it may empower them to issue regulations that bind the public.

The suggestion that “common sense” should dictate the “extent and character” of interbranch cooperation is an indefinite limiting principle. In *Hampton* itself, the Court found that “common sense” permitted the executive agency in question—the Interstate Commerce Commission—to regulate tariff rates, observing that if “Congress were to be required to fix every rate, it would be impossible to exercise the power at all.” The majority did note, however, that the commission was only empowered to act “in accord with a general rule that Congress first lays down.” It was here that the Court articulated a standard for determining whether a congressional delegation of regulatory power to the executive branch passes constitutional muster: “If 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.”

In this case, the “intelligible principle” appeared in section 315 of the act, which stipulated both the extent to which the tariffs could be raised.
or lowered and the factors that the executive would need to consider in determining the production costs of imports. Subsequent rulings have referred to this same idea of an intelligible principle when questions of legislative-power delegation arise.

The non-delegation doctrine as established in *Hampton* has gone largely unchanged since 1928. In the intervening years, the Court has only found that Congress failed to do its due diligence in two cases—both of which occurred amid a rapid expansion of the federal government under the New Deal.

The first instance arose in 1935 in the case of *Panama Refining Company v. Ryan*, where the Court considered a challenge to a provision of the National Industrial Recovery Act (NIRA). Section 9(c) of the act authorized the president to prohibit the transportation of oil produced in excess of quotas established by state governments. Petroleum producers found to have violated the prohibition sued, arguing that Congress had unconstitutionally delegated its legislative power to regulate the transportation of oil to the executive branch. The Court agreed, holding that Congress had “left the matter to the President” without any limiting principle to guide his discretion.

The ruling in *Panama Refining* was novel in that it was the first to strike down a statute on non-delegation grounds. The Court, however, did not see itself as departing from the long-established understanding of the non-delegation principle. In declaring that the “Constitution has never been regarded” as prohibiting Congress from erecting bodies that would draft additional rules circumscribed by legislative limits, the justices recognized that Congress could not be expected to legislate directly on minutiae that would inevitably arise in carrying out duly enacted statutes. Yet the Court did make clear that, “if our constitutional system is to be maintained,” legislative delegations of lawmaking authority “cannot be allowed to obscure the limitations of the authority to delegate.”

Just a few months after the *Panama Refining* decision, the Court declared another NIRA provision unconstitutional on the same grounds. *A. L. A. Schechter Poultry Corporation v. United States* involved a controversy over butchers violating the “standards of fair competition” that industry groups had developed and the president had adopted. As in *Panama Refining*, the Court noted that Congress could allow the executive branch to issue rules, but only if the statute enunciated a
clear policy and limitations on the executive’s discretion. In this case, the Court could not identify any such restrictions, so it struck down the provision. In the words of Justice Benjamin Cardozo, who had voted to uphold the law in *Panama Refining*, the delegation was “unconfined and vagrant” and “running riot.” The Court’s ruling on the matter was clear: Insufficient direction from Congress to the president meant that the law was unconstitutional.

**NON-DELEGATION AFTER GUNDY**

Although *Schechter Poultry* was the last successful non-delegation challenge to a statute, it wasn’t for want of trying. In the 1943 case *National Broadcasting Company v. United States*, for example, the plaintiff challenged the constitutionality of regulations issued by the Federal Communications Commission under the Communications Act of 1934. The provision in question authorized the commission to regulate associations between broadcasting networks and their affiliated stations through licensing measures consistent with “the public interest, convenience, and necessity.” In *Mistretta v. United States*, decided in 1989, litigants questioned Congress’s delegation of rulemaking authority to the U.S. Sentencing Commission, an executive entity established to issue guidelines for the sentencing of criminals in federal courts. And in the 2001 case *Whitman v. American Trucking Associations*, several industry groups sued the Environmental Protection Agency for ozone regulations it had issued under section 109(b)(1) of the Clean Air Act, which directed the agency to issue air quality standards “requisite to protect the public health.” In each case, the Court upheld the statutory provision in question.

The Court took up a non-delegation question most recently in 2019. The case, *Gundy v. United States*, challenged the constitutionality of a provision of the Sex Offender Registration and Notification Act (SORNA), with the petitioner arguing that it granted the attorney general too much discretion in deciding when and how sex offenders convicted before the act’s passage were to register with the police. The majority disagreed, reading SORNA to grant the attorney general only limited authority to determine various administrative details concerning the registration, not whether it occurred at all. This, the Court found, was an acceptable grant of regulatory discretion to the executive branch.

