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# Delegation of Powers: A Historical and Functional Analysis

*Richard A. Epstein\**

## INTRODUCTION

There is a spate of interest in the “nondelegation doctrine”—the prohibition against the delegation of legislative powers to the executive branch of government, or worse, to some independent agency. The immediate impetuses of the debate are the recent Supreme Court decisions in *Gundy v. United States*<sup>1</sup> and *Kisor v. Wilkie*.<sup>2</sup> Those cases have spurred the renewed interest in delegation—it seems that five members of the Supreme Court think that the time for reexamination is now.<sup>3</sup> At this point, the mood is quite different from a generation ago, when Professor Cass Sunstein dismissed the Supreme Court’s 1935 invocation of the nondelegation doctrine in both *A.L.A. Schechter Poultry Corp. v. United States*<sup>4</sup> and *Panama Refining Co. v. Ryan*<sup>5</sup> with this famous quip: “[I]t is more accurate, speaking purely descriptively, to see 1935 as the real anomaly. We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).”<sup>6</sup> It is precisely because the good old days of judicial lassitude may be numbered that the nondelegation doctrine has received inordinate attention in recent

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<sup>1</sup> 139 S. Ct. 2116 (2019).

<sup>2</sup> 139 S. Ct. 2400 (2019).

<sup>3</sup> See *Gundy*, 139 S. Ct. at 2131. In *Gundy*, Justice Gorsuch was joined by Chief Justice Roberts and Justice Thomas in dissent. Justice Alito concurred in the judgment solely to allow the issue to be decided in full when Justice Kavanaugh could contribute. Justice Kavanaugh has since opined that the Gorsuch dissent in *Gundy* “may warrant further consideration in future cases.” *Paul v. United States*, 140 S. Ct. 342 (2019).

<sup>4</sup> 295 U.S. 495 (1935).

<sup>5</sup> 293 U.S. 388 (1935).

<sup>6</sup> Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000). I criticize his position in RICHARD A. EPSTEIN, *THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW 67–73* (2020) [hereinafter *DUBIOUS MORALITY*].

years from courts and scholars alike.<sup>7</sup> Much of the discussion has centered on historical questions within a broad originalist framework. These analyses have led to conclusions that appear at first glance to be in deep tension with each other.

The effort to revive the nondelegation doctrine has met fierce resistance on historical and originalist grounds. Most notable is the exhaustive historical account offered by Professors Julian Davis Mortenson and Nicholas Bagley, who in their forthcoming article, *Delegation at the Founding*,<sup>8</sup> take the position that looking for evidence of a nondelegation doctrine in the founding period is a bit like looking for a unicorn: lots of talk in theory but no presence in fact. In their view, “any particular use of coercive rulemaking authority could readily be characterized as the exercise of either executive or legislative power, and was thus formally valid regardless of the institution from which it issued.”<sup>9</sup> In their view, it follows “[e]asily the best reading of the historical materials is that this question was simply left to politics.”<sup>10</sup> It is to construct a firewall against such a movement that Mortenson and Bagley write in protest by reviewing the evidence in sufficient detail in order to beat the conservative originalists at their own game. Accordingly, they target Justice Gorsuch’s dissent in *Gundy*.<sup>11</sup>

Gorsuch’s opinion [in *Gundy*] calls for ditching the intelligible principle standard in favor of a test that would distinguish between those statutes allowing the executive to “fill up the details” and those that confer policymaking discretion. Were it to become law, Gorsuch’s approach would force courts to make subjective and contestable judgments about what counts as a detail and what counts as something more.<sup>12</sup>

Yet at no point do they explain why the “intelligible principle standard,” which they misconstrue,<sup>13</sup> is free of similar ambiguities as the “fill-in-the-details” standard. Their selective appeal to linguistic relativism should be regarded as a tacit sign of intellectual surrender.<sup>14</sup> Ironically, the principle of intelligibility has its own peculiar history that when properly understood is perfectly consistent with the fill-in-the-details standard they disparage. What is really at stake here, therefore, is not the choice of labels, but a

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<sup>7</sup> See, e.g., Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164 (2019).

<sup>8</sup> Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021).

<sup>9</sup> *Id.* (manuscript at 1).

<sup>10</sup> *Id.* (manuscript at 4).

<sup>11</sup> *Id.* (manuscript at 18–22).

<sup>12</sup> *Id.* (manuscript at 20).

<sup>13</sup> See discussion of *Hampton* *infra* p. 34.

<sup>14</sup> Richard A. Epstein, *Linguistic Relativism and the Decline of the Rule of Law*, 39 HARV. J.L. & PUB. POL’Y 583 (2016).

claim that only the lowest level of judicial scrutiny should be given to nondelegation challenges. Justice Gorsuch’s fill-in-the-details test is really a stand-in for a claim that a more robust form of scrutiny should be adopted in these cases.

Nonetheless, their call has been taken up by other scholars on delegation in specific substantive areas. Thus, Cristine Kexel Chabot analyzes in great detail the delegations with respect to the public debt and concludes that both Hamilton and Madison blessed the actions of the First Congress that delegated the powers to “borrow Money” and “pay the Debts” conferred on Congress by Article I, Section 8.<sup>15</sup> In a parallel development, Nicholas Parrillo explores a congressional delegation that occurred in 1798, which gave authority to the executive branch to obtain an inventory of real estate values throughout the United States.<sup>16</sup> This project was necessary to implement the “direct taxation provision” found in Article I, Section 9, Clause 4: “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”<sup>17</sup> Executive branch officials were in charge of collecting, sorting, and evaluating the information, as has always been common in running surveys of this sort.

Executive prerogative in this area dates to the Domesday book,<sup>18</sup> which surveyed English titles under the supervision of the King, acting with his Council, long before the tripartite distinction between legislative, executive, and judicial was fully established.<sup>19</sup>

<sup>15</sup> Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, GA. L. REV. (forthcoming 2021).

<sup>16</sup> See Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. (forthcoming 2021).

<sup>17</sup> U.S. CONST. art. I, § 9, cl. 4.

<sup>18</sup> See FREDERIC WILLIAM MAITLAND, *DOMESDAY BOOK AND BEYOND: THREE ESSAYS IN THE EARLY HISTORY OF ENGLAND* (1897). The effort, starting in 1085, to make a detailed study of the entire lands of England was done in large measure to find a taxation base. See *id.* at 1–3. As such, it involved the cooperation of “barons,” “legates,” and “justices.” *Id.* at 1. Justices were involved with the cooperative efforts because they were needed to resolve disputes over ownership. See *id.* at 11.

<sup>19</sup> Neither Parliament nor any other legislative body had a role to play in this operation. It was an executive function issued by the King in Council, with a judicial backup. Here is one description:

Then, at the midwinter [1085], was the king in Gloucester with his council . . . . After this had the king a large meeting, and very deep consultation with his council, about this land; how it was occupied, and by what sort of men. Then sent he his men over all England into each shire; commissioning them to find out ‘How many hundreds of hides were in the shire, what land the king himself had, and what stock upon the land; or, what dues he ought to have by the year from the shire.’

ALFRED THE GREAT, *THE ANGLO-SAXON CHRONICLE* 107 (James Henry Ingram trans., 1996).

It is just not feasible for any deliberative body to engage in a survey of this kind, and the only question of delegation is how best to do this survey, which in this instance followed lines that are still in use today.<sup>20</sup> Chabot and Parrillo, each separately, have undertaken their analyses with the same motivation that drove Mortenson and Bagley: to defend the current broad versions of the nondelegation doctrine from ungrounded attacks.<sup>21</sup> In so doing, however, they have vastly overstated the potential consequences of reversing the outcome of *Gundy* by assuming that a reversal would entirely eviscerate the post-New Deal version of the nondelegation doctrine. In reality, it is both possible and correct to limit Gorsuch's argument in *Gundy* to accommodate the progressive state (which in my view should be struck down on other constitutional grounds).<sup>22</sup>

All these claims are subject to the obvious objection that the term "legislative power" must demarcate some area of exclusive legislative power, in contradistinction to both the "executive power" as used in Article II, and the judicial power, as used in Article III. Without doubt, there is much overlap in the work done among the political branches, and in many cases, it is far easier for an executive to discharge the task than Congress. After all, do we really expect Congress to make a survey of all lands in the United States? Or to renegotiate various kinds of debts, all of which require detailed knowledge of individual transactions, and none of which require the articulation of any major policy decision? But it hardly follows from these sensible divisions of labor between the Congress (which only met periodically during the Founding Era) and the Executive (who was, and is, always on call) that the overlap in functions between the two branches was complete. Nor does it follow that overturning some matters of delegation necessarily requires the invalidation of the entire administrative state.

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<sup>20</sup> As Richard FitzNeal wrote in the *Dialogus de Scaccario*:

For as the sentence of that strict and terrible last account cannot be evaded by any skilful [sic] subterfuge, so when this book is appealed to . . . its sentence cannot be quashed or set aside with impunity. That is why we have called the book 'the Book of Judgement' . . . because its decisions, like those of the Last Judgement, are unalterable.

RICHARD, SON OF NIGEL, *THE COURSE OF THE EXCHEQUER* 64 (V.H. Galbraith & R.A.B. Mynors eds., Charles Johnson trans., 1950).

<sup>21</sup> "Even if the Court does not categorically invalidate all agency rulemaking about domestic private conduct other than fact-finding, rulemaking is so ubiquitous that mere doubt about its constitutionality could work major changes in the nondelegation doctrine and administrative law more generally." Parrillo, *supra* note 16 (manuscript at 6). "The new Supreme Court is poised to bring the administrative state to a grinding halt. Five Justices have endorsed Justice Gorsuch's dissent in *Gundy v. United States*—an opinion that threatens to invalidate countless regulatory statutes in which Congress has delegated significant policymaking authority to the executive branch." Chabot, *supra* note 15 (manuscript at 1).

<sup>22</sup> See RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

Given the fever pitch of the nondelegation discussion, it is no surprise that Mortenson and Bagley's article has prompted a vigorous response. In his detailed historical account of the same materials, Ilan Wurman defends a more exacting nondelegation position by arguing that the essential features of a given legal scheme must be passed by a legislature before the executive (or his delegate) is allowed to fill in the blanks.<sup>23</sup>

Wurman is far closer to the truth, but for the moment, it should be sufficient to note at least one counterexample to the view that legislation and executive action are perfectly substitutable. It should be perfectly clear, as becomes evident in the pages below, that at no time could the executive unilaterally impose a pension system, create a patent system, organize a post road system, or conduct an inventory of real estate, without having first taken its cue from Congress. The reason we do not get a constant repetition of the same theme is that some version of a nondelegation norm is so central to the constitutional structure that no commentator thought fit to deny it in theory and no President sought to extend his power beyond the implicit line in the sand that was as apparent in the Founding period as it is today.

Filling in the details about how this schema should work is no easy task. It is hardly evident that the operation of the delegation doctrine at the Founding should bear any close similarity with the nondelegation doctrine today when the major shifts in constitutional order of the progressive era—the expansion of federal commerce and taxing powers, as well as the contraction of constitutional protections for economic liberties and property rights—have led to the rise of a modern administrative state that may well involve a very different form of administrative law.<sup>24</sup>

It is important here not to get ahead of oneself, for what is often missing in these elaborate historical debates is a sure sense of why anyone—legislators, judges, lawyers, laypersons, and even scholars—should care about the doctrine in the first place. This Article aims to fill the gap with a functional analysis of the nondelegation doctrine that helps explain where it should have teeth and where it should not. Accordingly, Part I offers a brief account of the evolution of the nondelegation doctrine from a historical—mostly originalist in nature—and doctrinal perspective. Part II develops a simple analytical model to explain

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<sup>23</sup> Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L. J. (forthcoming 2021).

<sup>24</sup> See DUBIOUS MORALITY, *supra* note 6.

why and how the doctrine should be used, by resorting back to a traditional account of agency costs, which builds upon the classic 1976 article on the subject by Meckling and Jensen, there restricted to the context of public corporations. Part III explains how this model works in the context of private business contexts, in order to set up a baseline against which the public law nondelegation doctrine, which operates in a different institutional setting, can be evaluated. In so doing, this Article looks both at bailment arrangements with chattels and trustee decisions over corporate assets to show the persistent net benefit from delegating to agents creates a rebuttable presumption in favor of delegation. But like any rebuttable presumption, it is necessary to state the conditions in which the presumption can be overcome. In this case, the presumption should be abandoned whenever there is evidence of a serious conflict of interest between the welfare of the principal, the public at large, and its agents, Congress, the President, and various administrative agencies. In Part IV, the Article circles back from the private sector to the public sector in order to apply this model to help explain a broad range of delegation cases, starting with the First Congress's treatment of pensions, patents, and post roads, and then extending forward through the nineteenth century into the post-New Deal developments ending up with *Gundy*.

In carrying out this four-part exercise, it is important to never lose sight of two inescapable difficulties in the articulation and application of any legal principle. The moment anyone on or off the courts starts to talk about rebuttable presumptions in any legal setting, it necessarily implicates trade-offs in the economic analysis. In the end, there is always some need to balance interests, which will inexorably lead to hard borderline cases whether the analysis is done on a class basis or a case-by-case basis. In close cases on which reasonable persons can disagree, the novel circumstances that give rise to cases are likely to result, metaphorically and literally, in five-to-four decisions in the Supreme Court.

