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Delegation and Original Meaning

Gary Lawson*

88 *Va. L. Rev.* – (2002) (forthcoming)

Abstract

The nondelegation doctrine may be dead as doctrine, but it is very much alive as a subject of academic study. Concurring opinions by Justices Thomas and Stevens in the *American Trucking* case raise anew the question whether the nondelegation doctrine has any grounding in the Constitution's text and structure. The answer is "yes." The nondelegation doctrine flows directly from the doctrine of enumerated powers: the executive and judiciary have no enumerated power to make law, and Congress has no enumerated power to constitute them as lawmakers. The correct formulation of the Constitution's nondelegation doctrine was outlined by Chief Justice Marshall in 1825, and no one has improved on his formulation in nearly two centuries.

DELEGATION AND ORIGINAL MEANING

Gary Lawson*

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Section 109(b)(1) of the Clean Air Act specifies that primary air quality standards “shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator [of the Environmental Protection Agency] . . . are requisite to protect the public health.”¹ In 1999, a panel of the D.C. Circuit held that this statute, as interpreted by the Environmental Protection Agency, left the agency so much leeway in the setting of air quality standards that it violated the nondelegation doctrine.² In Whitman v. American Trucking Ass’ns,³ the Supreme Court unanimously reversed that judgment. The Court construed the statute to mandate air quality standards that are “‘requisite’--that is, not lower or higher than is necessary--to protect the public health with an adequate margin of safety,”⁴ and it held that such a standard “fits comfortably within the scope of discretion permitted by our precedent.”⁵

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¹ 42 U.S.C. § 7409(b)(1) (2000). In addition to the primary standards that are “requisite to protect the public health,” the statute also calls for secondary standards that are “requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air.” Id. § 7409(b)(2).

² American Trucking Ass’ns. v. U.S. EPA, 175 F.3d 1027 (D.C. Cir. 1999), modified, 195 F.3d 4 (D.C. Cir. 1999).

³ 121 S. Ct. 903 (2001).

⁴ Id. at 914.

⁵ Id.

The Supreme Court's 9-0 decision in American Trucking was predictable and entirely unremarkable. The truly remarkable fact is that in the year 2001, the Court still found it necessary to reverse a lower court decision on the nondelegation doctrine. American Trucking is merely the latest in a long, unbroken line of setbacks for proponents of the nondelegation doctrine. The Supreme Court has rejected literally every nondelegation challenge that it has considered since 1935,⁶ including challenges to statutes that instruct agencies to regulate in "the public interest, convenience, or necessity"⁷ and to set "fair and equitable" prices.⁸ After 1935, the Court has steadfastly maintained that Congress need only provide an "intelligible principle"⁹ to guide decisionmaking, and it has steadfastly found intelligible principles where less discerning readers find gibberish.

In 1989, in Mistretta v. United States,¹⁰ the Court brought more than half a century of case law to culmination by unanimously declaring the nondelegation doctrine to be effectively a dead letter.¹¹ The eight-Justice majority in Mistretta upheld an open-

⁶ In that year, of course, the Court held unconstitutional provisions of the National Industrial Recovery Act. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A. L. A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

⁷ National Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943).

⁸ Yakus v. United States, 321 U.S. 414, 426 (1944). The NBC and Yakus decisions, perhaps along with American Power & Light Co. v. SEC, 329 U.S. 90 (1946), which rejected a delegation challenge to the provisions of the Public Utility Holding Company Act that forbid "unfair[] or inequitabl[e]" distributions of voting power, are generally put forth as the death certificates for a judicially enforceable nondelegation doctrine. If statutes as vacuous as those are constitutional, the argument goes, surely there are no cognizable requirements of specificity for congressional statutes.

⁹ The phrase originated in J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928), though the case did not necessarily use the phrase in quite the way that modern law surmises. See infra XXX.

¹⁰ 488 U.S. 361 (1989).

¹¹ Mistretta stopped just short of declaring the doctrine nonjusticiable. The federal courts have jurisdiction to hear nondelegation challenges – just as they have jurisdiction to review, for example, challenges to an agency's decision whether to initiate a rulemaking. But in both cases the courts are so despairing about the

ended grant of authority to the United States Sentencing Commission¹² in terms that should have left no doubt about the fate of future nondelegation challenges.¹³ Justice Scalia, who authored the majority opinion in American Trucking, dissented from the judgment in Mistretta because of a technical quirk in the design of the Sentencing Commission's authority,¹⁴ but he was even more emphatic than was the majority about the futility of garden-variety nondelegation claims.¹⁵ It was painfully obvious that the Court in Mistretta was trying to take the nondelegation doctrine off of the constitutional agenda for the foreseeable future.

possibility of discerning principles to guide decisionmaking that they effectively treat the issues as nonreviewable.

¹² See 28 U.S.C. §§ 991-98 (1994) (establishing and defining the authority of the Commission). The statute sets forth a wide range of goals, purposes, and factors for the Commission to consider, see 488 U.S. at 374-77, but at the end of the day “[t]he Commission does have discretionary authority to determine the relative severity of federal crimes and the assess the relative weight of the offender characteristics that Congress listed for the Commission to consider,” *id.* at 377, the Commission has “significant discretion to determine which crimes have been punished too leniently, and which too severely,” *id.*, and the Commission must “exercise its judgment about which types of crimes and which types of criminals are to be considered similar for the purposes of sentencing.” *Id.* at 377-78.

¹³ See 488 U.S. at 372-74, 378-79.

¹⁴ Justice Scalia's problem was that the Sentencing Commission's sole authority was to promulgate sentencing rules. Thus, “[t]he lawmaking function of the Sentencing Commission is completely divorced from any responsibility for the execution of the law or adjudication of private rights under the law.” 488 U.S. at 420. In other words, the statute does not tie the agency's standardless grant of authority to any task of law implementation, so that one cannot indulge the fiction that the agency is actually exercising executive rather than legislative power. In virtually all other cases that potentially raise nondelegation issues, such as the EPA's authority under the Clean Air Act, the agency has some responsibility for the enforcement or implementation of the law, so that its rulemaking authority can be conceptualized under Justice Scalia's analysis as ancillary to its distinctively executive functions.

¹⁵ See *id.* at 415-16:

But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree [I]t is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.

It is painfully obvious that the Court's plan in Mistretta didn't work. The nondelegation doctrine is the Energizer Bunny of constitutional law: no matter how many times it gets broken, beaten, or buried, it just keeps on going and going. The D.C. Circuit's decision in American Trucking was merely a continuation of an outpouring of attempts by lawyers, judges, and scholars in the past decade to find some way around the unmistakable import of Mistretta. And, in turn, the Supreme Court's decision in Whitman was merely a continuation of the Court's decidedly unsympathetic response to these efforts.¹⁶

Modern scholars have been no more willing than have litigants or lower court judges to give up on the nondelegation doctrine. Two major books and a major article, post-Mistretta, have urged revitalization of the nondelegation doctrine.¹⁷ Other scholars have raised nondelegation issues concerning the use of private actors to implement

¹⁶ In 1989 in Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989), the Court unanimously reversed a district court judgment holding unconstitutional a congressional delegation of the taxing power. See id. at 222-23 (finding “no support . . . for Mid-America’s contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power”). In 1991 in Touby v. United States, 500 U.S.160 (1991), the Court unanimously declined an invitation to prescribe a more rigorous nondelegation standard for statutes that delegate the power to define criminal conduct. In 1996 in Department of the Interior v. South Dakota, 519 U.S. 919 (1996), the Court vacated and remanded an Eighth Circuit decision finding an unconstitutional delegation in a statute giving the Secretary of the Interior open-ended authority to acquire land for Indians. Also in 1996, in Loving v. United States, 517 U.S. 748 (1996), the Court, without dissent, held that Congress could leave it to the President to specify the criteria for application of the death penalty in military courts martial. (Justice Thomas concurred in the judgment without directly addressing the nondelegation question.) And in 1998, in Clinton v. City of New York, 524 U.S. 417 (1998), challengers of the Line Item Veto Act launched a broad-based nondelegation challenge to the President’s authority to “cancel in whole” certain spending and tax-preference provisions; the majority avoided the issue, see id. at 447-48, while the three Justices who addressed it found the statute obviously constitutional.

¹⁷ See Martin H. Redish, The Constitution As Political Structure Ch. 6 (1995); David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation (1993); Michael B. Rappaport, The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. New York, (forthcoming).

governmental programs.¹⁸ Still others have found nondelegation concerns lurking in cases involving ordinary statutory interpretation.¹⁹ And the Court's decision in Loving v. United States,²⁰ which unanimously rejected a nondelegation challenge in the context of the death penalty,²¹ spawned an entire academic conference on the nondelegation doctrine entitled "The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives."²²

There is something very fundamental – indeed, almost primal -- about the nondelegation doctrine that keeps resuscitating it when any rational observer would have issued a Code Blue long ago. It is therefore unlikely that the Court's decision in

¹⁸ See Jody Freeman, The Private Role in Public Governance, 75 **N.Y.U.L. Rev.** 543 (2000); A. Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution, 50 **Duke L.J.** 17 (2000); METZGER (forthcoming).

¹⁹ See Lisa Schultz Bressman, Schechter Poultry at the Millenium: A Delegation Doctrine for the Administrative State, 109 **Yale L.J.** 1399 (2000). Professor Bressman argues that the Supreme Court's decision in AT & T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999), which held unreasonable the FCC's interpretation of the network access provisions of the Telecommunications Act of 1996, 47 U.S.C. § 251(d)(2) (2000), reflected concerns about excessive delegation to the agency and implicitly sought to address those concerns through application of the Chevron doctrine rather than through direct constitutional analysis. The article is thoughtful, informative, and well worth reading, but it is entirely wrong about Iowa Utilities Board. The case holds merely that the agency read its statutory authority in an unreasonably broad fashion. That decision turns entirely on the language and structure of the relevant statute; it says nothing about the power of Congress to pass unconstraining statutes, and to permit unconstraining agency interpretations, if it so desires. For a similar critique of Professor Bressman's reading of Iowa Utilities Board, see Mark Seidenfeld & Jim Rossi, The False Promise of the "New" Nondelegation Doctrine, 76 **Notre Dame L. Rev.** 1. 17-18 (2000).

²⁰ 517 U.S. 748 (1996).

²¹ See supra note 16.

²² The published proceedings of the conference can be found at 20 **Cardozo L. Rev.** 731-1018 (1999). I do not want to be misunderstood as in any way criticizing this outstanding conference. The conference brought together a truly amazing collection of talent, and the published works amply justify the enterprise. I was invited to participate in the conference, and I would have gratefully and eagerly accepted if the conference had not been scheduled within days of my wife's due date for our second child. My point is only that it is difficult to read the Court's remarks in Loving as signaling the rebirth of the nondelegation doctrine. The most that one can say is that Loving did not casually dismiss the plaintiff's nondelegation argument as a near-sanctionable waste of time. That was a thin reed on which to balance one's hopes for the rise of the phoenix.

American Trucking will put the issue to rest. Indeed, quite to the contrary, the concurring opinions by Justice Thomas and by Justice Stevens promise to generate a new, even more vigorous, round of debate.

Justice Thomas joined the majority's brusque dismissal of the delegation challenge in American Trucking in light of existing precedent, but he added the following provocative comment:

The parties to this case who briefed the constitutional issue wrangled over constitutional doctrine with barely a nod to the text of the Constitution. Although this Court since 1928 has treated the "intelligible principle" requirement as the only constitutional limit on congressional grants of power to administrative agencies . . . , the Constitution does not speak of "intelligible principles." Rather, it speaks in much simpler terms: "All legislative Powers herein granted shall be vested in a Congress." U.S. Const., Art. 1, § 1 (emphasis added). I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative."

As it is, none of the parties to this case has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.²³

Justice Stevens, joined by Justice Souter, added an equally provocative concurring comment. He argued that one should frankly acknowledge that Congress routinely delegates legislative power and that one should directly uphold that authority.

Significantly, Justice Stevens insisted that this view is "fully consistent with the text of the Constitution. In Article I, the Framers vested 'All legislative Powers' in the Congress, Art. I., § 1, just as in Article II they vested the 'executive Power' in the President, Art. II, § 1. Those provisions do not purport to limit the authority of either

²³ 121 S. Ct. at 919-20.

recipient of power to delegate authority to others.”²⁴ Justice Stevens invoked, inter alia, a prominent administrative law treatise, which opined that “[t]he Court was probably mistaken from the outset in interpreting Article I’s grant of power to Congress as an implicit limit on Congress’ authority to delegate legislative power.”²⁵ Justice Thomas and Justice Stevens have thus raised anew the question whether the Constitution actually contains a nondelegation principle that is measurably more stringent than the modern Court’s caselaw.

That question has a very straightforward answer: Justice Thomas is clearly right about the Constitution. It does contain a discernible, textually grounded nondelegation principle that is far removed from modern doctrine. Justice Stevens is wrong – and quite fundamentally wrong – to suggest that the Constitution contemplates delegations of legislative power. If one is concerned about the original meaning of the Constitution, the widespread modern obsession with the nondelegation doctrine, at least partially reflected in Justice Thomas’s concurrence, may have some justification.

Part I of this article explains the textual source and precise character of the Constitution’s nondelegation principle. The nondelegation principle is grounded in the more basic principle of enumerated powers. Executive officials cannot exercise legislative powers on their own initiative because they are not granted any such power by the Constitution. Nor can Congress cure this defect by passing vacuous statutes for such officials to “execute,” because those statutes will not be “necessary and proper” for carrying into effect federal powers and will therefore exceed Congress’s enumerated

²⁴ *Id.* at 921.

²⁵ 1 **Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise** 66 (3d ed. 1994).

powers under the Sweeping Clause of Article I. It is well within the original meaning of “[t]he executive Power” for executive officials to exercise discretion with respect to minor or ancillary matters in the implementation of statutes, and ordinary law execution therefore poses no nondelegation problems, but a statute that leaves to executive (or judicial) discretion matters that are of basic importance to the statutory scheme is not a “proper” executory statute. Part II applies this principle to many of the issues that have arisen over the past two centuries. Part III briefly addresses some likely criticisms of my analysis.

This article is an attempt to resolve the budding conflict between Justice Thomas and Justice Stevens by uncovering the Constitution’s original meaning. Nothing in this article should be taken to herald or predict a rebirth of the nondelegation doctrine in the courts, Congress, or the Executive.²⁶ The forces that ground down the nondelegation doctrine are still at work, and they are not likely to go away. But those who reject a meaningful nondelegation doctrine – and that is almost everyone today -- should be open about their reasons. They should have the grace, as did the Supreme Court in Mistretta, to declare that their choice “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”²⁷ They should not pretend to speak in the name of the Constitution.

I

²⁶ Congress and the Executive long ago abandoned any pretense of concern for nondelegation issues. See Gary Lawson, The Rise and Rise of the Administrative State, 107 **Harv. L. Rev.** 1231, 1241 (1994).

²⁷ 488 U.S. at 372.

The Constitution does not contain an express “nondelegation clause.” Article I provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,”²⁸ but there is nothing in the Constitution that specifically states, in terms, that no other actor may exercise legislative power or that Congress may not authorize other actors to exercise legislative power.²⁹ Such clauses were known to the founding generation. The Massachusetts Constitution of 1780 famously provided:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.³⁰

The absence of any such provision in the Constitution of 1788/1789,³¹ or of any provision more directly targeted at the delegation of legislative power, is the basic fact that drove Justice Stevens in American Trucking to deny that the Constitution must be read to prohibit all delegations.

This search for an express nondelegation clause, however, reflects a fundamental misunderstanding of the American Constitution. Because this misunderstanding is so pronounced and so widespread, even among those who ought to know better, it is

²⁸ **U.S. Const.** art. I, §1, cl. 1.

²⁹ See Cass R. Sunstein, Nondelegation Canons, 67 **U. Chi. L. Rev.** 315, 322 (2000).

³⁰ **Mass. Const. of 1780**, art. XXX. Similar provisions appeared in the Virginia Constitution of 1776, the Georgia Constitution of 1777, and the Vermont Constitution of 1786. See Gary Lawson & Patricia Granger, The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 **Duke L.J.** 267, 291-92 (1993).

³¹ This strange locution is necessary because different parts of the Constitution took effect at different times between June 21, 1788 and mid-1789. See Gary Lawson & Guy Seidman, When Did the Constitution Become Law?, 77 **Notre Dame L. Rev.** – (2001) (forthcoming).

necessary to root it out by rehearsing some oft-ignored first principles of American constitutionalism.

A.

The government of the United States is a government of limited and enumerated powers.³² The Constitution does not limit a pre-existing national government.³³ Rather, it creates, defines, and empowers – and in that process limits – a new national government. More precisely, it creates, defines, and empowers – and in that process limits – the constituent institutions of a new national government. The Constitution never grants power to the national government as a unitary entity. Every power grant in the Constitution is a grant to some specific institution or actor within the national government. The principle of enumerated power is really a principle of enumerated institutional power rather than a principle of enumerated national power simpliciter. Any action by any institution or person in the national government must originate in some explicit or implicit constitutional grant of power to that institution or person.³⁴

Accordingly, the correct constitutional question with respect to delegation is not, “Does any clause of the Constitution expressly or implicitly forbid the delegation of

³² Although some Antifederalists disputed that the principle of limited and enumerated powers applied to the national government, the Federalists uniformly and consistently maintained that the national government’s institutions had to trace their powers to a defined constitutional source. See Lawson & Granger, supra note XX, at 315-16.

³³ The Constitution does to some extent limit pre-existing state governments. See, e.g., U.S. Const. art. I, § 10.

³⁴ And, of course, such action must not run afoul of any express or implied constitutional limitation on the exercise of the relevant power.

legislative authority?” The correct question is, “Does any clause of the Constitution expressly or implicitly permit the delegation of legislative authority?”

One cannot answer this question without some understanding of the Constitution’s most basic grants of power. Each of the first three articles of the Constitution begins by vesting a particular kind and quantity of power in a specific institution. Article I vests “[a]ll legislative Powers herein granted”³⁵ in Congress, which expressly confirms that Congress can exercise only those legislative powers referenced elsewhere in the Constitution rather than any imaginable powers that bear the label “legislative.” By contrast, Articles II and III begin with vesting clauses that do not contain any “herein granted” limitation: “[t]he executive Power shall be vested in a President of the United States of America,”³⁶ and “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”³⁷ Accordingly, the President and the federal courts are granted all of the powers that come within the ordinary understanding of, respectively, the executive and judicial powers. If an activity falls within the ordinary, late-eighteenth century understanding of “executive” or “judicial” power, the President or the federal courts are presumptively authorized to engage in that activity.

