

DELEGATION RECONSIDERED: A DELEGATION DOCTRINE FOR THE MODERN ADMINISTRATIVE STATE

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INTRODUCTION

The American Constitution designed structures intended to limit discretionary government power, checking assignments of discretionary power necessary for effective government (something the new Constitution was supposed to improve) by dividing them among different entities and different officials.¹ The national government was granted limited powers;² the states retained plenary powers not at odds with national powers;³ 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.⁴ 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

1. See, e.g., THE FEDERALIST Nos. 76–78 (Alexander Hamilton), Nos. 10, 41, 42, 47–51 (James Madison).

2. See, e.g., U.S. CONST., art. I, §§ 8, 10.

3. See U.S. CONST., amend. X.

4. See U.S. CONST., art. I, § 1, cl. 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1, cl. 1.

of the United States⁵ or to execute the laws,⁶ nor can it assign to non-Article III officers the judicial power of the United States.⁷

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. For example, the Constitution's structure cannot be squared with Congress giving its own peculiar authority—the legislative powers granted in the Constitution—to any other body.⁸ This conclusion follows from both the language of the document and the understanding of the people framing it that the reasons against 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*,⁹ 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—there are merely two cases in which

5. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

6. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

7. See, e.g., *Stern v. Marshall*, 564 U.S. 462 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). But see *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (holding that an administrative agency is permitted under certain conditions to hear and decide matters that could have been committed to Article III courts, including common-law counterclaims to regulatory-statutory claims, subject to availability of subsequent review by an Article III court); *Crowell v. Benson*, 285 U.S. 22, 51–54 (1932) (holding that administrative determinations of fact in maritime workers' compensation cases are permitted, so long as final decision on matters of law is reserved to Article III courts). It is open to question how much of *Schor* and *Crowell* remain good law following *Northern Pipeline* and *Stern*. It also is not clear whether the assignments approved in *Schor* and *Crowell* should be considered part of the judicial power of Article III or, given the limitations on what is being finally determined, merely administrative power to resolve some issues through adjudication. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting).

8. 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.

9. 143 U.S. 649, 692 (1892).

the Supreme Court has overturned laws on that ground¹⁰—that many scholars have opined that the doctrine exists as no more than a tautology¹¹ or that it is simply unenforceable as a practical matter.¹² 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.

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*,¹³ expressed concern about legislated grants of expansive authority to make rules regulating private conduct.¹⁴ Whether or not 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. Although the difficulty of drawing clear lines among classes of government power has been acknowledged repeatedly, the framers of the Constitution thought divided power was critical to the defense of liberty, and courts found approaches that enforced constitutionally separated powers.¹⁵ The alteration of the delegation doctrine in

10. See *Whitman v. Am. 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).

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

12. 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).

13. 135 S. Ct. 1225 (2015).

14. See *id.* at 1237 (Alito, J., concurring); *id.* at 1240–41, 1253–55 (Thomas, J., concurring in judgment).

15. See, e.g., *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43, 46 (1825); discussion *infra*, at Parts II.A., II.B., & II.D.

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 to 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 to 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 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.

I. 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.¹⁶

16. THE FEDERALIST No. 47, at 235 (James Madison) (Mary Carolyn Waldrep ed., 2014).

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 foundation for the nation in other statements made during the national debate over ratification of the Constitution.¹⁷ Madison's Federalist No. 51 is justly renowned for its soaring rhetoric about how different a task constitution-making would be "[i]f men were angels," the role of the people as critical to checking power, and the constitutional design that enabled "[a]mbition . . . to counteract ambition."¹⁸ More prosaically, but equally important, Federalist No. 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 the 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.¹⁹

In Federalist 48, 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

17. The insistence of the framers on separation of powers, and the criticism of some state constitutions for failing to do this effectively, *see, e.g.*, THE FEDERALIST No. 47 (James Madison), or for failing to balance powers against one another effectively, *see, e.g.*, THE FEDERALIST No. 48 (James Madison), does not mean that only one constitutional arrangement would satisfy the framers' concerns, *see, e.g.*, Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989); William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263 (1989); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000). Madison and others, however, strongly urged those considering ratification to appreciate the virtues of the particular arrangement adopted in the Constitution. *See, e.g.*, THE FEDERALIST Nos. 47–51 (James Madison), Nos. 67–73, 78–80 (Alexander Hamilton).

18. THE FEDERALIST No. 51, at 254 (James Madison) (Mary Carolyn Waldrep ed., 2014).

19. *Id.* at 253.

provide some practical security for each, against the invasion of the others.²⁰

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 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."²¹

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.²²

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.*²³

20. THE FEDERALIST No. 48, at 242 (James Madison) (Mary Carolyn Waldrep ed., 2014).

21. *Id.*

22. JOHN LOCKE, *Second Treatise of Government* § 141, in JOHN LOCKE, TWO TREATISES OF GOVERNMENT 363 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (emphasis omitted).

23. Anyone who has had direct experience with delegation should understand this point. Delegation within an organization creates increased freedom, increased opportunity to claim successful outcomes, and increased insulation against blame for bad outcomes. See, e.g., Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); John F. Man-

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.²⁴ 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-seeking²⁵—there are competing pressures to use scarce funds in ways that provide the greatest returns.²⁶ Efficiency in government, however, is not measured in the 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.²⁷

Whatever the nature of the political and personal benefits—which exist even where the “outplacement” is associated with

ning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223; Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015). 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* note 11, at 1746–50. But these arguments are ultimately only quibbles over the *degree*, not the *existence*, of these effects.

24. See, e.g., David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of 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); Mathew D. McCubbins, Roger G. Noll & Barry R. 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 Electoral Competition*, 66 AM. POL. SCI. REV. 555 (1972).

