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**DELEGATION RECONSIDERED:  
A DELEGATION DOCTRINE FOR THE  
MODERN ADMINISTRATIVE STATE**

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**DELEGATION RECONSIDERED:  
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**ABSTRACT**

*The delegation doctrine—holding that legislative authority cannot be ceded to executive or judicial officers—long has been accepted as a common-sense statement of the proposition that the constitutional design of separated powers for more than a century. Yet despite its broad acceptance as a doctrine that is consistent with the structure and text of the Constitution, it effectively is treated as simply a notional, not a realistic, constraint. Recent opinions from Justices Samuel Alito and Clarence Thomas, however, pointedly expressed concern about legislated grants of expansive authority to make rules regulating private conduct. These opinions provide an occasion for reexamining how much the Constitution’s division of and limitations on power traditionally assumed to be “legislative” can and should be judicially enforceable.*

*If the constitutional structure is to be preserved, an enforceable delegation doctrine is needed, but the current doctrine—which turns on the scope of a legislative assignment of authority— will not work. Focusing instead first and foremost on the nature of the authority granted and its connection to the constitutional competence of the officials or*

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*bodies authorized to exercise discretionary power can provide a path to reinvigorating separation of powers protections.*

## **I. INTRODUCTION: LIMITING POWER**

The American Constitution was designed around structures intended to limit discretionary government power, checking assignments of discretionary power necessary to effective government (something the new Constitution was supposed to improve) by dividing them among different entities and different officials.<sup>1</sup> The national government was granted limited powers; the states retained plenary powers not at odds with national powers; and the “vesting clauses” of Articles I, II, and III grant the entirety of the legislative, executive, and judicial powers of the national government to specific bodies and officers.<sup>2</sup> That set of assignments long has been understood to preclude reassignment of those powers to others. Congress cannot, for example, claim for itself part of the President’s power to appoint officers of the United States<sup>3</sup> or to execute the laws<sup>4</sup> or assign to non-Article III officers the judicial power of the United States.<sup>5</sup>

This allocation of power does not only bar rearrangement of authority by invasion; it also prevents rearrangement via what might appear to be a voluntary surrender of authority. So, for example, the Constitution’s structure cannot be squared with Congress giving its own peculiar authority—the legislative

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<sup>1</sup> See, e.g., THE FEDERALIST Nos. 10 (Madison), 41-42 (Madison), 47-51 (Madison), 76-78 (Hamilton).

<sup>2</sup> See, e.g., U.S. CONST., Art. I, sec. 1, cl. 1; *id.*, Art. I, sec. 8, 10; *id.*, Art. II, sec. 1, cl. 1; *id.*, Art. III, sec. 1, cl. 1; *id.*, Amend. 10.

<sup>3</sup> See *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>4</sup> See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

<sup>5</sup> See, e.g., *Stern v. Marshall*, 564 U.S. 2 (2011); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

powers granted in the Constitution—to any other body.<sup>6</sup> This conclusion follows from both the language of the document and the understanding of the people framing it that the reasons for altering the allocation of powers are the same regardless of the form of that change.

The delegation doctrine (or nondelegation doctrine), first clearly articulated in *Field v. Clark*,<sup>7</sup> has been accepted as a common-sense statement of this proposition for more than a century. Nonetheless, judicial application of the doctrine has been sufficiently rare—merely two cases in which the Supreme Court has overturned laws on that ground<sup>8</sup>—that many scholars have opined that the doctrine exists as no more than a tautology<sup>9</sup> or that it is simply unenforceable as a practical matter.<sup>10</sup> In other words, despite its broad acceptance as a doctrine that is consistent with the structure and text of the Constitution, it effectively is treated as simply a notional, not a realistic, constraint.

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<sup>6</sup> See, e.g., *Clinton v. New York*, 524 U.S. 417 (1998); *Loving v. United States*, 517 U.S. 748, 757-58 (1996); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825). This proposition, though often repeated by the courts and seemingly self-evident at some level, is not universally accepted. See, e.g., Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87 (2010). Although this article will refer to the reassignment of powers given to Congress, reference to delegation of power that must be exercised through formal legislation also should be understood as affecting the related power of the President who participates in lawmaking through the requirement of presentment.

<sup>7</sup> 143 U.S. 649, 692 (1892).

<sup>8</sup> See *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 474 (2001), citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>9</sup> See, e.g., Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

<sup>10</sup> See, e.g., Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 790-91 (1999); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 326-28 (2000) (“*Canons*”).

Recent opinions from two justices, however, may signal new openness to reconsideration of the Court’s apparent reluctance to reject laws that effectively cede legislative authority to executive—or non-executive administrative—officers. Both Justice Samuel Alito and Justice Clarence Thomas, writing in *Department of Transportation v. Association of American Railroads* (“*American Railroads*”),<sup>11</sup> expressed concern about legislated grants of expansive authority to make rules regulating private conduct.<sup>12</sup> Whether these opinions presage a change in the Court’s posture respecting delegation, they provide an occasion for reexamining how much the Constitution’s division of and limitations on power traditionally assumed to be “legislative” can and should be judicially enforceable.

This article traces the concerns that informed constitutional decisions separating powers along with early laws and judicial decisions respecting the assignment of authority to the executive and judicial branches. The alteration of the delegation doctrine in the late 19th and early 20th Century, however, set the law on a different path, one that gave a binary choice essentially requiring either detailed lawmaking by Congress on all points or judicial acquiescence in extraordinary commitments of discretionary authority for other branches of government to adopt rules governing conduct that should be regulated by legislation if at all. That choice resolved into periodic statements of fealty to a delegation doctrine coupled with routine acquiescence in authorizations that effectively delegated Congress’ legislative power to others.

If the constitutional structure is to be preserved, the delegation doctrine needs realignment. The doctrine should

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<sup>11</sup> U.S. Sup. Ct. No. 13-1080 (Mar. 9, 2015).

<sup>12</sup> See *id.*, *American Railroads*, slip op. at 6-7 (Alito, J., concurring); *id.*, *American Railroads*, slip op. at 2-22, 25-27 (Thomas, J., concurring in judgment).

return to its historic roots. It should focus first and foremost on the nature of the authority granted—on whether discretionary authority assigned to another branch is of such importance that it should only be decided by Congress and on whether the authority fits within the set of functions constitutionally committed to that branch. A law that fails this test constitutes an attempted delegation of legislative power instead of a legal authorization for specific exercises of executive or judicial power. Changing the focus from the *scope* to the *nature* of the authority legally assigned can provide a path to reinvigorating separation of powers protections.

## II. SEPARATION VERSUS DELEGATION

### A. Separation of Functions

The most basic proposition about the U.S. Constitution in the eyes of its framers was its ability to enable effective national government without putting liberty at risk by separating power in different hands. James Madison put the point starkly:

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that . . . [t]he accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny.<sup>13</sup>

The importance of separated powers as a safeguard of liberty was not simply part of a set of considerations that the Constitution's best-known advocates acknowledged. The framers, Madison most of all, repeatedly stressed its place in the constitutional scheme and its centrality to a proper

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<sup>13</sup> THE FEDERALIST No. 47 (Madison).

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foundation for the nation in other statements made during the national debate over ratification of the Constitution.

Madison's Federalist No. 51 is justly renowned for its soaring rhetoric about how different a task constitution-making would be "if men were angels," the role of the people as critical to checking power, and the constitutional design that enabled "[a]mbition . . . to counteract ambition."<sup>14</sup> More prosaically, but equally important, Federalist 51 declares that the "separate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty" and that "the division of government into separate and distinct departments," together with the division of power between state and national governments, provides a critical protection against usurpation of the rights of the people.<sup>15</sup>

Madison went on to add that while separation of the legislative, executive, and judicial powers—placing them in different bodies and different officials' hands—is necessary to protect liberty, it is not sufficient:

. . . [P]ower is of an encroaching nature, and . . . it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others.<sup>16</sup>

This separation of functions plainly does not contemplate that one branch of government would take over functions assigned to a different branch. Warnings about encroachment of one branch on the powers of another were directed at this

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<sup>14</sup> THE FEDERALIST No. 48 (Madison).

<sup>15</sup> THE FEDERALIST No. 51 (Madison).

<sup>16</sup> THE FEDERALIST No. 48 (Madison).

end, along with a particular caution about the legislature. In Madison's memorable words, "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."<sup>17</sup>

### **B. Delegation—Encroachment's Other Side**

Equally important, the understanding of separated powers did not permit one branch to assign its functions to another branch. That prospect was not so evident a concern as the intrusion of one branch into the affairs of another over the other's objection. But the framers of the Constitution were well aware of John Locke's warning against delegation of legislative power:

The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making laws, and place it in other hands.<sup>18</sup>

The critical point, however, goes beyond Locke's declaration that the people have not consented to a grant of legislative power to others. It also must be understood that the incentives that so obviously made the framers concerned with encroachment apply equally to delegation. The bottom line is that *the grant of power from one entity to another is never an act of pure generosity; the grantor invariably gains something from the grant.*<sup>19</sup>

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<sup>17</sup> THE FEDERALIST No. 48 (Madison).

<sup>18</sup> John Locke, Second Treatise of Government §141, in JOHN LOCKE, TWO TREATISES OF GOVERNMENT 363 (1690) (Peter Laslett ed., Cambridge Univ. Press 1988).

<sup>19</sup> Anyone who has had direct experience with delegation should understand this point; delegation within an organization creates both increased freedom, increased opportunity to claim successful outcomes, and increased insulation against blame for bad outcomes. See, e.g., Peter H. Aronson,



In the case of a delegation of authority from the legislature, the returns to legislators could be in the form of reducing the degree to which they will be held accountable for unpopular actions, or the returns could flow from enabling a less costly mechanism for taking some steps that legislators are persuaded provide public benefits.<sup>20</sup> Despite the common caricature of government as a sinkhole for wasteful spending—reflecting the fact that politicians often benefit from spending that is difficult to divorce from rent-seeking<sup>21</sup>—there are competing pressures to use scarce funds in ways that provide the greatest returns.<sup>22</sup> Efficiency in government, however, is not measured in the

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Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); John Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223 (2000). Arguments about the limitations on such benefits—on the degree to which Congress, for instance, can insulate itself from criticism for unpopular results—raise legitimate points. See, e.g., Posner & Vermeule, *supra*, at 1746-50. But these arguments are ultimately only quibbles over the *degree*, not the *existence*, of these effects.

<sup>20</sup> See, e.g., David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and Separate Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947 (1999); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985) (“Prodelegation”); Mathew McCubbins, Roger Noll & Barry Weingast, *Structure and Process, Politics and Policies: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Kenneth A. Shepsle, *The Strategy of Ambiguity: Uncertainty and Political Competition*, 66 AM. POL. SCI. REV. 555 (1972).

<sup>21</sup> The literature on rational-choice politics and rent-seeking is voluminous. Among the classic expositions of core concepts, see, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (Univ. Michigan Press 1962); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION AND THE THEORY OF GROUPS* (Harvard Univ. Press 1965); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974).

