

# Fixing Deference: Delegation, Discretion, And Deference Under Separated Powers

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## ABSTRACT

*Deference doctrines that set the terms for judicial review of administrators' actions are complicated because concepts critical to deference decisions often are misunderstood. Although generally viewed as free-standing matters, deference questions conceptually are the third part of three related inquiries, preceded by questions of the constitutionally permissible delegation of authority and the discretion granted to specific officials. The scope and nature of lawfully conferred discretion—determined by the first two inquiries—dictate the appropriate scope and nature of deference in judicial review of officials' actions.*

*Power—the nature of distinctive powers constitutionally assigned to different government officials to be exercised in different ways—is the key to resolving these issues appropriately. Constitutional design reflects interests in limiting discretionary authority and separating different kinds of authority. Conflating powers granted to executive officials with those of legislative or judicial officials—often done in the characterization of official acts—misleads discussions of deference.*

*Anchoring analysis in constitutionally separated powers and limited provision for discretionary power and using language that more accurately reflects divisions among tasks given to different government officials provides an avenue for better understanding the three related topics and for unravelling the tangle of deference decisions.*

## TABLE OF CONTENTS

INTRODUCTION .....	1
I. DEFERENCE'S DOCTRINAL MUDDLE .....	5
A. Illustrating Inconsistency .....	5
B. Deference's Difficulty .....	7
II. CONSTITUTING GOVERNMENT'S POWERS .....	9

A.	Safeguarding Liberty: Restraining Discretionary Power ..	9
1.	<i>Constitutional Structures' Discretion-Limiting and Power-Separating Goals</i> .....	9
2.	<i>Conception and Compromise: Lessons in Lawmaking</i> .....	11
B.	Separation as Limitation: Divided Power and Due Process .....	16
III.	DELEGATION: PERMITTED VS. PROHIBITED DISCRETION.....	19
A.	The Easy Issue: Need for a Nondelegation Rule .....	19
1.	<i>Problematics of Lawmakers Making Lawmakers</i> .....	19
2.	<i>Revisionist Visions: Delegation Without Borders</i> .....	25
B.	The Hard Issue: Rule Design.....	34
1.	<i>The Concept of Nondelegation's Domain</i> .....	34
2.	<i>Principles Defining Nondelegation's Domain</i> .....	36
3.	<i>The Limits of Principle</i> .....	39
IV.	DISCRETION AND DEFERENCE .....	42
A.	Judges' Dominion versus Administrators' Domain .....	42
1.	<i>Article III's Territory: What Lies Within</i> .....	43
2.	<i>Ceding Territory: What Lies Outside Courts' Reach</i> .....	45
B.	Deference to Discretion .....	48
1.	<i>Basics of Deference: Interpreting vs. Implementing the Law</i> .....	48
2.	<i>Applying Deference to Discretion: Re-sorting Cases</i> .....	52
3.	<i>Major Questions: Closing the Circle</i> .....	70
V.	CONCLUSION .....	79

# FIXING DEFERENCE: DELEGATION, DISCRETION, AND DEFERENCE UNDER SEPARATED POWERS

RONALD A. CASS\*

*That is what this ... is about. Power. The allocation of power ... in such fashion as to preserve the equilibrium the Constitution sought to establish ...*

—*Morrison v. Olson*, *Scalia*, *J. dissenting*.<sup>1</sup>

## INTRODUCTION

The genius of the United States' Constitution lies in its distribution of power. The Framers of the Constitution sought to accomplish three goals, with *power* central to each: (1) to limit the amount of discretionary power that can be exercised by any official (or group of officials) (*discretion-limiting*), (2) to assign distinctive types of power to different officials (*power-separating*), and (3) to find ways to accommodate the needs of effective government within the overarching approach to limited and separated powers (*effective governance*). The goals are listed here in descending order of importance to the Framing generation, an ordinal ranking that has important implications for how the Constitution should be read.

To be sure, the effective governance goal prompted the call for a new constitution to replace the Articles of Confederation, an almost unworkable framework that had required unanimous consent of the states for important decisions and supermajorities

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<sup>1</sup> 487 U.S. 654, 699 (1988) (*Scalia*, *J.*, *dissenting*).

for most routine decisions.<sup>2</sup> The most imperative goals in constructing the new government, however, were the discretion-limiting and power-separating goals. While not the most important goals for *change* at that moment—for fixing problems with the then-current structure of national government—they remained the overriding objectives for American self-government.<sup>3</sup>

The Framers viewed constraining discretionary power as essential to preserving liberty. They saw separated powers as a critical mechanism for constraining discretionary power *of* the national government (the vertical separation between state and national power) and *within* the national government (the horizontal separation of distinctive government powers).<sup>4</sup> Specific aspects of this horizontal separation of powers also channeled authority in ways that were consistent with received notions of due process and the rule of law.

In many ways, the Constitution has been a signal success. Its framework has provided continuous governance free from violent changes in power for more than 230 years.<sup>5</sup> It has

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<sup>2</sup> See, e.g., JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 50–52, §§ 33–35 (Regnery/Gateway 1986) (1840); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 354–56, 464–67 (Univ. of North Carolina Press 1998) (1969).

<sup>3</sup> See, e.g., THE FEDERALIST Nos. 10, 41, 47–51 (James Madison), Nos. 67–73, 78–80 (Alexander Hamilton); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 57–67 (Belknap/Harv. Univ. Press 2017) (1967). Arguments over the adoption and ratification of the Constitution centered primarily not on questions of its predicted effectiveness but on questions of its efficacy in restraining abuses of discretionary official power. See generally THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES (Ralph Ketcham ed., Penguin Books 1986) (ANTI-FEDERALIST PAPERS).

<sup>4</sup> See, e.g., BAILYN, *supra* note 3, at 351–72; WOOD, *supra* note 2, at 524, 536–47.

<sup>5</sup> Consider, for example, the contrast with France, which for centuries has been one of the most prominent, Western European nations. In the time since America's Constitution was written, France has had as its government a monarchy, a constitutional monarchy, a republic, a series of revolutionary governments followed by the Consulate (the first Napoleonic government), an empire (with Napoleon as Emperor), a second constitutional monarchy which was overthrown and replaced by a third constitutional monarchy, a second republic which was followed by a second empire, a third republic, a government dominated by Germany (in effect governing only the portion of France that was not formally German-occupied territory), a fourth and then a fifth republic. In virtually every instance, the change in government was the product of violence, actual or threatened, rather than a predictable, constitutionally empowered transition. See,

promoted adherence to the rule of law in circumstances that, elsewhere, often produce capitulation to rulers of the moment.<sup>6</sup> And it has helped secure a measure of liberty that, though not perfect, ranks among the world's most successful.<sup>7</sup>

Even so, the explosive growth of government over the past 85 years, the vast expansion of national government into areas initially assigned to the states, and some aspects of the present American administrative state stand as bold contradictions to critical aspects of the Constitution.<sup>8</sup> While the rise of the modern administrative state across different nations (including the United States) no doubt responds to demands for what it can offer its constituents,<sup>9</sup> the size and shape of the American

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e.g., ANDREW KNAPP & VINCENT WRIGHT, *THE GOVERNMENT AND POLITICS OF FRANCE* 1–63 (5th ed., Routledge 2006).

<sup>6</sup> See, e.g., RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 64–65, 86–97 (Johns Hopkins Univ. Press 2001) (RULE OF LAW); Ronald A. Cass, *Property Rights Systems and the Rule of Law*, in *THE ELGAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHTS* 222–48 (Enrico Colombatto ed., Edward Elgar Pub. 2004). See also Barry Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 *AM. POL. SCI. REV.* 245 (1997) (providing a theoretical construct to explain the success of government under the rule of law in some societies and failure in others). But see John Yoo, *Fixing Failed States*, 99 *CALIF. L. REV.* 95 (2011) (arguing that a principal reason for states' failure is not the specific contents of the governance documents but a forced misalignment of the population and the territory defined as a state by the international community).

<sup>7</sup> See, e.g., Ian Vásquez, *New Economic Freedom Index, US Returns to Top 10*, POLICY COMMONS (Sep. 25, 2018), <https://policycommons.net/artifacts/1302772/new-economic-freedom-index-us/1906064/>; *Human Freedom Index: Freest Countries 2023*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/country-rankings/freest-countries>. See also Robert A. Dahl, *Thinking About Democratic Constitutions: Lessons from Democratic Experience*, in *NOMOS XXXVIII: POLITICAL ORDER*, at 175, 175 (Ian Shapiro & Russell Hardin eds. 1996) (observing that in the 20th Century “democracy has been replaced by a nondemocratic regime on more than fifty occasions.”).

<sup>8</sup> See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (Oxford Univ. Press 2004); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (Univ. of Chicago Press 2014); Douglas H. Ginsburg & Stephen Menashi, *Our Illiberal Administrative Law*, 10 *N.Y.U. J. L. & LIB. REV.* 475 (2016); Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231 (1994) (*Rise and Rise*); Jeffrey Pojanowski, *Neoclassical Administrative Law*, 133 *HARV. L. REV.* 852 (2020).

<sup>9</sup> See, e.g., Christopher DeMuth, *Can the Administrative State Be Tamed?*, 128 *J. LEGAL ANALYSIS* 121, 157–58 (2016). See also CASS SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* (Belknap/Harvard Univ. Press 2020).

administrative state also flows from failures to understand and implement legal rules.

Those failures affect many aspects of constitutional and statutory law,<sup>10</sup> but they are particularly reflected in American jurisprudence concerning three related concepts: delegation, discretion, and deference. Confusion respecting these concepts has damaged the stability of American government, impaired important aspects of constitutional design, and reduced the consistency of government with core aspects of both due process and the rule of law. In each case, the root cause of confusion traces back to questions respecting the proper division of power.

This Article offers a roadmap for understanding and applying the concepts of delegation, discretion, and deference and explores their importance to the goals set by America's constitutional Framers—particularly their relation to the constitutional division of powers. The Article begins in Part I with an illustration of difficulties attending the Supreme Court's analysis of deference, before exploring basic rules for the three concepts that must be understood together. Critical structural choices respecting the distribution of power—choices that undergird the Court's approach to all three concepts—are discussed in Part II.

Two major doctrinal issues—perhaps the two most fundamental issues of modern administrative law—are addressed in Parts III and IV. Part III explores basic issues respecting the delegation of lawmaking authority—first, why it must be limited by courts and, second, what types of discretionary power should be permitted and prohibited by a constitutionally grounded nondelegation rule. Part IV returns to the discretion granted to officials (almost always by statute) and the link between official discretion and deference. Most importantly, Part IV explains why much of the Court's deference analysis should be recast in different terms to clarify choices underlying the statutory rules and judicial interpretations of

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<sup>10</sup> See, e.g., Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J. L. & PUB. POL'Y 849 (2001); Ronald A. Cass, *Staying Agency Rules: Constitutional Structure and Rule of Law in the Administrative State*, 69 ADMIN. L. REV. 225, 237–43 (2017); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); Ginsburg & Menashi, *supra* note 8; Lawson, *Rise and Rise*, *supra* note 8; Pojanowski, *supra* note 8.

them. The distinction between the interpretation of law required in legal contests and the implementation of law that is necessary to its administration is essential. Recognizing the nature and legal structure of this distinction and using language that better aligns with it would pave the way for more easily (and consistently) administered rules, including those discussed preliminarily in Part I. Together, Parts III and IV demonstrate that understanding the way powers are separated among the branches and the way discretion is granted and limited is central to clarifying—and perhaps even resolving—debates over delegation and deference.

## I. DEFERENCE’S DOCTRINAL MUDDLE

### A. *Illustrating Inconsistency*

The current muddle resulting from failures to articulate with clarity the appropriate rules for delegation, discretion, and deference can be seen most easily in the United States Supreme Court’s jurisprudence on deference to administrative decisions—decisions addressing when, why, and how much courts should stand aside in favor of administrators’ judgments. Consider three examples.

In 1997, Justice Antonin Scalia wrote the opinion of a unanimous Supreme Court in *Auer v. Robbins* approving broad deference to agency decisions interpreting their own ambiguous rules.<sup>11</sup> Fourteen years later, he expressed serious doubts about the decision,<sup>12</sup> and two years after that, in the course of a trenchant critique of *Auer*’s rule, Justice Scalia described it as supported by “no good reason.”<sup>13</sup> When he complained to his colleague, Justice Clarence Thomas, about the problems created by the *Auer* doctrine, calling it a “terrible decision,” Justice Thomas laughingly replied, “Nino, *you* wrote it!”<sup>14</sup>

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<sup>11</sup> 519 U.S. 452 (1997).

<sup>12</sup> *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

<sup>13</sup> *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part).

<sup>14</sup> There may not be a published version of the story, but Justice Thomas has told this story in public as well as private settings. Similar conversations occurred between Justice Scalia and the author over many years, including admission of responsibility, explanation of the thinking behind the original *Auer* decision and



Justice Thomas subsequently had his own *mea culpa* moment respecting judicial deference to agency decisions. In 2005, he wrote for the Court in *National Cable Telecommunications Association v. Brand X Internet Services* that “[a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to [deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>15</sup>] *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”<sup>16</sup> Fifteen years later, Justice Thomas recanted that declaration together with much of the analytical framework that supported it and *Chevron* as well.<sup>17</sup> Justice Scalia was not there to tease him with “Clarence, *you* wrote it.”

Turning to a more institutional change of heart, consider a trio of decisions beginning with the Court’s declaration in *Christensen v. Harris County*<sup>18</sup> that courts should give *Chevron* deference only to administrative interpretations of law that are adopted using formal administrative processes.<sup>19</sup> One year later, in *United States v. Mead Corp.*, the Court announced that formality was neither necessary nor sufficient for *Chevron* deference.<sup>20</sup> Just one year after that, Justice Stephen Breyer, writing for the Court in *Barnhart v. Walton*, used *Chevron* deference to uphold an agency rule, citing in part the rule’s consistency with prior *informal* guidance from the agency<sup>21</sup>—exactly the form of agency action that *Christensen* said was ineligible for such deference. Common sense (along with basic propositions of logic) would say that if informal guidance doesn’t merit deference, adhering to it also shouldn’t merit deference. The weight given to consistency on the part of the agency also seems suspect in a case that constitutes a volte-face in the Court’s own reasoning, especially when the Court fails to

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the reason its flaws escaped notice at the time, and critiques of the decision, offered in turn.

<sup>15</sup> 467 U.S. 837 (1984) (*Chevron*).

<sup>16</sup> 545 U.S. 967, 982 (2005) (emphasis added) (*Brand X*).

<sup>17</sup> *Baldwin v. United States*, 140 S. Ct. 690, 691–95 (2020) (Thomas, J., dissenting from denial of certiorari).

<sup>18</sup> 529 U.S. 576 (2000) (*Christensen*).

<sup>19</sup> *Id.* at 587.

<sup>20</sup> 533 U.S. 218, 229–31 (2001) (*Mead*).

<sup>21</sup> 535 U.S. 212, 218–20 (2002) (*Barnhart*).

acknowledge the tension with its own prior decisions (despite the Court's requirements of acknowledgement and explanation for crediting *agency* changes of mind).<sup>22</sup>

### B. Deference's Difficulty

Each of the subjects addressed by these decisions—deference to agency rule interpretations, the relation between agency and court interpretations of statutory commands, and the more general identification of occasions for judicial deference to agency decisions—is discussed below.<sup>23</sup> For now, the point is not to establish the specific content that any deference doctrine should embrace or to criticize any given approach to deference issues. Instead, the examples above are selected to illustrate the difficulties encountered even by judges one might expect to have the clearest understanding of the subject or at least the greatest clarity in their views on it. This includes judges, such as Justices Scalia and Thomas, who have been especially attentive to issues of separated powers and devoted to the original constitutional design. It also includes judges, such as Justices Breyer and Scalia, who enjoyed very successful academic careers largely devoted to writing and teaching about administrative law.<sup>24</sup>

That these judges' writings on deference display difficulty working through the subject suggests that something is needed beyond standard approaches to deference analysis.<sup>25</sup> At one

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<sup>22</sup> See, e.g., *Federal Communications Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 511–15 (2009) (generally deferring to agency policy changes if accompanied by statement of reasons) (*Fox Television Stations*); *Brand X*, 545 U.S. at 981, 989 (granting agencies freedom to change policy and act “inconsistent[ly]” if accompanied by statement of reasons).

<sup>23</sup> See text at notes 172–342 *infra*.

<sup>24</sup> Of course, both of the categories set out in text with respect to expectations of heightened sensitivity to analytical issues regarding deference can include other judges and justices as well. For examples, Justices Alito, Kavanaugh, and Gorsuch have been among the jurists most attentive to issues of separated powers and constitutional design, and Justices Barrett and Kagan, like Justices Breyer and Scalia, enjoyed successful academic careers largely focused on administrative law, interpretation, and cognate constitutional law issues.

<sup>25</sup> Other scholars have made similar observations, though with different concepts of what is central to the relationship among the constitutional and statutory inquiries. 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) (*Delegation*); Michael Greve, *Nondelegation in Context* (Jan. 2023, draft manuscript, on file with author).

level, if there is any topic in administrative and constitutional law that should be off the “needs attention” list, deference is it.<sup>26</sup> Yet, deference remains a source of confusion for judges—and, in truth, for scholars and other students of the law as well.<sup>27</sup>

The real problem is not the question of deference *by itself* but the need to understand it in the context of a set of related concepts about powers properly within the purview of the different branches of government.<sup>28</sup> In a real sense, the problems illustrated by the three examples above trace to the fact that deference is neither a stand-alone inquiry into the relationship between agencies and courts nor the first step in a multi-step inquiry into that relationship. In fact, it is the last step in the inquiry. Put differently, looking at deference on its own is akin

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<sup>26</sup> One caveat is in order to what is a fairly obvious point: although deference as a focus of administrative law is a subject of much commentary from many perspectives, deference itself as a more general subject—including in contexts outside administrative law—is not. For an exceptional entry into that broader space, see GARY LAWSON & GUY I. SEIDMAN, *DEFERENCE: THE LEGAL CONCEPT AND THE LEGAL PRACTICE* (Oxford Univ. Press 2020).

<sup>27</sup> See, for example, writings discussing how many steps *Chevron* deference has and how *Chevron* deference functions: Kenneth Bamberger & Peter L. Strauss, *Chevron’s Two Steps*, 95 VA. L. REV. 611 (2009); Cary Coglianese, *Chevron’s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339 (2017); Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017); Kristin E. Hickman & David Hahn, *Categorizing Chevron*, 81 OHIO ST. L. REV. 611 (2020); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009); Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143 (2012) (*Confusing*); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) (*Step Zero*). See also sources cited at notes 200–201 & 203 *infra*. Although each scholar who writes on this topic no doubt thinks that he or she has a clear and cogent view of the matter (while others who don’t agree must be confused), it is not self-indulgent to say that, regardless of the position taken on the main points of deference analysis, there is a fair degree of difficulty in finding a clear and convincing path charted by most writings. That widely shared view, in large measure, explains the continued production of deference scholarship.

<sup>28</sup> See, e.g., Bamzai, *Delegation*, *supra* note 25; John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Ginsburg & Menashi, *supra* note 8; Greve, *supra* note 25; John Harrison, *Legislative Power and Judicial Power*, 31 CONST. COMMENTARY 295 (2016); Saikrishna Prakash, *Zivotofsky and the Separation of Powers*, 2105 SUP. CT. REV. 1 (2015); Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923 (2020). See also A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. REV. 1, 15–16 (1999) (situating Friendly’s views with respect to developments in administrative law by reference to broader concepts of administrative discretion and judicial role).

to coming into a play in the third act. Even for seasoned theater-going aficionados, that's no way to understand the play.

Understanding what deference is appropriate—what the limits are to statutory assignments of authority to agencies and to courts and how those limits should inform the way courts read those statutory assignments—begins with understanding the constitutional allocation of power to the different branches. That set of constitutional conferrals of authority and responsibility dictates what discretion can be assigned to agencies. And the scope and nature of lawfully conferred discretion in turn dictates the scope and nature of deference in judicial review of agency actions. The following Parts address these topics in turn.

## II. CONSTITUTING GOVERNMENT'S POWERS

### A. *Safeguarding Liberty: Restraining Discretionary Power*

#### 1. *Constitutional Structures' Discretion-Limiting and Power-Separating Goals*

The first act is the distribution of powers—understanding the structure of the Constitution as directed by discretion-limiting and power-separating goals. Although the nature of and reasons behind the Constitution's separation of powers—and particularly its design for the legislative power of the new government—have been recounted often, they are worth setting out again in light of assertions that arguments based in the Constitution's limitations on legislative power tend to be merely reflections of an “anti-administrativist” bias.<sup>29</sup> The strength and clarity of the commitment to limited and separated power, summarized below, is at odds with that claim.

Writers whose works informed the Framers' conceptions about government emphasized limiting discretionary official power as essential to preventing tyranny and stressed separating powers as essential to limiting discretionary official

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<sup>29</sup> See, e.g., Gillian E. Metzger, *Foreword—The 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017). Others advancing similar claims, buttressed by formalist analysis of constitutional meaning or extrapolation from historical vignettes, are cited *infra* note 90.

power.<sup>30</sup> The Framers also knew the practical history of assertions of discretionary government power, the resulting abuses, and forms of resistance to those assertions of power over the preceding several centuries of European—and especially British—experience.<sup>31</sup> Exercises of discretionary authority by individual officials and small, insulated bodies of officials may not have been the only uses of government authority at odds with developing notions of innate individual rights, but they certainly were the most numerous and most notable.<sup>32</sup>

The Framers—viewing discretionary power, unconstrained by law, as antithetical to the human liberty that was the touchstone of their aspirations for the new nation—consciously sought to create a government structured to limit the amount of discretionary government power enjoyed by any one individual, any group of officials, or any group that might come together to secure exercise of government powers on their behalf.<sup>33</sup> Discretionary power’s threat to liberty was understood in part

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<sup>30</sup> See ARISTOTLE, *THE POLITICS* (Ernest Barker trans., Oxford Univ. Press 1958); ARISTOTLE, *THE RHETORIC* (Robert C. Barkett trans., Univ. of Chicago Press 2019); JOHN LOCKE, *Second Treatise of Government* § 141, in JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 363 (Peter Laslett ed., Cambridge Univ. Press 1988) (orig. 1690); CHARLES DE SECONDAT DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 185–223 (Dublin ed., G. & A. Ewing & G. Faulkner 1751) (orig. 1748). For a list of the books most often found in the libraries of the Founders, see On-Line Library, *Founding Fathers’ Library*, <https://oll.libertyfund.org/page/founding-father-s-library> (including Montesquieu, Blackstone, Locke, and Hume among the top five, joined by Sir Edward Coke’s *INSTITUTES OF THE LAWS OF ENGLAND* among the top dozen). Among the widely read authorities, Blackstone’s “*Commentaries on the Laws of England*” was a work especially well-known to those trained in law. See generally WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (4th ed., Exshaw, Saunders, Grierson & Williams 1771) (1765) (*COMMENTARIES*).

