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Bill of Rights Nondelegation

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Eli Nachmany[*]

Speculation about the "revival" of the nondelegation doctrine has reached a fever pitch. Although the Supreme Court has not applied the nondelegation doctrine to declare a federal statute unconstitutional since 1935, the doctrine appears to be making a comeback.

The common understanding is that the nondelegation doctrine prohibits Congress from "delegating" legislative power to the executive branch. Although the nondelegation doctrine appears to be about limiting Congress, the doctrine's ultimate target is delegation. But if the nondelegation doctrine is about policing delegation, then the Court has been regularly—and rigorously—applying the doctrine in a different context: In litigation concerning various provisions of the Bill of Rights, the Court has enforced a nondelegation principle to constrain the delegation of unfettered discretion to the executive.

The uncovering of a Bill of Rights nondelegation doctrine reveals that, contrary to popular belief, the Court has been applying some form of nondelegation in an active manner for many years. Recognizing a Bill of Rights nondelegation doctrine could have important implications for Bill of Rights jurisprudence writ large. Further, understanding the "Bill of Rights nondelegation doctrine" as a coherent line of cases separate from what this Article calls the "Article I nondelegation doctrine" helps to clarify the connection that some have pointed out between the nondelegation principle and certain parts of the Bill of Rights.

From the First and Second Amendments to the Fourth and Fifth Amendments, the Bill of Rights nondelegation doctrine prevents the delegation of unfettered discretion when enumerated rights are at stake.

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INTRODUCTION

The familiar conception of the nondelegation doctrine is something like the following: Congress cannot delegate its legislative power to the executive branch.[1] In practice, if Congress passes a statute that would permit the executive to exercise legislative power in carrying out the law, a court applying the nondelegation doctrine would declare the offending statutory provision to be unconstitutional.[2] Scholars and jurists are divided on whether the nondelegation doctrine is consistent with the original meaning of the Constitution,[3] serves constitutional values,[4] or even exists.[5] The debates rage on. But against the backdrop of serious scholarly and jurisprudential inquiry into the doctrine's propriety, all would likely agree that the Supreme Court has signaled its openness in recent years to "reviving" something called the "nondelegation doctrine."[6]

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[1] *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2098–99 (2004). To be sure, the nondelegation doctrine is not only about Congress and the executive. The nondelegation doctrine also prohibits Congress from delegating legislative power to the judicial branch. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825); *see also* Aaron L. Nielson, Erie *as Nondelegation*, 72 OHIO ST. L.J. 239, 266 (2011) (noting the focus in the scholarly literature on delegations to the executive as opposed to delegations to courts).

[2] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (declaring Section 3 of the National Industrial Recovery Act of 1933 unconstitutional on nondelegation grounds).

[3] *Compare* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021), *with* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021). *See also* Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388 (2019).

[4] *Compare* Gundy v. United States, 139 S. Ct. 2116, 2130 (2019), *with* David Schoenbrod, *Consent of the Governed: A Constitutional Norm That the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 214 (2020), *and Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

[5] *Compare* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017), *and* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002), *with* Douglas H. Ginsburg, *Reviving the Nondelegation Principle in the US Constitution*, in THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 20 (Peter J. Wallison & John Yoo eds., 2022) [hereinafter PERSPECTIVES ON NONDELEGATION], *and* Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079 (2021), *and* Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718 (2019), *and* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003).

[6] In *Gundy v. United States*, Justice Gorsuch dissented from the Court's decision to uphold a sex offender registration statute that had been challenged on nondelegation grounds. The statute—known by the acronym SORNA (Sex Offender Registration and Notification Act)—granted authority to the Attorney General of the United States to

"Reviving" is in scare quotes for a reason. The belief that application of the nondelegation constitutes a "revival" proceeds from the view that the Court has not applied it in nearly a century.[7] The traditional understanding of the nondelegation doctrine is that it flows from the Vesting Clause of Article I of the Constitution,[8] preventing Congress from delegating a vested legislative power. To that end, this Article will refer to this version of the nondelegation doctrine as the "Article I nondelegation doctrine." And the traditional view is correct—the Court has not applied *this version* of the nondelegation doctrine to hold a statute unconstitutional since 1935. That year, the Court declared the National Industrial Recovery Act of 1933—a centerpiece of President Franklin Delano Roosevelt's New Deal agenda—to be an unconstitutional delegation of legislative power.[9] In 2000, Professor Cass Sunstein wrote that "the conventional doctrine has had one good year, and 211 bad ones (and counting)."[10] Over two decades later, one might say that the nondelegation doctrine still has not had another "good year."

Yet the Court's Bill of Rights jurisprudence indicates that the nondelegation doctrine is alive and well. In fact, the Court has regularly—and rigorously—applied a form of the nondelegation doctrine to enforce various provisions of the Bill of Rights. This Article reveals the existence of a Bill of Rights nondelegation doctrine. In Bill of Rights litigation, the Court has developed something like a nondelegation doctrine to evaluate

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"'specify the applicability' of SORNA's registration requirements" for "individuals convicted of a sex offense before SORNA's enactment." *Gundy*, 139 S. Ct. at 2122 (majority opinion). Justice Gorsuch articulated a strong conception of the nondelegation doctrine, and Chief Justice Roberts and Justice Thomas joined Justice Gorsuch's dissenting opinion. *See id.* at 2131, 2133–37 (Gorsuch, J., dissenting). Justice Alito authored a concurring opinion that signaled possible support for the doctrine while articulating that he felt its application would be inappropriate in the instant case "because a majority [was] not willing to do that." *See id.* at 2130–31 (Alito, J., concurring in the judgment). Justice Kavanaugh joined the Court after *Gundy* was argued, and in a statement respecting the denial of certiorari in a case similar to *Gundy*, he expressed measured support for the nondelegation doctrine as well. *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) ("Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.").

[7] For an example of the view that application of the nondelegation doctrine would constitute a revival, see, e.g., Mike Rappaport, *Reviving the Nondelegation Doctrine*, L. & LIBERTY (Mar. 8, 2018), https://lawliberty.org/reviving-the-nondelegation-doctrine/.

[8] *See* Cary Coglianese, *Six Degrees of Delegation*, REGUL. REV. (Dec. 23, 2019), https://www.theregreview.org/2019/12/23/coglianese-six-degrees-delegation/; *see also* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

[9] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[10] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

whether certain infringements on individual liberty are permissible.[11] Here, the Court disfavors the delegation of discretion.

At bottom, the nondelegation doctrine is about cabining non-inherent[12] executive discretion by policing delegation. The prohibition on Congress delegating legislative power to the executive is, in fact, a prohibition on Congress delegating to the executive the ability to exercise a kind of discretionary power pursuant to the executive's own will. Importantly, the Article I nondelegation doctrine is not a *substantive* limit on Congress's power; it is a procedural one. Suppose that Congress passes a law that significantly constrains individual liberty, but it sets forth detailed instructions for how the executive is to carry out the law. One might challenge the law on the grounds that Congress has exceeded its own legislative power,[13] but a nondelegation objection would fail. So long as Congress has made the relevant policy choices, it has not *delegated* legislative power.

The Bill of Rights nondelegation doctrine cuts a similar profile. When evaluating First Amendment challenges to permitting regimes for speech, the Court has long recognized that "a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."[14] Ditto for the Second Amendment. In *New York State Rifle & Pistol Association v. Bruen*,[15] the Court recently declared that New York's "unusual discretionary licensing regime[]" for granting concealed-carry permits was unconstitutional.[16] Under the New York law, licensing officials enjoyed "open-ended discretion,"[17] unlike licensing officials in states "where authorities *must* issue concealed-carry licenses whenever applicants satisfy certain threshold requirements."[18] The Court keyed in on this distinction.

But the Bill of Rights nondelegation doctrine is not merely about permitting regimes for speech and guns. Consider the requirement that, under the Fourth Amendment, a warrant must describe—with

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[11] This Article takes no position on whether the Bill of Rights nondelegation doctrine is consistent with the original meaning of the Constitution.

[12] Some executive discretion, such as prosecutorial discretion, is inherent to executive power. *See infra* text accompanying note 342. That type of discretion is not at issue in this Article, because it does not come to the executive by way of delegation.

[13] For example, one might challenge an economic regulatory statute on the ground that it exceeds Congress's power "to regulate commerce . . . among the several states"—one of the substantive legislative powers that the Constitution vests in Congress.

[14] Lakewood v. Plain Dealer Publ. Co., 486 U.S. 750, 757 (1988).

[15] 142 S. Ct. 2111 (2022).

[16] *Id.* at 2161 (Kavanaugh, J., concurring).

[17] *Id.*

[18] *Id.* at 2123–24 (majority opinion) (emphasis added).

particularity—"the place to be searched or the things to be seized."[19] Of course, this requirement is about the balance of power between *courts* and the executive, but the upshot of the particularity doctrine is an allocation of discretion among the judicial and executive branches (and a rule about how those actors are to exercise the discretion). Moreover, the Court has interpreted the Fifth Amendment's Due Process Clause to embody a so-called "void for vagueness" doctrine—here, a penal statute is unconstitutional if the law is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, *or so standardless that it invites arbitrary enforcement*."[20]

This Article rethinks the conventional wisdom on nondelegation. It reveals the existence of a nondelegation doctrine in a line of cases wholly separate from the Article I Vesting Clause-inspired doctrine that dominates much of the scholarly literature on nondelegation. The connection between the nondelegation doctrine and discretion is well-known.[21] And some have even drawn the parallel between the void-for-vagueness doctrine and the nondelegation doctrine.[22] But this Article is the first piece of scholarship explicitly tying together—and shining a light on—a coherent nondelegation doctrine for the Bill of Rights.

Some caveats are necessary. Most importantly, this Article does *not* take the position that the Bill of Rights nondelegation doctrine and the Article I nondelegation doctrine are perfectly analogous. Moreover, the Bill of Rights nondelegation doctrine does not prohibit the executive from exercising *prosecutorial* discretion. Furthermore, the Bill of Rights nondelegation doctrine is not the only way that the Court enforces the various protections of the Bill of Rights; it is merely one of a few tools in the Court's rights-protective toolbox. Nor does the "Bill of Rights nondelegation doctrine" necessarily apply to each provision of the Bill of Rights. That said, the Bill of Rights nondelegation cases offer important insights about how the Court enforces the guarantees of the Bill of Rights.

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[19] United States v. Leon, 468 U.S. 897, 923 (1984).

[20] Johnson v. United States, 576 U.S. 591, 595 (2015) (emphasis added); *see also* Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (applying the void-for-vagueness doctrine outside of the criminal context to civil deportation).

[21] *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); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005); *see also* Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 980 (2018) (describing the "intelligible principle test" as "entirely a question of discretion").

[22] *See, e.g.*, Todd Gaziano & Ethan Blevins, *The Nondelegation Test Hiding in Plain Sight: The Void-for-Vagueness Standard Gets the Job Done*, *in* PERSPECTIVES ON NONDELEGATION, supra note 5, at 45; Arjun Ogale, Note, *Vagueness and Nondelegation*, 108 VA. L. REV. 783 (2022).

This Article proceeds in four parts. Part I provides background on the Article I nondelegation doctrine's history. Part II uncovers the Bill of Rights nondelegation doctrine, tying together the relevant First, Second, Fourth, and Fifth Amendment cases into a coherent framework. Part III considers some potential applications of the Bill of Rights nondelegation doctrine. Part IV then distinguishes the Bill of Rights nondelegation doctrine from the Article I nondelegation doctrine, while articulating other, important caveats to the parallels drawn in this Article and considering some implications of the Article's thesis. This Part also locates the Bill of Rights nondelegation doctrine within the broader framework of the protections of the Bill of Rights.

Certainly, the *Article I* nondelegation doctrine has only had "one good year" since 1935. But the Bill of Rights nondelegation doctrine has had plenty of good years. As this Article will reveal, the doctrine is firmly ensconced in the Court's jurisprudence.

I. THE ARTICLE I NONDELEGATION DOCTRINE

To understand the Bill of Rights nondelegation doctrine, one must understand how it is distinct from a wholly separate doctrine of nondelegation: the Article I nondelegation doctrine. This Part surveys the development of *this* doctrine in American constitutional law. When scholars and jurists speak of the "nondelegation doctrine," often what they are talking about is the Article I nondelegation doctrine. To demonstrate the point, this Part locates the textual and structural sources of the Article I nondelegation doctrine. From there, this Part surveys the doctrine's development in the Supreme Court.

A. Locating the Constitutional Source of the Article I Nondelegation Doctrine

Various scholars and jurists take the position that Congress may not delegate any of its vested legislative powers—in whole or in part—to another branch of the federal government. Often, the purported textual sources of this principle of nondelegation are the Vesting Clause of Article I and the structure of the Constitution (thus, this Article refers to this version of the doctrine as the "Article I nondelegation doctrine"). In the interest of supporting the claim that the Article I nondelegation doctrine exists, nondelegation proponents must argue that the Constitution—properly understood—contains this principle.

This subpart explores the Article I nondelegation doctrine. As part of this discussion, this subpart offers competing views as to what the term

"legislative power" even means, interrogating *what* exactly it is that Congress may not delegate to another branch of the federal government. From there, this subpart locates the common ground among these varying conceptions of "legislative power," as relevant to this Article—whatever one's understanding of the term, legislative power implicates the exercise of *discretion*.

1. Article I Nondelegation: An Argument from Text and Structure

The Constitution separates power. While the dividing lines of such separation are perhaps not entirely clean,[23] the fact remains that the separation of powers is one of the core organizing principles—if not *the* central principle—of the Constitution's framework.[24] To that end, Articles I, II, and III of the Constitution lay out a structure of government in which (as a general matter) three different institutions respectively exercise three different sorts of power. In particular, Article I sets up the legislative branch, Article II sets up the executive branch, and Article III sets up the judicial branch.[25]

Each Article begins with what is called a "Vesting Clause," vesting power in the branch of government that the Article establishes. The three Articles begin similarly, but the first clause of Article I contains an important linguistic difference from the first clauses of Articles II and III. Compare the following three opening clauses:

- Article I: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a

[23] *See* THE FEDERALIST No. 47 (James Madison); *see also, e.g.*, Julian Davis Mortenson & Andrew Kent, *Executive Power and National Security Power*, *in* THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION 261–91 (Karen Orren & John Compton eds., 2018) (demonstrating tension between the defining role of the executive as law-executor and presidential power in the national security realm); Frederick Green, *Separation of Government Powers*, 29 YALE L.J. 369, 384 n.60 (1920) ("The pardoning power, like the veto, is a legislative power of negative nature, vested by the constitution in the chief executive."). One might also say that the Senate's power to withhold consent to (and thereby block) certain of the president's nominees for positions in the executive branch—a power housed in Article II of the U.S. Constitution, *see* U.S. CONST. art. II, § 2, cl. 2—is a sort of executive power reposed in (part of) the legislative branch.

[24] *See* THE FEDERALIST No. 51, at 75 (James Madison) (Benediction Classics 2016); *see also Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 6-8 (2011) (statement of Justice Antonin Scalia) (venerating the separation of powers as safeguarding individual liberty and the protections of the Bill of Rights).

[25] *See* U.S. CONST. art. I, § 1; art. II, § 1, cl. 1; art. III, § 1.

Senate and House of Representatives."[26]

- Article II: "The executive power shall be vested in a President of the United States of America."[27]
- Article III: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[28]

Unlike the Article II and III Vesting Clauses, Article I begins with the word "[a]ll." In this way, the Article I Vesting Clause does not vest in Congress a free-floating federal legislative power. Rather, it vests in Congress no more (and no less) than the legislative powers "herein granted."

To some extent, the Article I Vesting Clause is a linguistic minefield of interpretation. Uncertainty about the meaning of various terms in the Article I Vesting Clause—including "legislative" power,[29] "herein granted,"[30] and "vested"[31]—has provided significant fodder for scholarly inquiry in recent years. This scholarship has introduced nuance into the task of interpreting the Article I Vesting Clause. Nevertheless, the classic understanding of this constitutional provision begins from the following premise: Article I vests in Congress all of the legislative powers set forth in Article I of the Constitution. From there, proponents of the nondelegation doctrine argue that because *the people* have vested these legislative powers in Congress, the Constitution forbids Congress from *delegating* any of these powers to another branch. In other words, if the federal government is going to legislate pursuant to one of the legislative powers in Article I, Congress must be the one to do it. Congress cannot authorize another branch—and in practice, this often means the executive branch[32]—to do so.

