

# The Nondelegation Doctrine and the Structure of the Executive

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*In a series of recent opinions, the Supreme Court has threatened to transform the nondelegation doctrine into a device for imposing sweeping limits on congressional authority to empower the regulatory state. But, as a matter of history and logic, the nondelegation doctrine has a quite different purpose. This Article argues that the nondelegation doctrine plays an underappreciated role in constitutional structure: encouraging the segmentation of executive power. The nondelegation doctrine vindicates the Article I Vesting Clause by preventing Congress from being divested of its legislative power. Its purpose is to reinforce Congress's legislative supremacy in the realm of ordinary law, not to impede Congress's ability to achieve legislative objectives by delegating regulatory authority to administrative agencies. The nondelegation doctrine accomplishes its distinctly structural purpose by constraining the delegation of broad powers to the President directly, a constraint that encourages legislative delegation of regulatory authority to administrative agencies. The Article explains as a matter of theory why broad delegations to the President, unlike the delegation of substantial regulatory authority to administrative agencies, jeopardize legislative supremacy and hence pose heightened nondelegation concerns, and it finds strong support for this distinction in the history of nondelegation decisions. It concludes that the diffuse departmental structure of the modern administrative state is a testament to the great success of the nondelegation doctrine, not evidence of its underenforcement. Indeed, the contemporary push to reinvent the nondelegation doctrine in an indiscriminate way would turn it into something closer to its opposite, a cudgel against legislative supremacy rather than its guardian.*

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## Introduction

It is widely expected that the coming years will see a “revival” of the nondelegation doctrine.<sup>1</sup> Even before Justice Barrett’s elevation to the high court, a majority of the justices had indicated interest in more vigorous enforcement of the nondelegation doctrine against federal agencies.<sup>2</sup> The Court is poised, a recent commentator has warned, to turn the nondelegation doctrine into an “anti-administrative” doctrine.<sup>3</sup> Yet the doctrinal change at which they have hinted would not be a revival of the nondelegation doctrine but a reinvention of it. Nondelegation “revivalists” misrepresent the history and the logic of the doctrine in order to turn it into something closer to its opposite: a constraint on Congress’s power to achieve legislative objectives rather than a constitutional reinforcement of Congress’s legislative supremacy.<sup>4</sup>

The prevailing understanding of nondelegation’s history facilitates this deceptive presentation. The conventional story sees the nondelegation doctrine as a short-lived instrument in the arsenal of *Lochner*-era jurisprudence.<sup>5</sup> In this telling, the nondelegation doctrine was part and parcel of the constitutional law of that era seeking to restrict Congress’s power to intervene in economic life, in the case of the nondelegation doctrine by making it difficult for Congress to enlist the help of its agents in the executive branch in formulating policy, and it was abandoned alongside the Court’s evolving understanding of the Commerce Clause. Subsequent jurisprudence paid lip service to the nondelegation doctrine even as judicial decisions, for all practical purposes, negated it. On this view, a prospective revival of the nondelegation doctrine is a potential Trojan horse that threatens to dismantle the entire administrative state.<sup>6</sup>

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1. E.g., Hannah Mullen & Sejal Singh, *The Supreme Court Wants to Revive a Doctrine That Would Paralyze Biden’s Administration*, SLATE (Dec. 1, 2020, 12:56 PM), <https://slate.com/news-and-politics/2020/12/supreme-court-gundy-doctrine-administrative-state.html> [<https://perma.cc/Q8RM-3BLU>].

2. See *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); *id.* at 2131 (Alito, J., concurring) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (“Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.”).

3. Note, *Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1159 (2021).

4. The term “legislative supremacy” here refers to Congress’s authority to have the final word on the content and meaning of the law, at least outside of the realm of constitutional law. It is not inconsistent with legislative supremacy for Congress’s agents in the executive and judicial branches to interpret and apply law, as long as these acts of interpretation and application are subject to congressional authority to respond to and modify them.

5. See *infra* Part II.

6. See, e.g., Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL’Y 87, 101-02 (2010) (observing that more vigorous judicial assertion of the nondelegation doctrine could be used “to block sociopolitical developments that have bipartisan, cross-branch, and enduring popular support”).

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But the truth of nondelegation's history reflects more continuity than rupture. The doctrine has an integrity that cynical diagnoses of nondelegation's nadir neglect. Rather than being aimed at limiting Congress's ability to achieve its governance objectives by delegating authority, the nondelegation doctrine is properly understood as a constitutional constraint on the agglomeration of legislative power outside of Congress and the concomitant sapping of congressional capacity. In other words, the nondelegation doctrine ought to reinforce congressional capacity rather than debilitate it. And the truth of nondelegation's history is that this is how it has functioned.