<sup>22</sup> This is a general axiom of economics, though in the context of government, it is arguable what the maximand is that is advanced by a particular spending level or by particular efficiencies within the set budget level. See, e.g., WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 24-38 (Aldine-Atherton 1971); KENNETH A. SHEPSLE & MARK S. BONCHEK, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* 348-77 (W.W. Norton & Co. 1997).

same way as in private enterprise; the benefits come in returns to those who hold office, which are not strictly correlated with the sorts of inputs and outputs associated with standard concepts of economic efficiency.<sup>23</sup>

Whatever the nature of the political and personal benefits—which exist even where the “outplacement” is associated with public benefits (at least from some vantage)—assigning some part of an official’s or entity’s functions to others invariably has some return for the delegating officials.<sup>24</sup> Acknowledgement of official self-interest in delegation of power as much as in the acquisition of power should be enough in itself to raise questions about the practice. The practical and policy considerations associated with these observations are addressed further below.

From the standpoint of constitutional design, the critical point is that redistribution of authority from one entity to another—whether by encroachment or delegation—is at odds with the inclusion of specific procedures for each branch’s and officer’s functions. The division of legislative authority between houses of Congress having different geographic bases and different balances among the members, along with the requirement of presentment to the President and potentially a veto requiring a supermajority to supersede, serve important

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<sup>23</sup> See, e.g., George J. Stigler, *Economic Competition and Political Competition*, 13 PUBLIC CHOICE 91 (1972).

<sup>24</sup> See, e.g., Aronson, Gellhorn & Robinson, *supra*; Epstein & O’Halloran, *supra*. In this sense, however, it is worth noting that *both* legislating and delegating (and *not* legislating or *not* delegating) can confer benefits. A similar concept is found in Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987), which observes that not regulating, despite the acknowledged possibility of imposing regulatory constraints, can serve the same rent-extracting function as regulating. The same “two sides of the same coin” corollary applies to delegation as another means for expanding power.

roles as checks on specific decisions. A delegation of authority that elides those checks should be viewed with suspicion.<sup>25</sup>

### C. Early Experience—Laws

The early Congresses, which included a substantial number of drafters and ratifiers of the Constitution, adopted laws that granted administrative officials power to make a variety of discretionary decisions.<sup>26</sup> The grants of authority almost inevitably permitted executive officials (or, in at least one case, judges) to make decisions that might otherwise have been made directly by Congress. Yet in each case that nature of the assignment of authority was accepted as consistent with the Constitution's division of powers. The existence of alternative mechanisms that would have allowed direct exercise of more decisional power by Congress and less by others did not, in the view of those who were present at the constitutional creation, make any of these assignments an improper grant of *legislative* power.

For example, the Second Congress passed the Residence Act, which authorized presidentially appointed commissioners to purchase or accept land (of no more than ten square miles located within certain bounds along the Potomac) that the President deemed sufficient to create a federal district—now the District of Columbia—to house the national government and to provide suitable buildings “for the accommodation of Congress, and of the President, and for the public offices of the government of the United States” on terms deemed appropriate by the President.<sup>27</sup> Congress certainly could have set the precise metes and bounds of the District itself and also could

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<sup>25</sup> See, e.g., *Clinton v. New York*, 524 U.S. 417 (1998).

<sup>26</sup> See Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 719-20 (1969); Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 738-39 (1994); Posner & Vermeule, *supra*, at 1735-36.

<sup>27</sup> See Act of July 16, 1790, 1 Stat. 130.

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have approved details of each building itself, but the legislators found it unnecessary to specify further details.

Similarly, the Judiciary Act of 1789, passed by the First Congress—in addition to setting the number of Supreme Court justices, creating specified lower courts in particular jurisdictions, and laying out a series of detailed requirements for the operation of the judiciary—empowered the federal courts to adopt “all necessary rules for the orderly conducting of business” in those courts.<sup>28</sup> Again, the Congress presumably could have legislated the details of the procedural requirements for filings, briefs, arguments, execution of judgments, and so on.

Another example concerns procedures for paying pensions for military veterans. Part of the law adopted by the First Congress authorizing the formation of the army authorized continued payment from the federal government of pensions initially obligated by the states; these payments would be made under regulations prescribed by the President.<sup>29</sup> In the same vein, the Third Congress extended the government’s pension payments to disabled veterans for another year, again allowing the President to fill in the procedural details for making the payments.<sup>30</sup>

The Third Congress also passed the Embargo Act of 1794, which authorized the President, if Congress was not in session, “whenever, in his opinion, the public safety shall so require, to lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances of the case may require, and to continue or revoke the same, whenever he shall think

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<sup>28</sup> See Act of Sept. 24, 1789, 1 Stat. 73, 83.

<sup>29</sup> See Act of Sept. 29, 1789, 1 Stat. 95.

<sup>30</sup> See Act of Mar. 3, 1791, 1 Stat. 218.

proper.”<sup>31</sup> Among other limitations, any embargo instituted under this authority was to expire within 15 days of the next session of Congress.

What is striking about the list of delegations of authority in the early Congresses is the *nature* of the delegations. Although Congress could have legislated all of the details that it deputized other officials to direct, the Congress committed to the other branches decisions that were consistent with the functions of those branches. Outside the realm of foreign affairs (where the President enjoys substantial independent authority, as over the use of embargoes), it did not authorize the President or the courts or other governmental officers to adopt rules that broadly regulated behavior of private individuals or entities or that controlled the conduct of other officials outside the branch carrying out the legislated mandate.

Instead, the early laws deputized other officers to make decisions on matters of housekeeping, of management of national property, of licensing, of procedures for performing duties aligned with the assignee’s other powers. So, for instance, laws such as the Judiciary Act only gave judges authority over procedures that were traditionally within judges’ discretion, that is, issues of *judicial* process generally thought to be adjuncts to the decision of cases and controversies.<sup>32</sup> And in the foreign affairs and national security domain, where Congress gave the broadest authority to the President, the authorization under the Embargo Act was limited both in the time for which it applied (when Congress was not in session) and its potential duration (expiring shortly after Congress’ return).

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<sup>31</sup> See Act of Jun. 4, 1794, 1 Stat. 372.

<sup>32</sup> The matters of process committed to the judiciary in early law, hence, stand in sharp contrast to the laws at issue in *Morrison v. Olson*, 487 U.S. 654 (1988), and *Mistretta v. United States*, 488 U.S. 361 (1989).

While the early laws do provide examples of legislative commitment of discretionary authority to the President, the courts, or specific executive officers, the authorizations are almost entirely consistent with the exercise of *administrative* power, not of *coercive* power over private activity that is separate from access to government benefits or permits (at least outside the special realm of national security and foreign affairs powers) or of *obligatory* power that would enable the delegate to alter the nation's financial commitments. Those powers remained squarely in the legislature's domain.

#### **D. Early Experience—*Wayman v. Southard***

Although not the first case to uphold legislative commitment of authority to the President,<sup>33</sup> the most significant early decision of the Supreme Court delineating the contours of congressional entitlement to authorize other federal entities to exercise power that might have been exercised by Congress came in the 1825 case of *Wayman v. Southard*.<sup>34</sup> Chief Justice John Marshall's opinion for the Court tracked the same line as the early laws, recognizing the propriety of delegations of discretionary authority over matters associated with powers constitutionally committed to the other branches.<sup>35</sup>

*Wayman* presented a challenge to a particular rule of executing judgment, based on a provision in the Process and Compensation Act of 1792<sup>36</sup> that adopted for federal courts "the

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<sup>33</sup> See, e.g., *The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813), addressing the constitutionality of delegations of authority to respond in specified ways to particular post-enactment events. This decision is discussed *infra* at Part III.

<sup>34</sup> 23 U.S. (10 Wheat.) 1 (1825). The Court's decision in *The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813), addressing the constitutionality of delegations of authority to respond in specified ways to particular post-enactment events, is discussed *infra* at Part III.

<sup>35</sup> See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) ("*Wayman*").

<sup>36</sup> See Act of May 8, 1792, 1 Stat. 275.

same forms of writs, executions, and other process” used in the applicable state courts. The provisions respecting reliance on state law, were “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.”<sup>37</sup> The defendants, resisting execution of judgment under the federal rule (which differed from Kentucky’s), asserted that the “subject to” provision, “if extended beyond the mere regulation of practice in the court, would be a delegation of legislative authority which Congress can never be supposed to intend and has not the power to make.”<sup>38</sup>

Chief Justice Marshall, writing for the Court, stated what he took to be an obvious rule:

It will not be contended that Congress can delegate to the courts or to any other tribunals powers which are strictly and exclusively legislative.

But Congress may certainly delegate to others powers which the legislature may rightfully exercise itself.<sup>39</sup>

Powers that fall into the first category are rules for decisions on matters of such importance that they “must be entirely regulated by the legislature itself.”<sup>40</sup> The second category is comprised of subjects “of less interest,” where Congress properly may make “general pronouncements” and leave it to others to “fill up the details.”<sup>41</sup>

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<sup>37</sup> *Id.*, 1 Stat. 276; see *Wayman*, *supra*, 23 U.S. at 41.

<sup>38</sup> *Wayman*, *supra*, 23 U.S. at 42.

<sup>39</sup> *Wayman*, *supra*, 23 U.S. at 42-43.

<sup>40</sup> *Wayman*, *supra*, 23 U.S. at 43.

<sup>41</sup> *Id.*

While admitting that the line between these two classes of power is not “exactly drawn,” Marshall made plain his view that regulation of matters having to do with judicial forms and proceedings fell cleanly into the second class and were appropriate subjects for the discretion of the federal courts. He invoked the provisions of the Judiciary Act of 1789 and other laws granting authority over judicial processes to the courts as evidence that the contemporaneous understanding saw such delegations as unproblematic.<sup>42</sup>

Marshall’s *Wayman* opinion added two thoughts that help clarify his approach to delegated authority. He wrote that “[t]he 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 . . .”<sup>43</sup> Further, Marshall seemed to have this description of the general division of powers in mind when he observed that “[a] general superintendence” over the execution of judgments “seems to be properly within the judicial province, and has been always so considered.”<sup>44</sup> In other words, the justices in *Wayman* were looking at the nature of the delegation in the context of the separation of powers, considering both what was being authorized by Congress and how it connected with the nature of the power constitutionally exercised by the recipient of that authority.

*Wayman* did not provide entirely clear guidance for what would be permissible delegations. Marshall acknowledged that “the precise boundary of this power [to commit discretionary

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<sup>42</sup> *Wayman, supra*, 23 U.S. at 42-47. Although the decision became known, rightly, for its statements on delegation of power, much of the opinion dealt with details of the Process and Compensation Act, evaluating what the Act comprehended relative to the execution of judgments.