Earlier conceptions of the Article I nondelegation doctrine located the doctrine's constitutional source in Article I's Vesting Clause.[33] But recent

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[26] U.S. CONST. art. I, § 1.

[27] U.S. CONST. art. II, § 1, cl. 1.

[28] U.S. CONST. art. III, § 1.

[29] *See, e.g.*, Mortenson & Bagley, *supra* note 3, at 294–95; Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 FLA. L. REV. 1, 9–21 (2018).

[30] *See, e.g.*, Richard Primus, *Herein of "Herein Granted": Why Article I's Vesting Clause Does Not Support the Doctrine of Enumerated Powers*, 35 CONST. COMMENT. 301, 302–03, 302 n.6 and accompanying text (2020); Coglianese, *supra* note 8.

[31] *See, e.g.*, Jed Shugerman, *Vesting*, 74 STAN. L. REV. (forthcoming 2022); Mortenson & Bagley, *supra* note 3, at 309–10; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 329 (2002) [hereinafter Lawson, *Delegation and Original Meaning*].

[32] *But cf.* Mistretta v. United States, 488 U.S. 361 (1989) (reviewing a delegation to the judicial branch).

[33] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935).

scholarship suggests that the source of the doctrine may be a combination of both the Vesting Clause *and* the general structure of the Constitution (or even just the latter).[34] The two are related. The Constitution sets up a structure of government that vests different sorts of power in different branches—*the* executive power in the executive branch, *the* judicial power in the judicial branch, and a certain reservoir of legislative powers in the legislative branch. One might even say that "[i]f Congress could pass off its legislative power to the executive branch, the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'"[35]

The purpose of this Article is not to enter the Article I nondelegation debates; as such, it takes no position on whether nondelegation proponents are correct that the Article I nondelegation doctrine comports with the original meaning of the Constitution. Scholars have spilled a significant amount of ink on the question,[36] and this Article's central insight does not rise or fall on the debate's resolution. Rather, the point of this subpart is that one can conceivably recognize a version of the nondelegation doctrine in Article I's Vesting Clause and the Constitution's general structure. The traditional understanding of *that* doctrine, discussed further in Part I.B, sets the stage for the uncovering of a Bill of Rights nondelegation doctrine.

2. Different Views of "Legislative Power"

Even if one agrees that the Constitution forbids the delegation of legislative powers vested in Congress, one must delineate that which constitutes "legislative" power from that which constitutes executive power. Consider four approaches to answering this question: the "private conduct" view, the "general will" view, the Article I-informed view, and the Hamiltonian view. The "private conduct" view is a cabined understanding of the meaning of "legislative power," focused on individual liberty. The "general will" view is a capacious understanding of the power. The Article I-informed view is somewhat circular, but straightforward. And the Hamiltonian view is an intuitive description of what legislatures *do*. All of the views, however, have one, key thing in common: Legislative power entails the exercise of discretion.

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[34] *See* Mascott, *supra* note 3, at 1395; *see also* Gundy v. United States, 139 S. Ct. 2116, 2134–35 (2019) (Gorsuch, J., dissenting) (quoting Lawson, *Delegation and Original Meaning*, *supra* note 31, at 340).

[35] *Gundy*, 139 S. Ct. at 2134–35 (quoting Lawson, *Delegation and Original Meaning*, *supra* note 31, at 340); *cf.* St. Louis v. DOT, 936 F.2d 1528, 1534 (8th Cir. 1991) ("No one claims, incidentally, that the delegation here was so broad as to violate Article I.") (explicitly grounding the nondelegation doctrine in Article I).

[36] *See supra* note 3.

a. The "Private Conduct" View of Legislative Power

The core of legislative power is the making of policy decisions concerning the regulation of private conduct. As Justice Gorsuch explained in his dissent in *Gundy v. United States*, the framers "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty."[37] In a concurrence in another case about nondelegation, Justice Thomas wrote that "the formulation of generally applicable rules of private conduct. . . . requires the exercise of legislative power. By corollary, the discretion inherent in executive power does not comprehend the discretion to formulate generally applicable rules of private conduct."[38] Perhaps the best example of Congress's exercise of the legislative power to regulate private conduct is the creation of the federal criminal code. But Congress has also enacted civil laws that regulate private conduct pursuant to a number of other powers, including Congress's power to regulate interstate commerce.[39] When government prescribes the rules by which people must order their conduct, it is legislating. The "private conduct" view sees the legislative power as the power to exercise *discretion* concerning what should—and should not—be proscribed.

b. The "General Will" View of Legislative Power

Some believe that legislative power extends further. Professors Julian Mortenson and Nicholas Bagley point to Baron de Montesquieu's view of legislative power as the "general will of the state."[40] As the professors explain, Jean-Jacques Rousseau held this view and analogized legislative power and executive power to the human mind and the human body.[41] Whatever the mind tells the body to do is legislation, and whatever the body does pursuant to that direction is executive. In the professors' telling, the founders "simply wouldn't have agreed with Justice Gorsuch's narrow definition of legislative power as the power to make binding rules of

[37] *Gundy*, 139 S. Ct. at 2135.

[38] Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 70 (2015) (Thomas, J., concurring).

[39] *See, e.g.*, The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the Court upheld Title II of the Act—forbidding racial discrimination in public places whose activities affected commerce—as a proper exercise of Congress's legislative power under the Commerce Clause of Article I, Section 8 of the Constitution.

[40] Mortenson & Bagley, *supra* note 3, at 294; *cf.* JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 32 (2021) ("A system of three branches of power was not as inevitable as it now seems.").

[41] *See* Mortenson & Bagley, *supra* note 3, at 294.

general applicability for private persons. In the literature and political discussions of the Founding, legislative power was both broader and simpler."[42] Within this framework, legislative power might just encompass everything that the Congress does.

The "general will" understanding is somewhat consistent with how Professor Ilan Wurman has described the legislative power: "the power to alter legal rights and relations prospectively."[43] Professor Wurman would tether the exercise of legislative power to the alteration of "the legal rights and obligations of both public and private actors"[44]—perhaps a bit more concrete (in its relation to actual parties) than is the abstract idea of the general will. Nevertheless, Professor Wurman's definition would reach not only the ordering of private conduct, but also the distribution of "public benefits," such as "granting a patent . . . or a slice of public land."[45] Within this framework, the definition of legislative power encompasses a great deal of policymaking. This policymaking, however, is also discretionary; the choices to be made when directing the general will are unconstrained.

c. The Article I-Informed View of Legislative Power

One could read Article I's Vesting Clause to mean that all of the specific powers delineated in the enumerated powers part of Article I, Section 8, are legislative powers. Maybe they are not *all* of the legislative powers that one could repose in a government (the Tenth Amendment seems to demonstrate that this is the case), but if "[a]ll legislative powers herein granted" is a container, at least all of the powers in Section 8 are within the container under this view. This understanding would sweep in such powers as establishing post offices, coining money, and constituting lower federal courts.[46] Some of these powers are far afield from regulation of private conduct. To be sure, Section 8 does include some such powers, like the interstate commerce power (discussed earlier) or the power to establish a uniform rule of naturalization. But if something like, say, establishing inferior federal courts is not a legislative power, it is not clear what it is. The Article I-based view is perhaps a bit circular, but it is at least remarkably straightforward. And in any event, the powers in Article I are also discretionary—nothing constrains the choices that Congress makes concerning the exercise of its Article I powers.

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[42] *Id.*

[43] Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735, 765 (2022).

[44] *Id.*

[45] *Id.*

[46] *See* U.S. CONST. art. I, § 8.

d. The Hamiltonian View of Legislative Power

Professor Aditya Bamzai recently uncovered an early speech of Alexander Hamilton in which Hamilton discussed the nondelegation doctrine.[47] Hamilton defined the legislative power as "the power of prescribing rules for the community."[48] In the speech, Hamilton went on to define a certain set of pre-constitutional powers as "of the legislative kind":

> to require from the several states as much money as [the United States shall] judge necessary for the general purposes of the union, and to limit the time within which it is to be raised: to call for such a number of troops as they deem requisite for the common defence in time of war—to establish rules in all cases of capture by sea or land—to regulate the alloy and value of coin; the standard of weights and measures, and to make all laws for the government of the army and navy of the union.[49]

In the end, Hamilton's understanding of legislative power is not so different from the first three views just discussed—especially not from the Article I-informed view (although it is perhaps true that describing his understanding as the "Article I-informed" view is backwards). Nevertheless, his focus on rules *for the community* suggests that legislative power is not the sort of power that the government would exercise on an individual, case-by-case basis.[50] Yet again, establishing rules for the community is a discretionary act.

3. The Exercise of Legislative Power as the Exercise of Discretion

Ascertaining the true meaning of "legislative power" would significantly advance the legal community's understanding of the scope of the nondelegation doctrine. Part I.A.2 of this Article lays out a range of

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[47] *See generally* Aditya Bamzai, *Alexander Hamilton, the Nondelegation Doctrine, and the Creation of the United States*, 45 HARV. J.L. & PUB. POL'Y 795 (2022).

[48] Alexander Hamilton, Remarks on an Act Granting to Congress Certain Imposts and Duties (Feb. 15, 1787), *in* 4 THE PAPERS OF ALEXANDER HAMILTON: 1787–MAY 1788, at 75 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

[49] *Id.*

[50] *Cf.* William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 382 (2000) (explaining the so-called *Londoner*/*BiMetallic* distinction for when the due process right to a hearing applies).

possible views on the question without explicitly adopting any of them. For the purposes of this Article, the bottom line is that—whichever view one takes—the exercise of legislative power requires the exercise of *discretion*. When this Article speaks of "discretion," the point is that an actor (whether the executive or the legislature) may make an unconstrained decision between two or more choices.

Legislators support one policy over another for all sorts of reasons. Suppose that a legislature is considering a ban on coal mining. One legislator, representing a district with highly environmentally conscious voters, may support the policy because she thinks that it is the best option to combat climate change. Another legislator, representing a district with a thriving solar energy industry, may think that the policy would confer a competitive advantage on the solar industry and support the policy for that reason. A third legislator might simply think that coal mining is too dangerous and support the ban on worker safety grounds. In voting on the policy, each legislator is making a discretionary choice: support or oppose the coal mining ban. No *binding* principle guides the legislator's making of the choice.

Under the Article I nondelegation doctrine, only Congress may exercise this sort of discretion—at least when the government legislates pursuant to a "legislative power[] herein granted." The executive, by contrast, may not. Governmental discretion in the formulation of legislation is a dangerous thing—often, the government's wielding of such discretion results in arbitrary rule. Hence, "the concept of the 'rule of law' . . . has been understood since Greek and Roman times to mean that a ruler must be subject to the law in exercising his power and may not govern by will alone."[51] Concern about the arbitrary exercise of will by the executive motivated the adoption of Magna Carta in England[52] and underlies the bedrock American principle that we are "a government of laws, not of men."[53]

Given that the legislature would be the branch empowered to exercise discretion in the crafting of legislation, the Framers warned that Congress would be the most powerful branch.[54] Because of this reality, the Constitution not only divided the legislative branch into two separate bodies (the Senate and the House of Representatives) but also provided the

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[51] Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 70 (2015) (Thomas, J., concurring).

[52] *See* William D. Guthrie, *Magna Carta*, 15 A.B.A. J. 39, 41 (1929).

[53] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

[54] *See* THE FEDERALIST No. 51, at 75 (James Madison) (Benediction Classics 2016) ("In republican government, the legislative authority necessarily predominates.").

executive with the power to veto legislation.[55] The requirements of bicameralism and presentment necessarily make legislation difficult. But some believe that this design is a feature, not a bug—"the better to protect liberty."[56] So, delegating this discretion to another branch is impermissible because such a delegation is inconsistent with the rule of law.

B. "One Good Year": The Article I Nondelegation Doctrine in Practice

The Article I nondelegation doctrine is a doctrine of judicial review. Only twice in its history (both times in 1935) has the Supreme Court declared a federal statute to be unconstitutional on Article I nondelegation grounds. Granted, the Court recognized a nondelegation doctrine in Article I early on. But enforcement of the Article I nondelegation principle was one of the main catalysts for a dark period in the Court's history—President Franklin Delano Roosevelt's proposal to "pack" the Court with Justices more sympathetic to his New Deal economic program. The history of President Roosevelt's court-packing proposal potentially provides a concrete explanation for why the Court backed away from enforcing the Article I nondelegation doctrine. In the wake of the court-packing proposal, the Court has continued to acknowledge the existence of the Article I nondelegation doctrine, but it has not since applied the doctrine to declare a federal statute unconstitutional. That said, recent developments suggest that the Article I nondelegation doctrine may be making a return.

1. Article I Nondelegation Before the New Deal

In the words of Professors Keith Whittington and Jason Iuliano, an examination of "the pre-New Deal tradition of [Article I] nondelegation jurisprudence . . . reveals that the constitutional limitation on the delegation of legislative power was frequently observed in theory but rarely enforced in practice."[57] This tradition began in the early 1800s, when the Marshall Court "heard the earliest cases challenging the unconstitutional delegation of legislative power."[58] For the first quarter of the nineteenth century, the Court did not apply a particular rule of nondelegation.[59]

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[55] *See id.*

[56] *See Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 184 (2017) (statement of Hon. Neil M. Gorsuch, Judge, U.S. Ct. App. for the 10th Cir.).

[57] Whittington & Iuliano, *supra* note 5, at 383.

[58] Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1291 (2009).

[59] *See* Whittington & Iuliano, *supra* note 5, at 392–94; Andrew J. Ziaja, *Hot Oil and*

But in an 1825 case—*Wayman v. Southard*[60]—Chief Justice Marshall kicked off the Article I nondelegation doctrine's development at the Court. In *Wayman*, the Court stated an important principle of law: "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."[61] The next paragraph began: "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[62] The underlying delegation of interest to the Court in *Wayman* was a statutory provision in the Judiciary Act of 1789 that gave federal courts the power to regulate their own civil procedure.[63] But the idea that certain delegations are okay and others are not okay was a constitutionally significant proposition—necessarily, its corollary was that courts had the power to declare certain laws unconstitutional for effectuating an impermissible delegation of "powers which are strictly and exclusively legislative."

Chief Justice Marshall's dicta in *Wayman* seemed to establish the ground rules for the Article I nondelegation doctrine. Congress could, in some instances, delegate power to a coordinate branch of the federal government. The big question seemed to be where one drew the line between "those important subjects" and "those of less interest." Professor Gary Lawson has suggested that the test for delegations might simply be that "Congress must make whatever decisions are important enough to the statutory scheme in question so that Congress must make them."[64] But perhaps this formulation is not exactly what Chief Justice Marshall was getting at. Rather, *Wayman*'s dicta may stand for the notion that certain congressional *powers* (like the power to regulate interstate commerce) are important—and nondelegable—while other *powers* (like the power to establish post offices) are "of less interest" and thus susceptible of

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Hot Air: The Development of the Nondelegation Doctrine Through the New Deal, a History, 1813-1944, 35 HASTINGS CONST. L.Q. 921, 925–28 (2008).

[60] 23 (10 Wheat.) U.S. 1 (1825).

[61] *Id.* at 42–43.

[62] *Id.* at 43.

[63] *See id.* at 43 (citing Sections 7 and 17 of the Judiciary Act of 1789). We know these regulations today as the Federal Rules of Civil Procedure.

[64] Lawson, *Delegation and Original Meaning*, *supra* note 31, at 361. Professor Lawson's view of *Wayman* appears to have evolved in recent years. *See* Gary Lawson, *A Private-Law Framework for Subdelegation*, *in* PERSPECTIVES ON NONDELEGATION, *supra* note 5, at 123.

delegation.[65]

A little over a century later, the Court articulated an authoritative test for the Article I nondelegation doctrine. In *J.W. Hampton, Jr. & Co. v. United States*,[66] the Court reviewed the constitutionality of a congressional grant of tariff-adjusting power to the President.[67] The Court upheld the statute against a nondelegation challenge, citing the fact that Congress had established a clear "policy and plan" for how the President was to carry out the law.[68] Explaining its reasoning, the Court found that "[i]f Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[69] *J.W. Hampton*'s rule represented a bit of a drift from the earlier, more muscular conceptions of the nondelegation doctrine. The intelligible-principle test was forgiving; it permitted some delegation so long as Congress prescribed a standard by which a court could measure the executive's compliance with a given statute's command.

