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Dimensions of Delegation:
Constitutional Limits on the Administrative State
from *Schechter Poultry* to *American Trucking*

Cary Coglianese[1]

The nondelegation doctrine has mattered more in U.S. constitutional history for what courts have *not* done with it than for what they have. This doctrine, which ostensibly constrains Congress in its ability to delegate rulemaking authority to administrative agencies, has been fundamental to the modern administrative state mainly because the Supreme Court has almost never invoked it to invalidate congressional legislation authorizing rulemaking power by executive officials. With the exception of the Court's disapproval of the National Industrial Recovery Act in 1935,[2][3] the Court has rejected all other challenges to legislation based on the nondelegation doctrine,[4] leading various academic commentators to surmise that the doctrine is "dead,"[5] "moribund,"[6] or at least a "failure."[7]

As a purely formal matter, the nondelegation doctrine has been widely understood to require that any statute which authorizes agencies to make rules and carry out law must contain an "intelligible principle" to cabin the exercise of governmental authority.[8] But for decades the Supreme Court has upheld a variety of statutory authorizations that have been accompanied by principles that seem far from "intelligible" in any ordinary sense—such as those of "public interest, convenience, and necessity."[9] As the Court itself has noted, since 1935 it has "upheld,

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[2] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S.
[3] (1935).

[4] In one other case, the Court has held unconstitutional the delegation of authority to private parties. Carter v. Carter Coal Company, 298 U.S. 238 (1936). But the Court's underlying reasoning in that case sounded in due process more than the nondelegation doctrine.

[5] *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. Chi. L. Rev. Dialogue 393, 419 (2015) ("After the Court's unanimous decision [in *Whitman v. American Trucking*], it would be fair to say this of the nondelegation doctrine: dead again").

[6] *See* Nat'l Cable Television Ass'n, Inc. v. United States, 415 U.S. 352, 352–54 (1974) (J. Marshall concurring) (describing the nondelegation doctrine that "was briefly in vogue in the 1930's" as being "surely as moribund as the substantive due process approach of the same era"); Synar v. United States, 626 F. Supp. 1374, 1383 (D.D.C.), aff'd sub nom. Bowsher v. Synar, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986) ("These attempts at narrowing the cases, and the Supreme Court's failure to use the delegation doctrine to strike down a statute in fifty years, have led some to conclude that the delegation doctrine is dead, or at least 'moribund.'");

[7] Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969) ("The non-delegation doctrine is almost a complete failure.").

[8] Hampton & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."). *See generally infra* Part I.B.

[9] National Broadcasting Co. v. United States, 319 U.S. 190, 225-226 (1943); Federal Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266, 285 (1933).

without exception, delegations under standards phrased in sweeping terms."[8] As a result, today administrative agencies possess a considerable accumulation of rulemaking authority.[9]

Recognition of the sweeping nature of legislative delegations approved by the Supreme Court, though, does not necessarily mean that the doctrine has died or that the Court has failed to apply it faithfully. On the contrary, from its 1935 decision in *A. L. A. Schechter Poultry Corp. v. United States*,[10] striking down the National Industrial Recovery Act, to its most recent major nondelegation doctrine decision in 2001 in *Whitman v. American Trucking Associations*[11] upholding the Clean Air Act, the Court has continued to affirm the existence of the nondelegation doctrine. It has also applied it coherently. That coherence, though, only becomes evident upon the recognition of the full dimensionality of a delineation of administrative authority.

Unfortunately, the emphasis that scholars and judges have placed on the intelligible principle test has tended to obscure that full dimensionality, focusing primarily on just one dimension of it. Once the other facets of congressional delineations are accounted for, it becomes clear why the Court appropriately struck down the National Industrial Recovery Act but has not struck down other legislation on nondelegation doctrine grounds. Rather than abandoning the nondelegation doctrine or failing to enforce it, as numerous scholars have claimed,[12] the Court has applied it consistently since *Schechter Poultry*.

The problem is that nondelegation doctrine has too often been incompletely understood. The doctrine limits the transfer to the executive branch of full, expansive lawmaking power—that is, the truly *legislative power* of the kind that the Constitution vests in Congress. The intelligibility of any principle dictating the basis for the exercise of lawmaking power is only one feature affecting the extent of the power—its degree of constraint. That constraint may be minimal if the scope and significance of the power is itself limited. Yet attention to the importance of the scope or significance of the power being delegated has not been given its due in accounts of the nondelegation doctrine. The nondelegation doctrine properly concerns both the degree of *constraint* on the exercise of delegated power—the "intelligible principle test"—and the degree or extent of the underlying *power* itself. Properly understood, the nondelegation doctrine lives on; it is just that the home in which it resides is small and Congress has almost never ventured to visit it since the New Deal.

[8] Loving v. United States, 517 U.S. 748, 771 (1996). *See also* KENNETH CULP DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 2, at 76, 88 (1958) (noting that "[t]he vaguest of standards are held adequate, and various delegations without standards have been upheld" and that "many valid delegations fail to state an 'intelligible principle'"). [9] For a vigorous critique of this accumulation of administrative authority, see DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993). [10] 295 U.S. 495 (1935).

[11] 531 U.S. 457 (2001). The Court currently has before it another case that raises a question under the nondelegation doctrine. This latter case is discussed in Part III of this Article.

[12] *See, e.g.*, Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 822, 855 (2018) (claiming that "[t]he Supreme Court has decided not to enforce the constitutional principle against subdelegation"); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004) (describing the nondelegation doctrine as "unenforced"); David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83

MICH. L. REV. 1223, 1228 (1985) (arguing that "the Court has failed to articulate a coherent test of improper delegation").

I. The Nondelegation Doctrine and the Administrative State

The Constitution expressly acknowledges that the U.S. government will comprise executive departments and officers—and presumably, by extension, it acknowledges that these departments and officers would possess discretion.[10] But the text and structure of the Constitution also place clear primacy on Congress as the source of legislative authority: "All legislative Powers herein granted shall be vested in a Congress of the United States."[11] The Court has long recognized that this vesting clause in Article I, Section 1 means that Congress cannot transfer its legislative powers to any other body.[12] After all, if Congress were to grant the President or others its legislative powers, then it could by itself override the Constitution's explicit scheme for bicameralism and representation in lawmaking.

Rulemaking by departments and executive officers is not expressly addressed in the text of the Constitution. Is rulemaking the same as the "legislative powers herein granted" that Article I, Section 1 vests in Congress? The Constitution does not explicitly say. It does authorize Congress to adopt all laws that are "necessary and proper" to carry out its powers—and Congress has deemed the delegation of rulemaking authority to be "necessary" from the earliest days of the Republic.[13] As to whether (or to what extent) delegation of rulemaking authority might be "proper," that is just another way of framing the question that the nondelegation doctrine aims to answer. Certainly nothing in the Constitution expressly precludes the Congress from authorizing the heads of departments to create rules, even though it does impose a series of other clear prohibitions on Congress in Article I, Section 9.