In her opinion for the majority, Justice Elena Kagan defended the Court’s arguably toothless non-delegation doctrine, observing that
the Court has repeatedly “upheld even very broad delegations” of power by the legislature to the executive. These “broad delegations,” according to Kagan, make government possible, since Congress is “dependent... on the need to give discretion to executive officials to implement its programs.” She went as far as to declare that if the delegation of authority in this case were deemed unconstitutional, “most of Government” would be unconstitutional as well.

Justice Gorsuch filed a dissenting opinion, which was joined by Chief Justice John Roberts and Justice Clarence Thomas. The dissenting justices read SORNA as granting the attorney general much more authority than the majority thought it did. More broadly, though, Gorsuch used the dissent as an opportunity to criticize the Court’s treatment of non-delegation cases since Panama Refining and Schechter Poultry.

The Court, Gorsuch argued, had too often abdicated its role in preventing Congress from abandoning its duty to set policy. He insisted that, for a given delegation of power to be constitutional, it had to be limited to cases where Congress enunciated clear and specific standards for major policy, where it listed conditions under which the official could act, or where the subject matter was within the official’s constitutional powers (e.g., discretion granted to the president on an issue relating to foreign affairs). While he acknowledged Congress could allow non-legislative officials some discretion in carrying out the law, in the decades since Panama Refining and Schechter Poultry, the Court had misapplied the phrase “intelligible principle” to the point where it “began to take on a life of its own,” justifying impermissible delegations of lawmaking authority to non-legislators.

Gorsuch’s reasoning harkens back to Locke’s writings. Questions of non-delegation are often conceived of as issues related to power balances between the executive and legislative (and sometimes judicial) branches. But for Gorsuch, “enforcing separation of powers isn’t about protecting institutional prerogatives or governmental turf.” Rather, it is a matter of “respecting the people’s sovereign choice” to delegate legislative power to Congress and defending “a structure designed to protect their liberties, minority rights, fair notice, and the rule of law.” This rationale evokes Locke’s distinction between structural designs and natural law, the latter of which forbids the legislature from transferring lawmaking power to officials that the people have not authorized to make law.

Though only three justices dissented in Gundy, others have signaled a willingness to revisit the non-delegation doctrine. In his Gundy
concern, Justice Samuel Alito stated that he would be willing to entertain a reconsideration of how the Supreme Court treats non-delegation if a majority wished to do so. Later that year, Justice Brett Kavanaugh issued a statement relating to a petition for a writ of certiorari in which he mentioned Gorsuch’s *Gundy* dissent and suggested the Court re-examine its non-delegation jurisprudence. These statements, combined with the dissenting opinion signed by three justices in *Gundy*, suggest that at least five justices—a majority of the Court—may be willing to reconsider how the Court handles non-delegation cases. (This count does not include Justice Amy Coney Barrett, who has yet to vote on a Supreme Court case involving the non-delegation principle.)

While these are promising signs, those hoping to restore Madison’s system of separate powers would be wise to temper their expectations of how much a stricter non-delegation doctrine can accomplish. Gorsuch may have criticized the general trend in the Court’s non-delegation jurisprudence, but he qualified his argument by noting that “the scope of the problem can be overstated.” In his telling, when it appeared the non-delegation doctrine was a non-starter, the “hydraulic pressures” of our system often led the Court to turn to other doctrines to invalidate congressional delegations of power. The “void for vagueness” doctrine, for example, forbids government officials outside of Congress from rendering judgements on policy matters when the authority to do so belongs to legislators. Similarly, the “major questions” doctrine prohibits non-lawmakers from assuming the authority to provide policy answers on important issues when the relevant legislation is silent on the matter. So although the Court may have shied away from striking down laws under the non-delegation doctrine in recent decades, it has been less hesitant to strike them down under related doctrines. In other words, Congress has hardly had free rein to delegate lawmaking authority to the executive *carte blanche*.