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

<sup>44</sup> *Wayman, supra*, 23 U.S. at 45.



authority to another branch] is a subject of delicate and difficult inquiry.”<sup>45</sup>

The decision, however, did suggest the general contours of the constitutional rule respecting delegation as Marshall and his colleagues then saw it. Under *Wayman*, delegation of authority that could have been exercised by Congress directly through legislation is allowed if it satisfies two conditions. *First*, it must consist of discretion on a matter of sufficiently slight importance not to require resolution by Congress. And *second*, it must convey a discretionary authority that is of the sort reasonably associated with the activity of the body exercising that discretion. Together these conditions render the delegated authority not a devolution of *legislative* power but instead part of the power constitutionally vested in the other branch.<sup>46</sup>

### III. THE “INTELLIGIBLE PRINCIPLE” TEST: DELEGATION AS SCOPE

Unfortunately, after a century of holding to the understanding evidenced in *Wayman* (albeit not always in as clear and cogent a fashion), Supreme Court cases addressing the delegation issue shifted the focus to a different question than Marshall thought compelling for distinguishing between permissible and impermissible delegations. The difference can be seen by comparing two decisions often treated as similar,

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<sup>45</sup> *Wayman*, *supra*, 23 U.S. at 43.

<sup>46</sup> This conception differs from the “naïve view” championed by Professors Posner and Vermeule. They favor a tautology that any legislative delegation of authority satisfies the Constitutional requirement that the legislative power be exercised by the Congress; having legislated, Congress has exercised that power and any other power given to others, no matter its breadth or nature, is not to be objected to on that ground. See Posner & Vermeule, *supra*. Differences between this and the approach suggested by *Wayman* are further discussed *infra* at Part V.

*Field v. Clark*<sup>47</sup> and *J.W. Hampton, Jr., & Co. v. United States*.<sup>48</sup>

### A. *Field* Test for Delegation

*Field v. Clark* is best known for its clear statement that the Constitution prevents delegation of legislative authority. Justice John Marshall Harlan's majority opinion asserts "[t]hat 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."<sup>49</sup> Similarly, Justice Lucius Lamar's dissent for himself and Chief Justice Melville Fuller declared "[t]hat no part of this legislative power can be delegated by Congress to any other department of the government, executive or judicial, is . . . universally recognized as a principle essential to the integrity and maintenance of the system of government ordained by the Constitution."<sup>50</sup>

While the *Field* majority and dissent clearly condemned delegation of legislative power, analysis of whether that had occurred in the law at issue—the Tariff Act of 1890, generally known as the McKinley Tariff Act<sup>51</sup>—was muddled. The McKinley Tariff Act raised tariff rates on most dutiable products while simultaneously eliminating tariffs on a set of products, including sugar, molasses, coffee, tea, and hides. The law also directed the President to revoke the duty exemption of those products and to impose other, specified duties on each product, whenever the President

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<sup>47</sup> 143 U.S. 649 (1892) ("*Field*").

<sup>48</sup> 276 U.S. 394 (1928).

<sup>49</sup> *Field*, *supra*, 143 U.S. at 692.

<sup>50</sup> *Field*, *supra*, 143 U.S. at 697 (Lamar, J., dissenting).

<sup>51</sup> Act of Oct. 1, 1890, 26 Stat. 567. See, e.g., Oona Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L. REV. 140, 173 (2009).

shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides . . . imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States he may deem to be reciprocally unequal and unreasonable . . . <sup>52</sup>

The *Field* majority found that the law did not work an unconstitutional delegation—that it “does not in any real sense invest the President with the power of legislation”<sup>53</sup>—because the law specified the action that had to occur if the President found a certain fact to exist.<sup>54</sup> When the President found that fact and took the prescribed action, this was not an exercise in making law:

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 lawmaking department to ascertain and declare the event upon which its expressed will was to take effect.<sup>55</sup>

The majority relied on a series of earlier decisions, reaching back to Court’s 1813 decision in *The Brig Aurora*,<sup>56</sup> to support the conclusion that “contingent legislation”—legislation that provides for actions to take place on the finding of a particular fact or set of facts—does not work a delegation of lawmaking

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<sup>52</sup> Act of Oct. 1, 1890, 26 Stat. 567, 612. See, e.g., C. Stuart Patterson, *The Constitutionality of the Reciprocity Clause of the McKinley Tariff Act*, 31 AM. L. REGISTER & REV. 65, 66 (1892).

<sup>53</sup> *Field, supra*, 143 U.S. at 692.

<sup>54</sup> *Field, supra*, 143 U.S. at 692-93.

<sup>55</sup> *Field, supra*, 143 U.S. at 692.

<sup>56</sup> 11 U.S. (7 Cranch) 382 (1813).

authority but consists of deputizing another officer to make inquiries over matters that do not require the sort of policy discretion associated with legislation.<sup>57</sup> Lacking that sort of discretion, the authorized actions, the Court said, are quintessentially executive in nature.

The test laid down by the Court, thus, looks very much like the test used in *Wayman v. Southard*. In fact, it may have represented an even narrower test for (at least a subset of) delegations of authority.

The problem with *Field* is not so much the test used as uncertainty about its application. As the dissent noted, the concept of what is “reciprocally unequal and unreasonable” tariff treatment—not just for duties laid on the class of goods for which tariffs were suspended but for any “duties or other exactions” on any goods exported from the United States—is not a matter of simple fact-finding.<sup>58</sup> Further, the duration of the President’s action is by law “for such time as he shall deem just,” a provision that the dissenters found conveyed policy-making discretion.<sup>59</sup>

The assertion that all that was at issue in *Field* was simple fact-finding and non-discretionary action is misleading. A case like *Brig Aurora* shows the difference between the provisions of the McKinley Tariff at issue in *Field* and contingent legislation as traditionally understood (and approved). *Brig Aurora* addressed a provision that directed the President to revoke or modify parts of the Non-Intercourse Act if he determined that France or Britain had revoked measures that violated U.S. neutrality.<sup>60</sup> That is a far more limited, and far more fact-based, commitment of authority.

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<sup>57</sup> See *Field, supra*, 143 U.S. at 682-94.

<sup>58</sup> See *Field, supra*, 143 U.S. at 696-700 (Lamar, J., dissenting).

<sup>59</sup> See *Field, supra*, 143 U.S. at 699 (Lamar, J., dissenting).

<sup>60</sup> See Act of March 1, 1809, 2 Stat. 528.

The division between majority and dissent reveals a softness in the justices' efforts to determine whether the McKinley Tariff in fact granted discretion—as it surely did in some measure—and, if so, whether that discretion violated the Constitution's assignment of separate powers to the various branches. The narrow focus on fact-finding versus discretion does not as clearly direct analysis to the real separation of powers issue as the considerations identified in *Wayman*: the importance of the matter on which decision by the President was authorized and the relation of the decision to the authority constitutionally committed to the President. But at least the justices were still asking—although not as directly as Chief Justice Marshall—whether the *nature* of the decision committed to the President fit with executive rather than legislative decision-making, whether it was an exercise of general policy-making discretion (a legislative prerogative) or of fact-finding and implementation (an executive function).

### **B. Hampton's Road to Delegation: An Intelligible Principle?**

If *Field* represented a somewhat less clearly articulated continuation of the approach taken in *Wayman* and other cases, the language employed by Chief Justice William Howard Taft in the next major delegation case to come before the Court, *J.W. Hampton, Jr., & Co. v. United States* (“*Hampton*”), pointed delegation analysis in a different direction. Not surprisingly, given the long-running debate over tariffs and the obvious need for mechanisms to set and collect them,<sup>61</sup> *Hampton* concerned another trade law provision, Section 315 of the Tariff Act of 1922, known at the time as the Fordney-McCumber Tariff.<sup>62</sup>

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<sup>61</sup> Debate over the tariff dates back to the First Congress, which passed the contentious Hamilton Tariff, Act of July 4, 1789, 1 Stat. 24, as the nation's first substantive law, and the Collection Act, Act of July 31, 1789, 1 Stat. 29, as one of the first handful of laws.

<sup>62</sup> Act of Sep. 21, 1922, 42 Stat. 858. See, e.g., STEPHEN W. STATHIS,

That section gave the President authority to raise or lower tariffs by up to 50 percent in order to equalize the costs of production between the United States and the principal competing country for imports into the United States. The President depended on—but was not bound to implement the findings of—an investigation by the U.S. Tariff Commission (a formally independent agency of six presidentially-appointed and senatorially-confirmed officials), setting out the relative differences in costs of production for the affected products.<sup>63</sup> President Calvin Coolidge’s decision to increase by 50 percent the duty applied to barium dioxide from Germany was challenged as an unconstitutional exercise of legislative power which the Congress could not delegate.<sup>64</sup>

Chief Justice Taft’s opinion in *Hampton* saw advantages from extending power to the President and deferred to the political process that produced grants of authority such as in the Tariff Act. After observing that Congress’ legislative purview encompasses “all and many varieties of legislation action,” Taft declared that

. . . Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations.<sup>65</sup>

In the specific case of finding what differences existed in the production costs of particular products in the U.S. and

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LANDMARK LEGISLATION 1774-2012: MAJOR U.S. ACTS AND TREATIES 221 (2d ed., Sage-CQ Press 2014).

<sup>63</sup> See Act of Sep. 21, 1922, §315, 42 Stat. 858, 941.

<sup>64</sup> *Hampton, supra*, 276 U.S. at 404.

<sup>65</sup> *Hampton, supra*, 276 U.S. at 406.

elsewhere and calculating how much tariffs needed to be adjusted to make these costs the same—in pursuit of the concept of fair competition—Congress needed to find a more efficient mechanism than the cumbersome and unscientific process of legislation, as Taft saw the matter. To that end,

. . . Congress adopted in § 315 the method of describing with clearness what its policy and plan was, and then authorizing a member of the executive branch to carry out its policy and plan and to find the changing difference from time to time and to make the adjustments necessary to conform the duties to the standard underlying that policy and plan. As it was a matter of great importance, it concluded to give by statute to the President, the chief of the executive branch, the function of determining the difference as it might vary. He was provided with a body of investigators who were to assist him in obtaining needed data and ascertaining the facts justifying readjustments.<sup>66</sup>

The opinion acknowledged that the President was not required to follow the determination of the Tariff Commission, and in fact the law's text did not require the President to follow any particular method of deciding what to do or when to do it.<sup>67</sup> Despite that, the Court decided that Congress had sufficiently prescribed its plan for tariffs that the President was merely exercising discretion in implementing that plan rather in creating it. Thus, there was no delegation of legislative power.<sup>68</sup>

The capstone to the Chief Justice's opinion, and the test for which *Hampton* became known, came after comparing presidential adjustment of tariff rates (to make U.S. sales prices of imports more equivalent to those for domestically produced goods) under the Fordney-McCumber Act to the exercise of

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<sup>66</sup> *Hampton, supra*, 276 U.S. at 405.