The Court has thus had to reconcile two seemingly competing propositions: first, that Article I's vesting of legislative powers in Congress does not permit Congress to transfer those constitutional powers to another entity; and, second, that Congress may (and frequently does) lawfully authorize rulemaking by the President or administrative agencies. The seeming tension

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[10] Executive departments and officers are acknowledged twice in Section 2 of Article II of the Constitution, and officers are recognized in Sections 3 and 4 of Article II. Departments and officers are also included in the "necessary and proper" clause of Article I. That the heads of these departments would possess discretion seems implicitly acknowledged in the Take Care Clause of Article II, which imposes a duty on the President to make sure that the laws are faithfully executed by those officers who make up the executive branch.

[11] U.S. CONST. art. I, § 1.

[12] *See, e.g.*, 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."); Schechter Poultry Corp, 295 U.S. at 537–38 ("But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."); Touby v. United States, 500 U.S. 160, 165 (1991) ("Congress may not constitutionally delegate its legislative power to another branch of Government.").

[13] As other scholars have amply pointed out, starting with the earliest Congresses, legislation has expressly authorized the President or other officers to make rules or regulations with respect to various matters. *See* Posner & Vermeule, *supra* note 12, at 1735-36; Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 331-332 (1999); Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 738-739 (1994); *see also* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("Congress simply cannot do its job absent an ability to delegate power;"); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility.").

between these propositions only exists, though, if rulemaking is treated as a legislative power. Admittedly, issuing binding rules that are fully enforceable as law certainly *looks* legislative. And in the field of administrative law, binding rules are actually called "legislative rules."[14] But despite the similarity in the semantic label as well as in the general form, rulemaking power is not the same as "legislative power," at least not for purposes of the Vesting Clause.[18] It is deemed executive power. Rulemaking power, after all is always subsidiary to legislative power, in the sense that, in the event of conflicts between administrative rules and legislation, legislation prevails.[15] Moreover, rulemaking power is undeniably an essential tool for executive officials who are responsible for implementing legislation.[16] Even one of the "purest" of executive functions—the delivery of mail—depends on a postmaster to create binding rules.[17] Congress has recognized this need by repeatedly authorizing administrative officials to make rules in the course of carrying out their executive responsibilities.

But what distinguishes Congress's permissible authorization of executive power to make rules from an impermissible delegation of legislative power that Article I vests in Congress? That is the very question that the nondelegation doctrine seeks to answer, drawing the line between permissible and impermissible grants of law-making authority by Congress to executive officials. When congressional legislation accords with the nondelegation doctrine, any grant of lawmaking power to executive officials will be deemed, by definition, constitutionally permissible rulemaking authority—not the transfer of a legislative power vested in Congress.

II. The "Intelligible Principle" as Core to the Nondelegation Doctrine

Courts and scholars widely invoke the "intelligible principle" test as the defining feature of a permissible grant of law-making power to executive officials.[1819] The underlying notion is that if a grant of law-making power is sufficiently constrained by fairly cognizable decision-making criteria, then it will not be deemed tantamount to "legislative power" vested in Congress.

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[14] *See, e.g.,* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015) ("Rules issued through the notice-and comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'"). [18] Touby, 500 U.S. at 165 ("Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors.")United States v. Grimaud, 220 U.S. 506, 516 (1911) ("Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power."). Of course, Justice John Paul Stevens called it mere "pretend" to think administrative rulemaking is anything but the exercise of legislative power. Whitman v. Am. Trucking Associations, 531 U.S. 457, 488 (2001) (Stevens, J., concurring) (arguing that the Court should "admit that agency rulemaking authority is 'legislative power'").

[15] Merrill, *supra* note 12, at 2112 (noting that "agency regulations have the force of law only if Congress has delegated authority to promulgate them.")

[16] *See* Mistretta v. United States, 488 U.S. 361, 417 (1989 (Scalia, J., dissenting) (noting that "a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action") (emphasis removed).

[17] Myers v. United States, 272 U.S. 52 (1926) (treating a postmaster as an executive officer); *see also* Humphrey's Executor v. United States, 295 U.S. 602 (1935) (describing a postmaster as a "purely executive officer"). For an early treatment of postal rulemaking authority, see Rosen v. United States, 245 U.S. 467 (1918).

[18] *See, e.g.,* Cass R. Sunstein, The American Nondelegation Doctrine, 86 Geo. Wash. L. Rev. 1181, 1189 (2018) ("Above all, the standard [nondelegation] doctrine is designed to ensure that Congress does not 'delegate' its lawmaking functions and that it supplies an 'intelligible principle' for the executive branch to follow."); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*,

[19] GEO. WASH. L. REV. 235 (2005) (describing "the dominant modern formulation … that regards an 'intelligible principle' as the touchstone for a constitutional grant of discretion" to an executive official); John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup. Ct. Rev. 223, 240 (2000) ("Under black-letter law, the Court will uphold any organic statute that supplies an 'intelligible principle' to channel agency discretion.").

After all, the only legal constraints on Congress's discretion to exercise its "legislative powers herein granted" are those inherent in Article I's grants of enumerated powers (as well as, of course, procedural constraints and substantive limits imposed by other provisions of the Constitution, such as in Article I Section 9 and in the Bill of Rights). When Congress authorizes rulemaking by executive officials in accord with an intelligible principle, it means that the executive's discretion will be cabined by that principle and thus cannot be legislative power.

From its earliest cases on the subject, the Court has accepted that legislation authorizing executive discretion nevertheless places executive officials in a subsidiary role to Congress. As early as 1825, Chief Justice Marshall described the authority given to executive officials "to act under … general provisions" in legislation as merely the power "to fill up the details."[20] The Court in 1892 upheld presidential tariff authority because it viewed that legislation as simply calling for the President to make a "contingent" factual determination.[2122] By 1928, in another case involving presidential tariff authority, the Court articulated what has now become the "intelligible principle" test.[25] In *J.W. Hampton, Jr. & Co. v. United States*, the Court upheld legislation granting the President authority to impose tariffs because it stated that the President was to act to "equalize the costs of production in the United States and the principal competing country."[23] The existence of such an "intelligible principle" to constrain presidential tariff decisions bounded the President's tariff authority in a way that the "legislative powers" granted to Congress in Article I are not similarly bounded.

When the Court struck down the National Industrial Recovery Act in 1935, it likewise emphasized its inquiry into the extent to which the Act contained a principle or standard to constrain decisions made in the exercise of the delegated authority.[24] Under the statute, the President was authorized to approve codes of "fair competition" for various industry sectors. The unanimous *Schechter Poultry* Court concluded that the Act provided "no standards" to guide presidential approval of such codes, leaving the President's discretion "virtually unfettered."[25] Justice Cardozo, writing in concurrence, vividly observed that the law-making authority Congress had authorized in the Act was "not canalized within banks that keep it from overflowing."[26]

In the years since *Schechter Poultry*, the Court has never ruled that any other piece of legislation offends the nondelegation doctrine, but it has repeatedly quoted the *J.W. Hampton*

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[20] Wayland v. Southard, 10 Wheat 1, 16 (1825). *See also* U.S. v. Grimaud, 220 U.S. 506 (1911) (upholding statute against nondelegation challenge because in authorizing the Secretary of Agriculture to issue rules it was merely authorizing the "power to fill up the details").