One must say “presumptively authorized,” because the Constitution contains much more than these basic vesting clauses. Other provisions of the Constitution qualify, limit, or expand the range of activities permitted by the vesting clauses, and still others regulate the kinds of inferences that one can make from the basic power grants. Consider

³⁵ **U.S. Const.** art. I, § 1, cl. 1.

³⁶ **Id.** art. II, § 1, cl. 1.

the powers of the President. To the extent that the executive power includes the power to appoint lesser governmental officials,³⁸ that power is defined and qualified by the Appointments Clause,³⁹ which gives the Senate a vital role in the appointment of principal officers, the Congress a vital role in specifying the method of appointment for inferior officers, and the federal courts and department heads a potential role in the appointment of inferior officers. To the extent that the executive power might be thought to include a general superintendence over foreign affairs,⁴⁰ that power is qualified by numerous grants of power to Congress concerning the maintenance, regulation, and use of military forces.⁴¹ To the extent that one might try to infer an executive power to draw resources from the treasury without legislative authorization, that inference is foreclosed

³⁷ Id. art. III, § 1.

³⁸ I do not explore here the extent to which eighteenth-century audiences would have understood an appointment power to be part and parcel of the executive power. For some provocative indications that they would not, see Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725, 1770, 1776-77 (1996).

³⁹ Id. art. II, § 2, cl. 2 (providing that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments”).

⁴⁰ Again, I do not explore the extent to which the executive power includes a foreign affairs component. For a brilliant introduction to the question, see PRAKASH & RAMSEY; Michael D. Ramsey, The Myth of Extraconstitutional Foreign Affairs Power, 42 Wm. & Mary L. Rev. 379 (2000).

⁴¹ See U.S. Const. art. I, § 8, cl. 3 (giving Congress power “[t]o regulate Commerce with foreign Nations . . . and with the Indian tribes”); id. art. I, § 8, cl. 10 (giving Congress power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”); id. art. I, § 8, cl. 11 (giving Congress power “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”); id. art. I, § 8, cl. 12 (giving Congress power “[t]o raise and support Armies”); id. art. I, § 8, cl. 13 (giving Congress power “[t]o provide and maintain a Navy”); id. art. I, § 8, cl. 14 (giving Congress power “[t]o make Rules for the Government and Regulation of the land and naval Forces”); id. art. I, § 8, cl. 15 (giving Congress power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”); id. art. I, § 8, cl. 16 (giving Congress power “[t]o Provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress”).

by the Appropriations Clause.⁴² To the extent that the ordinary understanding of the executive power would not include a veto power over proposed legislation, the Presentment Clauses defines the executive power to include a qualified veto.⁴³ To the extent that the executive power more generally does not include power to make laws, that understanding is modified in the contexts that implicate the Commander-in-Chief Clause,⁴⁴ which in conjunction with the Vesting Clause authorizes the President to wage war in accordance with international norms, including the norm permitting occupying armies to govern conquered territory.⁴⁵ And to the extent that the power of law execution that lies at the heart of the executive power might be thought to contain a general power to suspend laws, the Constitution imposes on the President the duty to “take Care that the Laws be faithfully executed.”⁴⁶

⁴² *Id.* art. I, § 9, cl. 7 (“No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”).

⁴³ *Id.* art. I, § 7, cls. 2-3 (describing the constitutional requirement of presentment to the President and providing for a presidential veto, subject to an override by a two-thirds majority of each house of Congress). The veto power must be viewed as part of the executive power under the Constitution because the Article I vesting clause states that “[a]ll legislative Powers herein granted shall be vested in a Congress” *Id.* art. I, § 1. Because the veto power is not vested in Congress, it cannot be considered legislative for purposes of the Constitution and therefore must be understood to be part of “[t]he executive Power.” Even if that usage, in the abstract, would not conform to ordinary understandings, the Constitution can establish its own internal rules of interpretation..

⁴⁴ **U.S. Const.** art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”).

⁴⁵ For a detailed discussion of this presidential power – and its oft-ignored limits – see Gary Lawson & Guy Seidman, *The Hobbesian Constitution: Governing without Authority*, 95 *Nw. U.L. Rev.* 581 (2001). It does not matter whether the power to govern occupied territory stems from the Commander-in-Chief Clause, the Vesting Clause, or some combination of the two. If pressed, I would say that it stems from the Vesting Clause, and that the Commander-in-Chief power is simply a confirmation of the chain of authority of military command (so that Congress cannot argue, for instance, that its powers to raise armies and declare war also carry the power to direct military operations).

⁴⁶ **U.S. Const.** art. II, § 3.

Whatever additional powers, limitations, or qualifications the Constitution provides, however, the President's most basic power derives from the Vesting Clause of Article II. The core element of the executive power is the power to carry into effect – to execute – the laws of the United States.⁴⁷

On some occasions, execution of the law requires little or no discretion. If a statute instructs the Secretary of the Treasury to place on a list of persons eligible for pensions all names that were previously forwarded to Congress by the Secretary,⁴⁸ the Secretary does not have discretion to alter the list; the list's content is controlled by the statute. Sometimes, law execution consists merely of dotting "i's" and crossing "t's."

Often, however, execution requires a degree of discretion. If the statute concerning pensions does not specify the precise manner in which the Secretary must enter names on the list of eligible recipients, the Secretary has discretion to fill in that gap. Discretion, of course, is always bounded; the Secretary surely does not have discretion to write the names in invisible ink. But within large bounds established by the statute's meaning and background legal conventions, the person charged with executing the law has some measure of ability to determine the forms and manner of execution.

Executive discretion can even involve matters concerning the meaning and content of a statute. Very few statutes can resolve every possible issue that can arise in every possible application. When courts decide questions involving such statutes, it is an

⁴⁷ PRAKASH. As this discussion suggests, the precise contours of the "executive Power" are, to put it mildly, less than crisp. The term surely did not have a precise meaning in the late eighteenth century in many contexts. See Flaherty, *supra* note XX, at 1790-91. That does not mean, however, that the term is empty. A term need not be precisely determinate in order to have meaningful content. It is not difficult, for example, to establish that the "executive Power" includes the power to execute the laws and to conduct foreign affairs, though it may be quite difficult to establish the precise extent and proper forms for exercise of those powers.

⁴⁸ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803).

ordinary incident of the judicial power. Similarly, when the President makes decisions in the face of ambiguous statutes, it is an ordinary incident of the executive power. The ordinary operations of the executive and judicial powers necessarily entail some measure of discretion in application and interpretation. Indeed, this familiar “gap-filling” role is virtually constitutive of the executive and judicial functions.⁴⁹

But there comes a point where “interpretation” or “application” shades into legislation. Suppose that Congress enacts a “statute” that consists of blank verse or gibberish (or even Robert Bork’s famous inkblot). The marks on the page of the Statutes at Large literally make no sense. If a court or the President tried to implement such a “statute,” on the theory that any enactment by Congress must have some identifiable meaning, they would not be engaged in “interpretation” in any useful sense of that term. They would simply be making up a law – that is, exercising legislative power in the guise of interpretation. As used in the Constitution, the term “executive power” does not mean anything done by an executive actor, and the term “judicial power” does not mean anything done by a court. These are terms with real content.⁵⁰ The courts and the President exceed their enumerated powers by purporting to give meaning to gibberish just as surely as they would exceed their enumerated powers by directly inserting their own texts into the Statutes at Large.

⁴⁹ That is why there has traditionally been a distinction between mandamus (or actions in the nature of mandamus) and other legal remedies against putative illegal executive action. Mandamus is appropriate precisely in those circumstances in which the actor had no significant discretion – as Chief Justice Marshall so painstakingly explained in Marbury. See 5 U.S. (1 Cranch) at 171-73.

⁵⁰ Because the point is so often misunderstood, it is worth repeating, see supra note XX, that “real content” does not always mean “clear content.” Such repeated disclaimers are sadly necessary because of the widespread and pernicious idea that formalism as a mode of constitutional inquiry somehow depends on finding clear understandings about governmental lines in concrete historical sources. For an articulate expression of this deeply rooted fallacy, see Flaherty, supra note XX, at 1734, 1736, 1773.

Suppose now that Congress enacts a law forbidding “all transactions in interstate commerce that fail to promote goodness and niceness,” with no further explanation or contextual clarification. These words are not literally gibberish, but they are so vacuous that any attempt to implement this law would in essence amount to creation of a new law. If a court tried to give the statute effect in an adjudication, it would not be engaging in “interpretation” and therefore would not be exercising the judicial power. The statute leaves so much undetermined that it would constitute an act of legislation to attribute any meaning to it. Similarly, if the President tried to implement the statute, the President would have to give it some construction. But again, that would not constitute the kind of “interpretation” that is within the scope of the executive power. It would be an exercise of legislative power. The President would be making the law.

The Constitution clearly – and one must even say obviously – contemplates some such lines among the legislative, executive, and judicial powers.⁵¹ The vesting clauses, and indeed the entire structure of the Constitution, otherwise make no sense. The Constitution does not merely create the various institutions of the federal government; it vests, or clothes,⁵² those institutions with specific, distinct powers. The Constitution reflects a separation of powers in addition to a separation of personnel.⁵³

⁵¹ See Marci A. Hamilton, Representation and Nondelegation: Back to Basics, 20 **Cardozo L. Rev.** 807, 807 (1999) (“The language of the Constitution would seem to prescribe a bright-line doctrinal approach. For its application, all it would seem to require is a set of definitions – ‘lawmaking’ and ‘enforcement’ – that can be applied to each legislative or executive action, respectively, to determine constitutionality”).

⁵² See Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 **Nw. U.L. Rev.** 1377, 1380-82 (1994).

⁵³ The separation of personnel, of course, is also extremely important to the Constitution’s structure. See Steven G. Calabresi & Joan L. Larsen, One Person, One Office: Separation of Powers or Separation of Personnel?, 79 **Cornell L. Rev.** 1045 (1994).

This obvious point was well understood, and often discussed, by the founding generation and subsequent legal actors.⁵⁴ The famous Massachusetts Constitution of 1780, which was quoted earlier,⁵⁵ assumes a real, functional difference among the legislative, executive, and judicial powers, even if it is not able or willing to specify precisely what that difference might entail. Madison similarly spoke of the need to discriminate among “the several classes of power, as they may in in their nature be legislative, executive, or judiciary,”⁵⁶ which clearly manifests a belief in real distinctions among those powers. Madison elsewhere observed that the task of distinguishing among these powers is difficult, and perhaps in some contexts impossible:

Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces – the legislative, executive, and judiciary Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.⁵⁷

⁵⁴ It may seem strange to some readers that a self-proclaimed originalist would find it necessary to apologize for his uses of founding-era materials, but originalism is poorly enough understood to make some explanation necessary. If the object of originalist inquiry is concrete, subjective understandings – either of some privileged group of founders or ratifiers or of some more amorphous general public – then careful exegesis of historical sources becomes the sine qua non of originalist inquiry. If, however, the proper object of originalist inquiry is something a bit more hypothetical, such as the understanding that the general public would have had if all relevant information and arguments had been brought to its attention, historical sources remain relevant and probative but are inconclusive. As long as documents can have meanings that are latent in their language and structure even if they are not obvious to observers at a specific moment in time (and it is difficult to have a plausible theory of concepts that does not allow for such a thing), then the role and relevance of historical sources is more attenuated. I plan to spell out the (limited) role of history in originalist analysis more fully in a future work. For now, I simply want to emphasize that I do not invoke these sparse sources as proof of any grand propositions about separation of powers or constitutional design. They merely indicate the linguistic acceptability of the basic idea, clearly latent in the constitutional structure, that the basic governmental powers were regarded in the founding era as (for want of a better phrase) basic governmental powers.

⁵⁵ See supra XX.

⁵⁶ **The Federalist** No. 48, at XXX (Clinton Rossiter ed., 1961) (emphasis added).

⁵⁷ Id. No. 37, at 228.

But those problems did not prevent Madison from emphasizing “the necessary partition of power among the several departments as laid down in the Constitution”⁵⁸ and the “separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty.”⁵⁹ The terms “legislative,” “executive,” and “judicial” meant something to Madison, even if he could not articulate precisely (or even vaguely) what they meant.

Chief Justice John Marshall expressed similar sentiments in the Supreme Court’s first extended discussion of the nondelegation doctrine in 1825 in Wayman v. Southard.⁶⁰ As did Madison, Marshall clearly acknowledged that there were real lines among the various governmental powers. And as did Madison, Marshall acknowledged that drawing those lines could be a vexing task:

The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.⁶¹

Despite these definitional problems, Marshall observed that “[I]t will not be contended that Congress can delegate to the Courts, or to any other tribunal, powers which are strictly and exclusively legislative.”⁶²

However difficult it may be to distinguish the legislative, executive, and judicial powers at the margins, the Constitution of 1788-89 clearly places such a distinction at the

⁵⁸ Id. No. 51, at XX.

⁵⁹ Id.

⁶⁰ 23 U.S. (10 Wheat.) 1 (1825). For further discussion of Wayman, see infra XXX.

⁶¹ Id. at 46.

⁶² Id. at 42.

center of its structure. There are constitutional lines that the executive and judicial powers may not cross.⁶³

Thus, the nondelegation doctrine is initially grounded in the principle of enumerated powers as it applies to Articles II and III of the Constitution. The President and the courts cannot make law, even in the guise of interpretation, because they have no enumerated power to do so.⁶⁴ As Professor David Schoenbrod elegantly put it, “[t]he test of permissible delegation should look not to what quantity of power a statute confers but to what kind -- statutes should be permitted to create an occasion for the exercise of executive or judicial power, but not to delegate legislative power.”⁶⁵

B.

The next question is whether Congress can cure those constitutional problems by legislation. Suppose that Congress adds to the organic statute for its hypothetical Goodness and Niceness Commission an explicit provision declaring that the President or some administrative body (or perhaps even the courts) “shall promulgate rules to define the conduct proscribed by this statute.” In light of this provision, if the executive now defines the conduct that fails to promote goodness and niceness in interstate commerce, it would seem to be “executing” the law in the most obvious sense of the term by following

⁶³ Of course, there are also lines that the legislative power may not cross. Congress may not, for example, initiate criminal prosecutions.

⁶⁴ This statement, of course, is subject to the textually grounded exception for presidential governance of occupied territory during wartime. See supra note XX.

⁶⁵ David Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance?, 83 **Mich. L. Rev.** 1223, 1227 (1985).

to the letter the congressional command that the executive assume the role of primary lawmaker. How can it violate Article II for executive officers to do precisely what a congressional statute instructs them to do?⁶⁶ Can Congress make the Article II (and Article III) problems with vague or meaningless statutes go away simply through enactment of an additional authorizing statute? Or can all of the constitutional problems with delegation be circumvented by the simple device of vesting power in state or private actors who are not limited by the enumerations of power in Articles II and III?

These arguments for delegation can be formulated in two ways. First, one might say that statutes giving open-ended authority to executive or judicial actors are not actually delegations, because they simply call for the exercise of executive or judicial power in carrying out the congressional command to make laws. Second, one might concede that such statutes are delegations, but insist that the Constitution permits such delegations, either in general or in certain classes of cases.

The first formulation is clearly wrong. Congress cannot transform lawmaking into execution (or judging) by the simple expedient of enacting a statute. “The executive Power” and “[t]he judicial Power” are formal categories, but they have substantive content. Something is not an exercise of executive power merely because it is carried out by an executive official; it is executive if it falls within the sphere of activity contained within the eighteenth-century understanding of “executive Power.”

⁶⁶ One presumes that this line of reasoning undergirds the position of those who believe that “most broad delegations satisfy the formal requirements of Article I legislation and that the merits of a nondelegation doctrine must therefore turn on broad functional considerations” Peter H. Schuck, Delegation and Democracy: Comments on David Schoenbrod, 20 *Cardozo L. Rev.* 775, 776 (1999) (making reference to comments by Michael Herz).

If one needs support for this obvious proposition: Consider a statute that creates the position of Attorney General of the United States. Can Congress avoid application of the Appointments Clause by stating in the statute that the Attorney General is not in fact an “Officer of the United States”? Clearly not; the term “Officer of the United States” has an objective content that does not depend on, and cannot be altered by, the terms of statutes. Similarly, the basic categories of legislative, executive, and judicial power have a content that is independent of congressional definition. It would not be execution of the law for the President, on his own initiative, to try to give content to a meaningless statute, and it does not become execution of the law if Congress purports to authorize it.⁶⁷ There is a certain kind and quality of discretion that lies beyond the power of the President and the courts to exercise. (And by the same token, there is a certain kind and quality of discretion that is so basic to the powers of the President and the courts that Congress cannot control it.⁶⁸)

Statutes that purport to authorize executive and judicial officials to exercise a kind and quality of discretion that extends beyond the reaches of the executive and judicial powers are delegations of legislative power. If such statutes are constitutional, they must be traceable to some grant of power in the Constitution.

Obviously, if the Constitution expressly said, “Congress may delegate legislative power,” that would be the end of the story. The general categories of legislative, executive, and judicial power are the baseline, or residuum, against which the rest of the

⁶⁷ See Sartorius A. Barber, *The Constitution and the Delegation of Congressional Power* 17-19 (1975).

⁶⁸ See Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decisionmaking*, 18 *Const. Comm.* – (2001) (forthcoming).

Constitution operates, but the Constitution can establish its own intratextual⁶⁹ rules even if those rules fly in the face of traditional understandings of the basic categories.⁷⁰ There is no such express delegation clause. The question is whether the power to delegate can be found in some subtler form.

Consider again the statute prohibiting interstate transactions that fail to promote goodness and niceness and authorizing the executive to define the conduct that violates the statute. The basic prohibition is (let us assume) authorized by the Commerce Clause of Article I, which gives Congress power to “regulate Commerce . . . among the several States.”⁷¹ The ancillary provision instructing the executive (or a state or private actor) to define the conduct proscribed by the statute, however, is not a regulation of commerce and thus cannot be authorized by the Commerce Clause. The authorization for such a statute must instead come, if at all, from the Sweeping Clause of Article I, which grants Congress power to “make all Laws which shall be necessary and proper for carrying into Execution” all constitutionally granted powers.⁷² A number of modern scholars have indeed invoked this clause as a possible constitutional authorization to Congress to confer broad discretion on administrators.⁷³ Any others who wish to defend delegations need to

⁶⁹ On the use of “intratextual” arguments for constitutional meaning, see Akhil Reed Amar, Intratextualism, 112 **Harv. L. Rev.** 747 (1999).

