2016

Who's Exercising What Power: Toward a Judicially-Manageable Nondelegation Doctrine

Martin Edwards

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MARTIN EDWARDS*

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* J.D. Duke University School of Law, 2013; B. Accy. University of Mississippi, 2010. Associate, Phelps Dunbar, LLP, Jackson, Mississippi. I would like to thank Professor Margaret Lemos, Robert G. Seaks L.L.B. '34 Professor of Law at Duke Law School, for overseeing the original drafting of this Article, reviewing multiple drafts, and providing valuable suggestions and insight. I also wish to thank my wife, Annie, for her love, support, and valuable editing throughout this and all aspects of my career. Finally, I wish to thank my parents, Attorney Eddy and Professor Celie Edwards, who first challenged me to write and write better.

INTRODUCTION

The nondelegation doctrine is one of American constitutional law's peculiarities: Judges of all ideological stripes describe it as fundamental to our constitutional system of government, but very few judges can—or will—readily apply it to invalidate an act of Congress. It has become a popular punch line among professors of constitutional and administrative law since it has only had "one good year, and 211 bad ones" in the Supreme Court.[1] Given the rise of the twentieth-century administrative state and numerous concomitant grants of authority from Congress, is it not strange that not a single statute has elicited so much as a nondelegation-based whimper, much less a roar, from the Supreme Court? Additionally, it seems quite unlikely that administrative governance is due for any sort of serious reconsideration. If delegation of government power is occurring within the present administrative framework, does anyone realistically believe it will slow down in the near future?

Reams of literature have pondered this apparent paradox, either praising or criticizing the Court's apparent reticence to enforce nondelegation. Some scholars, for example, have answered by declaring the nondelegation doctrine dead and happily performing a jig upon its grave.[2] Another suggests that the nondelegation doctrine has retreated into various tools of statutory construction, thus confirming that the Court *is* enforcing nondelegation in a real, not ham-handed sort of way, albeit indirectly.[3] Another even suggests that the tangible benefits of the administrative state and apparent public acceptance of it render a robust nondelegation doctrine a countermajoritarian judicial hot potato.[4] On the other hand, there are a few wilderness-wandering souls who yearn for nondelegation to be more strictly enforced, if for no reason other than the hope that more accountability would actually result in *better regulation*.[5] But, despite the author's more primal desire to criticize government by administrative

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

2. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine,* 69 U. CHI. L. REV. 1721, 1721–23 (2002). Not to mention grousing about its zombie-like ability to be revived in scholarly circles.

3. *See* Sunstein, *supra* note 1, at 315–16 (arguing the nondelegation doctrine is enforced through canons of construction rather than directly as an independent doctrine).

4. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 81–82 (1985).

5. *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY ix–x (1993); *cf.* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1232–33 (1994) (expressing frustration that no one seems to want to prod the federal government into *less* regulation).

bureaucracy, perhaps there is a more useful and appropriate question lurking just beneath the surface: Is there something missing from the current doctrine that makes its enforcement so difficult? Better yet, could the discovery of this constitutional and administrative law MacGuffin[6] be the key to unlocking a more robust, or at least comprehensive, nondelegation doctrine?

The question of positive law (can the nondelegation doctrine be enforced judicially in any realistic manner?) is perhaps even more interesting than the question of whether it *should* be enforced at all.[7] Therefore, I do not propose here to pluck nary a pebble from the vast stone castle of the American administrative branch—to do so is at once impossible and perhaps even undesirable. I simply appreciate seeing a court apply a coherent rule for drawing the line between legislative authority and executive (or judicial)[8] authority. To that end, this Article argues that the traditional, "intelligible principle" nondelegation analysis is incomplete and that an examination of the *delegate*, rather than just the delegation, more effectively animates the doctrine. This is true not only as a practical matter; early Supreme Court cases, as well as later ones, have taken a keen interest in the recipient of the alleged delegation. In other words, a realistic and judicially enforceable nondelegation doctrine must include more than a mere tip of the juridical cap.

This Article proceeds as follows: Part I will discuss the constitutional nondelegation principle, lay out fundamental principles of accountability, and propose that the courts should enforce nondelegation through a more complete analysis of the delegate, instead of only the traditional intelligible principle analysis. Part II will discuss, in more detail, the normative judgments underlying the fundamental principles discussed in Part II. Part III combines the classical intelligible principle doctrine with the new institutional nature paradigm and proposes an analysis of the new Consumer Financial Protection Bureau (CFPB) and Financial Stability Oversight Council (FSOC). The proposed test measures not only whether Congress has articulated an intelligible principle, but also whether Congress has intelligibly directed an improper delegate to exercise legislative power.

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6. The term "MacGuffin" refers to a plot device used in cinema. It is a physical object within the story that serves as the driving force of the plot, but its literal identity does not matter. *See* DONALD SPOTO, THE ART OF ALFRED HITCHCOCK xi (First Anchor Books ed. 1992) (1976). For example, the plot arc of *The Maltese Falcon* likely would not change if it were a Burmese Pigeon instead.

7. *See* Mashaw, *supra* note 4, at 81–82.

8. *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. Cal. L. Rev. 405, 405–06 (2008).

I. THE CONSTITUTIONAL PRINCIPLE OF NONDELEGATION AND THE NONDELEGATION DOCTRINE

The constitutional nondelegation principle flows from another fundamental principle: separation of powers.[9] The Constitution vests Congress—and Congress alone—with "[a]ll legislative Powers" of the United States.[10] The Court has long interpreted the Constitution to prohibit Congress from delegating its vested legislative authority.[11] The principle itself is fairly straightforward: legislators alone have the authority to enact binding statutes containing policy preferences, but conferring discretion for execution of a given law is both acceptable and necessary in giving effect to those preferences.[12] It should be rather apparent that this paradigm is limited in its helpfulness. Determining whether a given act of Congress crosses this apparent line is thought to consist of answering a single question: has Congress provided an "intelligible principle" for the implementation of the statute?[13] Unless the court determines that Congress has "failed to articulate any policy or standard that would serve to confine the discretion" of the delegate, the nondelegation doctrine as it exists today is satisfied.[14] As a practical matter, courts applying this test have very rarely held any act of Congress unconstitutional for lack of an intelligible principle.[15] Part I describes these fundamental nondelegation principles and discusses how the intelligible principle doctrine is limited in serving those principles. Furthermore, it will discuss how an examination of the institutional nature of the delegate serves those principles better and is grounded in the Court's nondelegation jurisprudence.

A. The Constitutional Principle of Nondelegation

Separation of powers has long been understood as a feature fundamental to our constitutional system of government.[16] Indeed, separation of powers may be considered fundamental to western theories of statecraft stretching back centuries. The principle is often attributed, at least in part, to Baron de Montesquieu, who wrote, "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty."[17] Article 1, Section 1 of the Constitution provides, "All

9. Mistretta v. United States, 488 U.S. 361, 371 (1989).
10. U.S. CONST. art. I, § 1.
11. *See* Field v. Clark, 143 U.S. 649, 692 (1892).
12. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 407 (1928).
13. *Id.* at 409.
14. *Mistretta*, 488 U.S. at 373 n.7.
15. *Id.*
16. *Id.* at 371.
17. BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 163 (Thomas Nugent, trans.

legislative Powers herein granted shall be vested in a Congress of the United States."[18] Since the Constitution emerged from the heated crucible of the American Revolution, this has been understood to mean that Congress cannot delegate its specific, constitutionally-vested authority to another entity.[19] After all, what is the benefit of separating powers if one branch, or even one person, could simply meld them back together? Indeed, "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[20]

The very concept of separation of powers is involved intimately with "checks and balances," the notion that dividing powers limits the aggregate power of government over the governed.[21] The nondelegation principle could be said, perhaps, to lie in the space between separation of powers and checks-and-balances. It maintains the separation of powers by prohibiting delegation, thus simultaneously vindicating the elegant theory of checks-and-balances through prohibiting the entities to be checked and balanced from circumventing them.

More important, perhaps, than separation of powers and checks-and-balances, is accountability. If any branch of government delegates its authority, the system of accountability contemplated by the democratic process would also be frustrated. In sum, it can be said that the nondelegation doctrine represents and combines three fundamental principles: democratic accountability for legislators and the President, inter-branch accountability for executive and administrative action, and limitation on government power through checks-and-balances.