25. 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, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS 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).

26. 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).

27. See, e.g., George J. Stigler, *Economic Competition and Political Competition*, 13 PUB. CHOICE 91 (1972).

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.²⁸ 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 roles as checks on specific decisions. A delegation of authority that elides those checks should be viewed with suspicion.²⁹

C. *Early Experiences*

1. *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.³⁰ 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

28. See, e.g., Aranson et al., *supra* note 23; Epstein & O'Halloran, *supra* note 24. 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.

29. See, e.g., *Clinton v. New York*, 524 U.S. 417 (1998).

30. See Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 719–20 (1969); Posner & Vermeule, *supra* note 11, at 1735–36; Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 738–39 (1994) (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993)).

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,³¹ 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.³² Congress certainly could have set the precise metes and bounds of the District itself and also could have approved details of each building itself, but the legislators found it unnecessary to specify further details.

Similarly, the Judiciary Act of 1789,³³ 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.³⁴ 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.³⁵ In the same vein, the Third Congress extended the government's pension payments to disa-

31. 1 Stat. 130 (1790).

32. *Id.*

33. 1 Stat. 73.

34. *Id.* at 83.

35. Act of Sept. 29, 1789, 1 Stat. 95.

bled veterans for another year, again allowing the President to fill in the procedural details for making the payments.³⁶ The Third Congress also passed the Embargo Act of 1794,³⁷ 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 proper.”³⁸ 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 embargoes³⁹), 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.⁴⁰ And in the foreign affairs and national security domain, where Congress gave the broadest authority to the President, the authorization under the

36. Act of Mar. 3, 1791, 1 Stat. 218.

37. 1 Stat. 372.

38. *Id.*

39. *See, e.g.,* The Prize Cases, 67 U.S. 635 (1863).

40. 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).

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).

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.

2. Wayman v. Southard

Although not the first case to uphold legislative commitment of authority to the President,⁴¹ 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*.⁴² 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.⁴³

Wayman presented a challenge to a particular rule of executing judgment, based on a provision in the Process and Compensation Act of 1792 that adopted for federal courts the same "forms of writs, executions, and other process" used in the applicable state courts.⁴⁴ 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 [S]upreme [C]ourt of the United States shall think proper

41. See, for example, *Cargo of the Brig Aurora v. United States*, 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.

42. 23 U.S. (10 Wheat.) 1 (1825).

43. See *id.* at 46.

44. Act of May 8, 1792, 1 Stat. 275.

from time to time by rule to prescribe to any circuit or district court concerning the same."⁴⁵ 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."⁴⁶

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.⁴⁷

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."⁴⁸ The second category is comprised of subjects "of less interest," where Congress properly may make "general provisions" and leave it to others to "fill up the details."⁴⁹

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

45. *Id.* at 276; see *Wayman*, 23 U.S. at 41.

46. *Wayman*, 23 U.S. at 42.

47. *Id.* at 42–43.

48. *Id.* at 43.

49. *Id.* Some scholarly commentaries on the English law with respect to royal prerogative of proclamations view the Crown's power as similarly limited to elaborating details within the scope of existing law. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *303; ALBERT VENN DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 53–54 (MacMillan Press 1979) (1885). Framers of the American Constitution were familiar with Blackstone's views on the limits of the executive—in the person of the King—to exercise power that rightly belonged to the legislature, as well as with Blackstone's observations on times when the King's authority intruded into the realm properly reserved to Parliament. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES *424.

evidence of the contemporaneous understanding that such delegations were unproblematic.⁵⁰

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 . . ."⁵¹ 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."⁵² 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 authority to another branch] is a subject of delicate and difficult inquiry."⁵³ 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. 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

50. *Wayman*, 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.

51. *Id.* at 46.

52. *Id.* at 45.

53. *Id.* at 46.

legislative power but instead part of the power constitutionally vested in the other branch.⁵⁴

II. 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), delegation cases shifted their 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, *Field v. Clark*⁵⁵ and *J.W. Hampton, Jr., & Co. v. United States*.⁵⁶

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.”⁵⁷ Similarly, Justice Lucius Lamar’s opinion 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.”⁵⁸

While both *Field* opinions clearly condemned delegation of legislative power, analysis of whether that had occurred in the

54. This conception differs from the “naïve view” championed by Professor Posner and Professor 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* note 11, at 1736. Differences between this and the approach suggested by *Wayman* are further discussed *infra* at Part V.

55. 143 U.S. 649 (1892).

56. 276 U.S. 394 (1928).

57. *Field*, 143 U.S. at 692.

58. *Id.* at 697 (Lamar, J., dissenting from the opinion but concurring in judgment).

law at issue—the Tariff Act of 1890,⁵⁹ generally known as the McKinley Tariff Act—was muddled.⁶⁰ 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:

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 . . .⁶¹

The *Field* majority found that the law did not work an unconstitutional delegation—that it “[did] not, in any real sense, invest the President with the power of legislation”⁶²—because the law specified the action that had to occur if the President found a certain fact to exist.⁶³ That is, the law did not leave it to the President to determine the appropriate course, which was suspension of the specific exemption of a set of goods from tariff duties, and did not leave it to the President to decide the amount of the tariffs that would then be imposed.⁶⁴ For that reason, the majority declared, when the President found the fact Congress had decided would trigger the prescribed action and then took that action, this was executive, not legislative, action:

59. 26 Stat. 567.

60. See, e.g., Oona Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 173 (2009).

61. 26 Stat. at 612; see, e.g., C. Stuart Patterson, *The Constitutionality of the Reciprocity Clause of the McKinley Tariff Act*, 40 AM. L. REGISTER & REV. 65, 66 (1892).