⁷⁰ See supra XX.

⁷¹ **U.S. Const.** art. I, § 8, cl. 3.

⁷² Id. art. I, § 8, cl. 18. Today, the clause is generally known as the “Necessary and Proper Clause,” but the founding generation uniformly called it the Sweeping Clause.

⁷³ See Harold J. Krent, Delegation and Its Discontents, 94 **Colum. L. Rev.** 710, 736 (1994); Peter M. Shane, Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies, 36 **Am. U.L. Rev.** 573, 597–98 (1987); cf. Dan M. Kahan, Democracy Schmemocracy, 20 **Cardozo L. Rev.** 795, 805 (1999) (intimating that the Sweeping Clause might authorize delegations); Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?, 72 **Cornell L. Rev.** 488, 493 (1987) (suggesting generally that the Constitution left “Congress free to make whatever arrangements it

join the bandwagon. If the Sweeping Clause does not in fact authorize Congress to empower executive (or judicial) agents to make law, there is nothing else in the Constitution that will do the trick.

The Sweeping Clause, however, is not quite as sweeping as is commonly supposed. I have elsewhere argued at length, with Patricia B. Granger, that the Sweeping Clause only authorizes laws that are consistent with underlying constitutional principles of federalism, separation of powers, and individual rights.⁷⁴ Although it is impossible to summarize here the extensive textual, structural, and historical arguments that justify this conclusion, the Sweeping Clause is so central to the delegation issue that a brief outline of the argument is necessary.

The Sweeping Clause authorizes laws that are “necessary and proper” for carrying into execution powers vested by the Constitution in federal institutions. The word “necessary” was famously construed by Chief Justice Marshall in McCulloch v. Maryland⁷⁵ to mean “convenient, or useful, or essential to another”⁷⁶ rather than, as opponents of the Bank of the United States had argued, “indispensably requisite.”⁷⁷ Marshall was probably correct: one can argue about just how closely executory laws must

deemed 'necessary and proper' for the detailed pursuit of government purposes," but not specifically discussing the nondelegation doctrine). See generally **James O. Freedman, Crisis and Legitimacy: The Administrative Process and American Government** 79 (1978).

⁷⁴ See Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 **Duke L.J.** 267 (1993).

⁷⁵ 17 U.S. (4 Wheat.) 316 (1819).

⁷⁶ *Id.* at 413.

⁷⁷ *Id.* at 367 (argument of Mr. Jones).

“fit” the ends that they are designed to serve, but a standard of strict necessity is difficult to reconcile with other constitutional uses of the term “necessary.”⁷⁸

The Sweeping Clause, however, requires all executory laws to be both “necessary” and “proper,” in the conjunctive. As was evidenced by common usages in the late eighteenth century, the word “proper” is a distinct term with a distinct meaning.⁷⁹ The term “proper” was frequently used in eighteenth-century legal discourse, especially discourse concerning the allocation of governmental powers, to describe power that is “*within the peculiar jurisdiction or responsibility of the relevant governmental actor.*”⁸⁰ It was used in that fashion in a number of pre-1787 state constitutions⁸¹ and in ordinary legal discourse before and shortly after ratification of the federal Constitution.⁸² These usages point to a meaning of the Sweeping Clause that Patricia Granger and I have termed “jurisdictional”:

[F]irst, an executory law would have to conform to the “proper” allocation of authority within the federal government; second, such a law would have to be within the “proper” scope of the federal government’s limited jurisdiction with respect to the retained prerogatives of the states; and third, the law would have to be within the “proper” scope of the federal government’s limited jurisdiction with respect to the people’s retained rights. In other words, under a jurisdictional construction of the Sweeping Clause, executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights.⁸³

⁷⁸ See Lawson & Granger, *supra* note XX, at 287-88; cf. Randy E. Barnett, *Necessary and Proper*, 44 *U.C.L.A. L. Rev.* 745 (1997) (suggesting a stricter interpretation of “necessary”).

⁷⁹ See Lawson & Granger, *supra* note XX, at 289-91 (marshalling evidence that the terms “necessary” and “proper” in the Sweeping Clause were not redundant).

⁸⁰ *Id.* at 291 (emphasis in original).

⁸¹ See *id.* at 291-92.

⁸² See *id.* at 293-97.

⁸³ *Id.* at 297.

This meaning of the Sweeping Clause finds powerful and cumulative support in statements from eighteenth- and nineteenth-century legal actors;⁸⁴ intratextual comparisons with other constitutional provisions, most notably the Recommendation Clause and the Territories Clause;⁸⁵ the language of contemporaneous state constitutions;⁸⁶ and evidence from the constitutional design, especially the Federalists' understanding of the role of the bill of rights in the constitutional structure.⁸⁷ In sum,

A jurisdictional interpretation of the Sweeping Clause harmonizes with the Framers' conception of limited government, accounts for the otherwise puzzling explanation offered by advocates of the Constitution for the absence of a bill of rights, and provides a role for the Bill of Rights, including the Ninth and Tenth Amendments, that is consistent with almost everything we know about the Constitution's design.⁸⁸

Obviously, I cannot defend this construction of the Sweeping Clause in detail in this article. One does not need to accept all of that construction's possible implications in order to conclude that the Sweeping Clause does not authorize delegations of legislative power. One needs only to conclude that legislation, in order to be "proper," must operate within rather than without the structural scheme established by the rest of the Constitution. That is a very hard claim to rebut, and I know of no one who has seriously tried to do it. The only extended criticism of our construction of the Sweeping Clause has come from Professor Thomas McAfee,⁸⁹ and it is too extended for response here.⁹⁰ But at the risk of

⁸⁴ See id. at 298-308.

⁸⁵ See id. at 308-11.

⁸⁶ See id. at 312-14.

⁸⁷ See id. at 315-26.

⁸⁸ Id. at 315.

⁸⁹ See Thomas B. McAfee, The Federal System As Bill of Rights: Original Understandings, Modern Misreadings, 43 *Vill. L. Rev.* 17, 46-140 (1998).

oversimplifying a ninety-five page analysis: Professor McAfee's complaints run primarily to the implications of our argument for unenumerated rights,⁹¹ which is concededly the most problematic aspect of our argument. To the extent that our interpretation of the Sweeping Clause merely prevents it from becoming a vehicle for subverting the basic constitutional structure, I understand Professor McAfee to question its significance⁹² but not its soundness.⁹³

⁹⁰ Response is also difficult because much of our disagreement with Professor McAfee involves questions of methodology. Professor McAfee ably demonstrates that few, if any, of the founders subjectively understood the Sweeping Clause to have all of the implications that we claim for it. If the search for original meaning consists primarily of a search for concrete historical understandings, Professor McAfee's criticisms, at least of those parts of our argument that concern the relationship between the Sweeping Clause and the bill of rights, have much force. If, however, original meaning is an objective, hypothetical construct that represents the meaning that the Constitution would have had to a fully-informed public audience in possession of all relevant facts and arguments, see supra note XX, then our construction of the clause, which is based primarily on structural inferences, is much stronger.

⁹¹ See McAfee, supra note XX, at 61 ("it is in the individual-rights area that Lawson and Granger seem to go beyond the clearest and relatively modest implications of their general formulations of the jurisdictional role of the term 'proper' in the Necessary and Proper Clause").

⁹² See id. at 53 ("an important question is raised as to whether the general thesis of Lawson and Granger clearly adds anything of substance to the understanding that it purports to replace"); id. at 54 ("If, however, the only implication of Lawson and Granger's thesis is the recognition that the exercise of executive authority as set forth in the Necessary and Proper Clause cannot constitutionally exceed well-established jurisdictional boundaries rooted in the structure of the constitutional order, their thesis hardly calls for the kind of serious reconsideration of constitutional doctrine that they seem to advocate"); id. at 58 (finding it unlikely "that the invocation of the word 'proper,' as a touchstone for analysis, is likely to contribute any of the real work in establishing constitutional claims"). Professor Larry Lessig has raised a similar objection to our analysis in the context of federalism claims. See Lawrence Lessig, Translating Federalism: United States v. Lopez, 1995 **Sup. Ct. Rev.** 125, 201 (doubting that one can advance the ball by framing arguments in terms of "proper" principles of federalism if one must resort to other constitutional principles to define what counts as "proper"). The short answer is that a trivial reading of the Sweeping Clause is enough to sustain the present argument about delegation – and indeed most arguments for which the Sweeping Clause is relevant. Proponents of delegation must find in the Sweeping Clause sufficient authorization to permit Congress to delegate legislative authority. If the word "proper" serves no function other than to provide a textual objection to the use of the Sweeping Clause to undo the Constitution's intricate scheme of limited institutional powers, that is function enough. One must, of course, employ ordinary tools of analysis to determine the contours of that intricate scheme, and in that sense the Sweeping Clause does not perform any of the heavy lifting. But as to whether this understanding of the Sweeping Clause is trivial, one can only answer: Would that it were. I will stop obsessing about the Sweeping Clause when people stop using it as justification for everything from delegations of legislative power, see supra note XX, to the regulation of home-grown wheat, see Wickard v. Filburn, 317 U.S. 111 (1942), to statutes controlling the judicial use of precedent. See Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?, 109 **Yale L.J.** 1535 (2000).

⁹³ Professor Evan Caminker has raised, in passing, some objections to what he terms the "revisionist"

The bottom line is actually quite simple: Congress cannot use the Sweeping Clause to authorize executive or judicial lawmaking if such a statute would not be a “proper” means for carrying into execution governmental powers. Specifically, if a fully informed eighteenth-century audience would have viewed a statute purporting to authorize an executive agent to make laws as “improper,” then Congress does not have the enumerated power to circumvent the Constitution’s basic Article II and Article III limitations on executive and judicial activity.

There is not the slightest doubt that a statute delegating legislative power would not be “proper” and hence would not be authorized by the Sweeping Clause, for the same reasons that Congress cannot delegate power by labeling it execution. The Sweeping Clause, as with all of the other power grants in the Constitution, is a limited rather than unlimited grant. Congress can enact laws to implement federal powers, but only if those laws are consistent with, *inter alia*, a “proper” distribution of powers among federal

account of the Sweeping Clause. See Evan H. Caminker, Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity, 53 *Stan. L. Rev.* 1127, 1138 n.47 (2001). Professor Caminker’s (concededly preliminary) objections are three-fold. First, he argues that “‘proper’ clearly modifies ‘for carrying into execution’ rather than the ‘laws’ themselves, and thus syntactically serves a teleological function.” *Id.* That is untrue, as can be seen from substituting into the Sweeping Clause the Lawson/Granger definitions of “necessary” and “proper”: “Congress shall have power . . . [t]o make all Laws which shall be teleologically fitted and jurisdictionally appropriate for carrying into Execution” federal powers. The subject of the Sweeping Clause is not “Laws,” but rather “Laws . . . for carrying into Execution” federal powers; it makes no difference whether the adjectives come before or after the word “Laws.” Second, he argues that anything substantive that is allegedly provided by the Sweeping Clause is subsumed within the broader notion of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) that all federal laws must “consist with the letter and spirit of the constitution,” *id.* at 421. See Caminker, supra. That is a restatement of the objection that our construction of the Sweeping Clause is trivial. See supra note XX. Finally, he argues that “the Court as well as statespersons focusing on the term ‘proper’ as used in the Necessary and Proper Clause have consistently employed the term in its more natural, teleological sense.” Caminker, supra. We never claimed that our interpretation of the Sweeping Clause was consistent with precedent. Nor did we argue that all usages during the founding era conformed to our understanding; we claimed only that our usage was prevalent enough to be linguistically plausible. See Lawson & Granger, supra note XX, at 292-93, 298. We then relied on textual and structural arguments to show that it was the best construction.

institutions. The Sweeping Clause incorporates the basic constitutional structure; it does not offer a vehicle for circumventing it.

Additional evidence, if any is needed, that the Sweeping Clause embodies a basic constitutional principle against delegation of legislative powers, can be found in the history and purposes of the Constitution's structural arrangements. Professor Mike Rappaport has recently marshaled these considerations in defense of a powerful restatement of the nondelegation doctrine.⁹⁴ His evidence is compelling⁹⁵ but superfluous. Once one recognizes that the Sweeping Clause permits Congress to implement but not to subvert the Constitution's basic structure, there is nothing in the Constitution that can be read generally to authorize the delegation of legislative power.⁹⁶

Accordingly, the prohibition on delegation of legislative power is not merely a free-floating expectation of the founding generation.⁹⁷ It is textually embodied in the requirement that Congress's executive laws respect a "proper" allocation of governmental powers. Thus, far from authorizing broad delegations, the Sweeping Clause is in fact a crucial textual vehicle through which the specific contours of the nondelegation doctrine are constitutionalized.⁹⁸ The background principles that define the "proper" jurisdictional sphere of Congress and other federal actors thus constrain the extent to which Congress can

⁹⁴ RAPPAPORT

⁹⁵ His argument that a prohibition on legislative delegations is necessary to preserve the Constitution's commitment to federalism, as reflected in the design of Congress, is especially striking. RAPPAPORT.

⁹⁶ There may, however, be specific power grants that do authorize delegations in limited contexts. See infra XX.

⁹⁷ PAULSEN

⁹⁸ See Lawson & Granger, supra note XX, at 333–34; Gary Lawson, Who Legislates?, 1995 **Pub. Int. L. Rev.** 147 (1995). See also John L. FitzGerald, Congress and the Separation of Powers 33-35 (1986) (arguing that the Sweeping Clause does not authorize delegations).

create alternative federal lawmaking institutions. Congress simply lacks the enumerated power to authorize other actors to make law.

What about delegations to state officials or private parties? Delegations to those actors do not seem directly to raise Article II or Article III problems. Can Congress therefore delegate its powers to these actors with impunity? A full answer to this question would require a separate article, but it is enough for now to say the following: as far as implementation of federal law is concerned, the Constitution vests “[t]he executive Power” in the President. Accordingly, all execution of federal law must ultimately be controlled by the President, at least through the ability to veto actions that do not conform to presidential instructions.⁹⁹ Even if one can somehow skirt the Appointments Clause problems that are caused by authorizing enforcement of federal law by nonfederal actors, it is constitutionally impossible for Congress to vest executive authority without in some way implicating the President’s powers under Article II. There is accordingly no escape from the operation of the Article I/Article II nondelegation principle.

⁹⁹ There is a huge academic debate about the existence of the so-called “unitary executive.” A great many academics question whether the Constitution truly places control of federal law execution in the hands of the President. See, e.g., Flaherty, supra note XX, A. Michael Froomkin, The Imperial Presidency’s New Vestments, 88 Nw. U.L. Rev. 1346 (1994); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1 (1994). The classic pro-unitarian work is Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 Yale L.J. 541 (1994). After all of the trees are felled, the basic question is really quite simple. The language of the Article I Vesting Clause places control of law execution in the President’s hands about as clearly as it is possible to do so. The case against the unitary executive must either deny that the Article I Vesting Clause is a grant of power or affirm that the Sweeping Clause authorizes Congress to undo the basic constitutional structure. Neither move is plausible. The issue looks complicated only because so much of modern discourse on presidential power has focused on the removal power, which is indeed a very problematic question. As I have elsewhere explained, however, the removal question is actually separate from the issue of the unitary executive. See Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1241-45 (1994). If one focuses instead on either a presidential “veto power” over discretionary decisions by subordinates or a direct presidential power to make all discretionary executive decisions, the case for the unitary executive is quite straightforward, though the unitary executive does not necessarily lead to precisely the conclusions that many modern unitarians have sought to draw.

As for delegations to state courts: as long as review is available in Article III courts, the Article I/ Article III nondelegation principle continues to govern. A full treatment of this issue thus implicates the perennial debate about the extent of federal court jurisdiction over state decisions construing federal law. That is a swamp that that we will mercifully avoid for today.¹⁰⁰

The only vehicle through which Congress could authorize delegations is the Sweeping Clause. If a “proper” law under that clause requires Congress to exercise its legislative power, which it does, then Congress cannot avoid the nondelegation doctrine by authorizing federal, private, or state actors to make federal law. The Constitution’s delicate allocation of governmental powers cannot be unraveled by statute. The Framers were not that stupid.

C.

Even if the Constitution does contain a nondelegation principle, however, there remains the problem of determining when grants of discretion to administrators or judges constitute delegations of legislative authority. Administrators and judges, after all, are constitutionally capable of exercising, respectively, Article II “executive Power” and Article III “judicial Power,” and those powers surely include some ability to exercise discretion. When does discretion cross the line from executive or judicial to legislative authority?

¹⁰⁰ For an intriguing entrée into that debate, and an equally intriguing proposed resolution, see David E. Engdahl, Intrinsic Limits of Congress’ Power Regarding the Judicial Branch, 1999 **B.Y.U. L. Rev.** 75, 143-53.

The difficulty of drawing this line – a difficulty that was acknowledged by Madison and Marshall, among others – drives much of the suspicion of a constitutionally meaningful nondelegation doctrine. Justice Scalia, who in his academic guise toyed with the idea of a reinvigorated nondelegation doctrine,¹⁰¹ reconsidered that position when it required formulating a concrete, judicially enforceable standard. In his dissent in Mistretta, Justice Scalia fully agreed with the majority’s view that the Sentencing Reform Act is not unconstitutional “because of the lack of intelligible, congressionally prescribed standards to guide the Commission.”¹⁰² Doctrinally, Justice Scalia’s agreement with the majority rested on a straightforward reading of precedent,¹⁰³ but he made clear that he regards the degree of discretion to be vested in administrators as essentially a political question that cannot (at least in the normal run of cases) be evaluated by courts:

But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.¹⁰⁴

And for Justice Scalia, to say that it is something other than a matter of principle is to say that it is not something for courts to decide.

A plethora of scholars agree that, even if the Constitution contains some abstract nondelegation principle, it is too indefinite and uncertain to form the basis for constitutional

¹⁰¹ See Antonin Scalia, A Note on the Benzene Case, 4 **Regulation** 25 (July/Aug. 1980).

¹⁰² 488 U.S. at 416.

