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Defining Lawmaking Power

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INTRODUCTION

What *is* the constitutional lawmaking power? In *Department of Transportation v. Association of American Railroads*,[1] the Justices expressed a spectrum of tolerance for legislative delegations: banning the exercise of any lawmaking power by an entity other than Congress on one end, and condoning legislative delegations to agencies but not to the private sector on the other.[2] Whether Congress's quintessential constitutional role—lawmaking—is exclusively for Congress has enormous practical as well as theoretical implications.

Association of American Railroads involved a challenge to legislation authorizing Amtrak to jointly formulate with a federal agency "metrics and standards" for the performance and scheduling of passenger railroad services.[3] The Court remanded to the Court of Appeals for the D.C. Circuit a number of issues of constitutional importance, including whether such metrics and standards "reflect the exercise of 'rulemaking' authority or permit Amtrak to 'regulate other private entities'" so as to trigger nondelegation concerns.[4]

Yet the question articulated for remand merely begs another one: how *should* constitutional lawmaking power be defined? In his concurrence, Justice Alito characterized the ban on congressional delegations of legislative authority as existing to ensure "accountability checkpoints."[5] At the same time, he acknowledged that agencies function under the guise of executive power "in ways that resemble lawmaking."[6] Justice Thomas wrote separately to define "certain core functions that require the exercise of legislative power and that only Congress can perform" as including the

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1. 135 S. Ct. 1225 (2015).
2. *Id.* at 1228.
3. *Id.*
4. *Id.* at 1234.
5. *Id.* at 1237 (Alito, J., concurring).
6. *Id.*

Blackstonian definition of "law," to wit, "the formulation of generally applicable rules of private conduct."[7]

The difference between Justice Alito's definition of lawmaking and that of Justice Thomas is of immense constitutional significance. If only Congress can formulate generally applicable rules of private conduct, the Code of Federal Regulations is unconstitutional. Justice Thomas's definition would accordingly require the dismantling of the federal regulatory state.[8] For his part, Justice Alito would draw the constitutional divide at the illusory line between the public and private sectors.[9] Whereas "the other branches of Government have vested powers of their own that can be used in ways that resemble lawmaking," he wrote, "[w]hen it comes to private entities . . . there is not even a fig leaf of constitutional justification."[10] Justice Alito's definition of "legislative Powers"[11] would preserve the administrative state but draw a sharper boundary around the kind of power that must be exercised by politically accountable actors.[12] It calls into question the constitutionality of the federal government's practice of outsourcing rulemaking functions to private contractors.

The competing opinions in *Association of American Railroads* reinvigorate a longstanding debate that goes to the heart of the separation of powers: What does Congress's power to "make all laws" mean? Can Congress delegate any of that power to another entity? If so, to whom? Although conditional delegations of legislative authority to agencies have long been considered constitutional under the nondelegation doctrine,[13] these questions carry pragmatic implications for mainstream administrative law doctrine as well as the structure of modern government itself. No uniform answers exist within the myriad separation of powers doctrines that bear on the scope of Congress's lawmaking power.

This Article teases apart the various permutations of what the federal lawmaking power means, canvases the Court's historical treatment of that question, and describes its practical implications as a matter of both constitutional and administrative law. It proposes a taxonomy of lawmaking in an effort to bring coherence to the task of defining the lawmaking power as well as Congress's prerogative to exercise it.

Part I reviews the constitutional text bearing on the question of whether the lawmaking function is—to all or at least some extent—the exclusive prerogative of Congress. It discusses the primary

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7. *Id.* at 1242 (Thomas, J., concurring).
8. *See id.* at 1251–52.
9. *See id.* at 1237 (Alito, J., concurring).
10. *Id.*
11. U.S. CONST. art. I, § 1.
12. *See Ass'n of Am. R.Rs.*, 135 S. Ct. at 1237–38 (Alito, J., concurring).
13. *Id.* at 1237.

doctrinal frame for answering this question—nondelegation—and outlines the two key scenarios in which it has practical significance: administrative rulemaking and government outsourcing. The Supreme Court grappled with both contexts in opinions issued on the same day—*Department of Transportation v. Association of American Railroads*[14] and *Perez v. Mortgage Bankers Ass'n*,[15] providing guideposts for scrutinizing formulations of generally applicable rules of private conduct by entities other than Congress.

Drawing from the opinions in *Association of American Railroads* and *Mortgage Bankers Ass'n*, Part II develops a taxonomy of lawmaking power. It examines constitutional text, historical artifacts relating to the meaning of the legislative power, and the separation of powers doctrine under Article I—including the Bill of Attainder Clause, the Ex Post Facto Clause, the void for vagueness doctrine, and nondelegation—as well as under Articles II and III of the Constitution. The first taxonomic step classifies governmental action into one of three categories: judicial decision making, first-order laws, and second-order laws or law execution.[16] The second step asks whether the exercise of lawmaking power is constitutional—not by falling back on the stagnated nondelegation doctrine—but by looking first to whether the government action is one of establishment or interpretation and, second, to whether it is tethered to lines of political accountability.[17]

Part III offers two foundational takeaways from the discussion in Part II. The first is that the exercise of lawmaking by administrative agencies is constitutional so long as it is bound by first-order statutory law, as explained in Part II. Second, lawmaking by private parties is likely unconstitutional to the extent that political accountability is lacking. The latter conclusion is essential to maintaining the integrity of the structural Constitution.

I. DEFINING LAWMAKING: WHY IT MATTERS

The definition of Article I lawmaking power is important for two reasons: it determines the viability of the federal regulatory state, and it draws a theoretical line past which private parties cannot venture.[18] This Part stakes out these battlegrounds by introducing

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14. *Id.* at 1225.

15. 135 S. Ct. 1199 (2015).

16. *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1253 (Thomas, J., concurring) ("The first step . . . should be to classify the power . . . ."); *see Mortg. Bankers Ass'n*, 135 S. Ct. at 1206 (discussing the difference between legislative rules, interpretive rules, and judicial decisions).

17. *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1253 (Thomas, J., concurring) ("The second step should be to determine whether the Constitution's requirements for the exercise of that power have been satisfied."); *see Mortg. Bankers Ass'n*, 135 S. Ct. at 1203–04 (discussing the differences between legislative and interpretive rules and then discussing the process to issue rules).

18. *See Ass'n of Am. R.Rs.*, 135 S. Ct. at 1237 (Alito, J., concurring).

a pair of Supreme Court cases decided on March 9, 2015[19]—*Mortgage Bankers Ass'n* and *Association of American Railroads*—which evince a renewed interest in the proper scope of delegated lawmaking power in the modern administrative state.

A. The Constitutional Text and Doctrinal Backdrop: Nondelegation

Arguably, the question whether the lawmaking function is an exclusively legislative prerogative is answered by the plain text of the Constitution. Article I, Section 1 of the Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States."[20] Yet as Lawrence Tribe has observed, unlike its counterparts in Articles II and III, this provision does not endow Congress "with 'all legislative power.'"[21] Legislative powers are instead limited by Article I's nonexclusive list of what such powers encompass, including the explicit power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[22]

The Supreme Court has been careful not to encroach on the legislature's role in determining what is necessary and proper for carrying into execution the powers delineated in Article I. Construing this language to uphold Congress's implied power to charter the Bank of the United States, Chief Justice Marshall explained in *McCulloch v. Maryland*[23] that Congress can do that which the Constitution does not prohibit, and the courts are loathe to second-guess what the legislature deems "necessary" as an incident to its enumerated powers.[24]

McCulloch, however, did not address the constitutional boundary between Congress's power to "carry[] into Execution the foregoing powers" and Article II's requirement that the "[President] shall take Care that the Laws be faithfully executed."[25] Congress passes laws through the constitutionally prescribed process of bicameralism and presentment.[26] Although the Constitution

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19. *Mortg. Bankers Ass'n*, 135 S. Ct. at 1199; *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1225.

20. U.S. CONST. art. I, § 1.

21. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 789 (3d ed. 2000).

22. U.S. CONST. art. I, § 8, cl. 18.

23. 17 U.S. (4 Wheat.) 316 (1819).

24. *See id.* at 423. Professor Tribe describes the implicit narrowing principle of *McCulloch* this way: "Congress may [not] regulate anything that is related to interstate commerce" but "Congress may enact any regulation that assists it in carrying out its commerce power . . . ." TRIBE, *supra* note 21, at 802.

25. U.S. CONST. art I, § 8; *id.* art. II, § 3.

26. As Justice Marshall observed in *McCulloch*, the Necessary and Proper Clause also gives Congress authority "to raise a revenue, and to apply it in the support of the government, and defence of the country," for example. *McCulloch*, 17 U.S. (4 Wheat.) at 324.

contains limits on the power of all three branches (e.g., the Bill of Rights), the question of what constitutes lawmaking is derived from a number of separation of powers doctrines, including nondelegation, which has long been considered obsolete.[27]

For purposes of nondelegation challenges, the Supreme Court has broadly defined "legislative power" as "the power to make laws."[28] Article I of the Constitution, the Court explained, "permits no delegation of those powers."[29] This definition, however, is circular. What *are* laws that only Congress can make as a matter of its legislative power? Because Congress cannot function in a vacuum, the line between nondelegable and delegable legislative authority is difficult to draw. William Blackstone long ago recognized that "in laws all cases cannot be foreseen or expressed."[30] Congress cannot draft legislation with the precision and foresight to anticipate every factual circumstance that could arise under it.[31] Nor does it have the expertise or resources to do so. Under the Constitution, therefore, Congress must have the power to invoke some level of assistance. However, the text of the Constitution alone does not answer what kind of assistance is permissible.