62. *Field*, 143 U.S. at 692.

63. *Id.* at 692–93.

64. Note, however, that the goods at issue in the case for which duties were challenged—certain woolen, silk, and cotton products and cloths—were not those identified in the law as subject to the exemption as an initial matter or to the suspension of that exemption under particular conditions. See *id.* at 662–64. The case, thus, must be deemed a facial challenge to the law’s constitutionality, a challenge to the imposition of any duties under the Act rather than a challenge to its application in a narrower sense. See *id.* at 694–97 (discussing the severability of challenged provisions from the application of the Act as a whole).

Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.⁶⁵

The majority relied on a series of earlier decisions, reaching back to Court's 1813 decision in *The Brig Aurora*,⁶⁶ 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 authority but consists of deputizing another officer to make inquiries over matters that do not require the sort of policy discretion associated with legislation.⁶⁷ 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 Justice Lamar 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.⁶⁸ Further, the duration of the President's action is by law "for such time as he shall deem just," a provision that Justice Lamar found conveyed policy-making discretion.⁶⁹

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

65. *Id.* at 693.

66. 11 U.S. (7 Cranch) 382 (1813).

67. See *Field*, 143 U.S. at 682–94.

68. See *id.* at 696–700 (Lamar, J., dissenting from the opinion but concurring in judgment).

69. See *id.* at 699.

modify parts of the Non-Intercourse Act⁷⁰ if he determined that France or Britain had revoked measures that violated U.S. neutrality.⁷¹ That is a far more limited, and far more fact-based commitment of authority.

The division between the two opinions in *Field* 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 the 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—and probably misapplied—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*,⁷² 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,⁷³ *Hampton* concerned another trade law provision, Section 315 of the Tariff Act of 1922,⁷⁴ known at the time as the Fordney-McCumber Tariff.

70. 2 Stat. 528 (1809).

71. See *The Brig Aurora*, 11 U.S. (7 Cranch) at 382–83 (1813).

72. 276 U.S. 394 (1928).

73. 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.

74. Pub. L. No. 67-318, 42 Stat. 858; see also STEPHEN W. STATHIS, LANDMARK LEGISLATION 1774–2012: MAJOR U.S. ACTS AND TREATIES 221 (2d ed. 2014).

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.⁷⁵ 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.⁷⁶ 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 Congress could not delegate.⁷⁷

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 legislative 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.⁷⁸

In the specific case of finding what differences existed in the production costs of particular products in the U.S. and elsewhere and calculating how much tariffs needed to be adjusted to make those costs the same—in pursuit 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 section 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 con-

75. 42 Stat. at 858–59.

76. *Id.* at 941.

77. *Hampton*, 276 U.S. at 404.

78. *Id.* at 406 (citation omitted).

form 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.⁷⁹

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.⁸⁰ Despite that, the Court decided that Congress had sufficiently prescribed its plan for tariffs, and that the President was merely exercising discretion in implementing that plan rather than creating it. Thus, there was no delegation of legislative power.⁸¹

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 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."⁸²

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."⁸³ 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

79. *Id.* at 405.

80. *Id.*

81. *Id.* at 406–10.

82. *Id.* at 409.

83. *Id.* at 410–11.

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,⁸⁴ Taft’s vision of good government encompassed a broader role for discretionary executive decisions—especially presidential decisions—than Marshall, Madison, and other founders and contemporaries had envisioned.⁸⁵ 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”

84. See, e.g., Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985); Epstein & O’Halloran, *supra* note 24; Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51; Hathaway, *supra* note 60; Mashaw, *supra* note 24; Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391 (1987).

85. See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–53 (2002) [hereinafter *Delegation*].

test. Although the Supreme Court rejected broad, unstructured delegations of regulatory authority in the *Panama Refining* and *Schechter Poultry* decisions,⁸⁶ since 1935 it has been unable to find a delegation that was not sufficiently intelligible to satisfy the majority of Justices.

So, for example, in *National Broadcasting Co., Inc. v. United States*,⁸⁷ 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.’”⁸⁸ 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 standard⁸⁹ in which he said: “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.”⁹⁰

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.⁹¹ 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.⁹² It extracted the instruction from the narrow context of radio spectrum licensing—which, rightly or wrongly, has been viewed as bestowing a

86. 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).

87. 319 U.S. 190 (1943).

88. *Id.* at 225–226.

89. *Id.* at 216.

90. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940).

91. *National Broadcasting*, 319 U.S. at 214–18, 225–226.

92. *Id.* at 227, 230–32 (Murphy, J., dissenting).

privilege or government benefit on licensees—and applied it to the sort of regulation of private business relationships that traditionally has been seen as requiring more particularized legislative direction.⁹³ 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*.⁹⁴ The Emergency Price Control Act of 1942⁹⁵ created the Office of Price Administration in order "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices" and to guard against a variety of ill effects flowing from "excessive prices."⁹⁶ The act instructed that the Administrator should set prices that "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."⁹⁷ The law also directed the Administrator "[s]o 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 increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941."⁹⁸

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

93. 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) [hereinafter *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) [hereinafter *Purposes*].

94. 321 U.S. 414 (1944).

95. Pub. L. No. 77-421, 56 Stat. 23.

96. *Id.* at 23-24; *Yakus*, 321 U.S. at 420.

97. 56 Stat. at 24; *Yakus*, 321 U.S. at 420.

98. 56 Stat. at 24–25; *Yakus*, 321 U.S. at 421.

deputizing another to perform that function.⁹⁹ Justice Owen Roberts's 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.¹⁰⁰

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.¹⁰¹

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 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*,¹⁰² 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.¹⁰³

99. See *Yakus*, 321 U.S. at 423.

100. See *Yakus*, 321 U.S. at 448–51 (Roberts, J., dissenting).

101. See, e.g., Posner & Vermeule, *supra* note 11, at 1726.

102. 488 U.S. 361 (1989).