<sup>31</sup> See [CITES]. The general knowledge of these experiences no doubt informed the Founding Generation’s views on what to fear. Blackstone’s discussion of the history of the 1539 Statute of Proclamations, for example, may have been of particular interest with respect to fears of problematic delegations of legislative authority. See BLACKSTONE, *COMMENTARIES*, *supra* note 30, at 1:261. The British and early American portions of the history of experiences with assertions of power and abuses of power are thoughtfully catalogued and discussed in HAMBURGER, *supra*, note 8.

<sup>32</sup> See *id.*

<sup>33</sup> See *THE FEDERALIST* Nos. 10, 41, 47–51 (James Madison), Nos. 67–73, 78–80 (Alexander Hamilton).

as a product of self-interest, which, if unchecked, leads to abuse of power.<sup>34</sup>

James Madison's famous explanation of the problem of faction in *Federalist 10* captures the Framers' concerns about the role of interested parties (relating these to concerns respecting the self-interest of individual government officers).<sup>35</sup> It also expresses the difficulty and costs of addressing the problem by endeavoring to suppress the interests that support faction.<sup>36</sup> Even though during the Constitutional Convention Madison opposed some of the constitutional features that most clearly help constrain faction,<sup>37</sup> his essay stands as the best known explanation of the *need* for governance mechanisms that perform that function, just as other Madison *Federalist* essays best encapsulate the *manner* in which the constitutional plan performs that role.

## 2. *Conception and Compromise: Lessons in Lawmaking*

Despite Madison's thoughtfulness about government structures and functions, he did not agree with some of the critical features of the Constitution's design, including features he explained as critical to its success. Madison's initial disagreement with parts of that plan, however, does not detract from its merit. Indeed, the fact that the Constitution was the product of compromise—rather than following a single, unified plan embraced by any of the Framers—reinforces the story of constitutional design as suited to combatting the sorts of

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<sup>34</sup> See BAILYN, *supra* note 3, at 55–60, 346–47; 1 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 704–08 (Kermit L. Hall & Mark David Hall eds., Liberty Fund 2007); BRUTUS No. 1 (Oct. 18, 1787), *reprinted in* ANTI-FEDERALIST PAPERS, *supra* note 3, at 270, 274–75, 279; BRUTUS No. VI (Dec. 27, 1787), *reprinted in* ANTI-FEDERALIST PAPERS, *supra* note 3, at 280, 285; BRUTUS No. XV (Mar. 20, 1788), *reprinted in* ANTI-FEDERALIST PAPERS, *supra* note 3, at 304–09; Letter from the Federal Farmer, No. I, Oct. 8, 1787, *reprinted in* ANTI-FEDERALIST PAPERS, *supra* note 3, at 257–64.

<sup>35</sup> See THE FEDERALIST No. 10, at 79–80 (James Madison) (Clinton Rossiter ed., New Amer. Lib. 1961).

<sup>36</sup> See *id.* at 78 (James Madison) (Clinton Rossiter ed., 1961) (declaring that it is impossible to abolish faction without abolishing liberty—a cure worse than the disease).

<sup>37</sup> See JAMES MADISON, RECORDS OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 291–94, 345, 379–81 (Charles C. Tansill ed., 1927; *reprinted*, Legal Classics Lib. 1989) (MADISON, RECORDS); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 489, 490, 550 (Max Farrand ed., Yale Univ. Press 1911).

restraints on liberty produced by self-interest or bias that tends to be at odds with innate rights or broader public interest.<sup>38</sup> After all, the basis for debate and eventual compromise repeatedly was that each advocate feared the use of government power to his disadvantage. Structures that made for compromise restricted the expected prospects for conduct that disadvantaged any of the compromising parties.<sup>39</sup>

Nowhere is this more evident than in construction of the legislative power. Some of the Framers contended for a unicameral legislature, others for an upper and lower chamber.<sup>40</sup> Some Framers argued for selecting legislators to represent small constituencies, apportioned among the states in accordance with states' populations.<sup>41</sup> Others urged that representation should be equal among the states regardless of population.<sup>42</sup> Some Framers urged selection by state legislatures or a combination of state and federal officeholders instead of through direct voting.<sup>43</sup> Some of the Framers expected the chief executive to be selected by and accountable to the national legislature and to play only the role of implementer or proposer of legislation, not a role in its enactment.<sup>44</sup> In the end, what emerged was a mixture of features drawn from different proposals, favored by different participants, for divergent reasons.<sup>45</sup>

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<sup>38</sup> For a particularly clear, cogent, and accessible explanation, see Richard A. Epstein, *Self-Interest and the Constitution*, 37 J. LEGAL EDUC. 153 (1987).

<sup>39</sup> See, e.g., DAVID BRIAN ROBERTSON, *THE ORIGINAL COMPROMISE: WHAT THE CONSTITUTION'S FRAMERS WERE REALLY THINKING* (Oxford Univ. Press 2013). It is a commonplace today to observe that the compromises did not take account of—and certainly did not fully account for—the interests of all of the people who were within the polity at the time of the Framing. [CITES]. Despite the importance of this observation, it does not undermine the proposition that compromises made in the constitutional design tended to increase, rather than decrease, the likelihood that a broader set of interests would be taken into account.

<sup>40</sup> See, e.g., MADISON, RECORDS, *supra* note 37, at 204–25 (proceedings of June 15, 1787 to June 18, 1787).

<sup>41</sup> See, e.g., MADISON, RECORDS, *supra* note 37, at 116–18 (proceedings of May 29, 1787).

<sup>42</sup> See, e.g., MADISON, RECORDS, *supra* note 37, at 204–11 (proceedings of June 15, 1787 to June 16, 1787).

<sup>43</sup> See, e.g., MADISON, RECORDS, *supra* note 37, at 168–73 (proceedings of June 7, 1787).

<sup>44</sup> See, e.g., MADISON, RECORDS, *supra* note 37, at 117 (proceedings of May 29, 1787).

<sup>45</sup> See ROBERTSON, *supra*, note 39.

The resulting (compromise-based) structure for lawmaking had three advantages. First, it made the act of legislating reliant not on one set of political actors or influences but on many. To become law, legislation needs support from officials who are selected at different times, by different methods, representing differently composed constituencies, for different length terms.<sup>46</sup> The legislation must secure majorities of the Senate and House, appealing to different lawmaking interests, and must secure approval from a President who represents a national constituency (or secure super-majorities to override his veto).<sup>47</sup> Thus, notwithstanding later-developed insights into ways in which intensely interested minorities can secure legislative favor,<sup>48</sup> the constitutional lawmaking process assures as much as possible that there will be broad support for laws.<sup>49</sup>

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<sup>46</sup> The Constitution assigned lawmaking to a Congress composed of one chamber of representatives elected every two years from relatively small districts apportioned among states on the basis of population and another chamber of senators selected by the states (initially, by state legislatures rather than by popular election) for six-year terms, with one-third of the Senate selected biennially. See U.S. CONST., Art. I, §§ 1–3. And it required the assent of a President selected by the nation for a four-year term, on a basis that mixes the weighting of states in the two legislative chambers. See U.S. CONST., Art. I, § 7; *id.*, at Art. II, § 1. The President’s term, hence, is not coterminous with that of either chamber of Congress, just as his constituency is not the same as that of any member of Congress.

<sup>47</sup> See U.S. CONST., Art. I, §§ 1–3, 7; *id.*, at Art. II, § 1; THE FEDERALIST No. 73 (Alexander Hamilton). Even following the 17th Amendment’s change from selection of Senators by state legislatures to direct elections, U.S. CONST., Amend. 17, cl. 2, differences between the House and Senate remain. These follow from divergence in the scope of their constituencies (with rare exception of states having only a single congressional Representative) and the length of their terms (meaning also, at most moments, a difference in the timing of their election).

<sup>48</sup> See generally DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (Cambridge Univ. Press 1958); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (Univ. of Mich. Press 1960); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (Harv. Univ. Press 1965); JAMES Q. WILSON, POLITICAL ORGANIZATIONS (Basic Books 1973).

<sup>49</sup> See generally R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION (Yale Univ. Press 1990); DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (Yale Univ. Press 1954). For a description of the literature that combines discussion of narrow interest-group explanations of legislators’ behavior and broader public-interest explanations, see, e.g., Steven P. Croley, Review: *Imperfect Information and the Electoral Connection*, 47 POL. RESEARCH Q. 509 (1994) (reviewing works by Douglas Arnold and John Mark Hansen, the first being generally supportive of interest group influence explanations, the second far less so, but both in Croley’s



Second, because the Constitution requires laws to be made in this cumbersome and difficult manner, it tends to frustrate some of the worse impulses associated with catering to temporary majorities.<sup>50</sup> Anyone who has had occasion to observe teenage children can understand how bad ideas come to be acted on quickly by a relatively like-minded group—even when no member of the group might act so foolishly on his or her own and none of those ideas could muster a majority if forced to gain broader support from people of other ages and perspectives outside the group. The process of deliberation, and the delay that accompanies it, makes it more likely that legislation catering to temporary passions will be defeated or moderated before passage.<sup>51</sup>

Third, the combination of these effects also means that laws are less likely to be pure mechanisms for taking from one group to give to another or punishing one group that is disfavored by another, without broader interests at play.<sup>52</sup> At least, it is less

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view connected by informational asymmetries that affect both sources and recipients of information).

<sup>50</sup> See, e.g., No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961); *id.*, No. 73, at 443–44 (Alexander Hamilton); *U.S. Dept. of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1237 (Alito, J., concurring) (*American Railroads*); *id.*, at 1243–45 (Thomas, J., concurring in judgment); *Gundy v. United States*, 139 S. Ct. 2116, 2134–35 (Gorsuch, J., dissenting) (*Gundy*).

<sup>51</sup> See, e.g., THE FEDERALIST No. 62, at 378–79 (James Madison) (Clinton Rossiter ed., 1961); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 708–10 (1997). The point is almost always accompanied by recounting the (probably apocryphal) story of George Washington explaining to Thomas Jefferson the purpose of the Senate by comparing it to a saucer into which tea is poured to allow it to cool so as not to burn the drinker's mouth. Madison also urges a separate advantage to the inclusion of the Senate in its longer terms supporting greater likelihood of knowledge regarding the manner in which laws should be constructed. THE FEDERALIST No. 62, at 380 (James Madison) (Clinton Rossiter ed., 1961). This argument is little developed and probably not as sound as Madison's other defenses of the creation of a Senate, a creation that departed from his own preferences.

<sup>52</sup> Apart from the self-evident consequences of the multiple, overlapping, and distinctive bases for selection of the various lawmaking participants, a voluminous technical literature supports the conclusion in text. For a particularly thoughtful review of one important branch of writings on the operation of different components of the lawmaking process and the manner in which their combination affects congruence with broader public interests, see, e.g., McNollgast (Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast), *The Political Economy of Law*, in HANDBOOK OF LAW AND ECONOMICS 1651, 1674–92 (A. Mitchell Polinsky & Steven Shavell eds., Elsevier 2007).

likely under the American Constitution's rules than under decision-making structures that permit faster, less broadly supported legislation.<sup>53</sup>

In short, the Constitution's structure made the exercise of legislative power difficult. By constraining the discretionary power of each official and each group of officials essential to exercise lawmaking power, the constitutional requirements for legislating reduce—and were justified at the time as reducing—the prospects of legislation's use to invade important liberty interests.<sup>54</sup> For the Framers and the Founding Generation, avoiding government overreach was a much more pressing concern than the correlative risk of missing out on publicly beneficial lawmaking.<sup>55</sup>

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<sup>53</sup> Although this is doubtless true, and a reason that the American experiment has produced general stability and prosperity, it does not preclude possibilities that a large group would coalesce around mechanisms that take from many citizens to facilitate distribution of largesse to many different sets of individuals, entities, and interests. This prospect is especially likely when such transfers can be effected in ways that are largely hidden from public view and, by distributing benefits to a broad group, raise the electoral prospects of many legislators who support it. [CITE Public Choice literature for general discussion of the mechanics of such outcomes.] [Example: Omnibus Budget bills]

<sup>54</sup> See THE FEDERALIST Nos. 47–51 (James Madison), No. 73 (Alexander Hamilton). The point is especially clear in *Federalist 51* and *Federalist 73*. *Federalist 51*, among the most famous of the essays, includes Madison's admonition that "[i]n republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit." THE FEDERALIST No. 51 at 322 (James Madison) (Clinton Rossiter ed., 1961). *Federalist 73* adds Hamilton's observation that "those who can properly estimate the mischiefs of [defects] in the laws ... will consider every institution calculated to restrain the excess of lawmaking, and to keep things in the same state in which they happen to be at any given period, as much more likely to do good than harm ... [t]he injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones." THE FEDERALIST No. 73, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Although in this particular essay Hamilton focused principally on the benefit of a presidential veto power, he makes clear that a primary benefit is "to increase the chances ... against the passing of bad laws, through haste, inadvertence, or design." *Id.* at 443. This primary benefit is the aim of the entire structure of legislation.

<sup>55</sup> This observation has the same roots as the Framers' emphasis on the discretion-limiting and power-separating goals. It also explains the almost entirely negative orientation to the Bill of Rights, adopting rules focused on limiting inappropriate interference with important liberties rather than rules designed to promote specific visions of beneficial private behavior. See, e.g., Vincent A. Blasi, *The Pathological*

B. *Separation as Limitation: Divided Power and Due Process*

The story of legislative power's constraint is not merely an illustration of the Constitution's (reasonably) happy combination of plan and pragmatism. It is far more important as the story of how each substantial competing interest represented in the Framing was accommodated in constraining the forces most feared as likely to infringe on the liberty cherished by the Framing generation. The legislative power was first on that list of feared institutions for many as it was regarded as the well-spring of government powers—both of powers that were expected to threaten liberty and powers that were deemed necessary for government to function effectively.<sup>56</sup> Separation of the legislative power from other powers and insistence that it function only through specified means that made the imposition on individuals' freedoms difficult, thus, served both power-separating and discretion-limiting goals.

This separation of powers also fit the historic understanding of due process as requiring two essential features.<sup>57</sup> First, any exercise of control over individuals had to be based on “the law of the land”—a generally applicable law adopted by the legislative power in advance of its application to individuals. This requirement, especially in combination with constitutional restrictions on *ex post facto* laws and bills of attainder,<sup>58</sup> provided a basis for expecting any restriction of liberty to be consequent to an exercise of authority that has attributes of *legitimacy* (lawmaking by a properly ordained authority), *generality* (the need for law to apply to a suitably broad set of cases), *neutrality* (a rule's application similarly to all similar cases), and *notice* (the adoption of a rule sufficiently in advance and sufficiently accessible to the public to provide opportunity

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*Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985); Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405 (1987); Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989). Appreciation to Gary Lawson for comments underscoring this point.

<sup>56</sup> See, e.g., THE FEDERALIST Nos. 47–48 (James Madison).

<sup>57</sup> See generally Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

<sup>58</sup> See U.S. CONST., Art. I, § 9, cl. 3 (prohibiting congressional adoption of bills of attainder or *ex post facto* laws); *id.*, Art. I, § 10, cl. 1 (prohibiting state adoption of *ex post facto* laws).

for those subject to a rule to know of it and to conform their conduct to it).<sup>59</sup>

The second requirement of due process (certainly, as understood at the Framing) was that the power to *adopt* those rules must be separate from the power to *apply* those rules—an exercise that was subject to suitable judicial process, including in certain settings the intervention of juries of one’s peers.<sup>60</sup> The jury constituted a protection against arbitrary discretion wielded by officials beholden to a particular individual or group.<sup>61</sup> That is, the requirement of neutral enforcement based on law—and procedures conducive to that—constituted an essential companion to the “law of the land” requirement.<sup>62</sup> The common sense of that is familiar to anyone who has rooted for a team or player in an athletic contest—having rules for the contest confers little protection if the rules are left to be enforced by a biased referee. (That means an *actually* biased referee, in distinction to one who merely *must have been* biased for my team to have lost!)

Although the jury was historically important as a means of protecting against biased enforcement,<sup>63</sup> it was not the only potential mechanism for independent judgment on laws’

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<sup>59</sup> See, e.g., J. Roland Pennock, *Introduction*, in NOMOS XVIII: DUE PROCESS xv, xvi–xix (J. Roland Pennock & John W. Chapman eds., New York Univ. Press 1977) (NOMOS XVIII); Thomas M. Scanlon, *Due Process*, in NOMOS XVIII, *supra*, at 93–125. These requirements also inform conceptions of the rule of law. See, e.g., CASS, RULE OF LAW, *supra* note 6, at 3–19; LON L. FULLER, THE MORALITY OF LAW 38–40 (Yale Univ. Press, rev. ed. 1969); Richard H. Fallon, Jr., “The Rule of Law” as a Concept in *Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997); Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1987–89 (2015).

<sup>60</sup> See, e.g., Magna Carta, ch. 39 (1215) (guaranteeing protection against punishment of anyone covered by the document without the “lawful judgment of his peers”); William E. Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 913–17 (1978) (explaining the broad power exercised by eighteenth Century American juries, including power over construction of the law). The requirement for juries in criminal trials and certain civil suits is made explicit through the Sixth and Seventh Amendments to the Constitution. See U.S. CONST., Amends. VI, VII.

<sup>61</sup> See, e.g., John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J. L. & PUB. POL’Y 119, 119–22, 123–25 (1992) (explaining both the importance and the fragility of the constitutional guarantee of jury trial in criminal cases).

<sup>62</sup> See, e.g., Chapman & McConnell, *supra* note 57, at 1679–1726.

<sup>63</sup> See, e.g., BLACKSTONE, COMMENTARIES, *supra* note 30, at 3:349–81.

application and the Constitution's separation of powers was conceived as a critical additional protection. Certainly, judges historically had not been separated in clear fashion from other government offices. Even in the colonies, judicial powers were frequently exercised by the legislature.<sup>64</sup> The change from a legislative power that was the supreme source of law to a legislative power subordinated to the Constitution as the supreme source of law was part of a transformation in the American conception of judicial independence.<sup>65</sup> In framing the Constitution, insulating judges against control through requirements of life tenure and irreducible pay reflected the importance of power-separating as a safeguard against an abusive concentration of government authority in any person or group.<sup>66</sup>

In the end, the specific requirements for lawmaking and the separation of lawmaking (by Congress) from enforcement against individuals (at the instance of the executive and through the intermediation of the courts) served the two highest priority goals of the Framers and the related ends of due process.<sup>67</sup> As Madison's *Federalist 51* declares, the "separate and distinct exercise of the different powers of government ... is admitted on all hands to be essential to the preservation of liberty" and the "necessary partition of power among the several departments," together with the division of power between state and national governments, provides a critical protection against usurpation of the rights of the people.<sup>68</sup> The protection is not by any means absolute,<sup>69</sup> but it is nonetheless substantial.

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<sup>64</sup> See, e.g., Chapman & McConnell, *supra* note 57, at 1671–72.

<sup>65</sup> See, e.g., Lowell Howe, *The Meaning of Due Process Prior to the Adoption of the Fourteenth Amendment*, 18 CAL. L. REV. 583, 586–87 (1930).

<sup>66</sup> See, e.g., THE FEDERALIST Nos. 78–79 (Alexander Hamilton).

<sup>67</sup> See, e.g., Chapman & McConnell, *supra* note 57, at 1671–72 (explaining evolution from Parliament and many pre-Independence state legislatures also constituting supreme judicial authorities to a stricter separation of legislative from judicial competences).

<sup>68</sup> THE FEDERALIST No. 51, at 320–21 (James Madison) (Clinton Rossiter ed., 1961).

<sup>69</sup> [CITE to sources re interference with rights of control over property, exercise of religion, etc.; federal usurpation of authority originally understood to lie with state governments (including federalization of defamation law and control over intra-state commerce)] See also note 53, *supra*; text at notes 80–89, *infra*.

### III. DELEGATION: PERMITTED VS. PROHIBITED DISCRETION

The first act of the Delegation, Discretion, Deference play follows directly from the description of the constitutional framework's separation of powers. It addresses how limitations on the reassignment of other branches' powers to administrative agencies are to be enforced. This act proceeds in two parts, focusing on: (i) whether there is to be judicial enforcement; and (ii) if so, what test will separate lawful from unlawful assignments of authority. The first question, although contested, presents the easy issue—by far, the easier of the two.

#### A. *The Easy Issue: Need for a Nondelegation Rule*

##### 1. *Problematics of Lawmakers Making Lawmakers*

The case for judicial enforcement of the Constitution's assignment of lawmaking to Congress, with its requirements of bicameralism and presentment, has been spelled out in the opinions of Supreme Court justices over two centuries, stretching from the early 1800s to the 2020s. Far from being a recent innovation, today's assertions of judicial authority to enforce limits on congressional outplacement of legislative authority follow from Chief Justice John Marshall's famous statement in *Marbury v. Madison* laying out the predicate behind judicial review of legislation's constitutionality. In Marshall's words:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.<sup>70</sup>

Marshall explained that the ability of a constitutional provision to bind government officials *as law* and to prevent contrary actions is an essential element of a written constitution—and cannot be effected without judicial capacity to interpret and enforce constitutional commands.<sup>71</sup>

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<sup>70</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803) (*Marbury*).

<sup>71</sup> *Id.* at 176–78.