As important as the nondelegation principle appears in theory, applying it in practice is frustrating. Even the most strident advocates for strict separation of powers and limited government must recognize that "legislative" does not lend itself to a simple definition. Obviously, legislation reflects policy preferences. And, obviously, legislative power is much wider than executive power or judicial power. Despite the fact that Congress seems to have broad authority to select among many policy choices, "legislative" does not precisely equal "discretionary."[22] In practice, the other branches of government can and must exercise a measure of discretion when properly exercising their own functions, whether acting

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1752) (1748).

18. U.S. CONST. art. 1, § 1.

19. *See* Lawson, *supra* note 5, at 1237–38, (describing the Constitution's tripartite scheme of government and nondelegation's place within that scheme).

20. Field v. Clark, 143 U.S. 649, 692 (1892).

21. *See* Lemos, *supra* note 8, at 411.

22. Lawson, *supra* note 5, at 1239.

pursuant to a legislative directive or in their various spheres of independent authority.[23] Given this unavoidable discretion, courts have attempted for years to give effect to the nondelegation principle by inquiring whether any given congressional act is an unconstitutional delegation of legislative authority and necessary discretion in executing or adjudicating upon Congress's legislative pronouncements.[24] As such, accountability for legislative judgments properly lies with Congress, consisting of the people's elected representatives, and accountability for executive judgments properly lies with the President, who also serves at the pleasure of the electorate. That line-drawing exercise has resulted only in the half-hearted development of the incomplete intelligible principle analysis, which is the lone component of the modern nondelegation doctrine.

Despite never utilizing the insight formally, the Court has at times pondered *who* was sitting on the receiving end of a congressional directive.[25] Because this analysis has never been developed outside circumstances where the intelligible principle was not met[26] or outside a dissenting opinion,[27] courts inconsistently consider who is receiving the delegation. Not only can critical evaluation of the delegate add a useful and discrete component to the doctrine, but it can also inform and enrich the intelligible principle analysis to which it will be yoked. With this in mind, I turn to the well-known, but perhaps less well-understood, intelligible principle doctrine.

B. Classical Intelligible Principle Nondelegation

First-year constitutional law students learn the nondelegation doctrine in reference to little more than the intelligible principle doctrine. This is reasonable, of course, because the overwhelming majority of the Court's nondelegation cases appear to rest solely on this idea. Fundamentally, the intelligible principle doctrine is a rough judicial approximation of an *improper* delegation. To the early courts grappling with this idea, an obviously improper delegation might be a statute that said simply: go forth and make the world a better place. To understand this, we must keep in mind that the mighty administrative oak we know today was but a seed.

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23. *See* Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("A certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action. . . .").

24. *See, e.g.*, Field v. Clark, 143 U.S. 649, 650 (1892).

25. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (discussing delegation to nongovernmental industry groups); *see also Mistretta*, 488 U.S. at 427 (Scalia, J., dissenting) (comparing delegation to "a sort of junior-varsity Congress").

26. *See Schechter*, 295 U.S. at 500.

27. *See Mistretta*, 488 U.S. at 413–27 (Scalia, J., dissenting).

Perhaps it seemed sufficient to those early courts merely to read the actual congressional direction and determine whether it was clear enough to avoid leaving too much discretion with the delegate. Furthermore, the vast majority of early alleged delegations were to one person: the President. As such, the Court rarely had the occasion to even consider *who* was on the receiving end of Congress's instructions because it was always just the President. The earliest of the nondelegation precedents are representative of this theme.

One of the earliest traces of nondelegation is *Field v. Clark*.[28] In *Clark*, a group of merchants sued the government over tariffs assessed on goods they sought to import.[29] The statute in question authorized the President to decide whether and when to enforce various tariffs on certain goods.[30] The Court reasoned that this exercise of discretion was permitted because the legislation directed the President to activate or not to activate a certain set of tariffs based upon what facts he found to exist at any given time.[31] Because "nothing involving the expediency or the just operation of such legislation was left to the determination of the President," there was no breach of the nondelegation principle.[32] In support of its position, the *Clark* Court cited *Cincinnati, Wilmington & Zanesville Railroad Co. v. Commissioners of Clinton County*,[33] the Ohio Supreme Court case laying out the basic, theoretical underpinning of the nondelegation doctrine:

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.[34]

The *Clark* Court clearly did not think it was dealing with an unfamiliar exercise of legislative and executive power in concert, as it painstakingly listed the contents of several other tariff and customs statutes that operated similarly to the challenged statute.[35] Perhaps like the dichotomy of fact and law, the former being the province of the jury and the latter of the judge, legislative and executive power should be seen as inextricably linked. In *Clark*, the President was to survey the economic scene, evaluate the

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28. *See* 143 U.S. 649 (1892).
29. *Id.* at 650–51.
30. *Id.* at 662–67.
31. *Id.* at 680–81. In truth, the statutory scheme was somewhat more complicated than this, but this is the basic idea.
32. *Id.* at 693.
33. 1 Ohio St. 77 (1852).
34. *Id.* at 88–89.
35. Field v. Clark, 143 U.S. 649, 682–83 (1892).

evidence, and make findings of fact.[36] He then referred to the authorizing legislation to determine whether Congress desired a tariff based upon the facts he had just ascertained.[37] If this was to be the working framework of the nondelegation doctrine, the *Clark* Court could have done worse.

Continuing in the world of customs duties and trade protection, the next whisper of nondelegation surfaced in 1928 with *J.W. Hampton, Jr. & Co. v. United States*.[38] The facts in *Hampton* were quite similar to those in *Clark*: Congress had authorized a set of tariffs to be activated—or not activated—when certain conditions were found to exist.[39] This time, however, Congress had set forth a procedure whereby a United States Tariff Commission (Tariff Commission) would investigate the conditions on behalf of the President, who would proclaim whether or not the tariff activated based upon its findings.[40] The *Hampton* Court subsequently had no trouble quickly disposing of the claim that Congress had unlawfully delegated any legislative authority to the President or the Tariff Commission; in doing so, the Court wrote the words that would become the basis for the doctrine as it exists today: "If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[41] *Clark* and *Hampton* illustrate that the Court was not concerned about alleged delegations to the President, or even to a committee that delivered its fact-finding to him directly. It might be said that an intelligible principle leaves Congress accountable for legislative judgments, while the President—the clear delegate—could be held accountable for executive judgments. Or, each could be held accountable for the entire affair if the people disliked the results. Furthermore, in this simple scenario, each branch was limited in its overall exercise of power. That is, a Congress utilizing an intelligible principle could not delegate to the President unlimited power, nor could the President utilize vast power on his own claiming that Congress had authorized him such power through a broad delegation.

By 1935, the nondelegation doctrine had many times played the role of the hapless Washington Generals,[42] having never defeated an act of

36. *Id.* at 656–61.
37. *Id.*
38. 276 U.S. 394, 407 (1928).
39. *Id.* at 400.
40. *Id.* at 402.
41. *Id.* at 409 (emphasis added).
42. The Washington Generals were the team that traveled with and "competed" against the famous Harlem Globetrotters exhibition basketball team. The Generals defeated the Globetrotters only once, in 1971. *See* Rodger Sherman, *A Requiem for the Washington Generals, the Worst Sports Team of All Time*, SBNATION (Aug. 14, 2015, 10:24 AM),

Congress. But the New Deal era represented a shift in the way the federal government perceived its role in regulating the nation's economic and industrial affairs. Furthermore, the architects of the New Deal were also the architects of what would become the vast bureaucracy that exists today.[43] The New Deal, unsurprisingly then, brought with it a flurry of legislation designed to change the way industry and the economy were regulated. One of the first and most comprehensive acts of the New Deal was the National Industrial Recovery Act (NIRA), which authorized the president to promulgate Codes of Fair Competition for a large number of industries.[44] The mechanics of the promulgation of these codes were fairly straightforward: trade groups or other industry associations could cooperate with federal and state agencies and unions to create codes for their industries and submit them for approval by the President.[45] In 1933, President Franklin D. Roosevelt approved and enacted by Executive Order the Code of Fair Competition for the Petroleum Industry, promulgated under § 9(c) of NIRA.[46]

In *Panama Refining Co. v. Ryan*,[47] the Supreme Court took occasion to determine whether the authority Congress intended the President to exercise under NIRA, with respect to permitting or prohibiting flows of oil, violated the nondelegation doctrine.[48] The Court began by examining § 9(c), the provision in question. The section authorized the President to stop the flow of oil in interstate or foreign commerce to the extent that amount of oil exceeded the amount permitted by any state or state agency.[49] The Court had the following to say about § 9(c):

> Section 9(c) does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the State's permission. . . . It does not require any finding by the President as a condition of his action. . . . So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.[50]

Clearly, the Court was looking for some specific "magic words" when it was

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http://www.sbnation.com/2015/8/14/9152971/washington-generals-harlem-globetrotters-losing-all-the-time).