[21] Marshall Field & Co. v. Clark, 143 U.S. 649 (1892).

[22] U.S. 394 (1928).

[23] *Id*.

[24] Panama Refining Co. v. Ryan, 293 U.S. 388, 415 (1935) (noting that "we look to the statute to see whether the Congress has declared a policy with respect to that subject" and to "whether the Congress has set up a standard for the President's action"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935) (stating that "we look to the statute to see … whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others").

[25] Schechter Poultry Corp., 295 U.S. 495. at 542.

[26] *Id*. at 551 (Cardozo, J., concurring).

Court's formulation of the need for a delegation to be accompanied by an intelligible principle.[27] The Court has even subsequently described this as "[t]he intelligible-principle rule."[31] The upshot of this approach, as Cass Sunstein has put it, is that it has become widely accepted that "[i]f Congress gives the executive a 'blank check,' or states no intelligible principle, it has violated Article I."[32]

III. The Intelligibility Puzzle: From *Schechter Poultry* to *American Trucking*

Despite the Court's longstanding claim that the "intelligible principle" test constitutes the core of the nondelegation doctrine, what the test actually demands is far from clear. What exactly makes a principle "intelligible?" How intelligible is intelligible enough? The answers to these questions have never been clear—or, one might say, never fully intelligible. This is because, in the years since *Schechter* Poultry, the Court has subsequently approved delegations where the accompanying decision-making standards seem at least as sweeping or vague as those in the National Industrial Recovery Act—if not more so. The intelligibility test has thus created an intelligibility puzzle.[33]

Despite the Court's disapproval of the National Industrial Recovery Act in *Schechter Poultry*, the President, in acting under that statute, appeared not to have been left completely at sea in terms of how he was to exercise his authority. The statute authorized the President to approve codes of "fair competition" drafted by industry groups, and it declared that violations of any such approved codes would subject the violator to criminal penalties.[34] Although the Court found that the statute established "no standards" for the exercise of the President's approval authority, the Court did recognize that the statute required the President, before approving any code, to make specific findings about the fairness of the process by which the proposed code had been developed and to find that the proposed code would not "promote monopolies" or "eliminate or oppress small enterprises"[35] In addition, as the Court also noted, before approving a proposed industry code the President needed to find that the code would "tend to effectuate the policy of Title I of the Act."[36] That policy in the 166-word opening section of the Act stated, among other things, that the Act was intended to "remove obstructions to the free flow of interstate and foreign commerce," "eliminate unfair competitive practices," "increase the consumption of industrial and agricultural products," "reduce and relieve unemployment,"

Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) ("Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. So long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'"); Loving v. United States, 517 U.S. 748, 771 (1996) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) ("Congress as a general rule must also 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'"); Clinton v. City of New York, 524 U.S. 417, 484 (1998) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) ("[T]he Constitution permits only those delegations where Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'"); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) ("[W]e repeatedly have said that

[27] Mistretta v. United States, 488 U.S. 361, 371 (1989) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) ("So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'"); Touby v. United States, 500 US. 160, 165 (1991) (quoting J.W.

when Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'").
[31] *Loving*, 517 U.S. at 771.
[32] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 318 (2000).
[33] *Id*. at 318 n. 15 (describing the nondelegation cases as creating a "puzzling line of doctrine").
[34] 48 Stat. 195, § 3.
[35] Schechter Poultry Corp., 295 U.S. 495. at 522-523.
[36] *Id*.

"improve standards of labor," and "conserve natural resources."[28] These phrases are admittedly quite general and far from determinative of what the President should do when confronted with any particular code, but the specification of these policies in the statute nevertheless would seem to bely the inference that the Act contained "no standards" whatsoever—at least not literally so.

The puzzle of intelligibility grows more pronounced when the provisions of the National Industrial Recovery Act are compared with others in statutes that the Court has upheld in the face of nondelegation challenges.[29] Even if the various provisions in the National Industrial Recovery Act, taken together, amounted effectively to no standards for the exercise of authority because of their overall vacuity, the provisions in other statutes the Court has approved hardly seem more clear. For example, the Court subsequently upheld the congressional authorization of price controls at levels that the government administrator deemed "generally fair and equitable."[30] It upheld administratively imposed milk price controls at levels that merely "reflect" various economic conditions, "insure a sufficient quantity of pure and wholesome milk," and are found to "be in the public interest."[31] The Court also upheld the Federal Communication Commission's authority to regulate broadcasting "in the public interest, convenience, or necessity."[32] And it allowed Congress to authorize the Attorney General to designate a drug as a controlled substance—a designation backed up with criminal sanctions for unlawful possession—as long as "necessary to avoid an imminent hazard."[3334]

In its most recent decision on the nondelegation doctrine, the Court in 2001 approved Congress's delegation in the Clean Air Act authorizing the Administrator of the Environmental Protection Agency to set air quality standards which, in the Administrator's "judgment," would be "requisite to protect the public health" and would "allow[] an adequate margin of safety."[43] The Agency had assumed that adverse health effects would occur from any non-zero level of ozone and particulate matter pollution in the ambient air, which led the appellate court to conclude that the statute, as understood by the agency, contained no "determinate criterion for drawing lines" and thus lacked any intelligible guidance as to how the Administrator should set standards. On review, the Supreme Court reversed, dismissing the lower court's concerns about

[28] *Id*. at 534-535.
[29] In cases before and after *Schechter*, the Supreme Court has also held that Congress need not provide a principle for exercising delegated authority that is any more specific than is "reasonably practicable." *See, e.g.*, Buttfield v. Stranahan, 192 U.S. 470 (1904); United States v. Royal Rock Cooperatives, 307 U.S. 533 (1939); American Power & Light Co. v. SEC, 329 U.S. 90, 105, 67 S. Ct. 133, 142, 91 L. Ed. 103, 116, (1946) ("Necessity … fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules").
[30] Yakus v. United States, 321 U.S. 414, 420 (1944).
[31] Royal Rock Cooperatives, 307 U.S. at 533 (upholding Act of June 3, 1937, 50 Stat. 246, §8(c)(18) against nondelegation challenge).
[32] Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943).
[33] Touby v. United States, 500 U.S. 160 (1991).
[34] U.S.C. § 7409(b).

the lack of a principle to guide the agency in drawing a line. According to the unanimous Court, the Clean Air Act's principle—"requisite to protect the public health" with an "adequate" margin of protection—was sufficiently intelligible, "fit[ting] comfortably within the scope of discretion permitted by our precedent."[35]

The Court was surely correct about how the Clean Air Act's principle fit within past precedent—but what does that say about the National Industrial Recovery Act? Given the cases since the 1930s, was *Schechter Poultry* wrongly decided and should it be overturned? Or has the Court simply abandoned a doctrine that it previously thought was proper to apply in *Schechter*? These questions reveal the seeming inconsistency that has led commentators to decry the Court's incoherent application of, and even total abandonment of, the nondelegation doctrine. But maybe what looks incoherent or puzzling from the standpoint of the "intelligible principle" test—which itself appears not to be all that intelligible on its face—does not look so puzzling from a broader perspective.