2. The Article I Nondelegation Doctrine Meets the New Deal and the Court-Packing Plan

If *J.W. Hampton* signaled a more permissive approach in the Court's nondelegation jurisprudence, that shift was not immediately felt. To set the stage for the next few cases: By the mid-1930s, America was in the throes of an economic depression.[70] In response, President Franklin Delano Roosevelt pushed Congress to enact his "New Deal" program.[71] One of the cornerstones of the New Deal was the National Industrial Recovery Act of 1933 (NIRA), which gave the Roosevelt administration wide-ranging discretion to manage the economy as the United States grappled with economic calamity.[72] For example, the NIRA authorized the Roosevelt

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[65] A.J. Kritikos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 MO. L. REV. 441, 446 (2017) (presenting this view). Another scholar has proposed "that the nondelegation doctrine be transformed into a series of nondelegation doctrines, each corresponding to one of Congress' distinct powers." Chad Squitieri, *Towards Nondelegation Doctrines*, 86 MO. L. REV. 1239, 1239 (2021).

[66] 276 U.S. 394 (1928).

[67] *See id.* at 404.

[68] *See id.* at 405, 410–11.

[69] *Id.* at 409 (emphasis added).

[70] *See President Franklin Delano Roosevelt and the New Deal*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/franklin-delano-roosevelt-and-the-new-deal/ (last visited Sept. 17, 2022).

[71] *See id.*

[72] *See* Ziaja, *supra* note 59, at 942.

administration to enact "codes of fair competition."[73] The Roosevelt administration proceeded to regulate with a heavy hand; impacted businesses sought recourse in the federal courts, challenging the constitutionality of key aspects of the New Deal.[74]

Perhaps the most famous nondelegation case from this era is *A.L.A. Schechter Poultry Corp. v. United States*.[75] The case stemmed from the indictment of Jewish poultry slaughterhouse operators in New York for violations of the "Live Poultry Code": a series of poultry regulations promulgated by the Roosevelt administration pursuant to the power conferred under the NIRA.[76] The NIRA provided that after "one or more trade or industrial associations or groups" submitted an application to the President, he "may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants."[77] And on April 13, 1934, President Roosevelt approved a code of fair competition for the live poultry industry—these included labor provisions (minimum wage and maximum hour requirements) and a trade-practice provision requiring so-called "straight killing" of poultry.[78]

The government charged the Jewish slaughterhouse operators with various violations of the Code.[79] The slaughterhouse operators responded by challenging—on Article I nondelegation grounds—the underlying statutory grant of authority pursuant to which the President approved the Code. The challenge succeeded. In declaring the code-making provision of the NIRA to be unconstitutional, the Court explained that "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

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[73] *Id.*

[74] *See id.* at 943, 951 (describing the businesses that brought suit against the federal government).

[75] 295 U.S. 495 (1935).

[76] *See id.* at 520–21.

[77] Act of June 16, 1933, 48 Stat. 195, 196 (quoted in *Schechter Poultry*, 295 U.S. at 521 n.4). The statute required that, before approval of the code or codes, the President find "(1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title." *Id.*

[78] *Schechter Poultry*, 295 U.S. at 525–28. As the Court noted, "[The 'straight killing'] requirement was really one of 'straight' selling. The term 'straight killing' was defined in the Code as 'the practice of requiring persons purchasing poultry for resale to accept the run of any half coop, coop, or coops, as purchased by slaughterhouse operators, except for culls.' The charges in the ten counts, respectively, were that the defendants in selling to retail dealers and butchers had permitted 'selections of individual chickens taken from particular coops and half coops.'" *Id.* at 527–28.

[79] *Id.* at 525–28.

the rehabilitation and expansion of trade or industry."[80]

Schechter Poultry was part of a trio of cases from the mid-1930s that included *Panama Refining Co. v. Ryan*[81] and *Carter v. Carter Coal Co.*[82] In these cases, the Court articulated a robust version of the Article I nondelegation doctrine on the way to declaring significant parts of President Roosevelt's New Deal to be unconstitutional.[83] Unsurprisingly, President Roosevelt was not too pleased with these developments.[84]

After the Court issued its rulings, America voted. In the 1936 election, a referendum on the New Deal, President Roosevelt and the Democrats won in a landslide.[85] Emboldened by the electoral results, President Roosevelt took on the Court. Fed up with the Court's obstruction of his domestic policy agenda, the President proposed a plan by which he would add new Justices to the bench and alter the composition of the Court.[86] President Roosevelt's proposal provided a real-world example of why the stakes for judicial review are so high. Professor William Baude has described this as "the New Deal paradigm," taking the view that "the argument for court reform is especially strong . . . when the Court is standing in the way of Congress; Congress wants to do things and the Court won't let them."[87] In one fireside chat in 1937, President Roosevelt opined that "[i]n the last four years the sound rule of giving statutes the benefit of all reasonable [constitutional] doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body."[88] In standing up for the constitutionality of his domestic policies, President Roosevelt launched a political attack on what Alexander Hamilton once described as "the

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[80] *Id.* at 537–38 (emphasis added).

[81] 293 U.S. 388 (1935). The Court in *Schechter Poultry* cited *Panama Refining*, noting that the case had "recently [provided] occasion to review the pertinent decisions and the general principles which govern the determination of" whether a statute violates the nondelegation doctrine. *Schechter Poultry*, 295 U.S. at 529.

[82] 298 U.S. 238 (1936).

[83] *See* Ziaja, *supra* note 59, at 924 (discussing the cases).

[84] *See* Franklin D. Roosevelt, U.S. President, Fireside Chat on the Plan for Reorganization of the Judiciary (Mar. 9, 1937), *available at* https://www.presidency.ucsb.edu/documents/fireside-chat-17 [hereinafter FDR Fireside Chat]; David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1225 (1985).

[85] *See 1936: FDR's Second Presidential Campaign*, CUNY: SEE HOW THEY RAN!, http://www.roosevelthouse.hunter.cuny.edu/seehowtheyran/portfolios/1936-fdrs-second-presidential-campaign-the-new-deal/ (last visited Sept. 27, 2022).

[86] *See* FDR Fireside Chat, *supra* note 84.

[87] *Settling of Scores*, DIVIDED ARGUMENT (July 10, 2022), https://www.dividedargument.com/episodes/settling-of-scores (16:10).

[88] *Id.*; *see also* Morrison v. Olson, 487 U.S. 654, 724 (1988) (Scalia, J., dissenting) (describing the Court in 1935 as "an activist, anti-New Deal Court bent on reducing the power of President Franklin Roosevelt").

weakest" of the three branches of government.[89]

President Roosevelt's court-packing plan did not come to fruition, but the Court nevertheless caved in the face of the political pressure. No surprise—as one writer put it: "The Supreme Court needs a lot of fortitude to challenge one of the elected branches. And in truth, this Court didn't have it."[90] Notably, "[a]fter President Roosevelt threatened to pack the Court if it persisted in rendering such decisions, the Justices changed their tune, and nondelegation challenges were thereafter uniformly rejected."[91] In Federalist No. 78, Alexander Hamilton had predicted that such a confrontation would end this way. As Hamilton put it, the judicial branch "can never attack with success either of the other two" branches, and "all possible care is requisite to enable it to defend itself against their attacks."[92]

The Court has not since used the Article I nondelegation doctrine to declare a federal statute unconstitutional. In particular, in the years immediately following 1937, the Court upheld several statutes against nondelegation challenges—including one that was "facially similar to [the] NIRA."[93] By 1944, when the Court decided *Yakus v. United States*,[94] the Article I nondelegation doctrine was effectively a dead letter.[95] To be sure, the nondelegation cases were far from the only reason that President Roosevelt sought to pack the Supreme Court with New Deal

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[89] THE FEDERALIST No. 78 (Hamilton).

[90] Peter J. Wallison, *Only the Supreme Court Can Effectively Restrain the Administrative State*, NAT'L REV. (Dec. 1, 2020, 6:30 AM), https://www.nationalreview.com/2020/12/only-the-supreme-court-can-effectively-restrain-the-administrative-state/.

[91] Merrill, *supra* note 1, at 2103; *see also* Meaghan Dunigan, *The Intelligible Principle: How It Briefly Lived, Why It Died, and Why It Desperately Needs Revival in Today's Administrative State*, 91 ST. JOHN'S L. REV. 247, 259 (2017) ("Both *Panama Refining Co.* and *A.L.A. Schechter Poultry* provide meaningful insight into the intelligible principle. Unfortunately, this insight has largely been dismissed based on the notion that the Court struck down congressional delegation in the [1930s] solely because of the tension that existed between the Court and President Roosevelt. The fact that the Court has not invalidated a statute as an unconstitutional delegation of legislative authority to the executive branch since 1935 largely supports this assertion." (footnote omitted)); George Bunn et al., *No Regulation Without Representation: Would Judicial Enforcement of a Stricter Nondelegation Doctrine Limit Administrative Lawmaking?*, 1983 WIS. L. REV. 341, 342 (pointing to President Roosevelt's court-packing plan as a catalyst for the mid-1930s shift in nondelegation jurisprudence).

[92] THE FEDERALIST No. 78 (Hamilton).

[93] Johnathan Hall, Note, *The Gorsuch Test:* Gundy v. United States, *Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, 187–88 (2020).

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

[95] *See* Ziaja, *supra* note 59, at 923 ("Scholars furthermore point to *Yakus v. United States* in 1944 as the doctrine's effective end, but the doctrine lost its momentum several years earlier." (footnotes omitted))

sympathizers.[96] But this constitutional episode sheds some light on why the Court became skittish about robust application of the Article I nondelegation doctrine.[97]

3. The Decline (and Possible Return?) of the Article I Nondelegation Doctrine: From the Court Packing Plan to the Modern Day

In the years following World War II, the Court sought to articulate a consistent test for disposing of Article I nondelegation challenges. Returning to the pre-1930s regime, the Court recast its nondelegation jurisprudence as being about application of *J.W. Hampton*'s "intelligible principle" test.[98] But in practice, the "test" was no test at all. In 1974, Justice Marshall put it aptly when he described the Article I nondelegation doctrine as "surely as moribund as the substantive due process approach of the same era—for which the Court is fond of writing an obituary."[99] Some Justices resisted. Perhaps most famously, then-Justice Rehnquist called for the revival of the Article I nondelegation doctrine in a concurrence in what has come to be known as "The Benzene Case."[100] But overall, the nondelegation doctrine failed to gain the support of a majority of the Court.

In 2000, Professor Sunstein suggested that over the years, the Article I nondelegation doctrine morphed into a set of canons of statutory interpretation. In Professor Sunstein's telling, the doctrine has operated in practice—through the canons—as something of a background constraint on agency action.[101] Given the principle that Congress may not delegate legislative power to the executive branch, Professor Sunstein opines that the nondelegation "canons impose important constraints on administrative authority, for agencies are not permitted to understand ambiguous provisions to give them authority to venture in certain directions; a clear

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[96] *See* Barry Cushman, *The Court-Packing Plan as Symptom, Casualty, and Cause of Gridlock*, 88 NOTRE DAME L. REV. 2089, 2089–90 (2013).

[97] *Cf.* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 152 (1893) (suggesting that courts "not step into the shoes of the law-maker").

[98] *See* Mistretta v. United States, 488 U.S. 361, 371 (1989) (describing the "intelligible principle" test as driving the Court's nondelegation jurisprudence in *Panama Refining* and the years following).

[99] Fed. Power Comm'n v. New England Power Co., 415 U.S. 345, 353 (1974) (Marshall, J., concurring); *see also Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting) ("[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.").

[100] Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring).

[101] *See* Sunstein, *supra* note 10, at 316.

congressional statement is necessary."[102]

One especially important development occurred the next year in 2001, when the Court decided *Whitman v. American Trucking Associations, Inc.*[103] In that case, the Court—unsurprisingly—turned away an Article I nondelegation challenge to a provision of the Clean Air Act.[104] But in so doing, the Court clarified how a nondelegation challenge is supposed to work. Writing for the Court, Justice Scalia explained that "[i]n a delegation challenge, the constitutional question is whether the *statute* has delegated legislative power to the agency."[105] To that end, "an agency [cannot] cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute."[106] For that reason, litigants lodging Article I nondelegation challenges are challenging the *underlying statute*, not the executive action taken pursuant to the statute's grant of authority.

Fast forward to the present: The Court may be about to revive the Article I nondelegation doctrine. In a 2019 case, *Gundy v. United States*,[107] Justice Gorsuch called for the Court to bring back the doctrine.[108] Chief Justice Roberts and Justice Thomas joined the dissent,[109] and Justice Alito wrote in a concurrence that "[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."[110] And the Court now has two new Justices—Justices Kavanaugh and Barrett—who might be sympathetic to the Article I nondelegation doctrine.[111] That said, not all are convinced that the Court is about to return to declaring statutes unconstitutional on Article I nondelegation grounds.[112]

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[102] *Id.* at 330. In some ways, this observation bears striking similarity to the Court's recent requirement of a clear statement from Congress before an agency can answer a so-called "major question." *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (discussing the "major questions doctrine").

[103] 531 U.S. 457 (2001).

[104] *See id.* at 474.

[105] *Id.* at 472 (emphasis added).

[106] *Id.*

[107] 139 S. Ct. 2116 (2019).

[108] *See id.* at 2131–33 (Gorsuch, J., dissenting).

[109] *Id.* at 2131.

[110] *Id.* (Alito, J., concurring).

[111] *See* Peter J. Wallison, *An Empty Attack on the Nondelegation Doctrine*, AM. ENTER. INST. (Apr. 22, 2021), https://www.aei.org/op-eds/an-empty-attack-on-the-nondelegation-doctrine/.

[112] *See, e.g.*, Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75, 84 (2022); Adrian Vermeule, *Never Jam Today*, YALE J. ON REGUL.: NOTICE & COMMENT (June 20, 2019), https://www.yalejreg.com/nc/never-jam-today-by-adrian-vermeule/.

II. THE BILL OF RIGHTS NONDELEGATION DOCTRINE

Whatever the status of the Article I nondelegation doctrine, the Court has been applying the principles of nondelegation in a related area: Bill of Rights litigation. From the First and Second Amendments to the Fourth and Fifth Amendments, the Court has developed a robust jurisprudence that disfavors unfettered executive discretion. To be sure, not all of the cases or lines of cases discussed in this Part are a *perfect* analog to the traditional understanding of the Article I nondelegation doctrine. But the Bill of Rights nondelegation cases translate the Court's abstract disapproval of unfettered discretion into substantive action—in a way that the Article I nondelegation doctrine does not.

This Part reveals a Bill of Rights nondelegation doctrine. First, it presents the Bill of Rights as a series of substantive, enforceable protections. Second, this Part lays out the various cases and lines of cases that come together to form a Bill of Rights nondelegation doctrine. Third, this Part ties the cases together into a coherent doctrinal framework.

A. The Enforceability of the Bill of Rights

The Constitution did not initially contain a Bill of Rights. In fact, the Federalists argued *against* amending the Constitution to include a Bill of Rights. Ultimately, the dissenters relented and the Bill of Rights joined the Constitution. Years later, in the wake of the Civil War, America amended the Constitution again to include—among other things—the Fourteenth Amendment. The Supreme Court has interpreted this Amendment to have "incorporated" the protections of the Bill of Rights against the state governments. This subpart briefly recounts this constitutional history, setting the stage for the introduction of the Bill of Rights nondelegation doctrine.

1. The Push for Enumerated Rights as Substantive Guarantees

On September 17, 1787, the delegates to the Constitutional Convention in Philadelphia signed the final draft of the Constitution.[113] By June of 1788, the Constitution became America's official governing framework when New Hampshire became the ninth of the 13 states to ratify it.[114] The document set out a structure of government, providing for the separation of

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[113] *See Today in History – September 17*, LIBR. OF CONG., https://www.loc.gov/item/today-in-history/september-17 (last visited Sept. 27, 2022).