*Marbury's* explanation tracks Alexander Hamilton's in *Federalist 78*, though Hamilton includes a memorable coda on the importance of judicial enforcement:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority ... Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. *Without this, all the reservations of particular rights or privileges would amount to nothing.*<sup>72</sup>

Admittedly, the arguments made by Hamilton and Marshall did not satisfy all of the participants in ratification debates,<sup>73</sup> just as they do not satisfy every jurist and constitutional scholar today.<sup>74</sup> Skeptics doubted that judges could be trusted to exercise this power wisely and consistently and worried that excessive power in the judiciary would threaten liberty as much or more than excessive power in the Congress.<sup>75</sup> Yet, the fact that *both* the proponents and opponents of constitutional ratification saw the document as necessarily granting federal courts the power to declare congressional actions unconstitutional strongly supports the Hamilton-Marshall position.

The import of that position for judicial enforcement of constitutional limitations on assignment of legislative power to other branches—delegation or subdelegation is the usual term<sup>76</sup>—also should be clear. As Justice Samuel Alito said:

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<sup>72</sup> THE FEDERALIST No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

<sup>73</sup> See, e.g., BRUTUS No. XI (Jan. 31, 1788), reprinted in ANTI-FEDERALIST PAPERS, *supra* note 3, at 293–98; BRUTUS No. XII (Feb. 7, 1788), reprinted in ANTI-FEDERALIST PAPERS, *supra* note 3, at 298–302.

<sup>74</sup> See, e.g., THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE* 196–97 (Harv. Univ. Press 2022) (arguing that existence of judicial power to assess meaning of law in relation to Constitution in appropriate case does not exclude existence of separate power in other branches or require superiority of judicial construction outside the ambit of its judgment in the specific case at hand).

<sup>75</sup> See, e.g., BRUTUS No. XI, *supra* note 73, at 293–98; BRUTUS No. XII, *supra* note 73, at 298–302.

<sup>76</sup> These terms reflect the understanding that, in contrast to claims of divine right or other sources of power, the power at issue under the American Constitution was

The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. ... *It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints.*<sup>77</sup>

That same proposition has been embraced by other justices—notably in expansive and detailed opinions by Justice Neil Gorsuch (for three dissenters) in *Gundy* and Justice Thomas in *American Railroads*—and by a very substantial number of scholars as well.<sup>78</sup> As the italicized portions of the quoted passages from Hamilton and Alito emphasize, the investment made in agreeing on a structure that divides and (at least for Congress) channels power in ways that secured approval of large states and small states, agrarian and commercial interests,

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delegated to Congress by the people whose exercise of innate, autonomous rights—acting through the medium of states—empowered the federal government, in particular the Congress, to wield specific, limited power. With the concept of The People as the principal, Congress and other governmental bodies and officials would be the entities to whom authority was delegated. On that view, the law respecting the exercise of power turns on the background law of delegation. *See, e.g.,* Gary Lawson, *A Private-Law Framework for Subdelegation*, in *THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT* 123, 131–36 (Peter J. Wallison & John Yoo eds., Am. Enterprise Inst. 2022) (*ADMINISTRATIVE STATE*) (Lawson, *Private-Law Framework*).

<sup>77</sup> *American Railroads*, 135 S. Ct. at 1237 (Alito, J., concurring) (emphasis added).

<sup>78</sup> *See, e.g., American Railroads*, 135 S. Ct. at 1240, 1242–54 (Thomas, J., concurring in judgment); *Gundy*, 139 S. Ct. at 2131, 2133–42 (Gorsuch, J., dissenting); Paul v. United States, 140 S. Ct. 342, 342 (Kavanaugh, J., concurring in denial of cert.); HAMBURGER, *supra* note 8, at 83–85; Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1038, 1041–48 (2007) (*Running Riot*); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 148–51 (2017) (*Delegation Reconsidered*); Douglas H. Ginsburg, *Reviving the Nondelegation Principle in the US Constitution*, in *ADMINISTRATIVE STATE*, *supra* note 76, at 20, 26 (*Reviving*); Ginsburg & Menashi, *supra* note 8; Greve, *supra* note 25; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328–30, 334 (2002) (*Delegation*); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1464–68 (2015); Michael B. Rappaport, *A Two-Tiered and Categorical Approach to the Nondelegation Doctrine*, in *ADMINISTRATIVE STATE*, *supra* note 76, at 195, 195–208; David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 355–58 (1987) (*Purposes*); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224–28, 1240–41 (1985) (*Substance*); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (*Founding*).



and disparate concerns of states in different parts of the nascent nation is at odds with conceding to Congress the power to deputize *others* to exercise that power *in other ways*.<sup>79</sup>

Both the *risk* from assignment of Congress's lawmaking power to others and the *reasons* why Congress might engage in such delegations matter. The risk, as Hamilton and Alito (among others) declare, is loss of the protections of liberty inherent in the constitutional creation of hurdles to too-ready adoption of rules binding others.<sup>80</sup>

The reasons why legislators, with the consent of the President, might assign their lawmaking power to others underscore the problem with unpoliced delegations. As Professors Peter Aranson, Ernest Gellhorn, and Glen Robinson explained 40 years ago, assigning important decisionmaking functions to agencies frequently serves the interests of lawmakers and favored groups.<sup>81</sup> It allows difficult decisions on which there is disagreement among lawmakers to be given to others, often with greater prospect of decisions that please especially important constituencies, while preserving opportunities for escaping blame for unpopular outcomes.<sup>82</sup> The capacity to externalize responsibility for decisions also provides opportunities for securing support for particularly interested legislators who have options for influencing the agent charged with decisionmaking—controlling agency budgets, influencing

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<sup>79</sup> See Alexander & Prakash, *Running Riot*, *supra* note 78; Cass, *Delegation Reconsidered*, *supra* note 78; Lawson, *Delegation*, *supra* note 78; Rappaport, *supra* note 78; Schoenbrod, *Purposes*, *supra* note 78. See also Aditya Bamzai, *Alexander Hamilton, the Nondelegation Doctrine, and the Creation of the United States*, 45 HARV. J.L. & PUB. POL'Y 795, 828–36 (2022) (connecting concerns about delegation of authority in state governance issues before and around the Founding, in framing the Constitution, and in the ratification and adoption of the Constitution) (*Hamilton and Nondelegation*).

<sup>80</sup> See also *Gundy*, 139 S. Ct. at 2134–35 (Gorsuch, J., dissenting). Recognition of this risk is evident not only in commentary on nondelegation, but also in decisions respecting a “major questions” doctrine and other doctrines as well. See, e.g., Jonathan Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931 (2020); Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L. REV. 191 (2023); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

<sup>81</sup> See Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

<sup>82</sup> See *id.*, at 39, 51–52, 55–62. See also [CITES – include comments by Alito, Thomas, Gorsuch re accountability]

administrators' selection, imposing special costs on recalcitrant administrators through hearings and other mechanisms that can tarnish prospects for personal advancement.<sup>83</sup>

Not all of the reasons for delegating legislators' lawmaking power need to be entirely at odds with public benefits. For example, although explanations based in broader public benefits from administrators' expertise frequently are contrasted with arguments based in legislators' self-interest, both types of interest can be served by enhancing efficiency and expertise in certain decisions requiring scientific or technical knowledge or experience.<sup>84</sup>

The critical point, however, is not whether *any* public benefit derives from delegation but whether legislators' delegation of their own constitutional responsibility should be assumed to be unproblematic because it is a sacrifice of *their* power, in contrast to conduct of one branch seeking to invade the ambit of authority assigned to another. The answer to that is a definite "no." As I've said elsewhere, "[t]he bottom line is that *the grant*

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<sup>83</sup> See, e.g., Aranson, Gellhorn & Robinson, *supra* note 81; John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. 1 (Special Issue 1990); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 2 AM. J. POL. SCI. 165 (1984); Morris S. Ogul & Bert A. Rockman, *Overseeing Oversight: New Departures and Old Problems*, 15 LEG. STUD. Q. 5 (1990); Rao, *supra* note 78; Barry Weingast & Mark Moran, *The Myth of the Runaway Bureaucracy*, REGULATION 33, 34 (May/June 1982).

<sup>84</sup> See Cass, *Delegation Reconsidered*, *supra* note 78, at 154 (explaining why a particular form of efficiency matters to legislators and administrators and can be advanced at times by delegations of administrative authority). For broader defenses of delegations as enhancing efficiency and democratic accountability in certain settings, see, e.g., Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985); David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947 (1999); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985) (*Prodelegation*); Metzger, *supra* note 27, at 86–87; Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391 (1987) (*Response to Lowi*). It is worth adding that even where scientific, technical, or other forms of expertise may beneficially inform decisionmaking, that does not, of itself, justify delegating responsibility to scientists, technicians, or others with the relevant experience. See, e.g., HANNAH ARENDT, *THE HUMAN CONDITION* xiv (Univ. of Chicago Press, 2d ed. 1998).

*of power from one entity to another is never an act of pure generosity; the grantor invariably gains something from the grant.*"<sup>85</sup>

Most important for rule of law purposes, arguments for letting the political branches police decisions on when and how much to grant lawmaking authority to executive branch officials fail to explain how this will achieve consistency with the Constitution. As explained below, neither arguments based in claims of delegations' propriety nor arguments based in textual constructions that would make *any* (or virtually any) statutorily enacted authorization lawful are persuasive as matters of constitutional interpretation.<sup>86</sup> And the evidence that legislators' self-interest will support delegations at odds with the constitutional design—for the reasons that Aranson, Gellhorn, and Robinson, as well as others, explain—should be conclusive.<sup>87</sup>

On legislators' inclinations, it's worth recalling a caution voiced by then-Professor (later, Justice) Scalia. After explaining that it now is common—indeed, too common—for legislators to believe that “if a constitutional prohibition is not enforceable through the courts, it does not exist,” Scalia added that, in this setting, “the congressional barrier to unconstitutional action disappears unless reinforced by judicial affirmation.”<sup>88</sup> Despite Justice Scalia's oft-noted reservations about a nondelegation doctrine that would require judicial weighing and balancing of considerations that are neither susceptible of a bright-line rule nor peculiarly within the domain of judges, Professor Scalia concluded that “even with its Frankenstein-like warts, knobs,

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<sup>85</sup> Cass, *Delegation Reconsidered*, *supra* note 78, at 153 (emphasis in original). See also Nat'l Fed'n of Indep. Bus. v. Dept. of Labor, 142 S. Ct. 661, xxx (2022) (Gorsuch, J., concurring).

<sup>86</sup> See text at notes 90–135 *infra*.

<sup>87</sup> See, e.g., Aranson, Gellhorn & Robinson, *supra* note 81; [other CITES]. For cogent, and telling, descriptions of the number and scope of rules made pursuant to congressional delegations, see, e.g., CLYDE WAYNE CREWS, JR., TEN THOUSAND COMMANDMENTS, 2020: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE (2022), available at [https://cei.org/wp-content/uploads/2022/10/10000\\_Commandments\\_2022.pdf](https://cei.org/wp-content/uploads/2022/10/10000_Commandments_2022.pdf); Maeve P. Carey, *Counting Regulations: An Overview of Rulemaking, Types of Rulemaking, and Pages in the Federal Register* 1, 7, 19–20, 22–23 (Cong. Research Serv., Sep. 2019).

<sup>88</sup> Antonin Scalia, *A Note on the Benzene Case*, REGULATION 25, 28 (July/August 1980).

and (concededly) dangers, the unconstitutional delegation doctrine is worth hewing from the ice.”<sup>89</sup>

## 2. Revisionist Visions: Delegation Without Borders

In contrast to the views of Professor Scalia—who embraced the predicates for constitutional restraint on delegating legislative authority while worrying about the design of a legal test for implementing that restraint—some scholars in recent years have questioned long-accepted predicates for a nondelegation doctrine. These scholars have advanced three sorts of arguments in opposition to the more widely accepted view that Scalia and most commentary on delegation accept.<sup>90</sup> Although each of the revisionist arguments could be addressed at length (and have been in other papers), they are treated here more summarily, with only brief explanations of the reasons for rejecting them. This section discusses only the revisionist arguments against the existence of any (or any significant) constitutional limitation on the delegation of authority to particular officials—that is, against *any* nondelegation doctrine; arguments respecting the *scope* of a nondelegation doctrine are taken up in the succeeding section.

*Delegation for One, Delegation for All.* The first of the revisionist arguments, advanced most cogently by Professor Cynthia Farina, rests on both an assumed equivalence of the Constitution’s treatment of the three branches of government and an assertion respecting the manner in which background legal rules of private law should affect the construction of constitutional delegation issues.<sup>91</sup> Both parts of this argument analogize delegation of national legislative authority to other delegations.

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

<sup>90</sup> Arguments favoring broad acceptance of legislative delegations—arguments at odds with any significant, direct judicial restraint (at least, constraint based in a rule against such delegations, as opposed to rules aimed at other substantive or procedural deficits)—are advanced for example in Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021); Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL’Y 87 (2010); Metzger, *supra* note 29; Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

<sup>91</sup> See Farina, *supra* note 90.

The argument claims that because the President—who, like Congress, has vested powers—has the authority to delegate his power to others working for him, Congress has the same authority.<sup>92</sup> It also asserts that subdelegation is accepted under private law rules and should be treated similarly as a matter of constitutional construction.<sup>93</sup>

At the outset, the analogy of vested legislative power to vested executive power is inapt.<sup>94</sup> The power relevant to legislative delegations is the central power of *lawmaking*—that is the power that was of most concern to the Framers and the Founding Generation, the power most strictly circumscribed in the Constitution in *how* it is to be exercised and *who* is to exercise it.<sup>95</sup> The power that a President relies on when delegating authority to others is the power (and obligation) to “take Care that the Laws be faithfully executed.”<sup>96</sup> The terms chosen in framing this responsibility in the Constitution indicate an expectation that the President will not directly execute the laws but rather will *oversee* their execution by others, an expectation backed up by explicit provision of the President’s power to demand opinions from executive department heads.<sup>97</sup> Presidential control over the functioning of officials who exercise subdelegated presidential authority also is, as a general matter, consequentially greater—and reclaiming the power considerably easier—than the control that can be exercised by Congress once it has delegated lawmaking authority to another entity.<sup>98</sup>

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<sup>92</sup> See *id.* at 90–93.

<sup>93</sup> See *id.* at 91–93. This argument includes the observation that, in light of the Necessary and Proper Clause, legislative delegations should be treated more leniently than delegations of executive authority.

<sup>94</sup> See Cass, *Delegation Reconsidered*, *supra* note 78, at 179–80.

<sup>95</sup> See, e.g., THE FEDERALIST No. 48 (James Madison); Cass, *Delegation Reconsidered*, *supra* note 78, at 180–81.

<sup>96</sup> U.S. CONST., Art. II, § 3, cl. 4.

<sup>97</sup> See U.S. CONST., Art. II, § 2, cl. 2. For an argument building on this and extending it to argue against a strong inference of presidential control associated with the “unitary executive” theory, see Peter L. Strauss, *Overseer or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007). See also LAWSON & SEIDMAN, *supra* note 26, at 127–28 (arguing that there is a fundamental difference between the President’s law-execution power, as to which the Constitution evidences an expectation of delegability, and other, non-delegable presidential powers such as the pardon power).

<sup>98</sup> See, e.g., David P. Currie, *The Constitution in Congress: Jefferson and the West, 1801–1809*, 39 WM. & MARY L. REV. 1441, 1481 n. 217 (1998) (describing and

Further, apart from any conclusion respecting its applicability to constitutional interpretation, the assumption that accepted rules in private law support broad authority to subdelegate—at least, the private law relevant to interpretation of constitutional text, the law in effect at the time that text was written and ratified<sup>99</sup>—is questionable at best.<sup>100</sup> Professor Gary Lawson, after careful exploration, concluded that private law at the time of the Founding tightly circumscribed the settings and grounds that allowed a delegee to further delegate responsibility.<sup>101</sup> Lawson’s conclusions fit a much narrower class of follow-on delegations than the free-range delegation contention supports.<sup>102</sup> Thus, neither support for the first revisionist argument holds up well.

*Lawmaking: Once is Enough.* A second revisionist argument, articulated most notably by Professors Eric Posner and Adrian Vermeule, reduces to the “formalist” or “naïve” proposition that Congress eliminates delegation objections when it acts through properly enacted legislation.<sup>103</sup> In their words, “[a] statutory grant of authority to the executive isn’t a *transfer* of legislative power but an *exercise* of legislative power.”<sup>104</sup> On this view, if

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commenting on objections raised by Rep. John Randolph to a particular provision of the treaty respecting the Louisiana Purchase, focusing on the interim government for the acquired territory). Thanks are due to Ilan Wurman for pointing to this argument.

<sup>99</sup> See, e.g., William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809 (2019); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Originalism and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009); A. Raymond Randolph, *Originalism and History: The Case of Boumediene v. Bush*, 34 HARV. J. L. & PUB. POL’Y 89 (2011); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015).

<sup>100</sup> Professor Farina, however, relies more on the modern version of agency law. See Farina, *supra* note 90, at 91–93. In this respect, criticism here is less directed at her construction of the law than her choice of the relevant law to construct.

<sup>101</sup> See Lawson, *Private-Law Framework*, *supra* note 76.

<sup>102</sup> See *id.*, at 127–44. Moreover, reliance on the Necessary and Proper Clause cannot carry the day without the springboard of support for delegation more generally. That is, the clause is not a constitutional version of Cole Porter’s “Anything Goes.” See, e.g., Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of Sweeping Clause*, 43 DUKE L.J. 267 (1993) [other CITES re necessary and proper clause].

<sup>103</sup> See Posner & Vermeule, *supra* note 90.

<sup>104</sup> *Id.* at 1723.

Congress passes a law complying with formal lawmaking requirements such as bicameralism and presentment, one might object on various grounds, including legislating on subject matters outside constitutionally authorized limits. But, Posner and Vermeule argue, delegation of authority to others itself cannot be a valid objection.<sup>105</sup> For them, Congress has exercised its *legislative* authority in enabling others to act and that is the end of the inquiry—any authority delegated, no matter how legislative it looks, is by definition executive or judicial.

As Professors Larry Alexander and Sai Prakash have explained, however, it cannot be the case that nothing Congress does—no alteration of requirements respecting performance of its functions under the Constitution—is objectionable on grounds that it has gone too far in rewriting the Constitution.<sup>106</sup> Congress cannot, for example, deputize an “Amendment Commission” to exercise the Congress’s power to propose constitutional amendments.<sup>107</sup> For exactly the same reason, it cannot outpace its lawmaking authority to others.<sup>108</sup>

Certainly, Posner and Vermeule are right that what executive officials do must be an exercise of executive power, whether the officials engage in rulemaking that seems legislative or adjudication that seems judicial.<sup>109</sup> But that is because executive officials constitutionally are limited to performing executive functions; they are only *permitted* to make rules that are within the ambit of their duties in executing the law and to render adjudicative decisions that fulfill obligations to execute the law.<sup>110</sup> The point of the Constitution—in service of its power-

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<sup>105</sup> See *id.* at 1724. See also Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2115 (2004) (*Rethinking*).

<sup>106</sup> See Alexander & Prakash, *Running Riot*, *supra* note 78, at 1038–39, 1052–55.

<sup>107</sup> See *id.* at 1054–55.

<sup>108</sup> See *id.* at 1038–39. See also Bamzai, *Hamilton and Nondelegation*, *supra* note 79, at 828–36; Cass, *Delegation Reconsidered*, at 181–83. The Alexander-Prakash argument could be pressed further, as the lawmaking power was seen as the most significant power given to Congress; for that reason, even if some of Congress’s other constitutional powers could be delegated to others, delegation of its lawmaking power would require additional (and, one would think, more explicit) support. See text *supra* at notes 46–67.

<sup>109</sup> See text at notes 176–183 *infra*.

<sup>110</sup> See *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (*Mistretta*).

separating goal—was *allocation*, not *definition*, saying who could exercise particular powers rather than what a given official’s acts should be called.

For that reason, even if there is a formal—one might say, tautological—appeal to the Posner-Vermeule argument, there is no provision in Article I that says the set of powers given to Congress, expressly restricted to a particular process for their exercise by a particular combination of officials, can be exercised by some other person or group if majorities of Congress think that is advantageous. Nor was this a mere oversight. Those who wrote and ratified the Constitution were fully cognizant of John Locke’s admonition that the legislature cannot “transfer the power of making Laws to any Body else, or place it anywhere but where the People have.”<sup>111</sup>

If it were as simple to separate one type of government power from another as referring merely to the formal action of Congress, it is quite unlikely that James Madison would have remarked that “no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary.”<sup>112</sup> In the end, the line must be drawn on substantive ground between what constitutes “legislative Powers” and what constitutes “[t]he executive Power” or “[t]he judicial Power” to answer whether what Congress delegates to another person or body is constitutionally permitted.

*The New History: Regulatory State from the Start.* The third revisionist argument paints both the intellectual genesis and the reality of American government as embracing delegation of broad regulatory power from its inception.<sup>113</sup> This argument, most prominently associated with the work of Professors Julian Davis Mortensen and Nicholas Bagley,<sup>114</sup> in some respects is based on careful, painstaking research.<sup>115</sup> Yet, at critical points, it

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<sup>111</sup> LOCKE, *supra* note 30, at § 142.

<sup>112</sup> THE FEDERALIST No. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961).

<sup>113</sup> See Chabot, *supra* note 90; Mortensen & Bagley, *supra* note 90; Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021).

<sup>114</sup> Mortensen & Bagley, *supra* note 90.

<sup>115</sup> For example, Mortensen and Bagley did extensive data base searches to check for use of language indicating assertion of particular arguments, and Parrillo



leaps from the evidence to conclusions that, while congenial to advocates of an expansive regulatory state, are significantly overstated.<sup>116</sup> The evidence supporting assertions that the Founding Generation embraced broad delegations of regulatory power has been examined in great detail.<sup>117</sup> The following paragraphs merely recount highlights of the arguments respecting that history.