IV. Seven Degrees of Delegation

Just looking to the "intelligible principle" test makes it easy to wonder whether the Court has applied the nondelegation doctrine inconsistently—or even whether the Court has abandoned the doctrine altogether. It seems hard to square the Court's disapproval in *Schechter Poultry* of the National Industrial Recovery Act's spongy principles for executive decision-making with its approval of comparably spongy principles in subsequent cases. It is also undeniable that, under the sheer softness of the decision-making principles approved by the Court for decades, administrative agencies today exercise very considerable discretion in carrying out their delegated authority.

Yet if the aim of the nondelegation doctrine is to determine whether a particular delegation has effectuated a transfer of "legislative power," then a focus merely on the extent of administrative discretion authorized by statutes—a focus reinforced by the intelligible principle test—is too limited.[36] The nondelegation doctrine, after all, is supposed to distinguish between permissible grants of executive rulemaking authority and impermissible grants of legislative powers. But the amount of discretion the law affords to a decision-maker is not, by itself, what distinguishes these two types of powers. Under the "legislative powers herein granted" in Article I, Congress possesses more than just virtually unfettered discretion; it also possesses the ability to impose laws addressing as full a range of issues, actors, and actions as the Constitution's enumerations afford it.

Scholars and judges have solely emphasized the level of discretion granted by Congress because they have tended to assume that what the Court has long treated as nontransferable

[35] American Trucking, 531 U.S. at 476.

[36] *See, e.g.*, Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2181 (2004) (explaining that courts have opted for a "definition of 'legislative power' as the exercise of unconstrained discretion"). Even those who ground nondelegation on something other than the intelligible principle test have dwelled on discretion. See, e.g., Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 Geo. Wash. L. Rev. 235, 237 (treating the nondelegation doctrine as concerned about "excessive grants of discretion").

"legislative powers" are simply any powers to make law.[37] Since administrative rules are in many respects "functionally indistinguishable from statutes," as Thomas Merrill has aptly put it, then any power to create rules must be, at least functionally speaking, legislative power.[38] That would seem to leave only the amount of discretion possessed by the law-maker (or rule-maker) as the only difference left for distinguishing between rulemaking and legislative power. The intelligible principle test is supposed to "measure" that amount of discretion. When a statute authorizes an executive official to make law, the conventional analysis asks whether the principle that guides the rule-maker's decision is sufficiently intelligible. If it is, then discretion is cabined and the statutory authorization is constitutional. If it is not intelligible, then the executive official has been given unfettered discretion and the statute will be deemed to have authorized the unconstitutional transfer of Article I "legislative power."

But as Merrill has also helpfully suggested, legislative powers of the kind vested in Congress have properties other than merely the degree of decision-making discretion afforded the law-maker. For Merrill, one additional key characteristic that makes legislative power different from administrative rulemaking authority is what he calls the former's "inherency."[39] Legislative power derives inherently from the Constitution. By contrast, administrative rulemaking authority is not inherent in any executive official but is derivative of and dependent on statutory authorization.[40] In other words, the administrator's power depends on Congress, in the exercise of its legislative power, authorizing the exercise of rulemaking.[41] The derivative nature of rulemaking means that courts confine it to the terms of its underlying legislative authorization. Rulemaking is also to be subsidiary to legislative power, which means that Congress can use its legislative power to override or nullify the legal effect of any specific provision in an administrative rule—and can even use it to take back any authorization of rulemaking authority in its entirety.[42]

Merrill is surely correct about the existence of these differences between statutes and rules, and his observations point in a helpful direction by highlighting the need to think harder about what "legislative power" means and how it differs from rulemaking power. The need to distinguish nondelegable legislative power from delegable rulemaking power is, after all, what the nondelegation doctrine's "intelligible principle" test has purportedly always aimed to accomplish.[43] Yet, the Court's puzzling application of the "intelligible principle" test suggests a serious weakness in that account, as the Court has been unable to define and then clearly apply

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[37] An exception is Todd D. Rakoff, *The Shape of Law in the American Administrative State*, 11 TEL AVIV U. STUD. L. 9, 22-24 (1992) (arguing that agencies cannot lawfully combine both executive and legislative powers with an "omnicompetent" oversight role of the entire economy).

[38] Merrill, *supra* note 44, at 2101.

[39] *Id*.

[40] This is, of course, putting to the side the separate conceptual possibility of certain inherent powers, if any, that might derive from Article II directly.

[41] Merrill, *supra* note 44, at 2101.

[42] *Cf*. Cary Coglianese & Kalypso Nicolaidis, *Securing Subsidiarity: The Institutional Design of Federalism in the United States and Europe*, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 277 (Nicolaidis & Howse eds. 2001) (discussing principals' option of reversing the delegation of authority to their agents).

[43] See supra Part I.

any required level of intelligibility.[44] Relying on the intelligible principle as the essence of a test for legislative power is thus ultimately unhelpful.

But beyond the degree of discretion afforded to a law-maker, what exactly makes legislative power different from rulemaking power? Merrill's emphasis on inherency of legislative power and the derivative nature of administrative rulemaking unfortunately only seems to restate the critical question that the nondelegation doctrine is supposed to address. The conventional grounding of the doctrine already accepts that legislative power is inherent, for that is what Article I's vesting accomplishes. It also accepts that a transfer of that power would be derivative, for that is what it means to delegate. What the conventional account needs is a test or method independent of this conventional conceptual structure of inherency and derivation by which a court can distinguish between a permissible (derivative) authorization of rulemaking power and an impermissible (but still derivative) authorization of the exercise of legislative power.

The Supreme Court has in fact indicated, in the way that it has handled nondelegation cases from *Schechter Poultry* to *American Trucking*, what such a test entails, even though this test is not captured in the Court's canonical references to the need for an intelligible principle. The test for nondelegation requires looking at more than just the intelligibility of the statutory principle that seeks to guide decisions about how to use the law-making authorized by a statute. To see what a more complete identification of a "legislative power herein granted" entails, it helps to think about authority a bit like property. Just as property comprises a bundle of distinct rights, any congressional grant of authority to an executive official consists of distinct parts too. The intelligibility of the required principle for making decisions is just one part of a larger bundle that together distinguishes rulemaking power from legislative power. Once the other parts are taken into account, the Court's approach to the nondelegation doctrine no longer seems incoherent—or even dead.

Let us begin by specifying the parts, and then see how they can come together to help distinguish rulemaking powers from legislative powers. Any grant of authority, legislative or otherwise, can exhibit seven features that collectively define or constitute that authority.[45] Each of these features are briefly elaborated below, with reference to how statutory grants of authority to executive officials have included these features and what relevance each may have separately in the context of the nondelegation doctrine.[46] Although a total of seven features are numbered below, these characteristics can be further grouped into four main categories as shown, based on whether they address (a) the nature of the authority, (b) its scope or impact, (c) the basis for exercising the authority, and (d) the authority's duration. These four groupings will be helpful in the next Part of this Article in seeing how delegations can be spatially understood and how

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[44] See supra Part IV. *See also* Merrill, supra note, at 2181 (noting that "the line between constrained and unconstrained discretion is difficult to discern").