If the aim of the Article I Vesting Clause,<sup>7</sup> the textual source of the nondelegation doctrine,<sup>8</sup> is to ensure that Congress wields the legislative power that the Constitution grants it, then delegations of unilateral authority to the President are particularly concerning. The nondelegation doctrine therefore ought to apply higher scrutiny to delegations to the President directly, which it has done historically. Nondelegation concerns are heightened when Congress delegates directly to the President. Schemes authorizing the President to trigger broad powers by making vague findings create the risk that the legislative power will, for practical purposes, be located outside of Congress, precisely what the nondelegation doctrine seeks to prevent. By contrast, Congress can mitigate nondelegation problems simply by delegating to administrative agencies with limited portfolios, internal separation of powers, and the obligation to observe specific procedural requirements.<sup>9</sup>

The nondelegation doctrine helps to uphold the separation of powers by encouraging Congress to structure the executive in ways that facilitate deliberative and consultative processes tethering executive action to a legislative plan while eliciting the benefits of deliberation and evidence-based policy development. The nondelegation doctrine exists because policymaking should not be a matter of personal will but rather should occur through regular procedures designed to mobilize and assess evidence in a deliberative way in service of a legislative scheme.<sup>10</sup>

Indeed, the diffuse departmental structure of the modern administrative state is a testament to the success of the nondelegation doctrine, not evidence of its underenforcement.<sup>11</sup> In the absence of the nondelegation doctrine, Congress would be permitted to transfer its legislative power to another actor, as it briefly flirted with doing in the 1930s. In the aftermath of the Court's 1935 nondelegation decisions, Congress recalibrated its approach to delegation, and the contemporary

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7. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

8. See *infra* Part I.

9. See *infra* Part III.

10. See *infra* Section II.A.

11. See *infra* Section II.B.

administrative state began to take shape. The administrative state diffuses regulatory power across disparate and specialized agencies, each of which must implement its statutory directives in an evidence-based and reasoned manner.<sup>12</sup> The proliferation of regulatory agencies does not offend the nondelegation doctrine; in fact, it is the implication of a well-enforced nondelegation doctrine.

This understanding of the nondelegation doctrine yields insight into its proper role within U.S. constitutional structure—and its proper limits. Unlike the so-called-conservative activists calling for a new, enhanced nondelegation doctrine, this Article does not call for any doctrinal change but rather for continued enforcement of what has always been the law. If conservatives reinvent the nondelegation doctrine in an indiscriminate way, they will be unfaithful not only to the Founders' understanding of delegation<sup>13</sup> but also to the consistent historical application of the nondelegation doctrine, including at its supposed zenith in 1935. Moreover, a collateral consequence of politicization of the nondelegation doctrine will be undermining its valuable and legitimate purpose. The nondelegation doctrine, in its proper form, can help to ensure that governance proceeds by programmatic legislation and deliberative enactment rather than by presidential decree.

The Article's doctrinal proposal is, accordingly, to recognize the existence of a nondelegation Step Zero<sup>14</sup> distinguishing between delegations to agencies and delegations to the President. Courts should then engage in more searching review of whether statutes delegating to the President directly contain adequate limiting principles. This doctrinal refinement would formalize what courts have already been doing in practice: applying the intelligible principle standard with more bite in reviewing delegations of authority to the President directly. In addition to being inconsistent with longstanding precedent, failure to distinguish between delegations to agencies and delegations to the President in nondelegation analysis—an error that proponents of the looming reinvention commit—betrays the nondelegation doctrine in two ways. First, it converts the nondelegation doctrine into a yoke on Congress's legislative power rather than its protector. The nondelegation doctrine, which implements Article I's vesting of legislative power in Congress, should reinforce rather than vitiate congressional capacity. Second, it fails to check the agglomeration of legislative power in the presidency, which is the major threat to Congress's legislative supremacy.

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12. See *infra* Part III.

13. See *infra* note 35 and accompanying text.

14. This nomenclature is of course a nod to Cass Sunstein's famous proposal to formalize a "Chevron Step Zero." See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 207-31 (2006).

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The Article proceeds as follows. Part I considers the constitutional basis of the nondelegation doctrine, arguing that the formalist intelligible principle standard serves the doctrine's functional aim of protecting Congress's legislative supremacy. Part II surveys the history of the nondelegation doctrine, observing that the Court has thought differently about vague delegations to administrative agencies than it has about vague delegations to the President. Part III discusses the central features that distinguish the exercise of delegated authority by the President from the exercise of delegated authority by administrative agencies, arguing that this distinction is constitutionally significant in that delegations to agencies are more conducive to Congress's legislative supremacy. Part IV presents the Article's doctrinal proposal: the formalization of a nondelegation Step Zero, asking whether a statute delegates authority directly to the President, followed by more searching review in Step One of the constitutionality of statutes that do. The import of this approach is to provide Congress two options: to funnel authority into portioned executive structures or to delegate to the President with more constraints, either substantive or procedural. Part V considers procedural alternatives to more precise delegations of statutory authority, including providing for ex post arbitrariness review of presidential decisions and providing for ex ante congressional approval, arguing that both innovations may complement rather than substitute for presidential nondelegation.