103. *Id.* at 415 (Scalia, J., dissenting).

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.”¹⁰⁴

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

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.*¹⁰⁵ 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.¹⁰⁶

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.”¹⁰⁷ 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”¹⁰⁸—a conclusion that critics of the Supreme Court’s decisions in this

104. *Id.* at 416. 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.

105. 531 U.S. 457 (2001).

106. *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.

107. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1679.

108. *American Trucking*, 531 U.S. at 474.

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 on a test as soft as the intelligible principle standard for protection of constitutional structure, 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 congressionally conferred."¹⁰⁹ 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 aspect of *American Trucking* looks a great deal like the question of *importance* that figured prominently in Marshall's *Wayman* analysis.¹¹⁰ It is an idea that fits well with the approach taken by the Court at times in applying judicial review standards, where clearer statements of deference to administrative decisions are demanded for important issues or "major questions" than for run-of-the-mill determinations.¹¹¹ It also is a notion that seems to be in tension with Justice Scalia's expression of skepticism about judicial tests that turn on matters of degree, visible in cases such as *Mistretta*.¹¹² Still, however intriguing the observation about differentiating the delegation standard according to the importance of the issue may be, the *American Trucking* decision did not elaborate on this observation or create a framework for more determinate analysis.

109. *Id.* at 475 (citation omitted).

110. See discussion of *Wayman* decision *supra* at Part II.D.

111. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *American Trucking*, 531 U.S. at 468 (pinning the increased clarity requirement to a change in the law, but one important enough to be deemed an "elephant"); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JODY FREEMAN, *ADMINISTRATIVE LAW: CASES & MATERIALS* 173–77 (Wolters-Kluwer, 7th ed. 2016); Ronald A. Cass, *Is Chevron's Game Worth the Candle? Burning Interpretation at Both Ends*, in *LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE* 57, 60–63 (Dean Reuter & John Yoo eds., 2016); Abigail R. Montcrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (Or Why Massachusetts v. EPA Got It Wrong)*, 60 *ADMIN. L. REV.* 593 (2008).

112. See, e.g., *Mistretta*, 488 U.S. at 415–16 (Scalia, J., dissenting).

Moreover, Justice Stevens, in a partial concurrence joined by Justice Souter urged straightforward recognition that no matter what the Court said, it would no longer take the notion of non-delegation seriously, and in their view should not.¹¹³ In fact, Stevens wrote that it would be best for the Court to “frankly acknowledg[el] 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.”¹¹⁴ The Stevens 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 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.¹¹⁵

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.¹¹⁶ 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.

113. *American Trucking*, 531 U.S. at 487–90 (Stevens, J., concurring in part and concurring in judgment).

114. *American Trucking*, 531 U.S. at 488 (Stevens, J., concurring in part and concurring in judgment).

115. See, e.g., *Wayman*, 23 U.S. at 48; *Field*, 143 U.S. 649, 692–93; *id.* at 697 (Lamar, J., dissenting from the opinion but concurring in judgment); *Hampton*, 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. Beermann, *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).

116. 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* note 85, at 330.

III. AMERICAN RAILROADS: FROM SCOPE TO SEPARATION

While academic debates about whether the delegation doctrine was dead for all practical purposes, 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 following that decision.¹¹⁷ Against that background, the Supreme Court's decision more 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)¹¹⁸ 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.¹¹⁹ The case seemed at first blush to turn on peculiarities of the authorizing statute that raised questions about 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.¹²⁰ 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.¹²¹ It also was given some authority over measures and goals for the operation of other railroads, which to a certain degree can be

117. See, e.g., Farina, *supra* note 8; Manning, *supra* note 23; Thomas W. Merrill, *Rethinking Article 1, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004); Posner & Vermeule, *supra* note 11; see also Sunstein, *supra* note 12, at 318.

118. *Ass'n of Am. R.Rs. v. Dep't of Transportation*, 721 F.3d 666 (D.C. Cir. 2013)

119. *Id.* at 670–77.

120. See Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1328.

121. See *id.*; *American Railroads*, 721 F.3d at 674.

seen as competitors to Amtrak.¹²² 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 arbitration (under less than clear terms for who the arbitrator would be and how the arbitration would work).¹²³

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*¹²⁴ spent its time sorting through questions of whether Amtrak was indeed private or public and whether it was exercising regulatory authority.¹²⁵ The Court did not reach the issue that seemed to have prompted a grant of certiorari in the case: whether the authority 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.¹²⁶ 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, "[l]iberty requires accountability."¹²⁷ He observed that delegation allows officials to hide the real source of decision-making from ordinary citizens.¹²⁸

122. See Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4907; *American Railroads*, 721 F.3d at 668–69.

123. See *American Railroads*, 721 F.3d at 673.

124. 135 S. Ct. 1225 (2015).

125. See *id.* at 1128–34.

126. Compare *American Railroads*, 135 S. Ct. at 1234–40 (Alito, J., concurring), with *id.* at 1240–55 (Thomas, J., concurring in judgment).

127. *Id.* at 1234 (Alito, J., concurring).

128. *Id.* at 1234–35.