#### I. A BRIEF HISTORY OF THE NONDELEGATION DOCTRINE

As is characteristic of many major legal principles, the nondelegation doctrine has its origins in Roman law. It began with a rigid general principle, *delegatus non potest delegare*—the delegatee is not able to delegate to a subdelegatee. Indeed, as will become clear, that maxim does not stand in splendid isolation, but rather operates as a special instance of broader principles of “natural justice” as it is termed in England, or “procedural due process” as it is termed in the United States. The basic principles

of natural justice are two: *nemo iudex in causa sua* (“no one should be a judge in his own cause”) and *audi alteram partem* (“hear the other side”).<sup>25</sup> The nondelegation maxim has the typical Roman law strengths and weaknesses. The former is its shrewd condensation of a principle with strong intuitive appeal that survives through the ages. Yet its characteristic weakness, true of much Roman law doctrine, is that it is overbroad in part because it does not offer an explicit rationale for its adoption. More concretely, in the Roman setting, most of these delegations were from single principals to a single agent. The principle does not explicitly address the rise of large corporate structures, which play a central role today and require extensive delegation to operate. In addition, the natural law theories with which the Romans and early Anglo-Americans worked did not offer a strong defense of their principles in the consequentialist terms that today rule the roost.<sup>26</sup>

Yet that same conceptual weakness applies to the constitutional scholarship of today. One common feature of both originalism and living constitutionalism is that neither approach appeals to consequentialist theories to make sense out of the nondelegation doctrine, as is evident in the articles that reexamine the delegation doctrine. Indeed, the canonical texts that deal with this problem offer little assistance in this endeavor. Consider a famous passage from John Locke’s Second Treatise:

The *legislative cannot transfer the power of making laws* to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the common-wealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by *laws* made by such men, and in such forms, no body else can say other men shall make *laws* for them; nor can the people be bound by any *laws*, but such as are enacted by those whom they have chosen, and authorized to make *laws* for them. The power of the *legislative*, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands.<sup>27</sup>

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<sup>25</sup> See SIR WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 384, 405 (11th ed. 2014). More specifically, “in administrative law natural justice is a well-defined concept which comprises two fundamental rules of fair procedure: that a man may not be a judge in his own cause; and that a man’s defence must always be fairly heard.” *Id.* at 374. Wade and Forsyth make numerous references to the American cases and the parallel concept of procedural due process.

<sup>26</sup> See generally Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL’Y 713, 716 (1989).

<sup>27</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 141 (C.B. Macpherson ed., 1980) (1690).



Locke's argument is sound as far as it goes, but, for a canonical text, it does not go very far. It is surely the case that if a group of legislators is selected by some legitimate process, it cannot simply wash its hands of its responsibilities, backed by individual oaths of office, by asking a second body to step in its shoes to do its legislative work. For these purposes, it does not matter how the legislature is selected: it applies to a Republican form of government that features indirect elections (including the selection of Senators by state legislatures), just as it applies to legislatures who operate by, as Madison feared, simple popular majorities. The basic risk is the same regardless of whether we call the action of the derivative actor an outright transfer of power or only its further delegation.<sup>28</sup> Consistent with this view, there has long been a principle that the government cannot transfer its police power to a third party.<sup>29</sup> Nor indeed could any individual legislator decide to appoint a successor to his place and then resign from office. The new body will not come up with the same laws as the old body, given its different membership. Indeed, if by some miracle it did, everyone would think of this delegation as a form of harmless error.

This same principle can be extended, as Wurman correctly argues, to a situation in which the original legislature reserves the power to call back its power at some future time. That option still leaves the interim actions with full force and effect, unless the reclamation of the power is somehow read to "void" those actions in ways that only complicate the reliance interest of citizens in the consistency and integrity of law, which Locke long prized.<sup>30</sup> As was said by Chief Justice Taney in *Luther v. Borden*, it is dangerous business to bless any transfer of power (including overthrow) which calls into question the status of all interim actions.<sup>31</sup> Locke only deals with the case of total

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<sup>28</sup> For the strong arguments in favor of this position, see Wurman, *supra* note 23 (manuscript at 4–6) rejecting the position of Mortenson and Bagley that there was a categorical distinction between alienation and delegation. Wurman summarizes their position as follows: "[T]he Founders agreed that although the legislative branch could not *alienate* its power—it could not give away its power for good—the legislative branch could *delegate* its power, so long as it had the ultimate authority to reclaim any legislative power that it had so delegated." *Id.* (manuscript at 4).

<sup>29</sup> See, e.g., *Stone v. Mississippi*, 101 U.S. 814, 817–18 (1879). "All agree that the legislature cannot bargain away the police power of a State," such that the state could not make a long-term binding contract to give rights to lotteries. These contracts "are not, in the legal acceptance of the term, *mala in se*, but, as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well-ordered community." *Id.* at 821.

<sup>30</sup> LOCKE, *supra* note 27, § 142. The same position is articulated in LON L. FULLER, *THE MORALITY OF LAW* 33–38 (rev. ed. 1969).

<sup>31</sup> See 48 U.S. 1, 38–39 (1849).

delegation, alienation, or transfer, but does not address the interim cases of partial delegation that were then everyday occurrences in England, given its complex system of public administration that befit a major power.<sup>32</sup> For Locke's purposes, it may well have been sufficient to block the major abuse, but for anyone who works within a detailed constitutional framework, the intermediate cases present the real challenge. It is here that the differences are indeed troublesome, for everyone on both sides of the debate admits that some delegation is necessary and some prohibited, differing only in the putative extent of the differences, without offering any theory as to how they should be resolved.

The old maxim that a public office is a public trust deserves in these cases to be taken literally, and a private trustee cannot put someone else in his place unless and until there is some orderly process, usually set out in the trust instrument, for them to do so.<sup>33</sup> But by the same token, the principle does not quite explain what the legislative power is, or whether a limited delegation should be regarded as a permissible delegation to the executive or an improper transfer of some portion of the legislative power. That line-drawing difficulty is reflected in the constitutional text. Article I deals with the legislative power but defines only specific grants of power in which the House and the Senate do not legislate. Specifically, Article I includes the Senate's power to approve treaties and confirm principal officers, the House and Senate's respective roles in impeachment, and the processes in making resolutions or proclamations.<sup>34</sup> These specific powers survive any general categorization, and leave wide open the

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For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned,—if it had been annulled by the adoption of the opposing government,—then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

*Id.*

<sup>32</sup> See WADE & FORSYTH, *supra* note 25, at 373–475.

<sup>33</sup> See, e.g., S. DOC. NO. 93-1, at 115–16 (1973) (“The ideal concept of public office, expressed by the words, ‘A public office is a public trust’, signifies that the officer has been entrusted with public power by the people; that the officer holds this power in trust to be used only for their benefit and never for the benefit of himself or of a few; and that the officer must never conduct his own affairs so as to infringe on the public interest. All official conduct of Members of the Senate should be guided by this paramount concept of public office.”).

<sup>34</sup> U.S. CONST. art. I; see generally *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318–29 (1936).

possibility that some delegations by the legislature properly hand things over to the President, or to the heads of his departments.<sup>35</sup> Getting the right answer in the extreme all-or-nothing case remains critical for the overall enterprise, but it does not tell when or why lesser forms of delegation should be regarded as permissible actions or an impermissible surrender of legislative power.

These principles, and these risks, were well understood in the founding period. Thus, the public trust language was in common use at the time. Elsewhere in the Second Treatise, Locke wrote of the legislative power “to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still *in the people a supreme power to remove or alter the legislative*, when they find the *legislative* act contrary to the trust reposed in them.”<sup>36</sup> With a heavy reliance on Locke, Robert Natelson identified the following six standard fiduciary duties: (1) follow instructions and remain within authority, (2) loyalty and good faith, (3) care, (4) exercise personal discretion, (5) account, and (6) impartiality.<sup>37</sup> It takes little imagination to see that the duty to exercise personal discretion operates as a limit on the power of delegation. But the statement of that principle, however powerful, does not tell how far it goes. Madison himself was always of two minds on the subject. In the one breath, in anticipation of *Wayman*, he could state with confidence that the trichotomy of the legislature that makes the law, the executive who enforces it, and the judiciary that construes the law is a fundamental bulwark of liberty: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>38</sup> But he also knew that the lines could not be precisely drawn, and was prepared to lie with the consequences. Thus, in his defense of the 1800 Virginia resolutions, he wrote:

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<sup>35</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>36</sup> LOCKE, *supra* note 27, § 149.

<sup>37</sup> Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 57–59 (Gary Lawson et al. eds., 2010). Elsewhere, Natelson has written, “I have not been able to find a single public pronouncement in the constitutional debate contending or implying that the comparison of government officials and private fiduciaries was inapt. The fiduciary metaphor seems to rank just below ‘liberty’ and ‘republicanism’ as an element of the ideology of the day.” Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077, 1086 (2004).

<sup>38</sup> *THE FEDERALIST* NO. 47, at 249 (James Madison) (Gideon ed., 2011).

However difficult it may be to mark, in every case, with clearness and certainty, the line which divides legislative power, from the other departments of power; all will agree, that the powers referred to these departments may be so general and undefined, as to be of a legislative, not of an executive or judicial nature; and may for that reason be unconstitutional. Details, to a certain degree, are essential to the nature and character of a law . . . .<sup>39</sup>

That position made its way into the case law through a well-known passage from Chief Justice Marshall in *Wayman v. Southard*.<sup>40</sup> He addresses the nondelegation principle in connection with deciding whether the federal courts are entitled to make rules of procedure for all actions, state or federal, brought in federal court. He starts by stressing what he regards as an obvious proposition: “It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”<sup>41</sup> But there are certain issues that are subject to control by either Congress or the Executive, or by the Executive or the Judiciary—including setting the rules of the return of writs and other processes. The Chief Justice then must draw the line between the exclusive and nonexclusive cases that *Mortenson and Bagley* deny exist, and he does so in this much-mooted passage that echoes Madison’s views:

The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.<sup>42</sup>

Marshall thus establishes a rebuttable presumption in favor of the delegations Congress can make to the two other branches of government, while accepting as binding the tripartite division of powers set out in Articles I, II, and III of the Constitution. The terms that Marshall uses to organize cases in that overlapping domain are as good as one can get in dealing with terms that fall into a continuum. Indeed, precisely this logic is evident in the 1934 federal statute that delegated to the Supreme Court superintendence over the Federal Rules of Civil Procedure. The key provision reads:

Be it enacted . . . That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of

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<sup>39</sup> James Madison, *The Report of 1800*, in 17 THE PAPERS OF JAMES MADISON 303, 324 (David B. Mattern et al. eds., 1991); Wurman, *supra* note 23, at 20, discussed in connection with the Aliens Friends Act.

<sup>40</sup> 23 U.S. 1 (1825).

<sup>41</sup> *Id.* at 42.

<sup>42</sup> *Id.* at 46.

the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.<sup>43</sup>

In *Sibbach v. Wilson & Co.*,<sup>44</sup> the Supreme Court cited *Wayman* to support this proposition, while paying full attention to the proviso found in the last sentence quoted above:

Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States; but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution.<sup>45</sup>

The clear inference from these two delegation cases is that some general nondelegation doctrine was operative as an indisputable background norm. In the end, a categorical distinction between branches of government necessarily gives rise to some difficult cases of degree in the middle. But so long as the basic principle is observed, the system will survive the numerous marginal cases, at least if we can develop some analytical framework to resolve these problems.

## II. THE ANALYTICAL TRADEOFF

The ups and downs in the historical debates over the nondelegation doctrine should come as no surprise, but they are just a reflection of the larger debate over the role of agents in all kinds of business and social transactions. The Roman maxim *qui facit per alium facit pro se* ("he who transacts through another transacts for himself") applies across the board for the simple reason that it is typically not possible for any individual to spread himself so thin that he can manage everything he needs managed without cooperation from others. In general, the basic principle of contractual choice is that voluntary agreements are for mutual benefits, and that principle applies as much to the agency relationship as it does to ordinary contracts of hire and sale. By extension, the decision to use an agent, and thus to delegate power, should be understood as part of the basic logic of the division of labor. Thus, when specific tasks are divided in routine transactions, the allocation of rights and responsibilities

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<sup>43</sup> Act of June 19, 1934, ch. 651, 48 Stat. 1064, 1064 (codified as amended at 28 U.S.C. § 2072).

<sup>44</sup> 312 U.S. 1, 9–10 (1941).

<sup>45</sup> *Id.* (citing *Wayman*, 23 U.S. at 42).

is almost never an all-or-nothing affair. There is a bilateral risk. The principal may fear that the agent will stray too far from the appointed task, including running away with either goods or money. The agent fears that the principal may not pay for the work done, or may give garbled instructions that make the effective discharge of the task impossible. So, in virtually every situation, some restrictions monitored in a wide variety of ways are placed on the agent's discretion. Knowing what these restrictions look like and why they are imposed gives a sense of direction to private law transactions that can be used to evaluate the public law transactions that inspired some version of the nondelegation doctrine.