[114] *The Day the Constitution Was Ratified*, NAT'L CONST. CTR. (June 21, 2022), https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified.

powers across three co-equal branches.[115] But one aspect of the Constitution—with which we are intimately familiar today[116]—was conspicuously absent from the version ratified in 1787.

It was "[n]ot until late in the Convention [that] a general bill of rights [was] suggested."[117] George Mason led the way, and Elbridge Gerry backed him.[118] Mason had written the Virginia Declaration of Rights, and in Philadelphia he "insisted that the new Constitution . . . spell out the rights and liberties the proposed government would honor and protect."[119] Roger Sherman, another Convention delegate, objected to the idea. To Sherman, "a federal bill of rights would be superfluous, because the state bills of rights were not repealed and were thus sufficient."[120] In the end, "the delegates defeated the motion for a committee to draft a bill of rights by a vote of ten states to none."[121]

The failure to include a Bill of Rights in the proposed Constitution opened the door to criticism of the document. Opponents of ratification—the Anti-Federalists—"discovered quickly that the most effective way to mobilize suspicion about the creation of a federal government was to point out the absence of a ringing statement of the peoples' rights and liberties."[122] The Anti-Federalists capitalized on the concerns of everyday Americans who feared the possible tyranny of an all-powerful federal government.[123] Although the states ultimately ratified the Constitution, James Madison "did not doubt that widespread suspicion and fear of the federal government created by the Constitution persisted."[124] Seeking to avoid a second Constitutional Convention, Madison sought "to drive a wedge between the Antifederalist leadership and their followers"; to do so,

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[115] *See* U.S. CONST. art. I, II, III.

[116] *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1131 (1991) ("To many Americans, the Bill of Rights stands as the centerpiece of our constitutional order.")

[117] John P. Kaminski, *Restoring the Grand Security: The Debate Over a Federal Bill of Rights*, 33 SANTA CLARA L. REV. 887, 890 (1993); Gary L. McDowell & Judith A. Baer, *The Fourteenth Amendment: Should the Bill of Rights Apply to the States?*, 1987 UTAH L. REV. 951, 953.

[118] *See* Kaminski, *supra* note 117, at 890. Perhaps the jumping-off point was Convention delegate Hugh Williamson's suggestion to add "to the new Constitution some guarantee of the right to a jury trial in civil cases." Jeff Broadwater, *George Mason, James Madison, and the Evolution of the Bill of Rights*, 15 GEO. J.L. & PUB. POL'Y 547, 549 (2017).

[119] Carol Berkin, *To Counteract the Impulses of Interest & Passion: James Madison's Insistence on a Bill of Rights*, 15 GEO. J.L. & PUB. POL'Y 527, 528 (2017).

[120] Kaminski, *supra* note 117, at 890.

[121] *Id.*

[122] Berkin, *supra* note 119, at 529.

[123] *See id.* at 529–30.

[124] *Id.* at 530.

he resolved that "the Federalist dominated First Congress—of which he was a member—must get credit for passing a bill of rights."[125]

So, Madison set about drafting a Bill of Rights. He scrupulously avoided the addition of provisions that might weaken core federal powers, like the taxing power.[126] Madison's initial efforts struggled to gain support, but after a bit of time (and some pushing by Madison), "Congress accepted most of the substance of what Madison suggested."[127] Congress whittled (and edited) Madison's many proposed amendments down to twelve, and eventually Congress ratified ten of those amendments in 1791—what we know today as the first ten amendments to the Constitution.[128]

When the dust settled, the Bill of Rights provided for a set of *substantive* protections against the government. These protections were, for the most part, negative liberties: prohibitions on the government from doing certain things that would necessarily infringe liberty. For example, when the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech,"[129] the provision reads as an instruction to Congress *not* to do something (namely, make a law abridging the freedom of speech). Other Bill of Rights amendments guarantee "the right of the people to keep and bear Arms"[130] and "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[131]

Madison himself was not initially convinced of the need for a Bill of Rights—he had derisively described it as nothing more than a "parchment barrier" in private correspondence with Thomas Jefferson.[132] But Jefferson countered with a powerful response. He contended that "a bill of rights could serve as a basis for judicial decision-making," arguing that judges could—through adjudication—give substance to the liberties protected in the Bill of Rights.[133] Madison found this argument persuasive; he even made "it a key point in a speech he delivered some months later to the

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[125] *Id.* For further discussion of Madison's motivations in amending the Constitution to include a Bill of Rights, see *id.* at 530–32.

[126] *See id.* at 532.

[127] Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 301–02.

[128] *See id.* at 302.

[129] U.S. CONST. amend. I.

[130] U.S. CONST. amend. II.

[131] U.S. CONST. amend. IV.

[132] Shlomo Slonim, *The Federalist Papers and the Bill of Rights*, 20 CONST. COMMENT. 151, 161 & n.26 (2003).

[133] Michael P. Zuckert, *Madison's Consistency on the Bill of Rights*, NAT'L AFFS. (Spring 2011), *available at* https://nationalaffairs.com/publications/detail/madisons-consistency-on-the-bill-of-rights.

House of Representatives."[134] As one scholar put it, "Jefferson's argument thus elevated what had been a mere 'parchment barrier' to a law enforceable against political actors."[135]

The extent of the courts' power to enforce these protections was not immediately clear from the text of the amendments. To be sure, the First Amendment specifically prohibited *Congress* from making certain laws. But the other "amendments were at least ambiguous concerning their application to state governments."[136] Naturally, the question would be litigated. But in 1833, the Supreme Court "forcefully dismissed" a Fifth Amendment Takings Clause challenge lodged against the City of Baltimore, reasoning that "the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states."[137] This limitation of the Bill of Rights' protections to the national government meant that "[f]or the first century of its existence, the Bill of Rights did not appear in many Supreme Court cases" as "the state governments exercised the most power over citizens' lives."[138]

2. Incorporation of the Bill of Rights Against the States

The Bill of Rights would eventually become a bulwark of liberty against the state governments, but it took a significant amount of bloodshed. In the 1860s, the United States endured a brutal civil war. In the aftermath of that war, America ratified the "Reconstruction Amendments"[139] in what some have called the "Second Founding."[140] Relevant here, the Fourteenth Amendment to the Constitution—ratified as part of the Reconstruction Amendments—provided important guarantees against state governments.

Per the Fourteenth Amendment,

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[134] *Id.* Even still, "Madison was not fully satisfied with judicial review as a safeguard against tyranny." *Id.*

[135] *Id.*

[136] McDowell & Baer, *supra* note 117, at 954.

[137] Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) (quoted in McDowell & Baer, *supra* note 117, at 955); *see also Now Cherished, Bill of Rights Spent a Century in Obscurity*, U.S. COURTS (Dec. 12, 2019), https://www.uscourts.gov/news/2019/12/12/now-cherished-bill-rights-spent-century-obscurity ("In 1833, a Baltimore wharf owner asked the Supreme Court to extend the Bill of Rights to state and local governments . . . . The appeal met with a loud legal thud.") [hereinafter *Century in Obscurity*].

[138] *Century in Obscurity*, *supra* note 137 (quoting Linda Monk).

[139] *See* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001).

[140] *See, e.g.*, ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT (2020); ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2020).

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[141]

In the years immediately following the amendment's ratification, the substance of the amendment's guarantees against state governments was not entirely obvious. In 1873, the Supreme Court decided the *Slaughter-House Cases*,[142] effectively rendering the first part of the amendment—the so-called "Privileges and Immunities Clause"—a nullity.[143] But over the course of the twentieth century, the Court "initat[ed] what has been called a process of 'selective incorporation,' i.e., the Court began to hold that the Due Process Clause [of the Fourteenth Amendment] fully incorporates particular rights contained in the first eight Amendments."[144] To take an example, the First Amendment famously provides that "*Congress* shall make no law . . . abridging the freedom of speech, or of the press."[145] In 1925, the Supreme Court found that "freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment *by the States*."[146] As the Court explained its incorporation doctrine in a recent case, "[w]ith only a handful of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States."[147]

In determining whether the Fourteenth Amendment incorporates a particular protection of the Bill of Rights against the states, the touchstone

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[141] U.S. CONST. amend. XIV.

[142] 83 U.S. (16 Wall.) 36 (1873).

[143] John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 YALE L.J. 1385, 1414 (1992). *But see* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House *Cases*, 109 YALE L.J. 643, 686–87 (2000) (suggesting a different reading of the *Slaughter-House Cases*).

[144] McDonald v. City of Chicago, 561 U.S. 742, 763 (2010). Although Justice Brennan was "not the first to suggest the selective incorporation doctrine," his opinions in the early 1960s "were the first both to articulate it clearly and to advance it as a preferred position." Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 253 n.1 (1982).

[145] U.S. CONST. amend. I (emphasis added).

[146] Gitlow v. New York, 268 U.S. 652, 666 (1925) (emphasis added).

[147] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019). *But cf.* Lehman v. Shaker Heights, 418 U.S. 298, 305 n.1 (1974) (Douglas, J., concurring in the judgment) ("The Court has frequently rested state free speech and free press decisions on the Fourteenth Amendment generally, rather than on the Due Process Clause alone.").

of the analysis is whether the right "is fundamental to our scheme of ordered liberty, or deeply rooted in this Nation's history and tradition."[148] Formally, "[i]ncorporated Bill of Rights guarantees are 'enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'"[149] Professor Akhil Amar notes that "because of the peculiar logistics of incorporation, the Fourteenth Amendment itself often seems to drop out of the analysis. We *appear* to be applying the Bill of Rights directly."[150] Nevertheless, the key point here is to illuminate that "modern constitutional doctrine has incorporated (almost all of) the Bill of Rights against the states."[151] In the modern era, federal constitutional review of state (and city and municipal) legislation and action is a core component of the Supreme Court's docket.[152] The Fourteenth Amendment's incorporation of the Bill of Rights against the state governments has put the federal courts in the position of rights-guarantor whenever a state abridges the freedom of speech,[153] searches someone's home without a warrant,[154] or effectuates an excessive forfeiture of someone's assets.[155] This doctrine of incorporation recognizes—through the Fourteenth Amendment's Due Process Clause—a set of rigorous individual liberty protections that are

[148] *Timbs*, 139 S. Ct. at 687 (quoting *McDonald*, 561 U.S. at 767) (internal quotation marks omitted).

[149] *Id.* (quoting *McDonald*, 561 U.S. at 765).

[150] Amar, *supra* note 116, at 1131. Professor Amar goes on to note that "[l]ike people with spectacles who often forget they are wearing them, most lawyers read the Bill of Rights through the lens of the Fourteenth Amendment without realizing how powerfully that lens has refracted what they see." *Id.* at 1136–37.

[151] Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1054 (2011).

[152] October Term 2020 at the Supreme Court involved various of these sorts of challenges. *See, e.g.*, Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021) (First Amendment challenge to state regime of disclosing names of charitable organizations' donors); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (Fifth Amendment Takings Clause challenge to state regulation granting labor organizations a "right to take access" to an agricultural employer's property for union solicitation); Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021) (First Amendment challenge to public high school's suspension of student from the cheerleading team because of off-campus speech); Lange v. California, 141 S. Ct. 2011 (2021) (Fourth Amendment challenge to warrantless entry into man's garage after he fled); Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (First Amendment free exercise challenge to city's refusal to contract with Catholic foster care agency unless it agreed to certify same-sex foster couples); Caniglia v. Strom, 141 S. Ct. 1596 (2021) (Fourth Amendment challenge to warrantless removal of a man's firearms from his home); Torres v. Madrid, 141 S. Ct. 989 (2021) (Fourth Amendment challenge to officer shooting a fleeing suspect).

[153] *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989).

[154] *See, e.g.*, Florida v. Jardines, 569 U.S. 1 (2013).

[155] *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682 (2019).

enforceable against state governments.

B. Laying out the Bill of Rights Nondelegation Doctrine

The Bill of Rights "spells out Americans' rights in relation to their government."[156] These rights are often understood by reference to a particular, substantive guarantee: for example, "Congress shall make no law . . . abridging the freedom of speech";[157] "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated";[158] and "private property [shall not] be taken for public use, without just compensation."[159]

This subpart—and this Article—builds on the usual understanding of the Bill of Rights. This Article identifies a Bill of Rights "nondelegation doctrine," revealing a coherent framework of cases in which the Supreme Court has constructed a doctrinal edifice of nondelegation around the Bill of Rights. In various cases concerning different Bill of Rights amendments, the Court has evinced hostility to the conferral—or delegation—of too much discretion to the executive to impair certain liberties that the Bill of Rights guarantees. In these cases, the Court has attacked the constitutionality of the underlying *delegation* of discretion to violate an enumerated right (for example, the freedom of speech), as opposed to resting a finding of unconstitutionality solely on the impairment of the liberty itself. In a way, the Bill of Rights nondelegation doctrine operates a prophylactic protection, precluding grants of discretion to the executive when that discretion could be used in a way that infringes upon an individual liberty guaranteed by the Bill of Rights.

Doctrinal developments with respect to four separate Bill of Rights amendments illustrate this phenomenon. Beginning with the First Amendment, the "Court has condemned licensing schemes that lodge broad discretion in a public official to permit [or not permit] speech-related activity."[160] Similarly, in a recent Second Amendment decision,[161] the Court declared that a state's discretionary permitting regime for concealed-carry licenses was unconstitutional.[162] The Fourth Amendment also contains a rule of anti-delegation (or at least anti-discretion), even more explicitly

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[156] *The Bill of Rights: What Does It Say?*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/bill-of-rights/what-does-it-say (last visited Oct. 16, 2022).

[157] U.S. CONST. amend. I.

[158] U.S. CONST. amend. IV.

[159] U.S. CONST. amend. V.

[160] Police Dep't of Chi. v. Mosley, 408 U.S. 92, 97 (1972).

[161] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

[162] *See id.* at 2122, 2123–24.

textual: various cases have given effect to the Fourth Amendment's requirement that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized*."[163] Moreover, under prevailing Supreme Court precedent, the Fifth Amendment embodies a so-called "void for vagueness doctrine." Here, a court will declare a penal statute to be unconstitutional if it does not "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[164] The vagueness doctrine is therefore "a safeguard against legislative delegation of excessive discretion to courts and to executive officials and agencies, especially the police."[165] Taken together, these cases stand for a broad principle: On the way to enforcing the Bill of Rights, the Court has prevented the delegation of unfettered discretion to the executive.

1. Discretionary Licensing Regimes and the First Amendment

In 1948, the Supreme Court considered a First Amendment challenge (via the Fourteenth Amendment) to a local ordinance in Lockport, New York.[166] Samuel Saia was a Jehovah's Witness who wanted "to use sound equipment, mounted atop his car, to amplify lectures on religious subjects."[167] But Lockport law prohibited the use of sound equipment in this way, unless one had obtained permission from the town's chief of police.[168] The local ordinance set no standards for the police chief's issuance of the permit—in other words, issuance of the permit was at the police chief's unfettered discretion.[169] Saia had previously obtained a permit for his use of the sound equipment.[170] But once that permit expired, Saia applied for a new permit, and he was refused.[171] The town grounded its refusal in the fact that some people had apparently complained about Saia.[172] Saia

[163] U.S. CONST. amend. IV (emphasis added). For cases applying the principle, see, e.g., *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) and *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984).

[164] Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[165] Kim Forde-Mazrui, *Ruling out the Rule of Law*, 60 VAND. L. REV. 1497, 1500 (2007).

[166] Saia v. New York, 334 U.S. 558 (1948).

[167] *Id.* at 559.

[168] *See id.* at 558 n.1 (citing the local ordinance).

[169] *See id.*

[170] *See id.* at 559.

[171] *See id.*

[172] *See id.*

"nevertheless used his equipment as planned on four occasions, but without a permit. He was tried in Police Court for violations of the ordinance."[173]

Saia challenged the constitutionality of the ordinance.[174] By a vote of 5-4 at the Supreme Court, he won.[175] The Court held that the ordinance's permitting regime was unconstitutional, "for it establishe[d] a previous restraint on the right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment against State action."[176] The Court's main issue with the ordinance was that there were "no standards prescribed for the exercise of [the police chief's] discretion."[177] In the Lockport ordinance, "[t]he right to be heard [was] placed in the uncontrolled discretion of the Chief of Police. He [stood] athwart the channels of communication as an obstruction which [could] be removed only after criminal trial and conviction and lengthy appeal."[178] The Court analogized the Lockport ordinance to a similar local ordinance that it had declared unconstitutional in *Cantwell v. Connecticut*.[179] The ordinance reviewed in *Cantwell* required that one obtain a license "in order to distribute religious literature."[180] As the Court described the *Cantwell* ordinance in *Saia*: "What was religious was left to the discretion of a public official."[181] The key takeaway from *Saia* was as follows: "When a city allows an official to ban [the use of loud-speakers] in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas."[182] That suppression—as the Court saw it—is repugnant to the First and Fourteenth Amendments of the Constitution.