The most trenchant examination (and critique) of the revisionists' claims is Professor Ilan Wurman's review of the background materials, the relevance of analogies to assignments of authority from governments not subject to limitations akin to our Constitution,<sup>118</sup> the works known to the Framers, the language used in discussing matters relevant to delegations of authority, and the history of early experiences following the founding.<sup>119</sup> Although all of these matters are significant to debates over the revisionists' claims, it should suffice here to review Wurman's ripostes on only the last two of them—the

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examined a larger variety of different records in constructing his argument respecting the previously little-known 1798 legislation creating an apparatus to administer a national tax on private lands. See Mortensen & Bagley, *supra* note 90; Parrillo, *supra* note 113.

<sup>116</sup> See generally Wurman, *Founding*, *supra* note 78, explaining in detail claims that are overstated and specific statements that are in some respect misleading. Other works at odds with the revisionist claims on critical issues include HAMBURGER, *supra* note 8, at 83–85, 100–10; Cass, *Delegation Reconsidered*, *supra* note 78, at 155–58, 182–83, 188; Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 719–20 (1969); Lawson, *Delegation*, *supra* note 78, at 340–43, 353–55; Lawson, *Rise and Rise*, *supra* note 8, at 1235; David Schoenbrod, *Consent of the Governed: A Constitutional Norm That the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213, 266–71 (2020) (*Consent*). See also Jennifer L. Mascott, *Private Delegation Outside of Executive Supervision*, 45 HARV. J. L. & PUB. POL'Y 837, 878–82, 896–98 (2022) (analyzing the nature of assignments of authority in the patenting process in the Eighteenth and early Nineteenth Centuries). Works from scholars more sympathetic to broad delegations of authority, but nonetheless at odds with some of the revisionists' claims, include Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1268 (2006); Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 738–39 (1994) (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993)).

<sup>117</sup> See, e.g., Wurman, *Founding*, *supra* note 78.

<sup>118</sup> Wurman notes as the most egregious example of a misleading analogy Mortensen and Bagley's invocation of the Statute of Proclamations, as if this were comparable to what those writing the Constitution hoped to achieve. See *id.* at 1496. Respecting the Founding Generation's view of this episode in English governance, see also note 31 *supra*.

<sup>119</sup> See Wurman, *Founding*, *supra* note 78.

Founding Generation's asserted lack of concern over delegations of legislative authority evidenced, first, by the language used to discuss questions respecting allocation of power to act on others' behalf and, second, by events in the early years following adoption of the Constitution.

Mortenson and Bagley contend that the Framers'—and more broadly the Founding Generation's—lack of concern with delegation of power is evidenced in part by the fact that in then-contemporary language *delegation* meant a temporary and reclaimable assignment of power while *alienation* was the term used to denote a more permanent transfer of power.<sup>120</sup> They take the position that, while *delegation* is the practice being contested today, only *alienation* would have concerned those who framed the Constitution.<sup>121</sup>

Wurman, however, after careful examination of the language used in the contemporaneous writings, speeches, and debates, demonstrates that no such distinction can be supported in the manner asserted by Mortensen and Bagley.<sup>122</sup> The point is made with special force in respect of the language of the Founding Generation in the years following enactment of the Constitution. Wurman's summation of the evidence conveys this message:

... [T]hose who made nondelegation arguments in the early decades after the Founding used the terms delegation, alienation, and transfer interchangeably. ... [W]hen those in the Founding generation raised concerns that today would be understood as nondelegation concerns, they overwhelmingly spoke in the language of "alienation" and transfer." In other words, a "delegation" of power to the Executive would be an alienation.<sup>123</sup>

Mortensen and Bagley's assertion respecting the paucity of evidence of the Founding Generation's concern over delegation of broad regulatory power fails, too, with respect to the objections made to delegations—in actuality, relatively modest delegations—in the nation's early years. Wurman catalogs statements raising delegation issues regarding the major examples relied on by Mortensen and Bagley, as well as

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<sup>120</sup> See Mortensen & Bagley, *supra* note 90, at 307–08.

<sup>121</sup> See *id.* at 307–13.

<sup>122</sup> See Wurman, *Founding*, *supra* note 78, at 1518–21.

<sup>123</sup> *Id.* at 1521.

others.<sup>124</sup> His point is not that nondelegation objections routinely or even frequently carried the day. Instead, it is that the objections were raised even when the sort of discretion given to administrators was at, or well short of, the borderline that might be thought to separate proper conferral of executive authority from improper delegation of legislative power.<sup>125</sup> In other words, the principle of nondelegation was not controverted simply by conclusions that it was not violated in specific instances.

Ultimately, Professor Wurman's conclusion is that the evidence cannot support broad revision of earlier understandings—specifically, revision of long-accepted views that delegation of legislative power is at odds with the Constitution, that this was generally recognized at the time, and that objections to early delegations pressed that point even when it was doubtful that the legislation at issue crossed the line.<sup>126</sup>

Further, Wurman's explanation of the actual scope and nature of delegations in the nation's early years demonstrates the overreach of revisionists' claims. Consistent with observations of other scholars,<sup>127</sup> early delegations of authority were more limited and more consistent with concerns to keep lawmaking power in the Congress than the revisionists' assert. Wurman lays out the details in his analysis of the major episodes claimed as support for the revisionists' views.<sup>128</sup>

Beyond Wurman's explanations, examples such as the Patent Act of 1790, pointed to by revisionist scholars as evidence of broad delegations of regulatory authority,<sup>129</sup> are thin reeds on which to rest their claims. While leaving aspects of implementation to the Patent Examiner (Thomas Jefferson, then Secretary of State) and the Patent Board (consisting of the Attorney General the Secretaries of State and War), the Patent

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<sup>124</sup> See Wurman, *Founding*, *supra* note 78, at 1503–18.

<sup>125</sup> See *id.* at 1517–18.

<sup>126</sup> See *id.*

<sup>127</sup> See HAMBURGER, *supra* note 8, at 83–85, 100–10; Cass, *Delegation Reconsidered*, *supra* note 78, at 155–58, 182–83, 188; Davis, *supra* note 116, at 719–20; Lawson, *Delegation*, *supra* note 78, at 340–43, 353–55; Lawson, *Rise and Rise*, *supra* note 8, at 1235; Schoenbrod, *Consent*, *supra* note 116, at 266–71.

<sup>128</sup> See Wurman, *Founding*, *supra* note 78, at 1539–53.

<sup>129</sup> See Chabot, *supra* note 90, at 30–35; Mortensen & Bagley, *supra* note 90, at 38–39.

Act set out the considerations governing patent grants, the terms of the grants, the enforcement mechanisms, and the remedies for infringement.<sup>130</sup> To be sure, the Act did not answer all potential questions respecting its application in detail, but the major issues for patent grants and denials almost always have been more technical and factual than legal.<sup>131</sup> In other words, the patent law episode fits better with well-accepted delegations of fact-based determinations than with the creation of administrative lawmaking bodies with open-ended decisional authority.

The tax regulation program discussed by Professor Parrillo comes closest to the sort of delegation that would raise constitutional concerns.<sup>132</sup> Yet even this program had enough limitations on the margins that are especially problematic—and was close enough to being *sui generis*—to make this episode of limited import respecting the Founding Generation’s views.<sup>133</sup>

Major fights over delegation were rare for the late eighteenth and most of the nineteenth centuries largely because there was little delegation of the sort that would raise the issue—whether because the understanding was clear that delegation of legislative authority wasn’t permitted under the Constitution or because support for such delegations was limited.<sup>134</sup> Where it appeared as a potential problem, the delegation issue was raised.<sup>135</sup>

In the end, although the historical record is not completely one-sided, the revisionists’ story is far less well-supported and far less persuasive than the standard accepted view. The critical consideration remains the Constitution’s text, which is best read as consistent with the understanding that lawmaking power is confined to Congress acting through the constitutionally

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<sup>130</sup> See Act of Apr. 10, 1790 (Patent Act of 1790), 1 Stat. 109–112, §§ 1–7.

<sup>131</sup> See, e.g., RONALD A. CASS & KEITH N. HYLTON, *LAW OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS* 63–69 (Harvard Univ. Press 2013) (discussing issues respecting novelty and non-obviousness, fact-specific elements of patent eligibility that were inherent in evaluation of grants from the beginning of patent systems).

<sup>132</sup> See Parrillo, *supra* note 113.

<sup>133</sup> See Wurman, *Founding*, *supra* note 78, at 1549–53.

<sup>134</sup> See *id.* at 1506–16, 1531–53. A closely related point respecting rulemaking is made in Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 *GEO. MASON L. REV.* 683, 687 (2021).

<sup>135</sup> See Wurman, *Founding*, *supra* note 78, at 1503–18, 1540–55.

specified process and cannot be given to any other body, even though some degree of rulemaking authority in connection with implementation of laws can be.

B. *The Hard Issue: Rule Design*

If whether to have a nondelegation rule is the easy question, the hard question is how to specify clearly—at least, as clearly as possible—what power the Congress can and cannot assign to others. Although the argument for a separate legislative power vested in Congress is compelling, explaining the domain of that power and how its vesting works in practice takes work.

1. *The Concept of Nondelegation's Domain*

Consider first the conceptual issue. If the vesting clause in Article I requires Congress to exercise “[a]ll legislative powers” granted to the national government, how are those defined? If everything that Congress does is an exercise of legislative power, isn’t the logical corollary that Congress cannot authorize others to do *anything* it could do itself?

This all-and-only-legislative-power reading has never been the construction given to Article I’s vesting clause. Some matters have been understood to be within Congress’s *permissible* exercise of authority but not within the ambit of its *exclusive* powers, as Chief Justice Marshall explained in *Wayman v. Southard*.<sup>136</sup> Some things that are *not* the exercise of legislative power, such as investigating matters that may become grist for legislation, plainly could be performed by others.

Other acts, not so readily separated from legislating because they could be incorporated into legislation, equally seem beyond what is exclusively within Congress’s domain. After all, if some of the decisions that *could* be incorporated into a law could not also be done by executive officers, there would be precious little that would not have to be done by Congress. Consider, for example, how to distribute pension payments to injured veteran soldiers or how to perform the computations on exact amounts due to them.<sup>137</sup> Or think of the Residence Act, both setting out the location of the new seat of the federal government (though

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<sup>136</sup> 23 U.S. (10 Wheat.) 1, 42–43 (1825) (*Wayman*).

<sup>137</sup> See Act of Sept. 29, 1789, 1 Stat. 95; Act of Mar. 3, 1791, 1 Stat. 218.

not precisely marking its boundaries) and creating a commission to lay out the exact boundaries of the nation's capital city and to determine the needs for buildings for the government and provide for their construction.<sup>138</sup> Are all of these specifications required to be done by Congress through legislation? Obviously not.

The language of the Constitution itself is in line with Marshall's declarations in *Wayman* that the Constitution authorizes Congress to perform acts that are not legislating but are associated with its legislative power and also permits it to assign to others (especially the Executive Branch) decisions that could be made by Congress and announced in law.<sup>139</sup> Article I, Section 8, for example, declares that "The Congress shall have Power ... To coin money ... ;<sup>140</sup> ... To make Rules for the Government and Regulation of the land and naval Forces;<sup>141</sup> ... [and] To exercise exclusive Legislation ... over all Places ... purchased for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings ..."<sup>142</sup> It is inconceivable that any of these powers could be exercised without additional decisions being made by others. Congress would not actually produce the coins or control the specific processes for their production, specify every detail of what is needed for the regulation and operation of the armed forces, or issue precise instructions on every matter needed to control the operation of forts or other government buildings. The legislative authority vested in Congress may permit detailed statutory instructions on each of these activities, but it cannot be thought to require them.<sup>143</sup>

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<sup>138</sup> See Residence Act, 1 Stat. 130 (1790).

<sup>139</sup> *Wayman*, 23 U.S. at 42–43.

<sup>140</sup> U.S. CONST., Art. I, § 8, cl. 5.

<sup>141</sup> U.S. CONST., Art. I, § 8, cl. 14.

<sup>142</sup> U.S. CONST., Art. I, § 8, cl.17.

<sup>143</sup> As Professor Sai Prakash has said: "Congress will not (and cannot) specify every detail in its laws." Saikrishna Bangalore Prakash, *The Sky Will Not Fall: Managing the Transition to a Revitalized Nondelegation Doctrine*, in ADMINISTRATIVE STATE, *supra* note 76, at 271, 276 (*Sky Fall*).

## 2. Principles Defining Nondelegation's Domain

This conceptual framework, of course, leaves the problem of distinguishing what is in the category of determinations that *must* be made by law and those that merely *may* be.<sup>144</sup> It is especially difficult to do this in a judicially administrable manner.

Two different sorts of principle have been advocated as representing the means for deciding between what Congress must do itself and what Congress may do if it chooses. The first, articulated in *Wayman* and accepted by a number of scholars as the best account of the Article I vesting clause's meaning,<sup>145</sup> focuses on the character, specifically the importance, of the matter. The principle is that Congress must make important policy determinations itself—these cannot be delegated to others—while for subjects “of less interest, ... a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.”<sup>146</sup>

The second sort of principle focuses on the type of rule at issue, asserting that the legislative power exclusive to Congress is, according to Alexander Hamilton's *Federalist 75*, “to prescribe rules for the regulation of the society.”<sup>147</sup> Justice Gorsuch refers to this as passing a “rule regulating private conduct,”<sup>148</sup> and Professor Michael Rappaport frames the legislative power slightly differently, as the power to enact “rules that regulate the private rights of individuals in the domestic sphere.”<sup>149</sup>

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<sup>144</sup> For a more general effort to work out these distinctions, and to apply them to a broader set of legal questions, see, e.g., Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735 (2022) (*Nonexclusive Functions*).

<sup>145</sup> Scholarly acceptance of the “important subjects” versus subjects of “less interest” test includes those who see this as the best test standing alone and those who see it as the leading partner in tests that include additional markers. See, e.g., Alexander & Prakash, *Running Riot*, *supra* note 78; Cass, *Delegation Reconsidered*, *supra* note 78; Lawson, *Delegation*, *supra* note 78; Lawson, *Private-Law Framework*, *supra* note 76; Schoenbrod, *Substance*, *supra* note 78.

<sup>146</sup> *Wayman*, 23 U.S. at 43.

<sup>147</sup> See THE FEDERALIST No. 75, at 450 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>148</sup> *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

<sup>149</sup> Rappaport, *supra* note 76, at 196. See also John Harrison, *Executive Administration of the Government's Resources and the Delegation Problem*, in ADMINISTRATIVE STATE, *supra* note 76, at 232–34 (distinguishing different types of legal rights and rules, including the separate spheres of governmental proprietary

While these two principles have different potential implications and different proponents, implementation of the Constitution's separation of powers requires elements of both.<sup>150</sup> The question of *importance* critically distinguishes matters that only a legislative rule can address. These are: (i) matters for which there is the greatest risk of harm from rules that favor or disfavor particular individuals and that promote outcomes based on the self-interest of those backing and adopting the rule or (ii) matters for which there is the greatest public concern for, and therefore insistence on, adoption of a rule that satisfies competing political interests across the polity. Concerns about these rules and the risks associated with them explain constitutional adoption of such a high bar of disparate, overlapping interests as a necessary condition for lawmaking.<sup>151</sup>

The distinction between *types* of rule—notably, between rules regulating private rights of conduct, on the one hand, and rules respecting regulation of public property, publicly-provided benefits, or conduct of judicial proceedings (to name a few categories apart from that of private rights), on the other—assures that Congress has spoken to what is needed to authorize acts of other branches and has assigned the responsibility for further action to the appropriate branch.<sup>152</sup> As Justice Scalia recognized in his dissent in *Mistretta v. United States*, a critical aspect of lawful delegation is authorizing decisionmaking by an official whose constitutionally assigned power encompasses that *type* of decisionmaking (on its own or pursuant to statutory

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rights and of mandatory rules respecting private conduct outside the realm of governmental resources and benefits). Harrison, building on work by Professor Tom Merrill, also emphasizes that Congress must enact law establishing any authority for the other branches to take almost any form of action that has the force of law. *See id.* at 238–43; Merrill, *Rethinking*, *supra* note 105, at 2099–2101.

<sup>150</sup> *See, e.g.,* Cass, *Delegation Reconsidered*, *supra* note 78, at 185–90; Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849 (2019); Schoenbrod, *Purposes*, *supra* note 78.

<sup>151</sup> *See* text and notes, *supra* at notes 40–69.

<sup>152</sup> *See, e.g.,* *Gundy*, 139 S. Ct. at 2136–37 (Gorsuch, J., dissenting); Cass, *Delegation Reconsidered*, *supra* note 78, at 158, 160–61, 185–88; Harrison, *supra* note 149, at 242–43; Rappaport, *supra* note 76, at 198–203. Professor Harrison defines the legislative power as including both adoption of “general and prospective rules for [regulation of] private conduct” and the enactment of provisions for the creation or alteration of public rights and argues that different conceptions of the legislative power (and the limits to what can be delegated to other officials) are needed for each type of legislation. *See* Harrison, *supra* note 149, at 242–43.



enactment).<sup>153</sup> It is within Congress's power—as Scalia says, “up to a point”—to determine how broad or narrow the discretion is that accompanies a power appropriately exercised by executive officers or by the courts.<sup>154</sup>

Viewed simply, the focus on *importance* of a decision sets limits on *what* Congress can allow others to do, while the focus on *types* of decision sets limits on *which* others can do it as well as contributing to determination of how broad or narrow their authority can be. The principles provide somewhat different scope for authorizing discretionary action by federal officials, but each suggests aspects of a proper nondelegation doctrine that are distinct from what passes for the accepted framework. *Wayman's* formulation, for instance, is more limiting than generally acknowledged; it only recognizes authority for other officials to “fill up the details” with respect to subjects “of less interest.”<sup>155</sup> It is not, on its own terms, consistent with the test derived from *J.W. Hampton, Jr., & Co. v. United States*<sup>156</sup> that allows *any* delegation of authority—even on matters of critical importance—subject to the proviso that a statutory enactment contains an “intelligible principle” to guide further determinations.<sup>157</sup>

The test predating *Hampton*, in keeping with pre-constitutional English and American law, permitted an agent to make limited grants of authority to others but only with respect to constrained tasks respecting matters that weren't of substantial importance to the principal.<sup>158</sup> That is the reason Professor Gary Lawson defends a degree of delegation on issues that do not require important policy decisions, in keeping with

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<sup>153</sup> See *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting).

<sup>154</sup> *Id.*

<sup>155</sup> See *Wayman*, 23 U.S. at 43. See also Lawson, *Private-Law Framework*, *supra* note 76, at 144, 146.

<sup>156</sup> 276 U.S. 394 (1928) (*Hampton*).

<sup>157</sup> *Hampton*, 276 U.S. at 409. As Justice Gorsuch observes, it is far from clear that *Hampton* by its own terms approves use of this test as a general matter, rather than one limited to matters Marshall's *Wayman* opinion would characterize as suitable for other officials to fill up the details. See *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting).

<sup>158</sup> See Lawson, *Private-Law Framework*, *supra* note 76, at 129–44. See also Capozzi, *supra* note 80 (discussing U.S. courts' narrow reading of grants of governmental authority in the mid-to-late nineteenth century).

*Wayman*, pre-*Hampton* decisions, and even a generous reading of *Hampton*.<sup>159</sup> Important matters, however, under both then-applicable law respecting private-law delegations and under *Wayman*'s interpretation of the Constitution, do not permit *any* delegation without specific authorization from the principal—the equivalent of an express constitutional provision on the matter.<sup>160</sup> That provision is not to be found in the Constitution, absent an extraordinarily broad reading of the “necessary and proper clause”—indeed, a reading broad enough to swallow Article I's vesting clause.<sup>161</sup>

### 3. *The Limits of Principle*

The obvious problem is that Congress cannot specify all the relevant details on most matters of importance and cannot even provide sufficient guidance that the remaining decisions will not require discretionary judgments—judgments that necessarily include an element of policy making.<sup>162</sup> This is true even with respect to the regulation of private conduct, the core category of concern.<sup>163</sup> Even the simplest of these regulations, whether in the national or local realm, requires decisions for effectuation.<sup>164</sup>

This reality makes it essential to find a means for determining when an exercise of implementing discretion crosses over into a substitution of authority for Congress in making the rules. Neither of the principles offered for assessing the propriety of a legislative assignment of authority to another governmental

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<sup>159</sup> See *id.* at 143–47.

<sup>160</sup> See *id.* See also Prakash, *Sky Fall*, *supra* note 143, at 275–76.

<sup>161</sup> See, e.g., Lawson, *Delegation*, *supra* note 78, at 350. For further discussion of the scope and meaning of the necessary and proper clause, see, e.g., Lawson & Granger, *supra* note 102 [other CITES re necessary and proper clause].

<sup>162</sup> See, e.g., Prakash, *Sky Fall*, *supra* note 143, at 276.

<sup>163</sup> The point is, perhaps, most clearly expressed by Justice Scalia: “... no statute can be entirely precise, and ... some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it.” *Mistretta*, 458 U.S. at 415 (Scalia, J., dissenting).

<sup>164</sup> This observation implicates a broader set of issues respecting the nature and interrelationship of rules adopted by different authorities, their legitimacy, and their proper purposes. The accepted division is between primary rules and secondary rules (roughly, the division between rules creating legal obligations and subsidiary or implementing rules). See, e.g., CASS, *RULE OF LAW*, *supra* note 6, at 13–14; FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 198–201 (Oxford Univ. Press 1991).

office or officer provides anything approaching a determinate rule for accomplishing this task.<sup>165</sup> Jurists and scholars have asserted that this deficit, of itself, precludes the adoption of a judicial nondelegation rule.<sup>166</sup> Yet, the law is full of rules that rely more on qualitative judgments than on assignment of circumstances to categories readily recognized as absolutes. Not all rules require judgments comparable to distinguishing a dog from a cat; some require, instead, the ability to differentiate a boulder from a rock from a pebble—matters of degree rather than of absolute differences in nature.<sup>167</sup> These differences, even if matters of degree, still, have meaning; after all, a sign that tells drivers “Watch Out for Pebbles” does not send the same message as “Beware of Falling Boulders.”

Despite valid concerns about excessive judicial discretion when a rule depends on malleable judgments, Professor Scalia’s

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<sup>165</sup> See, e.g., Cass, *Delegation Reconsidered*, *supra* note 78, at 193–94; Lawson, *Delegation*, *supra* note 78, at 361.