<sup>67</sup> *Id.*

<sup>68</sup> *Hampton, supra*, 276 U.S. at 406-10.

rate-making authority by an administrative agency. Taft's opinion announced 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."<sup>69</sup>

While the *Hampton* decision did not offer much to clarify what "an intelligible principle" meant, it did invoke the *Field* case as an example. Taft quoted *Field's* conclusion that the President there did not exercise legislative power because the instructions he was given were sufficiently directive that he "was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect."<sup>70</sup> But unlike *Field*, which cast the legislated instructions as granting only a ministerial power to take actions prescribed for a particular contingency, *Hampton* asked whether there was sufficient legislative guidance to an exercise of far broader discretionary power.

*Hampton* also marked a clear departure from *Wayman* and its progeny in another dimension. Where Chief Justice Marshall in *Wayman* emphasized that *important decisions on matters of public policy must be made by Congress* and cannot be assigned to others, Chief Justice (and former President) Taft justified the delegation upheld in *Hampton* in part because the matter was of such "great importance" that the decision *should* be given to the President. As with various advocates for administrative policy-making as more thoughtful, informed, efficient, or even scientific,<sup>71</sup> Taft's vision of good government

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<sup>69</sup> *Hampton, supra*, 276 U.S. at 409.

<sup>70</sup> *Hampton, supra*, 276 U.S. at 410-11.

<sup>71</sup> See, e.g., Colin S. Diver, *Statutory Interpretation and the Administrative State*, 133 U. PA. L. REV. 549 (1985); Epstein & O'Halloran, *supra*; Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007); Hathaway, *supra*; Mashaw, *Prodelegation, supra*; Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391



encompassed a broader role for discretionary executive decisions—especially presidential decisions—than Marshall, Madison, and other founders and contemporaries had envisioned.<sup>72</sup> On this view, discretionary executive power did not have to be justified as part of a narrow set of constitutionally committed responsibilities but instead could be the product of a political preference for placing certain decisions in administrators' hands.

After *Hampton*, what mattered was not so much the *nature* of the delegated authority or its fit with core executive powers but the *scope* of the delegation. The new question was not whether the commitment of authority to the executive was on matters of a sort that was appropriate for executive action but rather whether it could be said to be guided by an instruction that could be understood. If so, the administering official was exercising authority that was not so open-ended as to be deemed “legislative” power.

### **C. The Intelligible Principle Test’s (Almost) Open Door**

In the nearly 90 years that have followed *Hampton*, it has become clear that even the vaguest, most incoherent set of mutually incompatible goals can satisfy the “intelligible principle” test. Although the Supreme Court rejected broad, unstructured delegations of regulatory authority in the *Panama Refining* and *Schechter Poultry* decisions,<sup>73</sup> since 1935 it has been unable to find a delegation that was not sufficiently intelligible to satisfy the majority of justices.

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(1987).

<sup>72</sup> See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335-53 (2002) (“*Delegation*”).

<sup>73</sup> See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

So, for example, in *National Broadcasting Co., Inc. v. United States*, the Court found a sufficiently intelligent principle in the law authorizing the Federal Communications Commission (FCC) to allocate broadcast licenses in a fair and efficient manner and to grant licenses that serve “the public interest, convenience, and necessity.”<sup>74</sup> Rebuffing a challenge to the legitimacy of this charge, Justice Frankfurter quoted his own language from a prior case raising a different issue respecting this standard: “While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.”<sup>75</sup>

After finding that the FCC was authorized essentially to take any action it deemed served “the public interest,” including comprehensively regulating relationships between broadcast stations and networks, Frankfurter declared—without any meaningful explanation—that the context of the use of that term in the law provided enough guidance that it was not too “vague and indefinite” to pass constitutional muster.<sup>76</sup> The statement was particularly unsatisfying because the Court’s opinion rendered the law’s instruction more vacuous than it needed to be. After all, Frankfurter’s opinion essentially stripped the phrase of all limiting language that could have given it meaning in the context of the law, a point forcefully made by Justice Murphy in dissent.<sup>77</sup> It extracted the instruction from the narrow context of radio spectrum licensing—which, rightly or wrongly, has been viewed as bestowing a privilege or government benefit on licensees—and

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<sup>74</sup> 319 U.S. 190, 225-226 (1943) (“*National Broadcasting*”).

<sup>75</sup> *Id.*, at 216. The language above in text is the full quotation from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

<sup>76</sup> *National Broadcasting*, *supra*, 319 U.S. at 214-18, 225-226.

<sup>77</sup> *National Broadcasting*, *supra*, 319 U.S. at 227, 230-32.

applied it to the sort of regulation of private business relationships that traditionally has been seen as requiring more particularized legislative direction.<sup>78</sup> If broad authority to regulate in the public interest constitutes an intelligible principle that adequately constrains the scope of the discretionary power being given to government officials, then *National Broadcasting* must be taken as abandoning the effort to control legislative delegations of policy-making authority.

The appearance of judicial surrender on the question of delegation was further cemented by the Court's decision the following year in *Yakus v. United States*.<sup>79</sup> The Emergency Price Control Act created the Office of Price Administration in order to "stabilize prices and prevent speculative, unwarranted, and abnormal" price increases and to guard against a variety of ill effects flowing from "excessive prices."<sup>80</sup> A subsequent act amended the law to instruct that the Administrator should set prices that "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."<sup>81</sup> The law also directed the Administrator "so far as practicable" to take account of the prices prevailing in October 1941, and to "make adjustments for such relevant factors as he may determine and deem to be of general applicability, including . . . [s]peculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general

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<sup>78</sup> For description of the historical treatment of such delegations, see, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 4-8 (Univ. of Chicago Press 2014); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985) ("Substance"); David Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355 (1987) ("Purposes").

<sup>79</sup> 321 U.S. 414 (1944) ("*Yakus*").

<sup>80</sup> See Emergency Price Control Act of January 30, 1942, 56 Stat. 23; *Yakus*, *supra*, 321 U.S. at 420.

<sup>81</sup> See Inflation Control Act of October 2, 1942, 66 Stat. 765; *Yakus*, *supra*, 321 U.S. at 420.

increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941.”<sup>82</sup>

The Court found that these instructions gave the Administrator standards to guide his price-fixing and concluded that the law sufficiently narrowed the scope of his discretion to satisfy constitutional requirements that it make the law rather than deputizing another to perform that function.<sup>83</sup> Justice Owen Roberts’ devastating dissent demonstrates that the flaccid and contradictory instructions leave to the Administrator virtually unfettered discretion to decide whether, when, how, and how much to regulate prices of an extraordinarily broad array of products.<sup>84</sup>

If instructions to take actions that are “in the public interest” or to set prices that are “fair and equitable” provide enough guidance to permit administrative officials to impose coercive requirements on private citizens and enterprises, it is hard to imagine congressional directives that cannot be said sufficiently clear to constitute lawmaking rather than delegation of legislative authority. That is consistent with the reasoning that has led some commentators to opine that the Constitution is satisfied by any legislation that does not formally state that some other body may act in Congress’ stead.<sup>85</sup>

Part of the problem surely is the difficulty of crafting a test based on the scope of authority given to an administrator by the Congress that does not become a vehicle for the exercise of uncabined judicial discretion, itself a constitutional problem. That is the reason that Justice Antonin Scalia, a fervent

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<sup>82</sup> See *Yakus*, *supra*, 321 U.S. at 421.

<sup>83</sup> See *Yakus*, *supra*, 321 U.S. at 423.

<sup>84</sup> See *Yakus*, *supra*, 321 U.S. at 448-51 (Roberts, J., dissenting).

<sup>85</sup> See, e.g., Posner & Vermeule, *supra*.

advocate of adherence to constitutionally prescribed limits on discretionary government power—while dissenting on other grounds from the Court’s decision in *Mistretta v. United States*, which declined to strike down a congressional delegation to an independent commission of authority to fix the terms of criminal sentences for federal crimes—observed:

[W]hile 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.<sup>86</sup>

Justice Scalia added that, given the difficulty of fixing a matter of degree together with recognition that Congress is better suited than the courts to decide what is necessary for effective governance, “it 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.”<sup>87</sup>

#### **D. *American Trucking*: Nondelegation’s End or *Wayman*’s Return?**

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<sup>86</sup> *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (“*Mistretta*”) (Scalia, J., dissenting).

<sup>87</sup> *Mistretta*, *supra*, 488 U.S. at 416 (Scalia, J., dissenting). Although concurring with the Court’s resistance to use of the nondelegation doctrine in its received form, Justice Scalia condemned the authorization for a commission to set criminal sentences as assigning authority unconnected to either the constitutionally assigned work of the executive in implementing the law or of the judiciary in deciding cases and controversies. *See id.*, at 417-22.

Just over a decade after *Mistretta*, the question whether the Court would ever again overturn a congressional authorization of action by other officials as constituting an unlawful delegation of legislative authority was seemingly put to rest in *Whitman v. American Trucking Associations, Inc.*<sup>88</sup> The U.S. Court of Appeals for the D.C. Circuit, breaking with the pattern for court decisions of the prior six decades, had invalidated on delegation grounds a decision of the Environmental Protection Agency (EPA) that it declared lacked any guiding intelligible principle.<sup>89</sup>

The Clean Air Act, as amended, authorized the EPA to promulgate air quality standards for each regulated air pollutant, instructing the agency to craft a standard that is “requisite to protect the public health” while assuring that there is “an adequate margin of safety.”<sup>90</sup> The D.C. Circuit concluded that these instructions were incoherent to the point of abandoning Congress’ duty to actually make law. Reversing the court of appeals, the Supreme Court found this assignment “well within the outer limits of our nondelegation precedents”<sup>91</sup>—a conclusion that critics of the Supreme Court’s decisions in this arena might find consistent with *both* the precedents and the D.C. Circuit’s condemnation of the law.

The Court’s decision, by Justice Scalia, did step slightly away from post-*Schechter* precedents in one respect. Displaying unease about relying for protection of constitutional structure on a test as soft as the intelligible principle standard,

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<sup>88</sup> 531 U.S. 457 (2001) (“*American Trucking*”).

<sup>89</sup> *Am. Trucking Ass’ns, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999); *see also Am. Trucking Ass’ns, Inc. v. EPA*, 195 F.3d 4 (D.C. Cir. 1999). The court of appeals did not, however, conclude that there was no possible interpretation of the law that could pass constitutional muster, instead remanding the matter to the agency.

<sup>90</sup> Clean Air Act Amendments, Act of Dec. 31, 1970, Pub. L. No. 91-604, 84 Stat. 1679.

<sup>91</sup> *American Trucking, supra*, 531 U.S. at 474.

the opinion seemed to hark back to Chief Justice Marshall's understanding of the delegation problem in *Wayman* by noting that the degree of precision required to survive a delegation challenge depends on "the scope of the power conferred."<sup>92</sup> Thus, less clarity is needed for smaller, less significant commitments of authority to other officials than for commitments of authority to impose substantial burdens on large numbers of individuals and enterprises. This looks a great deal like the question of importance that figured prominently in Marshall's *Wayman* analysis.<sup>93</sup> The *American Trucking* decision, however, did not elaborate on this observation or create a framework for more determinate analysis.