43. *See, e.g.*, JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (Yale Univ. Press 7th prtg. 1966) (1938).

44. Pub. L. No. 73-67 §§ 3(a)–(b), 48 Stat. 195, 196 (1933).

45. *Id.*

46. Panama Ref. Co. v. Ryan, 293 U.S. 388, 408–09 n.3 (1935).

47. 293 U.S. 388 (1935).

48. *Id.* at 414–15.

49. *Id.* at 406.

50. *Id.* at 415.

applying the nondelegation doctrine to the facts presented in *Panama Refining*. It is not clear that the Court believed it was doing anything more than applying the classical intelligible principle nondelegation doctrine that had come of age through *Clark*, *Hampton*, and the other early nondelegation cases. In all of those cases, the Court had allowed the President broad discretion in the methods or regulations used to determine whether to permit various imports,[51] the Secretary of Agriculture broad discretion to determine the appropriate methods to keep the national parks in good condition,[52] and the Federal Radio Commission broad discretion to "equitably" allocate the different frequencies of the electromagnetic spectrum.[53]

In *Panama Refining*, the Court determined that Congress was attempting to authorize the President to set his own terms for permitting or prohibiting the flow of oil, rather than just doing so under conditions prescribed by Congress.[54] Instead of finding facts and then applying the law set forth by Congress, the President was now finding facts and then making law based upon the facts found. In many ways, *Panama Refining* was very similar to its predecessor decisions: Congress wanted the President to undertake certain actions under certain circumstances.[55] The problem with Section 9(c) was that there were no conditions or guideposts under which the President could permit or prohibit the distribution of petroleum.[56] Congress had left out the *conditions* under which its solution to the problem of falling prices of oil should be given effect, thereby improperly delegating the determination of *which conditions should exist* rather than allowing discretion to determine *that certain conditions exist*. Since making these determinations is the essence of legislative power, the Court held that § 9(c) lacked an intelligible principle and, therefore, violated the nondelegation doctrine.[57] Though the Court did not delve deeply into the analysis, notice the effect of these rules on accountability. Congress, having exempted itself completely from any duty of draftsmanship, could no longer be accountable for any legislative judgment. Instead, Congress unnecessarily enlarged the power of the President by delegating to him Congress's almost unlimited legislative power to regulate oil production and prices. Accountability was gone, separation of powers was gone, and checks-and-balances were gone. The

51. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).
52. *See* United States v. Grimaud, 220 U.S. 506 (1911).
53. *See* Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266, 285 (1933).
54. Panama Ref. Co. v. Ryan, 293 U.S. 388, 415 (1935).
55. *Id.*
56. *Id.*
57. *Id.* at 429–30.

nondelegation doctrine, it can be said, was deployed in *Panama Refining* to combat both accountability-shirking by Congress and impermissible discretionary excess by the President.

In the modern era, the Court has spent little time and energy policing the nondelegation doctrine through the intelligible principle analysis. However, in 1980, the Court had occasion to reconsider the nondelegation doctrine and ruled in *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute* (*The Benzene Case*)[58] that certain provisions of the Occupational Safety and Health Act of 1970[59] did not violate the nondelegation doctrine, but did so by utilizing a saving construction.[60] The case dealt with the complex issue of how the Occupational Safety and Health Administration (OSHA) was supposed to quantify the exposure risk of benzene for the purpose of setting permissible levels of benzene in factory air.[61] OSHA had interpreted its grant of authority to mean that it could define risk as *any* risk of any health issue, without regard to the magnitude of the risk.[62] The government argued that this language permitted OSHA's interpretation, therefore allowing it to define the risk of benzene exposure however it saw fit, define feasibility however it saw fit, and not to restrict in any way the manner by which OSHA analyzed the risk of exposure to benzene.[63] The Court reasoned that a statute permitting such broad discretion in the determination of risk could potentially be broad enough to breach the nondelegation doctrine; therefore, the statute *must* be construed to avoid the question.[64] The Court proceeded to determine that, at least, the statute required OSHA to quantify the risk of benzene exposure such that OSHA could "characterize [the risk] as significant in an understandable way."[65] In doing so, the Court purported that Congress *must* have meant the statute's language to require more searching analysis by the delegate, OSHA.

Justice Rehnquist rejected the Court's saving construction, arguing in concurrence that the statute violated the nondelegation doctrine because it failed to set forth specific instructions for balancing health risks against economic feasibility.[66] Justice Rehnquist thought that Congress simply pushed to OSHA the difficult decision of how to quantify risk and feasibility, rather than having to face the political consequences of making

58. Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst. (*The Benzene Case*), 448 U.S. 607 (1980).
59. Pub. L. No. 91-596, 84 Stat. 1590 (1970).
60. *The Benzene Case*, 448 U.S. at 641–46.
61. *Id.*
62. *Id.* at 640–41.
63. *Id.*
64. *Id.* at 641–46.
65. *The Benzene Case*, 448 U.S. 607, 641–46 (1980).
66. *Id.* at 680–82 (Rehnquist, J., concurring).

this inherently unpopular decision.[67] For Justice Rehnquist, it did not matter whether OSHA was a constitutionally appropriate recipient because Congress had not laid down an intelligible principle for OSHA's actions.[68] Justice Rehnquist clearly perceived the issue in *Benzene* as one of congressional accountability.[69] He viewed the alleged delegation in *Benzene* as an effort by Congress to pass along a difficult judgment to an agency, rather than accepting the responsibility for regulating benzene through legislation.[70] Since the legislation was incomplete as to the most difficult issue, an inference emerged that Congress must be attempting to avoid accountability for its choices by delegating them. Though resolving the case on Justice Rehnquist's terms required only the intelligible principle doctrine, he determined additionally that this delegation enlarged the power of OSHA beyond even the *President's* proper authority.[71] While it is logical that an executive agency's authority cannot be greater than that of the President above it, one easily can imagine multiple scenarios where agency authority appears to transcend both congressional *and* presidential authority. As noted above, the purpose of the nondelegation doctrine, ostensibly, is to protect the people from the expansion of overall government power through respecting checks-and-balances. It follows, then, that an agency exercising power beyond or different from that of the President would frustrate checks and balances in an obvious way.

In sum, the intelligible principle analysis has been and is the only explicit test available to the Court in deciding delegation cases. Like all those above, a nondelegation case is likely to turn on a court's interpretation of (a) what Congress wants the delegate to do and (b) whether Congress has given the delegate adequate criteria under which the delegate can decide what it supposed to do. Given the complex and often extensive nature of most regulatory agency statutes and activities, it is at least defensible that the Court has not, since *Panama Refining*, found that Congress has simply failed to supply a course of action and enough criteria for the delegate to determine when that course of action should or should not be taken.

The cases discussed in Part I represent the clearest and simplest explanation of the modern nondelegation doctrine and its evolution over time. Since the focus of this Article is the delegate, *Hampton* and *Clark* are

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67. *See id.* at 687 (Rehnquist, J., concurring) (noting that Congress must make hard choices and exercise the heart of its legislative authority).

68. *See id.* at 685–87 (Rehnquist, J., concurring) (outlining the three functions of the nondelegation doctrine that the legislature failed to meet).

69. *See id.* (Rehnquist, J., concurring) (arguing that Congress was not making law, but rather making legislators).

70. *See id.* at 687 (Rehnquist, J., concurring) (describing the delegation as an attempt by Congress to avoid making a divisive decision).