Second, Alito pointed out that unconstrained delegation also elides purposefully constructed procedural constraints on important exercises of power that were designed to safeguard against government overreach.¹²⁹ 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 its power away to an entity that is not constrained by those checkpoints.¹³⁰

Justice Thomas spent almost the entirety of his 27-page opinion laying 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.¹³¹ Like Justice Alito, Justice Thomas anchored his concern in the need to preserve the constitutionally mandated—and philosophically attractive—separation of powers.¹³² He tied the constitutional commitment to separation of powers to historical roots in English law stretching back to Magna Carta, defined the special power vested in Congress to make “generally applicable rules of private conduct,”¹³³ and (as 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.¹³⁴

Thomas’ opinion also explored the transition from a test that adhered to historic understandings of legislative power’s non-delegability 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.¹³⁵ Justice Thomas invoked Locke, Madison,

129. *See id.* at 1239–40.

130. *Id.* at 1237.

131. *See id.* at 1240–55 (Thomas, J., concurring in judgment).

132. *See id.* at 1240–49.

133. *See id.* at 1245. Similar phrasing occurs at various points in Justice Thomas’s opinion, and he also connects this notion to the protection against deprivation of life, liberty, or property without due process.

134. *See id.* at 1240–52.

135. *See id.* at 1246–52.

and Hamilton for the philosophical importance of structural constraints on government, recognized that adherence to separated powers and cumbersome procedures can inhibit efficient solutions to public problems—and pointedly accepted that as a suitable trade-off for preventing too frequent or too intrusive regulations of private conduct.¹³⁶

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.

IV. A DELEGATION DOCTRINE FOR THE MODERN ADMINISTRATIVE STATE

There are a few, critical requirements 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

136. See *id.* at 1244–45, 1252.

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.¹³⁷

Professor Farina 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.¹³⁸ 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.¹³⁹ She reasons that the President's authority to delegate 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 delegate, why not the Congress, which is expressly given the power to make laws that are "necessary and proper" for doing its job?¹⁴⁰ 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

137. Farina, *supra* note 8, at 90 n.13.

138. *Id.* at 91.

139. *Id.* at 91–93.

140. *Id.* at 92.

the laws.¹⁴¹ But note that the instruction is that the President “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 mail delivered or to see that the armed forces drill in proper fashion because that is not constitutionally required. 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.¹⁴² 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 depute 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.¹⁴³ The President’s ability to perform

141. See, e.g., Peter L. Strauss, *Overseer or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) [hereinafter *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.

142. See, e.g., U.S. CONST. art. II, § 2, cl. 1–2. A similar inference is strongly suggested by the Incompatibility Clause. See U.S. CONST. art. I, § 6, cl. 1.

143. For a both thoughtful and entertaining explanation of the bar to congressional direction of delegations, including within other branches, see Larry Alexan-

his 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 1867.¹⁴⁴ These provisions were held to violate the Constitution's commitment of executive power to the President.¹⁴⁵

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.¹⁴⁶ 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 (at least not beyond a confined and modest realm) but whose work is essential to the execution of our military missions.¹⁴⁷

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 power.¹⁴⁸ The exercise of

der & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035 (2007).

144. 14 Stat. 430 (1867).

145. 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. *Id.*

146. 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. 462 (2011); *N. 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 not rely on recommendation of hearing officer without personally conducting hearing).

147. 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 601-100: Appointment of Commissioned and Warrant Officers in the Regular Army*, Nov. 21, 2006, http://www.apd.army.mil/pdf/AR601_100.pdf [<http://perma.cc/TYV4-DWRL>].

148. See, e.g., THE FEDERALIST No. 48 (James Madison).

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.¹⁴⁹ 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 Delegation's Place: Between Naïve Formalism and Denying Discretion*

The harder question is the line-drawing question: how do courts distinguish impermissible delegations of legislative power from permitted assignments of legal authority? Some possibilities should be rejected at the outset. One is the contention that Congress properly (and completely) exercises the legislative power whenever it enacts a law in the constitutionally required manner.¹⁵⁰ 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, directives—must be addressed on other grounds.¹⁵¹ 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.¹⁵²

Like the “delegation is fine” thesis, the naïve position must be rejected. Professors Larry Alexander and Sai Prakash demonstrate this by asking 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

149. See, e.g., Lawson, *Delegation*, *supra* note 85, at 336.

150. See, e.g., Posner & Vermeule, *supra* note 11, at 1721.

151. See, *id.* (articulating and defending the “naïve” approach). Professors Alexander & Prakash have labeled this the “formalist” approach. See Alexander & Prakash, *supra* note 143, at 1041.

152. See, e.g., Merrill, *supra* note 117, at 2115; Posner & Vermeule, *supra* note 11, at 1724.

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.¹⁵³ Nor could a duly ratified treaty authorize the President to enter into other treaties without the consent of the Senate.¹⁵⁴

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.¹⁵⁵ And, as Alexander and Prakash argue, each of the hypotheticals is indistinguishable from the exercise of core legislative power so far as the delegation questions they present.¹⁵⁶

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.¹⁵⁷ 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.¹⁵⁸ 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

153. See Alexander & Prakash, *supra* note 143, at 1038, 1054–55.

154. See *id.* at 1052.

155. See U.S. CONST. art. V.

156. See Alexander & Prakash, *supra* note 143, at 1038–39.

157. See, e.g., *Wayman*, 23 U.S. at 42–47; Strauss, *Overseer*, *supra* note 141, at 759.

158. See Residence Act, 1 Stat. 130 (1790).

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.¹⁵⁹ The discretion associated with such core executive decisions also necessarily encompasses an element of policy judgment. Resource expenditures within prosecutors' offices, on any rational view, 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.¹⁶⁰ 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 to 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

159. See, e.g., Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 393 (1976); Diver, *supra* note 84, at 568; Freeman & Vermeule, *supra* note 84, at 80; Mashaw, *supra* note 24, at 96; Robert Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 720 (1996); Pierce, *supra* note 84, at 417; Strauss, *Overseer*, *supra* note 141, at 700.