Moreover, Justices Stevens and Souter, concurring in the *American Trucking* decision, urged straightforward recognition that no matter what the Court said, it would no longer take the notion of nondelegation seriously, and in their view should not.<sup>94</sup> In fact, Stevens and Souter wrote that it would be best for the Court to "frankly acknowledg[e] that the power delegated to the EPA is 'legislative' but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute."<sup>95</sup>

The Stevens-Souter approach would have had the benefit of clarity, boldly renouncing any effort to constrain administrative power apart from exercising judicial review for some form of fidelity to the contours of legislative commands. That is, judges still could say that some exercises of administrative discretion exceed statutory authorization even if no delegation of power would violate their view of the Constitution. Such an approach

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<sup>92</sup> *American Trucking, supra*, 531 U.S. at 475.

<sup>93</sup> See discussion of *Wayman* decision *supra* at Part II.D.

<sup>94</sup> *American Trucking, supra*, 531 U.S. at 487-90 (Stevens, J., concurring & concurring in judgment).

<sup>95</sup> *American Trucking, supra*, 531 U.S. at 488 (Stevens, J., concurring & concurring in judgment).

would have marked a dramatic change in the Court's reading of the vesting clause of Article I and of the Constitution's approach to separated powers more generally.<sup>96</sup>

At the end of the day, *American Trucking* seemed to signal that the Court simply did not believe it had the wherewithal to craft a delegation test that did more than substitute judicial for legislative discretion.<sup>97</sup> There was no consensus on a way to give the delegation doctrine vitality, but there also was no inclination (apart from Justices Stevens and Souter) to throw the constitutional baby out with the bathwater.

#### **IV. AMERICAN RAILROADS: FROM SCOPE TO SEPARATION**

While academic debates about whether the delegation doctrine was dead for all practical purposes or never really had any legitimate constitutional basis or had morphed into canons of statutory construction did not end with *American Trucking*, betting odds were against the doctrine rising again as an effective constraint on congressional authorization of broad, unstructured exercises of policy-making power by administrative bodies.<sup>98</sup> The Supreme Court's decision more

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<sup>96</sup> See, e.g., *Wayman*, *supra*, 23 U.S. at 48; *Field*, *supra*, 143 U.S. 650, 692-93; *id.*, at 697 (Lamar, J., dissenting); *Hampton*, *supra*, 276 U.S. at 407-09; *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). *But see* Jack M. Beerermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 469-73, 491-94 (2011) (arguing that the cases are consistent with a reading of the vesting clauses as not constraining assignments of authority to the same extent as some other, more specific provisions).

<sup>97</sup> Gary Lawson observes that "the combined vote in the Supreme Court on nondelegation issues from *Mistretta* through *American Trucking* was 53-0." Lawson, *Delegation*, *supra*, at 330.

<sup>98</sup> See, e.g., *Farina*, *supra*; *Manning*, *supra*; Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004); Posner & Vermeule, *supra*. See also Sunstein, *Canons*, *supra*, at 318.



than a decade after *American Trucking* to grant certiorari to review a D.C. Circuit decision holding that Congress unconstitutionally had granted power to a private entity (the National Railroad Passenger Corporation, commonly known as “Amtrak”) to exercise regulatory power over other private parties (other railroads)<sup>99</sup> did not seem a likely vehicle for broader reconsideration of the delegation doctrine.

The court of appeals decision pointedly directed its attention to the special circumstance of a private party acting as a regulator.<sup>100</sup> The case seemed at first blush to turn on peculiarities of the authorizing statute that raised questions whether Amtrak was truly private, whether it was private for purposes of delegation analysis, and whether it was exercising regulatory authority. The governing law formally declared Amtrak to be a private, for-profit corporation and not to be an instrumentality of the federal government.<sup>101</sup> Yet, Amtrak receives government subsidies, operates under extensive government regulation, and has a board of directors that is (almost entirely) presidentially appointed and removable by the President.<sup>102</sup> It also was given some authority over measures and goals for the operation of other railroads, which to a certain degree can be seen as competitors to Amtrak.<sup>103</sup> Amtrak did not have unilateral control over these matters; it had to arrive at agreement with the Federal Railroad Authority or, if the two entities did not agree, refer the matters to

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<sup>99</sup> *Assoc. of Am. Railroads v. Dept. of Transportation*, 721 F.3d 666 (D.C. Cir. 2013) (“*DC Circuit, American Railroads*”).

<sup>100</sup> *Id.*, 721 F.3d at 670-77.

<sup>101</sup> *See Rail Passenger Service Act of 1970*, 84 Stat. 1328.

<sup>102</sup> *See id.*; *DC Circuit, American Railroads*, *supra*, 721 F.3d at 674.

<sup>103</sup> *See Passenger Rail Investment and Improvement Act of 2008*, 122 Stat. 4907; *DC Circuit, American Railroads*, *supra*, 721 F.3d at 668-69.

arbitration (under less than clear terms for who the arbitrator would be and how the arbitration would work).<sup>104</sup>

Given the peculiar combination of legislative provisions and facts pointing in different directions on Amtrak's status as public or private and the complicated alignment of authorizations under the law, it is not surprising that the Supreme Court's decision in *Department of Transportation v. Association of American Railroads* ("American Railroads") spent its time sorting through questions of whether Amtrak was indeed private or public and whether it was exercising regulatory authority.<sup>105</sup> The Court did not reach the issue that seemed to have prompted a grant of certiorari in the case: whether whatever authority was given to Amtrak by law violated the Constitution. The plain inference was that the majority was in no hurry to grapple with a delegation challenge, sending the delegation issue back to the court of appeals to address in light of the conclusion that Amtrak is governmental.

Two separate opinions, however, by Justice Samuel Alito and Justice Clarence Thomas, suggested that at least two members of the Court were prepared to consider constitutional problems attending delegation of policy-making authority. Both clearly signaled their concern that the majority's reluctance to strike down delegations on the basis of a test that depends on matters of degree threatens to undermine important constitutional values.

Justice Alito made two critical points. First, he underscored that delegation of authority is a way of evading accountability, an evasion that imperils liberty. In his words, "Liberty requires accountability."<sup>106</sup> He observed that delegation allows officials

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<sup>104</sup> See *DC Circuit, American Railroads*, *supra*, 721 F.3d at 673.

<sup>105</sup> See *American Railroads*, *supra*, U.S. Sup. Ct. No. 13-1080 (Mar. 9, 2015), slip op. at 6-12 (majority op.).

<sup>106</sup> *American Railroads*, *supra*, slip op. at 1 (Alito, J., concurring).

to hide the real source of decision-making from ordinary citizens.<sup>107</sup>

Second, Alito pointed out that unconstrained delegation also elides purposefully constructed procedural constraints on the exercise of important exercises of power, procedures that were designed to safeguard against government overreach.<sup>108</sup> His opinion states:

The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. . . . It would dash the whole scheme if Congress could give away its power to an entity that is not constrained by those checkpoints.<sup>109</sup>

Justice Thomas took time and space—almost the entirety of his 27-page opinion—to lay out even more starkly the importance of judicially administered rules against delegations of legislative power and his commitment to a reinvigorated delegation doctrine that can effectively police attempts at such delegations.<sup>110</sup> Like Justice Alito, Justice Thomas anchored his concern in the need to preserve constitutionally mandated—and philosophically attractive—separation of powers.<sup>111</sup> He tied the constitutional commitment to separation of powers back to historical roots in English law stretching back to Magna Carta, defined the special power vested in Congress as making “generally applicable rules of private conduct,”<sup>112</sup> and (as

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<sup>107</sup> *Id.*, slip op. at 1-2 (Alito, J., concurring).

<sup>108</sup> *See id.*, slip op. at 6-7 (Alito, J., concurring).

<sup>109</sup> *Id.*, slip op. at 6 (Alito, J., concurring).

<sup>110</sup> *See American Railroads, supra*, slip op. at 1-26 (Thomas, J., concurring in judgment).

<sup>111</sup> *See id.*, slip op. at 2-11 (Thomas, J., concurring in judgment).

<sup>112</sup> *See id.*, slip op. at 11 (Thomas, J., concurring in judgment). Similar phrasing occurs at various points in Justice Thomas’ opinion, and he also

Justice Alito did) stressed that the exercise of this power has to be done expressly by the Congress through the processes embedded in the Constitution, including bicameralism and presentment.<sup>113</sup>

Thomas' opinion also explored the transition from a test that adhered to historic understandings of legislative power's undelegability to a test that permitted it so long as it adhered to an "intelligible principle," and urged his colleagues to return to older notions of separated power generally and of legislative power specifically.<sup>114</sup> Justice Thomas invokes Locke, Madison, and Hamilton for the philosophical importance of structural constraints on government, recognizes that adherence to separated powers and cumbersome procedures can inhibit efficient solutions to public problems—and pointedly accepts that as a suitable trade-off for preventing too frequent or too intrusive regulations of private conduct.<sup>115</sup>

Justice Thomas' opinion in *American Railroads* is a bold declaration that the Court veered off track in *Hampton* and its progeny and needs to recall the fundamental meaning of separated power and of the constitutional structure that embraces that concept as a fundamental protection of liberty. It is not an opinion that suggests amenability to concurring in decisions based on the intelligible principle doctrine, to a narrow focus on the scope of legislatively-conferred discretionary power, or to any form of business-as-usual in this arena. Together with Justice Alito's concurrence, it also should provide impetus for asking what a Constitution-based delegation doctrine should look like.

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connects this notion to the protection against deprivation of life, liberty, or property without due process.

<sup>113</sup> See *id.*, slip op. at 2-22 (Thomas, J., concurring in judgment).

<sup>114</sup> See *id.*, slip op. at 11-22 (Thomas, J., concurring in judgment).

<sup>115</sup> See *id.*, slip op. at 9-10, 22 (Thomas, J., concurring in judgment).

## V. A DELEGATION DOCTRINE FOR THE MODERN ADMINISTRATIVE STATE

There are a few, critical parts to creating a basis for resolving delegation contests. The first requirement is recognition that delegation of power violates the Constitution; even if the Court has difficulty figuring out the right test, it must begin by acknowledging that there is a constitutional commitment of power that is incompatible with the sort of delegations that are now routinely accepted. Second, identifying an improper delegation of power requires understanding the power's *nature* rather than its scope. With this in mind, a broad authorization for exercise of a relatively minor power that *is* properly associated with the work of another branch does not fail simply because it is broad. By the same token, a narrow authorization for the exercise of a power of great importance that *is not* properly associated with the work of another branch does not become constitutional simply because it is narrow. Last, despite the fact that the nature of the power assigned to a particular official or entity is the critical question, the *locus* of the re-assignment (who receives the power) and the *scope* of the power conferred may help identify instances where that assignment is especially problematic.