<sup>166</sup> See, e.g., *Mistretta*, 488 U.S. at 415–17 (Scalia, J. dissenting); Posner & Vermeule, *supra* note 90. Even though others taking essentially the same position have refrained from clearly stating the point, expansive interpretations of the “intelligible principle” approach of *Hampton* amount to the same thing as abandoning the effort to enforce a meaningful constraint on delegation without abandoning acceptance of its consistency in theory with the Constitution’s division of powers. See, e.g., *Gundy*, 139 S. Ct. at 2131, 2139–40, 2145–48 (Gorsuch, J., dissenting) (criticizing judicial decisions adopting relaxed versions of the “intelligent principle” test).

<sup>167</sup> My daughter (a current U.S. Court of Appeals law clerk) assures me that the best citation here would be to an episode of “SpongeBob SquarePants” discussing rocks and boulders. Although that reference is outside my knowledge base, two well-developed academic literatures on analytical features of different types of legal rules are relevant to this discussion—one covering formalist versus functionalist analysis and the other concerning the relative characteristics of rules versus standards in legal determinations and elsewhere. See, e.g., SCHAUER, *supra* note 164, at xxx–xx; Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL’Y 13 (1998); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (19774); William N. Eskridge, Jr., *Relationships between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21 (1998); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303 (2003); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987). Although each of these literatures has many relevant insights, delving into them would require far more space than is justified for the points made here. So, maybe SpongeBob is the better reference after all.

caution about the absence of constitutional constraint without a judicially enforced nondelegation doctrine—more than Justice Scalia’s concern over imprecise judicial rules—should guide the Court’s decision on this subject.<sup>168</sup> Moreover, the combination of understandings discussed above dictates the appropriate shape of a nondelegation doctrine. Its essential elements are, *first*, that Congress cannot pass to others the power to make important judgments on legally binding rules, *second*, especially on matters respecting the regulation of private rights rather than of public property, and, *third*, that grants of authority must fall within the constitutionally assigned purview of the delegate (must pertain to the exercise of that delegate’s own power).<sup>169</sup>

These understandings leave a substantial range of discretionary judgments as matters that may be left to courts or agencies in the performance of their constitutional duties.<sup>170</sup> But they also draw a line around a set of delegations that are impermissible and that have grown substantially in both number and significance in the past century, with increasing fragmentation of the authority vested in Congress as a whole.<sup>171</sup>

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<sup>168</sup> To be fair to Justice Scalia, his expressions of concern came as he was immersed in the difficulties associated with implementing opaque legal standards and trying to persuade colleagues to embrace rules he saw as better fitting the applicable law and the role of judges. In those circumstances, increased concern over the consequences of less clear bases for decision is understandable, however one ranks that compared to other concerns. See, e.g., Ronald A. Cass, *Administrative Law in Nino’s Wake: The Scalia Effect on Method and Doctrine*, 32 J.L. & POL. 277, 279–80 (2017).

<sup>169</sup> Although the precise framing of the elements differs across authors and settings, admittedly with varied implications for specific disputes, the elements set forth here track what is common ground for many judges and scholars. See, e.g., *Gundy*, 139 S. Ct. at 2131, 2133–42 (Gorsuch, J., dissenting); *American Railroads*, 135 S. Ct. at 1240, 1242–54 (Thomas, J., concurring in judgment); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1311–12 (2003) (*Exaggerated*); Alexander & Prakash, *Running Riot*, *supra* note 78; Cass, *Delegation Reconsidered*, *supra* note 78; Ginsburg, *Reviving*, *supra* note 78; Lawson, *Delegation*, *supra* note 78; Lawson, *Private-Law Framework*, *supra* note 76; Schoenbrod, *Purposes*, *supra* note 78; Rappaport, *supra* note 78; Schoenbrod, *Substance*, *supra* note 78.

<sup>170</sup> See, e.g., Cass, *Delegation Reconsidered*, *supra* note 78, at 189–92; Lawson, *Delegation*, *supra* note 78, at 373–77; Lawson, *Private-Law Framework*, *supra* note 76, at 141–43, 145–47; Prakash, *Sky Fall*, *supra* note 143, at 280–81, 293–98. See also Wurman, *Nonexclusive*, *supra* note 144, at 808–11 (offering a different but largely similar analysis).

<sup>171</sup> This point is made especially forcefully in Rao, *supra* note 78.

Together, these elements should prove sufficient to allow a judicially manageable—though, admittedly, far from a bright-line—nondelegation doctrine. As discussed below, other doctrines will buttress this, but a functioning nondelegation doctrine’s existence is essential to appropriate framing of those doctrines as well.

#### IV. DISCRETION AND DEFERENCE

As explained above, the Constitution permits Congress to confer a degree of discretion—in some instances, quite substantial discretion—in the exercise of specific, legislatively authorized executive responsibilities. The test discussed above is designed not to eliminate discretion but to assure that executive officers only exercise appropriate executive, not legislative, discretion. This conforms to the discretion-limiting and power-separating goals for constitutional governance.

Although the delegation controversy has focused on the division between legislative and executive powers, making sense of judicial review requires attention to the division between executive and judicial powers as well. Understanding the contours of judicial review—specifically, of judicial deference to executive decisions—must be anchored in appreciation of the authority that *can* be assigned to administrators and of the authority that *has been* assigned to administrators.

Part III examined limitations on what authority could be granted to administrators to avoid outplacement of legislative power. This Part looks at the constitutional separation of judicial and executive power before turning to the implications of that separation in conjunction with the degree of discretion committed by law to executive officers.

##### A. *Judges’ Dominion versus Administrators’ Domain*

The Constitution’s division of powers among different branches of government, precluding concentration of excessive power in any official’s or group of officials’ hands, vested “[t]he judicial Power of the United States” in “one supreme Court, and in such inferior Courts as the Congress may from time to time

ordain and establish.”<sup>172</sup> The judges wielding this power are protected against other branches’ influence by the twin requirements of life tenure and irreducible pay.<sup>173</sup> The judicial power is defined as encompassing a set of named “cases” and “controversies,” including all cases arising under the Constitution and laws of the United States.<sup>174</sup> The Constitution assigns a set of these cases to the original jurisdiction of the Supreme Court, leaving all the others to its appellate jurisdiction “with such Exceptions, and under such Regulations as the Congress shall make.”<sup>175</sup>

These provisions yield two critical implications for the relation between courts and administrative officials: *first*, Congress cannot assign judicial powers to executive officers; *second*, Congress can assign executive authority without providing for judicial review in all instances. Start with the first of these.

### 1. *Article III’s Territory: What Lies Within*

The Constitution’s provisions respecting the judicial power plainly exclude others, not appointed to the judiciary in conformity with Article III, from exercising the judicial power, just as Article I excludes anyone but Congress from exercising the legislative power. This limitation of power to one set of officials insulated by specific, constitutionally prescribed means was recognized at the nation’s founding, as evidenced by discussion of the formation of the judiciary during the Constitutional Convention,<sup>176</sup> by James Madison’s *Federalist 47*, quoting Montesquieu’s observations respecting the risks of combining either the legislative or executive power with judicial

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<sup>172</sup> U.S. CONST., Art. III, § 1.

<sup>173</sup> *Id.* The connection between the provisions of Article III and the power-separating goal is explained at THE FEDERALIST Nos. 78–79 (Alexander Hamilton).

<sup>174</sup> U.S. CONST., Art. III, § 2.

<sup>175</sup> *Id.*

<sup>176</sup> *See, e.g.*, [CITE to debates on July 21, 1787].

power,<sup>177</sup> and by contemporaneous debate over the extent of the independent judicial power.<sup>178</sup>

The exclusive dominion of the Article III courts over judicial decisions was further underscored in decisions of the Supreme Court, such as *Northern Pipeline* and *Stern v. Marshall*, invalidating exercises of federal judicial powers by judges not appointed in conformity to Article III.<sup>179</sup> In other cases, dating back to *Murray's Lessee v. Hoboken Land & Improvement Co.*,<sup>180</sup> however, the Supreme Court has held that disputes on matters dealing with “public rights” may be resolved by non-Article III tribunals, treating those determinations as outside the exclusive “judicial power” domain.<sup>181</sup> That much of the judicial power’s reach and limits are fairly clear.

Beyond that, the Court’s precedents have wandered across numerous explanations for allowing or disallowing decision of specific matters by particular non-Article III decisionmakers, precedents that are not uniformly convincing in the individual cases and not all consistent with broader concerns about the allocation of power or about approaches to constitutional interpretation.<sup>182</sup> Still, the essential understanding relevant to

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<sup>177</sup> See, e.g., THE FEDERALIST No. 47, at 302, 303 (James Madison) (Clinton Rossiter ed., 1961) (defending the Constitution as adequately protecting the judiciary against congressional and presidential powers, based on Madison’s interpretation of Montesquieu).

<sup>178</sup> See, e.g., BRUTUS No. XI (Jan. 31, 1788), reprinted in ANTI-FEDERALIST PAPERS, supra note 3, at 293–98; BRUTUS No. XII (Feb. 7, 1788), reprinted in ANTI-FEDERALIST PAPERS, supra note 3, at 298–302. See also THE FEDERALIST Nos. 78–80 (Alexander Hamilton).

<sup>179</sup> *Stern v. Marshall*, 564 U.S. 462 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

<sup>180</sup> 59 U.S. (18 How.) 272 (1856) (*Murray’s Lessee*).

<sup>181</sup> See, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 571–75 (1985); *Atlas Roofing Co. v. Occupational Safety & Health Rvw. Comm’n*, 430 U.S. 442, 458 (1977); *Murray’s Lessee*, 59 U.S. at 284. See also Wurman, *Nonexclusive*, supra note 144, at 802–03 (offering a complementary analysis of the relation between judicial and executive functions under the Constitution and the distinction between matters of public right and of private right).

<sup>182</sup> For explanations and critiques of different judicial decisions and analyses of possible principles for assessing the permissible domain of non-Article III adjudications, see, e.g., Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts under Article III*, 65 IND. L.J. 233 (1990); William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511 (2020); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988); John C. Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L.

discussion here is that adjudicating disputes—just like making rules—sometimes can be part of the executive function of implementing the law.<sup>183</sup>

## 2. *Ceding Territory: What Lies Outside Courts' Reach*

The second implication from Article III's construction is that, while there are matters within the compass of the federal judicial power that cannot be withdrawn from Article III courts, the federal courts' appellate jurisdiction—including the Supreme Court's—is not constitutionally defined.<sup>184</sup> Article III does not say this expressly; but consider its language respecting the Supreme Court's appellate jurisdiction being subject to congressionally legislated exceptions and regulations. When this language is read together with the observation that some matters may be committed to non-judicial decision as part of the executive power—either as the exercise of discretion to make policy judgments or as the exercise of adjudicative authority in the course of implementing the law—the conclusion must be that it is permissible to grant Article III courts less than plenary authority to review other officials' actions.<sup>185</sup>

The line that divides what can and cannot be kept outside the purview of Article III courts' review is tied to what can and cannot be committed to other officers' discretion. An exercise of *lawful discretion* can be outside the scope of judicial review unless

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REV. 143 (2019) (*Public Rights*); Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291(1990); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007) 183; Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197 (1983); Wurman, *Nonexclusive*, *supra* note 144.

<sup>183</sup> See, e.g., *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365 (2018); Harrison, *Public Rights*, *supra* note 182; Nelson, *supra* note 182. See also Baude, *supra* note 182, at 1558 (summarizing discussion in RICHARD H. FALLON, JR., ET AL., *HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM* 379–80 (Foundation Press, 7th ed. 2015) respecting the circumstances in which a non-Article III tribunal may be treated as properly exercising non-Article III powers that are akin to those that generally would be exercised by Article III courts and the circumstances in which a tribunal must be treated as exercising strictly executive authority).

<sup>184</sup> See, e.g., Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1045–47 (1977).

<sup>185</sup> See, e.g., *Patchak v. Zinke*, 138 S. Ct. 897, 905–08 (2018); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514–15 (1869).



it violates a right of the sort that would trigger an independent entitlement to judicial process.<sup>186</sup> Thus, exercises of discretion do not have to be excepted from judicial review (and today generally are not),<sup>187</sup> but they can be.

Look first at the broad division between types of discretion. Where administrative officers are given discretion, Congress can choose to specify details of its exercise—that is, the law granting discretion also would control the lawful limits of that discretion. Article III courts, then, generally would have dominion over interpretation of the law, including the location of those limits on the exercise of discretion, if an act based on or governed by the law is challenged in a legal proceeding.<sup>188</sup>

In contrast, a matter that is lawfully committed to an official's discretion without other directions on the exercise of that discretion<sup>189</sup> is not subject to similar challenges. That is the meaning of *committing* a matter, by statute, to another official's discretionary judgments. If an exercise of such discretion is challenged, Article III courts would determine only whether the action falls inside the ambit of this type of discretion.<sup>190</sup>

In keeping with this distinction, the Administrative Procedure Act (APA) recognizes both ordinary discretion and extraordinary discretion (although it does not use either of these terms). Under the APA, acts of *ordinary discretion* typically are subject to judicial review for wrongful exercises of that discretion—not wrongful in the sense of being based on mistaken reasoning, but on reasoning that is wrong for specific

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<sup>186</sup> See, e.g., *Webster v. Doe*, 486 U.S. 592, 599–605 (1988) (*Webster*).

<sup>187</sup> See 5 U.S.C. § 706(2)(A). See also text at notes 191–193 *infra*.

<sup>188</sup> See, e.g., *Webster*, 486 U.S. at 599–601. The fact that discretion is commonly accorded to executive officers in respect of a given set of decisions, however, may affect interpretation of the Administrative Procedure Act provision, discussed *infra*, insulating decisions against review if review is committed to agency discretion by law, a different framing than the related provision making actions unreviewable to the extent review is precluded by statute. See, e.g., *Webster*, 486 U.S. at 608–11 (Scalia, J., dissenting); *id.*, at 605–06 (O'Connor, J., concurring in part and dissenting in part).

<sup>189</sup> The lawfulness of such a commitment of discretion requires that the matter is not so important that Congress must make the requisite policy choice itself and does not implicate a private right of conduct of the sort peculiarly guarded against executive intrusion. See text *supra* at notes 145–171.

<sup>190</sup> See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985).

reasons.<sup>191</sup> These include arbitrariness (at least of sorts not rationally related to the decision),<sup>192</sup> capriciousness, and abuse of discretion.<sup>193</sup> The point is that ordinary discretion is bounded not only by the terms of the specific statute granting the relevant authority—what might be termed jurisdictional boundaries or specific substantive boundaries—but also by general requirements of the rule of law.

*Extraordinary discretion*, on the other hand, is generally excepted from judicial review, an exception acknowledged in the APA.<sup>194</sup> Recognition of this type of discretion is not intended to authorize acts that violate the rule of law. The concept is not that officials exercise discretionary power that is accountable to no one. Instead, where judicial review is not available, accountability is through political processes, including those administered by others in the executive branch and the legislative branch.<sup>195</sup>

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<sup>191</sup> See 5 U.S.C. § 706(2)(A). See also *Baltimore Gas & Elec. Co. v. Natural Resources Defense Coun., Inc.*, 462 U.S. 87 (1983); *Federal Communications Comm'n v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 813–14 (1978); *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

<sup>192</sup> See 5 U.S.C. § 706(2)(A). The qualification in text recognizes that on occasion an arbitrary selection among outcomes—one that is essentially a coin flip or similar matter of chance—can be rational; for example, a lottery for a given benefit (such as rights to use specific radio spectrum space, such as for satellite communications) presents a cost-effective choice mechanism where other considerations are not dispositive. See, e.g., *Cowles Florida Broadcasting, Inc.*, 60 FCC2d 372, xxx–xx (Comm'r Glen O. Robinson, dissenting), excerpted in RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JODY FREEMAN, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 862, 870–71 (Wolters-Kluwer, 6th ed. 2011). See also Thomas W. Hazlett, *Assigning Rights to Radio Spectrum Users: Why Did It Take 67 Years?*, 41 J.L. & ECON. 529, 558–60 (1998) (discussing spectrum lotteries).

<sup>193</sup> See 5 U.S.C. § 706(2)(A). Capriciousness could be any decision made on a whim, not supported by a reasoned explanation, while an abuse of discretion could be something such as awarding valuable licenses only to friends or members of the decisionmaker's political party.

<sup>194</sup> See 5 U.S.C. §§ 701(a), 706(2).

<sup>195</sup> One form of accountability is review by the Office of Information and Regulatory Affairs (OIRA). See, e.g., Christopher DeMuth, *OIRA at Thirty*, 63 ADMIN. L. REV. 15 (2011); Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 MICH. L. REV. 877 (2010); Susan E. Dudley & Brian F. Mannix, *Improving Regulatory Cost-Benefit Analysis*, 34 J.L. & POL. 1 (2018); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013). The importance of accountability through those subject to political processes is part of the reason for insistence, in keeping with constitutional vesting clauses, on executive authority being confined to persons accountable to the President and for presuming that interference with such accountability is

At the same time, decisions for which extraordinary discretion is granted are shielded from judicial scrutiny that would not be informed by the same knowledge or decisional capacities as possessed by the designated decisionmaker. So, for example, military strategies are not subject to judicial review, nor are many decisions respecting deployment of resources for national security or law enforcement purposes.<sup>196</sup> The APA, thus, excepts review of discretionary judgments that are either declared nonreviewable by a specific statutory instruction or that have been—and traditionally are—committed fully to officials thought best able to understand (and to be held responsible for) the consequences of those judgments, especially when they implicate sensitive and complex trade-offs.<sup>197</sup>

These exceptions to the courts' jurisdiction, taken together with what is left within Article III courts' exclusive authority, have strong implications for how issues of judicial deference to administrators' decisions should be assessed. Those are addressed below.

## B. Deference to Discretion

### 1. Basics of Deference: Interpreting vs. Implementing the Law

The basic point of the analysis above is that when a claim that turns on interpretation of a legal rule is properly before a federal court, the court's interpretation of the rule is a matter on which no deference should be given to others. That is the exercise of "[t]he judicial power of the United States" which is given solely to the Article III courts.<sup>198</sup> As Hamilton and *Marbury* said, in order to resolve cases within their jurisdiction, judges must "say

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unconstitutional. See, e.g., *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021); *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020); *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 477, 508–09 (2010).

<sup>196</sup> See, e.g., *Webster*, 486 U.S. at 599–601; *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985).

<sup>197</sup> See 5 U.S.C. §§ 701(a), 706(2); *Webster*, 486 U.S. at 605–06 (O'Connor, J., concurring in part and dissenting in part); *id.* at 606–10 (Scalia, J., dissenting); Ronald A. Cass, *Auer Deference: Doubling Down on Delegation's Defects*, 87 FORDHAM L. REV. 531, 539–41 (2018) (*Auer Deference*); Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 495–502 (1986); Harvey Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

<sup>198</sup> See U.S. CONST., Art. III, §§ 1, 2.

what the law is” and base decisions on assessment of its meaning.<sup>199</sup>

This also means that courts should not defer to Congress with respect to deciding the meaning of the Constitution and should not defer to executive or other administrative officials with respect to the meaning of other legal rules.<sup>200</sup> Only within the ambit of lawfully committed discretion—and not to matters lying outside the scope of that discretion—are courts supposed to defer to the officer or entity authorized to exercise that discretion.<sup>201</sup> Commitment of discretion, constitutionally or statutorily, is not plenary, and courts generally are empowered to declare the limits of a commitment of discretion. Put simply, as part of the judicial power assigned to them, courts declare the meaning of laws.<sup>202</sup>

Confusion over this point is largely traceable to the aftermath of the *Chevron* decision. The *Chevron* Court is widely acknowledged to have been endeavoring to apply existing law on judicial review, not to change it.<sup>203</sup> The decision’s extended

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<sup>199</sup> See *Marbury*, 5 U.S. at 176–78; THE FEDERALIST No. 78 (Alexander Hamilton).

<sup>200</sup> See, e.g., Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 989–90 (2017) (*Origins*); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron’s Step Two*, 2 ADMIN. L.J. AM. U. 255, 262–63, 266–67 (1988); Ronald A. Cass, *Is Chevron’s Game Worth the Candle? Burning Interpretation at Both Ends*, in LIBERTY’S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 57, 57–58 (Dean Reuter & John Yoo eds., Encounter Books 2016) (*Chevron’s Game*); Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 472–73 (1989); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 187–90 (1992); Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931 (2021); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016).

<sup>201</sup> See, e.g., Byse, *supra* note 200; Cass, *Chevron’s Game*, *supra*, note 200; Herz, *supra* note 200. See also Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782 (2010) (*Failed Experiment*); Duffy, *supra* note 28, at 189–211; Kavanaugh, *supra* note 200; Walker, *supra* note 28.

<sup>202</sup> This long has been recognized and applauded as essential to the American system of constitutional, law-based governance. See, e.g., *Marbury*, 5 U.S. at 176–78; THE FEDERALIST No. 78 (Alexander Hamilton); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1568–70 (Hillard, Gray & Co. 1833); STORY, *supra* note 2, at 225–31, 266, §§ 297–306, 367.

<sup>203</sup> See, e.g., MERRILL, *supra* note 74, at 55–79; Beermann, *Failed Experiment*, *supra* note 201; Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1 (2013); Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW

and careful focus on the policy choice being made by the EPA and the way that choice fit with the terms of the law—specifically, the particular provision alleged to support or to forbid the EPA’s decision—validates that view of *Chevron*.<sup>204</sup> This reading of *Chevron* is buttressed by the decision’s famous footnote 9, declaring that courts hold final authority on issues of statutory construction, referencing judicial determinations of congressional intent, and stating that any administrative decision at odds with the court’s reading of the law (employing “traditional tools of statutory construction”) must yield.<sup>205</sup>

Subsequent decisions (by the circuit courts and, to a lesser extent, by the Supreme Court), however, emphasized the importance of an agency’s interpretation of the law it was administering and characterized *Chevron* as mandating judicial deference to reasonable agency interpretations of unclear statutory provisions without specific reference to the terms of the law’s grant of discretion to the agency.<sup>206</sup> This emphasis supported the conclusion that agency *interpretations of law* are entitled to deference from courts unless there is a clear statutory direction to the contrary.<sup>207</sup> The notion that courts defer to

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STORIES 398, 398–402 (Peter L. Strauss ed., Foundation Press 2006). *See also* Buffington v. McDonald, 143 S. Ct. 14, 17–21 (Gorsuch, J., concurring in denial or cert.) (contrasting *Chevron* as written with “*Chevron* maximalism”); Solar Energy Indus. Ass’n v. Fed. Energy Reg’y Comm’n, No. 21-1126, concurrence at 4–6 (D.C. Cir. 2023) (Walker, J., concurring) (same). The understanding of *Chevron* as intended to cohere with existing law, however, is not the same as stating that it was a faithful representation of the roots of that law. *See, e.g.,* Bamzai, *Origins*, *supra* note 200, at 997–1000.