71. *The Benzene Case*, 448 U.S. 607, 687–88 (1980) (Rehnquist, J., concurring).

probably not useful here because they involve a congressional grant of authority directly to the President.[72] There is nothing necessarily improper about authorizing the exercise of the executive power by the head of the Executive Branch, since the President is accountable directly to the people for his executive decisions. Further, given the "formulaic" direction, even a more strictly enforced intelligible principle doctrine would not invalidate either case because Congress has likely exercised legislative judgment to the extent necessary to hold Congress accountable to the people, respect separation of powers, and avoid frustration of checks and balances. Finally, in neither case did the delegation expand overall government power through a bypassing of the separation of powers. As for *Benzene*, one could argue, as Justice Rehnquist did, that Congress was avoiding accountability through delegating its tough decisions to OSHA. One could also argue that delegating to OSHA more power than could even be properly delegated to the President expands overall government power.[73] Even so, as discussed below, OSHA is an agency accountable directly to the President and may be invested with enough executive authority to be less useful in demonstrating an analysis of the delegate. *Panama Refining*, on the other hand, is probably the only case representative of the strictest employment of the intelligible principle aspect of the nondelegation doctrine, but it is not germane to our purposes here for the same reason as *Benzene*. The more important insights animating this Article emerge when viewing the intelligible principle doctrine in combination with a searching analysis of the delegate. Fortunately, the Court has more than once evaluated the identity and role of the delegate itself. Indeed, a few nondelegation landmarks appear to rest on more than just a mere intelligible principle analysis.

C. Cases Discussing the Institutional Nature of the Delegate

On January 7, 1935, the nondelegation doctrine appeared as a coherent picture: If Congress wants to regulate subject to the existence of some circumstance—e.g., when a tariff should apply—it must provide specific actions to be taken under specific circumstances, leaving the executive official only the discretion to determine when some condition precedent does, in fact, exist.[74] If Congress wants to regulate the management of federal property, it may determine what its goals for the property's use are,

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72. *See generally* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892).

73. Though perhaps only in "creating" theretofore non-existent power and granting it to an executive agency.

74. *J.W. Hampton*, 276 U.S. at 406.

and leave only the discretion to determine how the property may be used[75] or distributed.[76] In these two legislative contexts, the intelligible principle analysis fits neatly enough because the simplicity of the subject matter permits a clear set of policy choices for Congress to develop and prescribe to the delegate. Furthermore, the would-be delegate always was exercising or contributing to the exercise of executive authority through the President—once again, the chief executive. With this nondelegation framework in hand, the Court gave nondelegation its second win in *A.L.A. Schechter Poultry Corp. v. United States.*[77]

Much like the Code of Fair Competition for the Petroleum Industry in *Panama Refining*,[78] the subject of *Schechter* was a Code of Fair Competition for the sale, processing, and distribution of poultry.[79] Under § 3 of NIRA, industry groups were invited to create Codes of Fair Competition, which the President could approve under certain conditions.[80] The President could approve a Code, within his discretion, if he determined that the Code had been created by industry groups "representative" of the relevant industry and the Code was not anticompetitive, monopolistic, or hostile to small business.[81] In essence, there were two delegations: one to unnamed and unknown "industry groups" and one to the President. The industry groups would determine the prospective rules of conduct, and the President would "double-check" them before signing them into law.[82] The Court divided up the potential delegations in this way and dealt with them in turn. To begin, it determined that the Codes, regardless of who made them, were legislative in nature because they prescribed rules of conduct and were apparently supposed to determine "wise and beneficent" policies for their given industries.[83] According to the Court, such prescription of general rules of conduct and determinations of the wisdom or benefits of a given policy course was undoubtedly the province of the Legislative Branch.[84] This analysis is not different from analyses undertaken in the preceding nondelegation cases: the Court expected Congress to prescribe some action to be undertaken and under which conditions those actions should be

75. United States v. Grimaud, 220 U.S. 506, 522–23 (1911).

76. Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266, 285 (1933).

77. *See generally* 295 U.S. 495, 551 (1935) (finding the delegation of legislative power invalid).

78. 293 U.S. 388, 408 (1935).

79. *Schechter*, 295 U.S. at 519.

80. *Id.* at 521–23.

81. *Id.*

82. *Id.*

83. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 535–37 (1935).

84. *Id.*

taken. However, the Court did not stop at the above intelligible principle analysis. It continued:

> But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? . . . Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.[85]

The lack of an intelligible principle troubled the *Schechter* Court, but the Court seemed at least equally as troubled by Congress offloading its authority onto these unidentified trade or industry groups.[86] As private actors, these groups were not invested with any executive or judicial power under the Constitution. Undoubtedly, the Court was concerned with how the people would hold these industry groups accountable. Since they were neither the President nor an agency invested with any executive authority, the people's power to hold these groups accountable was almost nonexistent. Under the intelligible principle analysis, Congress was not accountable for the legislative judgments, and under an institutional nature paradigm, the industry groups were not exercising any executive authority for which the people could hold the President accountable. Finally, no one harmed by the industry groups' decisions would have effective recourse because the group was insulated from significant control of either branch. It might be argued that President's "check" on the industry groups should be enough to vindicate the principle of accountability embedded within the nondelegation doctrine. Nonetheless, separation of powers and checks and balances likely would be frustrated further. Again, the essence of separation of powers and checks and balances is that the overall power of government experiences functional, as well as substantive, limits. With or without the President's imprimatur, the wisdom of a given policy course had been delegated from Congress to him and these outside groups.

The Court then continued in *Schechter* to evaluate the authority vested in the President. Returning to its analysis of the two conditions under which the President was to accept, reject, or alter a proffered Code, the Court determined that those two conditions in no way limited the scope of the President's discretion.[87] Again, and just like in *Panama Refining*, the people could not have effective recourse against Congress, and overall government power was enlarged improperly.[88]

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85. *See id.* at 537.
86. *Id.*
87. *See id.* at 538–39.
88. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

Carter v. Carter Coal Co.[89] is the perhaps most direct Supreme Court case on the nature of the delegate.[90] There, the Bituminous Coal Conservation Act of 1935 (the Act) directed "the producers of more than two-thirds of the annual national tonnage production" of coal and employers of "more than one-half of the mine workers employed" to set wages and hours for the entire coal mining industry.[91] The Act, then, directed these unnamed, private sector coal mining entities to make important and far-reaching rules for all of their competitors. This, concluded the Court, "is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body."[92] Interestingly, the *Carter* Court did not even reference the intelligible principle doctrine, nor did it even discuss the intelligibility of the delegation.[93] It simply concluded, "The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this Court which foreclose the question."[94] Like *Schechter*, the Court simply refused to allow a non-governmental delegate to exercise any regulatory authority over its competitors. Note that in *Carter*, the Court rested its holding in part on the Due Process Clause of the Fifth Amendment.[95] While this is interesting as a historical matter, procedural due process has not been a common avenue for nondelegation challenges to statutes. Though this may be a fruitful question for future debate, the potential that delegation implicates principles of procedural due process is beyond the scope of this Article.

In *Yakus v. United States*,[96] the Court took occasion to determine whether Congress's vesting of price-fixing authority in an Office of Price Administration (OPA) violated the nondelegation doctrine.[97] During World War II, Congress wished to ensure that there was no price-fixing malfeasance taking place that might further burden Americans during wartime.[98] As such, the OPA was to set prices according to a number of factors, including pre-war price levels and other factors that might require

89. 298 U.S. 238 (1936).

90. *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (highlighting that Congress delegated to a party "not even . . . presumptively disinterested").

91. *See id.* at 310.

92. *Id.* at 310–11.

93. *See id.* at 311 (focusing on the delegation of a government function to private persons).

94. *Id.* at 311–12 (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935)).

95. *See id.* at 311 (1936); *see also* U.S. Const. amend. V.

96. 321 U.S. 414 (1944).

97. *See id.* at 418–20.

98. *See id.* at 419–20.

an increase or decrease in prices for various commodities during the war.[99] Applying the intelligible principle analysis, the Court determined that Congress had prescribed a certain remedy or prophylaxis (the setting of prices to stop or avoid inflation) and had provided a formula for the OPA to use when determining exactly how to deploy Congress's prescription.[100] But, once again, the Court did not stop at merely determining that the intelligible principle analysis had been satisfied. Instead, it distinguished *Schechter* on the grounds that, in that case, not only had the intelligible principle doctrine not been met, but Congress had sought to vest the authority to create prospective rules of conduct in private individuals who were not "public official[s] responsible to Congress or the Executive. . . ."[101] In essence, the Court was applying the combined accountability principle discussed above. In *Yakus*, the Court determined that the intelligible principle was met and, therefore, that Congress could be held accountable for legislative judgments. Furthermore, the delegate was properly invested with executive powers and, thus, accountable to the President. As such, a person harmed by the OPA's price decisions would have enough recourse against accountable elected officials for whatever harm these government actions caused. Perhaps this seems coherent, or perhaps it does not. Either way, the Court's willingness to consider not only what Congress said, but also to whom it spoke, is a net positive for the limitation of government power. In fact, it provides a framework much more useful than arguing over something as subjective as intelligibility.