To gain this sense of direction, we have to start with a simple model of comparative advantage: what is it that the principal can do better than the agent, and what can the agent do better than the principal? The principal, if an individual, in general will have a strong sense of his or her own preferences, and an ideal agency relationship is one that makes sure that the contractual decisions made by the agent are the perfect reflection and implementation of the preferences of the principal. In a situation of perfect trust and perfect knowledge, the delegation problem literally takes care of itself. The principal gives the signal and the agent springs into action, and all proceeds in accordance with the plan when monitoring costs are zero for both sides. This is closely related to the principle that no protection against government takings with a just compensation remedy is ever necessary in a world in which the risks of ignorance and fraud are put to one side.<sup>46</sup> It is better for both sides to save the transaction costs needed to set just compensation when the risk of misbehavior by government is zero.

But the perfect correlation of knowledge and preferences is yet another illustration of why, for lawyers and economists, Coase's "zero transaction costs" world is the closest that we get to heaven.<sup>47</sup> In reality, there is always some slippage on either knowledge or motivation, and the potential of some conflict of interest requires imposing limitations on the power of the agent. For example, the regulations of habitat protection under the Endangered Species Act<sup>48</sup> go far beyond the original intention of the statute, which contemplated that the government would have to pay to secure the habitat from private owners. Yet in *Babbitt*

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<sup>46</sup> See Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 52 (1992).

<sup>47</sup> See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960).

<sup>48</sup> See 16 U.S.C. § 1531.

*v. Sweet Home Chapter of Communities for a Great Oregon*,<sup>49</sup> the principles of administrative deference sustained such regulations (championed by environmentalists), even though they cut far deeper than the original statutory design allowed.<sup>50</sup> Clearly the political balance inside the Department of Interior was different from that inside the Congress that passed the statute, and a healthy dose of Chevron deference let the Supreme Court easily ratify that conscious agency drift.<sup>51</sup> Similarly, the gender discrimination rules under Title IX, when applied to intercollegiate athletics, converted a general antidiscrimination statute into a rigid quota statute, and this too was done by an agency determination. The scope of this agency determination was then further extended by an agency letter that has remained in effect for over forty years.<sup>52</sup>

The agency costs associated with this form of delegation in these political contexts are far more comprehensive than those that are involved in the famous, but stripped-down, agency cost model of Michael Jensen and William Meckling,<sup>53</sup> because they cannot be analyzed exclusively within a simple profit-maximization model. Jensen and Meckling were well aware of the generality of the problem, but to make their foray tractable they confine their work to “the analysis of agency costs generated by the contractual arrangements between the owners and top management of the corporation.”<sup>54</sup>

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<sup>49</sup> 515 U.S. 687, 708 (1995).

<sup>50</sup> *Id.* For criticism, see generally Richard A. Epstein, *Babbitt v. Sweet Home Chapters of Oregon: The Law and Economics of Habitat Preservation*, 5 S. CT. ECON. REV. 1 (1996).

<sup>51</sup> *Babbitt*, 515 U.S. at 703, 708.

<sup>52</sup> The operative provision of Title IX reads: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .” 20 U.S.C. § 1681(a). The exhaustive regulations under this section relating to Title IX are found in 34 C.F.R. § 106.41 (2020) and Title IX and Intercollegiate Athletics, 44 Fed. Reg. 239 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 26), which pushes the envelope even further. For my criticism, see Richard A. Epstein, *Foreword: “Just Do It!” Title IX as a Threat to University Autonomy*, 101 MICH. L. REV. 1365 (2003).

<sup>53</sup> Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976). Jensen and Meckling provide the following definition for an agency relationship: “[A] contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent.” *Id.* Note that their definition speaks of “delegating some [not all] decision making authority to the agent.” *Id.* And further, they “define *agency costs* as the sum of: (1) the monitoring expenditures by the principal, (2) the bonding expenditures by the agent, (3) the residual loss.” *Id.* (citation omitted).

<sup>54</sup> *Id.* at 309.

Nonetheless, that model can be usefully extended to address the nondelegation problem in constitutional law. The more general formulation of the problem has the delegator (the legislature to whom all powers in Article I of the Constitution are granted) acting at Time I in setting priorities that have to be executed at Time II by its agent (the President, or his agent) that could be then handed off to some sub-delegate. The principal has better collective knowledge of the priorities to be embodied in the general problem, but down the road the agent will have better information about the costs and benefits of various strategies that are not available to the principal. The problem need not stop at three levels, for in complex organizations, multiple levels of delegation should be regarded as the rule, not the exception. Accordingly, even in the best of situations, we should expect to see the emergence of a mixed strategy in which some ex ante explicit limitations are placed by any principal on its agent, but some degree of deference is left to the action down below.

Consistent with the Jensen and Meckling model, we expect to observe trade-offs at the margin. Too little oversight allows an agent to go astray, and too much oversight could create costly paralysis or delay.<sup>55</sup> The exact point of trade-off will depend on the alignment at each level of the interest of principal and agent. This is why it is commonly the case that general partners (often family relations) allow for the broad delegation of authorities, because a generalized duty of good faith—defined here as one in which each party takes the interests of his partner as equal to his own—is likely to occur in these settings where the biological connection operates as a nonlegal but powerful constraint.<sup>56</sup> Hence, as the trust relationship increases, the level of monitoring is reduced, which gives the small family firm an advantage over firms of comparable size that do not share the same degree of genetic and social overlap. Yet by the same token, the use of family ties necessarily limits the size of the firm, so that more formal restraints have to be imposed when the size of the firm

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<sup>55</sup> *Id.*

<sup>56</sup> The biological notion is one of inclusive fitness, whereby the parties share some but not all common genes. For the leading paper on this topic, see W.D. Hamilton, *The Genetical Evolution of Social Behaviour*, 7 *J. THEORETICAL BIOLOGY* 1, 1–2 (1964) (developing the identical framework as Jensen and Meckling to describe biological overlaps between relatives). In the simple agency cost example, a parent shared fifty percent of the genes with a child. Hence, it will take any action that costs it one unit to itself so long as it generates two units of benefit for the offspring. That relationship is easily satisfied with newborns and young children. But parent-child conflicts emerge on both sides as both parents and children age. The ratio remains the same, but the conditions for its satisfaction differ. See Robert L. Trivers, *Parent-Offspring Conflict*, 14 *AM. ZOOLOGIST* 249, 250 (1974).



must expand in order to meet the demands of a larger market. Billions of credit or debit card transactions cannot be individuated to take into account the peculiar preferences of all individuals. There must be, and is, a standard protocol that is easy to apply, done with a high level of certitude that binds all participants to the letter of the standard contract, with no room for individuation of transaction or institutional discretion in execution.

### III. PRIVATE LAW APPLICATIONS

It should be evident both with public corporations and with political governance that the slippage is far greater, such that the level of social control has to be more intense.<sup>57</sup> Therefore, it is important to understand how this mini drama plays out in connection with sub-delegation in a variety of settings. Thus, in a simple family example with no institutional overtones, a parent allows his son to drive his car. But usually there is an explicit prohibition against the son allowing his friends to drive the car as well. The father made the initial delegation because he had confidence in his son, but he has no knowledge or control over any his son's friends or acquaintances should the car be further handed over, i.e., by way of a sub-bailment. So, if the restriction is put on, the understanding is that it will be followed. There may be some exceptions for cases of genuine necessity, but the amount of discretion will be proportionately reduced when it is possible for the son to speak with the parent before making the sub-delegation. In essence, the knowledge of the principal is brought forward to reduce the conflicts in question. Moreover, in some cases, there may be no explicit instruction one way or another about whether the delegation should be allowed, at which point the parties face the same question of implied limitations on conduct for both agent and principal that arise everywhere in the law. The ever-present knowledge of potential

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<sup>57</sup> These bona fide contracts date back to Roman law and apply in cases in which there is need for flexibility, as in a partnership, where duties are defined in terms of good faith. See G. INST. 3.137 ("Likewise, in contracts of this description the parties are reciprocally liable, because each is liable to the other to perform what is proper and just; while, on the other hand, in the case of verbal obligations one party stipulates and the other promises; and in the entry of claims one party creates an obligation by doing so, and the other becomes liable."). Note the opposition between the good faith contracts (sale, hire, agency, and partnership) and the stipulation, a formal unilateral contract whereby one person promises to pay a particular sum of money or to hand over a particular thing. Usually there is discretion in the former and none in the latter, but the distinction is never absolute. Adjustments are expected as a matter of course in the consensual good faith contracts, but with liquidated obligations, the exceptions are narrow and must be specially pleaded. The same basic framework applies today to various types of commercial arrangements.

conflicts of interest is probably strong enough in most contexts to impose on the bailee an obligation not to allow other persons to drive the car unless permission can be explicitly obtained from above or unless narrow conditions of necessity pertain.

Speaking generally, the scope of the limitations likely increases when there are multiple principals (e.g., co-owners of the car). Where the number of co-owners is small, informal adjustments usually work to reach a solution. But when the number of co-owners is large, the prospect of disagreement is great so that collective decisions cannot be made in the first instance. It is this transactional situation that explains why the separation of ownership and control in the corporate context is a necessity, and it explains why that division gives rise to more stringent limitations on the actions of the board of directors.<sup>58</sup> Along with the limitations on sub-delegation, there are also limitations that deal with substantive terms: how long does the delegation last; what are the maximum and minimum prices that can be set; what other collateral conditions should be imposed as well. It is in all cases important to see how explicit delegations operate to form the framework for implicit limitations.

These arguments, moreover, make it clear from the corporate context that there are no watertight separations between the matters that are left to a board of directors and matters that may be properly delegated to the CEO, who in turn can delegate these decisions downward. But the common thread that runs through all these cases is whether the delegation is so loose that it raises risks of deviation from the master plan. From this simple observation comes the central distinction in corporate law that delegations to agents who have conflicts of interests with the corporation are subject to higher scrutiny, under the so-called fair value rule, than delegations in which there are no such conflicts of interest—where a lower, somewhat indefinite business judgment rule insulates agents from liability for simple mistakes.<sup>59</sup> The simple point is that, just as we should not expect perfect precision on these matters in the private sector, so we should not, as becomes clear, expect it in the public sector. But

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<sup>58</sup> For the seminal work, see generally ADOLPH A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

<sup>59</sup> For a general discussion, see FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 90–108 (1991). Note that their exposition equivocates, as do other sources, on the precise scope of the business judgment rule. Simple negligence will not trigger the obligation, but the plus factors (e.g., knowledge or gross neglect) are notoriously difficult to pin down—a problem that carries over to sub-delegation issues, which are not discussed there. I examine some of these issues in Richard A. Epstein, *Inside the Coasean Firm: Why Variations in Competence and Taste Matter*, 54 *J.L. & ECON.* S41 (2011) (dealing with a variety of agency relationships).

the common theme that broad delegations are routinely subject to restraints over critical matters of time, place, and manner that narrower ones may escape runs through both areas and helps in the public law to give some sense as to how the various cases should be decided.

The public corporation occupies, however, an intermediate position between the small group and large government entities at all levels. The question then arises as to what the various forms of private structures (corporations, condominiums, and unions) tell us about the larger problem.<sup>60</sup> There are two key features in the private context that have to be kept in mind in making any transition from a private to a public entity.<sup>61</sup> These two features of private organizations tend to reduce the differences in preferences among joint investors in a corporation or in a large limited partnership.<sup>62</sup> The first is that all of these people came together voluntarily in a common venture.<sup>63</sup> Accordingly, powerful selection pressures are at work both on formation and on subsequent transfers, so that the heterogeneity among its members will be reduced, thereby easing the costs of collective deliberation.<sup>64</sup> Few people voluntarily enter into an organization where they expect to have deep philosophical divisions with the dominant faction.<sup>65</sup> Then, second, even when these differences do emerge, as they will with time, the individuals involved have the ability to alienate shares or partnership interests to others who know the terms and conditions in the original charter.<sup>66</sup> The outliers leave and the others join in, given an effective way to narrow the gap in preferences. The dissidents sell out to others whose own preferences are aligned with the group. Or, in the alternative, there can be a takeover bid by an outsider which then cashes out the original members who can go their own separate ways.<sup>67</sup>

The situation with public bodies is very different. Membership in the group is not obtained by agreement, but by citizenship that comes as of birthright or by admission through

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<sup>60</sup> For my earlier treatment of this issue, see Richard A. Epstein, *Redistribution Within Collective Organizations: What Corporations, Condominiums and Unions Tell Us About the Proper Use of Government Power*, 8 N.Y.U. J.L. & LIBERTY 280 (2014).

<sup>61</sup> *See id.* at 281.

<sup>62</sup> *See id.* at 284.

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See id.* at 285.