[45] These seven features can also be said to delineate an agent's power in a principal-agent relationship. For general background on principal-agent theory and a useful conceptual guide to delegation more broadly, see John W. Pratt & Richard J. Zeckhauser, The Agency Relationship, in PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS (JOHN W. PRATT & RICHARD J. ZECKHAUSER, EDS., 1985); JEAN-JACQUES LAFFONT & DAVID MARTIMORT, THE THEORY OF INCENTIVES: THE PRINCIPAL-AGENT MODEL (2002); Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MANAG. REV. 57 (1989).

[46] For ease of presentation, each of the seven features of authority is presented here with a parenthetical illustration framed as a binary choice. In reality, only the first characteristic—the nature of authority—is truly binary: it is either "legislative" in form or it is not. The other six features array continuously along a relevant spectrum.

various parts discussed below can be combined to map illustratively the domain of unconstitutional delegations of legislative power.

Nature of Authority

1. Nature of authority (e.g., taking enforcement actions versus establishing binding rules).

For nondelegation doctrine purposes, this is a threshold characteristic of any grant of authority. It is necessary (but not sufficient) that a statute authorizes an executive official to make law in some fashion for the nondelegation doctrine to become even prima facie relevant. If a statute, though, authorizes demonstrably executive power—say, the taking of enforcement actions—then nondelegation concerns will not even become relevant. The Supreme Court has expressly held that enforcement discretion under a statute can be completely unconstrained by any statutory principles.[47]

Scope or Impact of Authority ("Extent of Power")

2. Range of regulated targets (e.g., single industry versus the entire economy)

Many statutes address a single industrial sector, whether it be telecommunications, nuclear energy, or milk production. Others sweep across many or even all sectors of the economy by addressing general concerns such as environmental protection or worker safety that arise across many different types of businesses. The more limited the range of possible regulated targets under a statute, the less authority delegated under it will look like the kind of legislative power "herein granted" by Article I—a power that sweeps across the entire economy under the Commerce Clause.[48] It is notable that the statutory provision at issue in *Schechter Poultry* applied to the whole economy, authorizing the President to approve codes that could have addressed any industrial sector.[4950] In this regard, it is also striking that more recently, in *Industrial Union Department v. American Petroleum Institute*,[59] the Court worried about the nondelegation issue in a dispute over the Occupational Safety and Health Administration's authority to impose standards on every workplace in the country.[51]

3. Scope of regulated actions (e.g., placing limits on air pollution versus requiring fair business practices of any kind)

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[47] Heckler v. Chaney, 470 U.S. 821 (1985).

[48] U.S. Const. Art. 1, §8, cl. 3.

[49] Schechter Poultry, 295 U.S. at 553 (Cardozo, J., concurring) (describing the authority authorized under the National Industrial Recovery Act to be "as wide as the field of industrial regulation").

[50] U.S. 607 (1980).

[51] And Justice Rehnquist would have used the occasion of this case to strike down the Occupational Safety and Health Act as violative of the nondelegation doctrine. 448 U.S. at 671-688 (Rehnquist, J., concurring). Although the EPA's ambient air quality standards at issue in *American Trucking* in 2001 would hold implications for any industrial sector with polluting facilities, the EPA's standard-setting authority under the Clean Air Act did not authorize the direct regulation of any economic actor. Even if an expansive, economy-wide impact of the Clean Air Act standards were conceded, the other facets of the delegation discussed below more than amply justified the Court in rejecting the nondelegation challenge in that case.

Independent of the number of sectors or firms under potential regulatory control, a statute can authorize executive officials to make laws with respect to a narrow or wide range of *actions* or *activities* undertaken by those firms or within those sectors. For example, even though environmental and occupational safety and health statutes authorize executive officials to make rules applicable across the entire economy, they still only authorize action addressing pollution or safe working conditions. They do not authorize actions that relate to other aspects of businesses operations or address other societal concerns. By contrast, the National Industrial Recovery Act authorized the President to approve codes addressing any and all aspects of economic activity: mergers and acquisitions, prices, purchasing decisions, employment practices, working conditions, and even environmental impacts—anything related to "fair competition" and the broad policies of the Act.[5253]

4. Type of sanctions (e.g., small penalties versus large penalties).

In almost all statutes, Congress provides for the size and type of penalties that can be imposed for violating statutory and administrative rules. It even did so in the National Industrial Recovery Act.[62] But, plausibly at least, a statute could authorize an executive official to issue an administrative rule making such a determination, perhaps within some bounds. More commonly, agencies are able in an adjudication to impose administrative penalties within a range. The higher the penalty allowed, the greater authority the agency could be said to have, all other things being equal. Of course, if the agency's only power is to select and impose administrative fines in the context of individual enforcement actions, then the nature of its authority would be non-legislative and, as noted above, the underlying statute would not implicate nondelegation concerns.

Basis for Exercise of Authority ("Degree of Constraint")

5. Basis for exercise of discretion (e.g., clearly stated principle versus no principle)

This fifth feature of authority is simply the "intelligible principle" test, about which much has already been said. To the extent that the basis for exercising law-making authority is constrained by a narrow, well-defined principle, executive officials will have less discretion. For example, the statute authorizing the Secretary of Transportation to establish air bag rules for automobiles provides that the Secretary should seek "to improve occupant protection for occupants of different sizes, belted and unbelted, … while minimizing the risk to infants, children, and other occupants from injuries and deaths caused by air bags."[54] That is clearly more constraining than merely the "public interest" as a basis for the exercise of law-making authority.

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[52] As noted earlier, the Act authorized the President to approve codes that addressed the gamut of economic actions as long as doing so was consistent with a broad range of purposes, including "to conserve natural resources." See *supra* note 37 and accompanying text.

[53] Stat. 195, §3(f).

[54] Transportation Equity Act for the 21st Century, 112 Stat. 107 (1998) [64]

5 U.S.C. §553.

6. Extent of required process (e.g., transparent and participatory process versus no required process at all)

Statutes will often require that executive officials follow specified procedures before exercising any delegated law-making authority—at a minimum the rulemaking procedures provided for in the Administrative Procedure Act.[64] Some of these procedures can be more demanding and constraining than others. In *Schechter Poultry*, the Court found it notable that the National Industrial Recovery Act dispensed with normal "administrative procedure and with any administrative procedure of an analogous character" in authorizing presidential approval of industry codes.[55] Of course, this facet of a delegation has not figured in a significant way in the reasoning of many other nondelegation cases.[5657] Perhaps this is in part because the Constitution itself spells out procedures for Congress to follow in enacting legislation, so except in cases like *Schechter,* where a statute provides for no procedures whatsoever, it may well be difficult for a court to discern whether specified administrative procedures are sufficiently comparable to the ones imposed on congressional action.