### A. No Delegation of Vested Power

First, it is imperative that the starting point for delegation analysis moving forward should be acceptance that the Constitution *does* bar delegation of the powers vested in particular branches. That is far from common ground today. Consider the argument by Professor Farina, one of the most articulate opponents of the anti-delegation-doctrine position:

[I]f the Article I vesting clause prevents delegation, so, it would seem, must the Article II and III vesting

clauses. Yet the President's ability to delegate executive power is well established.<sup>116</sup>

Professor Farina further roots her analysis in the laws of contract and, even more, of agency, understanding that government officers exercise power as agents of the people, that is, as the people's delegates. Looking to agency law, Farina finds that it is normal to permit subdelegations of power from an agent when that is necessary to effectuate the purposes behind the agent's charge.<sup>117</sup> She reasons that the President's authority to subdelegate is both recognized and consistent with the broader body of (nonconstitutional) law. Completing her argument, Farina asks if the President, who lacks a textual authorization to take actions that are "necessary and proper" to carry out his assigned duties, can subdelegate, why not the Congress, which is expressly given the power to make laws that are "necessary and proper" for doing its job?<sup>118</sup>

The syllogism at the heart of this argument—all branches have vested power; other branches, especially the President, may delegate that power; therefore, Congress may delegate its power—errs in both premise and conclusion.

Let's start with the notion that other branches may delegate power. To be sure, it long has been recognized that vesting executive power in the President to "take care that the Laws be faithfully executed" does not bar having others help implement the laws.<sup>119</sup> But note that the instruction is that the President

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<sup>116</sup> Farina, *supra*, at 90 n.13.

<sup>117</sup> *Id.* at 91-93.

<sup>118</sup> *Id.* at 92.

<sup>119</sup> See, e.g., Peter L. Strauss, *Overseer or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) ("Overseer"). Although Professor Strauss takes one side in the debate over the extent to which the President is constitutionally directed to be the sole decider on all matters within the executive domain, he also presents the range of divergent views on the issue as well as much of the background information respecting this debate.

“take care” that the laws are executed, not that the President personally perform all of the actions necessary to carry the laws into effect. It was not an accident of drafting that the instruction was to see that the laws are implemented rather than to implement the laws.

The President does not need to execute the tasks required to prosecute cases in the courts or to get the mails delivered or to see that the armed forces drill in proper fashion because that is not what the Constitution requires. Beyond the common sense of this, the Constitution refers to parts of the executive branch—the departments, officers of the United States, and inferior officers—that must be understood to be doing the work that the President does not do directly.<sup>120</sup> Without the ability to assign work to those who assist in execution of the laws, these references would be anomalous. Further, the constitutional reference to appointment of inferior officers suggests an understanding that governance would require lower-level officials who would perform tasks with less discretionary authority than higher-level officials. All of this is consistent with the President’s exercise of his constitutional power and responsibility to see that the laws are faithfully executed.

On the other hand, the President cannot deputize others to perform the tasks that *are* constitutionally assigned to him. So, for example, he could not turn over his power to appoint federal judges to the Attorney General, sending a note to the Senate saying that the Attorney General will be making those decisions and appointments—in short, “leave me out of this; just deal with her.” Nor could the Congress insist that the President turn over that power to the Attorney General, even if the insistence was by way of legislation duly presented to and signed by the President.<sup>121</sup> The President’s ability to perform his

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<sup>120</sup> See, e.g., U.S. CONST., Art. II, sec. 2, cl. 1 & 2. A similar inference is strongly suggested by the incompatibility clause, U.S. CONST., Art. I, sec. 6, cl. 1.

<sup>121</sup> For a both thoughtful and entertaining explanation of the bar to

constitutional duties was challenged in a related manner, through constraints on the power to remove senatorially confirmed officers, in the Tenure of Office Act of 1867.<sup>122</sup> These provisions were held to violate the Constitution's commitment of executive power to the President.<sup>123</sup>

Of course, the President may use assistants—including high-level assistants whose judgment the president generally relies upon—just as Article III judges may give some tasks of fact-finding to special masters and may treat the recommendations of those masters as presumptively valid. But in neither case does that constitute a delegation of final authority to those who assist.<sup>124</sup> That is true in the realm of administrative decision-making that consumes so much attention. And it is equally true for the military, which is populated by “Officers” who hold commissions from the President, by inferior officers, and by those who exercise no significant discretionary authority but whose work is essential to the execution of our military missions.<sup>125</sup>

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congressional direction of delegations, including within other branches, see Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035 (2007) (“*Running Riot*”).

<sup>122</sup> See Act of Mar. 2, 1867, 14 Stat. 430.

<sup>123</sup> See *Myers v. United States*, 272 U.S. 52, 176 (1926). The Court in *Myers* declared the Tenure of Office Act unconstitutional despite the fact that it had been repealed some four decades earlier, emphasizing the sense that this sort of legislated interference with presidential power sorely deserved formal condemnation.

<sup>124</sup> That conclusion is in line with Supreme Court decisions holding unconstitutional laws that purported to commit final authority over decisions within the judicial power of Article III to bankruptcy judges. See, e.g., *Stern v. Marshall*, 564 U.S. 2 (2011); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). See also *Morgan v. United States*, 304 U.S. 1 (1938) (Cabinet officer may rely on recommendation of hearing officer without personally conducting hearing).

<sup>125</sup> On the division among different federal officials, including between principal officers and inferior officers and different levels of military appointment, see, e.g., *Edmond v. United States*, 520 U.S. 651 (1997); *Weiss v. United States*, 510 U.S. 163 (1994); *United States Army, Army Regulation*



Just as the first part of the syllogism respecting delegations within the other branches fails, so too does the conclusion respecting delegations of legislative power. Concern over the exercise of legislative power was greater than over the exercise of either executive or judicial.<sup>126</sup> The exercise of legislative power was thought by the framers of the Constitution to be so central and so critical that it was bound up in constitutionally mandated procedures—the most notable being bicameralism and presentment—and the selection processes for those who participate directly in lawmaking were designed to divide legislative power among officials chosen by different constituencies and serving for different terms of office.<sup>127</sup> Given the obvious heightened attention to imposing constraints on legislation, even if the Constitution were thought to permit subdelegation within the executive branch or the judicial branch, that premise would be far from establishing an equivalence for the legislative power.

### **B. Discerning Delegations' Place: Between Naïve Formalism and Denying Discretion**

The harder question is the line-drawing question: how do courts identify impermissible delegations of legislative power from permitted authorizations of legal authority? Some possibilities should be rejected at the outset. One is the contention that the legislative power is properly (and completely) exercised by Congress whenever it enacts a law in the constitutionally required manner. On that view, sometimes called the “naïve” or “formalist” approach, anything that the law does—including assigning incredibly broad power over important decisions to others under vague, even meaningless,

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*601-100: Appointment of Commissioned and Warrant Officers in the Regular Army*, Nov. 21, 2006, available at [http://www.apd.army.mil/pdf/r601\\_100.pdf](http://www.apd.army.mil/pdf/r601_100.pdf).

<sup>126</sup> See, e.g., THE FEDERALIST No. 48 (Madison).

<sup>127</sup> See, e.g., Lawson, *Delegation*, *supra*.

directives—must be addressed on other grounds.<sup>128</sup> For adherents to this view, or some of its closer relatives, once Congress has formally enacted law it must be challenged, if at all, on grounds other than delegation.<sup>129</sup>

Like the “delegation is fine” thesis, the naïve position must be rejected. One way to understand why that is so is provided by Professors Larry Alexander and Sai Prakash; they ask readers to consider a series of imaginary delegations that would plainly be rebuffed as assigning to others powers that were vested by the Constitution in particular hands—purposefully and exclusively. Simple legislation could not, for instance, authorize a Federal Amendment Agency to exercise the power assigned to Congress to propose constitutional amendments or authorize a Federal Appointment Agency to exercise the Senate’s power of advice and consent to presidential appointments.<sup>130</sup> Nor could duly passed legislation authorize the President to enter into treaties without the consent of the Senate.<sup>131</sup>

Each of these hypotheticals conforms to the requirements of bicameral passage and presentment with the concurrence of the President (or, in the limit case, with supermajorities of both houses following a veto) yet fails any sensible view of what is constitutionally permitted—simply put, treating these initiatives as lawful would permit amendment of important structural features of the Constitution without engaging the amendment process.<sup>132</sup> And, as Alexander and Prakash argue, each of the hypotheticals is indistinguishable from the exercise

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<sup>128</sup> See, e.g., Posner & Vermeule, *supra* (articulating and defending the “naïve” approach). Professors Alexander & Prakash have labeled this the “formalist” approach. See Alexander & Prakash, *Running Riot*, *supra*.

<sup>129</sup> See, e.g., Merrill, *supra*; Posner & Vermeule, *supra*.

<sup>130</sup> See Alexander & Prakash, *Running Riot*, *supra*, at 1038, 1054-55.

<sup>131</sup> See *id.* at 1052.

<sup>132</sup> See U.S. CONST., art. V.

of core legislative power so far as the delegation questions they present.

At the opposite extreme, a delegation doctrine based in the text of the Constitution and the contemporaneous or nearly contemporaneous understanding of its meaning would not bar every commitment of discretionary authority to officials in the executive branch of the federal government.<sup>133</sup> While the early assignments of authority to the executive by law were mainly modest commitments of fact-finding or similarly circumscribed authority, they were not assignments of purely ministerial authority. Consider the law that granted presidentially appointed commissioners authority to fix the contours of the District of Columbia and to determine the needs for (and make provision for) accommodations for the new government.<sup>134</sup> The authorization was not discretion-free and could not have been if it was to have any usefulness. But the major policy questions—primarily where to locate the new capital city and how big it should be—were answered in the legislation.

This is consistent with the understanding of how other policy directives get put into effect, then and now. Ordinary operation of executive authority—such as deciding which criminal cases to pursue, how much to invest in each prosecution, what steps to take in making a case, how to train troops for potential combat, how to organize available naval forces for effective operation, and a myriad of other determinations—necessarily is associated with the exercise of discretion.<sup>135</sup> The discretion associated with such core

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<sup>133</sup> See, e.g., *Wayman*, *supra*, 23 U.S. at 42-47; Strauss, *Overseer*, *supra*.

<sup>134</sup> See Act of July 16, 1790, 1 Stat. 130.

<sup>135</sup> See, e.g., Sarah Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383 (1976); Diver, *supra*; Freeman & Vermeule, *supra*; Hathaway, *supra*; Mashaw, *Prodelegation*, *supra*; Robert Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996); Pierce, *supra*; Strauss, *Overseer*, *supra*.

executive decisions also necessarily encompasses an element of policy judgment. Resource expenditures within prosecutors' offices must be made on grounds such as the importance of particular types of prosecution as well as the likelihood of success and of influencing potential criminal conduct, judgments that must count as matters of policy as much as of fact.<sup>136</sup> Yet these decisions, just as the decisions on the number and nature of buildings needed to house the government and the way in which various departments of the new government would be accommodated, routinely are associated with executive, rather than legislative, authority.