<sup>66</sup> *See id.*

<sup>67</sup> *See* Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 113 (1965) (noting that the takeover is often a one-shot way to eliminate conflicts of interest among existing shareholders).

naturalization. The number of citizens (the rough functional equivalent to shareholders or partners) is likely to be very large, which on familiar transaction costs grounds generates huge impulses toward representative government. But the sentiments within these populations can be widely diverse. Yet at the same time there is no simple sale mechanism that can reduce the variance among members. And there is nothing remotely equivalent to the takeover mechanism. Since these large groups of individuals may have diverse sentiments, the practice of delegation could easily shift the center of gravity in the smaller group from what it is in the larger. There must accordingly be mechanisms that can control these risks, and a limitation on delegation is one such device. These pressures, moreover, are likely to become more insistent as the size of government gets larger, so that in principle a nondelegation doctrine should be part of the toolkit to deal with the risks of deviation from collective sentiment. How this plays out is dependent on the size of government and the kinds of powers that it exercises. What follows is an effort to trace that development historically.

#### IV. CONSTITUTIONAL DISPUTES OVER THE NONDELEGATION DOCTRINE

It should be no surprise that the principles that yield no clear answer in all situations will give rise to spirited debate when their application is disputed. The set of relevant cases starts with the Founding period, indeed the first Congress, and works its way forward. Here is a quick tour, which shows no evidence of any serious challenge to the nondelegation doctrine during the pre-New Deal era. Quite simply, given the model above, all of these cases should resist a nondelegation challenge, even if we treat the legal constraint, as we should, as posing serious limitations on the powers of Congress. Put another way, the below cases—none of which invalidated a delegation as unconstitutional—were rightly decided.

##### A. Disabled Veterans.

The Confederation Congress authorized by statute a payment of pension to disabled veterans who fought in the Revolutionary War.<sup>68</sup> It soon came time for the first Congress to implement that mandate, which in full reads as follows:

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<sup>68</sup> See Mortenson & Bagley, *supra* note 8 (manuscript at 88) (providing a helpful summary).

An ACT providing for the Payment of the Invalid Pensioners of the United States. Be it enacted by the Senate and House of Representatives, of the United States of America in Congress assembled, That the Military Pensions which have been granted and paid by the states respectively, in pursuance of the Acts of the United States in Congress assembled, to the Invalids who were wounded and disabled during the late war, shall be continued and paid by the United States from the fourth day of March last, for the space of one year, under such regulations as the President of the United States may direct.<sup>69</sup>

The question in this case was whether the delegation in question, under which the President and Secretary Knox subsequently required that the payments be made in two equal installments and requiring affidavits as evidence of injury and entitlement to payment, was constitutional.<sup>70</sup> In dealing with this statute, Professor Wurman is right to point out that Congress had by indirection fixed the amount of money to be paid and the period of time over which it was to be paid, so all that was left were matters of implementation.<sup>71</sup> In effect, the 1789 legislation adopts a mixed strategy wherein the job of Congress was to “continue” payments authorized previously by the Confederation government, so that the action is one for the assumption of debts for work done by the pensioners in the federal service. At this point, the only thing left for the President to do was to ask for proof of disability and fix an amount. Given the constraints otherwise in place, this delegation made sense. There is little reason to think that Congress has better knowledge on questions of implementation or that the Presidential delegation indicated any skew in favor of one class of veterans over another. The case looks like one of a faithful agent—this makes the delegation proper.

The overall situation would have been very different if the Act had not provided directly, or by reference, for the allocation, such that the President would have had power to determine the total budget and the individual payments.<sup>72</sup> At which point, the nondelegation doctrine should have been called into play given the explicit constitutional provision that all appropriations bills begin in the House of the Representatives.<sup>73</sup> And it would have been a

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<sup>69</sup> An Act Providing for the Payment of the Invalid Pensioners of the United States, ch. 24, 1 Stat. 95 (1789).

<sup>70</sup> See Wurman, *supra* note 23 (manuscript at 45–46) (outlining this implementation).

<sup>71</sup> *Id.*

<sup>72</sup> U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives . . .”).

<sup>73</sup> See *id.*

different manner if the President had decided to extend the period for payment or to include veterans from the French and Indian wars. Accordingly, this analysis also calls into question Mortenson and Bagley's support for "a non-exclusivity thesis," if that is taken to assume that the entire matter could be solved either by the Congress or the President so that the nondelegation doctrine just disappeared, given that budget constraint.<sup>74</sup>

This pension does raise the larger question of what sorts of delegation should be made to the administrative agencies. In dealing with this topic, Professor Aditya Bamzai notes the extensive nineteenth century practice under which it was commonplace to delegate to executive branch officials the power to determine the amounts owed in connection with civil and military salaries, pensions, promotions, fines, and discharges for government employees; the terms and conditions of patent and land grants, including railroad rebates.<sup>75</sup> He writes: "Under the traditional interpretive approach, American courts 'respected' longstanding and contemporaneous *executive* interpretations of law as part of a practice of deferring to longstanding and contemporaneous interpretation *generally*."<sup>76</sup> This line of cases was relied on by Justice John Paul Stevens to establish the general proposition that delegation to administrative agencies under standards of deference long preceded his decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>77</sup>

The Stevens position, however, is not consistent with the basic framework developed here. The continuous application of a body of rules to a large number of small disputes allows an administrative agency to develop a workable standard via a course of dealing (as that term is used in commercial transactions)<sup>78</sup> that both advances uniformity and gravitates, as is the case with most customs that arise through informed trial and error in consensual arrangements, toward an efficient solution.<sup>79</sup> By so doing, the optimal conditions for delegation set

<sup>74</sup> See Mortenson & Bagley, *supra* note 8 (manuscript at 7).

<sup>75</sup> Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 916 (2017).

<sup>76</sup> *Id.*

<sup>77</sup> 467 U.S. 837, 844 n.14 (1984) (citing *Edwards' Lessee v. Darby*, 25 U.S. 206 (1827) (priority to rival land grants); *Brown v. United States*, 113 U.S. 568 (1884) (naval retirement benefits); *United States v. Moore*, 95 U.S. 760 (1877) (surgeon pay increase); *United States v. Ala. Great S. R.R. Co.*, 142 U.S. 615 (1892) (railroad rebates). For an extensive discussion of these cases, see Richard A. Epstein, *Structural Protections for Individual Rights: The Indispensable Role of Article III—or Even Article I—Courts in the Administrative State*, 26 GEO. MASON L. REV. 777, 792–99 (2019).

<sup>78</sup> See U.C.C. § 1-303(d) (AM. L. INST. & UNIF. L. COMM'N 2019).

<sup>79</sup> See generally Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1 (1992).

out above are satisfied. The field is one in which Congress is likely to be unable to deal with subtle differences in individual cases that arise over years, let alone decades. The agency expertise is able to achieve that result, and in general does so in an area that is not charged heavily with political differences, so that, presumptively, officials in the executive branch will act as faithful agents of the legislature. Accordingly, the deference that is accorded is to the line of authorities, and not to an individual instance that breaks from the accepted practice:

It is a settled doctrine of this court that in case of ambiguity the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.<sup>80</sup>

Properly understood, this proposition is the polar opposite of the much-mooted Chevron deference. First, the issue raised in that case, about what counts as a “stationary source,”<sup>81</sup> is not one that is resolved by looking at a pattern of past practices in small cases. Rather, *Chevron* makes this critical error that has set the law into a state of intellectual disarray. Second, the deference here is not to a line of cases, but to the last agency decision even if that decision diverts (often without special explanation) from an established line of cases.<sup>82</sup> Hence, the rapid deviation from settled practice does indicate some deviation from the anticipated norm, so that when applying Chevron deference to decisions in the modern administrative state, one should be careful of these broad delegations. At this point, the need to constrain discretion points to the use of *de novo* review on questions of law, which is itself the textual norm under Section 706(a) of the Administrative Procedure Act, in part to avoid invalidation on what should be a revived nondelegation doctrine.<sup>83</sup>

## B. The Patent Act of 1790.

Yet another critical statute passed by the first Congress was the Patent Act of 1790, which also contained a mix of a legal

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<sup>80</sup> *Ala. Great S. R.R. Co.*, 142 U.S. at 621.

<sup>81</sup> *Chevron*, 467 U.S. at 840.

<sup>82</sup> See, e.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005). For a longer treatment of this issue, see DUBIOUS MORALITY, *supra* note 6, at 97–98.

<sup>83</sup> 5 U.S.C. § 706 (“To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”).

standard coupled with a delegation of its application. Its key provision for this point reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That upon the petition of any person or persons to the Secretary of State, the Secretary for the department of war, and the Attorney General of the United States, setting forth, that he, she, or they, hath or have invented or discovered any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used, and praying that a patent may be granted therefor, it shall and may be lawful to and for the Secretary of State, the Secretary for the department of war, and the Attorney General, or any two of them, if they shall deem the invention or discovery sufficiently useful and important, to cause letters patent to be made out in the name of the United States . . .<sup>84</sup>

This statute clearly contains an explicit delegation to three cabinet members, which has to be valid under any system of law, for it manifestly cannot be the case that the Congress has the degree of expertise to collectively decide on whether a given patent application meets a standard that is remarkably similar in language and purpose to the one which exists today.<sup>85</sup> The administrative decisions in individual cases to grant or deny are by no stretch of the imagination legislative acts. Mortenson and Bagley claim that this system represents some vast delegation of administrative power whereby “[t]he executive branch was thus empowered to prescribe, recognize, and adjust the private rights of both inventors and putative infringers—in other words, just the kind of ‘blank check to write a code of conduct governing private conduct’ that Justice Gorsuch decried in *Gundy*.”<sup>86</sup> Not so. The entire operation of the Patent Act of 1790 did not reflect the mores of the modern administrative state.<sup>87</sup> Indeed, as Adam Mossoff notes, the Act of 1790 was a conscious effort to break from the English system, which tolerated such discretion, to its vast disadvantage<sup>88</sup>:

It is the core difference between defining a patent, on the one hand, as a private property right or, on the other hand, as a regulatory entitlement—between securing rights through private law doctrines and legal institutions constrained by the rule of law versus granting

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<sup>84</sup> Patent Act of 1790, ch. 7, § 1, 1 Stat. 109, 109.

<sup>85</sup> *Id.*; see also 35 U.S.C. § 101 (“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”).

<sup>86</sup> Mortenson & Bagley, *supra* note 8 (manuscript at 84).

<sup>87</sup> See Adam Mossoff, *Institutional Design in Patent Law: Private Property Rights or Regulatory Entitlements*, 92 S. CAL. L. REV. 921, 921–23 (2019).

<sup>88</sup> See *id.* at 921–22.



rights as matters of public policy and through discretionary decision-making processes in the political organs of the government.<sup>89</sup>

Indeed, the constant reference to the term “grant” in the Act of 1790 is strong evidence that they conceived of these patent rights as vested once created, and thus, protected as a form of property against government expropriation, which in turn led to a restricted view of government.<sup>90</sup> Thus, John Duffy made explicit the contrast between the pre- and post-New Deal view of patent rights: “Unlike the sweeping delegations conferred in the Progressive and New Deal eras, the delegations of governmental power for the patent system were, and still are [as of 2000], extraordinarily narrow.”<sup>91</sup>

Given this institutional framework, it is not surprising that the downward delegation to the committee of three met both of the tests for a sensible delegation set out above: There was greater knowledge down below on particular cases and no obvious sign of institutional bias. Today, it may seem ludicrous that three of the first four cabinet members—the Postmaster General was not included—should be pressed into this service. Indeed, as the pace of business increased, a separate patent (and trade) office was developed to deal with the overall issue, again without serious challenges to the delegation. But there is no evidence that this particular delegation led to any deviation from the proposed statutory standard, and the decision in the executive branch allows for an individualized update based on knowledge that was obtained after the statute was enacted. There is, of course, some looseness in the language, but that hardly condemns this statute on the grounds of vagueness, for over 200 years of constant tinkering has not yielded a general formulation that radically departs from the 1790 standard.

Mortenson and Bagley miss all of the institutional constraints operative in the field when they describe this delegation of authority to the executive branch as a “blank check” to write an entire patent code.<sup>92</sup> There is no doubt that these decisions necessarily require some determination as to whether the new device represents a sufficient advance over previous

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<sup>89</sup> *Id.* at 922.

<sup>90</sup> *See, e.g.*, Richard A. Epstein, *Patent Originalism*, CASE W. RES. L. REV. (forthcoming 2021).

<sup>91</sup> John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1133 (2000); *see also* B. ZORINA KHAN, *THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790–1920*, at 51 (2005) (explaining that in contrast to British patent law, “U.S. doctrines emphatically repudiated the notion that the rights of patentees were subject to the arbitrary dictates of government”).