The Court has accordingly conceded that the constitutional legislative power "does not mean . . . that only Congress can make a rule of prospective force."[32] Rather, Congress's power to make laws "implies a power of delegation of authority under it sufficient to effect its purposes,"[33] including the power "to delegate to others at least some authority that it could exercise itself."[34] But Congress cannot, in theory, delegate complete and unfettered discretion to make laws.[35] The Court has held that legislation authorizing the executive branch to make rules must contain "a definition of legislative policy and standards" in order to pass constitutional

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27. *See* TRIBE, *supra* note 21, at 794. This paper does not discuss federalism, which is an additional constraint on congressional authority. *See id.* at 795.

28. Loving v. United States, 517 U.S. 748, 771 (1996).

29. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (citing *Loving*, 517 U.S. at 771).

30. 1 WILLIAM BLACKSTONE, COMMENTARIES *61–62; *see also* THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961) ("[I]t must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered.").

31. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 4–5 (2001).

32. *Loving*, 517 U.S. at 758.

33. Lichter v. United States, 334 U.S. 742, 778 (1948).

34. *Loving*, 517 U.S. at 758 (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825)).

35. *See Wayman*, 23 U.S. (10 Wheat.) at 42–43.

muster.[36] More specifically, Congress can delegate "the authority to make policies and rules that implement . . . statutes" so long as it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."[37] Easy to satisfy, the intelligible principle test is functionally impotent.[38] A meaningful check on the delegation of lawmaking power must be found elsewhere, if at all.

B. Rulemaking and Perez v. Mortgage Bankers Ass'n

In *Perez v. Mortgage Bankers Ass'n*, the Court grappled with the dividing line between the legislature's lawmaking power on the one hand and agencies' congressionally-authorized rulemaking function on the other—without mentioning the nondelegation doctrine.[39]

Federal agencies make laws all the time in two broad categories: legislative rules and nonlegislative rules.[40] If an agency proposes a rule in the Federal Register, considers and responds to public comments, and publicly explains the basis and purpose of the final rule pursuant to the procedure set forth in the Administrative Procedure Act ("APA"), the rule in its final form has the operative effect of an Act of Congress.[41] Such a rule is called a legislative rule because it has the "force and effect of law."[42] If an agency issues an interpretation of a statute or rule in order "to advise the public of the agency's construction of the statutes and rules which it administers," the resulting agency guidance is known as a nonlegislative rule.[43] There are several kinds of nonlegislative rules authorized under the APA, including "general statements of policy," but none require notice and comment,[44] and none have the force and effect of law.[45]

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36. *Lichter*, 334 U.S. at 774.

37. *Loving*, 517 U.S. at 771 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

38. *See* Nat'l Cable Television Ass'n v. United States, 415 U.S. 352, 352–53 (1974) (Marshall, J., concurring and dissenting) ("The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930s, has been virtually abandoned by the Court for all practical purposes . . . .").

39. *See generally* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015) (finding that the *Paralyzed Veterans* doctrine was contrary to the text of the APA and imposed an obligation beyond the procedural requirements specified in the APA).

40. *See id.* at 1203–04.

41. 5 U.S.C. § 553(b)–(c) (2012).

42. Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979).

43. Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995) (quoting *Chrysler*, 441 U.S. at 302).

44. 5 U.S.C. § 553(b)(A) (2012).

45. *Mortg. Bankers Ass'n*, 135 S. Ct. at 1208 (2015) (citing *Chrysler*, 441 U.S. at 302).

In *Mortgage Bankers Ass'n*, the Supreme Court considered whether agencies must use the APA's notice-and-comment provisions to issue a new nonlegislative rule that significantly deviates from a prior one.[46] In deciding that agencies can amend nonlegislative rules in the same manner they created them, the Court reversed the D.C. Circuit's longstanding contrary view first set forth in *Paralyzed Veterans of America v. D.C. Arena L.P.*[47] Unlike legislative rules, the Court reasoned, interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."[48] By imposing notice-and-comment procedures on agency attempts to make significant changes to interpretive rules, the *Paralyzed Veterans* doctrine "is contrary to the clear text of the APA's rulemaking provisions."[49]

To justify an unceremonious amendment process for nonlegislative rules, the Court ventured beyond the language of the APA.[50] Writing for the majority, Justice Sotomayor acknowledged that agencies make laws through the notice-and-comment process, but insisted that the act of interpretation is qualitatively different.[51] Justices Scalia and Thomas in separate concurring opinions largely agreed, but added that the Court's deference doctrines—whereby *agencies'* construction of vague statutory language may be treated as authoritative, even if contained in nonlegislative rules—effectively convert executive branch personnel into legislators.[52] Such doctrines include most prominently *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[53] which afforded deference to legislative rules, as well as *Barnhart v. Walton*,[54] which extended *Chevron* deference to some nonlegislative rules. In questioning the propriety of these deference doctrines on separation of powers grounds, the opinions in *Mortgage Bankers Ass'n* bear the potential to destabilize the modern administrative state to the extent that agencies make laws, however that term is properly defined.

C. *Outsourcing and* Department of Transportation v. Association of American Railroads

On the same day it issued *Mortgage Bankers Ass'n*, the Supreme Court in *Department of Transportation v. Association of American Railroads* separately confronted the question of whether

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46. *See id.* at 1203.
47. 117 F.3d 579 (D.C. Cir. 1997).
48. *Shalala*, 514 U.S. at 99.
49. *Mortg. Bankers Ass'n*, 135 S. Ct. at 1206 (quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978)).
50. *See id.* at 1207–08.
51. *See id.*
52. *Id.* at 1212 (Scalia, J., concurring); *id.* at 1213 (Thomas, J., concurring).
53. 467 U.S. 837, 844 (1984).
54. 535 U.S. 212, 222 (2002).

lawmaking power is exclusive to Congress by considering a counterpart to the nondelegation doctrine—the so-called private delegation doctrine.[55] In the wake of the New Deal, the Supreme Court struck down a number of statutory delegations of legislative authority to private hands,[56] only to later uphold laws authorizing private individuals to engage in regulatory efforts on the rationale that public officials ultimately retained review authority.[57] Yet the Court has never clarified the nature of government oversight required to render a private delegation constitutional. In *Association of American Railroads*, the Justices expressed varying degrees of tolerance for delegations of lawmaking power, while suggesting that the exercise of lawmaking or adjudicatory power by private parties is constitutionally dubious.[58]

In 1970, Congress created Amtrak[59] as a "private, for-profit corporation" to save the passenger train industry, which was hurt by increased competition from air travel and improved highway systems.[60] It also empowered private railroads to transfer passenger service to Amtrak so long as they leased their tracks back.[61] Amtrak and the railroads entered into operating agreements establishing rates that Amtrak would pay to use the private tracks.[62]

With the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"),[63] Congress sought to standardize those agreements

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55. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1228 (2015).

56. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (striking down a statute authorizing local coal boards to determine coal prices and employee wages and hours). The Court based its decision on the Commerce and Due Process Clauses. *Id.* at 297–304.

57. *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1438–43 (2003).

58. *Compare Ass'n of Am. R.Rs.*, 135 S. Ct. at 1233 (noting that an exercise of governmental power must be consistent with the design of the Constitution), *with id.* at 1237 (Alito, J., concurring) (explaining that nondelegation is not strictly enforced because other branches have powers that resemble lawmaking), *and id.* at 1245 (Thomas, J., concurring) (emphasizing that the Framers sought to protect legislative power from consolidation under the executive).

59. Rail Passenger Service Act of 1970, Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330 (repealed 1994); *see also* Ass'n of Am. R.Rs. v. Dep't of Transp., 865 F. Supp. 2d 22, 25 (D.D.C. 2012), *rev'd*, 721 F.3d 666 (D.C. Cir. 2013), *vacated*, 135 S. Ct. 1225 (2015) (noting that the National Railroad Passenger Corporation is better known as Amtrak).

60. *Ass'n of Am. R.Rs.*, 865 F. Supp. 2d at 25 (quoting Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Corp., 470 U.S. 451, 454 (1985)); *see* 49 U.S.C. § 24301(a) (2012).

61. *See* 45 U.S.C. § 561 (1970) (repealed 1994).

62. *Ass'n of Am. R.Rs.*, 865 F. Supp. 2d at 25.

63. Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, 122 Stat. 4848, 4907 (codified at 49 U.S.C. § 24101 note (2012)), *invalidated by* Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666 (D.C. Cir. 2013), *vacated*, 135 S. Ct. 1225 (2015).

by authorizing Amtrak and the Federal Railroad Administration ("FRA") to jointly "develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations."[64] Under the PRIIA, if Amtrak and the FRA cannot agree on metrics and standards, they may petition for binding arbitration by a private arbitrator.[65] The Association of American Railroads ("AAR") challenged on separation of powers grounds the portion of the PRIIA giving Amtrak shared authority to promulgate standards.[66]

Association of American Railroads reopened the question of whether the structural Constitution forbids delegations of lawmaking power to private parties.[67] The Court deemed Amtrak a governmental entity for nondelegation purposes but remanded the case for consideration of whether the PRIIA's provision for appointment of an arbitrator "is a plain violation of the nondelegation principle."[68] In his concurring opinion, Justice Thomas offered a two-part test for analyzing such delegations: "The first step [would] classify the power that [a statute] purports to authorize" an entity other than Congress to exercise.[69] If that power includes the ability to give content to or decide the applicability of rules governing private conduct, step one is satisfied.[70] "The second step [would] determine whether the Constitution's requirements for the exercise of that power have been satisfied."[71] The next Part builds on Justice Thomas's test to develop a taxonomy of delegable

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64. 49 U.S.C. § 24101 note (2012) (Amtrak Reform and Operational Improvements, Section 207: Metrics and Standards); *Ass'n of Am. R.Rs.*, 721 F.3d at 669; *see* Metrics & Standards for Intercity Passenger Rail Service Under Section 207 of the Passenger Rail Investment and Improvement Act of 2008, 75 Fed. Reg. 26,839 (May 12, 2010) (explaining that Section 207 of the PRIIA charged the FRA and Amtrak with developing new, and improving existing, metrics). The Standards were promulgated in 2010. *Id.* (explaining that the FRA and Amtrak developed new standards that went into effect May 11, 2010).