### C. Testing Delegation's Limits: Back to Nature

As the prior sections explain, three positions respecting delegation—first, acceptance of delegations of legislative, executive and judicial authority as constitutionally permitted; second, the naïve formalist position, allowing authorizations of discretionary power so long as they are enacted by proper process; and, third, the notion that no discretionary authority can be granted—must be rejected. Each is relatively simple, straight-forward, and wrong. This leaves the problem that has stymied efforts to resurrect a meaningful delegation doctrine: how to find the limits on legal authorization of discretionary authority.

The test cannot be whether there are “intelligible standards” for the exercise of discretionary authority. That test has utterly failed to provide meaningful constraint on assignment of broad, uncabined power for others to make the sort of basic policy choices that traditionally have been understood—including by those who framed the Constitution—as being exercises of the legislative power.<sup>137</sup>

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<sup>136</sup> See, e.g., Cox, *supra*; Misner, *supra*.

<sup>137</sup> See discussion *supra* Part III. See also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241 (1994) (“*Rise and Rise*”). On the understanding of legislative power, see, e.g., THE FEDERALIST

Instead, the *nature* of the power conferred, rather than the *scope* of the power, must be the linchpin for limiting delegations. After all, the point of the separation of power in the Constitution is that powers of different *kinds*—legislative, executive, and judicial—must be placed in different hands and exercised under different processes in order to protect liberty.<sup>138</sup>

Policing that framework must depend on the ability to separate the three sorts of power, to divide the powers by their nature and to assure that legal assignments of powers do not place powers in the wrong hands. As with the earliest commitments of discretionary authority to the executive, laws assigning executive officers power over particular decisions must be consistent with *executive* not *legislative* power as fundamentally understood.<sup>139</sup>

The separation is not between the existence of discretionary power and ministerial power. As already noted, both the executive power and the judicial power necessarily comprehend a degree of discretionary authority.

Justice Scalia's *Mistretta* dissent joined that observation to the equally important reflection that the question in each case where a "delegation" is asserted to have been made is whether the power assigned fits within the powers rightly committed to the officer or body enabled to exercise it:

The whole theory of *lawful* congressional  
"delegation" is not that Congress is sometimes too

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No. 75 (Hamilton); HAMBURGER, *supra* at 4-8; Schoenbrod, *Substance, supra*; Schoenbrod, *Purposes, supra*.

<sup>138</sup> See, e.g., THE FEDERALIST No. 37 (Madison); THE FEDERALIST No. 48 (Madison); THE FEDERALIST No. 51 (Madison); THE FEDERALIST No. 75 (Hamilton); THE FEDERALIST No. 78 (Hamilton).

<sup>139</sup> See, e.g., *Mistretta, supra*, 488 U.S. at 417-22 (Scalia, J., dissenting) (explaining the necessary connection of legislatively assigned discretionary authority to the power constitutionally committed to the branch receiving that assignment).

busy or too divided, and can therefore assign its responsibility of making law to someone else, but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be. Thus, the courts could be given the power to say precisely what constitutes a “restraint of trade,” . . . or to prescribe by rule the manner in which their officers shall execute their judgments, . . . because that “lawmaking” was ancillary to their exercise of judicial powers. And the Executive could be given the power to adopt policies and rules specifying in detail what radio and television licenses will be in the “public interest, convenience or necessity,” because that was ancillary to the exercise of its executive powers in granting and policing licenses and making a “fair and equitable allocation” of the electromagnetic spectrum.<sup>140</sup>

Scalia’s insistence on the connection of an assignment of discretionary authority to the work of the branch receiving it is central to any judicial constraint on delegation.

#### **D. Delegation’s Limits: Defining Nature**

It is not, however, enough to recognize that the Constitution bars naked assignments of power that looks similar to lawmaking. As Justice Scalia recognized, the power to make a policy decision covering a class of determinations is not automatically *legislative* power. It can be executive or judicial if it falls within the proper scope of what other branches do. A policy decision can be announced in an adjudication as a rule for decision or embraced in advance as a rule that covers a class of future determinations or articulated by an executive officer to guide implementation of a set of tasks. The connection to

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<sup>140</sup> *Mistretta, supra*, 488 U.S. at 417 (Scalia, J., dissenting) (citations and footnote omitted).

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core tasks of executive power or judicial power is an essential step in assuring that the authority exercised is appropriately classified as executive or judicial.

*1. Beyond Connection: Defining Legislative Power*

Attaching the decision to the exercise of other tasks within the constitutionally prescribed missions of the other branches—deciding a case or managing governmental resources—limits the likelihood that it will be an exercise of legislative power. If the constitutional separation of powers is to be sustained against efforts to outpace lawmaking authority to others, however, there must be an additional protection rooted in the understanding of what is essentially “legislative” power that, even if attached to some other assignment, cannot be given to others.

The Constitution’s framers understood that the conceptual lines separating the different powers were not easily articulated. So, for example, James Madison wrote that

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; or even the privileges and powers of the different legislative branches.<sup>141</sup>

Madison added that the conceptual problems were compounded, in the process of framing a Constitution, by difficulties in finding appropriate language to convey the separations of power that are dictated by their conceived distinct spheres, and also by the practical difficulties in gaining assent to appropriate divisions of power.<sup>142</sup> But Madison also emphasized the critical importance of actual agreement on the

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<sup>141</sup> THE FEDERALIST No. 37 (Madison).

<sup>142</sup> *Id.*

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division of power and the success enjoyed by the Constitutional Convention in surmounting the various obstacles to that end.<sup>143</sup>

### 2. *Rules for Regulation of Society*

What, then, is the dividing line between legislative and executive power? Again, the *Federalist* essays offer a starting point that is appropriate both because of its connection to the governing text and because of its common-sense approach to the question: “The essence of legislative authority is to enact laws, or, in other words, to prescribe *rules for the regulation of society*.”<sup>144</sup>

The difference between a general rule for the “regulation of society” (on the one hand) and a rule that applies to a more circumscribed group and setting (on the other hand) seems an appropriate place to begin drawing the line between determinations that must be exercised *only* by the legislative branch (in concert with the President) through constitutionally prescribed procedures for lawmaking and those that may be assigned to others. Rules that apply to settings in which the government traditionally has given responsibility to executive or judicial officers—such as determinations respecting the management of resources already in the government’s realm or decisions on licenses for others to use those resources or determining how to deploy our military assets in pursuit of the common defense—look less like general “rules for the regulation of society.”

### 3. *Policy Choices of Major Importance*

However, the distinction above is not enough. It is necessary also to ask whether the rule at issue asks an entity other than Congress to make policy choices of major importance, policy choices sufficiently basic and far-reaching

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<sup>143</sup> See, e.g., *id.*; THE FEDERALIST No. 51 (Madison). See also Lawson, *Delegation, supra*, at 341-42.

<sup>144</sup> THE FEDERALIST No. 75 (Hamilton) (emphasis added).



to constitute decisions that are *exclusively* legislative in nature. The authority given to the commissioners fixing the boundaries for the District of Columbia was executive, not because it was guided by an intelligible principle but because the Congress already decided the important questions of the capital's location and overall size. Those were contentious issues with serious political implications at the time;<sup>145</sup> the details were not. While a list of considerations could have been provided to guide the critical, contentious decision as well as the details, this course would not have rendered the larger decision appropriate for executive action. The same governing principle applies to assignments of authority to regulate behavior more directly.

So, for example, saying to the FCC “allocate radio station assignments in your discretion” is different than saying “regulate electronic communications in your discretion.” One is the grant of policy discretion in the disposition of licenses that Congress has determined should be used to allocate radio spectrum among potential users.<sup>146</sup> The use of regulatory discretion in a setting where the government already has claimed a resource and is now providing rules for its use is not cleanly differentiated from prescribing rules for the regulation of society—both, in fact, exert a degree of coercive government power. But the first assignment, within a licensing regime, nonetheless is within the executive authority as it is *not* a grant of regulatory power over a general audience in the way the

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<sup>145</sup> See, e.g., JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 50-52, 69-78 (Vintage Books 2000) (explaining the intense argument over the location of the nation's capital, the relation of that debate to other issues of regional conflict, and some of the maneuvering that led to compromise).

<sup>146</sup> Saying that a basic policy decision has been made to use licensure for regulating some area of economic activity is not the same as saying that the decision is the best or even a rationally defensible one. On licensure for radio spectrum, for example, see, e.g., Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959); Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990).

second assignment is; the second assignment, in contrast, is a grant of legislative power.

In the same vein, saying to the EPA, “determine the level of particulate matter of a given sort that seriously threatens human health” is different from saying “figure out what to do to respond to any environmental or health threat” or even to exercise that level of broad rulemaking authority over a class of environmental or health threats. This difference is a closer matter; both of these instructions are aimed at producing regulatory imperatives for elements of society that are not laying claim to particular benefits or resources within the government’s control. Both indeed can be characterized as “prescribing rules for the regulation of society.” Yet, if the first directive is not “figure out what level of this identified particulate matter threatens human health and then figure out what to do about it” but rather is to *identify* the level that corresponds to a particular instruction and then *implement* the rules that have been written by Congress, the difference between that instruction and the second instruction is not simply one of degree. Instead, it is the difference between a grant of discretion in making assessments within a legislatively prescribed regulatory framework and deciding far more basic propositions on the regulation of society.<sup>147</sup>

Basic judgments on regulation of society can produce the sort of coercive rules for the citizenry that were the subject of greatest concerns at the founding—concerns that were the basis for constitutional structures dividing and limiting legislative

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<sup>147</sup> For this reason, the proper rule is the division between *basic* rules for the regulation of society—rules of great importance—and more modest rules that, even if regulating others’ conduct, are of low importance *and* are tied to effectuation of other, plainly executive functions. *But see* Schoenbrod, *Substance, supra*, at 1252-55 (no delegation of authority to make *rules* regulating private conduct); Schoenbrod, *Purposes, supra* (same). The test advocated here allows a category of properly constrained policy-making that carries out core executive functions even where it constitutes in some fashion the regulation of society.

power. These judgments are not appropriate for administrative decision-making, even when attached to some regulatory structure that invokes executive powers such as prosecution.<sup>148</sup> As Chief Justice Marshall appreciated in *Wayman*, issues of *great importance* are to be decided by procedures that give the greatest prospect of engaging broad democratic support, of minimizing prospects for narrow self-interest, of protecting individual liberty, and of reflecting longer-term, not shorter, perspectives on society's interests.<sup>149</sup>

#### 4. *Conceptual Tests and Judicial Discretion*

The test advocated here is faithful to the constitutional design, but it is open to criticism for failing adequately to confine judicial discretion. After all, while the test endeavors to implement a formal, textual constraint in the Constitution, it requires analysis of what the legislative power conferred by the Constitution by reference to concepts that inhere in the division of power. Although there is no magic lexicon of analytical labels, this is best described as a *conceptual* test, not a *functional* test; it is based on text understood in the context of constitutional structure rather than being based in assessment of outcomes on measures divorced from formal text.<sup>150</sup>

Conceptual tests, however, often appear less determinate—and thus less constraining on those who apply them—than

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<sup>148</sup> See, e.g., Ronald A. Cass, *Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law*, 15 ENGAGE (No. 2) 14 (July 2014).