<sup>92</sup> Mortenson & Bagley, *supra* note 8 (manuscript at 84).

devices to count as a “nonobvious” advance worthy of protection.<sup>93</sup> But even though these judgments are required to make good the statutory scheme, it would be wrong to say that the Patent and Trademark Office could do whatever it wanted. It could not, for example, decide to issue patents while ignoring some of the requirements set out in the statute; nor could it decide to deny patents by insisting on some non-statutory element of its own, even though the application meets all the other standards. That principle has some traction in modern administrative law, in cases such as *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, where Justice Rehnquist in the sharpest of terms took the view that the Circuit Court for the District of Columbia was out of line when it tried to slow down the construction of nuclear power plants (which it eventually did anyhow) by adding new requirements to those set out in the Administrative Procedure Act.<sup>94</sup> The limits on delegation are also evident in the simple proposition that the Patent and Trademark Office most certainly could not decide to adopt some “first-to-file” approach, writ large,<sup>95</sup> which would, unless suitably cabined, allow non-inventors to claim patent rights. Indeed, when the “first-inventor-to-file” rule was adopted in 2011, it was through an explicit provision of the America Invents Act and not by any pronouncement of the Patent and Trademark Office.<sup>96</sup> Furthermore, individual decisions are also subject to judicial review, which could not take place sensibly if the entire process were as ill-formed as *Mortenson and Bagley* suggest. In fact, the general patent law does not operate through government regulations but relies on judicial decisions to fill in the gaps, which works the same way no matter who decides the various questions raised in patent enforcement. And, of course, neither the President nor any of his subordinates could decide to introduce any patent system at all if Congress had not exercised the grant of power given to it under Article I, Section 8, Clause 8.<sup>97</sup>

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<sup>93</sup> 35 U.S.C. § 103 (“A patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in section 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains. Patentability shall not be negated by the manner in which the invention was made.”).

<sup>94</sup> 435 U.S. 519, 525 (1978). Justice Scalia wrote a spirited defense of the Rehnquist opinion in Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345 (1978).

<sup>95</sup> *Mortenson & Bagley*, *supra* note 8 (manuscript at 85 n.299).

<sup>96</sup> America Invents Act, Pub. L. No. 112-29, § 3, 125 Stat. 285 (2011) (codified as amended at various sections of 35 U.S.C.).

<sup>97</sup> Congress has the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

The modern system of patent examination should similarly escape challenges on nondelegation grounds notwithstanding the enormous increase in the number and complexity of patent applications. But that same judgment cannot be made about the modifications in patenting procedure inside the revised Patent and Trademark Office in connection with the Patent Trial and Appeals Board (PTAB) that was established under the 2011 America Invents Act.<sup>98</sup> The first of these difficulties relates to the breakdown in the doctrine of separation powers that arises when a party charged with patent infringement in federal district court is allowed, with the consent of the PTAB, to transfer that case to the board for review on key issues of patent validity. There is no reason why this departure from well-established nineteenth century practice should be tolerated, as the Supreme Court unfortunately did in *Oil States Energy Servs., LLC v. Greene's Energy Group, LLC*.<sup>99</sup> Notwithstanding this erroneous decision, the nondelegation doctrine does raise deep concerns with the procedures that were developed inside the PTAB to deal with the administrative rehearing, most notably in the decision to allow the head judge of the PTAB to select on an ad hoc basis the members of the panel, based on the likelihood that they would decide a case consistent with the PTAB judge's view of department policy, and to add additional members to the panel (including himself) to change the outcome if the projected results are not to his liking.<sup>100</sup> At this point, the case for the nondelegation doctrine merges with a fundamental concern about due process, as noted earlier, and the entire structure should be struck down because the risk of deviation from Congressional policy by these ad hoc adjustments is too great when no added informational advantage comes from delegating this extraordinary power to the chief judge of any court.<sup>101</sup> The

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<sup>98</sup> America Invents Act, Pub. L. No. 112-29, 125 Stat. 284, 284–341 (2011).

<sup>99</sup> 138 S. Ct. 1365 (2018). The most powerful precedent against ousting the courts of jurisdiction is *McCormick Harvesting Mach. Co. v. Aultman*. 169 U.S. 606 (1898). There the Court stated:

It has been settled by repeated decisions of this court that when a patent has received the signature of the secretary of the interior, countersigned by the commissioner of patents, and has had affixed to it the seal of the patent office, it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or canceled by the president, or any other officer of the government.

*Id.* at 608–09 (citations omitted).

<sup>100</sup> For my critiques, see Richard A. Epstein, *The Supreme Court Tackles Patent Reform: A Series of Articles Examining Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 19 FEDERALIST SOC'Y REV. 172, 180, 188 (2018).

<sup>101</sup> The concern was raised, but not resolved, in *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co. Ltd.*, 868 F.3d 1013, 1020 (Fed. Cir. 2017) (Dyk, J., concurring).

standard practice in these situations is to select judges by a system of rotation to control the risk of downstream abuse,<sup>102</sup> and that practice should be followed in cases of this sort. There is nothing about the changes in technology or legal standards that requires a different result.

### C. Post Roads Debate

The nondelegation doctrine also lies at the center of the Second Congress, with the Post Roads Debate of 1791 in the House of Representatives.<sup>103</sup> The Constitution lists among the enumerated powers given to Congress under Article I, Section 8, Clause 7, the power “[t]o establish Post Offices and post Roads.”<sup>104</sup> One measure of the importance of this power was that the Post Office received cabinet status in 1792, when it joined the four initial departments (State, Treasury, War, and Justice) of George Washington’s first cabinet.<sup>105</sup> But the question then arises whether any of this function could be delegated by Congress to the President and his officers, including the Postmaster General. The same answer does not necessarily apply to post roads and to post offices, because the former involves the creation of a network industry, in which the location of post roads across the various cities and states could determine the overall efficiency of the system. In contrast, the location of a post office within a given city would mainly be of concern to the local residents of that community. The Congress had before it a map that indicated the location of the proposed post roads, when Representative Sedgwick proposed that the entire road network be scrapped and the matter be turned over to the President under a delegation of executive authority to the effect that roads would be laid down “by such route as the President of the United States shall, from time to time, cause to be established.”<sup>106</sup>

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[A]fter a three-member panel of administrative judges denied petitioner Broad Ocean’s request for joinder, Broad Ocean requested rehearing and requested that the rehearing be decided by an expanded panel. Subsequently, ‘[t]he Acting Chief Judge, acting on behalf of the Director,’ expanded the panel from three to five members, and the reconstituted panel set aside the earlier decision.

*Id.*

<sup>102</sup> See, e.g., Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 66–67 (2017).

<sup>103</sup> Nat’l Archives, *Post Office and Post Roads, [7 December] 1791*, FOUNDERS ONLINE (Dec. 7, 1971), <http://founders.archives.gov/documents/Madison/01-14-02-0126> [<http://perma.cc/TEXG-3CY6>].

<sup>104</sup> U.S. CONST. art. I, § 8, cl. 7.

<sup>105</sup> *Postal Service Act Regulates United States Post Office Department*, HIST. (Feb. 18, 2021), <http://www.history.com/this-day-in-history/postal-service-act-regulates-united-states-post-office-department> [<http://perma.cc/SE48-CYGA>].

<sup>106</sup> 3 ANNALS OF CONG. 229 (1791). See Wurman, *supra* note 23 (manuscript at 14–20) (critiquing Mortenson & Bagley, *supra* note 8 (manuscript at 97–106)) for exhaustive

It is clear from the overall debates that some form of a nondelegation doctrine was recognized, even if its contours were not fully described. Had Sedgwick's resolution passed, the case for a strong nondelegation doctrine would have been much diminished, but since his motion was defeated, it remains uncertain whether the outcome turned on constitutional principles or simply on an issue of prudence—namely, since the map had already been laid out, why delegate the matter any further?

In dealing with this issue, that question is urgent because of the delegation's evident lack of any direction as to which towns should be included along the route of the established post roads and which should be excluded. That point let Representative Page in the 1791 debate offer this instructive *reductio ad absurdum*:

If the motion before the committee succeeds, I shall make one which will save a deal of time and money, by making a short session of it; for if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation; and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction . . . I look upon the motion as unconstitutional, and if it were not so, as having a mischievous tendency . . .<sup>107</sup>

Note the equivocation in the last phrase, precisely because the proposed motion did not go the extreme, but took a weaker position. His remarks, as emblematic of the general debate, however, beg for an explanation as to why everyone agrees with the unconstitutionality of the extreme position, even if it is not clear how far they are prepared to back off from it. The most powerful reason for condemning the outright transfer of power points to the following vice, namely, that the President could easily choose routes that excluded certain cities that Congress would have included. But that point need not be dispositive, for the President through delegation could have superior knowledge as to how all the pieces of the puzzle fit together and thus at a larger level establish a set of post roads that would conform to a general desire to stitch the nation together through a single system. And in any event, even Page would have to concede that any contracting done in making existing roads suitable as post roads would have to be left to the President as beyond the effective power of Congress.

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discussions on a nondelegation doctrine at the Founding. Section 1 of the Act set out the routes in one paragraph. See Post Office Act of 1792, ch. 7, § 1, 1 Stat. 232. The list of towns covered from Maine to Georgia is set out in Wurman, *supra* note 23 (manuscript at 14 n.76).

<sup>107</sup> 3 ANNALS OF CONG. 233–34 (1791).

In this case, everything is in equipoise. The Congress *might* have a better sense of its own preferences, but the President *might not* have any obvious agenda to deviate from the ideal solution. It is a close call either way, which is why the nondelegation dispute was not fully resolved. Indeed, it is evident from the specific provisions of the Post Office Act of 1792 that the mixed solution was preferred. The Act ran for thirty sections, in which it set out an elaborate administrative structure that at points eschewed delegation, but at other points embraced it.<sup>108</sup> Thus Section 1 of the Act contained a detailed account of all the post roads that should be established from Maine to Georgia.<sup>109</sup> But as comprehensive as that list was, it was not fully exhaustive, given Section 2, which states “[t]hat it shall and may be lawful for the Postmaster General to enter into contracts, for a term not exceeding eight years, for extending the line of posts . . . .”<sup>110</sup> On the issue of rates there is a similar level of exactitude in Sections 9 and 10, which set out with great particularity basic postage rates for delivery by land and sea.<sup>111</sup> Yet at the same time, Section 3 contains this broad delegation: “He shall also have power to prescribe such regulations to the deputy postmasters, and others employed under him, as may be found necessary, and to superintend the business of the department . . . .”<sup>112</sup> It would therefore be absurd to read this statute as if it were intended to preclude any level of departmental delegation. But by the same token, the level of specificity in portions of the statute show some concern with the delegation doctrine. No matter which way this evidence is interpreted, it would be hasty to conclude that any broader delegation of powers would have passed muster as a matter of course.

Yet there is enough in this Act to give some insight into subsequent developments, for with the advantage of hindsight, it should be clear that the results reached in 1792 were very dependent on scale.<sup>113</sup> The knowledge advantage of the executive branch dominates today given the increase in scale; it is no longer

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<sup>108</sup> Post Office Act of 1792, ch. 7, 1 Stat. 232.

<sup>109</sup> Post Office Act § 1.

<sup>110</sup> *Id.* § 2, at 233.

<sup>111</sup> *See id.* § 9, at 235, § 10, at 235.

<sup>112</sup> *Id.* § 3, at 234.

<sup>113</sup> The issue also arises in connection with impeachment. With a small Senate and large House, a trial by the full Senate makes sense, especially when the official impeached is the President. But with lower-level officials, it is highly costly, and hence rules that delegated the matter to a Senate panel, subject to oversight, passed muster. *See Nixon v. United States*, 506 U.S. 224 (1993). For context, see U.S. CONST. art. I, § 3, cl. 6 (providing that the “Senate shall have the sole Power to try all Impeachments,” which leaves it open whether the Senate as a whole has to sit). In *Nixon*, a divided court held up a system where the case was delegated in the first instance to a committee, with review by the entire Senate. *Nixon*, 506 U.S. at 224.

possible to run a single post road from Maine to Georgia—you need an elaborate lattice. Hence the case for delegation becomes overwhelming, but at the same time the risk of political favoritism is larger. At this point, more extensive delegation is necessarily accepted, but at the same time, in line with the general theory of agency costs, we should expect Congress to establish other procedures for oversight and audit that are intended to rein in abuse, which always arises in these settings. Such procedures do not make an appearance in the 1792 Act. Hence the newer arrangement should also pass muster because Congress itself could have no collective judgment as to the ideal route structure.

#### D. Delegation of Tariff Determinations

Among the central sources of revenue in the United States during the nineteenth century were tariffs and custom duties, which were explicitly authorized under Article I, Section 8, Clause 1, which gave Congress the power to “lay and collect . . . Duties, Imposts and Excises,” so long as these were uniform throughout the United States.<sup>114</sup> This protectionist system is not consistent with the classical liberal ideal of free trade, but its explicit textual authorization means that the only serious question is how to administer it, given that tariff determinations and adjustments have to be made for literally thousands of products that are often difficult to define, let alone classify.<sup>115</sup> There is clearly the most practical justification for the delegation of this power first by Congress to the President and through him to lesser officials charged with the determination of particular rates for particular classes of goods. This issue arose in the important case of *J.W. Hampton, Jr., & Co. v. United States*,<sup>116</sup> which dealt with a statute requiring administrators to make tariff adjustments within relatively limited boundaries. In *Hampton*, the administrator had the power to impose tariffs on foreign goods such that “the duties not only secure revenue, but at the same time enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States.”<sup>117</sup> The statute followed a mixed strategy because the basic delegation in question had to fall

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<sup>114</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>115</sup> See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (applying *Skidmore* deference to tariff classification of the United States Customs Service).

<sup>116</sup> 276 U.S. 394 (1928). See also *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (“That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”). For further explication, see DUBIOUS MORALITY, *supra* note 6, at 48.