As for the modern era, there is one lone dissent that addresses explicitly the nature and location of the delegate.[102] In 1989, the Court decided *Mistretta v. United States*, which involved the work of the United States Sentencing Commission (Sentencing Commission).[103] The Sentencing Reform and Comprehensive Crime Control Act of 1984[104] created the Sentencing Commission to determine sentences for various federal crimes.[105] In *Mistretta*, the majority dusted off the tried-and-true precedents from *Clark* to *Yakus*, applying the traditional intelligible principle analysis.[106] The Court determined that Congress's legislative goal was to sentence people to the proper amount of time in prison based on certain enumerated purposes for imprisonment.[107] After considering the specific instructions

99. *See id.* at 420.
100. *See id.* at 423.
101. *Id.* at 424.
102. *See* Mistretta v. United States, 488 U.S. 361, 413–27 (1989) (Scalia, J., dissenting).
103. *See id.* at 362.
104. *See* Pub. L. 98-473, § 991, 98 Stat 1837, 2017 (1984) (codified at 28 U.S.C § 991).
105. *See Mistretta*, 488 U.S. at 368–69.
106. *Id.* at 371–74.
107. *See id.* at 367 (citing 18 U.S.C. § 3553(a)(2) (2012)).

Congress had given to the Sentencing Commission, the Court held that the nondelegation doctrine did not bar the discretion Congress had granted.[108]

The Court rested its holding exclusively on the intelligible principle analysis, concluding that Congress had indeed cabined the Sentencing Commission's discretion by stating Congress's goal for the Commission and by declaring current average sentences as a starting point.[109] However, when compared with *Schechter* and *Yakus*, the Court's opinion was missing something. Justice Scalia saw the missing piece, dissenting on the grounds that the *delegate*, as opposed to merely the *delegation*, rendered unconstitutional the enabling legislative grant to the Sentencing Commission.[110] Indeed, Justice Scalia even states the instructions Congress gave to the Sentencing Commission were intelligible on their face—they give the delegate an idea of what it is supposed to do.[111] The problem, according to Justice Scalia, was that Congress was intelligibly telling the Sentencing Commission to "*make law*."[112] Justice Scalia's explanation of the doctrine can be summarized by a few words from his opinion:

> The whole theory of lawful congressional 'delegation' is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action. . . .[113]

In short, Justice Scalia's analysis of the nondelegation doctrine is not only whether or not Congress has provided any constraints on the discretion of the delegate, but also on the nature of the delegate.[114] At the very least, Justice Scalia's framework ties the discretion of the delegate to the exercise of an *independent* constitutional power. Justice Scalia believed that because the Sentencing Commission has no executive or judicial authority, nor is it exercising the authority of any actor or branch that does, that its instructions from Congress, intelligible though they were, might only fairly be instructions to make law.[115] Justice Scalia might have argued that a stronger version of the intelligible principle doctrine was not met. Especially in light of the accountability of Congress, Justice Scalia could have cited Justice Rehnquist's dissent in *Benzene* since Congress was leaving the difficult decision of deciding minimum and maximum sentences to an

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108. *See* Mistretta v. United States, 488 U.S. 361, 374 (1989).
109. *Id.* at 372–75.
110. *See id.* at 413–22 (Scalia, J., dissenting).
111. *Id.* at 416 (Scalia, J., dissenting).
112. *Id.* at 417 (Scalia, J., dissenting) (emphasis added).
113. *Id.* at 417 (Scalia, J., dissenting) (emphasis omitted).
114. *See* Mistretta v. United States, 488 U.S. 361, 417–22 (1989) (Scalia, J., dissenting). This concept will be discussed further in Part II, *infra*.
115. *See id.* at 420 (Scalia, J., dissenting).

unaccountable delegate, but he chose to discuss the institutional pedigree of the Sentencing Commission.[116]

In 2013, while this Article languished in draft form, the U.S. Court of Appeals for the District of Columbia Circuit decided a case somewhat similar to *Schechter* and *Carter*, *Ass'n of American Railroads v. U.S. Department of Transportation*.[117] The D.C. Circuit concluded that a delegation of regulatory authority to the National Railroad Passenger Corp. (commonly known as AMTRAK) was unconstitutional on nondelegation grounds.[118] The D.C. Circuit based its conclusion substantially on an analysis of whether AMTRAK was actually a government agency.[119] Interestingly, the D.C. Circuit concluded explicitly that "delegating the government's powers to private parties saps our political system of democratic accountability."[120] On the other hand, the D.C. Circuit noted that delegation to private entities is "particularly perilous," since private entities are seeking private gain rather than pursuing the public interest.[121]

The Supreme Court, however, reversed the D.C. Circuit 9–0.[122] At this point, one might wonder whether nondelegation really has breathed its last. Though the author has little choice, he must disagree. The entire issue with respect to delegation turned upon whether AMTRAK was actually a government agency. The Court, then, reversed the D.C. Circuit on the grounds that AMTRAK *was* a government agency. Such, according to the Court, was enough to avoid the delegate-based issues emerging from *Schechter* and *Carter*. With just these three cases in mind, it might be tempting to suggest that the delegate portion of the nondelegation doctrine merely prohibits Congress from delegating government power outside the government itself. As a practical matter, perhaps this is the case. This again raises the question at the heart of this Article: What if the courts had a more robust doctrine to apply? Could the next case go the other way?

Schechter, *Carter*, *Yakus*, *Mistretta*, and *Ass'on of American Railroads* raised serious and specific questions about the nature of the delegate itself.[123] In *Schechter* and *Carter*, the Court spilled significant ink decrying the delegation

116. *Id.*; *see also Benzene Case*, 448 U.S. 607 (1980). It should be noted, however, that Justice Rehnquist himself voted in the majority in *Mistretta*.

117. *See* 721 F.3d 666 (D.C. Cir. 2013).

118. *Id.* at 668.

119. *Id.* at 674–76.

120. *Id.* at 675.

121. *Id.*

122. *See* U.S. Dep't of Transp. (DOT) v. Ass'n of Am. R.Rs., 135 S. Ct. 1225 (2015).

123. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (industry groups); *see also* Mistretta v. United States, 488 U.S. 361, 420 (1989) (Scalia, J., dissenting) (Sentencing Commission).

of policymaking authority to outside, non-governmental entities.[124] Indeed, the Court held that Congress's attempt to utilize such a delegate was "unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."[125] In *Yakus*, too, the Court made mention of the fact that the *Schechter* delegates were extra-governmental and "not . . . responsible" to Congress or the President.[126] In *Mistretta*, Justice Scalia conceded that Congress had articulated an intelligible principle, but apparently would have held that the Sentencing Commission's absolute lack of executive or judicial power meant that it was exercising improperly delegated legislative power.[127] Justice Scalia's argument rested upon the inherent powers of the President and the Judiciary. Those powers are independently constitutional, and, in the case of executive delegates, are connected to the democratically accountable President. The "junior varsity Congress" that so bedeviled Justice Scalia was not accountable to any voters, like the real Congress.[128] Furthermore, the Sentencing Commission was not properly accountable to Congress or the President, who are properly accountable to criminal defendants and citizens concerned with how to properly punish (or rehabilitate) criminals. Finally, *Ass'n of American Railroads* turned entirely upon whether AMTRAK was a private company or a government agency. If it was a government agency, it was more accountable than the D.C. Circuit might have believed.

Surely, in light of this set of cases stretching across the past eighty years to the present, the institutional nature of the delegate has some bearing on whether legislative power has been improperly delegated. Nonetheless, one could fairly counter that *Schechter* was a special case because of the extremely broad delegation and that it—not to mention *Panama Refining*—should be read in light of the contentious fighting between the President and the Court over the New Deal. Furthermore, Justice Scalia's dissent in *Mistretta* has never caught any traction whatsoever.[129] And, of course, even the D.C. Circuit concluded, and the Supreme Court "agreed," that were AMTRAK a public, rather than private, entity, "the regulatory power it

124. *See Schechter*, 295 U.S. at 537.