65. 49 U.S.C. § 24101 note (2012) (Amtrak Reform and Operational Improvements, Section 207: Metrics and Standards).

66. *Ass'n of Am. R.Rs.*, 865 F. Supp. 2d at 28.

67. *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1231 (2015).

68. *Id.* at 1234 (citing Brief for Appellant at 38, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225 (2015) (No. 12-5204)). The Court also instructed the D.C. Circuit to consider whether "Congress violated the Due Process Clause by 'giv[ing] a federally chartered, nominally private, for-profit corporation regulatory authority over its own industry.'" *Id.* On remand, the D.C. Circuit held that the PRIIA violates due process in granting Amtrak power to regulate freight operators, that the private arbitrator authorized by the statute to resolve impasses between Amtrak and the FRA is a principal officer under the Appointments Clause, and that, accordingly, the statute's provisions for appointment of the arbitrator are unconstitutional. Ass'n of Amer. R.Rs. v. U.S. Dep't of Transp., 821 F.3d 19, 39 (D.C. Cir. 2016).

69. *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1253 (Thomas, J., concurring).

70. *See id.*

71. *Id.*

lawmaking power that draws upon related separation of powers doctrines.

II. A TAXONOMY OF LAWMAKING POWER

This Part reconciles *Mortgage Bankers Ass'n* and *Association of American Railroads*, as well as pertinent separation of powers doctrines under Articles I, II, and III of the Constitution, to construct a taxonomy of lawmaking power that incorporates additional definitional concepts into Justice Thomas's two-part test. The first is that lawmaking differs from judicial interpretation and decision making in that the former affects large segments of the populace prospectively. There also exists a distinction of constitutional importance between prescriptive, first-order laws and interpretive, second-order laws. Lastly, the task of executing the laws merges comfortably with second-order lawmaking without constitutional friction. As described below, what materializes from these ideas is a definition of lawmaking power that gives some shape to the otherwise boundless—but theoretically important—nondelegation doctrine.

A. Step One: Classification

As noted above, Justice Thomas in *Association of American Railroads* proposed a two-step test for determining the propriety of delegations of lawmaking power.[72] The first step classifies the power that a statute purports to authorize.[73] This classification prong can be understood as operating to sort power amongst the constitutional triad of the judiciary, legislature, and executive according to definitions that have longstanding doctrinal roots.[74] The legislative power can be further subdivided into first-order laws, which are prescriptive, and second-order laws, which Congress authorizes agents to promulgate.[75] This subclassification of first- and second-order laws becomes important for purposes of determining the propriety of legislative delegations to the executive branch.[76]

1. Judicial Decision Making

With strikingly little complexity, the Court—like Congress in the APA[77]—has drawn the line between adjudicative and legislative decision making along two metrics: whether an action is retroactive versus prospective, and whether it affects a discrete set of parties

72. *See id.*
73. *Id.*
74. *See id.* at 1245–46.
75. *See id.* at 1241.
76. *See id.* at 1246.
77. *See* 5 U.S.C. § 553(b)–(c) (2012).

versus a generalized population.[78] These dual distinctions run through numerous constitutional doctrines, including due process, justiciability, bills of attainder, ex post facto laws, and congressional control of the federal courts. As discussed in Part II, this differentiation between adjudication and lawmaking becomes relevant to an examination of why second-order laws of binding effect are constitutional.

Procedural Due Process. Over a century ago, a doctrinal distinction emerged between adjudication and rulemaking for purposes of triggering procedural due process protections under the Fourteenth Amendment.[79] In *Londoner v. Denver*[80] and *Bi-Metallic Investment Co. v. State Board of Equalization*,[81] landowners claimed they had a right to notice and an opportunity to be heard before the City of Denver could assess certain taxes.[82] Only in *Londoner* did the Supreme Court find that due process protections applied.[83] The plaintiffs in *Bi-Metallic* challenged Denver's forty percent tax increase on the valuation of all taxable property.[84] Justice Holmes wrote for the majority that "[w]here a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption."[85]

Thus, the Constitution recognizes that "[g]eneral statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard."[86] This does not mean that those affected by a legislative act have no voice. "Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."[87] By contrast, the tax hikes at issue in *Londoner* warranted individualized hearings because "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds."[88] *Londoner* and *Bi-Metallic* remain the leading cases on the definitional distinctions between legislation and adjudication, which are mirrored in the APA itself.[89] Lawmaking is

78. Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 258 (2000).

79. Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 445–46 (1915).

80. 210 U.S. 373 (1908).

81. 239 U.S. 441 (1915).

82. *Id.* at 444; *Londoner*, 210 U.S. at 374.

83. *Londoner*, 210 U.S. at 385.

84. *Bi-Metallic Inv. Co.*, 239 U.S. at 443–44.

85. *Id.* at 445.

86. *Id.*

87. *Id.*

88. *Id.* at 446.

89. *See* 5 U.S.C. § 553(b)–(c) (2012).

prospective and of broad applicability, and it depends on "legislative facts" of a generalized nature (e.g., societal harms caused by discrimination on the basis of race) about which only a political branch of government is poised to make normative judgments.[90]

Standing. The Supreme Court's modern formulation of the test for Article III standing similarly suggests that the generalized nature of lawmaking is inappropriate for the judiciary.[91] The heart of the case-or-controversy requirement resides in the judicial mandate that "[t]he plaintiff . . . show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct."[92] In cases that do not involve common law rights—such as those in which members of the public sue the government for an injunction requiring compliance with a federal statute—standing doctrine must confront "the idea of separation of powers."[93] The injury-in-fact test serves the express objective of securing "the proper—and properly limited—role of the courts in a democratic society."[94] Unadorned "citizen-standing" to assert "only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys not be wasted" is insufficient to trigger federal jurisdiction.[95] This prohibition has come to be known as the ban on generalized grievances.[96]

The generalized grievance bar first emerged as a prudential concern.[97] The Supreme Court relied on constitutional standing to confront plaintiffs' attempts to challenge government expenditures solely on the grounds that they pay federal taxes.[98] In *Frothingham v. Mellon*,[99] the plaintiff based standing to seek enforcement of the Tenth Amendment on the fact that "she is a taxpayer of the United States; and . . . that the effect of the appropriations complained of will be to increase the burden of future taxation."[100] The Court

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90. Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 6 (2009).

91. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

92. City of Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983) (quoting Golden v. Zwickler, 394 U.S. 103, 109–10 (1969)).

93. Allen v. Wright, 468 U.S. 737, 750–51 (1984).

94. *Id.* at 750 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

95. Fairchild v. Hughes, 258 U.S. 126, 129–30 (1922) (challenging procedures by which the Nineteenth Amendment was ratified).

96. *See generally* Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221 (2008) (discussing the emergence of the generalized grievance bar).

97. *Id.* at 241.

98. *Id.*

99. 262 U.S. 447 (1923). The suit was a challenge to the Maternity Act, which appropriated federal funds for maternal and infant health care; the plaintiff asserted that the statute was a "usurpation of . . . the power of local self-government reserved to the States . . . ." *Id.* at 479.

100. *Id.* at 486.

rejected that argument, explaining that "[t]he administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not individual concern."[101] For something to be "of a Judiciary nature" as James Madison described it,[102] as opposed to a vehicle for airing political grievances, a plaintiff must have more than "a general interest common to all members of the public."[103] As the Court subsequently explained, generalized "subject matter is committed to . . . Congress, and ultimately to the political process."[104]

Further complicating the separation of powers gloss on standing doctrine is the question of whether Congress can statutorily authorize generalized citizen suits. In *Lujan v. Defenders of Wildlife*,[105] Justice Scalia famously explained for a plurality of the Court that Congress has no constitutional power to override the individualized injury requirement by conferring "upon *all* persons . . . an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."[106] The rationale for his conclusion was Article II, not Article III.[107] Enabling Congress to legislate standing to bring political disputes before the courts would impinge on the executive's constitutional prerogative to take care that the laws are faithfully executed.[108] While conceding that Congress can broaden the categories of concrete injury that are adequate in law, Justice Scalia viewed Congress as powerless to bypass the injury requirement altogether by enabling courts to participate in law enforcement via bald citizen suits; every plaintiff must satisfy the injury-in-fact standard regardless of congressional intent.[109] Although later cases like *Massachusetts v. EPA*[110] called into question the formidability of the generalized grievance ban as a barrier to judicial review, the Court's standing doctrine reinforces the foundational notion that the courts

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101. *Id.* at 487. *See also* Doremus v. Bd. of Educ., 342 U.S. 429, 433–34 (1952) (rejecting taxpayer standing to challenge on Establishment Grounds a New Jersey law authorizing public school teachers to read passages from the Bible).

102. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., rev. ed. 1966).

103. *Ex parte* Levitt, 302 U.S. 633, 634 (1937).

104. United States v. Richardson, 418 U.S. 166, 179 (1974).

105. 504 U.S. 555 (1992).

106. *Id.* at 573.

107. *Id.* at 577 (quoting U.S. CONST. art. II, § 3).

108. *Id.*

109. *See id.* at 578. By passing antitrust legislation, for example, Congress can create a legally actionable injury under circumstances where a company's interest in marketing a product free of anti-competitive practices is compromised.