<sup>149</sup> See *Wayman*, *supra*, 23 U.S. at 43; see also THE FEDERALIST No. 47 (Madison); THE FEDERALIST No. 44 (Madison); THE FEDERALIST No. 51 (Madison); Lawson, *Rise and Rise*, *supra*, at 1239.

<sup>150</sup> Compare, e.g., Erwin Chemerinsky, *Functionalism and Formalism in Federalism Analysis*, 18 GEORGIA ST. U.L. REV. 959 (1997), with Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13 (1998) ("*Formalism*"). Most important, it does not ask, as many functional arguments do, what would work best to protect a set of extra-constitutional values. For advocacy of functional analysis in support of external values, see, e.g., Chemerinsky, *supra*.

formalist tests.<sup>151</sup> The absence of presentment and bicameralism in the line-item veto,<sup>152</sup> for example, were more easily identified than is the characterization of a matter as of sufficient importance to require congressional resolution. Concern over the degrees of freedom allowed to judges in administering a test is certainly a valid consideration, at times a dispositive one;<sup>153</sup> and it was quite clearly a reason for Justice Scalia's reluctance to embrace the "intelligible principle" test.

This concern, however, has not prevented enforcement of other constitutional provisions that require conceptual analysis. In *Free Enterprise Fund v. Public Company Accounting Oversight Board* ("PCAOB"), for instance, the Court reviewed a challenge to having two levels of insulation against presidential at-will removal power.<sup>154</sup> Under the Sarbanes-Oxley Act which created the PCAOB,<sup>155</sup> members of the Oversight Board are appointed by the Securities and Exchange Commission ("SEC") and are removable by the SEC only for good cause. The members of the SEC, in turn, are appointed by the President and by law are removable by the President only for good cause. Although the Constitution does

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<sup>151</sup> A number of scholars have made similar points in connection with the divide between formalist and "functional" analysis, but also have observed the common practice of judges mixing functional and formal analysis and also have noted the blurred line between the two forms of reasoning. See, e.g., William N. Eskridge, Jr., *Relationships between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

<sup>152</sup> See *Clinton v. New York*, 524 U.S. 417 (1998).

<sup>153</sup> See, e.g., RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 4-19, 28-29 (Johns Hopkins Univ. Press 2001); Michael Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 680-89 (1995); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) ("Rules"). See also Easterbrook, *Formalism*, *supra* at 16-18; Scalia, *Rules*, *supra* at 1178-81, 1185.

<sup>154</sup> 561 U.S. 477 (2010).

<sup>155</sup> Sarbanes-Oxley Act of 2002, 116 Stat. 745.

not speak directly to the question of the removal of Officers of the United States,<sup>156</sup> a majority of the Court found the implications of Article II's vesting clause (vesting executive power in the President), supported the inference that the President must have effective control over those who execute the laws.<sup>157</sup> Even accepting that limits could be placed on the removal of some officers, the Court found that the imposition of two levels of insulation against presidential control exceeded constitutional limits on interference with the President's ability to see that the laws are faithfully executed.<sup>158</sup>

The conceptual test in *PCAOB* was based on the text and structure of the Constitution; it was an effort to understand and apply the instruction in the vesting clause of Article II. The same sort of analysis underlies the test advanced here. When the constitutional text and structures strongly suggest the need for judicial support to preserve a feature of government, even without the capacity to fashion a fitting formalist test, the Court rightly has found a way to do that. The same imperative should support the modest-importance-plus-connection test, especially for regulation of conduct. This does not give judges a tool for second-guessing legislative determinations of the best means of accomplishing tasks within their power to assign; but it does provide a tool for preventing authorization for other officials to exercise the core responsibility constitutionally committed to Congress.<sup>159</sup>

Of course, a test that is both effective at safeguarding constitutional separation of powers and less dependent on

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<sup>156</sup> The sole mechanism for removal of "civil Officers of the United States" mentioned in the Constitution is through impeachment by the House of Representatives and conviction by the Senate. *See* U.S. CONST., Art. II, sec. 4.

<sup>157</sup> *PCAOB*, *supra*.

<sup>158</sup> *Id.*

<sup>159</sup> This comports with concerns express in Easterbrook, *Formalism*, *supra*.

conceptual analysis might be preferable. In this vein, a broader delegation doctrine that invalidates all assignments of authority to adopt rules for private conduct—even if associated with circumscribed grants of power to take steps in furtherance of clearly executive or judicial functions—might be defended on prudential grounds. It might be a better means of protecting against unconstitutional reassignments of power because it so plainly prohibits a defined class of authorizations.<sup>160</sup> But it also would invalidate commitment of common law judging that has been common under laws such as the Sherman Act and that has been a characteristic of at least some branches of federal adjudication from the republic’s earliest days.<sup>161</sup> In the end, the advantage of such a strong delegation doctrine in sweeping away marginally questionable authorizations along with the central cases of unconstitutional delegations—creating a sort of “safety zone” to assure that the core is not breached<sup>162</sup>—would very likely make its continued application improbable. On balance, the test suggested in *Wayman* and renewed here is better likely to accomplish constitutional ends, avoid excessive intrusion into political decisions, and be sustainable over time.

### E. Further Margins: Locus and Scope

While the test for when assignment of power crosses the line to improper delegation of legislative authority should look to the distinction between grants of power to write rules for the

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<sup>160</sup> See, e.g., Schoenbrod, *Substance, supra*; Schoenbrod, *Purposes, supra*.

<sup>161</sup> On the nature and history of federal common law adjudication, see, e.g., Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996); Martha Field, *Sources of Law: The Scope of the Federal Common Law*, 99 HARV. L. REV. 881 (1986). See also *Mistretta, supra*, 488 U.S. at 417 (Scalia, J., dissenting) (re propriety of judicial discretion under the Sherman Act); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544 (1983) (same).

<sup>162</sup> For an explanation of a similar strategy in First Amendment jurisprudence, see, e.g., Frederick Schauer, *Fear, Risk and the First Amendment: Unravelling the “Chilling Effect,”* 58 BOSTON U. L. REV. 685 (1978).

regulation of society and grants of power to use discretion in carrying out other functions, like resource management, licensure, or benefit distribution, there plainly will be difficult cases. In close cases, two other considerations may be looked to in order to assess the consistency of the assignment with the Constitution's division of power. These are not part of the test for consistency with the constitutional division of powers—not considerations to be balanced against indications that a power has been reassigned against constitutional command—but instead are considerations that may help in difficult cases to identify more and less problematic assignments of authority.

One is the *locus* of the assignment. If the law assigns discretionary authority to the President directly, there is less likelihood that the allocation of power is intended to undermine constitutional divisions than if the power is assigned to officials who are insulated from presidential control and, therefore, more amenable to congressional influence.<sup>163</sup> So, for example, the commitment of power to the President reviewed in a case such as *Field* or even *Hampton* (where the President could rely on, but was not bound by, determinations from the Tariff Commission) differed from the commitment of authority to the Sentencing Commission reviewed in *Mistretta* or the devolution of authority to the EPA reviewed in *American Trucking*.

In one sense, the notion of granting power to an agency that is more independent of the President, and hence more likely to be responsive to Congress, seems to be a vehicle for retaining greater supervisory authority in Congress.<sup>164</sup> From that

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<sup>163</sup> See, e.g., Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 J. CONST'L L. 251 (2010).

<sup>164</sup> See, e.g., DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 134-35 (Yale Univ. Press 1974); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 589-91, 592-95 (1984). But see Neal Devins & David Lewis, *Not-So-Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 BOSTON U. L. REV. 459 (2008).

vantage, it might be regarded as more consistent with the exercise of power over policy-making by the institution supposed to exercise “all legislative powers.” But the power that is retained is not power checked by the processes the Constitution provided to guard against threats to liberty.<sup>165</sup> Members of Congress can expand their influence without having to be directly accountable by giving authority to officers who are far more apt to be susceptible to fears of public criticism or implicit promises of future reward than a President.<sup>166</sup> The point is not that Congressional oversight is generally problematic, only that when a grant of discretionary authority is at the margin of arguable constitutionality, greater leeway should be allowed where the authority runs directly to the President.

The other consideration that should have effect at the margin is the *scope* of the delegation. Grants of broad discretionary authority directly tied to core executive functions do not become unconstitutional merely because of their breadth. Similarly, narrow grants of discretionary authority divorced from the constitutionally committed power of the branch to which it is directed do not become constitutional merely because they are limited.<sup>167</sup> Yet, as with the consideration of locus, the breadth of the power granted can be a useful consideration when constitutionality is otherwise unclear. Other things equal, more open-ended authority over a wider range of decisions ought to count against a finding of constitutionality, but the critical concern remains whether the authority constitutes a commitment of discretion to make

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<sup>165</sup> See, e.g., *American Railroads*, *supra*, slip op. at 6 (Alito, J., concurring).

<sup>166</sup> See, e.g., *MAYHEW*, *supra*.

<sup>167</sup> So, for example, the cases striking down commitments of authority to non-Article III judges, for example, do not rely on the breadth of the commitment. See, e.g., *Stern v. Marshall*, 564 U.S. 2 (2011); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).



general rules for others or to direct activity within the recipient's constitutionally assigned realm.

## VI. CONCLUSION

The central feature of the U.S. Constitution—what the Constitution's framers thought provided the most important bulwark of liberty—is the division of power among different branches (and between the federal government and the states). Although federal courts, including the Supreme Court, have been zealous in policing some aspects of constitutional separation of power, they have been notoriously reluctant to enforce the limitation of the legislative power to Congress. The delegation doctrine has been invoked rarely and largely reduced to a superficial search for the inevitably discovered “intelligible principle” to guide commitments of discretionary authority to executive (or judicial) officers. Recent indications that at least two Supreme Court justices are open to revisiting and revitalizing the delegation doctrine, however, suggest a possible change.

That is a development to be hoped for. If it does transpire, the justices should reject the test of the past century, refocusing the delegation doctrine on the nature of the responsibility granted and its connection to the constitutional competence of the officials or bodies authorized to exercise discretionary power. Such a transformation would return delegation analysis to the considerations that animated constitutional separation of powers and that were central to early laws and decisions. It would provide a path to protect liberty without giving judges an elastic authority over lawmakers' choices. It would knit together the concerns that informed Chief Justice Marshall and his colleagues in the early years of the nation and those animating Justice Scalia (resisting the doctrine in its present form) and Justices Alito and Thomas (urging the doctrine's recasting and revival) almost two centuries later. Not least, by insisting that the basic rules governing society be made as our

**founding document provides, it would promote the rule of law as well.**