<sup>204</sup> *See Chevron*, 467 U.S. at 851–66. *See also* MERRILL, *supra* note 74, at 55–79, 97–98; Hickman & Hahn, *supra* note 27; Lawson & Kam, *supra* note 203.

<sup>205</sup> *See Chevron*, 467 U.S. at 843 n. 9 (stating, *inter alia*, that “[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law, and must be given effect.”).

<sup>206</sup> *See, e.g.,* Young v. Community Nutrition Inst., 476 U.S. 974, 980–82 (1986) (deferring to the agency’s interpretation); Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 137–38 (D.C. Cir. 1984); General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1567–70 (D.C. Cir. 1984) (discussing reasons for deferring to the agency’s interpretation apart from a clear grant of discretion).

<sup>207</sup> *See, e.g.,* MERRILL, *supra* note 74, at 83–99, 230–56 (discussing confusion in the law and recommending a different reading of the law respecting judicial review).

agencies on matters of law in turn fueled confusion on where the line between judicial and agency authority should be drawn.<sup>208</sup>

A better understanding of the roles of courts and agencies would be promoted if courts and commentators stopped talking about agencies *interpreting* the law and courts *deferring* to those interpretations. The point is not that that this is entirely a misdescription, but rather a source of misdirection. Courts are charged with *interpretation* of laws in cases that come before them—that is essential to disposition of legal cases and controversies.<sup>209</sup> It is, in common parlance, what courts do. In contrast, agencies are tasked not with resolution of legal disputes, but with *implementation* of the laws so far as authorized.<sup>210</sup>

Of course, those who implement a law want their conduct to fall within the confines of the authority given to them by law unless they are criminally lawless or utterly incompetent. And, naturally, much of the work done by agencies in implementing

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<sup>208</sup> For discussions of the problems associated with confusion of the line between judicial and administrative interpretation, see, e.g., [CITE ops. from Thomas, Gorsuch]; MERRILL, *supra* note 74, at 81–87; Bamzai, *Origins*, *supra* note 200, at 954–62, 969–76; Beermann, *Failed Experiment*, *supra* note 201; Byse, *supra* note 200; Cass, *Chevron’s Game*, *supra* note 200; Ronald A. Cass, *Vive la Deference? Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294 (2015) (*Deference*); Duffy, *supra* note 28; Farina, *supra* note 200; Herz, *supra* note 200; Kavanaugh, *supra* note 200; Lawson & Kam, *supra* note 203, at 39–50; Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197 (1991).

<sup>209</sup> See, e.g., *Marbury*, 5 U.S. at 176–78. See also Bamzai, *Origins*, *supra* note 200, at 915–17, 962–65 (explaining the tradition of judicial *de novo* construction of law without deference to executive interpretations as such); Woolhandler, *supra* note 208, at 198–99 (same).

<sup>210</sup> See, e.g., Ronald A. Cass, *Constitutional Chevron: Domains of Congress and Courts in Remedies for Unconstitutional Administrative Structures*, 22 GEORGETOWN U. J.L. & PUB. POL’Y (forthcoming 2023) (*Constitutional Chevron*); Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 675–83 (2007). See also Ilan Wurman, *The Specification Power*, 168 U. PA. L. REV. 689 (2020) (*Specification*) (making a similar point in distinguishing agency “interpretation power” from agency “specification power,” which consists of the agency’s “interstitial lawmaking, gap-filling, policymaking power where the statute is clear but does not specify a course of action.” *Id.* at 693); Lawrence B. Solum & Cass R. Sunstein, *Chevron as Construction*, 105 CORNELL L. REV. 1465, 1468–72 (2020) (differentiating the “construction power,” involving choices in application of the law, from the “interpretation power,” involving decisions that look to specify or “discern” law’s meaning more abstractly).

the law revolves around efforts to determine the meaning of the laws they administer.<sup>211</sup> Just as naturally, when the officials within an agency have a preferred course of action, they characterize the law as consistent with it.<sup>212</sup> But because the authority to make a legally binding pronouncement on the meaning of the law rests with the courts, it is better to think of—and talk about—the job being done by agencies as one of *implementing* the law, *not interpreting* the law.<sup>213</sup> Indeed, much of agencies' attention to the terms of governing law traces to the need to satisfy courts that review agency actions for consistency with the law—another signal of the division between the roles of courts and agencies.<sup>214</sup>

## 2. *Applying Deference to Discretion: Re-sorting Cases*

The distinction between interpreting and implementing charts a course that highlights both the sense and the difficulty with some of the Supreme Court's well-known deference decisions, starting with *Chevron* itself.

*Chevron v. NRDC*. As every administrative law student and practitioner knows, the *Chevron* opinion contains language that gave rise to the notion that deference to agency

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<sup>211</sup> See, e.g., [CITE]. Others who also have noted differences between judicial and administrative decisionmaking (generally agreeing on the need to distinguish judicial from administrative decisions) have emphasized distinctions in the manner of decisionmaking, as opposed to the legitimate domains of court and agency decisions. See, e.g., Foote, *supra* note 210, at 680, 691. Many administrative decisions, however, rely in part on legal analysis (performed by agency lawyers) that looks very similar to what judges and law clerks do to determine the parameters of the law. Yet, as Professor Foote observed, that analysis is not the only—and often not the most important—input to the agency's decision. [CITE] Professors Solum and Sunstein also distinguish the style and focus of decisionmaking in the “construction” camp from decisionmaking classified as “interpretation,” urging that the information and analytical tasks pertinent to construction are more associated with the skills and expertise of administrators while those pertinent to interpretation are more commonly associated with judges. See Solum & Sunstein, *supra* note 210, at 1470–72.

<sup>212</sup> See, e.g., [CITE re lawyering and especially agency lawyering before courts].

<sup>213</sup> See, e.g., Cass, *Constitutional Chevron*, *supra* note 210. Although not presented in these terms, a similar understanding is implicit in Peter Strauss's explication of the difference between approaches cast as applying *Chevron* deference and those applying *Skidmore* deference. See generally Strauss, *Confusing*, *supra* note 27.

<sup>214</sup> See, e.g., Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015).

interpretations of law is required when the statute administered by an agency does not speak clearly to the question at issue.<sup>215</sup>

Yet, as any serious student or practitioner also should know, the vast majority of the Court's opinion grapples in detail with the specific language of the Clean Air Act (CAA) and whether the EPA's decision contravened the law or fell within the scope of its discretion under the law.<sup>216</sup> The Court in *Chevron* read the relevant provision of the CAA as not comprehending a single, precise definition for the term "stationary source."<sup>217</sup> This was equivalent to saying that "stationary source" in the particular provision at issue could mean a single industrial smokestack, a group of smokestacks at one plant emitting the same pollutants from equipment and operations performing the same functions, all of the smokestacks at one building, or all of the smokestacks at a group of co-located buildings comprising an industrial plant or compound.

With this array of possible meanings that the Court could find consistent with the law, the opinion repeatedly emphasizes the discretion left to the agency to make *policy* decisions—decisions that turn on weighing competing considerations, including predicted consequences of different approaches to a problem placed within the agency's domain. Typical of views expressed in *Chevron* respecting the reasons for deferring to judgments left to agency discretion is the Court's statement that "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices ..."<sup>218</sup> Although the opinion refers to the agency's "construction" of the statute,<sup>219</sup> it is more in keeping with the opinion overall to regard the statement as indicating the Court's conclusion that EPA made a *policy* decision that was not inconsistent with the statute than to say that the Court deferred to EPA's *legal* conclusion.<sup>220</sup>

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<sup>215</sup> See *Chevron*, 467 U.S. 482–83.

<sup>216</sup> See *id.* at 844–66. See also MERRILL, *supra* note 74, at 65–78.

<sup>217</sup> See *Chevron*, 467 U.S. at 848–53, 861–65.

<sup>218</sup> See *id.* at 865.

<sup>219</sup> See *id.* at 866.

<sup>220</sup> As Professor Bamzai explains, pre-*Chevron* precedents and scholarship often failed to distinguish deference to fact-based agency decisions from deference to



A fair reading of the opinion, thus, does not suggest that the Court was handing over to agencies the courts' responsibility "to say what the law is." It was not letting agencies dictate the meaning of the law in the way prior judicial decisions often do, overriding the decision that a court might otherwise reach as to the law's meaning.<sup>221</sup>

Instead of deferring to agencies' interpretations of the law, *Chevron* confirmed what the applicable law on judicial review said: that courts should defer to agency policy decisions respecting implementation of laws committed to their administration so long as those decisions fell within the ambit of discretion conferred on the agency.<sup>222</sup> *Chevron* expanded the scope of deference only in suggesting that statutory ambiguity generally—though not invariably—may be regarded as evidence of legislative commitment of discretion to an agency.<sup>223</sup> That step should be read together with footnote 9's emphasis on courts' reading of law "using traditional tools of statutory construction" as the essential first step in judicial review.<sup>224</sup> Keeping in mind the distinction between *interpretation* and *implementation* makes the *Chevron* decision—though not all subsequent decisions invoking it—consistent with governing law and with constitutionally assigned powers as well.

*Auer v. Robbins.* Understanding the difference between interpretation and implementation also demonstrates the

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agency decisions respecting application of law incorporating expert judgments. See Bamzai, *Origins*, *supra* note 200, at 907–08.

<sup>221</sup> See, e.g., [CITE re stare decisis and the notion of binding precedent].

<sup>222</sup> See, e.g., MERRILL, *supra* note 74, at 55–79; Lawson & Kam, *supra* note 203. See also Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHL-KENT L. REV. 1253 (1997) (explaining how *Chevron* can be understood as consistent with the APA's standards of review). Although *Chevron* was governed by the review provisions of the Clean Air Act (CAA), not those of the APA, the CAA's provisions were modeled on, and largely restate, those of the APA. A classic pre-*Chevron* statement on the locus and scope of deference, broadly consistent with the description here, is Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

<sup>223</sup> See, e.g., Beermann, *Failed Experiment*, *supra* note 201; Byse, *supra* note 200; Cass, *Deference*, *supra* note 206.

<sup>224</sup> Whether *Chevron* jurisprudence is worth keeping or jettisoning, given the confusion associated with it, is a separate issue from original *Chevron's* fit with the law. See, e.g., Beermann, *Failed Experiment*, *supra* note 201; Cass, *Chevron's Game*, *supra*, note 200; Farina, *supra* note 200; Herz, *supra* note 200.

problem with the *Auer* decision. The same reasoning that makes *Chevron* more supportable illuminates the critical flaw in *Auer*.

Again, the central analytical point is that agencies are given deference respecting implementation to the extent that the law grants an agency discretion, explicitly or implicitly. As discussed further below, this understanding of the law does not, strictly speaking, make deference a simple derivative of statutory ambiguity.<sup>225</sup> But it does recognize that the sort of discretion that merits judicial deference is *statutorily committed discretion*—discretion conferred on executive officials through the constitutionally authorized mechanism of lawmaking.

The most obvious thing about this discretion is that it can *only* be conferred through statutes. No agency can expand the scope of its own lawful discretion through rulemaking, adjudication, or other form of administrative declaration.<sup>226</sup>

Although justices—including *Auer*'s author, Justice Scalia—and scholars have identified other reasons for overruling *Auer*,<sup>227</sup> those reasons do not support as broad a rejection of the *Auer* decision.<sup>228</sup> In particular, the notion that *Auer* is wrong because it permits a combination of rulemaking and adjudicative authorities misses the mark.<sup>229</sup> This combination of authorities in an administrator is not necessarily problematic so long as there is a sound basis for committing that discretion to the administrator. The reason behind that commitment would have to include these functions' utility as adjuncts to a clearly

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<sup>225</sup> See text at notes 297–331 *infra*.

<sup>226</sup> See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2432–34, 2435–39 (Gorsuch, concurring in judgment) (*Kisor*); Bamzai, *Delegation*, *supra* note 25; Cass, *Auer Deference*, *supra* note 197; Koch, *supra* note 197; Saferstein, *supra* note 197.

<sup>227</sup> See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1213 (Scalia, J., concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment); *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 615–16 (2013) (Roberts, C.J., concurring); *id.* at 616 (Scalia, J., concurring in part and dissenting in part); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–59 (2012); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 669–74 (1996).

<sup>228</sup> See Cass, *Auer Deference*, *supra* note 197, at 553–66.

<sup>229</sup> See *id.* at 560–64.

executive function.<sup>230</sup> Further, the authority conferred would have to be sufficiently modest (and sufficiently separate from regulation of private conduct) that assignment of this set of functions does not violate constitutional strictures on delegation.<sup>231</sup> But a blanket condemnation of the combination of rulemaking and adjudication is not supportable either on due process or statutory ground.<sup>232</sup>

In *Kisor v. Wilkie*, the Supreme Court reformulated the *Auer* doctrine to provide guiderails against many of the doctrine's more prominent difficulties.<sup>233</sup> The reformulation is in keeping with recognition of the need for statutory commitment of discretion to the administrator, a commitment that covers the decision for which deference is claimed.<sup>234</sup> *Kisor's* reformulated *Auer* doctrine also incorporates limitations recognized in earlier Supreme Court decisions, such as *Christopher v. SmithKline Beecham Corporation's* requirement that the agency's interpretation be predictable, consistent with agency practice and processes, and developed in a manner that gives "fair warning" to those subject to it.<sup>235</sup>

Reformulated in this manner, the "*Auer* doctrine" now could be stated this way: courts should accept an agency's reading of one of its rules insofar as the agency has discretion to adopt the rule and adopted it in a suitable manner, the interpretation is consistent with the rule's text (read in context), the agency's reading commands respect for reasons of special expertise or experience, and there is no reason to prefer a different interpretation. Of course, this isn't a rule of *deference*—it's an explanation of *persuasion*.<sup>236</sup> The most telling argument against *Kisor's* reformulation does not go to the substance of the changes

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<sup>230</sup> See *id.* at 561–64. This point is similar to the argument made by Justice Scalia in *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting), respecting limitations on assignment of authority to government officers more generally.

<sup>231</sup> See text *supra* at notes 70–171.

<sup>232</sup> See Cass, *Auer Deference*, *supra* note 197, at 562–66.

<sup>233</sup> See *Kisor*, 139 S. Ct. at 2414–18.

<sup>234</sup> See *id.* at 2412–13.

<sup>235</sup> See *Kisor*, 139 S. Ct. at 2414–18; *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012).

<sup>236</sup> For thoughtful discussion of deference that allows different forms of and reasons for giving special weight to others' judgments, including expertise and experience, see, e.g., LAWSON & SEIDMAN, *supra* note 26, at 154–66.

it makes to *Auer* but to the fact that it leaves *Auer* alive in name only—a kind of “zombie” precedent, as Justice Gorsuch’s concurring opinion points out.<sup>237</sup>

*Brand X*. As noted earlier, the Court’s decision in *NCTA v. Brand X*<sup>238</sup> proved a source of regret for its author, Justice Thomas, much as *Auer* had for Justice Scalia. As with Scalia’s second thoughts on *Auer*, Justice Thomas’s second thoughts on *Brand X* rightly found fault with the original decision. And, as with *Auer*, the problems with *Brand X* can be better captured by looking to the distinction between interpretation and implementation.

*Brand X* involved a provision in the Telecommunications Act of 1996 (incorporated into the Communications Act of 1934) respecting the regulatory regime applicable to entities supplying certain types of services related to the Internet; one type of services (transmission services) was highly regulated, while the other type of services (information services, or content-provision services) was essentially unregulated.<sup>239</sup> The *Brand X* case presented two issues: first, were broadband cable modem service providers selling information services or transmission services within the meaning of the law? and, second, did the Federal Communications Commission’s (FCC) answer to that question trump a prior decision of the Ninth Circuit or vice versa?<sup>240</sup>

The FCC answered the first question by asserting that bundling transmission along with entertainment and other material accessed through internet service provided via cable modems meant that cable modem services were “information” services, not “transmission” services. It also asserted that its answer to that question should supersede the answer given by the Ninth Circuit’s *City of Portland* decision.<sup>241</sup> Cases challenging

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<sup>237</sup> See *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in judgment). See also Ronald A. Cass, *Deference After Kisor*, REG’Y REV., Jul. 10, 2019, <https://www.theregreview.org/2019/07/10/cass-deference-after-kisor/>.

<sup>238</sup> Nat’l Cable & Telecoms. Ass’n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*).

<sup>239</sup> See *Brand X*, 545 U.S. at 974–79.

<sup>240</sup> See *id.*, 545 U.S. at 979–80.

<sup>241</sup> *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

the FCC decision were consolidated in the Ninth Circuit, which disagreed with the FCC.

The Supreme Court, however, sided with the FCC on both counts, concluding that the statutory terms were ambiguous and the Ninth Circuit, therefore, should have deferred to the agency's reasonable reading of the law in keeping with *Chevron*.<sup>242</sup> According to *Brand X*, if a statutory provision lacks a clear meaning, *Chevron* requires courts to defer to the agency's interpretation of the law, even if the court previously had announced its own, different construction.<sup>243</sup> Only if the court deemed the law clear, so that its interpretation was presented as the unambiguously correct reading—not simply the best reading—would a court decision override the agency's interpretation.<sup>244</sup>

Justice Scalia, writing for himself and Justices Stevens and Ginsburg, distinguished a court's ruling respecting the meaning of a statutory provision without *Chevron* deference from a court's ruling based on *Chevron* deference. In Scalia's view, a deference-based decision would not bind an agency, which still could change its mind on the meaning of the law.<sup>245</sup> In contrast, a court decision where deference played no role would be binding on the agency.<sup>246</sup>

Although not expressed in the same terms used here, the sense of Scalia's dissent is entirely compatible with it. The point is that when a court determines the meaning of the law on its own, it is *interpreting* the law; it is stating the correct reading of the statute's terms. Under long-accepted precedents, under the APA and cognate laws respecting judicial review, and under the separated powers assigned by the Constitution, Article III courts have the final word on the meaning of the law. But when a court accepts an agency's approach in *implementing* the law, it is not deferring to the agency's reading of the law. That remains true even when a court frames its interpretation as providing scope

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<sup>242</sup> See *Brand X*, 545 U.S. at 982-84, 987-1000.

<sup>243</sup> See *id.*, 545 U.S. at 984-86.

<sup>244</sup> See *id.*, 545 U.S. at 985-86.

<sup>245</sup> See *id.*, 545 U.S. at 1019 (Scalia, J., dissenting).

<sup>246</sup> See *id.*, 545 U.S. at 1015-19 (Scalia, J., dissenting).

for an agency to bring its judgment, informed by experience and expertise, to bear.<sup>247</sup>

Justice Thomas and the majority in *Brand X* were rightly skeptical of the argument that a judicial pronouncement on the law's meaning necessarily prevents the agency from changing its view of how the law applies in specific settings.<sup>248</sup> In many instances, understanding the difference between *interpretation* and *implementation* permits judicial acceptance of successive agency policies that are incompatible with each other as nonetheless reasonable means to exercise discretion over implementing the law.<sup>249</sup> These do not require courts to embrace different interpretations of the law, only to recognize that statutory ambiguities can "create a space, so to speak, for the exercise of continuing agency discretion" just as an express statutory grant of discretion can.<sup>250</sup>

In *Brand X*, however, accepting the agency's action as reasonable was equivalent to declaring that *City of Portland's* conclusion respecting the law's meaning was wrong. *City of Portland* did not involve review of an FCC decision, only interpretation of a law that was within the FCC's authority to implement—authority not yet exercised at that time. The Supreme Court in *Brand X* could have reversed the Ninth Circuit's reading of the law. But *Brand X's* conclusion that *City of Portland* did not bind the FCC missed the difference between that context and instances where an agency changes its approach to *implementing* a law after judicial acceptance of a prior agency approach as consistent with the law, not as mandated by the court's interpretation of it.<sup>251</sup> The second context involves merely acknowledgment of an appropriate exercise of

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<sup>247</sup> This characterization of the relationship between interpretation and deference also explains the seemingly incongruent precedents in older cases respecting challenges to administrative actions. See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), *NLRB v. Hearst Pub., Inc.*, 322 U.S. 111 (1944); *Gray v. Powell*, 314 U.S. 402 (1941); *United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 544 (1940); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294 (1933); RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JODY FREEMAN, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 176–79 (Wolters-Kluwer, 8th ed. 2020).

<sup>248</sup> See *Brand X*, 545 U.S. at 981–83.

<sup>249</sup> See, e.g., *Fox Television Stations*, 556 U.S. at 511–15.

<sup>250</sup> *Mead*, 533 U.S. at 248 (Scalia, J., dissenting).