125. *Id.*

126. Yakus v. United States, 321 U.S. 414, 424 (1944).

127. See Mistretta, 488 U.S. at 413–14 (Scalia, J., dissenting).

128. Id. at 427 (Scalia, J., dissenting).

129. Justice Scalia also delivered the majority opinion in *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457 (2001), holding that Congress had not delegated legislative authority to the Environmental Protection Agency (EPA) by directing them to set ambient air quality standards. *Id.* at 486. However, Justice Scalia may have simply thought that the EPA had been invested with proper executive authority under the control of the President, and was therefore accountable to both.

wields . . . is of no constitutional moment."[130] Arguably, though, there is still good reason to believe that the Court should be mindful of *who* is being authorized, as opposed to just *how* Congress frames that authorization. In fact, that is the very gulf that lies between the intelligible principle analysis and the "private delegate" cases—if democratic accountability and government power are issues in private delegate cases, why should they not be considered in public delegate challenges?

II. JUDICIAL ENFORCEMENT AND THE MODERN POLICY OF THE NONDELEGATION DOCTRINE

Judicial enforcement of any doctrine hinges on a court's ability to apply the doctrine with reasonable certainty and accuracy to any given set of facts. American public law is filled with complex multipart tests, rules, standards, and other judicially created decisional techniques. Many of these doctrines apply to specific types of state or federal law in fact-intensive circumstances that judges can easily discern.[131] There is no reason the nondelegation doctrine cannot have its own two-part test: one part testing whether Congress has provided an intelligible principle and, therefore, become accountable for its legislative judgments; and another part testing whether Congress activated some aspect of the delegate's executive or judicial authority, for which it is accountable to Congress and the President, who are in turn accountable directly to the people. This Part will discuss the heretofore fictional "Federal Department of Motor Vehicles," (FDMV) in hopes that the thought experiment will illustrate the limits of judicial capacity with respect to the intelligible principle doctrine alone and the normative judgment that a stronger nondelegation doctrine that includes an analysis of the delegate is, in itself, sound policy.

A. The Story of the FDMV and the Limits on Judicial Capacity

Imagine a new congressional initiative to license and regulate all drivers on America's roadways. Such a statute would authorize a FDMV to oversee or assist the President in overseeing driver licensing and might appear in three forms. In the first, Congress announces that age and driving proficiency are the two criteria for licensing drivers: (1) no one under sixteen may drive; and (2) no one who cannot demonstrate the use of an accelerator, brake, turn signal and windshield wiper will get a license. Congress then directs the FDMV to assist the President in granting licenses

130. Ass'n of Am. R.Rs. v. DOT, 721 F.3d 666, 674 (D.C. Cir. 2013).

131. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (containing a multi-part test for discerning whether a government action violates the Establishment Clause of the First Amendment).

to those who meet Congress's criteria. In the second, Congress might announce that age and driving proficiency are to be of utmost importance in licensing, authorizing the FDMV to set a driving age and proficiency in the "public interest, convenience and necessity."[132] In the third and most troublesome case, Congress might authorize the creation of a Licensing Standards Board (LSB) within, but not under the control of, the FDMV to set standards for safe and responsible driving that are not unduly burdensome on drivers whereby the LSB is to first consider the licensing requirements in place among the several states.[133] The FDMV must grant licenses under whatever conditions the LSB prescribes, and neither the FMDV nor the President may alter them in any way.

The first case gracefully hurdles the intelligible principle doctrine, leaving nothing to the FDMV but the determination of how to organize the queue for taking the test.[134] The second case, while somewhat concerning, climbs with little effort over even the early cases because Congress has cabined the FDMV's discretion to answering two questions. As to the third and most troublesome case, it might be tempting to argue that the Court should just strike it down on intelligible principle grounds,[135] but consider whether or not the above "delegation" is truly unintelligible. Surely, it could be worse. At least Congress specified "safe," "responsible," and "not unduly burdensome." Indeed, many proponents of broad delegation would argue that this is exactly the type of job at which expert administrators are best; they can perform research, study the driving laws of the several states, and determine how best to operate a scheme, undoubtedly based on the "best available evidence."

But for judges, the intelligible principle doctrine alone leaves them very little with which to work, whether interpreting the statute to avoid the Constitution or in deciding whether to invalidate the statute on intelligible principle grounds.[136] When the delegate has significant room to exercise discretion and very little statutory limitation, it becomes clear that the

132. *Cf.* Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266, 274 (1933).

133. *Cf.* Mistretta v. United States, 488 U.S. 361 (1989) (upholding grant to the Sentencing Commission to determine the appropriate sentences with respect to various congressional goals).

134. I attribute this example to Professor Stuart Benjamin, as this is his example of a "detail" that executive agencies are clearly permitted to "fill in" to a broader statutory scheme.

135. Indeed, Professors Schoenbrod, Lawson, and other supporters of "reviving" the "old" nondelegation doctrine might very well support this. *See* SCHOENBROD, *supra* note 5; Lawson, *supra* note 5. In principle, the author may as well.

136. *See Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting) ("The debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.").

discretion it exercises must be related to independent constitutional authority. If, like the LSB, the delegate has only the discretion to make rules but no power to execute them, it is an unaccountable "junior-varsity Congress,"[137] exercising legislative authority without the difficulty of navigating the legislative process and exercising no executive authority for which the President could be held accountable.

B. The Courts and the Delegate

Politically accountable representatives of the people should enact policy that affects individual conduct. That way, if the people do not like the regulatory policies, they can remove the rulemakers at the ballot box. If, on the other hand, the rulemaker is wholly unconnected from a democratically accountable person, he or she can make rules with less—or no—regard for the will of the people. Likewise, the intricate system of separation of powers and checks-and-balances falls apart when the rulemaker is not subject to explicit constitutional limitations on its own powers or through rivalry with other branches. By explicitly analyzing the institutional nature and pedigree of the delegate, courts can better police the constitutional principle of nondelegation.

The intelligible principle doctrine approaches the question of accountability through what amounts to a reduction analysis. If we subtract all the discretion left to the delegate, whoever it is, we should expect to see all of the "most important" decisions resolved in legislation. However, as mentioned earlier, the intelligible principle doctrine does not always apply perfectly to all sets of facts. As such, sometimes the Court might see only a few big decisions made by Congress, but not see so few that it can justify the employment of the nondelegation doctrine. The doctrine approaches the question of separation of powers and checks-and-balances in an even less valuable way; that is, the Court will not disturb delegation where someone from the government is the delegate.[138] The Court, then, needs to take a closer look at the delegate and ask, "Who is making the rest of the decisions?"

On the delegate side of the equation, policymaking discretion should be limited to what is necessary to carry out the major policy preferences Congress enunciated. When an executive delegate with clear executive authority is making policy in the process of carrying out Congress's major

137. *Id.* at 427 (Scalia, J., dissenting).

138. Because this arguably violates standard separation of powers doctrine—see, for example, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)—it may be important to note that the nondelegation doctrine is an even worse tool for enforcing separation of powers directly.

policy preferences, a court can be generally confident that the policymaking is ancillary to the delegate's executive duties and not merely legislative. On the other hand, if the delegate is left only to answer those policy questions and is entirely or largely separated from the execution of any policy, then the Court could hold more confidently that the nondelegation principle has been violated.

C. Why Should Anyone Care?

It is a familiar refrain in constitutional law that the twenty-first century is not the late eighteenth century of the Constitution's framers. Today's problems are bigger, broader, and more complex, and, in any case, it makes more sense for government to "work" for the people than to adhere to rigid formalities.[139] In his unambiguously titled 1985 work on the matter, Jerry Mashaw argues that administrators should make political decisions.[140] Mashaw's argument essentially represents any modern case for administrative governance: administrators will simply govern society more efficiently by reducing "decision, agency, and error costs."[141] Though Mashaw apparently believes that this is true of *all* delegation, he further argues that at least delegation delivers more cost savings than whatever costs it may impose.[142]

At bottom, democratic self-governance in a constitutional republic such as the United States is not all about the potential empirical superiority of one form of decisionmaking over another. Even if broad delegations are good for "efficient, speedy pursuit of government's goals,"[143] it undermines important constitutional protections of democratic accountability and limitations on power. What if, perhaps, the government's goals are different than those of the people? The Constitution's legislative process carefully arranged the federal legislative powers to protect accountability to the entirety of the people.[144] The Constitution also set the powers in rivalry with one another so as to require substantial cooperation when making

139. *See* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21 (1998) ("Formalism might be associated with bright-line rules that seek to place determinate, readily enforceable limits on public actors. Functionalism . . . might be associated with . . . seek[ing] to provide public actors with greater flexibility.").