110. 549 U.S. 497 (2007).

are tasked with resolving retroactive, individualized disputes.[111] Reciprocally, Congress creates prospective rules of broad and general effect, and the executive branch enforces them.[112]

Bills of Attainder and Ex Post Facto Laws. The Constitution's provision that "[n]o Bill of Attainder or *ex post facto* Law shall be passed [by the Congress]"[113] further reinforces the line of demarcation between the legislative and judicial functions. This language was "adopted by the Constitutional Convention unanimously, and without debate."[114] In the sixteenth, seventeenth, and eighteenth centuries, parliamentary bills of attainder sentenced individuals to death for threatening or attempting to overthrow the government.[115] Penalties short of death were also prescribed by "bill[s] of pains and penalties."[116] All thirteen states passed bills of attainder during the American Revolution.[117] Under the Constitution, a prohibited bill of attainder "may affect the life of an individual, or may confiscate his property, or may do both."[118] In banning them, the Framers drew a line as to what the legislative power does *not* include.

The Bill of Attainder Clause accordingly serves an important structural function. In *United States v. Brown*, the Court described it as "intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature."[119] The Court explained that certain provisions of the Constitution "entrust certain jobs exclusively to certain branches, while others say that a given task is *not* to be performed by a given branch."[120] In doing the latter, the Bill of Attainder Clause prevents too much power from accumulating in the legislature, which could otherwise single out individuals for adverse treatment under the guise of a law of general application.[121] Alexander Hamilton explained:

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111. *Id.* at 516.
112. *Id.* at 535.
113. U.S. CONST. art. I, § 9, cl. 3. The Constitution contains a similar provision applicable to the states. *Id.* § 10.
114. United States v. Brown, 381 U.S. 437, 441 (1965) (citing JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787, at 449 (Gallard Hunt & James Brown Scott eds., 1920)).
115. *Id.* at 441.
116. *Id.*
117. *Id.* at 442 (citations omitted).
118. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810).
119. *Brown*, 381 U.S. at 442.
120. *Id.* at 443.
121. *Id.* at 444.

> If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense.[122]

The Court has accordingly instructed that the Bill of Attainder Clause "be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups."[123]

By identifying what the constitutional lawmaking power does *not* include (i.e., "the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons") the Bill of Attainder Clause helps define what the lawmaking power *is*.[124] Lawmaking must affect segments of the population broader than those that would come before "politically independent judges and juries."[125] Under this definition, "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."[126]

Article I's prohibition on ex post facto laws similarly operates as a limitation on the legislature's power to exercise an inherently judicial function. An ex post facto law "renders an act punishable in a manner in which it was not punishable when it was committed."[127] In *Calder v. Bull*,[128] Justice Chase identified "the true distinction . . . between ex post facto laws, and retrospective laws."[129] "Every ex post facto law," he explained, "must necessarily be retrospective; but every retrospective law is not an ex post facto law: The former, only, are prohibited."[130] To trigger the constitutional prohibition, a retrospective law must "create, or aggravate, the crime; or encrease the punishment, or change the rules of evidence, for the purpose of conviction."[131] A law that merely "takes away, or impairs, rights vested, agreeably to existing

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122. *Id.* (quoting JOHN C. HAMILTON, HISTORY OF THE REPUBLIC OF THE UNITED STATES 34 (1859)).
123. *Id.* at 447.
124. *Id.* at 445.
125. *Id.*
126. United States v. Lovett, 328 U.S. 303, 315–16 (1946).
127. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 286 (1866).
128. 3 U.S. (3 Dall.) 386 (1798).
129. *Id.* at 391.
130. *Id.*
131. *Id.*

laws, is retrospective"; although potentially unjust, such a law is not unconstitutional and may in certain circumstances be necessary.[132]

The Ex Post Facto Clause exists as a "fundamental protection[] against arbitrary and oppressive government."[133] It defines the legislative power as affecting a swath of the population that is broader than would appear before a court in an individual case.[134] Madison deemed ex post facto laws "contrary to the first principles of the social compact and to every principle of sound legislation."[135] Hamilton considered the ban one of the "greater securities to liberty and republicanism than any [the Constitution] contains."[136] Like the Bill of Attainder Clause, the Ex Post Facto Clause protects against "the danger that the legislature will usurp the judicial power and will legislate so as to administer justice unfairly against particular individuals."[137] It is a barrier to "vindictive legislation."[138] Legislation that affects only a narrow class of individuals is constitutionally suspect under the Ex Post Facto Clause, as well as under the Bill of Attainder Clause. Both provisions serve the separation of powers.[139]

The Ex Post Facto Clause serves a second aim of ensuring that "legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."[140] The interest served by the Ex Post Facto Clause is accordingly one of "fundamental fairness . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life."[141] It keeps government accountable by precluding Congress from stepping into the role of the judiciary and legislating in a manner that affects individuals in discrete cases.

Congressional Control of the Federal Courts. Lastly, in a line of cases dating from 1792, the Supreme Court made clear that Congress cannot interfere with the judicial role of deciding

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132. *Id.*

133. Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 515 (1995) (Stevens, J., dissenting).

134. The Due Process Clause serves a similar purpose as a constraint on adjudications. *See* Bouie v. City of Columbia, 378 U.S. 347, 351–52 (1964).

135. THE FEDERALIST NO. 44, at 282 (James Madison).

136. THE FEDERALIST NO. 84, at 511 (Alexander Hamilton).

137. *Morales*, 514 U.S. at 520 (Stevens, J., dissenting).

138. Miller v. Florida, 482 U.S. 423, 429 (1987).

139. Carmell v. Texas, 529 U.S. 513, 566 (2000) (Ginsburg, J., dissenting).

140. Weaver v. Graham, 450 U.S. 24, 28–29 (1981). In *Bouie v. City of Columbia*, the Court explained that the "deprivation of the right to fair notice" is "potentially greater" when a statute "on its face is narrow and precise" but subject to "judicial enlargement" later. 378 U.S. 347, 352–53 (1964). In such instances, judicial broadening of statutory language can operate as a constitutionally impermissible ex post facto law. *Id.* at 353.

141. Peugh v. United States, 133 S. Ct. 2072, 2085 (2013) (quoting *Carmell*, 529 U.S. at 533).

individual disputes.[142] *Hayburn's Case*[143] established that Congress lacks the power to authorize executive branch officials to review decisions of Article III courts.[144] A century later, in *United States v. Klein*,[145] the Court held that Congress cannot "prescribe rules of decision to the Judicial Department of the government in cases pending before it . . . ."[146] This prohibition does not take hold, however, when Congress "amend[s] applicable law."[147]

In *Plaut v. Spendthrift Farm, Inc.*,[148] the Supreme Court further circumscribed the role of Congress as excluding the power to legislatively reopen or amend final judgments rendered by a federal court in a single case.[149] In a prior decision, the Court had construed the Securities Exchange Act of 1934 and its implementing regulations to impose statutes of limitations for certain suits alleging fraud and deceit in the sale of stock.[150] Congress subsequently amended the law to allow stale suits filed before the decision to go forward if they could have been brought under the previous law.[151] Citing *Marbury v. Madison*,[152] the Court found a violation of the separation of powers.[153] Article III establishes the judicial prerogative "'to say what the law is' in particular cases and controversies."[154] Thus, the Court reasoned, the federal judiciary has "the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy."[155] Accordingly, by passing legislation that reopened final judgments, Congress violated the separation of powers.[156] That "violation . . . consist[ed] of depriving judicial judgments of the conclusive effect that they had when they were announced, not of acting in a manner—specifically, with particular rather than general effect—that is unusual (though, we must note, not impossible) for a legislature."[157]

In his concurring opinion, Justice Breyer acknowledged that, although "Congress can enact legislation that focuses upon a small group, or even a single individual," the creation of law sometimes

142. *Carmell*, 529 U.S. at 566 (Ginsburg, J., dissenting).
143. 2 U.S. (2 Dall.) 409 (1792).
144. *Id.*
145. 80 U.S. (13 Wall.) 128 (1872).
146. *Id.* at 146.
147. Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992).
148. 514 U.S. 211 (1995).
149. *Id.* at 240.
150. Lampf v. Gilbertson, 501 U.S. 350, 359–60 (1991).
151. *Plaut*, 514 U.S. at 214 (citing 15 U.S.C. § 78aa-1 (2012)).
152. 5 U.S. (1 Cranch) 137 (1803).
153. *Plaut*, 514 U.S. at 218.
154. *Id.* (quoting Marbury v. Madison, 5 U.S. at 177).
155. *Id.* at 218–19.
156. *Id.* at 219.
157. *Id.* at 228.

improperly morphs into the application of law.[158] In *Plaut*, the law's "exclusively retroactive effect, its application to a limited number of individuals, and its reopening of closed judgments—taken together, show that Congress here impermissibly tried to *apply*, as well as *make*, the law."[159] As a result, the law "lack[ed] the liberty-protecting assurances that prospectivity and greater generality would have provided."[160]

Thus, the case law distinguishing between lawmaking and adjudication indicates that judges are ill-suited for prospective, generalized rulemaking. Congress, for its part, is constitutionally forbidden from making retrospective judgments regarding a limited number of individuals. These distinctions are important not just as a matter of the separation of powers but, as the case law suggests, because they operate to protect individual liberties.