Saia was just one of "a series of cases involving discretionary licensing schemes that were, *or might have been*, used to discriminate against certain speech because of its content."[183] The emphasis on "might have been" is important. In *Largent v. Texas*,[184] the Court explained that the very fact that "[d]issemination of ideas depends upon the approval of the distributor by the official . . . is [itself] administrative censorship in an extreme form" that

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[173] *Id.*
[174] *See id.* at 558.
[175] *See generally id.*
[176] *Id.* at 559–60.
[177] *Id.* at 560.
[178] *Id.* at 560–61.
[179] *See id.* at 560 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940)).
[180] *Id.* (discussing *Cantwell*).
[181] *Id.*
[182] *Id.* at 562.
[183] Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 627 n.42 (1991) (emphasis added); *see also* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 97 (1972) (collecting cases).
[184] 318 U.S. 418 (1943).

violates the Constitution.[185] The point of the First Amendment discretionary licensing cases is that the "lodg[ing of] broad discretion in a public official to permit speech-related activity" *itself* abridges speech.[186] The constitutional problem is the licensing schemes' "*potential* use as instruments for selectively suppressing some points of view."[187] That mere *potential* is enough to create a constitutional difficulty.

After *Saia*,[188] the Court confronted a number of other discretionary licensing regimes that imperiled First (and Fourteenth) Amendment rights. In a pair of cases decided on the same day in early 1951—*Niemotko v. Maryland*[189] and *Kunz v. New York*[190]—the Court expanded upon its First Amendment discretionary permitting jurisprudence.[191] The ordinances at issue in the cases had vested an unfettered discretion in local officials to deny permits, which the Court found unacceptable.[192] In the words of the *Kunz* Court, a state "cannot vest restraining control over the right to speak . . . in an administrative official where there are no appropriate standards to guide his action."[193] Over the next few decades, the Court continued to enforce this principle.[194] In case after case, regardless of whether the laws were neutral with respect to the expressive activity's message, "the Court was worried about the broad discretion they gave to government officials. The Court's suspicion of such discretion arose, in large part, from its fear that officials would use their power to discriminate among speakers based upon the content of their speech."[195]

Instead of making litigants challenge these discretion-delegating schemes in an as-applied posture, the Court has permitted facial

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[185] *Id.* at 422.

[186] *Mosley*, 408 U.S. at 97.

[187] *Id.* (emphasis added).

[188] To be sure, *Saia* was not the first case to condemn discretionary licensing regimes in the speech context. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 97 (1940); Schneider v. State, 308 U.S. 147, 164 (1939); Hague v. CIO, 307 U.S. 496, 516 (1939); *see also* Lovell v. Griffin, 303 U.S. 444, 451–52 (1938) (describing a discretionary licensing scheme as inconsistent with the freedom of the press guaranteed by the First Amendment).

[189] 340 U.S. 268 (1951).

[190] 340 U.S. 290 (1951).

[191] *See Niemotko*, 340 U.S. at 273; *Kunz*, 340 U.S. at 295.

[192] *See id.* The Court noted in *Kunz* that it had "consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." *Kunz*, 340 U.S. at 294.

[193] *Kunz*, 340 U.S. at 295.

[194] *See, e.g.*, Sec'y of Md. v. Joseph H. Munson Co., 467 U.S. 947, 964 n.12 (1984); Shuttlesworth v. Birmingham, 394 U.S. 147, 150–51 (1969); Freedman v. Maryland, 380 U.S. 51, 56–57 (1965); Cox v. Louisiana, 379 U.S. 536, 556–58 (1965); Staub v. City of Baxley, 355 U.S. 313, 325 (1958).

[195] Williams, *supra* note 183, at 701.

constitutional attacks.[196] By 1988, the Court explained that its "cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license."[197] This constitutional approach flows from "the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."[198] In the Court's telling, it is "the mere *existence* of the licensor's unfettered discretion, coupled with the power of prior restraint, [that] intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."[199]

From these cases, a rule of nondelegation for the First Amendment emerges: A statute is unconstitutional if it delegates standardless discretion

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[196] Professor Richard Fallon explains the difference between "as-applied" and "facial" challenges:

> In an as-applied challenge, a party maintains that the Constitution forbids a statute's application to his or her case. In contrast, a facial challenge asserts that a statute—or, more commonly, a provision of a multipart statute—exhibits a defect that renders it invalid as applied to all cases, even if a more narrowly (or occasionally a more broadly) framed provision could have prohibited the challenger's conduct.

Richard H. Fallon, Jr., *Facial Challenges, Saving Constructions, and Statutory Severability*, 99 TEX. L. REV. 215, 228 (2020) (footnote omitted).

[197] Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 755–56 (1988); *see also* FW/PBS, Inc. v. Dallas, 493 U.S. 215, 246 (1990) (White, J., concurring in part and dissenting in part) ("Licensing schemes subject to First Amendment scrutiny . . . have been invalidated when undue discretion has been vested in the licensor. Unbridled discretion with respect to the criteria used in deciding whether or not to grant a license is deemed to convert an otherwise valid law into an unconstitutional prior restraint. That rule reflects settled law with respect to licensing in the First Amendment context.") (citations omitted).

[198] *Lakewood*, 486 U.S. at 757.

[199] *Id.* (emphasis added). Perhaps in these sorts of cases, the Court is worried about what it describes as "the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority." Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 649 (1981). Professor Susan Williams takes it a step further, arguing that "[t]he serious, present harm in . . . discretion lies . . . in the concept of chill, a concept more closely related to content discrimination from the speaker's perspective." Williams, *supra* note 183, at 704; *see also* Sec'y of Md. v. Joseph H. Munson Co., 467 U.S. 947, 964 n.12 (1984) ("By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech."). As Professor Williams puts it: "Curing or avoiding chill requires changing the regulatory scheme so that speakers no longer feel threatened rather than changing the motives of government actors, who, by hypothesis, need not actually be discriminating." Williams, *supra* note 183, at 704.

to a government official to permit or deny expressive activity.

2. "May Issue" Concealed Carry Permitting Regimes and the Second Amendment

The Court recently recognized something of a rule of nondelegation in a Second Amendment case, too. While this rule does not have anything close to the doctrinal pedigree of the First Amendment nondelegation principle discussed earlier in this subsection, it nevertheless contributes to this Article's identification of a Bill of Rights nondelegation doctrine.

In the October 2021 Term, the Supreme Court decided *New York State Rifle & Pistol Association v. Bruen*.[200] The case concerned a New York state licensing regime for concealed-carry permits. To set the stage, New York law prohibited possession of a firearm without a license.[201] To obtain a license for carrying a firearm outside the home, an applicant had to prove that "proper cause" existed for the license's issuance.[202] As the Court noted, "[n]o New York statute defines 'proper cause,'" although New York courts had interpreted the term to mean "a special need for self-protection distinguishable from that of the general community."[203] Unfortunately for applicants, judicial review of these licensing decisions was limited.[204] New Yorkers Brandon Koch and Robert Nash had applied for unrestricted licenses to carry firearms, but licensing officials only issued them restricted permits.[205]

Koch and Nash sued the relevant state officials, alleging violations of their Second and Fourteenth Amendment rights.[206] Like Samuel Saia and many other litigants in the First Amendment cases discussed in Part II.B.1, Koch and Nash won. The Court noted that it had "granted certiorari to decide whether New York's *denial* of [Koch and Nash's] license applications violated the Constitution."[207] But the Court ultimately found that it was the state's "proper-cause *requirement*" that violated the Fourteenth Amendment's incorporation of the Second Amendment liberty.[208] The Court compared New York's licensing scheme—"under which authorities have *discretion* to deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the

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[200] 142 S. Ct. 2111 (2022).
[201] *See id.* at 2122.
[202] *See id.* at 2123 (citing N.Y. Stat. § 400.00(2)(f)).
[203] *Id.* (citing In re Klenosky, 75 A.D. 2d 793 (N.Y. App. Div. 1980)).
[204] *See id.*
[205] *See id.* at 2125.
[206] *See id.*
[207] *Id.* (emphasis added).
[208] *Id.* at 2156 (emphasis added).

applicant has not demonstrated cause or suitability for the relevant license"—to "the vast majority of States . . . , where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials *discretion* to deny licenses based on a perceived lack of need or suitability."[209] The contrast here was between "may-issue" and "shall-issue" regimes; in "may-issue" regimes, licensing officials maintain discretion to deny permits even if applicants meet the statutory criteria.

Justice Kavanaugh's concurrence specifically addressed the discretionary nature of "may-issue" licensing regimes.[210] He noted that "[a]s the Court explain[ed], New York's outlier may-issue regime is constitutionally problematic because it grants open-ended discretion to licensing officials and authorizes licenses only for those applicants who can show some special need apart from self-defense."[211] Echoing the themes of the First Amendment licensing cases, Justice Kavanaugh wrote that "the unchanneled discretion for licensing officials and the special-need requirement . . . in effect deny the right to carry handguns for self-defense to many ordinary, law-abiding citizens."[212] Here again, the very *delegation* of discretion constituted a denial of the enumerated right.

The *Bruen* Court also took issue with New York State's declaration of the island of Manhattan as a "sensitive place" "where the government may lawfully disarm law-abiding citizens" consistent with the Second Amendment.[213] Further, the Court concluded that the respondents in the case had "failed to meet their burden to identify an American tradition justifying New York's proper-cause requirement" before deeming the requirement unconstitutional.[214] Nevertheless, the discussion of discretion in *Bruen* provides further evidence for the existence of a Bill of Rights nondelegation doctrine.

Bruen—or, at least, Justice Kavanaugh's concurrence in *Bruen*—continued the Court's march of anti-delegation through the Bill of Rights. Like the First Amendment cases, *Bruen* stands for a nondelegation principle: legislatures may not delegate open-ended discretion to (executive) licensing officials to deny concealed-carry permits.

3. General Warrants and the Fourth Amendment

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[209] *Id.* at 2123–24.
[210] *See id.* at 2161 (Kavanaugh, J., concurring).
[211] *Id.*
[212] *Id.* (internal quotation marks omitted).
[213] *Id.* at 2133–34 (majority opinion).
[214] *Id.* at 2138.

The Fourth Amendment spells out its anti-delegation rule more explicitly than do the First and Second Amendments. After articulating an overarching prohibition on unreasonable government searches and seizures, the Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized*."[215] The Fourth Amendment's particularity requirement sets up a two-part test: the court must ask whether a warrant particularly describes (1) the *place* to be *searched* and (2) the *persons or things* to be *seized*. If the answer to either question is "no," the warrant is "invalid."[216] And "[a]lthough the Fourth Amendment does not, by its text, require that searches be supported by a warrant, [the Supreme] Court has inferred that a [valid] warrant must generally be secured for a search to comply with the Fourth Amendment."[217]

In Fourth Amendment cases, remedies are a tricky thing. The ordinary remedy for a Fourth Amendment violation is the application of the so-called "exclusionary rule," under which evidence obtained in violation of one's Fourth Amendment rights is inadmissible against that person at a criminal trial.[218] But in recognition of "the substantial social costs" of excluding evidence, the Supreme Court has carved out numerous exceptions to the exclusionary rule.[219] One of these carve-outs is known as the "good-faith exception," in which a court will not apply the exclusionary rule when an officer acts in "objectively reasonable reliance" on an invalid warrant.[220] And while the Court has applied the good-faith exception notwithstanding a particularity violation,[221] the exclusionary rule still undoubtedly applies

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[215] U.S. CONST. amend. IV.

[216] Groh v. Ramirez, 540 U.S. 551, 557 (2004).

[217] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2539–40 (2019) (Thomas, J., concurring) (internal quotation marks and citations omitted); *see also* Groh v. Ramirez, 540 U.S. 551, 559 (2004) ("[T]he presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant.").

[218] *See* Edwin G. Fee, Jr., *Criminal Procedure I: Narrowing the Protection of the Fourth Amendment*, 1989 ANN. SURV. AM. L. 371, 371 & n.4; *see also* Alexandra Natapoff, Atwater *and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 166 (2020) ("The usual rule is that police cannot use the fruits of an illegal seizure."). While the Court in 1971 recognized a private right of action for money damages under the Fourth Amendment itself, *see* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397–98 (1971), the Court has pared that remedy back in recent years. *See, e.g.*, Vega v. Tekoh, 142 S. Ct. 2095 (2022); Hernandez v. Mesa, 140 S. Ct. 735 (2020).

[219] United States v. Leon, 468 U.S. 897, 922–23 (1984); *see also* Hudson v. Michigan, 547 U.S. 586, 591–92 (2006) (describing a balancing approach for application of the exclusionary rule).

[220] *Leon*, 468 U.S. at 927 (Blackmun, J., concurring).

[221] *See* Massachusetts v. Sheppard, 468 U.S. 981 (1984); *see also generally* Martha

when "a warrant [is] so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid."[222] Thus, in light of the Court's exception-laden exclusionary rule jurisprudence, the particularity requirement remains an important bulwark against judicial delegation of discretion to police.[223] And when a warrant is insufficiently particular, the judge's issuance of the warrant permits the police to fill up the details, on their own, as they see fit—a discretionary exercise of the police power that the Fourth Amendment disallows.

The Supreme Court has been clear about this principle: "The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional."[224] Conformance to the particularity requirement requires that "nothing is left to the discretion of the officer executing the warrant."[225] Particularity in the *application* for the warrant is not enough.[226] The underlying warrant itself must provide the requisite particularity. To be sure, the "particularity requirement does not include the conditions precedent to execution of the warrant"—that is, anticipatory warrants (warrants with a "triggering condition") are constitutionally valid, even if the warrant does not itself specify the triggering condition.[227]

The particularity requirement is rooted in the Framers' abhorrence of the "general warrant."[228] Also known as "writs of assistance," general warrants in the colonies gave British "customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws."[229] General warrants would authorize standardless searches and seizures, drawing the ire of the colonists.[230] In particular, officials used

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Applebaum, Note, *"Wrong but Reasonable": The Fourth Amendment Particularity Requirement After* United States v. Leon, 16 FORDHAM URB. L.J. 577 (1988) (analyzing application of the good-faith exception to the exclusionary rule in cases concerning particularity-deficient warrants in the years immediately following *Sheppard*).

[222] *Leon*, 468 U.S. at 923 (majority opinion).

[223] *But cf.* David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 505 (2016) ("Police discretion is hemmed in only at the margins by legal constraints.").

[224] *Sheppard*, 468 U.S. at 988 n.5.

[225] Marron v. United States, 275 U.S. 192, 196 (1927).

[226] *See* Groh v. Ramirez, 540 U.S. 551, 557 (2004).

[227] United States v. Grubbs, 547 U.S. 90, 98 (2006). *But cf. The Supreme Court – Leading Cases*, 120 HARV. L. REV. 125, 161 (2006) (describing anticipatory warrants as constituting an "inherent delegation of discretion from an impartial magistrate to the officer executing the warrant").

[228] Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).

[229] Stanford v. Texas, 379 U.S. 476, 481 (1965).

[230] *See id.* at 481.

general warrants to harass dissenters.[231] For this reason, the particularity requirement has a doctrinal connection to the First Amendment's protections for speech and expression.[232] In *Stanford v. Texas*, the Court expounded on this connection when it explained that "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain."[233] In fact, resistance against the practice of general warrants may have been the spark that ignited the revolutionary fire in colonial America.[234]

The Fourth Amendment's particularity requirement is a rule of nondelegation. Unlike the ordinary delegation scenario, the delegation in the Fourth Amendment particularity requirement is from a *judicial* officer to an executive officer.[235] True, one might conceive of the requirement of the warrant itself as a limitation on executive power.[236] But whether the discretionary constitutional authority to issue the warrant is a freestanding element of the judicial power or a cabining of the executive power, the particularity requirement ensures that the judicial branch does not merely delegate the discretionary authority (to determine whether the warrant is particular enough) *back* to the executive.