160. See, e.g., Cox, *supra* note 159, at 402; Misner, *supra* note 159, at 776.

the legislative power.¹⁶¹ 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.¹⁶²

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.¹⁶³ 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 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 judg-

161. See discussion *supra* Part III. See also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241 (1994) [hereinafter *Rise and Rise*]. On the understanding of legislative power, see, e.g., THE FEDERALIST No. 75 (Alexander Hamilton); HAMBURGER, *supra* note 93, at 4–8; Schoenbrod, *Substance*, *supra* note 93, at 1226; Schoenbrod, *Purposes*, *supra* note 93, at 356.

162. See, e.g., THE FEDERALIST Nos. 37, 48, 51 (James Madison), Nos. 75, 78 (Alexander Hamilton).

163. See, e.g., *Mistretta*, 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).

ments, . . . 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.¹⁶⁴

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; it can be embraced in advance as a rule that covers a class of future determinations; or it can be articulated by an executive officer to guide implementation of a set of tasks. The connection to 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 policy 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.

164. *Id.* at 417 (citations and footnote omitted).

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.¹⁶⁵

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.¹⁶⁶ But Madison also emphasized the critical importance of actual agreement on the division of power and the success enjoyed by the Constitutional Convention in surmounting the various obstacles to that end.¹⁶⁷

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 the legislative authority is to enact laws, or, in other words, to prescribe *rules for the regulation of the society*."¹⁶⁸

The difference between a general rule for the "regulation of the 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

165. THE FEDERALIST No. 37, at 172 (James Madison) (Mary Carolyn Waldrep ed., 2014).

166. *Id.* at 173.

167. *See, e.g., id.* at 174; THE FEDERALIST No. 51 (James Madison); *see also* Lawson, *Delegation*, *supra* note 80, at 341–42.

168. THE FEDERALIST No. 75, at 366 (Alexander Hamilton) (Mary Carolyn Waldrep ed., 2014) (emphasis added).

determinations respecting the management of resources already in the government's domain, decisions on licenses for others to use those resources, judgments on how to deploy our military assets in pursuit of the common defense, or rulings governing concrete disputes on legal claims—look less like general “rules for the regulation of the society.”

This point effectively is the argument Justice Scalia made in *Mistretta*, that the creation of general rules for sentencing is a legislative act different in kind from the pronouncement of individual sentences or from the announcement of considerations that guide decision of legal claims in individual cases.¹⁶⁹ Even if the rule of a case is relied on in future cases—even if judges understand that it will be and self-consciously frame their opinions so that the rules for decision can be relied on in a broader class of cases—the application in the instant case coupled with the opportunity for later decisions to tailor it to the particulars of future cases make the judges' announcements quite different from a binding rule for society.

Recognizing the difference between such settings in which determinations given to officials are tethered to circumstances that limit and frame decisions for executive or judicial officers and less cabined settings does not give Congress carte blanche for all actions that can be described in terms similar to activity that is within the core of discretionary executive (or judicial) conduct. Congress cannot, for instance, commandeer resources and authorize officials to construct regulatory programs merely by using the label of resource management. Regulation of power plant emissions is not the same as management of government-owned buildings and land, as the former inevitably requires rules regulating a far broader spectrum of private conduct and implicating judgments about values and behavior that are less subject to decision-making divorced from contentious political considerations.¹⁷⁰ Both pro- and anti-regulatory forces may ar-

169. See *Mistretta*, 488 U.S. at 417–22 (Scalia, J., dissenting).

170. This explains courts' (occasional) reluctance to approve expansive interpretations of such regulatory authority, even if couched primarily in terms of statutory construction and “deference” analysis. See, e.g., *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2242–46 (2014); *id.* at 2455–58 (Alito, J., concurring and dissenting); *Am. Trucking Ass'n, Inc. v. EPA*, 531 U.S. 457, 468–75 (2001). Political support for such regulation (whether as a matter of public health or as simply a matter of personal preference), however, doubtless has contributed to approval of considerable degrees of government control not explicable as part-and-parcel of

gue over the scope of constitutionally permitted bases for treating property as common and regulable by the government, in the nature of navigable waters, or for programs to promote other constitutionally-sanctioned ends for which resource constraints are necessary and proper, but the authorization for broad, discretionary, administrative authority cannot rest on historical precedent for resource management.

3. Policy Choices of Major Importance

This limitation on the categorical separation of decisions, which is the basis for the distinction above, shows that categorization of activities alone 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 to constitute decisions that are *exclusively* legislative in nature.

The authority given to the commissioners fixing the boundaries for the District of Columbia, for example, 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 (along the Potomac river, between the Eastern Branch and Connogochegue) and overall size (not more than ten miles square, consistent with the maximum set in the Constitution).¹⁷¹ Those were contentious issues with serious political implications at the time;¹⁷² the details granted to executive action by the Residency Act were not. While a list of considerations could have been provided to guide the commissioners in making the critical, contentious decisions as well as in filling out the details of siting and building the new capital, this course would not have rendered the larger decisions appropriate for executive action.

ordinary resource management. See, e.g., Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. 75 (2007).

171. See U.S. CONST. art. I, § 8, cl. 17; Residence Act, 1 Stat. 130 (1790).

172. See, e.g., JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 50–52, 69–78 (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). Notably the Residency Act passed narrowly, by a vote of 32-29 in the House of Representatives and 14-12 in the Senate. See ANNALS OF CONGRESS, Sen., 1st Cong., 2d Sess., at 1039–40 (Jul. 2, 1790); ANNALS OF CONGRESS, H.R., 1st Cong., 2d Sess., at 1735–37 (Jul. 13, 1790).