<sup>117</sup> 276 U.S. at 404.

between four and six cents per unit and was subject to approval or disapproval by the President. Here is a case in which Congress has only a limited ability to engage in fine tuning of Madison’s “details” that this statute appears to embody, and the technical adjustments in this case appear to be subject to a formula that further limits the scope of administration discretion. Chief Justice William Howard Taft upheld this delegation of power, to an Article I court no less, saying: “It may be that it is difficult to fix with exactness this difference, but the difference which is sought in the statute is perfectly clear and perfectly intelligible.”<sup>118</sup>

That is just as it should be, given that there is a formula that can be used to determine the tariff within those limits. The principle here is indeed similar to that found in Roman law, where the requirement that the price be “certain” for the transaction to go forward did not require that the price be given in numerical form.<sup>119</sup> It was enough if a formula was supplied that allowed the price to be calculated once certain measurable variables were entered, such as the age and source of the wine. Just that mechanism is used today to allow people to calculate the sales price on certain items in uncertain market conditions. There is no sensible theory that says that a delegation of this sort should be rejected: all the expertise is downstream, and there is little risk of deviation from the main plan, especially when a judicial challenge is available in egregious cases under the principle of judicial review. The challenge that remains is what happens in the modern industrial age, which imposes far greater demands on the regulatory state.

### E. Delegation in the Modern Industrial Age

The challenges to the nondelegation principle become much more difficult to assess in the modern industrial age now that the tasks of government are far larger. The initial impulse on these issues comes first with the rate regulation cases that began to hit the courts in the post-civil war period.<sup>120</sup> With the rise of the railroads, it quickly became clear that competitive solutions were not always, even often, obtainable by market processes.<sup>121</sup> The root of the problem was the long-haul, short-haul inversion that arose because of the organization of the routes.<sup>122</sup> The most

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

<sup>119</sup> See DIG 18.7.1 (Ulpian, Sabinus 28).

<sup>120</sup> See, e.g., *Munn v. Illinois*, 94 U.S. 113 (1876).

<sup>121</sup> See, e.g., Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93, 94 (1994).

<sup>122</sup> *Long Haul-Short Haul Rate Discrimination*, ENCYCLOPEDIA.COM (Mar. 8, 2021), <http://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/long-haul-short-haul-rate-discrimination> [http://perma.cc/8FRM-X4AD].



famous example is that there are four different railroads that could shift and move freight and passengers from San Francisco to Chicago, but only one such railroad that could move traffic from Omaha to Kansas City. Given the multiple avenues on the long-haul lines, the prices tended to be bid down toward marginal cost. But given the inelastic supply on the short haul, the railroads could raise rates far above marginal costs, and these rates were still (as by definition) below what these shippers were prepared to pay for access to the system. It was therefore perfectly efficient to have these inversions, but it was also politically impossible to justify them. Hence the Interstate Commerce Act of 1887<sup>123</sup> (a huge deal at the time) adopted, as its core administrative standard, a principle that left little to the imagination, namely that the short-haul rates could not be higher than the long-haul rates of which they were a part.<sup>124</sup> That strategy forced rates up on the long haul to control the risk of rate inversions. Subsequent iterations of the Interstate Commerce Act, however, adopted direct ratemaking standards intended to keep rates of return at competitive levels.<sup>125</sup> Indeed that practice gave rise to a famous ratemaking difficulty that started with the *Minnesota Rate* cases,<sup>126</sup> in which the Supreme Court held that the desire (here expressed at the state level) to prevent the imposition of monopoly rates had to be policed in order to guard the railroads, and later other public utilities, from the risk of confiscation.<sup>127</sup> These issues arose under both state and federal law, and the former was not constrained by the nondelegation argument applicable to the federal Constitution any more than it was constrained to avoid delegation to various sorts of administrative agencies. Instead, state administrative law could impose limitations that could vary from state to

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<sup>123</sup> Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended at various sections of 49 U.S.C.).

<sup>124</sup> See also *id.* at 380 (“That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance . . . .”). The statute allowed for exceptions to the basic rule in “special cases,” which obviously makes the delegation more questionable. One way in which this flexibility was recognized was in cases of competition on the short-haul route. See *Interstate Com. Comm’n v. Ala. Midland Ry. Co.*, 168 U.S. 144, 165 (1897).

<sup>125</sup> See, e.g., Hepburn Act, ch. 3591, 34 Stat. 584 (1906); see also Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539.

<sup>126</sup> *Chi., Milwaukee & St. Paul Ry. Co. v. Minn. ex rel. R.R. & Warehouse Comm’n*, 134 U.S. 418 (1890).

<sup>127</sup> The theme was further developed in *Smyth v. Ames*, 169 U.S. 466, 470 (1898). See also *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944).

state.<sup>128</sup> Given the nature of the problem, some degree of delegation had to be tolerated. No one thought that the Congress could set out a precise formula to deal with these complex ratemaking issues. Overall, the federal constitutional law that developed to deal with these problems had sufficient integrity that the modern condemnation about the runaway administrative state did not have much traction in that period.

The same cannot be said, however, of the far more ambitious problems under the New Deal which, if anything, were the obverse of those of the earlier rate making cases. Thus, whether one speaks of the Motor Carrier Act of 1935,<sup>129</sup> the National Labor Relations Act of 1935,<sup>130</sup> the Fair Labor Standards Act of 1938,<sup>131</sup> the Communications Act of 1934<sup>132</sup>—but not the Securities Act of 1933,<sup>133</sup> nor the Securities Exchange Act of 1934,<sup>134</sup> which were primarily antifraud acts—a different problem was faced. With this vast expansion of federal power, it was now necessary for administrative bodies, such as the National Labor Relations Board, to undertake such tasks as determining the proper bargaining unit of union elections and the proper definition of an hour for minimum wage and overtime regulation under the Fair Labor Standards Act. Similarly, the Interstate Commerce Commission had to determine the kinds of freight that different forms of vehicles could take over interstate highways.<sup>135</sup>

This spate of new powers drove two additional challenges under the nondelegation doctrine, most notably in *A.L.A. Schechter Poultry Corp. v. United States*.<sup>136</sup> There, the Schechters were indicted for acts that were said to be in violation of the Code of Fair Competition for the Live Poultry Industry in the New York Metropolitan area,<sup>137</sup> which was promulgated under Section 3 of the

<sup>128</sup> For an exhaustive compilation of state law reactions to the nondelegation doctrine, see Benjamin Silver, *Nondelegation in the States*, (Dec. 31, 2020) (unpublished manuscript) (on file with author).

<sup>129</sup> Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543.

<sup>130</sup> National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169).

<sup>131</sup> Fair Labor Standards Act, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 201).

<sup>132</sup> Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151).

<sup>133</sup> Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa).

<sup>134</sup> Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78qq).

<sup>135</sup> See Interstate Commerce Act of 1887, ch. 104, § 1, 24 Stat. 379, 379 (codified as amended at various sections of 49 U.S.C.).

<sup>136</sup> 295 U.S. 495 (1935).

<sup>137</sup> See *id.* at 519.

National Industrial Recovery Act.<sup>138</sup> One ground on which the Court rejected the Codes was the view that the Commerce Clause governed only the interstate legs of the journey between New Jersey and New York, and did not extend to ground transportation by separate vehicle in New York state alone.<sup>139</sup> That argument did not have a long shelf life and was overturned two years later in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*<sup>140</sup>

The fate of the nondelegation doctrine is more complex. In *Schechter Poultry*, Chief Justice Charles Evans Hughes noted that the Codes did not use “[u]nfair competition” in its common law sense, which embraced two distinct and well-recognized torts: passing off one’s own goods as if they were made by another (superior) competitor, and falsely disparaging the goods of a competitor to make one’s own goods look better.<sup>141</sup> The reason that banning these actions would have met any standard of nondelegation is that they relied explicitly on well-established common law causes of action. But the new use of the term unfair competition bore no relationship to its common law cousin, because Congress deemed the common law definition “too narrow” for its purposes.<sup>142</sup> So at this point, a statement of what a term did not mean was not an articulation of what it did mean, and Justice Hughes took the position that no court should be put, in the course of resolving future cases, in the position of rescuing a statute that did not provide a workable definition of what conduct it covered. One of the key features of any criminal statute is that it gives fair notice of the covered offenses. So, the sword quickly struck:

Section 3 of the Recovery Act . . . is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in section 1.<sup>143</sup>

Exactly what is wrong with that delegation? First, the analysis did not change because the President had “approved the

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<sup>138</sup> See *id.* at 521; see also National Industrial Recovery Act, Pub. L. No. 73-67, § 3(a), 48 Stat. 195, 196 (1933) (authorizing the President to “approve a code or codes of fair competition”).

<sup>139</sup> See 295 U.S. at 543.

<sup>140</sup> See 301 U.S. 1, 37–38 (1937).

<sup>141</sup> See 295 U.S. at 531–32.

<sup>142</sup> See *id.* at 532.

<sup>143</sup> *Id.* at 541.

code by an executive order.”<sup>144</sup> Instead, what drove the analysis was the scope of the delegation on matters including wage and hour laws—whose constitutionality at that time was not yet established—as well as various rules governing the slaughter and preparation of the animals for market, and the provision as to the kind of animals (including “sick chickens”) that could be sold in commerce. And in this case, Justice Cardozo described the actions as “delegation running riot” and, echoing Locke, noted that “[n]o such plenitude of power is susceptible of transfer.”<sup>145</sup> The point here should be taken literally: it is highly likely that the strong pro-New Deal Congress was delighted with the flurry of presidential activity because of its welcome extension of progressive principles beyond the hoary conceptions of the common law, which at least at that time held some doubt. The correct point here is not to mock the decision as a lone outcast in a long history of cases. Rather, it is to make the candid judgment that Justice Hughes was right in finding that this was an unsustainable delegation of power that should not survive.

Indeed, in one sense, this kind of broad delegation surely did survive: the delegation issue arose in oblique fashion the next year in the well-vetted case of *United States v. Curtiss-Wright Export Corp.*<sup>146</sup> In May 1934, both Houses of Congress passed a joint resolution that, in explicit terms, strongly empowered the President. The resolution stated that if he thought that a prohibition of a sale of arms to parties involved in the armed conflict in Chaco (a border war between Bolivia and Paraguay) would reestablish peace, he could impose by proclamation a prohibition on the sale of arms to the warring parties.<sup>147</sup> As by evident prearrangement, that same day President Roosevelt issued a proclamation to that effect,<sup>148</sup> which he then revoked in November 1935.<sup>149</sup> In the interim, defendant Curtiss-Wright violated the prohibition, for which a criminal prosecution followed, but only after Roosevelt’s revocation of the proclamation.<sup>150</sup> The resolution was not legislation, and the proclamation was not the signing of a bill into law.

Curtiss-Wright defended on the ground that the particular resolution created an improper delegation of power to the President

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<sup>144</sup> *Id.* at 525.

<sup>145</sup> *Id.* at 553 (Cardozo, J., concurring).

<sup>146</sup> See 299 U.S. 304, 314 (1936).

<sup>147</sup> See *id.* at 311–12.

<sup>148</sup> See *id.* at 311.

<sup>149</sup> See *id.* at 313.

<sup>150</sup> See *id.* at 314.

because it conferred “unfettered discretion”<sup>151</sup> in violation of the nondelegation doctrine, whose existence was taken for granted in the opinion. But Justice Sutherland responded: “Whether, if the Joint Resolution had related solely to internal affairs, it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine.”<sup>152</sup> Note that this resolution was not legislation, but a directive to the President on how he might proceed *if* he chose to proceed. The President’s response was not a signing of a bill, but the issuance of a proclamation—leaving open the question of whether the President, in his extensive (if undefined) control over foreign affairs, needed to have the backing of a congressional resolution in the first place, or whether he could have engaged in that action on the strength of his own powers alone.<sup>153</sup> Sutherland chose the second route, by announcing that the President was this nation’s “sole organ” in international relations.<sup>154</sup> The joint resolution was thus superfluous, and the application of the nondelegation doctrine necessarily disappeared.

But how? Justice Sutherland’s main point was that foreign affairs are governed by entirely different principles than domestic affairs because the President’s powers over foreign affairs did not come from Congress, but were obtained in an entirely different fashion: “As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.”<sup>155</sup> How that happened was never explained, and if anything, *Federalist Paper No. 69* takes the position that the President as Commander-in-Chief of the army and navy has far more limited powers than either the English Crown or a state governor.<sup>156</sup> The absolutist position of

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<sup>151</sup> See *id.* at 315.

<sup>152</sup> *Id.*

<sup>153</sup> See *id.* at 319–20.

<sup>154</sup> See *id.*

<sup>155</sup> *Id.* at 316.

<sup>156</sup> See THE FEDERALIST NO. 69, at 357 (Alexander Hamilton) (Gideon ed., 2011)

The president is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British king extends to the *declaring* of war, and to the *raising* and *regulating* of fleets and armies; all which, by the constitution under consideration, would appertain to the legislature.

Hamilton later claims that in some instances the President is inferior in power to state governors. See *id.* at 360.