We should also be wary of resting our hopes of congressional reform on judicial tea leaves. There is simply no guarantee the Supreme Court will reconsider the non-delegation doctrine, and even if it does, there is no guarantee it will strike down laws for violating the doctrine more often than it does now. As a general matter, the Court tends to be reluctant to declare laws unconstitutional. If the hydraulic pressures of the system led the Court to invalidate laws under alternative doctrines, how can we be sure countervailing hydraulic pressures will not
compel it to uphold questionable laws even with a renewed emphasis on non-delegation?

At root, congressional reformers must acknowledge that a more robust non-delegation doctrine cannot revive Congress or restore the proper balance among the federal branches on its own. To achieve that, Congress itself must more jealously guard its constitutional prerogatives.

Legislator, heal thyself

Justice Gorsuch’s dissent in Gundy invites our national legislature to remember the political philosophy that undergirds its very existence. Members of Congress should read it not as speaking exclusively to judges, but as urging all government officials to see themselves as citizens’ trustees and servants, and as defenders of their rights. They should keep this responsibility in mind every time they vote.

Doing so might prevent the harsh wake-up calls lawmakers receive when they discover the president has used a statute to act contrary to their intent. In February 2019, when President Donald Trump declared a state of emergency to repurpose spending for his signature wall along the U.S.-Mexico border, Democrats in Congress were apoplectic. “The President is lawless and does violence to our Constitution, and therefore, our democracy,” House Speaker Nancy Pelosi said at the time. “His declaration strikes at the heart of our Founder’s concept of America which demands separation of powers.” Republicans, however, were at pains to point out to their Democratic colleagues that Congress itself had paved the way for Trump to act as he did—through sections 201 and 301 of the National Emergencies Act of 1976.

Trade is another area where Congress has undermined its own authority. According to the statement of purpose embedded in the text of the Trade Expansion Act of 1962, Congress intended for the law to stimulate the American economy, to forge closer ties with foreign allies, and to combat the economic reach of communist countries. To that end, section 232 of the act authorizes the president to “take such action, and for such time, as he deems necessary” to limit imports of particular items if he deems their importation a threat to national security. President Trump used the provision to justify imposing tariffs on imports from the European Union, Canada, and Mexico. Levying tariffs on friendly nations—each of which responded in turn with retaliatory tariffs—is hardly a way to carry out Congress’s intent of
expanding the American economy or strengthening relations with our allies. But thanks to the Supreme Court’s non-delegation precedent, a court would almost certainly uphold the constitutionality of the provision, even though Trump’s use of the authority it granted him arguably undermined Congress’s stated intent.

If the Court does change how it decides non-delegation cases, Congress will need to change how it drafts legislation. As a general matter, lawmakers will have to write legislation more carefully, more completely, and more clearly. Doing so will allow it to keep a tighter rein on the executive branch and lessen the likelihood that courts will find fault with its work.

Of course, crafting better, more detailed legislation is easier said than done. The process of enacting high-quality legislation is arduous, requiring policy expertise, working relationships with other members and party leaders, and an understanding of both the written and unwritten rules that dictate how Congress operates. None of these competencies are easy to come by, and much of the contemporary congressional culture works against each to some degree or another. Excessive control of the legislative process by congressional leaders, impoverished personal relationships between members, weakened committees, limited policy expertise, and other challenges all plague today’s Congress, making it less capable of crafting and passing good law.

Lawmakers can ameliorate these deep-seated problems by adopting reforms that aim at making Congress the place where representatives can debate our country’s principles, goals, and the means to achieve them, and then turn these deliberations into legislative language. Getting to this point will require a wholesale legislative reform effort. That is a monumental undertaking, but maintaining any semblance of the non-delegation doctrine—and, by extension, our entire constitutional system—requires it.

The power to make law is the greatest power bestowed upon our national legislature, and keeping it in the hands of our representatives offers the surest way to protect our right to self-govern. In cases where legislators have delegated their lawmaking authority to non-legislators, they have illegitimately ceded the people’s right to govern themselves to entities that are less representative of the people. Restoring Congress’s lawmaking power is the best way to ensure that the people maintain their sovereignty, and in turn, that their rights and liberties are preserved.
It’s not the job of the Supreme Court to save an unwilling Congress from itself. Lawmakers hoping to restore Congress to its rightful place in our constitutional system, therefore, cannot wait for the Court to act. Instead, they must begin the process of reform so that they can more effectively protect and preserve the people’s power, which is not Congress’s to give away.