2. First-Order Laws

The differences between adjudication and lawmaking are relatively straightforward when juxtaposed with the elusive dividing line between lawmaking and law execution. Although the Framers "limit[ed] legislatures to the task of rule-making,"[161] the Constitution does not identify the extent to which that task must reside exclusively with Congress. The Supreme Court has indicated that it is "the peculiar province of the legislature to prescribe general rules for the government of society."[162] Yet "the *application* of those rules to individuals in society would seem to be the duty of other departments."[163] The Court has accordingly defined the legislative power as prescriptive, carving out application or implementation as functions that can fall to other branches of government.[164] To be sure, when agencies make rules, they implement a statute.[165] But in order to do so they must fill interstitial gaps in legislation, which is lawmaking.[166] The question is whether there is a difference of possible constitutional significance between a prescriptive rule passed by Congress and an interpretive rule of equivalent legislative effect promulgated by an executive branch agency. One meaningful distinction is that laws passed by Congress are primary or first-order laws in that they define rights and obligations, including those of agencies.[167]

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158. *Id.* at 241–42 (Breyer, J., concurring).
159. *Id.* at 241.
160. *Id.* at 244.
161. United States v. Brown, 381 U.S. 437, 446 (1965).
162. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).
163. *Id.* (emphasis added).
164. *Id.*
165. *See* Kimberly N. Brown, *Public Laws and Private Lawmakers*, 93 WASH. U. L. REV. 615, 621 (2016).
166. *Id.* at 655.
167. *See id.* at 645.

The Constitution is the primary first-order, or prescriptive, law. It dictates a tripartite structure of government, which ensures accountability to the people.[168] The separation of powers, the enumeration of Congress's powers in Article I, and the Bill of Rights all function as checks on the federal government's power.[169] The legitimacy of the federal government derives from its constitutional authority and the democratic mandates of both Congress and the President.[170]

A secondary source of first-order law is the common law, which is "derived from judicial decisions, rather than from statutes or constitutions."[171] As the Supreme Court has observed, "the principles of common law [were those] distinguished and defined in this and the mother country at the time of the adoption of the Constitution of the United States."[172] While the Framers of the Constitution sharply checked the power of the federal government, they largely accepted state law,[173] with the exception of the Contract Clause and the Seventh Amendment, which elevated the common law "to the level of a constitutional right," demonstrating the Framers' strong belief in the legitimacy of common law.[174] Similarly, the doctrine of sovereign immunity is derived from common law, but the Supreme Court has construed it as a higher-order law than the plain text of the Eleventh Amendment itself.[175] Because it "rel[ies] on tradition to articulate evolving community standards and supermajoritarian principles,"[176] common law retains legitimacy even in the modern day.

A third source of first-order law is statutory law. It is the primary—but not exclusive—type of action taken by the

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168. Kimberly N. Brown, *"We the People," Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347, 1373–74 (2013).

169. *Id.*

170. Michael Herz, *Some Thoughts on Judicial Review and Collaborative Governance*, 2009 J. DISP. RESOL. 361, 365 (2009). "[G]overnment is said to be 'legitimate' if the people to whom its orders are directed believe that the structure, procedures, acts, decisions, policies, officials, or leaders of government possess the quality of 'rightness,' propriety, or moral goodness—the right, in short, to make binding rules." ROBERT A. DAHL, MODERN POLITICAL ANALYSIS 41 (2d ed. 1970); *see also* Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge to International Environmental Law?*, 93 AM. J. INT'L L. 596, 601 n.29 (1999).

171. *Common Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

172. Miss. Mills v. Cohn, 150 U.S. 202, 206 (1893).

173. David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1722 (1991).

174. *Id.*

175. *See* Hans v. Louisiana, 134 U.S. 1, 16 (1890) (extending the Eleventh Amendment to ban suits by a citizen of a state against that state in federal court on common law grounds).

176. A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 465 (1999).

legislature.[177] The legitimacy of statutory law stems from its grounding in popular sovereignty.[178] Traditionally, statutory law consisted of rules governing human conduct,[179] but it has numerous additional modern-day functions. Statutory laws may be punitive, setting forth consequences for violations of other first-order laws.[180] Statutes appropriate funds to other branches of government,[181] and they establish directives for implementation by other entities, both public and private.[182] When Congress authorizes other entities to promulgate rules, law implementation and lawmaking blur. Hence, the line between lawmaking and law execution has enormous implications for the constitutionality of government outsourcing as well as the viability of the administrative state itself.[183]

3. Law Execution and Second-Order Laws

Article II of the Constitution vests executive power in the President, but it does not define that power.[184] The Constitution deems the President the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States"; he has the power "to make Treaties" with the advice and consent of the Senate,[185] as well as the exclusive power to issue pardons, among other things.[186] For the vast array of administrative discretion that is generically executive in nature—such as setting standards; delivering benefits; implementing, monitoring or enforcing compliance with regulations; or exerting coercive power[187]—the Constitution is silent. To be sure, the Constitution provides for executive "Departments,"[188] but it does not establish federal agencies. All institutions of the United States government—other than the President, the Vice President, the Supreme Court, and Congress—are created by Congress under the Necessary and Proper Clause, including the multitudinous bureaucracies of

177. *See* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 372 (1989).

178. Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy, and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 256 (1997).

179. Rubin, *supra* note 177, at 371.

180. *See id.* at 374.

181. *See id.* at 391.

182. *See id.*

183. Brown, *supra* note 165, at 618.

184. *See* U.S. CONST. art. II.

185. *Id.* § 2, cl. 1, 2.

186. *Id.* cl 1.

187. *See generally* GOVERNMENT BY CONTRACT (Jody Freeman & Martha Minow eds., 2009) (detailing the discretionary nature of awarding governmental contracts). Similarly, Article II does not address the exercise of legislative or adjudicative power by private parties.

188. U.S. CONST. art. II, § 2; *see also id.* art. I, § 9 (indicating the existence of a "Treasury" of the United States).

unelected agents subordinate to the President.[189] The term "executive power" in Article II's Vesting Clause implies broad presidential power to supervise and control.[190] The provision directing the President to "take Care that the Laws be faithfully executed"[191] similarly suggests that Congress must leave the President with sufficient authority to manage others' exercise of executive authority if he or she is to fulfill these constitutional obligations.[192]

In *Morrison v. Olson*,[193] the Supreme Court outlined a "core functions" test for determining whether a statute providing for an independent counsel was unconstitutional, on the rationale that courts must "ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty 'to take care that the laws be faithfully executed' under Article II."[194] The Court identified the locus of executive authority in the Vesting and Take Care Clauses,[195] and established a constitutional standard that tolerates infringements on the President's executive authority so long as there are "means for the President to ensure the 'faithful execution' of the laws."[196] The majority conceded that the independent counsel performed "law enforcement functions that typically have been undertaken by officials within the Executive Branch."[197]

Although the Court ultimately upheld the statutory limitations on the President's power to remove the independent counsel, it made clear that executive functions inherently include law enforcement and prosecution.[198] In dissent, Justice Scalia noted that "a prosecutor [is] the virtual embodiment of the power to 'take care

189. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 4–5 (4th ed. 2007). *See also* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 107–08 (1994) (noting that the Necessary and Proper Clause provides the constitutional authority for independent agencies but suggesting that a strong showing of necessity is required). *But cf.* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1235 (1994) (arguing that the word "proper" requires that Congress enact laws that are "consistent with background principles of separation of powers, federalism, and individual rights").

190. *See* U.S. CONST. art II, § 1.

191. *Id.* § 3.

192. *See* Peter Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 600 (1989); *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508 (2010) (holding that Congress may not deprive the President of adequate control over the Board).

193. 487 U.S. 654 (1988).

194. *Id.* at 689–90.

195. *See id.* at 690–92.

196. *Id.* at 692.

197. *Id.* at 691.

198. *See id.* at 685–87.

that the laws be faithfully executed.'"[199] Thus, a definition of executive power necessarily includes the work of a prosecutor. Justice Scalia elaborated: "[If] the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[200]

In defining lawmaking as including prosecutorial power,[201] *Morrison* did not address whether rulemaking legitimately falls within executive authority or whether instead it is exclusive to Congress. In *Free Enterprise Fund v. PCAOB*,[202] the Court discussed the intersection between the power to regulate and the language of Article II.[203] It upheld an Article II challenge to Congress's creation of the Public Company Accounting Oversight Board ("PCAOB") in reaction to problems with the accounting industry that were brought to light after Enron's failure.[204] Congress gave the PCAOB broad regulatory powers to impose and enforce auditing standards, but folded the agency within the Securities and Exchange Commission ("SEC")—an independent agency whose commissioners are not susceptible to termination at will by the President.[205] Only the SEC could hire PCAOB members, and only the SEC could fire them for cause.[206] Thus, if the President sought to control the PCAOB's exercise of delegated authority through the threat of removal, his sole and highly attenuated means of doing so was to fire SEC members for failing to fire PCAOB members for cause.

The Court struck down the so-called "double for-cause" removal provisions that insulated PCAOB members from presidential control,[207] "reaffirm[ing] the principle that Article II confers on the President 'the general administrative control of those executing the laws.'"[208] As the executive power includes "the power of appointing,

199. *Id.* at 726 (Scalia, J., dissenting).

200. United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

201. *Morrison*, 487 U.S. at 656–58.

202. 561 U.S. 477 (2010).

203. *Id.* at 515–16 (Breyer, J., dissenting).

204. *See generally* Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 977–78, 1007–22 (2005) (describing the powers of the PCAOB).

205. The majority accepted the parties' agreement that the SEC is removable only for cause, despite the lack of statutory language to that effect. *See Free Enter. Fund*, 561 U.S. at 486. *But see id.* at 545 (Breyer, J., dissenting) ("How can the Court simply *assume* without deciding that the SEC Commissioners themselves are removable only 'for cause'?").

206. 15 U.S.C. §§ 7211(e)(1)–(5), 7217 (2012).

207. *Free Enter. Fund*, 561 U.S. at 513–14.