¹⁰³ “What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a ‘public interest’ standard?” *Id.*

¹⁰⁴ *Id.* at 415.

doctrine. For instance, Cass Sunstein notes, with characteristic perspicacity, that “[t]he distinction between ‘executive’ and ‘legislative’ power cannot depend on anything qualitative; the issue is a quantitative one. The real question is: How much executive discretion is too much to count as ‘executive’? No metric is easily available to answer that question.”¹⁰⁵ Accordingly, he argues, “the overwhelming likelihood is that judicial enforcement of the doctrine would produce ad hoc, highly discretionary rulings,”¹⁰⁶ to the point that “[w]ithout much exaggeration, and with tongue only slightly in cheek, we might even say that judicial enforcement of the conventional doctrine would violate the conventional doctrine – since it could not be enforced without delegating, without clear standards, a high degree of discretionary lawmaking authority to the judiciary.”¹⁰⁷ Other scholars have forcefully made similar arguments.¹⁰⁸

They have a point. It is one thing to wave the Constitution and rail against delegations. It is another matter to identify specific instances of impermissible delegation. My hypothetical Goodness and Niceness Commission statute may be a slam dunk, but is, for example, section 109(b)(1) of the Clean Air Act equally flawed?

Proponents of a meaningful nondelegation doctrine have produced, over a span of nearly two centuries, four different methods for giving the doctrine concrete content – one by Chief Justice John Marshall and three by modern scholars.

¹⁰⁵ Sunstein, supra note XX, at 326-27.

¹⁰⁶ Id. at 327.

¹⁰⁷ Id.

¹⁰⁸ See Richard J. Pierce, Jr., Political Accountability and Delegated Power: A Response to Professor Lowi, 36 **Am. U.L. Rev.** 391, 393-403 (1987); Richard B. Stewart, Beyond Delegation Doctrine, 36 **Am. U.L. Rev.** 323, 324-28 (1987).

1.

The first serious effort to define a nondelegation principle was put forth by Chief Justice Marshall in 1825 in Wayman v. Southard.¹⁰⁹ The State of Kentucky had enacted a statute providing that plaintiffs in Kentucky courts must accept state bank notes in satisfaction of their judicial judgments; victorious plaintiffs could not demand payment in hard currency.¹¹⁰ The plaintiff insisted that this statute did not govern the methods for executing federal court judgments in Kentucky, which were instead controlled by federal laws. The Supreme Court agreed with the plaintiff. In 1789, Congress had passed an act “to regulate processes in the Courts of the United States,” which stated that

until farther provision shall be made, and except where by this act, or other statutes of the United States, is otherwise provided, the forms of writs and executions, except their style, and modes of process, in the Circuit and District Courts, in suits at common law, shall be the same in each State respectively, as are now used in the Supreme Court of the same.¹¹¹

This statute established the various state laws as they stood on September 29, 1789, as the governing law for executing federal judgments. That principle was incorporated into a 1792 enactment, which provided that

the forms of writs, executions, and other process, except their style, and the forms and modes of proceeding in suits in those of common law, shall be the same as are now used in the said Courts respectively, in pursuance of the act entitled “an act to regulate processes in the Courts of the United States,” except so far as may have

¹⁰⁹ 23 U.S. (10 Wheat.) 1 (1825).

¹¹⁰ Wasn't this statute a flagrant violation of Article I, section 10, which forbids states from making “any Thing but gold and silver Coin a Tender in Payment of Debts”? **U.S. Const.** art. I, § 10, cl. 1. That point certainly occurred to the counsel for plaintiff, “[b]ut as the Court intimated that the cause might be upon the other points, the argument upon the constitutionality of the [Kentucky] statute was not pressed.” 23 U.S. at 10-11 (argument of plaintiff’s counsel).

¹¹¹ Act of Sept. 29, 1789, ch. 21, 1 Stat. 73, --.

been provided for by the act to establish the judicial Courts of the United States; subject, however, to such alterations and additions as the said Courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any Circuit or District Court concerning the same.¹¹²

In view of this statute, the Court concluded that the Kentucky bank-note statute, which was adopted after September 29, 1789, did not govern federal executions. The federal statute concerning executions adopted only those state laws in existence on September 29, 1789.¹¹³ Nor, said the Court, do subsequent state enactments apply to federal court processes of their own force; the state laws are relevant only to the extent that they are incorporated by federal statute.¹¹⁴ Therefore, the post-1789 Kentucky statute did not apply to execution of federal judgments.

The defendant who sought application of the Kentucky statute countered that the 1792 federal law was unconstitutional, because the provisions permitting federal courts to make unspecified “alterations,” “additions,” and “regulations” to existing law governing executions delegated legislative power to the courts. The Supreme Court did not formally decide this issue for two reasons. First, “the question respecting the right of the Courts to alter the modes of proceeding in suits at common law . . . is not the point on which the Judges at the circuit were divided, and which they have adjourned to this Court.”¹¹⁵ Second, because the Court soundly rejected the idea that Kentucky statutes could govern federal court processes of their own force, the Kentucky bank-note statute could apply only if there was a valid federal statute that made it applicable. The defendant therefore needed

¹¹² Act of May 8, 1792, ch. 137, 1 Stat. 275, --.

¹¹³ See 23 U.S. at 41.

¹¹⁴ Id. at 49-50.

¹¹⁵ Id. at 48.

the 1792 Process Act to be valid in order to win the case, and indeed needed it to incorporate post-1789 state laws – which would, of course, raise even more serious delegation problems than did the provisions for judicial alterations of the form of execution.¹¹⁶ Thus, the defendant would lose the case whether or not the Court invalidated the 1792 Process Act.

Although the Court therefore did not need to pass on the constitutionality of the Process Act, Chief Justice Marshall nonetheless penned a lengthy dictum on the nondelegation doctrine that still stands as the Court’s most sophisticated treatment of the issue.

Marshall began by observing that “[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”¹¹⁷ He continued with the following intriguing and important observation:

But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. Without going farther for examples, we will take that, the legality of which the counsel for the defendants admit. The 17th section of the Judiciary Act, and the 7th section of the additional act, empower the Courts respectively to regulate their practice. It certainly will not be contended, that this might not be done by Congress. The Courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended, that these things might not be done by the legislature, without the intervention of the Courts; yet it is not alleged that the power may not be conferred on the judicial department.¹¹⁸

This is a crucial passage that contains a fundamental insight about constitutional structure.

Each department of the national government can only exercise its enumerated powers; the

¹¹⁶ *Id.* at 47-48.

¹¹⁷ *Id.* at 42.

¹¹⁸ *Id.* at 43.

federal courts, for instance, can only exercise “[t]he judicial Power.”¹¹⁹ This division of power, however, does not mean that each and every possible function of government must uniquely be assigned to one department or institution.¹²⁰ It is possible that certain functions might fit within more than one kind of power. Consider the adjudication of disputes. This function certainly fits comfortably within the meaning of the “judicial Power,” so assuming that a particular dispute is within the enumerated heads of jurisdiction of the federal courts, there is no constitutional problem with courts performing that function. But that activity can also fit within the meaning of the “executive Power.” There is nothing constitutionally wrong with having executive officials determine, for instance, claims for veterans benefits under a statute defining terms of eligibility. Congress could, if it chose, entrust those determinations to federal courts (whose “judicial Power” would enable it to receive that grant of authority), or it could leave those determinations to executive officials (whose “executive Power” would permit exercise of the granted power). Congress could even choose to make those determinations itself in the form of private bills. Thus, the function of adjudicating disputes concerning government benefits could be performed by any of the three departments of the national government.

The Constitution uniquely assigns certain powers to each department. Sometimes, it uniquely assigns certain functions to one power; only the courts (or a jury), for instance, can adjudicate guilt in a criminal case. But the Constitution does not always uniquely assign any given function to one power. Accordingly, it is not a per se violation of the

¹¹⁹ Other than the Article III Vesting Clause, the only provision of the Constitution that grants any power to the federal courts is the Appointments Clause, which empowers the “Courts of Law” to receive from Congress the power to appoint inferior officers. See U.S. Const. art. II, §2, cl. 2.

¹²⁰ See *Freytag v. Commission of Internal Revenue*, 501 U.S. 868, 909-12 (1991) (Scalia, J., concurring in part and concurring in the judgment). Professor Flaherty, for one, has sometimes confused the difference between powers and functions. See Flaherty, supra note XX, at 1736.

nondelegation doctrine for Congress to authorize another actor to perform a function or make a decision that Congress could make for itself. The real question is whether Congress is attempting to authorize another actor to exercise power that exceeds that actor's enumerated constitutional powers. If making ancillary decisions about the operation and meaning of a statute is a valid exercise of the "executive Power," which it surely is, then Congress does not violate the nondelegation doctrine by authorizing such activity. And if regulating the processes for bringing and pursuing cases falls within the "judicial Power," then nothing prevents Congress from authorizing the courts to enact such regulations.¹²¹ That is essentially what Chief Justice Marshall said in Wayman. Perhaps one could quarrel with his implicit premise that the "judicial Power" includes anything beyond the bare power to decide a case in accordance with governing law,¹²² but the form of his argument is true to the constitutional structure.

Even accepting Marshall's method of framing the issue, one may still question whether specifying the form of payment for judgments is truly an exercise of "judicial Power"¹²³ or instead is an aspect of court process that is so bound up with substantive policymaking that it must constitute an exercise of legislative power. Marshall acknowledged the force of this question – and acknowledged it very powerfully by not directly answering it. Some aspects of court procedure seem more clearly judicial than

¹²¹ Whether courts can regulate their processes entirely without legislative direction, as opposed to fleshing out details in a legislatively-prescribed scheme, is yet another matter for consideration. Marshall addresses only the latter circumstance.

¹²² See infra XX.

¹²³ Again, one can break this question up into two separate questions: can courts fill in the details of a legislative scheme, and can courts impose their own scheme even in the absence of any legislative provision?

legislative. For example, the precise form of notice to judgment debtors that their property is subject to levy is something that legislatures may but need not decide; if the “judicial Power” includes any aspect of court procedure, this procedure surely falls within it. On the other hand, “[t]o vary the terms on which a sale is to be made, and declare whether it shall be on credit, or for ready money, is certainly a more important exercise of the power of regulating the conduct of the officer”¹²⁴ Is it therefore outside the boundaries of the “judicial Power”? An answer of “yes” would leave courts with no mechanism for enforcing judgments if Congress did not provide one, though that is hardly an unthinkable result. Marshall suggested that “[a] general superintendence over this subject seems to be properly within the judicial province, and has been always so considered,”¹²⁵ though he acknowledged that “in the mode of obeying the mandate of a writ issuing from a Court, so much of that which may be done by the judiciary, under the authority of the legislature, seems to be blended with that for which the legislature must expressly and directly provide, that there is some difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its Courts.”¹²⁶

In other words, policing the lines between the legislative and judicial (or between the legislative and executive) powers can produce hard cases, and the facts of Wayman v. Southard may present one very good example. As Marshall pointedly put it,

The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the

¹²⁴ 23 U.S. at 45.

¹²⁵ Id.

¹²⁶ Id. at 46.

precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.¹²⁷

All of which leaves us with the task of distinguishing legislative from executive from judicial power. Surely there are easy cases: the President cannot set tax rates,¹²⁸ the courts cannot initiate prosecutions,¹²⁹ and Congress cannot put people in jail.¹³⁰ But how would Chief Justice Marshall have us address the difficult cases?

Marshall put forth his ultimate methodology for resolving delegation issues in one cryptic sentence: “The line has not been entirely drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.”¹³¹ The line between legislative power and executive or judicial power thus turns, in close cases, on whether the function in question involves “important subjects” or matters of “less interest.” The precise form of notice to debtors is not important enough to require congressional resolution. The form of payment for judgments is more important than the form of notice, though perhaps also not important enough to require congressional resolution. But a decision, for instance, to exempt personal firearms from execution¹³² is not something that Congress could leave to the courts (nor is it something that courts could devise on their own). That determination

¹²⁷ Id.

¹²⁸ But see *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928) (letting the President set tax rates).

¹²⁹ But see *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987) (suggesting that courts can initiate prosecutions).

¹³⁰ But see *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821) (letting Congress put people in jail).

¹³¹ 23 U.S. at 43 (emphasis added).

¹³² CITE

just looks too important – too legislative – to be left to judicial (or executive) actors. In other words, after much sturm und drang, we end up with a test for delegations that says, in essence, “Congress must make whatever decisions are important enough to the statutory scheme in question so that Congress must make them.”

As constitutional tests go, this one certainly sounds pretty lame – not to mention absurdly self-referential.¹³³ It is no surprise that a rule-of-law devotee like Justice Scalia flees from it as a vampire flees garlic. Surely, one might think, the constitutionality of legislative authorizations to executive and judicial actors cannot turn on something as ephemeral, and ultimately circular, as a distinction between “important subjects” and matters of “less interest.” Perhaps the search for a manageable nondelegation principle must continue.

Subsequent Supreme Court cases, however, have never significantly elaborated on Chief Justice Marshall’s formulation. The Court’s next major pronouncement on the nondelegation doctrine did not come until 1892 in Field v. Clark.¹³⁴ Congress by statute provided for duty-free importation of such items as molasses, sugar, coffee, and tea, but specified that the statute's free-trade provisions with respect to any specific country must be suspended by the President if he determined that such country imposed "reciprocally unequal and unreasonable" trade restrictions on American exporters.¹³⁵ The plaintiff

¹³³ It is also sufficiently fuzzy to give rise to reasonable debate about whether Chief Justice Marshall truly intended it to be a meaningful test for delegations. See Barber, *supra* note XX, at 70-71 (suggesting that Wayman v. Southard can be interpreted as an extraordinarily permissive regime for delegations). Regardless of Chief Justice Marshall’s true intentions, however, his language and analysis stand on their own.

¹³⁴ 143 U.S. 649 (1892).

¹³⁵ Act of Oct. 1, 1890, § 3, 26 Stat. 612.

claimed that this provision unconstitutionally delegated legislative power to the President. The Court rejected the delegation challenge in a lengthy discussion, part of which reads as follows:

That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act . . . under consideration is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation Congress itself determined that the provisions of the act . . . permitting the free introduction of such articles, should be suspended as to any country producing and exporting them that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected and paid . . . while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President [W]hen he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural products of the United States . . . , it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.¹³⁶

Three Justices dissented, maintaining that the statute "certainly extends to the executive the exercise of those discretionary powers which the Constitution has vested in the law-making department."¹³⁷

The statute in Field is an instance of a widespread phenomenon known as contingent legislation, which is central to nondelegation analysis and requires some brief explanation. Every law has an effective date. Laws can take effect immediately, on some

¹³⁶ 143 U.S. at 692-93.

¹³⁷ Id. at 699-700 (Lamar, J., dissenting).

specific future date, or on the happening of some future event that may or may not be certain to occur. If a law takes effect only on the happening of some future event that is not certain to occur (or is not certain to occur at a specific time), it is contingent legislation.

Courts have long allowed Congress to make the effectiveness of laws depend on contingencies and to allow other actors to determine whether those contingencies have been satisfied. The first Supreme Court case expressly to permit this practice was Cargo of the Brig Aurora v. United States.¹³⁸ Beginning in 1809, Congress passed a series of statutes restricting trade with Great Britain and France and subjecting cargo shipped in violation of the statute to forfeiture. The 1811 version of the statute provided that the trade prohibition was to be in effect unless the President declared by proclamation that the relevant countries – in this case Great Britain -- had ceased to violate the neutral commerce of the United States.¹³⁹ Appellant's cargo was seized under the statute. The primary issue in the case concerned the date on which Congress intended the statute to take effect,¹⁴⁰ but counsel for appellant also argued that the entire statute was unconstitutional because "Congress could not transfer the legislative power to the President. To make the revival of a law depend upon the President's proclamation, is to give to that proclamation the force of a law."¹⁴¹ The Supreme Court dismissed the argument in one sentence: "[W]e can see no sufficient reason, why the legislature should

¹³⁸ 11 U.S. (7 Cranch) 382 (1813).

¹³⁹ Id. at 384-85.

¹⁴⁰ Id. at 385-86 (argument of Joseph R. Ingersoll).

¹⁴¹ Id. at 386 (argument of Joseph R. Ingersoll).

not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct."¹⁴²

The Court was correct to approve the general practice of contingent legislation. Normally, a statute's effective date will be a calendar date, but there is no evident reason why that effective date can't be determined by some event other than celestial motions – such as legislation that takes effect only upon occurrence of natural disasters. Once the statute identifies a contingent event as the trigger for effectiveness, someone must determine in any given case whether the event has occurred (just as someone must determine whether the relevant calendar date has occurred if the statute prescribes a calendar date). That someone will be either an executive agent or a judicial agent: the interpretation of the contingency (what counts as a natural disaster? how high does the water have to rise before it constitutes a flood?) and the ascertainment of whatever facts the contingency depends upon (how high did the water actually rise?) are core executive or judicial functions.

The statute in The Brig Aurora (and in Field v. Clark) gave the President the power to determine whether a stated contingency had occurred, but the contingency itself was specified in the statute. That is, Congress determined the conditions under which the statute would be effective, but left it to the executive to determine whether those conditions were satisfied. The statute did not say that the act would be effective if and when the President decided, on the basis of standardless discretion, that it would be a good idea. It is true that the facts underlying the contingency in The Brig Aurora -- whether Great Britain or France was violating the neutral commerce of the United States

¹⁴² Id. at 388.

-- were perhaps less easily ascertained than calendar dates or natural disasters,¹⁴³ but the uncertainties do not seem more severe than in the routine questions that form the everyday work of executive and judicial agents.

Field v. Clark presents a qualitatively different variation on this theme. The determination of the “facts” that drove the contingency in that case – whether foreign countries imposed “reciprocally unequal and unreasonable” trade restrictions on American exporters – seems to involve more of an exercise in judgment than does the ascertainment of calendar dates or the identification of hostile action by British warships. The tariff statute in Field resolves less and leaves more to the imagination than did the statute in The Brig Aurora. That is no doubt why the decision in Field was 6-3 rather than 9-0.

So assume that Field presents a case about which reasonable people could disagree. How did the Court propose to resolve that reasonable disagreement? It never told us. The majority repeatedly asserted that the President was merely following the legislative will by finding “facts” concerning unequal and unreasonable trade restrictions. It never explained how one would establish that such determinations are exercises of executive rather than legislative power. Nor did the dissent explain why it placed those determinations on the legislative side of the line.