Thus, the principle of nondelegation holds up. A main problem with general warrants was that "they delegated to the officer the power to decide whom to search and for what to search."[237] At bottom, general warrants constituted a "*delegation* of discretion."[238] To rectify this issue, the Framers

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[231] *See* Marcus v. Search Warrant of Property, 367 U.S. 717, 724–25 (1961)

[232] *See id.* at 729 ("The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power.").

[233] *Stanford*, 379 U.S. at 485–86.

[234] Boyd v. United States, 116 U.S. 616, 625 (1886).

[235] *Cf.* Johnson v. United States, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.").

[236] *See, e.g.*, Lo-Ji Sales v. New York, 442 U.S. 319, 326 (1979) (describing "a warrant authorized by a neutral and detached judicial officer" as "a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer").

[237] Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 17 PACE L. REV. 97, 141 (1997).

[238] *Id.* at 142 (emphasis added); *cf.* City of Los Angeles v. Patel, 576 U.S. 409, 427 (2015) (describing police discretion as an evil against which the Fourth Amendment guards); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 412 (1974) ("Under the fourth amendment, even where the initial justification for a search was determined by a magistrate, executive discretion in its execution was to be curbed by the requirement of particularity of description in the warrant of the items subject

enshrined a requirement in the Fourth Amendment that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized."[239] The Court has viewed "[t]he security of one's privacy against *arbitrary* intrusion by the police" as being "at the core of the Fourth Amendment" and "basic to a free society."[240] General warrants countenance arbitrary police intrusion, eroding "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"[241] because the police become the ones who get to fill out the substance of the warrant in practice through their searching. These warrants violate the Bill of Rights nondelegation doctrine.

4. The Void-for-Vagueness Doctrine and the Fifth Amendment

The Bill of Rights doctrine most familiar to the nondelegation discourse is the so-called "void for vagueness" doctrine. Various scholars and jurists have linked the void-for-vagueness doctrine to the Article I nondelegation doctrine.[242] The two have some overlap, to be sure. But the better way to understand the vagueness doctrine is that it exists as a component part of a wholly different nondelegation doctrine: the Bill of Rights nondelegation doctrine.

The Fifth Amendment provides, in relevant part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[243] Similarly, the Fourteenth Amendment prohibits "any state" from "depriv[ing] any person of life, liberty, or property, without due process of law."[244] In these clauses, the Supreme Court has found a rule of constitutional law applicable against the federal government via the Fifth Amendment and analogously applicable to the state governments via the Fourteenth Amendment. That rule is as follows: "[T]he Government violates [the Constitution's guarantee of due process] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."[245] The Court recently

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to seizure.").

[239] U.S. CONST. amend. IV.

[240] Wolf v. Colorado, 338 U.S. 25, 27 (1949) (emphasis added).

[241] U.S. CONST. amend. IV.

[242] *See, e.g.*, *supra* notes 21–22; *infra* notes 261–264; Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 264 n.72 (2010).

[243] U.S. CONST. amend. V.

[244] U.S. CONST. amend. XIV.

[245] Johnson v. United States, 576 U.S. 591, 595 (2015) (applying the Fifth Amendment's Due Process Clause in evaluating the constitutionality of a federal law);

even applied the void-for-vagueness doctrine to a civil law when the consequence of the civil penalty in question was deportation.[246] At bottom, "the 'void for vagueness' doctrine requires the state to set forth clear guidance before it may punish private conduct."[247]

Like the Fourth Amendment's particularity requirement, the void-for-vagueness doctrine has a special connection to the First Amendment. Despite the traditional understanding that the vagueness doctrine is reserved for criminal laws, Justice Thomas noted in concurrence in *Johnson v. United States* that the Court had previously applied the vagueness doctrine to a non-penal law.[248] The case he cited for this proposition was *Keyishian v. Board of Regents*,[249] in which the Court held that multiple state laws were unconstitutional on vagueness grounds.[250] But the decision was quite focused on the freedoms that the First Amendment guarantees. The state laws at issue would have authorized the removal of state education employees who uttered treasonous or seditious words.[251] In making its declaration of unconstitutionality, the *Keyishian* Court cited *NAACP v. Button*, in which it had explained that "standards of permissible statutory vagueness are strict in the area of free expression."[252] Moreover, in *Grayned v. City of Rockford*,[253] the Court drew a connection between its vagueness holdings and its First Amendment licensing cases (discussed in Part II.B.1).[254] As Professor Sunstein has written, specificity in the state's prescriptions of rules might be seen as "particularly important in the areas of criminal justice and freedom of speech."[255]

Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (applying the Fourteenth Amendment's Due Process Clause in evaluating the constitutionality of a state law).

[246] *See* Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

[247] Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 968 (1995) [hereinafter Sunstein, *Rules*].

[248] *Johnson*, 576 U.S. at 612 (Thomas, J., concurring).

[249] 385 U.S. 589 (1967).

[250] *See id.* at 609–10.

[251] *See id.* at 593.

[252] 371 U.S. 415, 432 (1963) (quoted in *Keyishian*, 385 U.S. at 604).

[253] 408 U.S. 104 (1972).

[254] *See id.* at 113 n.22.

[255] Sunstein, *Rules*, *supra* note 247, at 968. Professors F. Andrew Hessick and Carissa Byrne Hessick would go a step further. They argue that there is an "incompatibility between the prevailing justification for modern nondelegation doctrine and the vagueness doctrine." F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 286 (2021). In making this point, they posit that "treating criminal delegations no differently than other delegations" is a "fundamental problem"—as they put it, "criminal law delegations are different from other delegations. They are inconsistent with foundational criminal law doctrine, they present greater threats to the principles underlying the nondelegation doctrine, and they are not supported by the ordinary arguments in favor of delegation. And so we should treat criminal law delegations

The justifications for the vagueness doctrine are twofold. First, the vagueness doctrine guarantees that people will have "fair notice" of what conduct is proscribed.[256] Second, and pertinent to this Article's thesis, "the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges."[257] This second justification—which itself informs the first justification—is a kind of nondelegation rationale. Here, the Court's concern has been that "[s]tatutory language of . . . a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures *may not so abdicate their responsibilities* for setting the standards of the criminal law."[258] As the Court noted recently, "the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not."[259] And when Congress (or a state legislature) has failed to do so, thereby delegating this awesome power to the executive and the courts under a broad grant of penal authority, the Court has not hesitated to declare the offending statutes unconstitutional.[260]

The Article I nondelegation parallels are evident. Dissenting in *Gundy v. United States*, Justice Gorsuch submitted that the Court sometimes uses the vagueness doctrine in place of the nondelegation doctrine to "rein in

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differently." *Id.*

Justice Gorsuch has linked the Fourth Amendment's particularity requirement to the vagueness doctrine. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1227 (2018) (Gorsuch, J., concurring). Some scholars have also drawn connections between the Fourth Amendment and the vagueness doctrine. *See, e.g.*, Forde-Mazrui, *supra* note 165, at 1500 n.27; Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?*, 3 U. PA. J. CONST. L. 398, 404 (2001).

[256] *See Dimaya*, 138 S. Ct. at 1212.

[257] *Id.*; *see also* Smith v. Goguen, 415 U.S. 566, 574 (1974) ("[P]erhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.").

[258] *Smith*, 415 U.S. at 575 (emphasis added); *see also* Papachristou v. City of Jacksonville, 405 U.S. 156, 168 (1972) ("Another aspect of the ordinance's vagueness appears when we focus, not on the lack of notice given a potential offender, but on the effect of the unfettered discretion it places in the hands of the . . . police.").

[259] *Dimaya*, 138 S. Ct. at 1212; *see also* City of Chicago v. Morales, 527 U.S. 41, 70 (1999) (Breyer, J., concurring) ("[I]t is in the ordinance's delegation to the policeman of open-ended discretion . . . that the problem lies.").

[260] *See* Johnson v. United States, 576 U.S. 591, 612 (2015) (Thomas, J., concurring) ("We have become accustomed to using the Due Process Clauses to invalidate laws on the ground of 'vagueness.' The doctrine we have developed is quite sweeping. . . . Using this framework, we have nullified a wide range of enactments." (citation omitted)) (collecting cases).

Congress's efforts to delegate legislative power."[261] And dissenting in *Sessions v. Dimaya*, Justice Thomas hypothesized that "the vagueness doctrine is really a way to enforce the separation of powers—specifically, the doctrine of nondelegation."[262] To make this point, he pointed to the Court's admonition in *Grayned* that "[a] vague law impermissibly delegates basic policy matters."[263] Justice Thomas noted that he locates the nondelegation principle—which he defined as the rule "that the Constitution prohibits Congress from delegating core legislative power to another branch"—"in the Vesting Clauses of Articles I, II, and III—not in the Due Process Clause."[264] This view of the meaning of the nondelegation principle comports with the present scholarly discourse. Yet as this Article demonstrates, the rule that Justice Thomas describes is merely one *kind* of nondelegation principle: the Article I nondelegation doctrine. The idea that the Due Process Clause prohibits the delegation of discretion to the executive, as part of the *Bill of Rights* nondelegation doctrine, is entirely consistent with Justice Thomas's *Dimaya* dissent.

Scholars have expounded upon the parallels. A main observation has been that "[v]ague statutes have the effect of delegating lawmaking authority to the executive."[265] As Professor Michael Mannheimer has written, "the void-for-vagueness doctrine operates as a type of nondelegation doctrine, bolstering the separation of powers by requiring

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[261] Gundy v. United States, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting).

[262] *Dimaya*, 138 S. Ct. at 1248 (Thomas, J., dissenting). The idea that other aspects of law have "replaced" the nondelegation doctrine is not limited to vagueness. *See, e.g.*, Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 206 (2022) ("Instead of avoiding the difficulties of applying the nondelegation doctrine, the major questions canon achieves the same purpose *sub rosa*."); Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1295 (2008) ("[T]he [Administrative Procedure Act's] procedural constraints on the exercise of delegated discretion have effectively replaced the nondelegation doctrine."); *cf.* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345 ("Narrow construction of criminal statutes, it is proclaimed, . . . constrains the discretion of law enforcement officials.").

[263] *Dimaya*, 138 S. Ct. at 1248 (Thomas, J., dissenting) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)).

[264] *Id.*

[265] Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1806 (2012). Justice Thomas cites this quotation in his *Dimaya* dissent. *See Dimaya*, 138 S. Ct. at 1248 (Thomas, J., dissenting). That said, then-Professor (now Judge) Debra Livingston has taken the position that while "broad and overinclusive rules enhance police discretion, . . . a plethora of narrow rules may not meaningfully constrain it, since such rules may or may not be enforced." Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 618 (1997).

that the lawmaking power be housed in the legislative branch."[266] A recent Note, entitled "Vagueness and Nondelegation," makes the point succinctly: "The void-for-vagueness doctrine and the nondelegation doctrine share an intuitive connection: when Congress drafts vague statutes, it delegates lawmaking authority to courts and the executive."[267] Moreover, two attorneys have urged adoption of the void-for-vagueness standard—which they describe as requiring that criminal laws "(1) be clear enough to provide fair notice and (2) be enacted by elected legislators to ensure democratic legitimacy"—in nondelegation cases "to police noncriminal delegations as well."[268]

C. Tying It All Together

The Bill of Rights nondelegation doctrine emerges. Taken together, the cases discussed in Part II.B stand for a coherent rule: When a right enumerated in the Bill of Rights is at issue, neither the legislature nor the courts may delegate unfettered discretion to the executive to violate that right. In the First Amendment cases, the Supreme Court has prohibited legislatures from conferring open-ended discretion on executive officials to deny permits for expressive activity.[269] In *Bruen*—a Second Amendment case—the Court prohibited a state legislature from conferring this same sort of discretion on executive officials to deny concealed-carry permits.[270] Meanwhile, the Fourth Amendment particularity-requirement cases prevent *judges* from delegating discretion—via a warrant—to the executive about

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[266] Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 TEX. L. REV. 1049, 1055 (2020); *see also* Guyora Binder & Brenner Fissell, *A Political Interpretation of Vagueness Doctrine*, 2019 U. ILL. L. REV. 1548–49 (describing the "underlying concern" in the vagueness cases not in explicit nondelegation terms, but as a belief that "discretion allows executive officials to make determinations about what should be punished, but such determinations should only be made by elected legislatures"); Forde-Mazrui, Forde-Mazrui, *supra* note 165, at 1500 ("[C]entral to the rule of law is the principle that specificity in legal rules serves to constrain the discretion exercised by those charged with their enforcement. This principle has been constitutionalized by the courts, through the void-for-vagueness doctrine, as a safeguard against legislative delegation of excessive discretion to courts and to executive officials and agencies, especially the police.").

[267] Ogale, *supra* note 22, at 783. Ogale contends that "there are two vagueness doctrines"—what he calls "Rights-Based Vagueness" (exemplified by cases like *Papachristou*) and "Structure-Based Vagueness" (exemplified by cases like *Dimaya*). *See id.* at 786–87. In Ogale's view, "[t]o the extent that vagueness and nondelegation converge, it is in the context of Structure-Based Vagueness." *Id.* at 787. But as this Article has shown, even the rights-based vagueness cases indicate concerns about delegation. *See supra* notes 257–259.

[268] Gaziano & Blevins, *supra* note 5, at 45.

[269] *See supra* Part II.B.1.

[270] *See supra* Part II.B.2.

what to search and seize.[271] And in the Fifth Amendment (and Fourteenth Amendment) vagueness cases, the Court has required that the *legislature*—not the executive—make the relevant policy choices when crafting penal laws.[272]

In the Bill of Rights nondelegation cases, the Court has focused on the *branch* of government that is supposed to exercise a particular, discretionary power. If that branch of government delegates that discretion to another branch of government, the Court has declared the delegation *itself*—whether via statute or warrant—to be unconstitutional. This posture comports with one of the key insights of *Whitman v. American Trucking Associations, Inc.*, a nondelegation case discussed earlier in this Article[273]: the proper way to make out a nondelegation challenge is by challenging the underlying delegation, not the action taken pursuant to that delegation.[274] The Court has articulated different, yet similar, rationales for why the mere existence of a delegation impermissibly infringes upon individual liberty. For example, in the First Amendment cases, the Court has found that the "lodg[ing of] broad discretion in a public official to permit speech-related activity" itself abridges speech[275] because the fact that "[d]issemination of ideas depends upon the approval of the distributor by the official . . . is [itself] administrative censorship in an extreme form."[276] Meanwhile, in the Fourth Amendment caselaw, the Court has explained that when people are "secure only in the discretion of police officers," people cannot fully enjoy the security and privacy that the Fourth Amendment guarantees.[277]

To that end, note what these cases are *not* primarily about. The issue in the Bill of Rights nondelegation cases is—at least primarily—the fact of delegation of discretion, not the underlying statute's substantive limitation on the right in question or the executive action that violates the right. In the First Amendment cases, the Court has declared licensing regimes unconstitutional because they delegated discretion to the executive, not because the statutorily prescribed regime itself formally favored one viewpoint over another (the classic example of First Amendment violative legislation). To be sure, *Bruen* did look to the relationship between New York's proper-cause standard and the right guaranteed by the Second Amendment.[278] But Justice Kavanaugh, concurring in *Bruen*, interpreted the

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[271] *See supra* Part II.B.3.

[272] *See supra* Part II.B.4.

[273] *See supra* text accompanying notes 103–106.

[274] Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 472 (2001)

[275] Police Dep't of Chi. v. Mosley, 408 U.S. 92, 97 (1972).

[276] Largent v. Texas, 318 U.S. 418, 422 (1943).

[277] Johnson v. United States, 333 U.S. 10, 13–14 (1948) (describing the Fourth Amendment as "a nullity" in this circumstance).

[278] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022).

majority opinion to say that "New York's outlier may-issue regime is constitutionally problematic *because* it grants open-ended discretion to licensing officials and authorizes licenses only for those applicants who can show some special need apart from self-defense."[279] As Justice Kavanaugh put it, "[t]hose features of New York's regime—the unchanneled discretion for licensing officials and the special-need requirement—*in effect deny* the right to carry handguns for self-defense to many "ordinary, law-abiding citizens."[280] Similarly, the void-for-vagueness cases condemn the discretion that vague statutes lodge in the executive, without much inquiry into whether the police power of the state would permit the government to proscribe—for example—loitering on a street corner if done with the requisite specificity.