Duration of Authority

7. Duration of delegation (e.g., time delimited versus permanent)

Time-restricted authority will be more limited than permanent authority, ceteris paribus. But this facet of authority appears to be of limited relevance to nondelegation analysis, at least judging from the Court's past decisions. The National Industrial Recovery Act, after all, was emergency legislation slated to sunset after two years.[67] After those two years, any code of fair competition approved by the President under the statute would also have no longer enjoyed any legal effect. Despite this clear temporal limitation, the Court still found that the statute unconstitutionally delegated legislative powers. This makes a certain level of sense. After all, if a statute otherwise unconstitutionally authorizes the delegation of legislative power, its duration should not matter: two-year violations of the constitution are still constitutional violations.[58]

This brief explication of seven characteristics of authority—and hence, characteristics of any delegation of governmental authority—should on its own reveal something about the limited range of vision afforded by the intelligible principle test. The principle that provides the basis for the exercise of authority—and thus the amount of discretion afforded to a decision-maker—is but

[55] *Schechter Poultry*, 295 U.S. at 533.

[56] For a relatively recent exception, see Clinton v. City of New York, 524 U.S. 417, 487-490 (1998) (Breyer, J., dissenting).

[57] Stat. 195, §2(c).

[58] That same reasoning might well apply to still shorter durations, though we cannot say for sure since the Court has never confronted such a case. Perhaps it never will. As a practical matter, a statute that granted a President sweeping emergency powers for, say, just a sixty-day period (until, say, Congress could reconvene and ratify any exercise of those powers) would not provide much of an opportunity for full judicial consideration before the time period lapsed. That said, if such a limited delegation of otherwise legislative powers be adopted, and it should be plain that such a sixty-day emergency power would be a much narrower power than the two-year duration of the National Industrial Recovery Act.

one of a variety of features constituting any grant of authority. If the goal of the nondelegation doctrine is to determine when a grant of rulemaking authority is on par with nondelegable "legislative powers" vested in Congress, then courts must expect to look beyond just a single characteristic and instead should rely on a combination of characteristics.

A combinatorial approach such as outlined here finds textual support within the Constitution, which vests Congress not merely with "legislative power" but with "legislative powers *herein granted*." Powers granted in Article I to Congress are thus integrally defined by more than just the unlimited rational basis upon which Congress may exercise its powers—that is, a virtually unlimited discretion. Nondelegable legislative powers are those that are on par with what the Constitution expressly grants Congress, as expansive in the extent of their power as they are in their lack of any constraint on decision-making. The legislative power to regulate interstate commerce, in particular, exhibits a substantial substantive scope and impact as among its defining features. An approach to nondelegation that combines features of authority will prove more faithful to the constitutional text than reliance solely on the intelligible principle test.

V. Dimensionality as the Solution to the Intelligibility Puzzle

Combining features also helps to solve the puzzle created by trying to use the intelligible principle test to reconcile the Supreme Court's decisions from *Schechter Poultry* to *American Trucking*. What looks incoherent based on a single factor can be quite coherent through the lens of an amalgamation of multiple factors.[59] When Congress grants authority that shares all of the relevant characteristics of a legislative power, that authority cannot be treated as mere rulemaking authority and should be deemed nondelegable.

Another way to see this is in terms of what might be called the dimensionality of delegation. Each feature of authority discussed above can be thought to make up a distinct dimension which, when combined, constitutes the entirety of the permissible delegated authority. One can analogize to the way in which an airline defines permissible carry-on luggage: it does not merely specify one dimension of a suitcase—say, its height—but it instead specifies the permissible height, width, and depth of luggage. In much the same way, the nondelegation doctrine defines permissible authority for Congress to grant to executive officials. Rulemaking authority needs to fit in the proverbial overhead compartment, while nondelegable legislative powers are broader and less constrained along a number of dimensions and cannot be taken on board the delegation plane.

This approach not only makes conceptual sense but is also grounded in how the Court has actually attended to the multiple dimensions of delegation throughout its decisions, notwithstanding the canonical emphasis on the intelligible principle. In *Schechter Poultry*, for example, the problem was not merely that the National Industrial Recovery Act contained few if any meaningful standards for the delegation of authority; the problem also lay with the broad scope of the law-making powers delegated to the President. The Court stressed that the

[59] *Cf.* Cary Coglianese, *Bounded Evaluation: Cognition, Incoherence, and Regulatory Policy*, 54 STAN. L. REV. 1217 (2002).

President's authority under the Act encompassed a "wide field of legislative possibilities"[60] and "relate[d] to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country."[61] In his concurring opinion, Justice Cardozo emphasized the breadth of the statute's scope and impact, remarking that the Act authorizes the President to become "in effect … a roving commission to inquire into evils and upon discovery correct them."[62] He emphasized that the Act authorized presidential law-making authority "as wide as the field of industrial regulation,"[63] noting that "anything that Congress may do within the limits of the *[C]ommerce [C]lause* for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code."[64] It was the full "plenitude of power" that Cardozo reasoned could not be transferred to the executive branch.[65]

The dimensionality of delegation also figured prominently into Justice Antonin Scalia's unanimous opinion in *American Trucking*, where he matter-of-factly noted an inverse relationship between two different dimensions: "It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[66] He further suggested in dicta that, "[w]hile Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,' which are to be exempt from new-stationary-source regulations governing grain elevators, … it must provide substantial guidance on setting air standards that affect the entire national economy."[67]

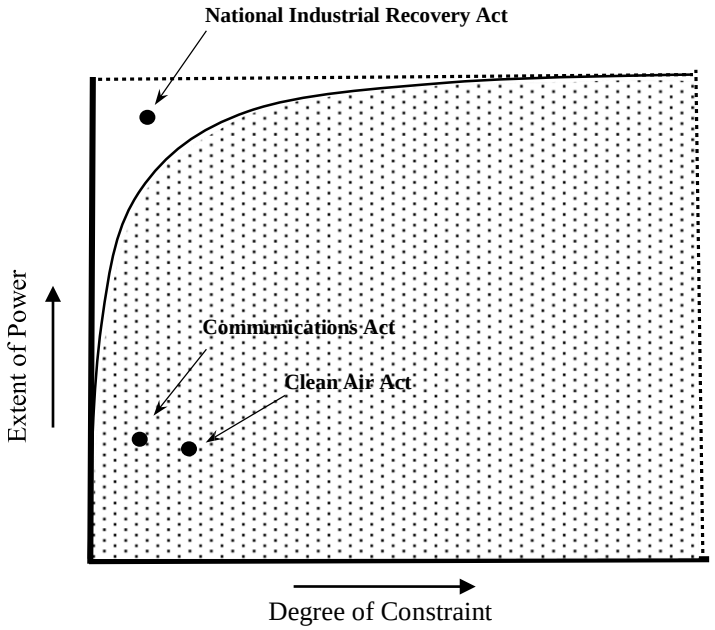
It is doubtful that the Court has actually followed anything close to the linear sliding scale that might be suggested by Justice Scalia's formulaic language. As Scalia himself acknowledged, "even in sweeping regulatory schemes," the Court has "never demanded … that statutes provide a 'determinate criterion'" for decision-making.[68] Still, Justice Scalia's formulation does support the appropriateness of combining different dimensions of delegated authority. In that light, it is striking to compare how the Clean Air Act and the National Industrial Recovery Act array in terms of the seven dimensions presented in the preceding Part of this Article. Both pieces of legislation authorized executive law-making, so in terms of the nature of authority they were on par. But on every other dimension save the delegation's duration, the National Industrial Recovery Act swept much more broadly. The delegated authority had direct implications for firms across the entire economy and could encompass potentially any business practice and any aspect of their economic activity. To be sure, the Clean Air Act had economy-wide impacts too—and EPA's rules under it would affect the air every American would breathe—but in the end the Clean Air Act was only concerned directly with air pollution. Moreover, the degree of constraint placed on the Environmental Protection Agency by the Act was greater than that imposed on the President by the National Industrial Recovery Act, both in terms of a somewhat more circumscribed basis for decision-making and in terms of the statute's highly specified

[60] *Schechter Poultry*, 295 U.S. at 538.
[61] *Id.* at 539.
[62] *Id*. at 551 (Cardozo, J., concurring).
[63] *Id*.
[64] *Id*. (emphasis in original).
[65] *Id*.
[66] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. at 475.
[67] *Id*.
[68] *Id*.

procedures for setting air quality standards, which actually applied on top of the requirements of normal notice-and-comment rulemaking.