Decisions of the significance that attached to the location of the nation's capital must be made by the legislature—and only by the legislature.¹⁷³ Picking a site for the capital did not regulate private conduct directly, but it was effectively a “regulation of society” because of its import for who would have easiest access to the national government's officers and, consequently, who would have greatest opportunity to exercise influence over them and profit from them. The concerns were not of a narrow effect on a matter of importance to a small set of people or interests but a broad effect on the full range of matters that potentially fall within the federal government's domain.¹⁷⁴ Those considerations underlay the intense controversy respecting the siting determination.¹⁷⁵

The same governing principle applies to assignments of authority to regulate behavior more directly. Consider, for example, three alternative assignments to the FCC, saying (i) “allocate radio station assignments in your discretion;” (ii) “allocate the radio spectrum in your discretion;” or (iii) “regulate *electronic communica-*

173. Another example is the decision on what expenditures would be cut to comply with the Gramm-Rudman-Hollings Act (formally, the Balanced Budget and Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038) (“Gramm-Rudman Act”). Details of the reductions were to be finally determined by, and implementation directed by, the Comptroller General (through a report from the Comptroller to the President, who was not given discretion to deviate from that document). Because of the Comptroller's decisions' direct effect on federal spending authority, his acts were held to be “executive” and impermissible for someone who was removable by Congress rather than the President. *See* *Bowsher v. Synar*, 478 U.S. 714 (1986). Paradoxically, the fallback provision in case that arrangement was held unconstitutional was to have Congress effectively pass a law melding recommendations of the Congressional Budget Office and Office of Management and the Budget. *See* Gramm-Rudman Act § 274(f). Although the law failed for conferring *executive* authority on the Comptroller General, his mandate was essentially *legislative* in its importance and its impact.

174. *See* ELLIS, *supra* note 172, at 69–80. Joseph Ellis also explains the link between the decision on siting the capital and the debate over national assumption of responsibility for debts previously incurred by the states, another deeply contentious matter at the start of the republic. *See id.* at 48–72.

175. Interestingly, there was discussion (at least among advocates of locating the capital along the Potomac) of preventing direct legislative determination of the issue. *See id.* at 74–75. The problem of capital location was not merely contentious but also multifaceted, making it terribly difficult to secure majorities in both houses. *See id.* at 69–75. Jefferson himself had at one point urged assignment of the entire problem to George Washington to avoid the difficulty of majoritarian decision—or, perhaps, to secure his favored solution. *See* “Jefferson's Report to Washington on Meeting Held at Georgetown,” Sep. 14, 1790, in 17 PAPERS OF THOMAS JEFFERSON 461–62 (Julian P. Boyd ed., 1965) (cited in ELLIS, *supra* note 172, at 75).

tions in your discretion.” The first of these alternative assignments is different than the other two. It is the grant of policy discretion in the disposition of licenses that Congress has determined should be used to allocate a portion of the radio spectrum among a defined class of potential users.¹⁷⁶

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 insofar as both exert a degree of coercive government power. But the distinction between allocation of a defined resource already within the government’s control and the regulation of what is presently private activity reinforces the considerations that divide the alternative assignments set out above.¹⁷⁷ The first alternative, which is set *within* a licensing regime, falls within the executive authority because it confers discretion over issues of modest importance that are directly connected to the performance of an executive function and also because it is *not* a grant of regulatory power over a general audience. The second and third potential assignments above, in contrast, are grants of legislative power, differing from the first assignment in importance, breadth of regulatory power, and the range of competing considerations relevant to reaching the necessary policy conclusions.¹⁷⁸

176. 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, see, for example, Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959) and Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990).

177. As the qualifications noted here should make clear, observing the differences among categories of activity provides a basis for inclining in one or another direction; it does not provide a guarantee that any congressional decision couched in terms of an activity more appropriate for administrative authority should or will be upheld as proper.

178. Whatever one thinks of the economic or political sense of the initial commitment of authority to the Federal Radio Commission in 1927 (carried forward as Title III of the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, 1081), the instruction respecting radio station allocation was a far narrower one in the context of the limited uses of wireless communications at the time than it might appear to be looking backward from today’s vantage. See, e.g., ERIK BARNOUW, *A TOWER IN BABEL: A HISTORY OF BROADCASTING TO 1933*, VOL. 1 (Oxford Univ. Press 1966); Coase, *supra* note 176; Hazlett, *supra* note 176; Kevin Werbach & Gregory Staples, *The End of Spectrum Scarcity*, 41 IEEE SPECTRUM 48 (Mar. 2004).

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 asking the agency 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.¹⁷⁹

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 power. These judgments are not appropriate for administrative decision-making, even when attached to some regulatory structure that invokes executive powers such as prosecution.¹⁸⁰

While this article was in process, a thoughtful scholar on constitutional law opined that those who would reinvigorate the delegation doctrine simply refuse to acknowledge “the reality of the

179. 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* note 93, at 1252–55 (no delegation of authority to make *rules* regulating private conduct); Schoenbrod, *Purposes*, *supra* note 93, at 359 (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.

180. *See, e.g.*, Ronald A. Cass, *Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law*, 15 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 11 (2014).