<sup>251</sup> See *Brand X*, 545 U.S. at 979–82, 983–86, 989–92.

discretion, not judicial embrace of a contrary interpretation of law. That is why Justice Thomas was right, looking back at the decision fifteen years later, in concluding that *Brand X* took the wrong tack.<sup>252</sup>

*Christensen, Mead, and Barnhart.* The *Christensen, Mead,* and *Barnhart* cases, discussed earlier,<sup>253</sup> often are discussed separately, but occasionally are viewed, in Professor Kristin Hickman's phrase, as a trilogy.<sup>254</sup> All three focus on what is sometimes called the "*Chevron* Step Zero" question: when does *Chevron* deference apply?<sup>255</sup>

*Christensen* declared that statutory "[i]nterpretations such as those contained in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."<sup>256</sup> The decision contrasted the *Chevron*-unworthy informal methods of announcing an agency's position on laws' meaning to methods such as "a formal adjudication or notice-and-comment rulemaking."<sup>257</sup> By *Chevron*-style deference, the Court—addressing a dispute respecting the weight to be given to the Department of Labor's position on the meaning of Fair Labor Standards Act provisions respecting overtime pay—plainly meant deference to the agency's understanding of the meaning of a statutory provision, with the agency's view entitled to deference only if it is legally binding on others.<sup>258</sup>

When such authority is absent, the majority in *Christensen* would look not to *Chevron* but to the Court's pre-APA decision in *Skidmore v. Swift & Co.*, granting whatever deference is due to the persuasiveness of the agency's action.<sup>259</sup> Although commonly referenced by the term "*Skidmore* deference,"

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<sup>252</sup> See *Baldwin v. United States*, 140 S. Ct. 690, 690–95 (2020) (Thomas, J., dissenting from denial of certiorari).

<sup>253</sup> See text *supra* at notes 18–22.

<sup>254</sup> See Kristin E. Hickman, *The Three Phases of Mead*, 83 *FORDHAM L. REV.* 527, 531 (2014).

<sup>255</sup> The "step zero" phrase comes from Sunstein, *Step Zero*, *supra* note 27.

<sup>256</sup> *Christensen*, 529 U.S. at 587.

<sup>257</sup> *Id.*

<sup>258</sup> See *id.*, 529 U.S. at 580–82, 586–87.

<sup>259</sup> See *id.*, 529 U.S. at 587.

nondeference would be as good a term. After all, if you have to persuade me that you're correct, I'm not really *deferring* to you—just listening to what you have to say.<sup>260</sup> And the Court in *Christensen* was not persuaded.

*Mead* followed a slightly different, but overlapping, path. That path started (in line with *Christensen*) with the proposition that the key question was whether the agency action had the requisite “force of law,” but identified a broader and less definite set of criteria for answering that question:

[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.<sup>261</sup>

The majority in *Mead* said that use of statutory rulemaking authority, while a common indicator of the requisite authority, was neither essential nor conclusive to finding that an agency acted with the force of law.<sup>262</sup>

*Mead*, however, mixes its “force of law” search with the broader notion that the key to deference is an indication that Congress, in passing the relevant legislation, implicitly or explicitly granted the agency discretionary authority over a decision implementing an ambiguous statutory prescription.<sup>263</sup> The Court both muddies the question on which test—force of law or commitment of discretionary authority—matters and confuses the relationship between the two inquiries. The majority did not find the appropriate delegation of *discretionary*

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<sup>260</sup> See text *supra* at note 236. But see LAWSON & SEIDMAN, *supra* note 26, at 124–28 (noting, *inter alia*, that treating *Skidmore* as a deference rule, not merely a rule of persuasion, provides impetus for courts at least to consider what weight to give agency interpretations of legal texts).

<sup>261</sup> *Mead*, 533 U.S. at 226–27.

<sup>262</sup> See *id.*, 533 U.S. at 229–34.

<sup>263</sup> See *id.*, 533 U.S. at 235–37.



*authority* in *Mead* because it did not credit the Customs Service's letter ruling as having the force of law.

The Court's opinion fails to present a clear picture of the test it uses to decide whether *Chevron* deference is triggered because it never clearly states what the relation is between its "force of law" criterion and the scope of delegated discretion. This, in turn, follows from a failure to confess that the majority is driven by justices' instinct that the only activity relevant to *Chevron* is the exercise of pseudo-legislative authority. The statute at issue authorized the Customs Service (under authority delegated by the Secretary of the Treasury) to issue "binding rulings" on tariff classifications—the subject of the *Mead* litigation.<sup>264</sup> Nonetheless, the Court said that the subject matter and organization of decisionmaking in the Customs Service fatally undermined any argument that *Chevron* deference was appropriate. The Court pointedly declared that the "suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting."<sup>265</sup> But if the rulings are binding on the parties affected, how do they lack the force of law?

The precise question in *Mead* was whether "day planners"—a year or more's calendar-based pages, with space for notes on daily events, collected in three-ring binders—are properly categorized as "diaries" that are "bound," which would be subject to a four percent tariff under applicable law, or as "other" paper imports, which would not pay any import fee. The majority variously characterized the agency's conduct as "elucidating," "implementing," "administering," or "interpreting" the relevant law—but ultimately gave the sense that whatever the Customs Service was doing, it was not important enough to merit broad discretion. The opinion then fell back on *Skidmore* as providing the appropriate deference framework.<sup>266</sup>

Justice Scalia, dissenting in *Christensen* and again in *Mead*, asserted that the only relevant question for invoking *Chevron* is whether the agency action represented an exercise of the

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<sup>264</sup> See *id.*, 533 U.S. at 221–22.

<sup>265</sup> *Id.*, 533 U.S. at 233.

<sup>266</sup> See *id.*, 533 U.S. at 234–37.

agency's authority, rather than that of an office or officer not possessed of that authority. In his view, authoritativeness was the sole criterion.<sup>267</sup> He was not, in other words, looking for an exercise of *lawmaking* authority—constitutionally, the province of the legislature—but an exercise of *executive* authority.<sup>268</sup>

*Barnhart* completed the trilogy's journey from an initial lack of clarity about the Court's deference jurisprudence to a position of even less clarity. There was at least a clear starting point in *Barnhart*. Although the *Mead* Court had declined to defer to the Customs Service's decision respecting the tariff appropriate for day planners, all of the justices in *Barnhart* agreed that the Social Security Administration's (SSA) construction of a statutory provision regulating entitlement to disability payments merited deference.<sup>269</sup> Both Justice Breyer's opinion for eight of the justices and Justice Scalia's concurrence clearly specified that the issue was the deference owed to SSA's interpretation of a statutory provision.<sup>270</sup>

Justice Scalia stuck to his position that, because lack of statutory clarity implies a delegation to the relevant agency of discretion respecting the unclear law's meaning, SSA could adopt any reasonable interpretation of the law.<sup>271</sup> Agree or disagree, that's clear enough.

Justice Breyer's opinion, in keeping with his long-advocated approach, listed a set of criteria that together supported reliance on *Chevron*, and, hence, deference to SSA's reading of the law. The opinion stated:

[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate

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<sup>267</sup> See *Mead*, 533 U.S. at 243, 256–61 (Scalia, J., dissenting); *Christensen*, 529 U.S. at 589–91 (Scalia, J., concurring in part and concurring in judgment).

<sup>268</sup> This is the same point Justice Scalia made in his dissent in *Mistretta*. See *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting).

<sup>269</sup> See *Barnhart*, 535 U.S. at 217–25; *id.*, at 226 (Scalia, J., concurring in part and concurring in judgment).

<sup>270</sup> See *id.*, 535 U.S. at 214–15, 217–19, 224; *id.*, at 226 (Scalia, J., concurring in part and concurring in judgment).

<sup>271</sup> See *id.*, 535 U.S. at 226–27 (Scalia, J., concurring in part and concurring in judgment).

that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation.<sup>272</sup>

The Court's opinion repeats a slightly different set of criteria supporting deference to SSA's reading of the law with respect to a related aspect of the dispute.<sup>273</sup> Which of the criteria is most important, what would happen if the information relative to different criteria pointed in opposing directions, and how a decision is made on the basis of the grab-bag of considerations are all questions the Court left unresolved. Further, the opinion includes reference to a variety of informal steps that are credited with bolstering the weight of SSA's determination, notwithstanding the decision in *Christensen*, just two years earlier, that such informal actions do not merit *Chevron* deference.<sup>274</sup>

The *Christensen* to *Barnhart* trilogy demonstrates the difficulty of trying to make judicial deference to administrative interpretations of law sensible. The opinions' difficulty explaining why the Court is searching for decisions with "the force of law"—primarily in the form of legislative-type rules—stems from the fundamental misunderstanding of the division between the courts' role and the agencies' role. If the Court imagines that the agency is dictating the interpretation of law, more formality and a stronger statutory commitment to letting *this agency* speak to the meaning of the law *in this setting* may seem to quiet reservations about an agency's view of the law superseding a court's interpretation. Authority to act with "the force of law" may have that meaning, though some references to agency authority to act with the force of law seem more accurately to conceive of the agency having been granted legislative authority—that is, the authority to "make law" in a strong sense.<sup>275</sup>

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<sup>272</sup> *Id.*, 535 U.S. at 222.

<sup>273</sup> *Id.*, 535 U.S. at 225.

<sup>274</sup> Compare *Barnhart*, 535 U.S. at 221–22 with *Christensen*, 529 U.S. at 587.

<sup>275</sup> See, e.g., *Mead*, 533 U.S. at 229. Some references to agencies "making law" also may have been based on misunderstanding of a classic article by Professor Henry Monaghan, which seeks to sort out the divisions between Congress, courts, and agencies. See Monaghan, *supra* note 222. Yet, Professor Monaghan is careful to make distinctions that are more subtle, evidenced (among other things) by his use of quotation marks around references to agencies making law. See, e.g., Monaghan, *supra* note 222, at 27–28.

If the concept instead is that the agency is *implementing* the law within a statutorily committed domain of administrative discretion, the tension between the roles of court and agency—as well as between agency and legislature—disappears. The court then has primacy over interpretation in cases brought before it; the agency has primacy over implementation decisions within its discretion; and the court has the final word on what falls inside or outside that domain as well as, in most instances, whether the agency’s exercise of discretion is reasonable.<sup>276</sup>

Within that construct, informal decisions as well as formal decisions can be exercises of statutorily committed discretion. Agencies can change their position on how to implement the law, so long as their position is reasonable. And the litany of indicia of appropriateness of an agency’s decision is unnecessary to the typical judicial decision reviewing agency action. Although Justice Scalia also mixed references to agency interpretation and implementation of law in his opinions, his more straightforward approach is preferable and more accurately captures the different roles of agency and court.

*City of Arlington.* Another case that is made more understandable when interpretation and implementation are assigned to their appropriate spheres—though one that would seem to put this construction to the test—is *City of Arlington, Texas v. Federal Communications Commission*.<sup>277</sup> The Telecommunications Act of 1996 requires state and local governments to act on requests from telecommunications networks for authority to use particular sites for wireless communications equipment (towers and antennas) “within a reasonable period of time.”<sup>278</sup> Acting on a petition from an association of wireless service providers, the FCC issued a ruling stating that it would interpret this to mean that state and local

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<sup>276</sup> The same thought respecting the division of responsibilities between court and agency can be conveyed using the term “interpretation” for what both the court and the agency are doing. See, e.g., Monaghan, *supra* note 222, at 27–28. The argument here, however, is that use of the term “interpretation” for the activity of court and agency alike is apt to mislead analysis. Different terms are helpful in underlining that the roles of the two parts of government are not, and should not be, the same.

<sup>277</sup> 569 U.S. at 290 (2013) (*City of Arlington*).

<sup>278</sup> 47 U.S.C. § 332(c)(7)(B)(ii). See *City of Arlington*, 569 U.S. at 294–95.

zoning authorities should act within 90 days on requests to use an existing tower and within 150 days on requests to use other locations or facilities.<sup>279</sup> State and local governments objected, arguing that the FCC lacked jurisdiction over these decisions.

The question before the Supreme Court in *City of Arlington* was whether a different, less deferential rule applies to review of agency decisions on jurisdiction than on substantive matters within an agency's jurisdiction. The majority, in an opinion by Justice Scalia, concluded that judicial review of an agency decision respecting the scope of agency authority applies the same standard as review of the agency's exercise of authority.<sup>280</sup> The opinion declared that the power of "agencies charged with administering congressional statutes ... to act and how they are to act is authoritatively prescribed by Congress."<sup>281</sup> This means that "when [agencies] act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires."<sup>282</sup> Because the majority saw the ultimate question as the same for either sort of potential administrative failure—did the agency stay within its statutory instruction?—it concluded that the same standard applies.<sup>283</sup> Further, the majority saw *Chevron* as providing the appropriate framework.<sup>284</sup>

Chief Justice John Roberts, writing for himself and Justices Kennedy and Alito, stressed the difference between deference to an agency decision that the agency has authority over a particular subject matter and deference to an agency decision as to a substantive determination it has made respecting that subject.<sup>285</sup> Whether framed as "jurisdictional" or not, the initial determination of agency authority to act, in the dissent's view, requires a clearer basis in statute than the decision on what action to take.<sup>286</sup> Chief Justice Roberts framed the first decision as an inquiry into "whether Congress has granted the agency

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<sup>279</sup> *Id.*, 569 U.S. at 295.

<sup>280</sup> *Id.*, 569 U.S. at 297–98, 307.

<sup>281</sup> *Id.*, 569 U.S. at 297.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*, 569 U.S. at 297–99.

<sup>284</sup> *See id.*, 569 U.S. at 301–07.

<sup>285</sup> *See id.*, 569 U.S. at 312, 316, 317, 322–27 (Roberts, C.J., dissenting).

<sup>286</sup> *See id.*, 569 U.S. at 322–24 (Roberts, C.J., dissenting).

interpretive authority over the statutory ambiguity at issue,”<sup>287</sup> which he also described as whether there is “congressionally delegated authority to issue interpretations with the force and effect of law.”<sup>288</sup>

The majority was correct in asserting that there is no clear differentiation between questions respecting the scope of authority granted to an agency over a subject and the exercise of agency authority on specific issues within the broader domain assigned to it. In either case, the question is whether the agency was authorized to take the challenged action.<sup>289</sup>

Yet, the dissent surely was right that there is a difference in importance between supervision of the agency’s decision on its authority over a particular subject and its exercise of that authority in specific ways. Of course, each question at bottom reduces to whether the agency has acted in accordance with the law. But for the agency to have discretion over the details of regulating a particular subject or industry, it necessarily must have the authority to take action of some sort respecting that subject or industry. The assertion that the Communications Act of 1934’s commitment of authority to the FCC to regulate “communications” suffices to answer the question—at a minimum, to constitute a presumptive assignment to the FCC of congressional authority to decide what falls within the agency’s domain—overlooks the fact that the Act gave the FCC regulatory authority only over some types of communications, specifically broadcast and wire communications.<sup>290</sup> The FCC did not receive authority to regulate books, letters, smoke signals, semaphore, interpretive dance, or any number of other means of communication.<sup>291</sup> It is questionable to assume that the Act’s

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<sup>287</sup> *Id.*, 569 U.S. at 316 (Roberts, C.J., dissenting).

<sup>288</sup> *Id.*, 569 U.S. at 316 (Roberts, C.J., dissenting).

<sup>289</sup> This view of the issue is similar to the argument that *Chevron* analysis really has only one step: was the agency’s decision a reasonable exercise of delegated discretion. See, e.g., Stephenson & Vermeule, *supra* note 27.

<sup>290</sup> See Communications Act of 1934, 48 Stat. 1064, codified at 47 U.S.C. § 151 et seq.

<sup>291</sup> Despite the Supreme Court’s acceptance of nude dancing as a constitutionally protected means of communication, see, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), the expansion of categories of “communicative” acts under the First Amendment raises serious questions. See, e.g., [CITE]. The point in text, however, is a tad less serious.

reference to communication by broadcast or wire covers any communication technology that arguably can be analogized to those categories.

Certainly, what communications are within the FCC's jurisdiction is an important question that has come up repeatedly as new technologies supplement or replace old ones. Consider, for example, the rise of cable television and the FCC's assertion of authority to regulate it. Initially, the FCC determined that it lacked that authority, as cable television was neither a wire common carrier transmission service such as telephone or telegraph (regulated under Title II of the Communications Act of 1934) nor a broadcast service (regulated under Title III of that Act).<sup>292</sup> Later, the FCC decided that it had authority to regulate cable TV, not as a communications service within the meaning of the FCC's assignment but as an *adjunct* to its regulatory authority over broadcast television. The FCC's theory was that competition from cable TV could affect the finances of broadcast television, potentially altering the mix of public and commercial broadcast stations.<sup>293</sup> Does this mean that the Interstate Commerce Commission (ICC), which had regulatory authority respecting interstate rail transportation, also could have asserted authority over air transportation without express statutory sanction? Or over truck and bus transportation? In a deferential, pre-*Chevron* decision, the Supreme Court upheld the expansion of FCC authority to cable under the competition-can-affect-our-regulated-businesses theory<sup>294</sup>—a theory scholars have compared to the “tar baby” in describing expanding regulation, a result commonly consistent with the interests of regulators and regulated businesses alike.<sup>295</sup>

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<sup>292</sup> See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 164 (1969) (*Southwestern*) (describing the FCC's conclusions reached in its First Report and Order on Network Program Exclusivity, 38 F.C.C. 683, 709 (1965)).

<sup>293</sup> See *Southwestern*, 392 U.S. at 165–67.

<sup>294</sup> See *id.*, 392 U.S. at 173–77. The Court also read broadly the scope of FCC authority under the prefatory statement of its jurisdiction in the Communications Act. See *id.* at 167–68. Had this been the basis for the Court's decision, however, the remainder of the opinion would have been unnecessary.

<sup>295</sup> See, e.g., James W. McKie, *Regulation and the Free Market: The Problem of Boundaries*, 1 BELL J. ECON. & MGT. SCI. 6, 15 (1970) (discussing regulatory expansion as “a tar-baby reaction”); James Q. Wilson, *The Politics of Regulation*, in *SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT* 135, 152, 157 (James W. McKie ed., Brookings Inst. 1975). Originally, the concept was that differing maximands and

The position of the dissenters in *City of Arlington* would have had the Court determine whether the FCC had the general authority to regulate cable television as an adjunct to the agency's regulatory authority over broadcasting before asking whether the specific regulations adopted for cable were appropriate. The first question would be addressed without deference to the FCC, the second with deference. This approach seems consistent with the common-sense understanding that broader questions of agencies' domain are more clearly the sort of statutory *interpretation* issues that are centrally within the domain of the courts, not agencies. Of course, as the majority indicates, a finding of general competence to regulate would not preclude a decision that a specific regulation goes beyond the FCC's authority.<sup>296</sup>

Recognition that the agency's job is *implementation*, not final resolution of statutes' meaning—not, in the terms used here, *interpretation* on the same plane as courts' decisions—underscores the fact that courts should not defer on issues that concern broader questions of statutory authority. It also explains why, however the inquiry is framed, the more consequential a decision is and the more it seems to require resolution of statutory language respecting it, the less appropriate judicial deference is to agency determinations. That is why, despite *City of Arlington's* declaration that there is no separate category of "jurisdictional" decisions, the Court retains doctrines that allow courts to give non-deferential interpretations of laws' meaning.

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capabilities for regulators and regulated entities underlay regulatory expansion, but the tar baby metaphor later recognized that both regulators' and private parties' interests could be served by expanded regulation. Alfred Kahn later observed that this effect also can work in reverse. See Alfred E. Kahn, *The Deregulatory Tar Baby: The Precarious Balance Between Regulation and Deregulation, 1970–2000 and Henceforward*, 21 J. REG'Y ECON. 35 (2002).

<sup>296</sup> See *City of Arlington*, 569 U.S. at 300–01. See also *Fed. Communications Comm'n v. Mid-West Video Corp.*, 440 U.S. 689 (1979) (holding specific regulations of cable television as beyond the FCC's statutory authority); *United States v. Mid-West Video Corp.*, 406 U.S. 649 (1972) (holding specific regulations of cable television to be within the FCC's statutory authority).



### 3. Major Questions: Closing the Circle

The most obvious example of doctrines that provide less deferential review is the “major questions doctrine.”<sup>297</sup> The short-form account of the doctrine is that courts “expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.”<sup>298</sup> In Justice Scalia’s more vivid phrasing, “Congress ... does not, one might say, hide elephants in mouseholes.”<sup>299</sup>

The major questions doctrine has been assailed as an invention of jurists with biases against government regulatory programs.<sup>300</sup> It also has been criticized—at least as recently deployed—as a mistaken reading of precedents, which assertedly do not support an exception from ordinary interpretation of statutory text because (critics say) the relevant precedents simply adhered to ordinary interpretive approaches in construing specific provisions of law as at odds with particular claims of broad administrative authority.<sup>301</sup>

A full examination of complaints about the major questions doctrine (and responses to them) is beyond the scope of this Article. Still, it should be acknowledged, in light of recent critical

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<sup>297</sup> See, e.g., *West Virginia v. Env'tl. Prot. Agency*, 142 S. Ct. 2587, 2605 (2022) (*West Virginia*).

<sup>298</sup> *Util. Air Reg'y Grp. v. Env'tl. Prot. Agency*, 573 U.S. 302, 324 (2014) (*UARG*). See also *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of cert.); *United States Telecom Ass'n v. Federal Communications Comm'n*, 855 F.3d 381, 419–22 (D.C. Cir.) (Kavanaugh, J., dissenting from denial of rehearing en banc).

<sup>299</sup> *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (*American Trucking Ass'ns*).

<sup>300</sup> See, e.g., *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217 (2022); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1938–39, 1943 (2017) (*Power Canons*); Lisa Heinzerling, *Major Answers*, 16 N.Y.U. J. L. & LIB. (forthcoming, 2023) (*Major Answers*).