### I. Form and Function

The Constitution instructs that Congress is to hold the legislative power, or at least all legislative powers granted by Article I.<sup>15</sup> Debates over the nondelegation doctrine are about what this means. The formalist logic behind the nondelegation doctrine is that the Article I Vesting Clause confers on Congress—and only Congress—these legislative powers, and consequently it would violate the Constitution for some other actor to exercise legislative power, even if Congress approved of such a delegation.

The first case invoking the nondelegation doctrine to strike down federal legislation, *Panama Refining*, interpreted the Article I Vesting Clause and the Necessary and Proper Clause in tandem to proscribe Congress's alienation of lawmaking functions.<sup>16</sup> Congress unconstitutionally alienates legislative power when it delegates authority

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15. See U.S. CONST. art. I, § 1.

16. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) (interpreting the Necessary and Proper Clause's authorization of Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution' its general powers" to mean that "[t]he Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested").

to an agent without providing an “intelligible principle”<sup>17</sup> that instructs the agent what objectives it is supposed to pursue in carrying out its assigned functions. The formalist rationale for this standard was that Congress was not alienating its lawmaking function as long as it remained ultimately responsible for policy choices, delegating only administrative tasks. *Panama Refining* maintained that Congress was permitted to delegate discretion in “fill[ing] up the details” of a legislative scheme “under the general provisions made by the Legislature,”<sup>18</sup> as long as the important policy choices were made by Congress in a way that meaningfully guided the subsequent exercise of discretion by the executive.

This classical derivation of the nondelegation doctrine involved a curious interpretation of the Necessary and Proper Clause.<sup>19</sup> Indeed, the most famous case articulating the meaning of the Necessary and Proper Clause, *McCulloch v. Maryland*,<sup>20</sup> understood it as authorizing Congress to empower a quasi-executive agent to act in aid of Congress’s enumerated powers.<sup>21</sup> More recently, the Supreme Court has referred only to the Article I Vesting Clause as the textual source of the nondelegation doctrine.<sup>22</sup>

One reason for skepticism about whether the Article I Vesting Clause should be taken so literally is that the President also exercises legislative power in at least one way expressly authorized by the Constitution—indeed by Article I. The President participates in the legislative process by deciding whether to sign or veto legislation.<sup>23</sup> This logical lacuna is similar to that of *Myers*, a case from the same era as the classic nondelegation cases, which held that the President possesses exclusive authority to remove executive officers.<sup>24</sup> *Myers* reasoned that the removal power is derivative of the appointment power, which the Constitution confers on the President. But the *Myers* Court neglected that the Constitution in the very same clause confers on Congress a role in the supervision of

17. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

18. *Panama Refining*, 293 U.S. at 426 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

19. See Farina, *supra* note 6, at 92 (viewing the Necessary and Proper Clause as textual evidence of Congress’s authority to delegate).

20. 17 U.S. 316 (1819).

21. The Bank was quasi-private, but Amtrak has a similar structure, and the Court held in *Department of Transportation v. Association of American Railroads* that “Amtrak act[s] as a governmental entity for purposes of the Constitution’s separation of powers provisions” when it issues metrics and standards jointly with the Federal Railroad Administration. 575 U.S. 43, 88 (2015).

22. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“Article I, § 1, of the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the United States.’ This text permits no delegation of those powers.”).

23. See U.S. CONST. art. I, § 7, cl. 2 (providing for presidential veto).

24. See *Myers v. United States*, 272 U.S. 52, 119 (1926).

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presidential appointments. The Court might, perhaps more plausibly, have reasoned that Congress is permitted to participate in removals of executive officers. It might even have reasoned, by a similar inferential logic, that Congress is constitutionally required to participate in removals of principal officers.

The nondelegation interpretation of the Article I Vesting Clause is also somewhat curiously in tension with the prevailing conservative (unitarian) interpretation<sup>25</sup> of the Article II Vesting Clause,<sup>26</sup> according to which not some but all of the executive power<sup>27</sup> must reside in the President. This unitarian interpretation of the Article II Vesting Clause has not been thought to imply that subordinate executive officers cannot exercise executive power but simply that the Constitution only permits them to do so subject to presidential supervision. Similarly, even if we thought (for the sake of argument) that delegates of Congress were exercising legislative power, they might do so permissibly as long as Congress retains the power to countermand their decisions.<sup>28</sup> As a matter of normative constitutional theory, we might think it curious that the Article II Vesting Clause strengthens the President, while the Article I Vesting Clause weakens Congress, but this could be in keeping with the Framers' curious views about legislative power.<sup>29</sup>

A potential response to Vesting Clause skepticism might be that Article I, Section 7 is the exclusive constitutionally permitted procedure for lawmaking.<sup>30</sup> But Article I, Section 7 provides no assistance, since it

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25. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992).