Judicial review is a big deal.[281] And perhaps the Article I nondelegation doctrine's history shows that the Court is wary about exercising its power of judicial review to enforce the nondelegation principle. But the Bill of Rights nondelegation cases demonstrate that this wariness is not an absolute bar to the exercise of judicial review. Granted, the bulk of these cases are about state statutes (or state warrants).[282] Nevertheless, the Court has employed the Bill of Rights nondelegation doctrine to engage in robust constitutional review on a regular basis.

The Bill of Rights nondelegation doctrine trains its fire on the delegation of executive discretion when that delegation *could lead to* the infringement of an enumerated right. The doctrine enforces a rule about which branch of government must exercise a certain, discretionary power—and, equally as important when applying the nondelegation doctrine, which branch of government *cannot* be delegated that power. The Court has applied the doctrine when merely the *potential* exercise—by the wrong branch of government—of the discretionary power in question would violate the people's constitutionally guaranteed rights of speech; keeping and bearing arms; security in their persons, houses, papers, and effects; or fair notice of what conduct is prohibited. The fact of the doctrine's existence illuminates an anti-delegation principle across Bill of Rights cases.

III. SOME POTENTIAL APPLICATIONS

The identification of a Bill of Rights nondelegation doctrine could have

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[279] *Id.* at 2161 (Kavanaugh, J., concurring) (emphasis added).

[280] *Id.* (emphasis added).

[281] *See supra* Part I.B.2.

[282] *But see, e.g.*, Sessions v. Dimaya, 138 S. Ct. 1204 (2018); Johnson v. United States, 576 U.S. 591 (2015).

significant consequences for Bill of Rights jurisprudence overall. For the purpose of illustrating the point, this Part touches upon three discrete scenarios in which the Bill of Rights nondelegation doctrine could have an impact. To be sure, this Part merely provides some examples; it does not intend to be an exhaustive summary of the doctrine's potential applications, and this Article does not claim that the doctrine necessarily applies across the entirety of the Bill of Rights. As to the three applications discussed in this Part: First, the doctrine could provide a path forward for judicial scrutiny of certain misleadingly labeled "shall-issue" concealed carry permit jurisdictions in the wake of *Bruen*, even if they operate *like* shall-issue regimes. Second, the doctrine could supply a framework for understanding whether and how courts should defer to congressional judgments of what is "reasonable" for the purposes of the Fourth Amendment. And third, the doctrine could solve what this Article calls the "*Jarkesy* problem," looking to a recent Fifth Circuit decision—*Jarkesy v. SEC*[283]—that attempted to square the Article I nondelegation doctrine with an issue of discretionary power to violate individuals' jury trial rights.

A. Perhaps Misleadingly Labeled "Shall-Issue" Concealed Carry Permit Jurisdictions

In *Bruen*, the Court confronted a discretionary permitting regime for concealed-carry permits that clearly violated the Bill of Rights nondelegation doctrine. With no standards by which the licensing authority was directed to determine "proper cause," the permitting scheme delegated "open-ended discretion to licensing officials."[284] The Court separated the different concealed-carry permitting regimes of the U.S. states into three buckets. First, the Court found that 43 states were "shall-issue" jurisdictions, meaning that "authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability."[285] Second, the Court explained that six states (including New York) and the District of Columbia operated "may-issue" regimes, "under which authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license."[286] Third and finally, the Court noted that one state—

[283] 34 F.4th 446 (5th Cir. 2022).

[284] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2161 (2022) (Kavanaugh, J., concurring).

[285] *Id.* at 2123 (majority opinion).

[286] *Id.* at 2123–24.

Vermont—had "no permitting system for the concealed carry of handguns."[287] A reasonable inference to draw from *Bruen* is that the second category of jurisdictions is constitutionally dubious while the first and third categories are likely fine.

But not all of the 43 purportedly "shall-issue" regimes are the same, and even some of *these* permitting schemes might violate the Bill of Rights nondelegation doctrine. In the first footnote of *Bruen*, the Court explained that "[t]hree States—Connecticut, Delaware, and Rhode Island—have discretionary criteria but appear to operate like 'shall issue' jurisdictions."[288] Recall the key insight of *Whitman*: in an Article I nondelegation challenge, the court evaluates the *underlying statute*.[289] Under *Whitman*, the very fact of delegation cannot be cured by an executive's narrowing interpretation of the discretion-delegating statute. Thus, the question for a court applying the Bill of Rights nondelegation doctrine is not whether the regime "appear[s] to operate like [a] 'shall issue' jurisdiction," but whether the underlying statute itself delegates unfettered discretion to the executive in a way that the doctrine prohibits.

A few basic legal principles are helpful in framing this inquiry. To start, federal courts "are bound by the construction" that state courts give to their own states' statutes.[290] Moreover, federal courts may accept a state supreme court's "narrowing of a state statute" "to avoid constitutional infirmities."[291] For these reasons, a state supreme court's discretion-cabining construction of a discretion-granting concealed-carry permitting regime likely cannot be disturbed by a federal court.[292]

Turning to the Connecticut, Delaware, and Rhode Island laws, the Bill of Rights nondelegation doctrine may change the way that federal courts should think about at least one of these states' concealed-carry permitting schemes. To start, Connecticut and Rhode Island are likely properly classified as shall-issue jurisdictions. The *Bruen* Court noted how both the Connecticut and Rhode Island courts have interpreted their concealed-carry permitting schemes to narrow discretion in such a way that does not present

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[287] *Id.* at 2123 n.1.

[288] *Id.*

[289] *See supra* Part I.B.2.iv.

[290] R.A.V. v. St. Paul, 505 U.S. 377, 381 (1992).

[291] Iancu v. Brunetti, 139 S. Ct. 2294, 2312 (2019) (Sotomayor, J., concurring in part and dissenting in part) (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)); *see also* Bell v. Cone, 543 U.S. 447, 456–60 (2005) (accepting a state court's narrowing construction of a state statute's "aggravating circumstance" to cure a vagueness problem).

[292] This Article assumes that the Bill of Rights nondelegation doctrine—even against the backdrop of the Fourteenth Amendment's incorporation of the Bill of Rights against the states—does not override the ordinary rule that federal courts must accept state supreme courts' constructions of state law when those constructions cure delegation issues.

a constitutional problem.[293] Whether those interpretations are correct is a separate question, but that question is not one that the Bill of Rights nondelegation doctrine would have anything to say about—at least in the federal courts.

Yet Delaware is different in kind. Rather than pointing to a Delaware court's narrowing construction of the permitting regime, the Court noted that as of its decision in *Bruen*, "the State ha[d] thus far processed 5,680 license applications and renewals in fiscal year 2022 and has denied only 112."[294] Relying on this justification, however, presents a *Whitman* problem. The fact that the government has prudently exercised improperly delegated discretion does not obviate what would otherwise be a Bill of Rights nondelegation issue.

Dissenting in *Bruen*, Justice Breyer noted an inconsistency in the Court's classification of the different regimes. Justice Breyer questioned why the Court deemed Connecticut, Delaware, and Rhode Island to be shall-issue jurisdictions when it recognized them as having may-issue statutory criteria.[295] As Justice Breyer explained, "these three States demonstrate [that] the line between 'may issue' and 'shall issue' regimes is not as clear cut as the Court suggests, and that line depends at least in part on how statutory discretion is applied in practice."[296] At least as to Delaware, Justice Breyer is correct—and the Bill of Rights nondelegation doctrine provides the proper framework for understanding why. Whether Delaware operates in *practice* like a shall-issue jurisdiction is immaterial. The very fact of delegated discretion likely renders it a may-issue jurisdiction. For this reason, even in light of the way Delaware administers its concealed-carry licensing regime, *Bruen* seems to indicate that the scheme is unconstitutional when applying the Bill of Rights nondelegation doctrine.

B. Congressional Determinations of Fourth Amendment Reasonableness

The particularity requirement for warrants is not the only aspect of the Fourth Amendment on which the Bill of Rights nondelegation doctrine might bear. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[297] The question

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[293] *See Bruen*, 142 S. Ct. at 2123 n.1.
[294] *Id.*
[295] *See id.* at 2172 (Breyer, J., dissenting).
[296] *Id.*
[297] U.S. CONST. amend. IV.

of reasonableness usually turns on the question whether the government has obtained a warrant.[298] But courts sometimes determine what is "reasonable" for Fourth Amendment purposes with reference to the judgment of a legislature.[299]

In *United States v. Watson*, the Supreme Court permitted introduction of evidence obtained pursuant to an arrest carried out by a federal postal inspector, despite the fact that the government had not obtained a warrant for the arrest.[300] A federal statute authorized such arrests.[301] In the Court's view, that statute "represent[ed] a judgment by Congress that it is not unreasonable under the Fourth Amendment for postal inspectors to arrest without a warrant provided they have probable cause to do so."[302] Quoting *United States v. Di Re*, the Court observed that it "should be reluctant to decide that a search . . . authorized by Congress was unreasonable and that the Act was therefore unconstitutional."[303] The Court noted that securing a warrant in advance of an arrest was ordinarily preferable. But it "decline[d] to transform this judicial preference into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause."[304]

The relationship between wiretapping and the Fourth Amendment provides another example of judicial deference to congressional judgments of reasonableness. Initially, the Court in *Olmstead v. United States*[305] held that wiretapping did not violate the Fourth Amendment.[306] Nearly 40 years later, the Court in *Katz v. United States*[307] took a different tack, determining that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[308] Then Congress stepped in, enacting Title III of the Omnibus Crime Control

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[298] *See* City of Ontario v. Quon, 560 U.S. 746, 760 (2010) ("Although as a general matter, warrantless searches are per se unreasonable under the Fourth Amendment, there are a few specifically established and well-delineated exceptions to that general rule." (internal quotation marks omitted)).

[299] *See, e.g.*, United States v. Watson, 423 U.S. 411, 416–17 (1976); United States v. Di Re, 332 U.S. 581, 585 (1948).

[300] *See Watson*, 423 U.S. at 423–24.

[301] *See id.* at 414–15.

[302] *Id.* at 415.

[303] *Id.* at 416 (quoting 332 U.S. 581, 585 (1948)).

[304] *Id.* at 423.

[305] 277 U.S. 438 (1928).

[306] *See id.* at 466.

[307] 389 U.S. 347 (1967).

[308] *Id.* at 353.

and Safe Streets Act of 1968.[309] As Justice Alito has pointed out: "Since that time, electronic surveillance has been governed primarily, not by decisions of [the] Court, but by the statute, which authorizes, but imposes detailed restrictions on, electronic surveillance."[310] Some Justices take the position that when it comes to the Fourth Amendment, "[l]egislatures, elected by the people, are in a better position than [judges] are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future."[311] That position, if taken to its logical conclusion (judicial deference to legislative judgments about reasonableness), would present a constitutional difficulty when considered through the lens of the Bill of Rights nondelegation doctrine.

Courts are the proper determiners—in the first instance—of whether a search violates the Fourth Amendment. Legislatures are certainly more democratically accountable than courts are. And no one doubts that "legislatures (or agencies) can . . . create additional protections" above that which the courts have determined the Fourth Amendment's floor to be.[312] Moreover, reference to a legislature's judgment may provide evidence of what the society finds to be reasonable. But the issue comes when a court *defers* to a statute's reasonableness determination, even if that statute goes below the floor of protection that the court would otherwise believe the Fourth Amendment secures. In effect, wholesale judicial deference to a legislature's reasonableness determination works a *reverse* delegation of discretion—*from* the courts *to* the legislature—and contravenes the cardinal constitutional rule that "fundamental rights may not be submitted to vote" because "they depend on the outcome of no elections."[313] Such deference to the legislature violates the Bill of Rights nondelegation doctrine.

In practice, deference to congressional judgments about reasonableness

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[309] *See* Riley v. California, 573 U.S. 373, 408 (2014) (Alito, J., concurring in part and concurring in the judgment).

[310] *Id.*; *see also* United States v. Jones, 565 U.S. 400, 427–28 (Alito, J., concurring in the judgment) ("After *Katz*, Congress did not leave it to the courts to develop a body of Fourth Amendment case law governing that complex subject. Instead, Congress promptly enacted a comprehensive statute, and since that time, the regulation of wiretapping has been governed primarily by statute and not by case law." (citation omitted)).

[311] *Jones*, 565 U.S. at 408; *see also* Carpenter v. United States, 138 S. Ct. 2206, 2233 (Kennedy, J., dissenting) ("In §2703(d) Congress weighed the privacy interests at stake and imposed a judicial check to prevent executive overreach. The Court should be wary of upsetting that legislative balance and erecting constitutional barriers that foreclose further legislative instructions. . . . The Court's decision runs roughshod over the mechanism Congress put in place to govern the acquisition of cell-site records and closes off further legislative debate on these issues." (citation omitted)).

[312] Matthew Tokson, *The Aftermath of* Carpenter*: An Empirical Study of Fourth Amendment Law, 2018-2021*, 135 HARV. L. REV. 1790, 1851 (2022).

[313] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

prevents the courts from undertaking an independent inquiry into the Fourth Amendment's floor. That independent inquiry guards against a legislature's recalibration of the balance that the Framers already struck with respect to the Fourth Amendment's protections. The inquiry entails the exercise of discretion—determining what is "reasonable" implicates a variety of considerations with no constraining principle. As discussed earlier in this Article, that discretion is dangerous. And in our system, the court must be the one exercising the discretion in this particular context.

C. Solving the Jarkesy *Problem*

The Fifth Circuit recently detonated an administrative and constitutional law bomb in *Jarkesy v. SEC*.[314] There, a Fifth Circuit panel picked apart various aspects of a Securities and Exchange Commission ("SEC") adjudicatory scheme on constitutional grounds, including the Article I nondelegation doctrine.[315]

In the early 2010s, after an investigation, the SEC determined that George Jarkesy had probably committed securities fraud.[316] The agency then decided it would bring charges against Jarkesy. The steps here are important: The SEC (1) investigated Jarkesy, (2) concluded that he likely violated multiple federal securities laws, and (3) decided to bring charges. But before the SEC could bring those charges at Step Three, it still had one more thing to do: decide the *forum* in which it wanted to bring an enforcement action against Jarkesy. Under the Dodd-Frank Act, the SEC could choose to bring an enforcement action *either* within the agency ("in-house") *or* in an Article III federal court.[317]

The SEC has publicly stated that "when the misconduct warrants it, the Commission will bring both proceedings."[318] In-house adjudication occurs before an administrative law judge (ALJ); this adjudicatory regime is often far more efficient and, the numbers show, slanted in the agency's favor.[319] The ALJs are themselves SEC employees.[320] Elizabeth Wang explains the

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[314] 34 F.4th 446 (5th Cir. 2022).

[315] *See id.* at 449-50.

[316] *See id.* at 450.

[317] *See id.* at 455 (citing 15 U.S.C. § 78u-2(a)).

[318] *How Investigations Work*, U.S. SECURITIES & EXCHANGE COMM'N, https://www.sec.gov/enforce/how-investigations-work.html (last visited June 14, 2022).

[319] *See* Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, WALL ST. J. (Nov. 22, 2015, 9:25 PM), https://www.wsj.com/articles/fairness-of-sec-judges-is-in-spotlight-1448236970.