<sup>301</sup> See, e.g., *West Virginia*, 142 S. Ct. at 2633–41 (Kagan, J., dissenting); Brunstein & Revesz, *supra* note 300; Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, Center for the Study of the Administrative State Working Paper 22-23, Dec. 15, 2022, available at [https://administrativestate.gmu.edu/wp-content/uploads/2022/12/Levin\\_22-23.pdf](https://administrativestate.gmu.edu/wp-content/uploads/2022/12/Levin_22-23.pdf) (*Unfounded*). For an expansive collection of references respecting the major questions doctrine, pro and con, see Beau J. Baumann, *The Major Questions Doctrine Reading List*, YALE J. ON REG. NOTICE & COMMENT, <https://www.yalejreg.com/nc/the-major-questions-doctrine-reading-list-by-beau-j-baumann/>.

commentary, that the doctrine has roots in prior law and neutral reasons for supporting it.<sup>302</sup> It also bears noting that the concept behind the doctrine applies equally to scrutiny of assertions of broad *deregulatory* authority and of broad *regulatory* authority.<sup>303</sup> Of course, the natural biases of regulators make the more common case triggering a potential major questions approach to arise as a challenge to assertion of broad regulatory power.<sup>304</sup> Still, a doctrine that applies, and has been applied, to deregulation as well as expanded regulation should be examined on its merits rather than the supposed motives of those who endorse it. Indeed, focusing on judicial motives rather than substance itself is at odds with Supreme Court precedent and considerations congruent with the rule of law.<sup>305</sup>

*Brown & Williamson.* Apart from speculation about the motives of justices favoring or opposing a major questions doctrine, there is ample basis for judicial hesitation to read grants of authority to administrators in ways that strain either the long-understood meaning of statutory text or its constitutionality.<sup>306</sup> Resisting departures from established interpretations of a particular law—in this instance, including

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<sup>302</sup> See, e.g., *Biden v. Nebraska*, 600 U.S. \_\_\_, \_\_\_ (2023) (Barrett, J., concurring) (defending the doctrine as common-sense interpretation that “situates text in context, which is how textualists, like all interpreters, approach the task at hand”); Capozzi, *supra* note 80; Eli Nachmany, *There Are Three Major Questions Doctrines*, YALE J. ON REG: NOTICE & COMMENT, <https://www.yalejreg.com/nc/three-major-questions-doctrines/>. See also Aaron Nielson, *The Minor Questions Doctrine*, 169 U. PA. L. REV. 1181 (2021).

<sup>303</sup> See, e.g., *MCI Telecoms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229–31 (1994). See also *American Trucking Ass’ns*, 531 U.S. at 469–71.

<sup>304</sup> For discussion of regulators’ maximands, see, e.g., WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 36–42 (Aldine-Atherton 1971); GLEN O. ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* (Univ. of Michigan Press 1991); Aranson, Gellhorn & Robinson, *supra* note 81; Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGT. SCI. 335 (1974).

<sup>305</sup> See, e.g., *United States v. Morgan*, 313 U.S. 409, 416–21 (1941) (analogizing impropriety of focusing on motives of administrative adjudicators to long-accepted impropriety of focusing on motives of judges). See also *Gregoire v. Biddle*, 177 F.2d 579, 581–82 (2d Cir. 1949).

<sup>306</sup> For discussion of the arguments in favor of this position, as well as a caution against methods of decision designed to avoid declarations of unconstitutionality, see, e.g., Ronald A. Cass & Jack M. Beerermann, *Interpretation, Remedies, and the Rule of Law: Why Courts Should Have the Courage of their Constitutional Convictions*, 74 ADMIN. L. REV. 657, 681–702 (2022).

those associated with administrators' assertions about laws' meaning as well as judges' pronouncements—is entirely in keeping with the notion of precedent as informing courts' judgments even when it is not binding. Many of the Supreme Court's decisions associated with the major questions canon fit this mode.<sup>307</sup>

For example, in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, the Court declined to defer to the FDA's assertion that the Federal Food Drug and Cosmetic Act of 1938 (FDCA) authorized the agency to regulate sale of tobacco products.<sup>308</sup> Although the FDA articulated a plausible reading of the law's terms in support of its declaration that nicotine is a drug and tobacco products are “drug delivery devices” subject to regulation under the FDCA, that construction of the law contradicted more than a half-century of FDA interpretations of its authority respecting tobacco products.<sup>309</sup> It also ran counter to numerous congressional enactments specific to the tobacco industry, including subsidies and, later, restrictions on tobacco advertising coupled with limitations on alternative advertising controls.<sup>310</sup> Further, the Court found that FDA's change of heart on tobacco regulation could not permit FDA action short of a complete ban on tobacco, given various provisions in the FDCA, including the requirement that the FDA must only permit substances it regulates to be marketed for pharmacological uses that are safe and do not pose a risk to human health—a finding that would not be possible for tobacco, given the FDA's and Surgeon General's conclusions respecting tobacco's health effects.<sup>311</sup>

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<sup>307</sup> See, e.g., *American Trucking Ass'ns*, 531 U.S. at 468; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–61 (2000) (*Brown & Williamson*); *MCI Telecoms. Corp. v. Am. Tel. & Tel. Co.*, 521 U.S. 218, 231 (1994). For an argument that, prior to *Brown & Williamson*, most applications of a major questions doctrine had required greater clarity to support an assertion of broad regulatory authority, see Capozzi, *supra* note 80.

<sup>308</sup> *Brown & Williamson*, 529 U.S. 120.

<sup>309</sup> See *id.*, 529 U.S. at 138, 143–57. In fact, denials that the law administered by the FDA gave regulators authority over tobacco went back to the agency's predecessor (the Bureau of Chemistry of the U.S. Department of Agriculture) and the predecessor law to the FDCA (the Pure Food and Drugs Act of 1906, 34 Stat. 768).

<sup>310</sup> See *Brown & Williamson*, 529 U.S. at 143–50, 152–59.

<sup>311</sup> See *id.*, 529 U.S. at 133–43.

Only after these observations—after the Court already had provided sufficient grounds for its decision—did the *Brown & Williamson* Court make its well-known observation about major questions. It declared that, although *Chevron* deference is predicated on the assumption that statutory ambiguity generally implies a grant of discretion to the agency administering the law, “[i]n extraordinary cases ... there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”<sup>312</sup> The opinion tacked on a quotation from then-Judge (later, Justice, but always Professor) Stephen Breyer respecting the relevance of an issue’s importance to the appropriate degree of deference: “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”<sup>313</sup>

The Court then stated facts about the case that bear on interpreting the law, including that the tobacco industry long had been a major economic force in the United States and that Congress repeatedly had rebuffed efforts to grant regulatory authority over it to the FDA.<sup>314</sup> All of this was strongly at odds with the FDA’s assertion of regulatory authority over tobacco products. Still, four justices—including Justice Breyer—saw the matter differently, supporting the FDA based on a literal reading of the law together with the broad health-protecting purposes of the FDCA.<sup>315</sup>

*West Virginia.*

After several more invocations of

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<sup>312</sup> See *id.*, 529 U.S. at 159.

<sup>313</sup> See *id.*, 529 U.S. at 159, quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986). In fairness, Judge Breyer identified the importance of an issue as only one among several criteria courts properly consider in deciding whether to defer to an agency’s reading of the law. See *id.* at 368–71.

<sup>314</sup> See *Brown & Williamson*, 529 U.S. at 159–61.

<sup>315</sup> See *id.*, 529 U.S. at 161–81 (Breyer, J., dissenting). The dissent also saw Congress’s rejection of efforts to alter the law to promote regulation of tobacco products as ambiguous, possibly explicable on grounds of legislators’ disinclination to interfere with FDA authority. See *id.* at 181–89 (Breyer, J., dissenting). For an argument that the dissent had the better argument on text, at least on the existence of ambiguity that would support deference to the FDA, but nonetheless supporting the result in *Brown & Williamson* as consistent with an understanding of constitutional interpretation separated from *Chevron*’s deference rule, see Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 984–88 (2018).

some form of major question doctrine—generally in the form of heightened clarity requirements for reading a commitment of discretionary regulatory authority into the law<sup>316</sup>—the Supreme Court gave the doctrine its most prominent and extensive treatment in *West Virginia v. Environmental Protection Agency*.<sup>317</sup> Reviewing the EPA’s “Clean Power Plan,” which sought broadly to restructure energy sources and uses in America to achieve reductions in carbon dioxide emissions, the Court in *West Virginia* observed that this was very different from the uses previously made of the relevant section of the Clean Air Act, which had focused on reducing harmful emissions at a specific site through improved technology.<sup>318</sup> As in *Brown & Williamson*, the Court noted that the agency’s action was designed to effect specific changes for which authority had been sought from and withheld by Congress.<sup>319</sup>

Summarizing the points it deemed dispositive, the Court in *West Virginia* listed differences in prior constructions of the statute, the divergence between the methods used in this instance and in prior uses of the relevant part of the law, the predicted consequences (amounting to sweeping changes in energy sources and uses, substantial and long-lasting increases in energy costs, a trillion-dollar price tag, and significant job losses)—all combining to indicate that *West Virginia* was “a major questions case.”<sup>320</sup> This meant requiring more than the usual degree of clarity to support a conclusion that Congress had granted the EPA the power it claimed—a degree of clarity entirely at odds with the reasons that led the Court to declare it a major questions case. Having concluded that skepticism rather than deference was in order, the Court decided that the Clean

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<sup>316</sup> See, e.g., *Nat’l Fed’n of Indep. Bus. v. Dept. of Labor*, 142 S. Ct. 661, xxx (2022); *Alabama Ass’n of Realtors v. Dept. of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021); *UARG*, 573 U.S. at 324; *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *American Trucking Ass’ns*, 531 U.S. at 468. On different forms of the major questions doctrine, see, e.g., Capozzi, *supra* note 80; Heinzerling, *Power Canons*, *supra* note 300, at 1947; Nachmany, *supra* note 302.

<sup>317</sup> *West Virginia*, 142 S. Ct. 2587.

<sup>318</sup> *Id.*, 142 S. Ct. at 2610–12. The Court did, however, conclude that one component of the EPA’s plan comported with past uses of the relevant section of the Clean Air Act, § 111(d). See *id.* at 2602–03.

<sup>319</sup> See *id.*, 142 S. Ct. at 2614.

<sup>320</sup> *Id.*, 142 S. Ct. at 2610. See also *id.* at 2607–14.

Air Act did not give the EPA the authority it had asserted in adopting the Clean Power Plan.<sup>321</sup> Justices Gorsuch and Alito concurred, expanding on the history of a major questions doctrine in the Supreme Court,<sup>322</sup> elaborating further the analysis associated with that doctrine,<sup>323</sup> and offering additional guideposts for invoking the doctrine.<sup>324</sup>

Three dissenting justices, in an opinion by Justice Elena Kagan, demurred with each of the points in both the majority and concurrence.<sup>325</sup> Among other things, Justice Kagan's dissent presented earlier cases, from *Brown & Williamson* on, as consistent with a different form of analysis, one tied to examination of each specific assertion of authority to see how it fit with statutory text, read in context.<sup>326</sup> Justice Kagan's dissent accepts these cases as mainly based on a legitimate approach to judicial review of administrative actions. Interestingly, the three *West Virginia* dissenters also dissented from each of the cases decided during their tenures that were touted now as congruent with better forms of analysis.<sup>327</sup> This apparent inconsistency—not the only one noted respecting positions taken by both sides—underscores the intensity of disagreement over the more robust major questions doctrine articulated by the *West Virginia* majority and concurrence.<sup>328</sup>

That intensity is linked to implications of the major questions doctrine—in particular, the *West Virginia* Court's major questions doctrine—for analysis of both deference and delegation issues.<sup>329</sup> Because the key to deference is the commitment of discretion to administrators, any doctrine

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<sup>321</sup> See *id.*, 142 S. Ct. at 2612–16.

<sup>322</sup> See *id.*, 142 S. Ct. at 2617–21 (Gorsuch, J., concurring).

<sup>323</sup> See *id.*, 142 S. Ct. at 2622–24 (Gorsuch, J., concurring).

<sup>324</sup> See *id.*, 142 S. Ct. at 2621–23 (Gorsuch, J., concurring).

<sup>325</sup> See *id.*, 142 S. Ct. at 2626–44 (Kagan, J., dissenting).

<sup>326</sup> See *id.*, 142 S. Ct. at 2634–36 (Kagan, J., dissenting).

<sup>327</sup> See [note cases and dissents].

<sup>328</sup> A similar intensity of concern about the doctrine articulated in *West Virginia* and its implications for assertions of broad regulatory power—including some that date back to much earlier regulatory initiatives—is evident in academic commentary on the decision. See, e.g., Heinzerling, *Major Answers*, *supra* note 300; Levin, *Unfounded*, *supra* note 301; Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174 (2022).

<sup>329</sup> See *West Virginia*, 142 S. Ct. at 2616–22, 2624–26 (Gorsuch, J., concurring); *id.* at 2626–29, 2633–38, 2641–43 (Kagan, J., dissenting).

circumscribing the scope of discretionary authority increases the difficulty of convincing courts to accept assertions of administrative power. The major questions doctrine that emerges from *West Virginia* inclines courts to see broad assertions of administrative authority as problematic and as requiring special articulation if not special justification. To the extent that the demand is for stronger justification of assignments of discretionary administrative authority—especially justifications that cohere with constitutional limits on delegation—the major questions doctrine may put much of the edifice of broad administrative power in play.<sup>330</sup> Insofar as the version of the major questions doctrine that survives merely requires a clearer statement of the relevant authority, the bar to exercise of broad administrative discretion will be lower, but far from insignificant.<sup>331</sup>

*National Broadcasting.* To understand the reason a major questions *deference* doctrine (as contrasted with a major questions *delegation* doctrine) still produces anxiety among those who favor broad grants of administrative discretion, look back to the Supreme Court’s decision in *National Broadcasting Co. v. United States*<sup>332</sup> and its prior decision in *Federal Communications Commission v. Pottsville Broadcasting Co.*<sup>333</sup>

*Pottsville* concerned a challenge to an FCC decision respecting an application for a broadcast license. After the FCC denied Pottsville’s application, its decision was reversed by the Court of Appeals for the District of Columbia which concluded that the FCC had misread applicable law in determining that Pottsville

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<sup>330</sup> See, e.g., Heinzerling, *Power Canons*, *supra* note 300; Levin, *Unfounded*, *supra* note 301; Richard J. Pierce, Jr., *The Remedies for Constitutional Flaws Have Major Flaws*, 17 DUKE J. CON. L. & PUB. POL’Y (forthcoming 2023), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4203719](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4203719). As noted above, however, this inquiry may prove less threatening to the current administrative state than is widely assumed. See discussion *supra*, text at notes 168–171. See also Cass, *Delegation Reconsidered*, *supra* note 78, at 189–92; 373–77; Lawson, *Private-Law Framework*, *supra* note 76, at 141–43, 145–47; Prakash, *Sky Fall*, *supra* note 143, at 280–81, 293–98.

<sup>331</sup> See Heinzerling, *Major Answers*, *supra* note 300; Levin, *Unfounded*, *supra* note 301; [OTHER CITES]. On the question of what level of clarity Supreme Court precedents require, see, e.g., Capozzi, *supra* note 80.

<sup>332</sup> 319 U.S. 190 (1943) (*National Broadcasting*).

<sup>333</sup> 309 U.S. 134 (1940) (*Pottsville*).

was financially disqualified. When the FCC then proceeded to compare Pottsville with other, competing license applicants, the company asked the Court of Appeals to halt that proceeding and decide only Pottsville's suitability. In an opinion by Justice Felix Frankfurter, the Supreme Court rejected Pottsville's argument. It found that the law implicitly gave the FCC discretion to decide what procedures to use in issuing broadcast licenses.<sup>334</sup> The Court also suggested that the Communications Act's direction for the FCC to issue broadcast licenses as "the public interest, convenience, and necessity" dictated constituted a sufficiently clear standard to survive a challenge on non-delegation grounds.<sup>335</sup> In Frankfurter's words, "this criterion is as concrete as the complicated factors in such a field of delegated authority permit" and constituted "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."<sup>336</sup>

In contrast to the law's assignment to the FCC of authority over broadcast station allocation and licensing, *National Broadcasting* dealt with, and approved, the FCC's adoption of rules extensively regulating agreements between station owners and broadcast networks that provided stations with programming and advertising revenues.<sup>337</sup> The rules prohibited a wide array of different terms in the contracts between stations and networks, including requirements that stations carry certain programs and not carry programs of competing networks, limitations on contract duration, and virtually every other major component of the contracts between networks and stations.<sup>338</sup> Justice Frank Murphy, dissenting, noted that the Court, just three years earlier (just two months after its *Pottsville* decision), without dissent, had declared that the Communications Act

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<sup>334</sup> See *id.*, 309 U.S. at 137–38, 142–44.

<sup>335</sup> See *id.*, 309 U.S. at 137–38. The Court, after describing the conditions that led to the assertion of public control over broadcasting, *id.* at 137, expressly noted that the ability to operate a broadcast station was a matter of public, not private right: "[t]he Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication." *Id.* at 138. *Pottsville* did not cite non-delegation cases or treat the issue more than in passing, but clearly had the issue in mind in their characterization of the FCC's authority.

<sup>336</sup> *Id.*, 309 U.S. at 138.

<sup>337</sup> See *National Broadcasting*, 319 U.S. at 196–209.

<sup>338</sup> See *id.*, 319 U.S. at 198–209.



“does not essay to regulate the business of the licensee” and that the FCC “is given no supervisory control of the programs, of business management or of policy.”<sup>339</sup> After reviewing the extent of authority asserted by the FCC, Murphy added that he could not assent to the FCC’s assumption of “a function ... of such wide reach and importance in the life of the nation, as a mere incident to its duty to pass on individual applications for permission to operate a radio station and use a specific wave length.”<sup>340</sup>

Justice Frankfurter’s approach in *National Broadcasting*, while cast as a straightforward reading of statutory language, was anchored in a strong inclination to support broad national regulatory authority. Unlike *Pottsville*’s language, which fit easily with the division between judicial interpretation and administrative implementation of law, *National Broadcasting* suggested openness to blending the two functions—that is, letting deference to an agency’s implementation color the Court’s interpretive judgment. Justice Murphy’s approach demonstrates the opposite inclination, requiring at a minimum a clear statutory commitment of regulatory authority before evaluating the propriety of an agency’s implementing decision.<sup>341</sup>

The same hesitation evinced by Murphy is encapsulated in the major questions doctrine approved in *West Virginia*. Responses to *West Virginia* become more understandable if viewed through the lens of reactions to a *National Broadcasting* decision choosing between paths of easier or harder judicial acceptance of the sort of claims that smooth the path to an expansive administrative state or that raise the costs of pursuing that end. Without Frankfurter’s approach prevailing in *National Broadcasting*, there wouldn’t have been as easy a glide path for the FCC’s increasingly expansive control over communications, including its assertion of authority over cable television a quarter-century

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<sup>339</sup> *Id.*, 319 U.S. at 230 (Murphy, J., dissenting) (quoting *Fed. Communications Comm’n v. Sanders Bros. Radio Stn.*, 470, 475 (1940)).

<sup>340</sup> *Id.*, 319 U.S. at 232 (Murphy, J., dissenting).

<sup>341</sup> *See id.*, 319 U.S. at 228–32 (Murphy, J., dissenting).

later as well as more recent efforts to regulate Internet-related business practices.<sup>342</sup>

Some of the strongly worded criticisms of *West Virginia* can be understood as reactions against the feared loss of judicial victories on behalf of a more substantial administrative state, victories won eighty years ago—almost equal to the four-score-and-seven that separated the Declaration of Independence from Lincoln’s Gettysburg Address. Not only does *West Virginia* insist on judicial dominion over laws’ interpretation, in keeping with the power-separating goal for constitutional governance; it also insists on clearer commitments of discretionary authority to administrators than decisions such as *National Broadcasting*, in line with the discretion-limiting goal. The *West Virginia* Court asks us, in effect, to imagine a world where Murphy’s position in *National Broadcasting* prevailed.

## V. CONCLUSION

Although discussion of rules for channeling government power often is seen as promoting or opposing administrative government, the more important questions focus on whether the rules properly reflect the law’s separation of different governance powers. The first imperative—regardless of one’s view on the desirability of more or less administrative authority—should be for law to fit the commands of the Constitution. In particular, legal rules should be in line with the discretion-limiting and power-separating goals reflected in the Constitution’s three vesting clauses. If judicial doctrines follow this line, rules respecting the delegation of constitutional authority, the discretion associated with specific grants of power, and the deference given by one branch to decisions of another branch should be easier to state and to apply.

In at least one sense, this approach is consistent with recognition of broader discretion than some current rules suggest. Congress can enact laws giving administrative officials discretion over decisions, whether those decisions are

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<sup>342</sup> See *Comcast Corp. v. Federal Communications Comm’n*, 600 F.3d 642 (D.C. Cir. 2010); *Verizon v. Federal Communications Comm’n*, 740 F.3d 623 (D.C. Cir. 2014); *United States Telecom Ass’n v. Federal Communications Comm’n*, 825 F.3d 674 (D.C. Cir. 2016).

announced as rules or as adjudicated determinations and whether arrived at through formal or informal processes. And where discretion is properly granted by law, courts are limited in what judgments they can make. These only reach policing the degree to which a matter is within administrators' discretion and whether the discretion has been exercised in ways that do not exceed legal bounds either by exceeding the administrators' jurisdiction or by resting on legally impermissible grounds. Congress can even exclude some judgments from judicial review altogether.

At the same time, constitutional assignments of legislative and judicial powers, respectively, to Congress and Article III courts, preclude administrative decisions that exercise powers outside the executive branch's domain. The lines of division are better understood not by focusing on whether a decision has the force of law or whether it encompasses an interpretation of law that should preempt judicial judgment. Instead, understanding the proper lines must be anchored in seeing what judges do as *interpreting* the law, what Congress does as *writing* the law, and what administrators do as *implementing* the law. The sort of authority—particularly discretionary authority—that is appropriate to each branch must fit this structure.

Of course, administrators speak in terms of what legal commands mean. But room given by law for the exercise of policy discretion cannot mean that the administrators in every case are interpreting the law in the same sense as judges. If that were so, there would be no sense in declaring that administrative agencies may change position on what they should do. Administrators make *policy decisions within the limits of their discretion*, and so can change their preferred policies, but it is up to judges, interpreting the law, to ascertain what limits the law places on administrative discretion.

In the same vein, administrators cannot make law in place of Congress, certainly not in ways that do more than implement statutory directions. It is up to Congress to make the important decisions—especially decisions respecting individual rights and responsibilities. The power over these issues cannot be passed along to others. Whether a nondelegation doctrine or a version of the major questions doctrine is used to assure that the limits on allocation of the lawmaking power are observed, the

assignments of power under the Constitution should be respected. Appreciating that as the central imperative should facilitate refinement of administrative law doctrines along clearer, more sensible, and more constitutionally consistent lines. As Justice Scalia said, preserving the Constitution's allocation of powers is, at bottom, what this is about.