140. Mashaw, *supra* note 4.

141. *Id.* at 92.

142. *Id.* at 92–93.

143. David Schoenbrod, *The Nondelegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1226 (1985).

144. Some describe this as protection against "factions." *See* David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 371 (1987).

rules that affect the lives of many. When Congress delegates its legislative authority, the protections of the legislative process are diluted and with it the voice of all of the people. The essence of a system of governance is discretion; this governmental discretion, in the abstract, can be exercised for the common good or for the good of whomever the government may want to benefit. Remove the discretion from a broader set of accountable parties—that is, Congress or the President—and place it in the hands of unaccountable administrators, the larger populace loses that voice.[145] Furthermore, total government power expands beyond the checks-and-balances intended to constrain it.

Nonetheless, the author concedes that this issue of accountability is relatively abstract and it is not necessarily apparent that a stronger nondelegation doctrine is the answer. However, the author posits that for anyone serious about constitutional self-government, a stronger judicial nondelegation doctrine is a necessary component. As one commentator put it, "The demise of the nondelegation doctrine . . . allows the national government's . . . legislative powers to be exercised by administrative agencies," rather than by an accountable Congress.[146] As the next Part will show, courts can (and should) do more to police the nondelegation doctrine and restore some of the lost accountability that has come with its dormancy.

III. THE FINANCIAL STABILITY OVERSIGHT COUNCIL AND THE CONSUMER FINANCIAL PROTECTION BUREAU

As should be clear by this point, the intelligible principle test is, by nature, difficult to apply. It is simple in the sense that it represents only one question a court must ask, but it is complex in that intelligibility is somewhat hard to define over wide and varying circumstances.[147] This need not be the end of the story, however. Previous courts have left a handful of proverbial breadcrumbs: the institutional nature of the delegate discussed above. This Part will paint in broad strokes a new framework for analyzing the institutional nature of the delegate and then apply the new framework to the CFPB and the FSOC, a pair of new species in the administrative zoo given life in the Dodd-Frank Wall Street Reform and

145. *See* Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 297–300 (1987) (discussing the "point of discretion" that has been relocated from Congress to administrators).

146. Lawson, *supra* note 5, at 1241.

147. Not to mention that the very word "intelligible" suggests "unintelligibility" as its opposite. Despite any shortcomings or unpopularity of Congress, it would be rather difficult to describe any given piece of its handiwork as "unintelligible."

Consumer Protection Act (Dodd-Frank).[148]

A. The Institutional Nature Paradigm

As discussed above, the *Schechter* and *Yakus* courts, along with Justice Scalia's dissent in *Mistretta*, all express discomfort with a delegate who possesses little or no independent authority or any government power at all. Such a delegate would be neither executive nor judicial, although it could be said to reside in either branch.[149] Let us return to our example regarding federal driver licensing above in order to analyze the nature of the third delegate, which is not like the other two. The first delegate is ultimately and explicitly the president; the FDMV is only there to assist him in carrying out his duty to hand out licenses. The second delegate is the FDMV, which, like some other well-known agencies, has significant executive authority, such as handing out licenses and testing drivers. Indeed, many congressional directions to the Environmental Protection Agency and agencies of its kind are not only intelligible but also quite direct; as such, some policymaking will be necessary in order to carry out Congress's specific demands. It simply carries out the directions that Congress has required it to perform, much like the President would were he the explicit delegate.[150] The third, though, is the ugly duckling; it does not exercise any executive power over driver licensing—it does not even decide how to arrange the queue. The LSB merely determines all the relevant standards for granting a driver license, and the President or FDMV must grant licenses to whoever meets the LSB's criteria. Nonetheless, the grant of authority to promote "safe and reasonable driving" and to "look to the licensing standards of the several states" are probably enough to wiggle over the intelligible principle doctrine in its current form.[151] However, if the Court critically analyzed the institutional pedigree of the LSB, it could fairly conclude that this delegate was doing nothing more than exercising *legislative* authority under an improper delegation. Indeed, since the LSB is completely divorced from any inherent executive (or judicial) authority, it might only be said to be legislating.

Comparing and contrasting the FDMV and the LSB should bring the institutional nature paradigm to life. The FDMV, as described above, is a

148. 12 U.S.C. §§ 5301–641 (2012).

149. *Cf.* Mistretta v. United States, 488 U.S. 361, 368–70 (1989) (noting that, under 28 U.S.C. § 991(a) (2012), the Sentencing Commission is in the Judicial Branch).

150. *See, e.g.*, J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 402 (1928) (describing the role of administrators in "assist[ing] the President" in carrying out his statutory duties).

151. *See, e.g.*, *Mistretta*, 488 U.S. at 407–08 (stating that separation of powers anticipates communication between the branches on matters of overlapping interest).

"classical" executive agency. Its organic statute directs it to do very "executive" things. It is charged with administering the testing and licensing of millions of drivers in the United States. As mentioned above, it must test people, print the licenses, and pass them out. The LSB, on the other hand, is directed only to sit in a room and make rules. It does not hand out licenses, it does not test people, and it does not organize local DMV offices or any other "executive" activity. Like in *Mistretta*, the intelligible principle doctrine alone would not "catch" the LSB because the bar it raises is so low.[152] However, if a court critically examined the nature of the delegate and its statutory purpose, it would find nothing to execute or adjudicate. It would only be weighing certain policy choices and making rules that govern individual conduct. As such, it is legislating, a power which is reserved only to Congress.

At this juncture, some might question the need for putting a stop to the LSB. After all, the LSB is within the government[153] and probably has a number of competitive advantages over a traditional executive agency in setting licensing standards.[154] Even better, this would allow the FDMV to use its resources on other prerogatives. As appealing as those things are, the LSB is acting as a "junior-varsity Congress," making legislative rules but without having to face constituents or the public recording of their decisionmaking process.[155] In addition, the LSB is not even exercising executive authority under the control of the President; in fact, it is actually *directing* the traditionally executive actors. This is undoubtedly the province of Congress, the body who is accountable to the people for its directions. Since the LSB's executive function is non-existent, it is not accountable to the people through the President. Finally, if a citizen is denied a license due to the LSB's ruling, he cannot hope to seek recourse, since the LSB's accountability apparently is to no one.

B. A New Analytical Framework

By this point, it is clearly understood that the intelligible principle is about how much guidance Congress has given the delegate, or, put another way, how much Congress has cabined the delegate's discretion. The institutional nature paradigm above would measure how much executive or

152. *Id.*

153. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 423 (1944) (acknowledging that the congressional exercise of power and the formation of administrative guidelines for the Office of Price Administration established it as part of the government).

154. *See, e.g.*, Schoenbrod, *supra* note 144, at 371–85.

155. *See* Mistretta v. United States, 488 U.S. 361, 426–27 (1989) (Scalia, J., dissenting) (questioning the constitutionality of a non-congressional body having no governmental powers other than promulgating rules with the force of law).

judicial authority the delegate possesses independent of the specific policy-related authority granted by Congress. When viewed through the prism of delegation plus delegate, as opposed delegation only, the nondelegation test becomes easier to manage. Furthermore, this addition to the test does not upset the current regulatory apple cart in a drastic or extreme way. Consider the following framework, described in terms of different ordered pair scenarios.

In Scenario I, the guidance from Congress is high and the delegate is the President or a delegate with well-established executive power.[156] This is the scenario to which "no valid objection can be made."[157] Indeed, this is exactly what most people would desire from Congress. In Scenario II, Congress has again provided a relatively high degree of guidance, but has left all of the guidance to a delegate with little or no independent power. The relevant question might become "how is a public delegate with no independent power substantially different than a private delegate with no government power?"[158] Scenario III is merely the inverse of Scenario II: a delegate with well-defined executive or judicial power and with a very broad grant of authority. Finally, Scenario IV involves a broad and ambiguous grant of authority to a delegate with little or no ancillary power.