[320] *See id. But cf. id.* (quoting an SEC ALJ as saying, "The SEC can't fire us, decide our pay or grade our performance. There's nothing the SEC can do to influence us and they don't try to").

difference between federal court adjudication and in-house adjudication well:

> In federal court, defendants have access to a jury trial, independent judges, and deposition "testimony [that] is subjected to the Federal Rules of Evidence." Alternatively, administrative proceedings are conducted before an ALJ, where there is no jury, discovery is restricted, hearings proceed on a rapid schedule, and the Federal Rules of Evidence do not apply.[321]

For the SEC, bringing the charges before an ALJ saves time, yields a high rate of success, and gets the case before an expert adjudicator whose primary role is to hear cases about securities law violations (as opposed to generalist Article III judges). It is no wonder, then, that "[t]he SEC has recently leaned more heavily on its in-house tribunal."[322] Naturally, the SEC brought its charges against Jarkesy in-house.[323]

In *Jarkesy*, the Fifth Circuit held—among other things—that the forum-selection provision of the Dodd-Frank Act violated the Article I nondelegation doctrine.[324] In the statute, Congress provided no guidance for how the SEC was to choose between these two options. In the Fifth Circuit's telling, "Congress gave the SEC a significant legislative power by failing to provide it with an intelligible principle to guide its use of the delegated power."[325] That legislative power was "the unfettered authority to choose whether to bring enforcement actions in Article III courts or within the agency."[326]

Professor Jonathan Adler disagreed with the court's Article I nondelegation holding. He put it the following way: "The delegated power at issue is the SEC's authority to make case-by-case decisions about how to enforce the securities laws against individual regulated entities. This is not legislative power."[327] Rather, Professor Adler wrote, "This is the sort of

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[321] Elizabeth Wang, Comment, Lucia v. SEC*: The Debate and Decision Concerning the Constitutionality of SEC Administrative Proceedings*, 50 LOY. L.A. L. REV. 867, 870 (2017) (footnotes omitted).

[322] Eaglesham, *supra* note 319.

[323] *Jarkesy*, 34 F.4th at 449.

[324] *See id.* at 451.

[325] *Id.* at 459.

[326] *Id.*

[327] Jonathan H. Adler, *The Good, the Bad, and the Ugly of* Jarkesy v. SEC, REASON: VOLOKH CONSPIRACY (Aug. 17, 2022, 6:10 PM), https://reason.com/volokh/2022/08/17/the-good-the-bad-and-the-ugly-of-jarkesy-v-sec/.

prosecutorial discretion that lies at the core of executive authority. And because this is not legislative power, no 'intelligible principle' is required."[328] The Fifth Circuit had written that "[g]overnment actions are 'legislative' if they have 'the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch.'"[329] Professor Adler countered that this definition "doesn't do the work the Fifth Circuit wants it to. Jarkesy's rights in an Article III court and in an administrative proceeding are what they are under the Constitution and relevant statutes. The SEC did not alter these rights. It merely chose how to enforce the laws Congress enacted."[330]

Professor Adler is half-right. The delegation to the SEC to determine the forum in which to bring an enforcement action is significantly different than what the Article I nondelegation doctrine has traditionally condemned as delegation of *legislative* power. But the forum-determination is not the same thing as prosecutorial discretion. When a prosecutor chooses whether to litigate in an Article III court or before an agency, that choice is different than the choice of the statute under which to prosecute or the choice of whether to prosecute at all. Ordinarily, as described above, an agency decides two things when bringing an enforcement action: (1) what statute—or implementing regulation—the alleged offender violated and (2) whether to bring the action. But the Dodd-Frank Act added a third step to this decisionmaking process for the SEC: the question of the forum in which to bring the action (in a federal court or before the agency itself). And as the cases demonstrate, the Bill of Rights nondelegation doctrine does not admit of a distinction between legislative rulemaking and adjudication when adjudication requires discretion and can lead to a rights violation.

Choosing in-house adjudication has real consequences. One such consequence has a Bill of Rights nexus: in-house adjudication provides no jury, potentially contravening the Seventh Amendment's guarantee that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[331] In fact, the Fifth Circuit in *Jarkesy* also held that the SEC's in-house adjudicatory

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[328] *Id.*

[329] *Jarkesy*, 34 F.4th at 461 (quoting INS v. Chadha, 462 U.S. 919, 952 (1983)).

[330] Adler, *supra* note 327.

[331] U.S. CONST. amend. VII. Determining that the no-jury scheme of the administrative tribunal violates the Bill of Rights nondelegation doctrine likely requires an antecedent determination that having to submit to administrative adjudication would violate one's Seventh Amendment right to a trial by jury. For an argument that the Constitution prohibits the juryless tribunals that have become a hallmark of administrative adjudication, see Richard Lorren Jolly, *The Administrative State's Jury Problem*, 98 WASH. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4144076.

scheme violated Jarkesy's Seventh Amendment right to a civil jury.[332]

The better way to think about the delegation problem in *Jarkesy* is by reference to the Bill of Rights nondelegation doctrine. The problem is an agency's ability to decide—in its unfettered discretion—to litigate in a forum in which a subject of enforcement gets no jury. Under the Bill of Rights nondelegation doctrine, Congress cannot delegate this sort of discretion to an administrative agency when an enumerated right—here, the right to a trial by jury—is at stake. Moreover, applying *Whitman*, the SEC could not itself cure the delegation problem by setting forth limits on its own discretion.[333] The underlying statute thus likely violates not the Article I nondelegation doctrine, but rather the Bill of Rights nondelegation doctrine.

IV. CAVEATS AND IMPLICATIONS

This Part addresses some counterarguments, clarifies this Article's thesis, and considers some implications of the Bill of Rights nondelegation idea. Three points are important. First, the Bill of Rights nondelegation doctrine and the Article I nondelegation doctrine differ in important ways. Second, the discretion at which the Bill of Rights nondelegation doctrine takes aim is different from prosecutorial discretion, which the doctrine does not address. Third, the Bill of Rights nondelegation doctrine is far from the only way in which courts enforce the Bill of Rights' protections, and it is not necessarily enforced across the entirety of the Bill of Rights. Nevertheless, reading the Bill of Rights nondelegation cases in relation to one another illuminates an important insight into how the Supreme Court has given teeth to the Bill of Rights.

A. The Article I Nondelegation Doctrine vs. the Bill of Rights Nondelegation Doctrine

The Bill of Rights nondelegation doctrine is not the Article I nondelegation doctrine. Important, substantive differences exist between the two doctrines, which both fall under the umbrella of the "nondelegation doctrine." The Article I nondelegation doctrine prohibits Congress from delegating—to the executive—any of the *legislative powers* with which the Constitution has vested Congress. Meanwhile, the Bill of Rights

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[332] *Jarkesy*, 34 F.4th at 465.

[333] The SEC had done exactly this, having "issued internal guidance on the selection between administrative and civil proceedings." Kenneth Oshita, *Home Court Advantage? The SEC and Administrative Fairness*, 90 S. CAL. L. REV. 879, 887 (2017); *see also* David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1207 (2016).

nondelegation doctrine prohibits the delegation of *discretion* to the executive to violate an enumerated right. In the end, the most meaningful parallel is the bar on delegation itself, but the two doctrines are not the same.[334]

Legislative power and discretion are similar. As Part I.A.2 lays out, the term "legislative power" admits of many different definitions. To some extent, the term connotes the discretionary power to prescribe—subject only to the constraints imposed by the Constitution[335]—the rules by which conduct is ordered in a given society. "Discretion" itself has a more particular definition. The relevant definition in Black's Law Dictionary is "[f]reedom in the exercise of judgment; the power of free decision-making."[336] But this freedom, in the hands of the executive, invites the arbitrary exercise of will.[337] The Bill of Rights nondelegation doctrine merely takes this observation, applies it when an enumerated right is at stake (whether as a result of legislative rulemaking or administrative adjudication), and safeguards these rights by prohibiting the delegation of discretion to the executive.

For that reason, the key takeaway is that the Bill of Rights nondelegation is just as much about *delegation* as is the Article I nondelegation doctrine.[338] In the First, Second, and Fifth Amendment cases, the delegation is clear: a legislature has delegated discretion to an executive official. That discretion could manifest as the power to deny a permit for expressive activity, to deny a permit to carry a concealed firearm, or to

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[334] Understanding the Article I nondelegation doctrine as a distinct aspect of the nondelegation doctrine may shed some light on the relevance of certain legal materials to the question whether the Article I nondelegation doctrine is consistent with the original meaning of the Constitution. *See, e.g.*, Eli Nachmany, *The Irrelevance of the Northwest Ordinance Example to the Debate About Originalism and the Nondelegation Doctrine*, 2022 U. ILL. L. REV. ONLINE 17 (arguing that the broad delegation of lawmaking authority in the Northwest Ordinance sheds no light on the original meaning of the Article I nondelegation doctrine because Congress enacted the ordinance pursuant to its power under Article IV as opposed to an Article I power).

[335] For a particularly strong version of this argument, see generally Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2019).

[336] *Discretion*, BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 11th ed. 2019); *see also Legal Theory Lexicon 091: Discretion*, LEGAL THEORY LEXICON (Oct. 22, 2022), https://lsolum.typepad.com/legal_theory_lexicon/2019/03/legal-theory-lexicon-091-discretion.html.

[337] *See supra* Part I.A.3.

[338] *Cf.* Indus. Union Dep't v. Am. Petroleum Inst. (*Benzene Case*), 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring) (describing the Article I nondelegation doctrine as "ensur[ing] that courts charged with reviewing the exercise of *delegated legislative discretion* will be able to test that exercise against ascertainable standards" (emphasis added)).

enforce a vague criminal ordinance. The Fourth Amendment cases are a bit trickier to analogize, but they too are about delegation. Here, the delegation is from the *judicial officer* to the police. Under the Constitution, the judicial magistrate is supposed to be the one who exercises the discretionary power to determine whether the warrant describes with particularity "the place to be searched, and the persons or things to be seized."[339] Just as the Article I nondelegation doctrine prohibits Congress from delegating certain legislative powers to the executive, the Bill of Rights nondelegation doctrine prohibits the delegation of unfettered discretion to the executive when an enumerated right is at issue.

Still, separating the Article I nondelegation doctrine from the Bill of Rights nondelegation doctrine illuminates a deeper truth: the nondelegation doctrine is about more than Article I of the Constitution. The nondelegation doctrine is an umbrella term for at least two doctrines of constitutional law that can co-exist. Whether the Supreme Court has applied the Article I nondelegation doctrine in the years since 1935 bears only on the continued vitality of that version of the nondelegation doctrine. As the cases demonstrate, the Bill of Rights nondelegation doctrine is alive and well.

B. Prosecutorial Discretion vs. Delegated Discretion

The Bill of Rights nondelegation doctrine does not disallow *all* executive discretion. The doctrine leaves prosecutorial discretion—the classic example of permissible executive discretion—undisturbed. To see the point here, one must understand the difference between prosecutorial discretion and the other sort of discretion at which the doctrine takes aim.

Prosecutorial discretion is "the power of the Executive to determine how, when, and whether to initiate and pursue enforcement proceedings."[340]

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[339] U.S. CONST. amend. IV. To be sure, this discretionary power is *itself* subject to a standard: the warrant may only issue "upon probable cause, supported by oath or affirmation." *Id.*

[340] Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 490 (2017); *see also* Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2115 (2019) (discussing the traditional understanding of federal prosecutorial discretion's constitutional textual source); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1659 (2010) ("[W]hen it comes to critical determinations of normative blameworthiness in petty public order cases, prosecutors enjoy almost unbridled equitable discretion."); BO COOPER, IMM. & NATURALIZATION SERVS., MEMORANDUM OF THE DEPUTY COMMISSIONER: INS EXERCISE OF PROSECUTORIAL DISCRETION 2 (2000), *available at* https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Gov-ProsDisc-07.11.00.pdf ("Although prosecutorial discretion is sometimes viewed solely as the decision of a prosecutor whether or not to bring charges against an individual, the term also can apply to a broad spectrum of discretionary enforcement decisions taken by a law

Given the executive's need to allocate limited prosecutorial resources effectively, the traditional justification for the prosecutor's exercise of discretion in enforcing the law is that the discretion is a necessary corollary to the discharge of the executive's duty.[341] The Bill of Rights nondelegation doctrine has nothing to say about prosecutorial discretion, largely because the executive does not exercise such discretion pursuant to a *delegation*. Rather, the executive possesses an "inherent" prosecutorial discretion, yielding only to a "clear and specific" statutory limitation and ordinarily not subject to judicial review.[342] Thus, the legislature may proscribe certain conduct (at times in violation of an enumerated right in the Bill of Rights), but the executive's discretion about how to allocate resources in enforcing that proscription is not a problem of delegation.

The discretion at issue in the Bill of Rights nondelegation cases is of a different kind. In these cases, the discretion goes to the nature of the law itself. Presume that a prosecutor's office has a readily prosecutable case against a suspect thought to have committed murder. The law of murder is clear, and the prosecutor can potentially make the case that this suspect committed murder. Nevertheless, given how difficult it might be to collect the evidence, the prosecutor declines to prosecute. That is prosecutorial discretion. By contrast, suppose that Congress had delegated to the prosecutor the power to define *what* the law of murder was, such that the prosecutor could decide whether the law should encompass the conduct in which the suspect had engaged. Here, the prosecutor has not been endowed with *prosecutorial* discretion. Rather, Congress has endowed him with a *lawmaking* discretion. The Bill of Rights nondelegation doctrine polices the latter kind of power grants—including conferrals of the power to determine whether a given individual has satisfied the necessary criteria to obtain a permit to speak or to carry a gun (an administrative adjudication). Understanding this distinction helps to clarify *Jarkesy* as a Bill of Rights nondelegation case masquerading as an ordinary Article I nondelegation

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enforcement agency.").

[341] *See generally* Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMPLE POL. & CIVIL RTS. L. REV. 369 (2010).

[342] Cooper, *supra* note 340, at 8. To be sure, prosecutorial discretion is still subject to constitutional constraints. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) ("Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."); *cf.* United States v. Texas, 577 U.S. 1101 (2016) (granting a petition for a writ of certiorari and directing the parties to brief the question whether an executive policy of non-enforcement of immigration law as to a particular subset of aliens "violates the Take Care Clause of the Constitution" before affirming the judgment of the lower court by an equally divided Court at 579 U.S. 547, 548 (2016)).

case.

C. Bill of Rights Jurisprudence vs. Bill of Rights Nondelegation

Courts enforce the Bill of Rights in a variety of ways. The Bill of Rights nondelegation doctrine is merely one such way. The vast majority of Bill of Rights cases focus not on the delegation of discretion to the executive but on the rights infringements themselves. Thus, the Bill of Rights nondelegation doctrine is best understood as existing within a broader framework of protections that the Bill of Rights guarantees the people. Moreover, the Bill of Rights nondelegation doctrine does not necessarily apply across the board.

The Supreme Court is solicitous of individual rights claims when those rights are enumerated in the Bill of Rights. To take one example, the Court has routinely declared state and federal laws to be unconstitutionally violative of the First Amendment. From the State of Texas's anti-flag burning statute in *Texas v. Johnson*[343] to the federal Stolen Valor Act in *United States v. Alvarez*,[344] the Court has exercised its power of judicial review many times when a law prohibits that which the Court believes the First Amendment protects. The same is true when the Court hears challenges under the Second Amendment.[345]

In these cases, the Court has confronted claims that either a "ban" or a limitation on this or that conduct impermissibly infringes on an enumerated right. When litigants make this point, the Court listens. While the Court often engages in "some type of means-end scrutiny" when evaluating these claims,[346] the cases demonstrate that the Court has frequently found in favor of challengers. These claims are different than those that undergird the Bill of Rights nondelegation doctrine. For example, in both *McDonald v. City of Chicago* and *District of Columbia v. Heller*, the challenges under the Second Amendment were to laws that affirmatively *banned* handguns.[347] Affirmative bans and limitations are different—and perhaps facially more severe—than are mere grants of *discretion* to deny certain rights to certain individuals. Nevertheless, the Bill of Rights nondelegation doctrine is a component part of the Court's Bill of Rights jurisprudence. Still, this Article does not purport to claim that the doctrine has influenced the jurisprudence of every nook and cranny of the Bill of Rights—at least not yet.

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[343] 491 U.S. 397 (1989).

[344] 567 U.S. 709 (2012).

[345] *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742 (2010); District of Columbia v. Heller, 554 U.S. 570 (2008).

[346] Joseph Blocher, *Bans*, 129 YALE L.J. 308, 310 (2019).

[347] *See McDonald*, 561 U.S. 742; *Heller*, 554 U.S. 570.

CONCLUSION

The nondelegation doctrine is about more than congressional delegation of legislative power to the executive branch. While those delegations may pose problems under the Article I nondelegation doctrine, the Supreme Court has long been applying another type of nondelegation doctrine in Bill of Rights cases. From the First and Second Amendments to the Fourth and Fifth Amendments, the Court has frequently prohibited the delegation of discretion to violate enumerated rights.

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