208. *Id.* at 492–93 (quoting Myers v. United States, 272 U.S. 52, 164 (1926)).

overseeing, and controlling those who execute the laws,"[209] the Court wrote, "the Constitution . . . empower[s] the President to keep executive officers accountable."[210] Even beyond the prosecutor's office, therefore, execution of the laws must be controlled by the President. *Free Enterprise Fund* accordingly emphasized that agencies are constitutionally accountable to the President and, through the President, to the people.[211]

B. Step Two: The Constitutionality of the Power's Exercise

As a matter of first-order lawmaking, Congress delegates rulemaking power to agencies. When that occurs, abuses of the exercise of that power are checked through the President's removal power as well as through the courts.[212] Theoretically, the nondelegation doctrine tethers agencies' lawmaking power to intelligible statutory principles. Similarly, *Chevron* is a doctrine of statutory construction. *Chevron* step one requires courts to give effect to clear congressional directives and, for functionalists, to scour legislative history and purpose to identify Congress's intent.[213] If the statute is not clear, *Chevron* step two authorizes deference to agency interpretations of legislation—a judicial nod to agency prerogative upon a finding of *vagueness* that is the virtual opposite of the nondelegation doctrine's intelligible principle test.[214] As a matter of constitutional doctrine, therefore, agencies routinely make interstitial law to complete ambiguous statutory language. Such rulemaking is second-order law, which, as this Part describes, is constitutional to the extent that it is bound by a first-order law.

Once a government action is classified as adjudication, first-order lawmaking, prosecutorial-type law execution, or second-order lawmaking, the second step per Justice Thomas's model is consideration of whether the exercise of that power is constitutional.[215] With respect to lawmaking power, two factors emerge from the separation of powers case law for making this determination: (1) whether the agent of Congress is making second-order law governed by a higher-order law (which, for agencies, is exclusively statutory), and (2) whether the exercise of such power is

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209. *Id.* at 492 (quoting 1 ANNALS OF CONG. 463 (1789)); *see also id.* at 492–93 ("The landmark case of *Myers v. United States* reaffirm[s] the principle that Article II confers on the President 'the general administrative control of those executing the laws.'") (quoting *Myers*, 272 U.S. at 164).

210. *Id.* at 478–79.

211. *Id.* at 513.

212. *Id.* at 513.

213. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1983).

214. *Id.*; J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1927) (establishing the intelligible principle test).

215. Dep't of Transp. v. Ass'n of Am. R.R.s, 135 S.Ct. 1225, 1233 (2015).

subject to accountability checkpoints, which are necessary to protect individual liberties.[216]

1. Establishment Versus Interpretation

Although the Constitution vests in Congress the power to "make all laws," agencies routinely exercise that function. The intelligible principle requirement theoretically preserves Congress's exclusive power to establish definitive rules governing human conduct while condoning delegations of power to implement such laws. Arguably, when an agency engages in rulemaking pursuant to delegated authority, it is interpreting a statute—a higher-order source of law.[217] To interpret something is "to explain or tell the meaning of" a thing that already exists.[218] Although Congress might amend or supplement prior law, when it does so, it is not expressing an understanding of the meaning or significance of existing law; it is establishing new law.[219]

Under the APA, however, if an interpretive rule creates a new duty, it functions like a legislative rule and is, therefore, unlawful.[220] Only rules that go through the formal or notice-and-comment rulemaking process can create binding duties.[221] Thus, interpretation is a materially different action under the APA than the creation of rules with the force of law.

Yet agencies do both. Thus, the distinction between establishing and interpreting laws cannot justify agencies' power to make rules with the force of law—an act that mirrors the lawmaking function of Congress itself. How, then, to give heft and meaning to Congress's constitutional lawmaking prerogative? If the answer is that there is—and can be—no meaningful dividing line between legislative and interpretive power, Article I's Vesting Clause becomes a hollow measure that fails its separation of powers function.

One possibility is to treat the power exercised by agencies charged with implementing the laws enacted by Congress as not legislative—but instead executive—power. In *Mistretta v. United States*,[222] Justice Scalia observed that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or

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216. *Id.* at 1233, 1237.

217. *See* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 141 (2003).

218. *Interpret*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/interpret (last visited Oct. 28, 2016).

219. *See* Rubin, *supra* note 217, at 141.

220. *See* Metro. Sch. Dist. of Wayne Twp. v. Davila, 969 F.2d 485, 488–89 (7th Cir. 1992).

221. *Id.* at 490.

222. 488 U.S. 361 (1989).

applying the law."[223] He acknowledged that "a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action."[224] "The true distinction," the Court elsewhere observed, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law."[225]

An alternative theory for defining legislative power per se is that the hierarchal "nesting" of lower-order lawmaking within higher-order lawmaking—and not the *nature* of the power exercised at either level—saves agency lawmaking from constitutional illegitimacy.[226] In making laws, Congress acts pursuant to a higher first-order law—Article I of the Constitution—than do agencies, some of which perform a quasi-legislative function pursuant to statutory law. In his concurring opinion in *Whitman v. American Trucking Ass'ns*,[227] therefore, Justice Stevens urged the Court to "frankly acknowledg[e] that the power delegated . . . is 'legislative' but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute."[228] In other words, second-order laws are bound by, and thus implement, first-order laws. John Locke characterized the legislative power as the power to make "established law," and the executive power as the power "to back and support the sentence . . . and to give it due execution."[229]

As a consequence, in nondelegation terms, the legislative power is both delegable and nondelegable. It is delegable to the extent that it is cabined by statutory law such that its execution is not done pursuant to Article I legislative power but, rather, pursuant to Article II executive/implementation authority. In *Mortgage Bankers Ass'n*, the Court analyzed the distinction between interpreting legislative text—which is within the authority of the executive and judicial branches—and amending legislative text, which is not.[230] Writing for the majority, Justice Sotomayor distinguished between

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223. *Id.* at 416 (Scalia, J., dissenting).

224. *Id.* at 417 (emphasis omitted).

225. Field v. Clark, 143 U.S. 649, 693–94 (1892) (quoting Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm'rs of Clinton Cty., 1 Ohio St. 77, 88–89 (1852)); *see also* Lichter v. United States, 334 U.S. 742, 775 (1948) (distinguishing between "an unconstitutional exercise of legislative power by an administrative official instead of a mere exercise of administrative discretion under valid legislative authority").

226. *See* Kevin M. Stack, *Interpreting Regulations*, 11 MICH. L. REV. 355, 368–69 (2012).

227. 531 U.S. 457 (2001).

228. *Id.* at 488 (Stevens, J., concurring).

229. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 63 (J. W. Gough ed., 1948); *see also* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

230. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1207 (2015).

"the act of 'amending'" and "the act of 'interpreting'" as a matter of "both ordinary parlance and legal usage."[231] To interpret is "[t]o ascertain the meaning and significance of thoughts expressed in words."[232] Courts—and agencies—routinely interpret legislative texts without being accused of amending them. To amend is "[t]o change the wording of or formally alter . . . by striking out, inserting, or substituting words."[233] By contrast, "in [its] initial interpretation as much as all that come after, the agency is giving a definite meaning to an ambiguous text."[234] The text is the first-order law that binds the agency and distinguishes lawmaking by Congress from lawmaking by agencies.

To summarize, the lawmaking power is exclusive to Congress under Article I because it consists of statutory, or first-order, law that is beholden only to constitutional constraints. Legislators do not interpret existing laws when they legislate. They either make new laws out of whole cloth or alter preexisting laws by substituting or striking language. Agencies, like judges, are constitutionally empowered to bind the public to a rule—a second-order law—on pain of sanction through the act of implementation. The creation of binding rules through Article II implementation power is different from Article I lawmaking because the former is bound by statutory law. Agencies and judges construe ambiguous statutory language, but only legislators can create first-order law under Article I of the Constitution.

2. Accountability and Individual Liberties

The second constitutional lens for evaluating delegated lawmaking is whether the lawmaking entity is accountable to the public in a manner that ensures protection of individual liberties. Even for congressional lawmaking, there are doctrinal limits on the manner in which laws are made as well as mechanisms for judicial review. For example, the Court's void-for-vagueness doctrine imposes an affirmative obligation on legislators to exercise a level of precision in lawmaking that ensures protection of individual due process rights.[235] A statute is unconstitutionally void for vagueness if it is so lacking in standards that the public would be uncertain of prohibited conduct, or if it gives judges and jurors the freedom to

231. *Id.*

232. *Id.* at 1207–08 (quoting *Interpret*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

233. *Id.* at 1207 (quoting *Amend*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

234. *Id.* at 1208.

235. *See* Tim Searchinger, *The Procedural Due Process Approach to Administrative Discretion: The Courts' Inverted Analysis*, 95 YALE L.J. 1017, 1036 (1986).

decide whether conduct is prohibited within each case.[236] An impermissibly vague statute, thus, violates due process.[237] The void-for-vagueness doctrine applies to all laws, civil and criminal.[238] It requires legislators to prescribe rules of conduct with sufficient precision to confine judges' ability to unfairly apply the law. As a consequence, properly worded statutes function to protect individual liberties.[239]

In *Association of American Railroads*, the Supreme Court similarly phrased its discussion of the delegation doctrines in terms of constitutional accountability and preservation of individual liberties.[240] Writing for the majority, Justice Kennedy emphasized that "[t]reating Amtrak as governmental" avoids what would otherwise amount to "an unbridled grant of authority to an unaccountable actor."[241] Indeed, "[t]he political branches . . . have imposed substantial transparency and accountability mechanisms [on Amtrak], and, for all practical purposes, set and supervise its annual budget."[242] Such "structural principles secured by the separation of powers" exist to "protect the individual as well."[243]

Positing that the PRIIA is unconstitutional, Justices Alito and Thomas both underscored the separation of powers implications of privatized policymaking as well; these include, in Justice Alito's words, "a vital constitutional principle [that] must not be forgotten: Liberty requires accountability."[244] To make the case against outsourcing, Justice Alito characterized governmental power as uniquely belonging to government actors who "are set apart from ordinary citizens."[245] Because they exercise greater power, they are subject to special restraints, such as swearing an oath of office.[246] Government actors are accountable to the people. Otherwise, "[w]hen citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences," such as by "passing

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236. Giaccio v. Pennsylvania, 382 U.S. 399, 402–03 (1966) (citing Baggett v. Bullitt, 377 U.S. 360, 367, 372 (1964); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)); *see also* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (noting that a statute is unconstitutional if the terms are so vague that a person of common intelligence must guess at its meaning).