With this framework in hand, a court could apply a two-part test that includes the traditional intelligible principle doctrine and the new institutional nature paradigm. Scenario I merits little discussion since it largely represents a well-functioning system of governance as envisioned by the formal structure of the Constitution. Congress is accountable for the legislative decisions that it made, the President is accountable for the executive decisions that he or she made, and the citizen knows who to blame for any adverse consequences. Scenario II could be invalidated under the institutional nature paradigm because the delegate has no executive authority. If the delegate has no authority to do anything but study evidence and set policy, then the Court could hold that it is making law, unaccountable to the people. Scenario III presents a circumstance where the Court would probably not invalidate the law as an unconstitutional delegation because the Court could look at the executive role and powers of the delegate and determine that the agency's

156. *E.g.*, Mashaw, *supra* note 4, at 93–94 (stating that the EPA has plenary enforcement authority to execute Congress's environmental enactments).

157. Field v. Clark, 143 U.S. 649, 694 (1892).

158. *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935); Ass'n of Am. R.Rs. v. DOT, 721 F.3d 666, 675 (D.C. Cir. 2013), *rev'd*, DOT v. Ass'n of Am. RRs., 135 S.Ct. 1225 (2015) (discussing the unconstitutionality of a congressional delegation of legislative power to private entities).

policymaking was connected with the enforcement and implementation powers of the delegate. Scenario IV, though, is exactly the circumstance in which the Court currently has to choose between upsetting the apple cart by expanding the intelligible principle doctrine again or simply allowing a broad delegation to stand. If the Court had another question to ask, it could invalidate the law because the delegate is not exercising executive authority and, therefore, must be exercising legislative authority committed to Congress.

In short, this test gives courts another avenue to enforce the nondelegation doctrine. If Congress grants significant powers to a given delegate, the Court need not only apply the weaker intelligible principle doctrine; it can investigate and analyze the nature of the delegate to determine whether or not Congress has improperly delegated its legislative authority. Furthermore, in evaluating the delegate and what executive or judicial power it may also rightfully possess, it can better determine which powers Congress is directing it to exercise.

C. Applying the New Test: The Financial Stability Oversight Council and the Consumer Financial Protection Bureau

At the time of this writing, litigants have already initiated an action challenging the constitutionality of Dodd-Frank on nondelegation grounds.[159] The primary challenges are to the FSOC and the CFPB. The case is the perfect opportunity to illuminate the usefulness of the new test, as well as any potential weaknesses in the construction or application of the test.

The FSOC is a new standing committee that is central to Dodd-Frank's regulatory scheme.[160] The committee consists of a group of heads of other federal financial regulatory agencies, and they sit on the FSOC in their capacities as heads of the other agencies.[161] The FSOC's primary function is "to identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, inter-connected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace."[162] However, the peculiar aspect of the FSOC's authority is that it does not have any independent enforcement authority; it can only recommend and direct other financial regulatory agencies to act in

159. *See* State Nat'l Bank of Big Spring v. Lew, 795 F.3d 48 (D.C. Cir. 2015).
160. 12 U.S.C. § 5321 (2012).
161. *Id.*
162. *Id.* § 5322(a)(1)(A).

accordance with its determinations.[163] Furthermore, it has the authority to designate systemically important financial institutions and recommend that the relevant regulatory authorities regulate these institutions.[164] In summary, the FSOC is charged with defining financial stability, identifying risks to financial stability, and then recommending solutions to those risks to the other regulatory agencies charged with enforcing financial law.

The CFPB is somewhat different in that it is more or less a new organ for exercising all previously existing consumer protection enforcement authority of financial regulatory agencies.[165] Its primary grant of authority is "to implement and, where applicable, enforce Federal consumer financial law consistently for . . . ensuring" access to "fair, transparent, and competitive" financial markets.[166] The CFPB has significant rulemaking authority that it exercises according to factors and considerations, including cost-benefit analysis to consumers of financial products.[167]

The CFPB has significant enforcement, investigation, and executive authority, therefore functioning similarly to other regulatory agencies. Indeed, as mentioned above, the CFPB is essentially a new owner of significant pre-existing financial regulatory authority, along with a huge new grant of almost plenary authority over financial regulation.

In applying the new test articulated above, we begin with the FSOC. Surely, the instruction to merely assess systemic risk across the entire financial economy and decide which entities are systemically important is an extremely broad grant with very little guidance. Nonetheless, one can almost hear a court scratching its head over how to apply the intelligible principle doctrine alone to the FSOC and questioning whether it really wants to interfere with this new regulatory methodology. However, since the intelligible principle question is hanging in the balance, our new test permits us to turn to the institutional nature of the FSOC. Though the FSOC is comprised of individuals who exercise well-established executive authority for their own agencies, the FSOC itself has little. It is merely a roving entity that defines risks to the financial system and recommends ways to mitigate those risks—that is, it recommends ways to regulate the system to the other regulatory agencies.[168] Clearly, the FSOC's policymaking function is "divorced" from any executive power.[169] Its

163. *Id.* §§ 5322(a)(2)(J)–(K).
164. *Id.*
165. § 5491(a).
166. 12 U.S.C. § 5511(a) (2012).
167. *Id.* § 5512(a)–(b)(2)(A)(ii).
168. *Id.* § 5322.
169. *See* Mistretta v. United States, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting) (stating that any delegation of legislative power is unacceptable).

policymaking authority is not merely necessary to carry out any other important congressional policy directive; its authority *is* Congress's directive. Put somewhat differently, the FSOC is ultimately acting like a miniature legislature. It is making policy judgments and directing other executive agencies to execute those choices. As such, a court faced with analyzing the FSOC under this Article's new nondelegation analysis could hold fairly, and with substantial basis, that the absolute non-existence of executive authority the FSOC possesses violates the nondelegation doctrine. After this assessment, it is clear that the FSOC is not executive and accountable to the President and can only be thought to be making rules and determinations constitutionally committed to Congress.

The CFPB, on the other hand, is closer. In fact, it presents itself more as a Scenario III case. Congress has given very little in the way of real guidance; it has only directed the CFPB to consider a few vague factors such as the "reduction of access by consumers" and the effect of regulations on "consumers in rural areas."[170] However, the CFPB is granted significant authority to enforce and execute both new and preexisting consumer protection laws.[171] On one hand, the CFPB's grant of rulemaking authority and factors to look for are far from the typical grant of rulemaking authority to agencies with plenary executive powers.[172] Indeed, the CFPB's primary function is not making financial regulatory policy alone, but executing and enforcing Congress's past and present declarations of financial regulatory policy. This compare-and-contrast between the CFPB and FSOC are very similar to the above discussion of the FDMV and LSB. One delegate is charged with carrying out or administering a statutory scheme, which necessitates certain limited policymaking. The other delegate is charged with making rules for another entity, which will then carry out its instructions. The former is acceptable under this new formulation of the nondelegation doctrine, while the latter is Congress's constitutional duty.

CONCLUSION

The nondelegation doctrine has had a long, peculiar, and storied life. It may or may not actually be dead, but even if it is, it may require but one missing piece to bring it back to life. This Article's new formulation of the nondelegation doctrine and new analytical test for applying it would offer

170. 12 U.S.C. § 5512(b)(2)(A).

171. *Id.* § 5512(a)–(b)(1).

172. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 465 (2001); *The Benzene Case*, 448 U.S. 607, 611–15 (1980) (demonstrating that the broad grant of powers to an agency are often found in statutory language).

courts and litigants an opportunity to police more effectively the line between legislative power, executive power, and judicial power, while not necessarily disturbing some of the more popular and well-established frameworks for administrative government. Again, the purpose of this Article was to determine whether or not the nondelegation doctrine could be reformulated in such a way that a judge could actually rely on it, not an attempt to dismantle the administrative state through the courts. Ultimately, time will tell whether the courts have any interest in utilizing a true nondelegation doctrine, or whether they are content with applying it in its hypothesized canonical form or with the status quo of non-enforcement. Either way, the constitutional principles of separation of powers and nondelegation are fundamental to the protection of ordered liberty in our constitutional system. But these protections are in jeopardy without robust, coherent, and consistent judicial application of the nondelegation doctrine. To give effect to the nondelegation doctrine, courts should begin analyzing *who* is getting to exercise grants of authority from Congress, instead of just whether Congress has granted authority intelligibly.