[modern] administrative state.”¹⁸¹ Restraints on delegation, in other words, seem to some observers incompatible with our current, large-scale, powerful administrative operations, and (in the more jaundiced view of this) efforts to revive a doctrine that would work to constrain delegations are explicable as based primarily in hostility to the modern administrative state.¹⁸²

As the examples above show, however, many assignments of authority to administrative officials can pass muster under this test, including assignments of “legislative rulemaking” authority.¹⁸³ More fundamentally, preserving the status quo cannot be the ultimate goal of constitutional law.¹⁸⁴ That some current assignments of authority to administrators may fail a more serious delegation screen should not be enough to condemn the effort to create a workable doctrine. As Chief Justice Marshall appreciated in *Wayman*, issues of *great importance* are the province of Congress, to be decided by procedures that give the greatest prospect of engaging broad democratic support, of minimizing prospects for narrow self-interest, of protecting in-

181. See Private e-mail to Ronald A. Cass (May 6, 2016) (on file with Author).

182. While this paraphrases the point made in correspondence, it encapsulates both the sentiment expressed in an unguarded way and, surely, sentiments shared by other delegation proponents. See *id.*; see also Catherine Sharkey, In the Wake of *Chevron's* Retreat 8–10 (unpublished manuscript) (March 2016) (on file with Author) (describing margins along which skeptics of administrative authority respond by tailoring legal doctrines, including revising rules for judicial review of agency action and noting that “Chief Justice Roberts [seized] the opportunity in *King* to further a broader project of resisting the administrative state by cutting back on *Chevron*”); Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer* 2 (Harv. Pub. L. Working Paper No. 16-02, 2016) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2716737, [<https://perma.cc/H5UG-D66Q>] (“The argument in favor of independent judicial judgment reflects an emerging large-scale distrust of the administrative state.”).

183. It also is worth noting that even changes in doctrine seen as potentially reducing the scope of administrative discretion often work to provide avenues for supporting it. See, e.g., Sharkey, *supra* note 182, at 11–19 (describing the relationship between demands for a “hard look” at agency action and its encouragement of improved decision-making by virtue of increased reliance on the administrative record).

184. Certainly, the Supreme Court has plainly rejected this argument in other contexts involving unconstitutional delegations of authority. See, e.g., *Stern v. Marshall*, 564 U.S. 2 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

dividual liberty, and of reflecting longer-term, not shorter, perspectives on society's interests.¹⁸⁵

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 constitutes 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 assessing outcomes on measures divorced from formal text.¹⁸⁶

Conceptual tests, however, often appear less determinate—and thus less constraining on those who apply them—than formalist tests.¹⁸⁷ The absence of presentment and bicameralism in the line-item veto,¹⁸⁸ 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,¹⁸⁹

185. See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825); see also THE FEDERALIST Nos. 44, 47, 51 (James Madison); Lawson, *Rise and Rise*, *supra* note 161, at 1239.

186. Compare Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997), with Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13 (1998) [hereinafter *Formalism*].

187. A number of scholars have made similar points in connection with the divide between formalist and "functional" analysis. They also have observed the common practice of judges mixing functional and formal analysis as well as 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).

188. See *Clinton v. New York*, 524 U.S. 417 (1998).

189. See, e.g., RONALD A. CASS, THE RULE OF LAW IN AMERICA 4–19, 28–29 (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, 1178–81, 1185 (1989); see also Easterbrook, *Formalism*, *supra* note 186, at 16–18.

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*¹⁹⁰ ("PCAOB"), for instance, the Court reviewed a challenge to having two levels of insulation against presidential at-will removal power. Under the Sarbanes-Oxley Act,¹⁹¹ which created the PCAOB, 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 not speak directly to the question of the removal of Officers of the United States,¹⁹² 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.¹⁹³ 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.¹⁹⁴

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 particular distinction set forth in *PCAOB* (the difference between a one-level and a two-level constraint on at-will removal of executive officers) will not be compelling to everyone—indeed, probably not to very many—but the analytical approach to the issue presented nonetheless should be credited as a valid one. It avoids pitfalls of an excessively narrow reading of the text (as, for instance, containing no implication respecting presidential control of removal because it was not expressly mentioned in the Constitution). At the same

190. 561 U.S. 477 (2010).

191. Pub. L. No. 107-204, 116 Stat. 745 (2002).

192. 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, § 4.

193. See *PCAOB*, 561 U.S. at 496–97.

194. *Id.*

time, the *PCAOB* test does not admit the degree of freedom for judges that more free-ranging inquiries into motivation behind the text almost certainly would confer.¹⁹⁵

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;¹⁹⁶ but it does provide a tool for preventing legislative authorization for other officials to exercise the core responsibility constitutionally committed to Congress.¹⁹⁷

Of course, a test that is both effective at safeguarding constitutional separation of powers and less dependent on 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.¹⁹⁸ But it also would invalidate commitment of common law judging that has been routine under laws such as the Sherman Act and that has

195. For critical discussion of the less constraining approaches of motive-based or similar purposive analysis, see, e.g., Easterbrook, *Formalism*, *supra* note 186, at 16–18; Scalia, *supra* note 189, at 1178–81, 1185; see also Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 *UCLA L. REV.* 1405 (1987).

196. Most important, the test advanced here 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* note 186.

197. This comports with concerns express in Easterbrook, *Formalism*, *supra* note 175.

198. See, e.g., Schoenbrod, *Substance*, *supra* note 93; Schoenbrod, *Purposes*, *supra* note 93.

been a characteristic of at least some branches of federal adjudication from the republic's earliest days.¹⁹⁹

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 breached²⁰⁰—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.

5. 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 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,

199. 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*, 488 U.S. at 417 (Scalia, J., dissenting) (discussing the propriety of judicial discretion under the Sherman Act); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) (same).

200. 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 B.U. L. REV. 685 (1978).

more amenable to congressional influence.²⁰¹ 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.²⁰² From that 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.²⁰³ 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.²⁰⁴ 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

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

202. See, e.g., DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 134–35 (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 B.U. L. REV. 459 (2008).

203. See, e.g., *Ass'n of Am. R.Rs. v. Dep't of Transportation*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring).

204. See, e.g., MAYHEW, *supra* note 202.

limited.²⁰⁵ 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 general rules for others or to direct activity within the recipient's constitutionally assigned realm.

V. 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

205. 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); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

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.