237. *See* Leonen v. Johns-Manville Corp., 717 F. Supp. 272, 278–79 (citing Papachristou v. City of Jacksonville, 405 U.S. 156, 162–63 (1972)).

238. *Id.* at 279 (citing *Giaccio*, 382 U.S. at 402–03).

239. Michael S. Kelly, *Something Beyond: The Unconstitutional Vagueness of Rico's Pattern Requirement*, 40 CATH. U. L. REV. 331, 372–73 (1991).

240. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1233 (2015).

241. *Id.*

242. *Id.*

243. *Id.* (quoting Bond v. United States, 131 S. Ct. 2355, 2365 (2011)).

244. *Id.* at 1234 (Alito, J., concurring).

245. *Id.* at 1235.

246. *Id.*

off a Government operation as an independent private concern."[247] Because "a private person" can be appointed an arbitrator under the PRIIA, he concluded, "this law is unconstitutional."[248]

Justice Alito similarly described the function of the nondelegation doctrine as "exist[ing] to protect liberty."[249] "[B]y careful design," the structural Constitution "prescribes a process for making law, [with] many accountability checkpoints."[250] "It would dash the whole scheme," he quipped, "if Congress could give its power away to an entity that is not constrained by those checkpoints."[251] Justice Alito maintained leeway for preserving executive branch rulemaking even if private sector lawmaking is unconstitutional. Whereas "the other branches of Government have vested powers of their own that can be used in ways that resemble lawmaking," in his view, "[w]hen it comes to private entities . . . there is not even a fig leaf of constitutional justification."[252]

In his concurrence, Justice Thomas adopted a more formalist approach to Article I that would "require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process."[253] "Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress," he explained, "the Vesting Clauses would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government."[254] Justice Thomas pushed further to argue that Congress cannot allocate power to "an ineligible entity, *whether governmental or private*."[255] This view is radical to the extent that it would render unconstitutional vast swaths of the federal administrative bureaucracy, leaving many segments of the economy unregulated.

Like Justice Alito, Justice Thomas fastened his analysis on the concept of government accountability,[256] adding with irony that "[w]e never even glance at the Constitution to see what it says about how this authority must be exercised and by whom," which is a

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247. *Id.* at 1234.
248. *Id.* at 1237–38.
249. *Id.* at 1237.
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 1246 (Thomas, J., concurring).
254. *Id.* at 1252.
255. *Id.* (emphasis added).
256. *See id.* at 1234 (Thomas, J., concurring). ("Confronted with a statute that authorizes a putatively private market participant to work hand-in-hand with an executive agency to craft rules that have the force and effect of law, our primary question . . . is whether that market participant is subject to an adequate measure of control by the Federal Government."). *Id.* at 1240.

searing insight into the way in which the privatization movement (and, indeed, the growth of the administrative state) has vastly outpaced the courts and, thus, the law.[257] On this point, Justice Thomas critiqued the Court as having "sanctioned the growth of an administrative system that concentrates the power to make laws . . . in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure."[258]

For purposes of step two of Justice Thomas's test for delegations of lawmaking authority, therefore, lawmaking entities' accountability to the public is essential to the constitutionality of delegated lawmaking authority. For agencies, mechanisms for political accountability through the President and public access to judicial review—albeit under highly deferential standards—are in place. Federal officers and employees are susceptible to statutorily mandated transparency; regularity through bureaucratic processes; electoral accountability at the highest, Cabinet-level echelons;[259] the judicial enforcement of the rule of law;[260] market competition and correction;[261] and public exposure through the press and the "court of public opinion."[262] The majority of these mechanisms do not apply to private parties under contract with the government.[263] Although OMB Circular A-76 forbids the outsourcing of "inherently governmental" functions,[264] agencies often overlook its

257. *Id.* at 1240.

258. *Id.* at 1254–55.

259. *But see* John Braithwaite, *Accountability and Responsibility Through Restorative Justice*, *in* PUBLIC ACCOUNTABILITY 33, 33 (Michael W. Dowdle ed., 2006) ("[O]ur vote is mostly not the accountability tool it once was."); Edward Rubin, *The Myth of Non-Bureaucratic Accountability and the Anti-Administrative Impulse*, *in* PUBLIC ACCOUNTABILITY, *supra*, at 70–71 ("The highly attenuated nature of electoral accountability means that it will be of limited value for the purposes that proponents of accountability have recommended, that is, arguing against open-ended delegations by the legislature, in favor of a unitary executive, or in favor of federalism.").

260. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1401–02 (2003) (discussing the legal form of accountability through judicial review).

261. Michael W. Dowdle, *Public Accountability: Conceptual, Historical, and Epistemic Mappings*, *in* PUBLIC ACCOUNTABILITY, *supra* note 259, at 1, 3–4.

262. Jerry Brito & Drew Perraut, *Transparency and Performance in Government*, 11 N.C. J.L. & TECH. ON. 161, 170 (2010).

263. *See supra* Subpart III.B.

264. OFFICE MGMT. & BUDGET, CIRCULAR NO. A-76 REVISED, PERFORMANCE OF COMMERCIAL ACTIVITIES § 4(b), Attach. A, pt. B (2003), https://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction. Circular A-76 predated the Federal Activities Inventory Reform Act, which also provides a statutory definition of "inherently governmental functions." 31 U.S.C. § 501 note (1998) (Inherently Government Function—Definition) ("The term 'inherently governmental function' means a function that is so intimately related to the public interest as to require performance by Federal Government employees."). The statute then lists examples of the types of "functions

provisions,[265] and there is no judicial review.[266] The Federal Acquisition Regulation[267] is the principal set of regulations governing the process through which the government purchases goods and services, but only disappointed bidders have succeeded in challenging contract awards for noncompliance.[268] Private tort and contract law might apply, but lawsuits are often stymied by successful contractor immunity defenses.[269] Although the government retains contractual power to sue private contractors under the Contract Disputes Act,[270] it may contract out of certain

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included." *Id.* (Inherently Government Function—Functions Included). An agency's decision regarding what is "inherently governmental" is effectively not reviewable. *See* PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY 127 (2007).

265. *See* Jody Freeman & Martha Minow, *Reframing the Outsourcing Debates*, *in* GOVERNMENT BY CONTRACT, *supra* note 187, at 1, 3; *see also* Concurrent Resolution on the Budget for Fiscal Year 2010, S. Con. Res. 13, 111th Cong. § 502 (2010) (requiring the Department of Defense to "review the role that contractors play in operations, including the degree to which they *are* performing inherently governmental functions") (emphasis added); Correction of Long-Standing Errors in Agencies' Unsustainable Procurements ("CLEAN-UP") Act of 2009, S. 924, 111th Cong. § 3(1) (2009) (finding that inherently governmental functions "have been wrongly outsourced").

266. OFFICE MGMT. & BUDGET, *supra* note 264, at § 5(g) ("Noncompliance . . . shall not be interpreted to create a substantive or procedural basis to challenge agency action or inaction . . . ."); *see also* Courtney v. Smith, 297 F.3d 455, 463 (6th Cir. 2002) (holding that Circular A-76 does not provide standing because it is not a law and thus "the internal administrative appeals process . . . is intended to be the sole basis for challenging agency action that allegedly violates the Circular").

267. The Federal Acquisition Regulation is codified in Title 48 of the Code of Federal Regulations and is promulgated by the General Services Administration, Department of Defense, and the National Aeronautics and Space Administration under the authority of the Office of Federal Procurement Policy Act of 1974. *See* 41 U.S.C. §§ 1101–1121 (2012).

268. Bidders can either challenge the agency's failure to comply with Circular A-76 under the APA or file bid protests with the GAO under 31 U.S.C. § 3551. Robert H. Shriver III, *No Seat at the Table: Flawed Contracting Out Process Unfairly Limits Front-Line Federal Employee Participation*, 30 PUB. CONT. L.J. 613, 627 (2001) (citing CC Distribs., Inc. v. United States, 883 F.2d 146 (D.C. Cir. 1990) (finding no constitutional standing to sue)); *see also* Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L.R. 397, 453 (2006) ("This leaves contractors themselves the most likely candidates to achieve judicial review and makes such review dependent upon the government denying rather than granting a request to privatize a government function."); *id.* at 454 (suggesting that the Subdelegation Act might provide an avenue for judicial review of delegations to private parties).

269. *See, e.g.*, Bartell v. Lohiser, 215 F.3d 550, 557 (6th Cir. 2000) (applying immunity to private foster care contractor in action under federal disability laws); Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 76–77 (2d Cir. 1998) (applying immunity to private insurance company in Medicare dispute); *see also* Richard J. Pierce, *Outsourcing Is Not Our Only Problem*, 76 GEO. WASH. L. REV. 1216, 1228–29 (2008) (arguing that private contractors should not be immunized for government work performed).