*Curtiss-Wright* is an evident source of uneasiness, and the decision was cut back to an uncertain extent in the 2015 decision of *Zivotofsky v. Kerry*,<sup>157</sup> in which Justice Kennedy issued an *ipse dixit* that backtracked from the President's claim of exclusive authority: "This Court declines to acknowledge that unbounded power."<sup>158</sup>

Yet, now suppose that the delegation issue arose in a domestic context where (by hypothesis) some legislative act was necessary for its exercise. Could the President decide, for example, to intervene in a violent labor dispute by prohibiting the sale of guns, if he thought that conditions warranted it? It is a very close case indeed, and typically it is not one that would arise, in part because state officials have a general charge to keep order and would take over the situation. Or in most cases, legislation that contains far more particularity—allowing the protection of federal buildings against violence—would take over. This point is explored later, in a discussion of the *Steel Seizure* case which held that the President had exceeded his power.<sup>159</sup>

The delegation issue, however, arose again in *National Broadcasting Co. v. United States*,<sup>160</sup> where the Supreme Court was asked to construe the phrase "public interest, convenience, or necessity" as it appeared in the Communications Act of 1934.<sup>161</sup> At this point, the difference between *Schechter Poultry* in 1935 and *National Broadcasting Co.* in 1943 is that the common law benchmarks on which Justice Hughes and Justice Cardozo had relied were nowhere to be found. Now a broad reading of the statute was par for the course precisely because of the demotion of common law notions. Of course, it was still possible to read the 1934 Act as if it required that the government organize a bidding system whereby various firms could compete for various parts of the spectrum in auctions organized by the United States.<sup>162</sup> At this point, it would be required to set up standards for interference between neighboring frequencies (a problem that gets less serious as transmission improves), and to create rules for bidding, a task that is better done by an agency than by Congress. The agency has more knowledge with little incentive or ability to skew the bidding or interference rules in favor of one party. Here, a system of *ex post* challenges on grounds of bias is

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<sup>157</sup> 576 U.S. 1 (2015).

<sup>158</sup> *Id.* at 20.

<sup>159</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 614 (1952).

<sup>160</sup> 319 U.S. 190, 209 (1943).

<sup>161</sup> See *id.* at 214–18.

<sup>162</sup> For this suggestion, see R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 17–24 (1959).

likely to work far more efficiently than an effort to invite judicial review before the rules are allowed to go into effect.

The difficulty here was that Justice Frankfurter, the indefatigable progressive, could not stop with such modest ambitions. A year before Friedrich Hayek published *The Road to Serfdom*—which defended the view parallel to that taken in this Article, that it is dangerous to do too much with administrative control<sup>163</sup>—Justice Frankfurter, suffering no doubts, wrote:

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.<sup>164</sup>

Justice Frankfurter committed the basic economic blunder of assuming that shortages could not be resolved by competitive bids, indicating that comparative hearings should be used to resolve the competing applications in line with the basic scheme.<sup>165</sup> But in this instance, how does any conscientious agency best determine the composition of the traffic? The FCC dithered over the issue until 1965, when it tried to plug the holes in the record by giving, without weights, the full seven relevant issues for deciding these hearings: (1) diversification of control of the media of mass communications, (2) full-time participation in station operation by owners, (3) proposed program service, (4) past broadcast record, (5) efficient use of frequency, (6) character, and (7) other factors.<sup>166</sup>

It should be evident that the level of discretion given here is as great as the unconditional defenders of delegation think, and it is equally clear that the standard here does not have the perfectly intelligible features of the tariff determinations done in *Hampton*.<sup>167</sup> Here, there is little guidance from the statute and immense discretion over the entire process, which should doom

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163 See generally FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 1 (1944).

164 *Nat'l Broad. Co.*, 319 U.S. at 215–16.

165 See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 337–38 (1945).

166 For the historical development, see KPMG LLP, *Final Report: History of the Broadcast License Application Process*, FCC 4–5 (Nov. 2000), [http://transition.fcc.gov/opportunity/meb\\_study/broadcast\\_lic\\_study\\_pt1.pdf](http://transition.fcc.gov/opportunity/meb_study/broadcast_lic_study_pt1.pdf) [<http://perma.cc/7AKC-DMJ5>].

167 See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405–09 (1928).

this statute on the nondelegation doctrine because the nonmarket system of allocation does not and could not work. But once the progressive mindset takes over, the statute is unquestionably constitutional, which means that the vague standard is as good as can be found given the statutory ambition, should be treated as a feature, not a bug of the system. Hence any aggressive application of the nondelegation doctrine becomes a thing of the past. The basic plan of this statute is to encourage indeterminate property rights, at which point, the delegation doctrine has to expand in scope to be sufficient to handle the situation in which constitutionality was beyond dispute. Put otherwise, there are no principled limits on delegation to administrative agencies when the property rights model of business organization is rejected. The invocation of the nondelegation doctrine should not be used as a backdoor device to undermine the substantive determination on the merits of the statute, no matter how unsound that constitutional determination might be. As the substantive law expands, the nondelegation doctrine of necessity recedes.

Jumping ahead, the next quantum leap in delegation arises in *Mistretta v. United States*, which addresses delegation in the criminal context.<sup>168</sup> Here, the progressive mindset has proved to be much more concerned with the traditional procedural protections. Therefore, modern cases dealing with the assistance of counsel, self-incrimination, cross-examination, and searches and seizures are not examined under rational basis. Rather, they often deal with quite specific protections, such as the *Miranda* rules for the investigation of criminal subjects.<sup>169</sup> But as a general matter, both in civil and in criminal cases, it is easier to define the violation than it is to specify the sanction for its occurrence, especially when modern notions of exculpation broaden the relevant inquiry. Phrases like “in the sound discretion of the trial judge” are rife, and they persist because whether the issue is damages or injunctions, fines or imprisonment, the choices are far from ideal. In the criminal law, it is easy to see how the exercise of discretion need not only be unsound, but it can also be inconsistent across cases. This piles concerns of equal treatment on top of substantive fairness, which leads to strong pressures to institute a sentencing commission of sorts to improve both matters. The ground rules of that sentencing commission are complex themselves, and rules that

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<sup>168</sup> 488 U.S. 361, 371–72 (1989).

<sup>169</sup> See *Miranda v. Arizona*, 384 U.S. 436, 439 (1966).



they generate often introduce new anomalies to replace the old.<sup>170</sup> A divided Supreme Court sustained this exercise against an application of the nondelegation doctrine, invoking the intelligible principle test of *Hampton* to address these difficulties.<sup>171</sup> Mortenson and Bagley applauded the decision, writing, “By the founders’ lights, *Mistretta v. United States* was thus rightly decided: even if ‘rulemaking power originates in the Legislative Branch,’ it ‘becomes an executive function’ at the moment it is ‘delegated by the Legislature to the Executive Branch.’”<sup>172</sup> Current delegation is strikingly different from any form of delegation found in the early cases, which deal with revolutionary war pensions, patents or post roads, all of which were bounded inquiries conducted toward satisfying a stated statutory end.<sup>173</sup> The guidelines did—and did not—work, but *United States v. Booker* pulled back from *Mistretta* explicitly to remove the constitutional doubts that excessive delegation gives to mandatory rules, so much so that I regard *Booker* as qualifying *Mistretta*, presumably on nondelegation grounds.<sup>174</sup> The solution seems sensible, for it gives some assistance over uniformity and fairness even at the cost of letting the occasional fringe judge systematically go outside guidelines. Once again, some tradeoffs are needed.

#### F. Gatekeeper function: *Gundy* After *Auer*

Even after the massive expansion of delegated authority to accommodate vague New Deal directives, do any limitations on delegated powers survive decisions like *National Broadcasting Co. v. United States*? The answer is yes, for many key issues of delegation do not involve trade-offs among intangibles that require administrative actions. In particular, there are still key “gateway” provisions that only ask the simple question of whether certain

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<sup>170</sup> Here are the ground rules: The Commission “is established as an independent commission in the judicial branch of the United States.” 28 U.S.C. § 991(a). It has seven voting members (one of whom is the Chairman) appointed by the President “by and with the advice and consent of the Senate.” *Id.* “At least 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States.” *Id.* “Not more than four members of the Commission shall be members of the same political party . . .” *Id.* The Attorney General, or his designee, is an *ex officio* nonvoting member. *Id.* The Chairman and other members of the Commission are subject to removal by the President “only for neglect of duty or malfeasance in office or for other good cause shown.” *Id.* Except for initial staggering of terms, a voting member serves for six years and may not serve more than two full terms. 28 U.S.C. § 992(a)–(b).

<sup>171</sup> *Mistretta*, 488 U.S. at 372.

<sup>172</sup> Mortenson & Bagley, *supra* note 8 (manuscript at 56) (citing *Mistretta*, 488 U.S. at 386 n.14).

<sup>173</sup> *See id.*

<sup>174</sup> *United States v. Booker*, 543 U.S. 220 (2005).

types of individuals or projects fall within the scope of the statute. This very issue arose recently in the much-mooted decision of *Gundy v. United States*,<sup>175</sup> where the question was whether under the Sex Offender Registration and Notification Act (SORNA),<sup>176</sup> Congress could confer authority on the Attorney General to decide whether SORNA's registration requirements applied to sex offenders who committed their offenses prior to the passage of the statute. SORNA also delegated to the Attorney General the ability to prescribe rules for sex offender registration. This raised a distinct problem given that the government would be required to devise ways to notify individuals—many whom had been outside the prison system for years—that they were subject to a new registration requirement that carried with it criminal penalties.

It should be evident that there is a sharp distinction between the two delegated tasks. The second—giving notice to past offenders and requiring their registration—looks just like filling in the details of a scheme. But the same cannot be said of the first decision dealing with the proposed retroactivity of the criminal law. That decision raises not only the added administrative burden, but questions of whether to override a presumption against retroactive legislation given that these past offenders may still be recidivists. Thinking through the moral, practical, and constitutional dimensions on retroactivity is cut from a different cloth from devising notice provisions. Any legislature would be well advised to study these issues in detail. The question then is whether that ultimate decision could be delegated to the Attorney General, especially when he need not (and in fact did not) make any study of any sort. In principle, the right answer is clear enough: if the Congress cannot decide whether or not SORNA should be made retroactive, then they should not pass any provision dealing with the question. They cannot punt it over to the Attorney General any more than they could let him decide, for example, whether the statute should apply to both women and men offenders.

Justice Kagan did not address this simple solution. Instead, she sustained the delegation by reaching the dramatic conclusion that the operation of the entire administrative state was at risk if this statute were struck down on nondelegation grounds:

Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the

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<sup>175</sup> 139 S. Ct. 2116, 2121 (2019).

<sup>176</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, §§ 101–155, 120 Stat. 587 (codified as amended at 34 U.S.C. §§ 20901–20962).

need to give discretion to executive officials to implement its programs. Consider again this Court's long-time recognition: "Congress simply cannot do its job absent an ability to delegate power under broad general directives."<sup>177</sup>

Yet the differences between the simple up-down decision in *Gundy* and the dubious stretch of administrative power in *Mistretta* should require no explanation. As noted earlier, *Mistretta* was qualified and may, in some interpretations, have been overturned in *Booker*, but even if it was not, it is worlds apart from *Gundy*, which could be reversed without bringing the administrative state to a halt. Yet unfortunately, Justice Kagan never explored a narrower argument that would allow the Attorney General to set the registration requirement, without also being allowed to answer the gatekeeper question of whether the statute should extend to prior offenders. Indeed, *Gundy* comes very close to Locke's extreme hypothetical of the outright delegation of the entire legislative power to an official inside the executive branch.<sup>178</sup> After all, by that logic, the government could apply SORNA to all persons whether or not they were in prison when the statute was enacted, resulting in the destruction of the structural separation between the legislative and executive branch. This is not a case where a functional analysis calls for delegation. There is no new downstream information that the Attorney General can gather that the legislature cannot. And there is a serious risk that the Attorney General's decision could skew the outcome in a way that the majority did not approve. Hence a narrow nondelegation decision preserves the doctrine without calling into question any of the major delegation statutes of either the founding period or the progressive age.

None of this logic was able to deter Mortenson and Bagley, who continue to insist that the line between legislation and the executive power cannot be drawn.<sup>179</sup> But their account never explains what is left of the primary distinction between Article I and Article II of the Constitution. Rather, they consistently reject the account championed by Justice Gorsuch and others that legislation has "to mean the power to adopt generally applicable rules of conduct governing future actions by private persons."<sup>180</sup> That account contains a serious weakness because in *Gundy* the proposition that SORNA applies to sexual offenders who were released from custody has the same generality whether propounded by statute or regulation. But to the requirement of

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<sup>177</sup> *Gundy*, 139 S. Ct. at 2130 (citing *Mistretta*, 488 U.S. at 372).

<sup>178</sup> See *supra* text accompanying note 31.

<sup>179</sup> See Mortenson & Bagley, *supra* note 8 (manuscript at 31).

<sup>180</sup> *Id.* (citing *Gundy*, 139 S. Ct. at 2133).

generality must be added the proposition that the Attorney General could *not* on his own motion require any sexual offenders to register with his office, even if he can fill in the details on how the registration system should work.