If it were possible to visualize authority in greater than three dimensions, what Congress granted to the President under the National Industrial Recovery Act would surely be quite close in "shape" and "size" to the legislative power granted to Congress under the Commerce Clause. Although it is not possible to provide any spatial illustration of seven dimensions, it is possible to do so in two dimensions. To gain visual leverage on the nondelegation doctrine, we can simply focus on two of the most relevant groupings of features outlined in the preceding Part: "Extent of Power" (which captures the range of regulatory targets, actions, and sanctions), and "Degree of Constraint" (which focuses on the statute's intelligible principle and required procedures).[69] If

Figure 1: Illustrative Spatial Mapping of the Nondelegation Doctrine



we collapse the applicable features into just these two dimensions, delegated authority can be graphically represented as indicated in Figure 1, with one axis for the extent of power, and the other for degree of constraint. The shaded area in Figure 1 represents the domain of rulemaking, where permissible delegations of authority can be found. For sake of illustration, I have offered some arguable placements for three statutes within this two-dimensional space. Regardless of where exactly the Communications Act and Clean Air Act should be situated, it is clear that the National Industrial Recovery Act fell at the very upper left portion of the diagram, where the degree of constraint was exceedingly low and where the extent of power was extremely high.

[69] The other two groupings can be put to the side for different reasons. The "nature" of the authority is a binary threshold question: the relevant authority needs to be law-making in nature for the nondelegation doctrine even to be implicated. The "duration" seems not to matter for constitutional purposes, as the time-limited, emergency-oriented National Industrial Recovery Act was still held to be unconstitutional.

Figure 1's representation of the dimensions of delegation fits with the Court's treatment of statutes under the nondelegation doctrine. It shows that there exists substantial room for Congress to delegate law-making to executive officials—even with only the thinnest degree of constraint in terms of the intelligibility of the statute's basis for decision-making.[70] Of course, looking at how much shaded space exists, Figure 1 also could be said to show that, for most practical purposes, the nondelegation doctrine is dead, especially since Congress has generally avoided adopting statutes that fall within the upper-left portion of Figure 1.

Recognizing the dimensions of delegation does tend to affirm Eric Posner and Adrian Vermeule's basic conclusion that "the content of the [nondelegation] doctrine, if not zero, is trivial."[71] It is certainly not zero. But its space and content are indeed quite limited, and it is relatively easy for Congress to avoid the limited space where it applies. That said, even if this dimensional understanding of the nondelegation doctrine shows that the doctrine itself, for all practical purposes, may be "trivial," the dimensional approach to nondelegation holds several implications for lawyers, judges, and scholars that seem far from trivial.

First, from an internal perspective, a dimensional approach to nondelegation fits better with the Court's actual decisions. It avoids the incoherence that arises from an exclusive emphasis on the "intelligible principle" test—and it does so while still showing that the doctrine remains alive, as the Court continues to acknowledge. Furthermore, the doctrine as mapped here can be much more readily applied by courts than the narrow "intelligible principle" test ever can be. The dimensional approach also provides courts with a conceptual vocabulary and checklist for distinguishing between lawful grants of rulemaking authority and unconstitutional transfers of legislative power.

Second, critics of the nondelegation doctrine sometimes rely on parade-of-horribles arguments. They say that it would be surely unconstitutional for Congress to pass a law that, without anything more, authorizes the Secretary of Commerce to "regulate commerce with foreign nations, and among the several States, and with the Indian Tribes."[72] The dimensional approach offers a clear response to such horrible hypotheticals: Yes, any such massive transfer of a "legislative power herein granted" would indeed be unconstitutional. Not only would a hypothetical statute that tracked the exact language of an Article I enumerated power violate the nondelegation doctrine, but so too would any other statutory grant of law-making with dimensions similar to that of an enumerated legislative power, no matter how that grant was worded. Of course, the dimensions of any such delegation of law-making authority would still need to quite large before they would no longer fit in the Constitution's proverbial overhead compartment.

Finally, by situating the nondelegation doctrine in regulatory space, the dimensional approach should help clarify or contribute to debate over the future of the nondelegation doctrine. For example, in response to calls to reinvigorate the nondelegation doctrine by more robustly enforcing the "intelligible principle" test, it might be worth asking: Why should courts

[70] It may be that the rulemaking procedures imposed on agencies like the Federal Communications Commission and the Environmental Protection Agency would justify situating their underlying statutes much farther to the right in on the horizontal axis in Figure 1, in terms of degree of constraint.

[71] Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. CHI. L. REV. 1331, 1343 (2003).

[72] U.S. Const. Art. 1, §8, cl. 3.

single out that one feature of a delegation? After all, if the underlying legal justification for policing congressional delegation derives from the Vesting Clause, then any effort to ensure that delegated authority never amounts to a legislative power should presumably consider all dimensions of the delegated authority. Just seeking to tighten up the intelligibility requirement will only likely increase uncertainty, miring judges in what appears to be an impossible task of discerning in any fine-grained manner how much intelligibility is enough. Perhaps such judicial challenges in policing congressional judgments would be worth pursuing for normative or policy reasons, but it still remains to be demonstrated why courts should look at just one constitutive feature of a legislative power rather than at them all.

VI. Canons, Crimes, and Emergency Powers

A dimensional approach to delegation holds implications for other broader debates about the structure of government and the role of the courts in reviewing delegated authority. Brief mention here will be made of three of these: canons of construction; delegations involving criminal sanctions; and the delegation of emergency powers to the President.

Canons. Nondelegation concerns have sometimes influenced how courts construe statutes, especially when courts draw on the canon of constitutional avoidance. Yet if the space in which legislative authorizations offend the nondelegation doctrine is confined to a rather small corner of the regulatory landscape, then the need to invoke a nondelegation canons for constitutional avoidance will also be, by extension, quite small.