Nonetheless, one can fairly glean the methodology that underlies both opinions. For the majority, the legislative specification of the relevant contingency was the “important subject” for determining the effectiveness of the statute. Determining whether

¹⁴³ One might wonder how hard it could be to determine whether Great Britain or France was boarding or sinking our ships. The actual operation of the statute, however, may have been a bit more complicated than appears at first glance. See Barber, *supra* note XX, at 56-58.

foreign countries actually imposed unequal and unreasonable trade restrictions was a matter of “less interest” and thus appropriate for executive or judicial resolution; it involved some degree of policymaking, but not so much as to push it into the “legislative” category. The dissent construed the amount of policymaking involved differently. Put another way, the majority and the dissent disagreed about whether giving more precise definition to the phrase “reciprocally unequal and unreasonable” was a decision that was so important in the context of the statutory scheme that Congress had to make it. The majority and the dissent were both implicitly employing the vague, circular “test” set out by Chief Justice Marshall 67 years before.

Later cases tacitly employed the same methodology without additional elaboration. A good illustration is Buttfield v. Stranahan.¹⁴⁴ The case involved a statute that was on the books for ninety nine years before its repeal in 1996: the Tea Importation Act. Act of Mar. 2, 1897.¹⁴⁵ As codified just before its repeal,¹⁴⁶ the Act instructed the Secretary of Health and Human Services¹⁴⁷ each year to "appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea."¹⁴⁸ In accordance with the board of experts' recommendations, the Secretary was instructed to "fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United

¹⁴⁴ 192 U.S. 470 (1904).

¹⁴⁵ Ch. 358, 29 Stat. 604 (codified as amended at 21 U.S.C. §§ 41–50 (1994)).

¹⁴⁶ The Act was repealed by the Federal Tea Tasters Repeal Act of 1996, Pub. L. No. 104–128, 110 Stat. 1198 (1996).

¹⁴⁷ The original statute vested authority in the Secretary of the Treasury.

¹⁴⁸ 21 U.S.C. § 42.

States" and to deposit samples of these standards in the customhouses of various ports of entry.¹⁴⁹ Tea importers were required to submit samples of their product for comparison with the standard samples kept at the customhouses.¹⁵⁰ The imported samples were then tested "by a duly qualified examiner,"¹⁵¹ who would test "the purity, quality, and fitness for consumption of the . . . [imported tea samples] according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water and, if necessary, chemical analysis."¹⁵² The statute declared it unlawful to import into the United States "any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards [kept at the customhouses]"¹⁵³ In sum, for nearly a century, Congress provided that no imported tea could enter the United States unless federal tea-tasters decided that it measured up to pre-selected standard samples.

In 1904, the Court addressed a challenge to this statute on the ground that it delegated legislative power to the administering officials. The Court tersely upheld the statute:

The claim that the statute commits to the arbitrary discretion of the Secretary . . . the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute . . . but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary . . . the mere executive duty to effectuate the legislative policy declared in the statute We may say of the legislation in this case, as was said of the legislation considered in Field v. Clark, that it does not,

¹⁴⁹ Id. § 43.

¹⁵⁰ See id. § 44.

¹⁵¹ Id. § 46.

¹⁵² Id.

¹⁵³ Id. § 41.

in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute.¹⁵⁴

As in Field, the Court announced a result without much by way of explanation. The Court appeared to be saying that specifying the standard was the “important subject,” while filling in its meaning was a matter of “less interest.” There is nothing in Stranahan that advances the ball beyond the formulation of Wayman v. Southard.

Two historical watersheds for the nondelegation doctrine occurred in 1928 and 1935, but neither contributes significantly to an understanding of the appropriate nondelegation principle. J.W. Hampton, Jr. & Co. v. United States¹⁵⁵ took the next step beyond Field v. Clark in the analysis of contingent legislation. Field was a straightforward case of contingent legislation in which the President had to determine whether the effectiveness of a statute. But once the President determined that a certain country had imposed reciprocally unequal and unreasonable trade restrictions on American importers, the statute then operated of its own force. The statute in Field did not give the President discretion to suspend the statutory free-trade provisions in the event that a foreign country’s tariffs were reciprocally unequal and unreasonable, but rather required such suspension upon the appropriate finding. The regular tariff laws would then take effect, imposing congressionally-determined tariff schedules on goods imported from the offending nation. Thus, there were in essence two tariff schedules in place, and the President effectively determined which tariff schedule would apply by assessing the trade practices of foreign nations. But in either case the tariff levels were fixed by statute.

¹⁵⁴ 192 U.S. at 496.

¹⁵⁵ 276 U.S. 394 (1928).

In Hampton, however, the statute authorized to President to alter the amount of a duty on certain imported merchandise in order to “equalize the . . . costs of production”¹⁵⁶ between the United States and exporting foreign nations. The Court upheld the statute against a nondelegation challenge. The Court stated that the extent to which Congress can vest discretion in the executive or the courts must be determined “according to common sense and the inherent necessities of the governmental co-ordination.”¹⁵⁷ In oft-quoted language, the Court explained 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.”¹⁵⁸

Hampton is significant for two reasons. First, its language about “an intelligible principle” is generally taken as the specification of a new standard for delegation analysis; modern cases certainly recite the phrase as a mantra. Second, it moves beyond Field by permitting a scheme in which the President actually adjusts the tariff rates rather than merely determining whether pre-existing, congressionally-specified tariff schedules will take effect.

Upon closer examination, however, Hampton may not be as dramatic a development as is sometimes believed. Methodologically, there need not be an unbridgeable gap between saying that lawful delegations require an “intelligible principle” and saying that Congress must deal with “important subjects,” leaving matters of “less interest” to executive and judicial agents. Both formulations focus, in the normal run of

¹⁵⁶ Tariff Act of 1922, tit. 3, § 315, 42 Stat. 858, 941.

¹⁵⁷ 276 U.S. at 406.

¹⁵⁸ Id. at 409.

cases, on the degree of discretion that statutes grant to executive and judicial actors. There may, of course, be certain “important subjects” that cannot be addressed by any body other than the legislature, whether or not an “intelligible principle” is provided, and in those cases strict adherence to the different formulations might reach different results. But as a way of describing the inquiry in most cases, Hampton does not move beyond, but also does not necessarily fall short of, the analysis in Wayman and subsequent cases.

As for letting the President set tax rates, that sounds like an easy kill for an originalist nondelegation doctrine. Matters, however, are a bit more complicated than they may seem. There is no question that setting the level of a tariff is an “important subject[]” – so important that Congress must set the level itself. The question is whether Congress effectively sets the level by specifying a standard, such as “equalize the . . . costs of production,” and then letting the President (or a designee) determine its application. If the standard lent itself to relatively mechanical calculations, the answer would probably be “yes.” As any good accountant can verify, however, a phrase like “costs of production” does not lend itself to mechanical analysis. If the congressionally-prescribed standard in fact leaves too much unresolved, so that the President is in effect setting the tariff rate, then the statute is unconstitutional.

For now, it is enough to observe that Hampton may or may not have broken much new ground doctrinally, and it probably did not break any new ground methodologically.¹⁵⁹

¹⁵⁹ There is one aspect of Hampton, however, that almost surely has led subsequent courts astray. In its general discussion of contingent legislation, the Hampton Court said that “Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected [sic] by the legislation.” 276 U.S. at 407 (emphasis added). In the latter circumstance, according to Hampton, no intelligible principle needs to be provided because the stipulated condition for the validity of the law is simply the will of the regulated. This doctrine has been used to validate many statutory schemes in which legislation becomes effective only upon a (standardless)

Neither was any new ground broken in 1935, when the Court for the first (and only) times invalidated statutes on nondelegation grounds. In Panama Refining Co. v. Ryan¹⁶⁰ and A.L.A. Schechter Poultry Corp. v. United States,¹⁶¹ the Court held unconstitutional various provisions of the National Industrial Recovery Act,¹⁶² which gave to the President essentially unconstrained power to approve and prescribe codes of conduct for industries.¹⁶³ But while the cases are major historical and doctrinal events, they shed little light on the proper methodology for analyzing nondelegation problems. The Panama Refining decision is filled with vague generalities that are entirely consistent with, but do

vote of the regulatory beneficiaries. See, e.g. Currin v. Wallace, 306 U.S. 1, 15-16 (1939) (upholding provisions of the Tobacco Inspection Act, 7 U.S.C. § 511d (1994), which makes regulation conditional on the approval of interested tobacco growers); United States v. Rock Royal Co-Operative, Inc., 307 U.S. 533, 577-78 (1939) (upholding provisions of the Agricultural Marketing Agreement Act, 7 U.S.C. § 608c (1994), which makes regulation conditional on the approval of certain agricultural producers); United States v. Frame, 885 F.2d 1119, 1127-28 (3d Cir. 1989) (upholding provisions of the Beef Promotion Act, 7 U.S.C. § 2906(a) (1994), which makes regulation conditional on the approval of beef producers). The Court has suggested on several occasions that legislation of this sort does not involve any delegation of legislative authority. See Currin, 306 U.S. at 15 ("So far as growers of tobacco are concerned, the required referendum does not involve any delegation of legislative authority. Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market 'unless two-thirds of the growers voting favor it.'"); Hampton, 276 U.S. at 407 ("While in a sense one may say that such resident [who vote on the effectiveness of a law or regulation] are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution"). This is simply not true. The effective date of a statute or regulation is an important part of the law, and allowing an entity other than Congress to fix the effective date is no different than allowing that entity to fix any of the law's substantive terms. Accordingly, it is best to view the referendum-of-the-regulated cases as an historically sanctioned exception to the nondelegation principle that is difficult, if not impossible, to justify on originalist grounds.

¹⁶⁰ 293 U.S. 388 (1935).

¹⁶¹ 295 U.S. 495 (1935).

¹⁶² National Industrial Recovery Act of June 16, 1933, 48 Stat. 195.

¹⁶³ Actually, the specific, and quite limited, authority at issue in Panama Refining was perhaps more constrained than the Court was willing to admit. The Court had geared up in Panama Refining to decide broad issues concerning the NIRA, but it was discovered on the eve of argument that those broad provisions of the Petroleum Code had accidentally been amended out of existence. See **Louis L. Jaffe, Judicial Control of Administrative Action** – (1965). It's reasoning and rhetoric in Panama Refining may well have been targeted at provisions of the statute that were not at issue in the case. The authority at issue in Schechter Poultry, however, looks suspiciously like the hypothetical organic act of the Goodness and Niceness Commission.

not elaborate upon, Chief Justice Marshall's analysis in Wayman.¹⁶⁴ Schechter Poultry contained even less discussion of nondelegation principles than did Panama Refining. The Court was content (and perhaps properly so) simply to point out that the breadth and depth of presidential power under the NIRA was essentially unlimited.¹⁶⁵

After 1935, the Court essentially abandoned any serious nondelegation analysis. Subsequent cases announced the search for an "intelligible principle" and declared it satisfied by any collection of words that Congress chose to string together.¹⁶⁶ That remains the law today. The modern Court is not prepared, on any articulated standard, to determine whether statutes vest such broad discretion in executive or judicial actors that

¹⁶⁴ See, e.g., 293 U.S. at 421:

The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

¹⁶⁵ See 295 U.S. at 541-42.

¹⁶⁶ An especially comic example is American Power & Light Co. v. SEC, 329 U.S. 90 (1946), which concerned provisions of the Public Utility Holding Company Act that call upon the SEC to forbid reorganization plans that "unfairly or inequitably" distribute voting power. The statute was challenged on nondelegation grounds, and the Court responded by explaining that, out of the statute's background and context, "a veritable code of rules reveals itself for the Commission to follow in giving effect to the standards of § 11(b)(2). These standards are certainly no less definite in nature than those speaking in other contexts in terms of 'public interest,' 'just and reasonable rates,' 'unfair methods of competition' or 'relevant factors.'" 329 U.S. at 105. The "code of rules" that emerges from phrases like "relevant factors" is truly a wondrous thing to behold. Of course, lest one think that the Court was actually serious, the opinion immediately added that "[t]he judicial approval accorded these 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems." Id.

they effectively permit the exercise of legislative rather than executive or judicial power.¹⁶⁷

As far as the courts are concerned, no one has improved upon, or even elaborated upon, Chief Justice Marshall's 1825 declaration that the Constitution requires Congress to make whatever decisions are important enough so that the Constitution requires Congress to make them.

2.

Very few modern scholars defend a vigorous nondelegation doctrine that would police the lines among the legislative, executive, and judicial powers. Even fewer have sought to give concrete content to the Constitution's nondelegation principle. A number of scholars, however, have sought to provide a methodology for resolving the many difficult cases that such a line-drawing exercise inevitably raises.¹⁶⁸

Professor David Schoenbrod has thoughtfully addressed these issues in an important book¹⁶⁹ and several antecedent articles.¹⁷⁰ Professor Schoenbrod correctly

¹⁶⁷ Apart from Justice Thomas' brief concurring statement in American Trucking, the only modern opinion that expressed any serious interest in the nondelegation doctrine was Justice Rehnquist's concurring opinion in Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980). That case is discussed elsewhere in this article. See infra XX. For now, it is enough to observe that Justice Rehnquist had very little to say about the methodology for exploring nondelegation issues, but his scant comments fit in quite nicely with Chief Justice Marshall's analysis. See, e.g. 448 U.S. at 675 ("the language of § 6(b)(5) gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line. Especially in light of the importance of the interests at stake, I have no doubt that the provision at issue, standing alone, would violate the doctrine against uncanalized delegations of legislative power").

¹⁶⁸ Obviously, others have also suggested ways to reinvigorate the nondelegation doctrine. But none of those other discussions, to my knowledge, provide a comprehensive, theoretically grounded methodology for determining when legislative power has been improperly delegated. See Schoenbrod, supra note XX, at 1246-48 (cogently explaining the inadequacy of these discussions).

¹⁶⁹ **David Schoenbrod, Power without Responsibility: How Congress Abuses the People through Delegation** (1993). I have elsewhere (favorably) reviewed that book, see Gary Lawson, Who Legislates?, 1995 **Pub. Int. L. Rev.** 147, and much of my discussion here is based on that review.

locates the nondelegation doctrine in the principle of enumerated powers.¹⁷¹ Accordingly, he recognizes that “[t]he crucial task is therefore to determine when the statutory discretion of executive or judicial actors reflects an impermissible delegation of legislative authority or a permissible exercise of executive or interpretive authority.”¹⁷²

For Professor Schoenbrod, the crucial distinction for this purpose is between statutes that set rules and statutes that set goals. A valid statute must set forth a rule of conduct and not merely a goal or set of goals to which executive or judicial actors must strive. The act of legislation is not completed simply by announcing an ambition; the Constitution requires the legislature to specify how and to what extent those ambitions should be realized. “[T]he statute itself must speak to what people cannot do; the statute may not merely recite regulatory goals and leave it to an agency to promulgate the rules to achieve those goals.”¹⁷³ Such “goals statutes” are per se unconstitutional. A rules statute, by contrast, “demarcates permissible from impermissible conduct”¹⁷⁴ and therefore constitutes valid legislation.

That is fine as far as it goes. A goals statute, which prohibits nothing but merely empowers executive or judicial actors to define unlawful conduct, is certainly unconstitutional under any plausible understanding of the nondelegation doctrine. The problem, of course, is to distinguish permissible rules statutes from impermissible goals

¹⁷⁰ See Schoenbrod, supra note XX; David Schoenbrod, Goals Statutes or Rule Statutes: The Case of the Clean Air Act, 30 U.C.L.A. L. Rev. 740 (1983).

¹⁷¹ See **Schoenbrod**, supra note XX, at 181-89.

¹⁷² Lawson, supra note XX, at 149.

¹⁷³ Schoenbrod, supra note XX, at 1227. For more explanation of Professor Schoenbrod’s distinction between rules statutes and goals statutes, see id. at 1252-58.

¹⁷⁴ Schoenbrod, supra note XX, at 783.

statutes. That distinction turns on the substance of statutes rather than their form. Very few rules are entirely opaque; most leave some room for interpretation and discretion in application. This feature of rules does not necessarily raise nondelegation problems, because interpretation is an appropriate executive and judicial function. A statute that appears to state a rule, however, may nonetheless be a goals statute, in Professor Schoenbrod's parlance, if the stated "rule" has so little meaning independent of the interpreter that articulation of the rule requires an act of legislation rather than interpretation. How does one tell in any given case whether a statute that takes the form of a rules statute actually defines enough permissible and impermissible conduct to qualify as an act of legislation?

Professor Schoenbrod produces numerous examples of rules and goals statutes, but he provides no precise mechanism for making those determinations. Nor is it reasonable to expect one. The distinction between rules and goals statutes is designed to track the underlying constitutional distinction between norms requiring interpretation (executive and judicial action) and norms requiring legislation (legislative action). By their nature, those distinctions require judgment that must be exercised in the context of each unique statutory scheme and the background assumptions that lie behind it.¹⁷⁵ Moreover, one must pay close attention to the character as well as the quantity of conduct that a given statute regulates. A statute can surely be a rules statute if it defines the large outlines of permissible or prohibited conduct, even if executive and judicial actors must fill in those outlines to provide a complete picture of the legal regime.

¹⁷⁵ On the importance of context and background understandings, see Schoenbrod, supra note XX, at 784, 788.

In other words, one might fairly say that a rules statute must regulate the “important subjects” in any given statutory scheme, but that the act of interpretation can involve determination of ancillary matters of “less interest.” Or, in still other words, a statute is a permissible rules statute if it resolves those matters that are sufficiently important to the statutory scheme at issue so that the Constitution requires the statute to resolve them – all of which brings us back to Chief Justice Marshall’s circular formulation in Wayman v. Southard.

A third formulation for a nondelegation principle has been advanced by Professor Martin Redish. Although Professor Redish does not profess to be an originalist,¹⁷⁶ his approach to separation of powers issues is generally consistent with originalism (at least as I practice it).¹⁷⁷ Accordingly, his suggested formulation for a nondelegation principle warrants scrutiny.

Drawing on conceptions of political legitimacy and accountability, Professor Redish proposes what he calls the “political commitment” principle:

[A]ccountability for lawmakers constitutes the sine qua non of a representative democracy. It therefore seems reasonable to demand as the prerequisite for legislative action some meaningful level of normative political commitment by the enacting legislators, thus enabling the electorate to judge its representatives Statutes that fail to make such a commitment, instead effectively amounting to nothing more than a mandate to an executive agency to create policy, should be deemed unconstitutional delegations of legislative power. A reviewing court will be able to determine whether the necessary political commitment has been made by deciding whether the voters would be better informed about their representatives’ positions by learning how their representatives voted on the statute.¹⁷⁸

¹⁷⁶ See Redish, supra note XX, at 6-16; Martin H. Redish, Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis, 72 *S. Cal. L. Rev.* 673, 679-82 (1999).