270. 41 U.S.C. §§ 7101–7109 (2012).

protections in the negotiating process[271] or lack the resources and motivation to pursue common law remedies.[272] Finally, the False Claims Act[273] allows for qui tam lawsuits to recover penalties from private contractors for fraud, but its requirements are difficult to satisfy.[274]

Consequently, Jerry Mashaw has suggested that a "retreat from accountability" results when public functions are outsourced at the expense of transparency: "Private actors are presumptively entitled to privacy; public officials are not. Private actors generate 'proprietary' information; the information produced by public agencies is 'owned' by the public. Public actors must often give public reasons for their actions; private preference motivates markets."[275] If a contractor is in breach, the government stands as a party to the contract with common law remedies rather than as a superior with review and removal powers within an administrative structure. Although contract terms and private law contain a variety of standards for contractor behavior, such standards are not constitutionally moored, thus placing private contractors in a less accountable posture than their public counterparts who might exercise identical authority, albeit with statutory power to do so with the force of law.[276]

III. TAKEAWAYS

This Part draws two conclusions from the definitional analysis set forth in Part II. First, the exercise of lawmaking by administrative agencies is constitutional, so long as it is bound by a first-order law, e.g., a statute. Second, lawmaking by private parties is likely unconstitutional to the extent that political accountability and reciprocal protection of individual liberties are lacking. The latter conclusion is essential to maintenance of the integrity of the structural Constitution.

A. Lawmaking and Administrative Agencies

It is apparent from his opinion in *Association of American Railroads* that Justice Thomas would find unconstitutional any

271. *See* Nina A. Mendelson, *Six Simple Steps to Increase Contractor Accountability*, *in* GOVERNMENT BY CONTRACT, *supra* note 187, at 241, 245–47.

272. *See* Miriam Seifter, *Rent-A-Regulator: Design and Innovation in Environmental Decision Making*, *in* GOVERNMENT BY CONTRACT, *supra* note 187, at 93, 97 (explaining how both the executive and legislative branches may lack the motivation to hold private actors accountable).

273. 31 U.S.C. §§ 3729, 3733 (2012).

274. Laura A. Dickinson, *Public Values/Private Contract*, *in* GOVERNMENT BY CONTRACT, *supra* note 187, at 335, 356.

275. Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY, *supra* note 259, at 115, 136.

276. *See* Brown, *supra* note 168, at 1351.

legislation that authorizes the exercise of lawmaking power in a manner other than bicameralism and presentment under Article I of the Constitution.[277] For Justice Thomas, lawmaking power in the Blackstonian sense—power to make rules that affect substantive private rights and duties—begins and ends with Congress.[278] At the other end of the spectrum is a conception of legislative power that merges lawmaking with interpretation or enforcement; that is, Congress can identify nursemaids to its lawmaking function, both governmental and private, so long as it provides some semblance of guidance to them in a statute—a first-order law.[279] The latter conception of lawmaking is consistent with the nondelegation doctrine.[280] It is also reconcilable with *Chevron*, which, although affording deference to agency interpretations of ambiguous statutory language, premises such deference on congressional intent.[281] The theory is that, in the statute creating an agency and giving it powers, Congress passed along what one might call the "lawmaking baton," as well. Such first-order laws contain the second-order laws with respect to which agencies get deference over the courts.

The bedrock doctrinal distinction between adjudicative and legislative power underscores this result. Courts are ill-suited to make prospective, generalized rules as a matter of constitutional law. If, under *Chevron* step one, congressional intent is clear, courts continue to exercise their constitutional prerogative to say what the law is.[282] Executive branch agencies, which are politically accountable to the public through the President, are more akin to Congress as lawmakers, particularly when utilizing notice-and-comment procedures that invite and account for public input. Thus, as a matter of separation of powers doctrine, if a statute is unclear, agencies are better suited than courts to make prospective, generalized rules. Although deference to nonlegislative rules undermines the political accountability rationale for deference because the public is not involved, *Chevron* step two still tethers agency lawmaking to judicial review to ensure reasoned decision making. In that sense, it enables accountable government and protects the rights of those affected by rules promulgated through the notice-and-comment process.

B. Lawmaking and Private Actors

The analysis is somewhat different for rulemaking performed by private parties. The question of whether Congress can delegate

277. *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1254 (2015).
278. *See id.*
279. *See supra* Subpart II.A.2.
280. *See* U.S. CONST. art. I, § 1.
281. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
282. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173–74 (1803).

legislative power directly to the *private* sector—bypassing the executive branch altogether—was addressed most prominently in *Carter v. Carter Coal Co.*[283] The Court struck down a law authorizing coal miners and producers to establish wages and maximum labor hours for mine workers.[284] The statute required no governmental imprimatur before the provisions took effect.[285] "This is legislative delegation in its most obnoxious form," the Court wrote, "for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[286] Grasping for a public-private dividing line, the Court reasoned that "[t]he difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function."[287]

Likewise, Justice Alito in *Association of American Railroads* drew the line between constitutional and unconstitutional delegations of lawmaking power at government actors who take an oath of office.[288] He would accept that the executive function includes what amounts to rulemaking in the Blackstonian sense, but cringed at the lack of accountability—and thus the potential compromise of individual rights—that accompanies the exercise of such power by the private sector.[289]

Since *Carter Coal*, the Court has uniformly upheld delegations to private parties.[290] In *Currin v. Wallace*,[291] it found constitutional a statutory scheme that afforded private industry an "effective veto" over government regulations affecting tobacco markets.[292] And in *Sunshine Anthracite Coal Co. v. Adkins*,[293] it upheld a statute

283. 298 U.S. 238, 311 (1936).

284. *Id.* at 310–11.

285. *Id.* at 311.

286. *Id.* The Court further suggested that the delegation violated due process to the extent that it allowed private parties to regulate competitors. *Id.* This argument is problematic to the extent that it applies procedural due process protections to a legislative versus adjudicative decision. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 446 (1915) (holding that "a general determination" affecting a large number of people in unexceptional ways is not bound by due process).

287. *Carter Coal*, 298 U.S. at 311.

288. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1234–35 (2015).

289. *Id.* at 1237–38.

290. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–74 (2001) (holding that the phrase, "requisite to protect the public health," was a sufficient determinate to guide the Environmental Protection Agency's establishment of national ambient air quality standards under the Clean Air Act).

291. 306 U.S. 1 (1940).

292. *Id.* at 18 (1940) (upholding a statute requiring two-thirds of regulated industry to approve regulations before they could take effect).

293. 310 U.S. 381 (1940).

allowing private coal producers to propose minimum coal prices to a government commission on the grounds that the industry merely "function[ed] subordinately to the Commission," which retained the ultimate authority to implement legislative standards.[294]

To the extent that the exercise of lawmaking power by the private sector is constitutional, it requires an express handoff of the legislative baton to a private sector recipient named in the legislation. Congress arguably made such a handoff to Amtrak with the PRIIA. Although the Supreme Court found Amtrak to be a public entity for purposes of the nondelegation doctrine, it is notable that Congress's blessing of Amtrak's rulemaking authority did not factor prominently in the Court's analysis of the statute's constitutionality. This suggests that, even with respect to statutes that authorize private-sector rulemaking, the absence of public accountability through the courts or through the political branches of government likely renders private-sector rulemaking unconstitutional. Importantly, this is a limitation on Congress's power as well as that of private actors because, without it, Congress could hand off lawmaking power to unaccountable actors with impunity, rendering the separation of powers and corresponding system of checks and balances as impotent as the nondelegation doctrine has become.

CONCLUSION

The twin decisions in *Department of Transportation v. Association of American Railroads* and *Perez v. Mortgage Bankers Ass'n*, although ostensibly addressing different legal issues, together reinvigorate a time-honored and possibly unanswerable separation of powers question: What is Article I lawmaking authority, and can it be handed off to entities other than Congress? Traditionally, law has been defined as rules governing human conduct.[295] If Article I's vesting of lawmaking power is to have meaning, there must be some version of lawmaking that is exclusive to Congress. Congress makes laws, the executive enforces them, and the judiciary applies them to individualized disputes. But with the advent of the administrative state and practical demise of the nondelegation doctrine, lawmaking by administrative agencies has eclipsed that of Congress in terms of sheer volume. Agencies make rules with the force of law. To the extent that they interpret existing laws—a function that is classically reserved for the executive and for the courts—the resulting nonlegislative rules are not binding, so they do not carry constitutional weight. Something other than interpretation is, therefore, happening when agencies make rules with the force of

294. *Id.* at 399.
295. *Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

law. If it is constitutional lawmaking per se, then a violation of the separation of powers has occurred.

A better frame for looking at the distinction between law and execution of the law than the *nature* of the function is the *posture* in the hierarchy of law at which a particular act of lawmaking sits. The Constitution is the highest-order law, followed by statutes, then common law and regulations. So long as regulations are bound by a higher-order statute, they do not represent lawmaking in the constitutional sense; when agency rulemaking is contained within a statute, judicial and political accountability exists. Thus, a second-order law—identified as such under step one of the taxonomy proposed in this Article—satisfies Justice Thomas's step two for determining the constitutionality of delegated lawmaking if it was authorized by Congress in a way that ensures accountability to the public. For private parties, the second step gives way as a matter of public accountability. Although Congress might delegate rulemaking power outside the government, current statutory law does not provide for equivalent mechanisms for judicial review of lawmaking by private parties. Nor is there political accountability through the President for the lawmaking activity of individuals or entities that instead answer to private employers or shareholders. Thus, unlike lawmaking by agencies, lawmaking by private parties is likely unconstitutional unless the enabling statute includes accountability measures to protect individuals against arbitrariness and unfairness.