This is not a novel position. Just this understanding of the limitations on presidential power was articulated in the *Steel Seizure* case, brought against Charles Sawyer, Truman's Secretary of Commerce.<sup>181</sup> Limitations on the executive are certainly embodied in the decisions of all the Justices who questioned the power of President Truman to seize on his own initiative the steel plants during the Korean War on the ground that it was necessary to keep production going in the face of a strike.<sup>182</sup> Justice Frankfurter had taken the view that the Labor Management Act of 1947 had considered and rejected the idea of vesting the President with this power, and that such power could not be read into the President's personal powers derived solely from holding the office.<sup>183</sup> And Justice Jackson famously concluded that the President's power was "at its lowest ebb" when it was against the will of the Congress.<sup>184</sup> Yet the assorted statements from notable political theorists that Mortenson and Bagley cite include such heavyweights as Montesquieu<sup>185</sup> and Rousseau<sup>186</sup>, and constitutional founders who do not address explicitly the architectural split between Article I and Article II. And even their citation to Locke ignores Paragraph 141, cited above in favor of relying on the anodyne Section 143, which talks about standing laws and arbitrary decrees, without addressing the separation of powers implicit in his discussion of the legislative power in Paragraph 141.<sup>187</sup> Indeed, with all the

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<sup>181</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582–84 (1952).

<sup>182</sup> *Id.* at 588–89.

<sup>183</sup> *Id.* at 599 (Frankfurter, J., concurring).

No room for doubt remains that the proponents as well as the opponents of the bill which became the Labor Management Relations Act of 1947 clearly understood that as a result of that legislation the only recourse for preventing a shutdown in any basic industry, after failure of mediation, was Congress.

*Id.*

<sup>184</sup> *Id.* at 637 (Jackson J., concurring). Low ebb does not mean, however, that the President always loses. Indeed, in *Zivotofsky v. Kerry*, 576 U.S. 1, 14 (2015), the majority of the Court held that the President exercised the exclusive power to recognize foreign nations on an issue where there is a genuine constitutional gap, resting on a theory of consistent practice over the years. But note that recognition is not a legislative act.

<sup>185</sup> Mortenson & Bagley, *supra* note 8 (manuscript at 32 n.106) (citing Montesquieu Book 11, Chapter 6) ("The other two powers may be given rather to magistrates or permanent bodies, because they are not exercised on any private subject; one being no more than the general will of the state, and the other the execution of that general will[.]").

<sup>186</sup> *Id.* (citing JEAN-JACQUES ROUSSEAU, SOCIAL CONTRACT (1762)).

<sup>187</sup> *Id.* (citing JOHN LOCKE, SECOND TREATISE ¶ 143 (1689)).

huffing and puffing, these attacks miss the narrow ground by which *Gundy* can be attacked, namely that it seeks to delegate a simple dichotomous decision on statutory coverage that raises none of the tradeoffs required under other modern Progressive statutes such as the Federal Communications Act. Those delegations remain valid under the analysis made here, at least if these statutes remain constitutional, which in my view they should not.

The fear with respect to excessive delegation expressed first by Mortenson and Bagley, and subsequently by Parrillo is all the more remarkable because neither of them—nor for that matter, Wurman—cite the one case that was correctly under siege in *Gundy*, namely the extravagant decision of Justice Scalia in *Auer v. Robbins*,<sup>188</sup> which was spared constitutional oblivion by Justice Kagan's ingenious reinterpretation in *Kisor v. Wilkie*.<sup>189</sup> In one sense, *Auer* is not a delegation decision at all, because the Congress did not ask the Secretary to decide whether to include “executive, administrative or professional employees” as protected workers, which would have been an impermissible delegation.<sup>190</sup> It is even worse, because the Secretary of Labor unilaterally extended the scope of the Fair Labor Standards Act in the teeth of statutory language that required the other result.<sup>191</sup> That said, *Auer* and *Kisor* are constitutional opposites. The issue in *Kisor* was a narrow and technical question that dealt with the award of disability benefits for an ex-marine who suffered combat-related injuries. The particular statutory phrase at issue was whether there were “relevant official service department records” which should have been considered in his case for disability benefits.<sup>192</sup> The key issue was defining “relevant.”<sup>193</sup> At one level, the case is a pure question of statutory construction that the Court could decide on its own, given that the text of the Administrative Procedure Act requires these questions of statutory construction be decided *de novo*.<sup>194</sup> After the legal determination, the VA, in the ordinary course of business, can make a factual determination of when the various

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<sup>188</sup> 519 U.S. 452 (1997). For a more detailed discussion, see DUBIOUS MORALITY, *supra* note 6, at 134–35.

<sup>189</sup> *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

<sup>190</sup> *Auer*, 519 U.S. at 454, 461.

<sup>191</sup> *See id.* at 461.

<sup>192</sup> *Kisor*, 139 S. Ct. at 2409.

<sup>193</sup> *See id.*

<sup>194</sup> 5 U.S.C. § 706 (“To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”). *Contra* *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (which never cites the operative text).

injuries arose. This last delegation is required by the general test: there is better downstream information that would be useful to handle individual cases, without any fear of systematic bias. But there is no reason to delegate down to the agency questions that are properly left to judicial interpretation.

Nonetheless, *Kisor* served as a jumping-off point from which to examine the judicial deference afforded to federal agencies in interpreting the language of federal statutes in the context of the Department of Labor's unilateral decision to expand the jurisdiction of the Fair Labor Standards Act. *Auer* involved the question of the proper scope of the Fair Labor Standards Act, which provides first that the minimum wage and overtime provisions should apply to employees, subject to an exception that excludes "bona fide executive, administrative, or professional" employees from the overtime provisions.<sup>195</sup>

During the Clinton Administration, Secretary of Labor Robert Reich reclassified police sergeants and lieutenants as ordinary employees, equivalent to the patrolmen whom they were charged to supervise. Justice Scalia applied extreme deference to sustain this position that runs contrary to both the applicable statutory context and ordinary usage. The deference in this case extended coverage far beyond any sensible reading of the statute, allowing the Secretary to rope into the statute individuals who did not belong there. Justice Kagan (who also wrote in *Gundy*) knew that the Scalia opinion was highly vulnerable, so she overruled the case, de facto, by announcing that deference should only apply after every effort was made with traditional statutory tools to find the correct meaning of the phrase—at which point that outcome in *Auer*, as well as similar coverage cases, should be read as if it were a tantamount violation of the nondelegation doctrine. Justice Kagan wrote, "[f]irst and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous," and she added that "before concluding a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction."<sup>196</sup> So once again, *Auer*, like *Gundy*, is indefensible (as a purported delegation) even in a regime that accepts the delegations found permissible in *National Broadcasting Co. v. United States*,<sup>197</sup> and perhaps even *Mistretta*.

There is a double irony here. The progressives strongly backed *Auer* and its progeny, but they are deeply opposed to

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<sup>195</sup> 29 U.S.C. § 213(a)(1).

<sup>196</sup> *Kisor*, 139 S. Ct. at 2415.

<sup>197</sup> 319 U.S. 190 (1943).

*Gundy*.<sup>198</sup> Indeed, *Gundy* was represented by the Stanford Law School Supreme Court Legal Clinic while the Trump Administration's Deputy Solicitor General Jeffrey Wall defended SORNA.<sup>199</sup> Nothing in the principle of separation of powers calls for any distinction between civil and criminal cases. But if there were any such distinction, then *Gundy* should be subject to greater scrutiny than *Auer* because the requirements of notice are always stronger in the criminal context. But the correct solution for progressives as well as classical liberals is the nondelegation principle, which blocks both *Auer* and *Gundy*. Both cases set policy on basic coverage while neither fills in the details (valuation and administration). The line at the founding is the same line today.

## V. CONCLUSION

The basic rule against sub-delegation has its origins in private law, dating back to Roman times. Yet an absolute prohibition would make it impossible for people to form partnerships or other kinds of complex associations, all of which may require multiple levels of delegation. What is true of private firms is also true within the public sector. Congress itself receives delegated power from the people, but routinely makes further delegations down to particular agencies. There is no other organizational structure that could allow any set of general legislated principles to be applied to particular cases. In both these settings, therefore, the task is to find ways to allow for delegation, but to control for the potential of abuse, either by the party who makes the delegation or, what is relevant here, the party to whom that delegation is made. Controlling for abuse involves complex trade-offs in an effort to minimize the two types of error that always arise under conditions of uncertainty: blocking a delegation that should be permitted and permitting a delegation that should be blocked. There is no single simple strategy that deals with these problems, so every legal system must adopt mixed strategies that rely on some combination of ex ante and ex post sanctions.

This essay has explored how these two sanctions mix, first by dealing with the private delegation issues, which in turn become a template by which to analyze the delegation problem under

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<sup>198</sup> Indeed, there was not a single amicus brief in support of the government, with both progressive and libertarian organizations urging reversal. See *List of 29 Filings for Gundy v. United States*, WESTLAW, [https://1.next.westlaw.com/RelatedInformation/I90a2c403933011e99b14f2ee541cf11a/riFilings.html?docSource=01b390dec9f64aa5beb0845fdb9b0c81&pageNumber=1&facetGuid=hc78d6806e458f19c4b8a254945fcadea&transitionType=ListViewType&contextData=\(sc.Default\)](https://1.next.westlaw.com/RelatedInformation/I90a2c403933011e99b14f2ee541cf11a/riFilings.html?docSource=01b390dec9f64aa5beb0845fdb9b0c81&pageNumber=1&facetGuid=hc78d6806e458f19c4b8a254945fcadea&transitionType=ListViewType&contextData=(sc.Default)) [http://perma.cc/2TJG-6VJK].

<sup>199</sup> *Gundy*, 139 S. Ct. at 2118.

American constitutional law. The basic model asks two questions. First, can the delegatee take advantage of knowledge about a particular case that is not available to the principal? Where it is true, the delegation should be encouraged. Second, is there a danger that the delegatee will adopt a substantive position at odds with the general program set out by the principal? The principal could be a board of directors of a corporation or association, or the United States Congress.

In general, the presumption should be set in favor of allowing delegation to proceed, but subject to this critical caveat: in an individual case, the government's decision could be challenged after the fact, on the grounds that it exceeds the proper scope of delegation. But in an important class of cases, the ex-ante prohibition of delegation should be implemented. These include cases where the delegated party seeks to expand (or contract) its jurisdiction in ways that are inconsistent with the terms of the original grant, or allow them to make critical decision that the principal could have made with equal dispatch.

In general, relatively few challenges should succeed on these grounds. That result holds not because there are no principled limitations on the delegated powers of the agent, but, rather, because these limitations are routinely observed. That basic insight informs the analysis of key legislative actions during the Founding period, where delegation to executive branch officials was commonly and correctly used in cases involving patents, pensions, post offices, land recordations, and taxes that required the application of general principles to particular cases. But it is one thing to show that these delegated actions took place, and quite another to show that they exceeded appropriate limitations, usually by consciously defying the norms set out in the basic legislation.

Accordingly, the formulation offered, most notably by Chief Justice Marshall, in *Wayman v. Southard*<sup>200</sup> is that the legislature sets the basic parameters while the executive or administrator fill in the details. This is not an empty proposition that allows any and all tasks to be shifted back and forth between legislative and executive officials either "easily" or "readily" as Mortenson and Bagley claim. Rather, in all cases it takes legislation to get the process going, and requires the executives to follow the basic prescription, without adding or eliminating any of its requirements.

That basic prohibition works as well in modern times as it did in the Founding period. What differs between the pre- and post-New Deal constitutions is the specificity of the terms of the

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<sup>200</sup> 23 U.S. 1 (1825).



mandates that are allowed. In the earlier period where the tasks of government were more clearly confined to land grants, patents, post offices, tariffs and the like, these delegations were quite limited so that the basic nondelegation principle was rarely tested. But moving onto the Progressive Era, the aims of government expanded for two reasons: first the scope of federal power under the Commerce Clause expanded, and second the limitations on government power, at both the federal and state level, to regulate economic liberties or private property were largely erased. Together these developments gave space for major government initiatives that require the operation of the administrative state. Hence, either executive branch officials or independent agencies had to bear an ever-larger fraction of the work under broad, but necessarily vague, formulas such as “public interest, convenience, or necessity.”<sup>201</sup> The only way those delegations could be attacked is to strike down the basic scheme on constitutional grounds, which was far more common when the Commerce Clause was narrowly read and economic liberties and private property enjoyed greater protection. Those days are gone, and with their passing the set of delegations necessarily had to increase. It would, moreover, in my view be grossly improper to try to use the back-door tactic of the nondelegation doctrine to undermine the New Deal synthesis on both federal power and individual rights. Those doctrines should be overruled (as I have long urged) explicitly, or kept. And the scope of the delegation doctrine should be determined by the chosen set of constitutional principles, not otherwise. But even when these constitutional changes are given full rein, there still comes a point at which the legislature sets the mission, and the executive fills in the details. The misguided operations of the FCC may still be protected, but by the same token the sprawling delegations of *Mistretta* can be blocked and the bald delegation in *Gundy* can be undone. As such the nondelegation doctrine survives, but in the end of the day, it does not flourish as a dominant constraint on governmental power.

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<sup>201</sup> *Nat'l Broad. Co.*, 319 U.S. at 215.