¹⁷⁷ See Lawson, supra note XX, at XX.

¹⁷⁸ Redish, supra note XX, at 136-37.

Professor Redish's "political commitment" principle explicitly draws attention to the importance to the electorate of the issues involved in the statute. Legislators need not make every conceivable choice embodied in a statute, but they must make those choices that are necessary for the political responsibility contemplated by the Constitution's scheme of representation. Because Professor Redish advocates what he terms "pragmatic formalism,"¹⁷⁹ the degree of detail required in any case "may vary, depending on pragmatic considerations,"¹⁸⁰ though the basic requirement of political commitment "imposes a floor, below which Congress may not fall under any circumstances."¹⁸¹

How does one tell in any given case, however, whether a particular statute provides enough information to the electorate about their representatives to satisfy the political commitment principle? As Professor Redish's examples demonstrate,¹⁸² the answer surely will vary with the statutory scheme at issue. One must carefully examine the issues raised by a particular regulatory regime and ask which of those issues are central from a policymaking perspective (and therefore highly relevant for evaluating representatives) and which are peripheral. In other words, the test must involve examining whether the issues left unresolved by the statute concern "important subjects" or matters "of less interest" -- which brings us right back to Chief Justice Marshall's circular formulation in Wayman v. Southard.

¹⁷⁹ Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory, 41 **Duke L.J.** 449 (1991).

¹⁸⁰ **Redish**, supra note XX, at 155.

¹⁸¹ Id.

¹⁸² Id. at 157-58.

Actually, there are two potentially important differences between Professor Redish's political commitment principle and Chief Justice Marshall's formulation. First, Professor Redish distinguishes – as Marshall, Schoenbrod, and I do not – between the kind of discretion that is permissible in executive and judicial actors; Professor Redish would give the nondelegation doctrine broader bite in the former context. That dispute raises fundamental issues about the nature of the judicial power and the role of Congress in regulating that power that cannot be addressed here.¹⁸³ Second, and more pertinently here, Professor Redish defines the importance of an issue in terms of its ability to inform the electorate about its representatives' positions. Chief Justice Marshall never identified precisely what he meant by “important subjects,” but it probably involved the centrality of the topic to the particular regulatory scheme at issue rather than the electorate's likely perceptions of Congress. It is, I suppose, possible to imagine a circumstance in which Professor Redish would deem an issue important under the political commitment principle while Chief Justice Marshall would have regarded it as a matter of “less interest,” or vice versa. In practice, however, these two understandings of importance will converge in most cases, and perhaps even in all significant cases.

Sartorius Barber, in his important and illuminating study of delegation, advanced a formulation that strongly resembles the political commitment principle put forth by Professor Redish. For Barber, statutes vesting authority in others are “necessary and proper,” and therefore lawful executory statutes, “as long as it can be said that Congress has arrived at a clear policy decision among salient alternatives and that the delegations in

¹⁸³ I start the dialogue elsewhere. See Lawson, *supra* note XX.

question are instrumental to such decisions.”¹⁸⁴ Perhaps it would be possible, on close analysis, to discern differences between this formulation and Professor Redish’s pragmatically formalist political commitment principle, but any such differences are probably too subtle to concern us here.

Thus far, all roads have led back to Chief Justice Marshall’s seemingly unsatisfying formulation for improper delegations. In essence, the formulations examined thus far all reduce, in the end, to the proposition that Congress must make whatever decisions are sufficiently important to the statutory scheme at issue so that Congress must make them. In light of these prior efforts, I have elsewhere proposed my own formulation of the appropriate nondelegation principle: “Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them.”¹⁸⁵ In other words, Chief Justice Marshall was right all along, and rather than wind our way back to him indirectly, we might as well take the freeway. The line between legislative and executive power (or between legislative and judicial power) must be drawn in the context of each particular statutory scheme. In every case, Congress must make the central, fundamental decisions, but Congress can leave ancillary matters to the President or the courts. One can try to find alternative ways to express the distinction between fundamental and ancillary matters, such as focusing on case-resolving power or demonstration of political commitment or choices among salient alternatives, but in the end, one cannot really get behind or beneath the fact that law execution and application involve discretion in matters of “less interest” but turn into legislation when that discretion

¹⁸⁴ Barber, *supra* note XX, at 40-41.

¹⁸⁵ Lawson, *supra* note XX, at 1239.

extends to “important subjects.” That is the line that the Constitution draws, and there is no escape from it.

In Part III, I will briefly consider some likely objections to my nondelegation analysis, but two obvious objections to Chief Justice Marshall’s – and my -- vague and circular formulation require attention right now: first, that it is vague, and second, that it is circular.

The charge of circularity is most easily dealt with. As I have explained elsewhere,¹⁸⁶ many issues of structural constitutionalism end up in a circle. An officer of the United States for purposes of the Appointments Clause is an employee who is important enough to be considered an officer. A principal officer for purposes of the Appointments Clause is an officer who is important enough to be considered principal. These kinds of circular formulations are inevitable whenever categorizations depend on substance rather than form. And the lines among the legislative, executive, and judicial powers are substantive rather than formal lines; “[e]xecutive Power,” for instance, does not simply describe everything performed by an executive official. Whenever line-drawing involves an element of judgment, one cannot eliminate the need for judgment by a verbal formulation; one can only conceal or obscure it. Accordingly, Marshall’s and my formulation for the nondelegation doctrine is not truly circular. Rather, it points directly to the appropriate inquiry, however difficult that inquiry may prove to be in particular cases.

The charge of vagueness in the formulation is more plausible at first glance, but also dissolves on close analysis. It is true that the distinction between “important subjects” and matters of “less interest” will sometimes give rise to hard cases on which reasonable

¹⁸⁶ Lawson, supra note XX, at XX.

people can disagree.¹⁸⁷ It is even true that judges may sometimes come to different conclusions about the relative importance of various issues within the context of a statutory scheme based on their prior commitments or predilections.¹⁸⁸ That simply means, however, that the Constitution sometimes requires that hard decisions be made by fallible humans, which is scarcely a startling conclusion. It does not mean, as Professor Redish has claimed, that “there is no textual, theoretical, or historical basis on which to exclude delegations of so-called unimportant policy choices to unaccountable administrators from Article I’s requirement that the legislative power be exercised by Congress.”¹⁸⁹ Quite to the contrary, text, theory, and history all point to the conclusion that matters of “less interest” are within the constitutional purview of the executive and judicial power, and that delegating such decisions to those departments is therefore not a delegation of legislative power.

As to whether these potentially hard decisions can properly be made by various agents, such as courts: the relevant question is not whether the task is hard or subject to abuse on political grounds, but whether it is literally impossible. The existence of numerous easy cases, some of which are described in Part II, should dispose of this objection summarily. As Professor Redish elegantly put it while responding to a similar objection to his “political commitment” principle:

Admittedly, it would be absurd to suggest that invocation of the political commitment principle would magically end all uncertainty and unpredictability in the measurement of statutes’ constitutionality. It would be equally absurd, however, to demand such certainty from constitutional doctrine. Few, if any, of the Supreme Court’s modern constitutional doctrines meet such a standard, yet

¹⁸⁷ Indeed, as previously noted, Wayman v. Southard may have presented such a case.

¹⁸⁸ See Pierce, supra note XX, at 393.

¹⁸⁹ Redish, supra note XX, at 153.

somehow our system of judicial review manages to function. One may reasonably demand no more from the doctrinal standard by which we measure the constitutionality of legislative delegation.¹⁹⁰

II

Because the correct nondelegation principle requires judgment in the context of each particular statutory scheme, it is difficult to make useful generalizations about application of that doctrine. The best that one can do is to offer some examples that can serve as guideposts.

Start with some easy cases. The Securities Exchange Act of 1934 makes it unlawful “[t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”¹⁹¹ This is a naked delegation. The statute prohibits nothing by itself, but simply makes illegal whatever the Securities and Exchange Commission prohibits by rule. This is not even an instance of a vague legislative standard that the agency (and ultimately the courts) must interpret. Rather, the statute straightforwardly authorizes the agency to make law. That is obviously something that is sufficiently important to the statutory scheme in question so that Congress must do it. Put another way, the instruction to the agency to establish primary rules of conduct is not “necessary and proper” for carrying into effect federal powers.

¹⁹⁰ *Id.* at 137.

¹⁹¹ 15 U.S.C. § 78j(b) (2000).

Every other test for delegations would reach the same result. In Chief Justice Marshall’s terminology, prescribing the standard for illegal conduct is an “important subject” that cannot be left to executive and judicial actors. In Professor Schoenbrod’s terminology, this is a classic instance of a “goals statute”: Congress sets a goal of prohibiting market manipulation but specifies no means by which that goal should be achieved. In Professor Redish’s terminology, Congress has clearly failed to make any meaningful normative commitment beyond a general dislike for manipulation.¹⁹² However one chooses to verbalize the nondelegation principle, this statute clearly fails it.

The case would be more interesting if the statute directly prohibited “any manipulative or deceptive device or contrivance,” without tying the prohibition to rules promulgated by the SEC. In that circumstance, the question would be whether the legislative standard was so vague that its implementation by the agency or the courts would exceed the limits of the executive and judicial powers (and Congress’ instructions to the agency or courts to implement the statute would exceed the limits of Congress’ authority under the Sweeping Clause). The answer depends on how much content the statute can be given by conventional tools of statutory interpretation. For instance, if one believes that legislative history is a legitimate tool of interpretation,¹⁹³ a very thick legislative history might enable one to flesh out the statute’s meaning. Or, as Professor Schoenbrod has strongly emphasized,¹⁹⁴ statutes often draw meaning from background understandings. If, for instance, the term “manipulative or deceptive device or contrivance” was a term of art

¹⁹² See **Redish**, *supra* note XX, at 157.

¹⁹³ I generally do not.

¹⁹⁴ CITE

with a well understood core of meaning, implementation of that term might involve nothing more than ordinary executive or judicial interpretation.

To the best of my knowledge, no conventional source of interpretation could provide much meaning to the term “manipulative or deceptive device or contrivance” as it appears in the 1934 Securities Exchange Act. In that circumstance, implementation by executive or judicial actors would amount to an act of law creation, which is constitutionally forbidden.

The same analysis applies to the various statutes instructing the Federal Communications Commission to grant broadcast licenses “if public convenience, interest, or necessity will be served thereby.”¹⁹⁵ Unless that phrase was given content by background assumptions in 1934, which it pretty clearly was not,¹⁹⁶ the statute leaves the agency (and the court on review of the agency) with so much discretion that it crosses the line from interpretation to lawmaking. An agency that gave content to the phrase “public interest, convenience, or necessity” would not be engaging in “interpretation” in any meaningful sense of that term. The specification of concrete criteria for licensing is a matter sufficiently important to a licensing scheme so that Congress must address it. Congress can permit agencies and courts to implement those criteria through interpretation, but it cannot permit them to create the criteria through lawmaking.

Again, all of the various tests for delegations would reach the same conclusion. Chief Justice Marshall would surely have regarded establishment of criteria for licensing as an “important subject” that needed to be resolved by the statute. To the extent that the

¹⁹⁵ 47 U.S.C. § 307 (2000). In fact, “Congress has directed or authorized the FCC to act in the public interest in nearly one hundred statutory provisions.” Randolph J. May, The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?, 53 **Fed. Comm. L.J.** 427, 429 (2001).

phrase “public interest, convenience, or necessity” does not establish criteria but merely empowers the agency to establish criteria, the law would be unconstitutional. Professor Schoenbrod would quickly identify the Communications Act as a “goals statute” that fails to specify the means by which, or the extent to which, the goals should be achieved. Professor Redish would readily conclude that Congress has failed to make a meaningful normative commitment and that the “statute does nothing more than delegate both policymaking and implementational authority to the . . . agency.”¹⁹⁷

The Clean Air Act provisions that were upheld in American Trucking suffer from similar defects. Those statutes prohibit nothing until the Administrator of the EPA exercises his or her judgment by specifying emissions rules. The statute sets out the general goal of promoting health and welfare, but that does not come close to the line of legislative power. Congress has authorized the EPA to legislate, but it has not provided a statute that the executive or the courts can implement. In the language of the various nondelegation tests: Without some interpretable measure of guidance about pollution levels, the Clean Air Act is a “goals statute” that makes no meaningful normative political commitment because it fails to address an “important subject” that the Constitution requires Congress to address. Thus, however vague any of these standards may be at the margins, there are plenty of real-world cases in which there is no room for reasonable doubt about the proper application of the nondelegation doctrine.

¹⁹⁶ See id. at 445-48 (discussing the origins and legislative history of the Communications Act).

¹⁹⁷ **Redish**, supra note XX, at 157.

Now let's look at some cases that are not quite so easy. Consider, for instance, section 6(b)(5) of the Occupational Safety and Health Act,¹⁹⁸ which was at issue in Industrial Union Dep't, AFL-CIO v. American Petroleum Institute.¹⁹⁹ With respect to workplace exposure to toxic substances, the statute instructs the Secretary of Health and Human Services (through the Administrator of the Occupational Safety and Health Administration) to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life."²⁰⁰ The dispute in Industrial Union focused on the phrase "to the extent feasible." Justice Powell insisted that the phrase required the agency to insure that the benefits of any safety standard exceeded the costs.²⁰¹ Justice Marshall and three other dissenters argued (as did the agency) that the statute required the agency to reduce risks until the next marginal reduction would bankrupt the relevant industry.²⁰² A three-Justice plurality did not address the phrase's meaning, as it held that other portions of the statute required the agency to find that it was regulating a significant risk before setting any standards.²⁰³ Justice Rehnquist concluded that the phrase

¹⁹⁸ 29 U.S.C. § 655(b)(5) (2000).

¹⁹⁹ 448 U.S. 607 (1980).

²⁰⁰ 29 U.S.C. § 655(b)(5).

²⁰¹ 448 U.S. at 668-70 (Powell, J., concurring in the judgment).

²⁰² Id. at 718 (Marshall, J., dissenting); see also id. at 637 (describing the agency's interpretation of the statute).

²⁰³ Id. at 639-45. The plurality focused on section 3(8) of the statute, which defines an occupational safety and health standard as "standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8) (1994). This is unpromising language from which to glean a threshold requirement of a "significant risk." Indeed, the plurality reached its conclusion

“to the extent feasible” was entirely vacuous and rendered the statute as written unconstitutional. Absent that phrase, the statute “would have required the Secretary . . . to set the permissible level of exposure at a safe level or, if no safe level was known, at zero,”²⁰⁴ which would have been a “clear, if somewhat unrealistic, standard.”²⁰⁵ The addition of the phrase “to the extent feasible,” however, left it to the agency to decide whether, and to what extent, economic costs, scientific uncertainty, and even political reality rendered a standard “infeasible.” And that, Justice Rehnquist reasoned, is precisely what the nondelegation doctrine forbids.

As far as it goes, Justice Rehnquist’s assessment of section 6(b)(5) is entirely correct. Nothing in the language, structure, context, or legislative history of the statute provides any determinate content to the phrase “to the extent feasible.” Indeed, as Justice Rehnquist ably demonstrated, that was precisely the phrase’s attraction to Congress.²⁰⁶ The statute is, as he put it, an “obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge.”²⁰⁷ Justice Rehnquist did not specifically explain the methodology he employed to reach his ultimate conclusion, but the emphasized phrase indicates that his reasoning was in line with that of Chief Justice Marshall: determining the appropriate

by way of the avoidance doctrine, on the ground that alternative constructions would raise questions under the nondelegation doctrine. *Id.* at 646.

²⁰⁴ *Id.* at 677 (Rehnquist, J., concurring in the judgment).

²⁰⁵ *Id.* at 682.

²⁰⁶ *Id.* at 681.

²⁰⁷ *Id.* at 687.

trade-off between safety and other concerns is the paradigmatic “important subject[]” in the context of this statutory scheme.

Professor Schoenbrod, for his part, would have no trouble concluding that section 6(b)(5), as written, is a quintessential “goals statute,” and he would therefore agree with Justice Rehnquist that the statute is unconstitutional. Similarly, this statute presents the classic situation in which Congress deliberately failed to make a meaningful normative commitment, and section 6(b)(5) would fail Professor Redish’s test as well.

A more interesting question, however, arises if we consider section 6(b)(5) shorn of the weasel phrase “to the extent feasible” (which I will henceforth call “the revised section 6(b)(5)”). In that circumstance, the statute would require the Secretary to adopt a standard for any given toxic substance “which most adequately assures, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity.” With no feasibility requirement to provide wiggle room, one might think that the revised section 6(b)(5) requires elimination of all workplace risks from toxic substances regardless of the consequences. Such a statute would perhaps be an act of lunacy, but no one would find it to be an unconstitutional delegation of legislative powers. Without the feasibility requirement to introduce elements other than safety into the analysis, the agency would have a clear mandate in any circumstance in which the best available evidence suggests a safety risk at some specific level of exposure.

But what about cases in which there is no relevant evidence concerning safety risks at specific exposure levels? That was precisely the situation in Industrial Union. The agency had plenty of evidence to suggest that benzene was potentially harmful at high

doses (above 25 ppm),²⁰⁸ and a standard that forbade exposures above that level would have been unchallengeable on any ground. The tough questions in the case, however, involved exposure levels below 10 ppm – a level at which the agency had no credible evidence of health effects one way or another.²⁰⁹ It would be possible to re-draft the revised section 6(b)(5) to require a workplace ban on any substance for which there is evidence of harmful effects at any exposure level. That is precisely the effect of the famous Delaney Clause of the Food and Drug Act, which forbids the use of food additives that are not demonstrably safe and which then provides that “no food additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animals.”²¹⁰ If the revised section 6(b)(5) contained a similar provision, then the agency would have had no choice but to ban workplace exposure to benzene at all levels, including levels at which there was no evidence concerning health effects. Such a statute would pass muster under any plausible understanding of the nondelegation doctrine. But the hypothetical version of section 6(b)(5) under discussion here – the actual statute without the “to the extent feasible” language – contains no specification of how the agency is to handle scientific uncertainty. More technically, the statute gives the agency no guidance on how to draw dose-response curves. With respect to benzene in the early 1970s, OSHA could plot points at 25 ppm and 100 ppm that both showed significant adverse health effects from workplace exposure. Those points, however, afford no basis for drawing conclusions about health effects at lower exposure

²⁰⁸ See 448 U.S. at 631.