In the OSHA benzene case, for example, the Court did not really need to construe the underlying statute to require a finding of "significant risk" for constitutional avoidance purposes.[73] The Court's constitutional question in that case should have answered itself, just in the asking: Is an occupational safety and health statute even plausibly unconstitutional if it does not demand "that the risk from a toxic substance [is] quantified … as significant in an understandable way"?[74] Surely the answer should be "no," because the statute only governed workplace health and safety risks. It did not give the Occupational Safety and Health Administration (OSHA) sweeping authority to regulate all types of actions across the entire market economy. OSHA could not have used its delegated authority to regulate securities fraud, radio spectrum licensing, railroad shipping rates, electricity transmission, or any number of other entities and activities over legislative power granted under Article I could cover.

Only to the extent that a piece of legislation can be plausibly construed as delegating a sweeping extent of power combined with a lack of meaningful constraint will constitutional avoidance become relevant. And when it does become relevant, the dimensionality model of delegation provides the court with multiple interpretative levers to address. It could construe the statute in such a way that narrows the basis for the administrator's judgment—such as by requiring an administrator to make a finding of "significant risk"—but it could also instead construe the statute to authorize law-making over a narrower economic range, confined to a smaller subset of firms or business activities.

[73] Industrial Union Department, AFL-CIO, 448 U.S. at 607.
[74] *Id*.

Crimes. The Supreme Court currently has before it the question whether the Sex Offender Registration and Notification Act (SORNA) violates the nondelegation doctrine.[7576] SORNA requires convicted sex offenders to register with their local governments, but it leaves it up to the Attorney General to determine by regulation whether sex offenders convicted prior to the enactment of SORNA need to register.[86] The Attorney General issued just such a regulation which gave rise to the challenge before the Court. The law's challengers argue, first, that SORNA failed to provide any intelligible principle to guide the Attorney General's judgment, and, second, that even if SORNA does contain some guiding principle, it needs to be extra intelligible because the Attorney General's regulation is backed up with criminal penalties provided in SORNA.

The challengers have a steep uphill battle because SORNA never transfer the authority to the Attorney General to establish criminal penalties—those penalties were set by Congress in the statute, not delegated. The only determination for the Attorney General to make was whether previously convicted sex offenders needed to register. This decision is not unlike any number of others that the Court approved in nondelegation cases. Consistent with the dimensional account, the Court has never insisted on a heightened intelligibility merely because criminal sanctions are potentially at stake. In a series of prior cases, the Supreme Court has expressly "upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal."[77] For example, the Court upheld a delegation of authority to the U.S. Food and Drug Administration to set rules backed up with criminal penalties—even in the absence of any meaningful statutory principle that might guide the exercise of the agency's rulemaking discretion.[78]

Nothing in SORNA looks at all akin to a full "legislative power herein granted" under Article I. SORNA is a narrow statute dealing with a single social concern and providing the Attorney General with a highly prescribed choice to make, one that will affect only a limited set of individuals. The extent of power provided the Attorney General in the statute does not even come close to looking at all like the kind of legislative power that the Court's dimensional approach requires in order to invalidate a statute.

Emergencies. At a fundamental level, emergencies do not change anything, constitutionally speaking. As the Court explained in *Schechter Poultry*, "[e]xtraordinary conditions do not create or enlarge constitutional power."[798081] Thus, when it comes to assessing the constitutionality of the National Emergencies Act[90] or any statute authorizing presidential action during an emergency, the issue will remain the dimensional one: Are the powers the President is authorized to exercise in a time of emergency close in their dimensions to legislative powers granted to Congress under Article I? The emergency nature of the National Industrial Recovery Act, and its expressly limited duration, properly did not prevent the Court from

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[75] Gundy v. United States, No. 17-6086.
[76] U.S.C. § 20913(d).
[77] Loving v. United States, 517 U.S. 748 (1996). *See also* Touby v. United States, 500 U.S. 160 (1991); United States v. Grimaud, 220 U.S. 506, 518 (1911);
[78] United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932).
[79] Schechter Poultry, 295 U.S. at 528.
[80] U.S.C. § 1601–1651. [91] 10
U.S.C. § 2808(a).
[81] U.S.C. § 1601–1651.

concluding that the Act's unprecedented grant of a full range of power under virtually no constraint amounted to an unconstitutional transfer of legislative power.

The recent controversy over President Donald Trump's declaration of a national emergency in connection with asylum seekers at the southern border of the United States may eventually present the Supreme Court yet another opportunity to review a statute's emergency authority under the nondelegation doctrine. If it does, the approach consistent with the Court's precedent will continue to be unaffected by the claim of an emergency. The question will be whether the specific features of the delegated power that Congress has authorized the President or other executive officials to exercise comes close in its dimensionality to a legislative power "herein granted" under Article I. The Military Construction Codification Act, for example, authorizes the Secretary in a time of declared national emergency to act "without regard to any other provision of law" and to pursue military construction initiatives "not otherwise authorized by law that are necessary to support such use of the armed forces."[91] Neither this Act nor the separate National Emergencies Act[92] define what constitutes an "emergency," so it might seem that these statutes would fail under the "intelligible principle" test. But the correct test demands that the Court examine more than the basis for exercising discretion. The correct test would be whether the Military Construction Codification Act affords the Secretary power to engage directly or indirectly in action that would be akin to the Congress's power to tax and spend. The degree of constraint on the Secretary and President may well be minimal due to an undefined basis for decision-making and minimal procedural requirements, but the extent of power authorized under the Act is far from sweeping. The Act stipulates that construction projects authorized in a time of emergency "may be undertaken only within the total amount of funds that have been appropriated for military construction … that have not been obligated."[82] This is a far cry from the virtually unlimited legislative power that Congress possesses to appropriate funds. Although other actions related to the Trump Administration's efforts to use national emergency authority to build additional physical barriers along the U.S. efforts may ultimately prove unlawful, Congress's action in authorizing the Secretary of Defense to reallocate construction funding in a time of emergency is not among them.

Conclusion

The nondelegation doctrine has held a puzzling status in contemporary constitutional and administrative law, with commentators treating it variously as a failure or as dead. Yet the Supreme Court treats the doctrine as alive and continues to ground it in the Vesting Clause of Article I. It does so even though it also continues to uphold delegations guided by statutory principles that are at best only dimly intelligible. Abandoning the nondelegation doctrine altogether would mean repudiating what the Supreme Court itself has never repudiated, but reinvigorating the nondelegation doctrine by tightening the "intelligible principle" test would also run contrary to decades of decisions from *Schechter Poultry* to *American Trucking*. The better approach, one more faithful to the Court's actual decision-making, would be to abandon the "intelligible principle" test as the defining essence of the nondelegation doctrine. Instead of relying solely on the "intelligible principle" test, the Court should continue to take a dimensional approach when assessing the constitutionality of congressional grants of authority to the executive branch. That dimensional approach combines attention to multiple features of a delegation so as to allow the Court to gauge the level of power and degree of constraint a statute

[82] *Id.*

includes with any grant of authority. When the authority granted involves law-making, the question for courts becomes whether the delegation equates to one of the legislative powers granted to Congress in Article I, such as the power to regulate interstate commerce. The proper judicial analysis requires a multi-dimensional inquiry into the make-up and extent of the power granted to the executive as well as the degree of constraint placed on the exercise of that authority. All of the dimensions of delegation remain a vital source for analyzing constitutional limits on Congress's ability to create and oversee the administrative state.