²⁰⁹ *Id.* at 631-34.

levels absent some theoretical grounds for making good assumptions about the shape of benzene's dose-response curve.²¹¹ Many substances have threshold levels below which they have no ill effects. Others, such as radiation, are harmful at high levels and affirmatively beneficial at low levels. If benzene behaves like radiation – and the OSHA in the early 1970s had no reason to believe that it did not – then the optimal standard may well have been to forbid high-level (above 25 ppm) exposure but to require some measure of low-level exposure. The agency in this case could not determine the appropriate standard without either much better evidence²¹² or much better guidance from the statute. Nothing in section 6(b)(5), with or without the “to the extent feasible” language, tells the OSHA how to draw dose-response curves in the face of scientific uncertainty, and the statute therefore fails to give directions in those circumstances in which “the best available evidence” is wholly inconclusive.

In Chief Justice Marshall's terms, one very “important subject[.]” in the context of the Occupational Safety and Health Act is how to draw dose-response curves for toxic substances in the absence of any credible evidence. Should all doubts be resolved in favor of assuming some kind of linear or near-linear dose-response relationship all the way to the origin?²¹³ Should the agency instead hesitate to wipe out industrial civilization without

²¹⁰ 21 U.S.C. § 321 (1994).

²¹¹ Actually, absent some fairly strong theoretical assumptions, the two points do not even provide a basis for making judgments about health effects between 25 ppm and 100 ppm or above 100 ppm. I assume that epidemiologists could justify the necessary assumptions to make those judgments.

²¹² The agency in 1970 had no way to get better evidence. Human tests would raise serious ethical and practical problems, and meaningful low-dose tests would take decades. Low-dose animal tests would raise the so-called “megamouse” problem, and high-dose animal tests could at most tell the agency what it already knew: high dose benzene exposure is harmful. The agency had to make policy based solely on the two available points.

²¹³ It does not help to say that all doubts must be resolved in favor of safety. Driving exposure levels to zero (or even near-zero) may be affirmatively harmful if the dose-response curve is positive at high

affirmative proof of harm at all relevant exposure levels? These are the crucial questions in any circumstance in which scientific evidence is inconclusive, and they are precisely the questions that section 6(b)(5) does not address – with or without the empty feasibility requirement. All of the various tests for delegation should invalidate the revised section 6(b)(5).

Ratemaking statutes that authorize agencies to set rates that are “just and reasonable” are also tricky. Professor Schoenbrod has discussed the proper delegation treatment of ratemaking statutes at length,²¹⁴ and my analysis is essentially in accord with his. As I have elsewhere explained,

If the statute simply instructs the agency to go forth and do what it thinks is good, the statute is a raw delegation of legislative authority. But the phrase "just and reasonable rates" has a long history and can be used as a term of art with a specific meaning. The traditional understanding of rate regulation is that a regulating agency must permit a utility to earn enough revenue to cover the utility's operating costs plus a return on capital sufficient to attract investors in a competitive capital market [I]f the phrase "just and reasonable rates" is a specific enough term of art to include a method for measuring the utility's rate base, such as the amount actually spent (or perhaps prudently spent) on plant, then Professor Schoenbrod would allow the statute to stand. So would I, though the question is a close one, because even when the statute (explicitly or implicitly) specifies the form of ratemaking and the method for determining the rate base, the agency still will have considerable discretion in allocating costs across time periods, choosing discount rates, estimating the risk of investment in the firm, and so forth. Nonetheless, the central policy choice--to engage in cost-of-service ratemaking using historical costs (or prudent historical costs) to determine the rate base and functioning capital markets to determine the rate of return--seems to have been made by the statute. On the other hand, if the ratemaking agency can choose its own standard for the rate base (or the rate of return), Professor Schoenbrod would invalidate the statute, and so would I. There is no knockdown argument for any of these results--which proves only that hard cases are hard.²¹⁵

exposure levels and negative at low exposure levels. A zero standard can easily be more dangerous than a non-zero standard.

²¹⁴ See **Schoenbrod**, *supra* note XX, at 184-85.

²¹⁵ Lawson, *supra* note XX, at 153-54.

Professor Redish has not specifically addressed the constitutionality of “just and reasonable” ratemaking statutes, but I do not see why he could not sign onto this analysis.

The universe of contingent legislation provides a wide range of contexts for delegation analysis. Contingent legislation is not per se unconstitutional; there is no reason why Congress cannot make the effect of legislation turn of some event other than standard celestial motions, and there is no reason why Congress cannot entrust executive and judicial agents with the implementational task of determining whether those specified events have occurred. The question is when, if ever, determination of those events passes beyond the implementational function of executive and judicial agents and instead becomes lawmaking.

The Supreme Court’s cases actually provide a nice natural progression. The statute from The Brig Aurora that required the President to determine whether Great Britain was violating America’s neutral commerce²¹⁶ clearly passes muster: Congress made the important decision (and therefore assumed political responsibility for it). The President has, of course, some measure of discretion in determining whether the actions of Great Britain amount to violations of neutral commerce, but the extent of that discretion is no greater than in run-of-the-mill cases involving matters other than effective dates.

Field v. Clark presents a harder case. The statute in that case authorized the President to suspend the operation of certain tariff laws (and therefore call into play others) when foreign countries imposed “reciprocally unequal and unreasonable” trade

²¹⁶ See supra XX.

restrictions on American exports.²¹⁷ The question here is whether the quoted phrase had enough understood content in the late nineteenth century to make the President's job one of interpretation rather than lawmaking. There is no formula for making that determination – which is no doubt why the Court split 6-3 on the question. One would have to be more steeped than I ever plan to be in nineteenth century trade law in order to evaluate this statute, though Louis Jaffe was probably correct to describe the statutory language as “not a formula at all but a bargaining power put into the President's hands in his conduct of foreign affairs.”²¹⁸

J.W. Hampton carries the analysis one step further. In that case, the President was instructed to alter tariff rates in order to “equalize the . . . costs of production” between American and foreign goods.²¹⁹ The question again is whether that task can draw on enough background assumptions to make it a reasonably directed act of implementation. And again, the answer would require serious inquiry into the general understandings concerning accounting practices in the early twentieth century. If the phrase “costs of production” had as much content at that time as the phrase “just and reasonable rates,” it is conceivable that the statute in Hampton was constitutional.

But what about contingent legislation that makes the effectiveness of a law depend solely on the wishes of another actor rather than on that actor's determination of some external fact? Can the “event” that triggers a contingent law be nothing more than, for instance, the President's decision?

²¹⁷ See supra at XX.

²¹⁸ **Louis L. Jaffe, Judicial Control of Administrative Action 56 (1965).** See also Barber, supra note XX, at 60 (doubting whether Field v. Clark was correctly decided). As to whether the foreign affairs context might justify a more lenient nondelegation standard, see infra XXX.

²¹⁹ See supra at XX.

This was the issue actually presented in Clinton v. City of New York²²⁰ -- the so-called “line-item veto case.” The Line Item Veto Act²²¹ gave the President the authority, upon the making of specified determinations, to “cancel in whole”²²² certain spending and tax-benefit provisions of enacted statutes.²²³ The effect of such cancellations was to prevent the relevant provisions “from having legal force or effect.”²²⁴ Although the parties in the case extensively briefed the question whether this statute violated the nondelegation doctrine, the Court decided instead that the statute was an unconstitutional line-item veto in violation of the lawmaking procedures in Article I, section 7.²²⁵ As the dissenting opinions by Justice Scalia and Justice Breyer pointed out,²²⁶ this holding makes no sense. The statute was not a “line-item veto”; it was a classic piece of contingent legislation. The effect of the so-called “line-item veto” was simply to make the operation of the statute depend on presidential action (or inaction), which is no different in principle from the statutes at issue in The Brig Aurora, Field v. Clark, or any of the countless other instances of contingent legislation. A true line-item veto would allow the President to sign into law only portions of a unitary bill enacted by both houses of Congress. The President almost

²²⁰ 524 U.S. 417 (1998).

²²¹ 110 Stat. 1200 (codified at 2 U.S.C. §§ 691-XXX).

²²² 2 U.S.C. § 691(a).

²²³ For a more detailed examination of this statute, see Saikrishna B. Prakash, Deviant Executive Lawmaking, 67 **Geo. Wash. L. Rev.** 1 (1998); RAPPAPORT.

²²⁴ 2 U.S.C. § 691(e)(4)(B)-(C).

²²⁵ 524 U.S. at 436-47.

²²⁶ See id. at 463-69 (Scalia, J., dissenting); id. at 473-81.

surely does not have that power under the Constitution,²²⁷ but that is not the power conferred by the Line Item Veto Act. Under that statute, the President signs the entire bill into law, but the effective dates of certain portions of the law are made contingent on subsequent presidential action. The question is whether the President's authority to determine effective dates crosses the line from execution to legislation. That has nothing to do with the procedures in Article I, section 7 and everything to do with the nondelegation doctrine.

The dissenting Justices in Clinton v. City of New York found the statute easily constitutional under the nondelegation doctrine.²²⁸ Matters may not be that simple. To begin with, the statute as enacted only provided for cancellation authority if the President signed the relevant spending bill into law; the President had no cancellation authority over spending bills that were enacted over a veto.²²⁹ Mike Rappaport has elsewhere argued at length that this “veto burden” feature of the statute violates the nondelegation doctrine.²³⁰ The more pertinent question for this analysis, however, is whether the statute would be constitutional without the veto burden.

The statute specifies certain procedural formalities with which the President must comply in order to cancel an item,²³¹ and it specifies certain matters that the President must

²²⁷ Technically, it depends on precisely what one means by an “item veto.” See J. Gregory Sidak & Thomas A. Smith, Four Faces of the Item Veto: A Reply to Tribe and Kurland, 84 *Nw. U.L. Rev.* 437 (1990) (discussing different variations on the item veto). The kind that lets the President pencil out items from an omnibus bill, however, is pretty clearly unconstitutional.

²²⁸ See 524 U.S. at 466-69 (Scalia, J., dissenting).

²²⁹ 2 U.S.C. § 691(a) (2000) (stating that the President's authority extends to portions of statutes that are “signed into law”).

²³⁰ Michael B. Rappaport, Veto Burdens and the Line Item Veto Act, 91 *Nw. U.L. Rev.* 771 (1997).

²³¹ See 2 U.S.C. § 691a(B) (2000).

consider in making those determinations,²³² but the statute does not make anything other than the President's will the basis for cancellation. The Line Item Veto Act was therefore unlike the tariff statutes discussed above. In those cases, the statutes specified external events that would determine the operation of the statutes but left it to the President to determine whether those events had in fact occurred. In some of those cases, the "events" were vague enough to give the President considerable discretion, and perhaps even enough discretion to invalidate the statutes. In the Line Item Veto Act, there is no specified event. It is as though the statute said, "This Act shall take effect unless the President declares that it should not."

Congress cannot leave the effective date of a statute to the unfettered discretion of the President or anyone else. It is one thing to let the President determine the existence vel non of a state of affairs on which the statute is contingent. It is another matter simply to let the President determine the effective date of a law on his own. Justice Scalia, in his dissenting opinion, acknowledged that the permissibility of this kind of presidential decisionmaking was dubious as an original matter, but he thought that history had come to accept some measure of presidential discretion to impound funds with congressional approval.²³³ That may be, but perhaps that is history's problem.

Concededly, my position is harder to defend than it might seem. After all, in The Brig Aurora, Congress was in one sense "delegating" the determination of the statute's effective date to the British: if they stopped boarding our ships, then all would be well. If Congress can "delegate" to the British – or to nature – in that manner, why can't Congress

²³² 2 U.S.C. § 691(a)(3)(A).

²³³ See 524 U.S. at 464.

simply let the President, or someone else, directly determine a law's effective date? Why is the President's decision a qualitatively different event than the actions of the British Navy?

I confess that there is no knock-down answer. If, for instance, a statute's effective date turned on whether the President formally recognized a foreign country, that would seem to be a straightforward example of permissible contingent legislation. It is hardly obvious that constitutional differences should turn on whether the President makes a decision about effective dates or makes a decision about some other matter that collaterally determines effective dates. Nonetheless, the distinction between execution and lawmaking is, as Madison and Chief Justice Marshall recognized,²³⁴ often quite ephemeral. If the President simply decides on an effective date, he is making a law. If he determines the existence vel non of an external fact, he is executing a law (provided that the determination does not require so much discretion that it crosses the line into lawmaking). If he makes some decision other than the effective date that consequentially establishes the effective date, the lines get very blurry. All of which proves once again that hard cases are hard.

There are certain arrangements that appear to be blatantly unconstitutional delegations but which on close examination turn out to be permissible exercises of legislative power. These include statutes giving wide authority to executive agents to manage public property and statutes creating territorial legislatures.

Approximately one-third of the land mass of the United States is owned by the federal government. Congress generally does not specify the precise uses to be permitted at each location, the times and circumstances of such uses, or other rules for the management of federal lands. Instead, Congress grants essentially unlimited discretion to

²³⁴ See supra at XXX.

executive agents to determine the various rules for the governance of public lands and other forms of public property. A conclusion that this practice is unconstitutional seems unlikely, and even bizarre.

Accordingly, Professor Schoenbrod devotes considerable attention to the problem of land management in his book on delegation, concluding that “Congress need not make rules for the management of government property, such as federal lands, monies, and corporations like the Postal Service.”²³⁵ He offers two reasons for this conclusion. First, he invokes precedent and practicality²³⁶; these are not considerations that bear on original meaning.²³⁷ Second, and more to the point, he notes that Congress gets its power over federal property from the clause authorizing it “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”²³⁸ Professor Schoenbrod notes that this clause’s location “outside the first three Articles of the Constitution, which focus on separation of powers,”²³⁹ suggests that it might simply escape Article I’s nondelegation principle.

²³⁵ Id. at 186.

²³⁶ Id. at 187-88.

²³⁷ Perhaps some originalists will argue that precedent is a legitimate source of constitutional meaning. I have elsewhere launched an uncalibrated assault against that claim. See Gary Lawson, The Constitutional Case Against Precedent, 17 Harv. J.L. & Pub. Pol’y 23 (1994). A more calibrated assault would pay closer attention to historical sources and would distinguish among various forms of and justifications for precedent. I have been planning that assault for several years; I am far enough along to be sure that it will not alter the basic message.

²³⁸ U.S. Const. art. IV, sec. 3, cl. 2.

²³⁹ Schoenbrod, supra note XX, at 187.

Professor Schoenbrod is right, but in a different way than he imagined.²⁴⁰ The location of congressional power over property in Article IV is indeed significant – not because Article IV somehow stands apart from the general constitutional structure but because of the specific text of the Property Clause. The Property Clause is a self-contained grant of authority to Congress to “make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.”²⁴¹ When Congress passes laws concerning property management, including laws instructing executive agents to make rules unconstrained by meaningful standards, Congress does not need to employ the Sweeping Clause of Article I. The Property Clause itself provides authorization for any ancillary legislation concerning the subjects within its compass. That clause does not require laws concerning property to be “necessary and proper”; it merely requires that they be “needful,” and this power grant functions as an implicit authorization to delegate legislative power.

To see how this works, consider the ancient institution of territorial legislatures. Congress has long allowed federal territories to govern themselves (subject to congressional oversight) through local legislatures, both as a prelude to statehood and as a matter of democratic theory.²⁴² Those authorizations to territorial legislatures look at first

²⁴⁰ Professor Schoenbrod candidly admitted doubts about his own analysis, *see id.* at 188, and he ultimately fell back on functional considerations about the extent to which delegation of responsibility over property management “can be made consistent with the safeguards of liberty.” *Id.* *See id.* at 188-89 (identifying circumstances in which delegation concerning property management might threaten liberty and therefore, on Professor Schoenbrod’s analysis, would be prohibited).

²⁴¹ Similarly, the District Clause is a general authorization for Congress “[t]o exercise exclusive Legislation, in all Cases whatsoever,” **U.S. Const.** art. I, § 8, cl. 17, in the territory that constitutes the seat of the national government.

²⁴² *See generally* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 76 **Cal. L. Rev.** 837 (1990).

glance like flagrant delegations.²⁴³ But when Congress legislates for territories pursuant to the Territories Clause, it functions as a general government rather than a limited government. Accordingly, the normal background rules concerning enumerated powers do not apply in that context. Within this enumerated sphere of jurisdiction, Congress functions as a legislature of general powers. Unless the term “needful” can be read to incorporate background norms of constitutional structure, the Territories Clause therefore permits Congress to delegate power to other actors. Other constitutional limitations, such as the Appointments Clause or various individual rights provisions may well limit Congress’s ability to legislate for the territories, but the Court’s longstanding conclusion that the nondelegation doctrine simply does not apply to territorial legislation is correct.

The same analysis supports a power to delegate with respect to other forms of federal property. The Territories Clause is in fact the Territories and other Property Clause. The text and structure of the clause do not distinguish between territories and “other Property belonging to the United States.” Congress therefore has general power over all federal property, just as it has general power over territories and the District of Columbia. Accordingly, Congress has the enumerated power to authorize executive agents to, in essence, make laws concerning territorial and property management, even though it does not (by virtue of the word “proper” in the Sweeping Clause) have such power with respect to other subjects within Congress’s constitutional jurisdiction.

Finally, there may be certain subject matter areas in which the range of discretion permitted under the executive power (or the judicial power) is larger than in other areas.

²⁴³ For the results of my first glance, unfortunately recorded for posterity, see *id.* at XX.

Professor Mike Rappaport has termed this the “selective nondelegation doctrine.”²⁴⁴ The basic insight is that as long as Congress is merely charging executive agents with the exercise of executive power, there is no constitutional problem, and that the scope of the executive power may vary with the context. For instance, Professor Rappaport has argued at length that Congress may give the President wide discretion to spend or not spend funds under appropriation laws, either through lump sum appropriations or through statutes that authorize spending up to a certain maximum but that do not specify the precise amount that must be spent.²⁴⁵ He makes an impressive and exhaustive historical and structural case that the “executive Power” contained in Article II includes this large measure of spending discretion. He similarly argues that Congress may give the President wide discretion to implement (or terminate) peacetime arms embargoes,²⁴⁶ and he suggests that there may be grounds for concluding more generally that the “executive Power” has a broader sweep in foreign affairs than in domestic affairs.²⁴⁷ I am in no position to dispute his conclusions, which are entirely consistent with the structure of my argument. Professor Rappaport’s work highlights the value of, and the need for, comprehensive and careful originalist work on the meaning of the cryptic phrase “[t]he executive Power.” But that is a task for another day.²⁴⁸

²⁴⁴ RAPPAPORT

²⁴⁵ RAPPAPORT

²⁴⁶ RAPPAPORT. Thus, the notorious (at least to originalists) United States v. Curtiss-Wright Export Co., 299 U.S. 304 (1936), case may have been correctly decided for the wrong reasons.

²⁴⁷ RAPPAPORT

²⁴⁸ How one performs that task is also a question for another day. The differences between my approach and Professor Rappaport’s are small on the scale of academic disagreements but are nonetheless substantive. Professor Rappaport captured those differences brilliantly in correspondence when he observed that his approach to defining key constitutional terms, such as “executive Power,” is essentially nominalist while mine is essentially conceptualist. By this, he means that he sees history as the primary

III

Many of the most common objections to the nondelegation doctrine have already been answered. The charge that the nondelegation doctrine is an extra-constitutional principle with no textual grounding²⁴⁹ is simply false: the Sweeping Clause textually embodies a nondelegation principle as part of its understanding of “proper” executive laws. The charge that no workable standard for judging delegations can be formulated is also false. It is true that application of the Constitution’s nondelegation principle requires judgment on occasions, but that is an inescapable feature of much of law. Drawing a line between execution and lawmaking is no harder, and indeed is probably considerably easier, than drawing a line between reasonable and unreasonable searches and seizures. Indeed, the most striking aspect of attempts to apply the nondelegation doctrine is the convergence of the various formulations. I have argued that the formulations put forward by Chief Justice Marshall, Professor Schoenbrod, and myself are all essentially identical; they simply reflect different ways of expressing the underlying distinction between lawmaking, executing, and judging. Professor Redish’s formulation (and that of Sartorius Barber) are formally different but functionally identical. I have been unable to locate a single real-

vehicle for discerning the content of those terms, while I am more inclined to view such terms as having an “essentialist” meaning that does not depend on historical usage. Obviously, I regard history as relevant to interpretation, and Professor Rappaport would never downplay the importance of conceptual and structural analysis. Nonetheless, while we agree on what evidence is admissible to prove original meaning, we do not always agree on the relative significance of different kinds of evidence. A full treatment of this question would require a lengthy discussion of the theory of concepts and how that relates to constitutional interpretation. It requires, in other words, a lengthy book on originalist methodology which does not yet exist. For some tantalizingly brief preliminary observations, see infra XX.

²⁴⁹ PAULSEN

world case in which the different formulations unambiguously point to different outcomes. (Some of us may in fact reach different outcomes, but that is likely to be a function of differences in application – in judgment, if you will – rather than intrinsic features of the various inquiries.) That suggests that application of the nondelegation doctrine may not be nearly as difficult as the doctrine’s critics typically suppose. Finally, the charge that the nondelegation doctrine would require elimination of all discretion in governance²⁵⁰ is also false. Discretion is part of the executive and judicial powers; only when the quality and quantity of discretion involved passes over into the legislative power does the nondelegation doctrine take notice.

One additional objection, however, bears mention here. Justice Stevens in American Trucking relied on the prominent administrative law treatise by Kenneth Davis and Richard Pierce for the proposition that “[t]he Court was probably mistaken from the outset in interpreting Article I’s grant of power to Congress as an implicit limit on Congress’ authority to delegate legislative power.”²⁵¹ The treatise, in turn, relies heavily on some statutes from the First Congress that Professor Davis unearthed many years ago that supposedly demonstrate that the founding generation did not subscribe to a strict nondelegation doctrine.²⁵² Professor Davis’s original work discussed six such statutes. One statute, from the original Judiciary Act, authorized the federal courts “to make and

²⁵⁰ MASHAW

²⁵¹ 1 **Davis & Pierce**, supra note XX, at 66.

²⁵² See Kenneth Culp Davis, A New Approach to Delegation, 36 **U. Chi. L. Rev.** 713, 719-20 (1969). To be fair, Professor Davis’ point in raising those statutes was slightly different. He argued that “delegation without meaningful standards . . . has been deemed a necessity from the time the United States was founded.” Id. at 719. The treatise, however, does use these statutes as authority for the proposition that there is no constitutional limit on delegations. Justice Stevens’ citation to the treatise in American Trucking, see 121 S. Ct. at XX, was entirely accurate.

establish all necessary rules for the orderly conducting of business in the said courts.”²⁵³

Another provision of the Judiciary Act gave district courts power to impose various penalties in maritime matters, subject only to specification of maximum penalties.²⁵⁴ A third statute concerned pensions for Revolutionary War veterans. The state and national governments, under the Articles of Confederation, had provided for pensions to wounded and disabled veterans. The twenty-fourth statute enacted by the First Congress in 1789 continued those previously-granted pensions for one year “under such regulations as the President of the United States may direct,”²⁵⁵ with no further direction concerning the regulations. A fourth statute, from the second session of the First Congress, followed up this authority by providing that wounded or disabled military personnel “shall be placed on the list of invalids of the United States, at such rate of pay, and under such regulations as shall be directed by the President,”²⁵⁶ subject to some specified maximum pay rates. A fifth statute, also from the second session of the First Congress, authorized the Secretary of the Treasury to remit or mitigate fines for violation of certain import laws “if in his opinion the same was incurred without willful negligence or any intention of fraud.”²⁵⁷

Finally, another statute that session prohibited unlicensed trade and intercourse with the Indian tribes, instructed the executive department to issue licenses “to any proper person”²⁵⁸ who posted a bond, without providing any definition of a “proper person,” and

²⁵³ Judiciary Act of 1789, ch. XX, § 17, 1 Stat. 73, 83.

²⁵⁴ Id. § 9, 1 Stat. 73, 77.

²⁵⁵ Act of Sept. 29, 1789, ch. XXIV, 1 Stat. 95.

²⁵⁶ Act of April 30, 1790, ch. X, § 11, 1 Stat. 119, 121.

²⁵⁷ Act of May 26, 1790, ch. XII, § 1, 1 Stat. 123, 124.

²⁵⁸ Act of July 22, 1790, ch. XXXIII, § 1, 1 Stat. 137.

required all licensees to be “governed in all things touching the said trade and intercourse, by such rules and regulations as the President shall prescribe.”²⁵⁹ Scholars today continue to cite (at least some of) these statutes as strong evidence that the founding generation did not understand the Constitution to prohibit delegations.²⁶⁰

The persistent reliance on these statutes demonstrates a continuing confusion about the nature of originalist analysis that can only be fully dissolved by a separate article. For now, it is enough to say that statutes of early Congresses are at best weak evidence of original meaning. Originalist analysis, at least as practiced by most contemporary originalists, is not a search for concrete historical understandings held by specific persons. Rather, it is a hypothetical inquiry that asks how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision. Actual historical understandings are, of course, relevant to that inquiry, but they do not conclude or define the inquiry – nor are they even necessarily the best available evidence. Enactments of early Congresses are particularly suspect because Members of Congress, even those who participated in the drafting and ratification of the Constitution, are not disinterested observers. They are political actors, responding to political as well as legal influences, who are eminently capable of making mistakes about the meaning of the Constitution. Their work product constitutes post-enactment legislative history that ranks fairly low

²⁵⁹ *Id.*

²⁶⁰ See Sunstein, *supra* note XX, at 322-23; Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 *Mich. L. Rev.* 303, 331-32 (1999); *cf.* John F. Manning, *Textualism As a Nondelegation Doctrine*, 97 *Colum. L. Rev.* 673, 726 & n.231 (invoking these statutes for the more modest proposition that “some delegation of law elaboration authority has nonetheless been a feature of our constitutional tradition since the beginning of the Republic”).

down on the hierarchy of reliable evidence concerning original meaning.²⁶¹ Accordingly, whatever evidence can be gleaned from early statutes – and there is evidence in both directions – is minimally relevant.

Nonetheless, it is worth examining these statutes (and a few others), on the theory that doubts about their value go to weight rather than admissibility. Moreover, the continuing invocation of these statutes by critics of the nondelegation doctrine reflects, in addition to confusion about originalist analysis, significant confusion about the nondelegation doctrine that warrants attention. It is true that these statutes vest a good deal of discretion in executive and judicial actors. But the nondelegation doctrine does not forbid all executive and judicial discretion. It only forbids Congress from vesting the kind of discretion in executive and judicial actors that falls outside of those actors' constitutionally enumerated powers. The real question is whether the six statutes identified by Professor Davis so clearly vest legislative power in executive or judicial actors that one can draw useful inferences from them about the original understanding of the nondelegation doctrine. The real answer is no.

The first statute, which authorizes the courts to make rules of procedure, gives no significant insight into the original understanding of the nondelegation doctrine. If formulating rules of procedure is part of the “judicial Power,” then the statute delegates nothing; it is a straightforward use of the Sweeping Clause power to implement and channel pre-existing constitutional powers of courts. One can argue, of course, that the “judicial Power” includes no such procedural component but instead is confined solely to the power to decide cases in accordance with governing law. There is in fact a lively

²⁶¹ For a much fuller exposition of this point, see Calabresi & Prakash, *supra* note XX, at 551-59.

debate about the extent to which promulgating rules of judicial procedure is a legislative function, a judicial function, or some combination of the two.²⁶² It is mercifully unnecessary to engage in that debate here. The statute would bear on the nondelegation doctrine only if it was so obvious to the founding generation that courts have no independent power to set procedural rules that the Judiciary Act can be understood as reflecting a view about Congress's ability to delegate legislative powers. That is clearly not the case, however one ultimately resolves the constitutional status of rules of judicial procedure.²⁶³

The second statute, which authorized courts to impose penalties subject only to specification of maximums, is even less evidence of a lack of concern for delegations. The power to exercise sentencing discretion is a part of the "judicial Power" to decide cases. The power to fashion a remedy (within traditional forms and limits) is clearly part of the traditional case-deciding power.²⁶⁴ If there was a common law of crimes, then the power to fashion a sentence (remedy) in that context would also be part of the judicial power. The existence of a serious dispute about that question²⁶⁵ is some evidence that a power to exercise sentencing discretion within congressionally prescribed limits is

²⁶² Robert J. Pushaw, Jr., The Inherent Power of Federal Courts and the Structural Constitution, 86 *Iowa L. Rev.* 735 (2001); William F. Ryan, Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions, 77 *B.U.L. Rev.* 761 (1997).

²⁶³ Ryan, supra note XX, at -- (describing the paucity of evidence of original meaning)

²⁶⁴ See Engdahl, supra note XX, at 170-71. It does not matter whether one describes such power as part of the judicial power or instead follows Professor Pushaw's nomenclature and terms it an "implied indispensable" power. Pushaw, supra note XX, at --. In either case, the power is vested by the Constitution in the federal courts – subject, of course, to congressional regulation under the Sweeping Clause and under the clauses authorizing Congress "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States," *U.S. Const.* art. I, § 8, cl. 6, "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.* art. I, § 8, cl. 10, "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.* art. I, § 8, cl. 14, and "[t]o provide for organizing, arming, and disciplining, the Militia." *Id.* art. I, § 8, cl. 16.

closely enough related to the traditional remedial powers of courts to pose no delegation problem.

The third statute, which continued the pre-Constitution pension scheme for veterans, seems to give the President a completely free hand in determining regulations for the pension scheme. Doesn't that demonstrate that the First Congress was unconcerned about delegation?

Consider exactly how far the President's power under this statute extends. The statute continues a pre-existing pension scheme. That means that such matters as eligibility criteria, payment amounts, and the like are already fixed by the statute through incorporation from the previous statutory scheme. Could the President validly promulgate regulations changing the amounts of the pensions, extending pensions to postal workers, or limiting the pensions only to wounded veterans from New York? Clearly not; the basic decisions about the structure of the pension scheme are all fixed by statute. The President's power to enact regulations obviously concerns such matters as forms of application, procedures for determining eligibility, proof of claims, etc. These are not trivial matters by any means, but they are not the central issues of a legislative scheme for pensions for war veterans. They concern what one might call ancillary matters, or perhaps matters of "less interest," that the Constitution does not require Congress to resolve. This statute accordingly charges the President with nothing more than standard executive tasks and therefore poses no delegation problem for originalists.

The succeeding statute that authorized the President to set pay levels for wounded or disabled military personnel is more troubling. There is nothing in the statute that the

President can interpret, or execute, in order to set the pay level. Nor is this an instance of presidential discretion under an appropriations statute; the President is determining the level of a private benefit, not the spending priorities under an appropriation. The only way in which this statute would not raise a nondelegation problem would be if the “executive Power” includes an especially wide range of discretion with respect to military matters – which is certainly a distinct possibility.²⁶⁶

The fifth statute, which authorized the Secretary of the Treasury to remit or mitigate certain fines, is a bit trickier than the others but ultimately yields the same conclusion about early understandings of delegation. The statute gives the Secretary power to remit or mitigate fines “if in his opinion the same was incurred without willful negligence or any intention of fraud.” Doesn’t this effectively give the Secretary untrammelled discretion to let lawbreakers off the hook?

The answer is yes, but the statute simply reflects and refines power that the Secretary already had. The executive department always has prosecutorial discretion to decide which instances of lawbreaking to pursue and what levels and kinds of statutorily-permitted penalties to seek. It is thus a routine part of the executive function for executive officials to have discretion concerning imposition of penalties. The only twist with this statute is that the fine is first imposed and then remitted rather than not being imposed in the first place. That may even be a difference with substance; formalists, after all, are concerned with form. But the most that one could draw from this example would be carelessness in drafting with regard to the manner in which the executive will

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exercise prosecutorial discretion. As a window into early understandings concerning delegation, it lets in very little light.

The last statute, concerning trade with Indian tribes, is a more serious matter. That statute essentially instructs the President to go forth and do good with respect to trade with Indian tribes. It is doubtful at best whether the statute sufficiently makes the important policy decisions with respect to qualifications of traders or the terms on which trade is permitted. Again, the question is whether the “executive Power” has a sufficiently broad sweep in the area of foreign affairs (which this statute plainly concerns) to permit Congress to give the President more discretion in this context than in others.²⁶⁷

None of the six statutes cited by Professor Davis unambiguously cast doubt on the vitality of the nondelegation principle. At most, we can give him two out of six. That may be enough to win a batting title, but it will not build constitutional doctrine. One certainly could not conclude from these statutes, even under the interpretations most favorable to Professor Davis, that the founding generation did not regard nondelegation as a basic principle. It is far more likely that the First Congress got a few wrong than that the Constitution does not contain a robust nondelegation principle.

If one wants to trade examples, supporters of a nondelegation principle can cite an interesting episode from the Second Congress. The Constitution grants Congress the power to “establish Post Offices and post Roads.”²⁶⁸ A bill introduced in the Second Congress to establish post roads specifically designated, town by town, the routes by which

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²⁶⁸ U.S. Const. art. I, § 8, cl. 7.

mail was to be carried. An amendment was introduced in the House to authorize the carriage of mail "*by such route as the President of the United States shall, from time to time, cause to be established.*"²⁶⁹ Several representatives objected strenuously that the amendment would unconstitutionally delegate legislative power to the President.

Representative Page, for example, declared:

If the motion before the committee succeeds, I shall make one which will save a deal of time and money, by making a short session of it; for if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation; and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction.²⁷⁰

The amendment was defeated, and the final legislation specifically designated the routes that were established as post roads.²⁷¹ The first post road established, for example, was described in the statute as follows:

From Wiscasset in the district of Maine, to Savannah in Georgia, by the following route, to wit: Portland, Portsmouth, Newburyport, Ipswich, Salem, Boston, Worcester, Springfield, Hartford, Middletown, New Haven, Stratford, Fairfield, Norwalk, Stamford, New York, Newark, Elizabethtown, Woodbridge, Brunswick, Princeton, Trenton, Bristol, Philadelphia, Chester, Wilmington, Elkton, Charlestown, Havre de Grace, Hartford, Baltimore, Bladensburg, Georgetown, Alexandria, Colchester, Dumfries, Fredericksburg, Bowling Green, Hanover Court House, Richmond, Petersburg, Halifax, Tarborough, Smithfield, Fayetteville, Newbridge over Drowning creek, Cheraw Court House, Camden, Statesburg, Columbia, Cambridge and Augusta; and from thence to Savannah
.....²⁷²

Doesn't this absurd degree of specificity, in the face of direct comments about delegation, demonstrate that proponents of the delegation doctrine were right?

²⁶⁹ 3 **Annals of Cong.** 229 (1791) (quoting Representative Sedgwick) (emphasis in original).

²⁷⁰ *Id.* at 233 (statement of Rep. Page). *See also id.* at 229 (objecting to the amendment because Congress could not "with propriety delegate that power which they were themselves appointed to exercise") (statement of Rep. Livermore).

²⁷¹ Act of Feb. 20, 1792, ch. VII, § 1, 1 Stat. 232.

²⁷² *Id.*

Not necessarily. There are many reasons why Congress would choose to designate postal routes in detail, and one of them leaps to mind: postal routes were the eighteenth-century equivalent of water projects. Being on a postal route was obviously an economic advantage (much as being on a railroad route would become an economic advantage a century later). In an era of relatively limited government, postal routes may well have been some of the tastiest pork that Congress was able to serve. Why would it let the President get credit for placing towns on the postal route, any more than the modern Congress would let the President have the responsibility, and therefore the credit, for the location of water projects?

In the end, all of these speculations from the actions of early Congresses are of minimal value. Perhaps a clear, consistent practice would be a good indication of original public meaning, but the episodic data that history gives us, in both directions, is unenlightening. Its probative value may well outweigh its potential for prejudice (though that is something that one could dispute), but that value pales before the available evidence from text, structure, and design.

Many critics of the nondelegation doctrine do not really question (or care) whether the original meaning of the Constitution includes a nondelegation principle. Instead, they simply, directly or indirectly, urge decisionmakers to be guided by something other than original meaning. That position does not concern me here. This article is not a prescription for decisionmaking. It is a straightforward exposition of the nondelegation principle that is contained in the Constitution. If decisionmakers don't want to follow the Constitution, that is their business. I ask only that they do it openly and honestly.