26. U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

27. See *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (“Article II, § 1, cl. 1, of the Constitution . . . does not mean *some of* the executive power, but *all of* the executive power.”).

28. Proponents of an expansive reading of the Article II Vesting Clause have sometimes sought to distinguish the Article I Vesting Clause on the grounds that its text refers not to “the legislative power” simpliciter but rather to “[a]ll legislative Powers herein granted.” U.S. CONST. art. I, § 1. See, e.g., Calabresi & Rhodes, *supra* note 25, at 1198-99. If anything, this distinction would suggest a more expansive view of the permissible alienation of Congress's powers.

29. See, e.g., THE FEDERALIST NO. 51 (James Madison) (“In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.”). For a critique of normative skepticism of legislatures, see David Froomkin & Ian Shapiro, *The New Authoritarianism in Public Choice*, 71 POL. STUD. 776, 777 (2023).

30. See, e.g., *INS v. Chadha*, 462 U.S. 919, 951 (1983) (“It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”). *But see id.* at 985 (White, J., dissenting) (observing that the Court's historical treatment of congressional delegation to executive agencies suggests that it



refers only to “Bills” and to “Order[s], Resolution[s], or Vote[s] to which the Concurrence of the Senate and House of Representatives may be necessary.”<sup>31</sup> With respect to nondelegation, this is question-begging, since the question is precisely whether the output of administrative agencies is a matter “to which the Concurrence of the Senate and House of Representatives may be necessary.”<sup>32</sup>

The fundamental problem with formalism in separation of powers is that there are no firm lines between “legislative” acts and “executive” acts.<sup>33</sup> The prescription of a general rule might affect a small number of individuals. Classificatory decisions about individuals might dramatically affect the coverage of a rule. Just as the Article II Vesting Clause has been invoked to support entirely atextual rationalizations of “inherent” executive authority, so too do restrictive doctrines on “legislative” power lack any essential basis in constitutional text. Consider the Court’s most significant foray into defining legislative action, according to which an act is “essentially legislative in purpose and effect” when it has “the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch.”<sup>34</sup> Congress is the only branch of the federal government that passes legislation. But all three branches act in ways that have legal import. Judicial and administrative orders routinely alter the rights and duties of persons outside of the legislative branch.

For these and related reasons, important scholarship has questioned the legal basis of the nondelegation doctrine. One intervention has been to cast doubt on its originalist credentials. Recent scholarship has demonstrated that broad delegations of regulatory authority to administrative agencies were not disfavored by the Framers and in fact were implemented in the early years of the Republic.<sup>35</sup> Indeed, prior to the

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does not violate Article I, Section 7); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 557 (1992).

31. U.S. CONST. art. I, § 7.

32. *Id.*

33. See A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 NW. U. L. REV. 1346, 1364-65 (1994). See also THE FEDERALIST NO. 37 (James Madison) (“Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces the legislative, executive, and judiciary. . .”).

34. *Chadha*, 462 U.S. at 952.

35. See Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1429 (2021) (arguing that original understanding permitted agency rulemaking imposing coercive regulations on private, domestic conduct); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282 (2021) (arguing that the original understanding included no limit on delegation); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 88 (2021) (arguing that the First Congress delegated multiple “important policy decisions” to executive officers); cf. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 29-78 (2012). But see Aaron Gordon, *Nondelegation*, 12

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twentieth century, the nondelegation doctrine was honored only in the breach at the Supreme Court,<sup>36</sup> if it was recognized as a doctrine at all. Perhaps even more damaging is the argument that the nondelegation doctrine lacks any textual basis in the Constitution.<sup>37</sup> According to Eric Posner and Adrian Vermeule, “the content of the ‘executive’ power simply is the execution of validly enacted law, including statutes; the substantive limitation is that the executive officer must act within the legal bounds that the statute itself sets.”<sup>38</sup> Thus, they claim, any legislative delegation to the executive is consistent with the constitutional separation of powers.

Although Posner and Vermeule argue that the Constitution does not support a nondelegation doctrine, another way of construing their argument is that the traditional intelligible principle standard is the correct nondelegation test. If it is impossible to say whether executive action occurs pursuant to a congressional authorization, then the executive action does not meaningfully follow from a legislative act. Perhaps Posner and Vermeule’s point would be that such a limiting principle is not a doctrine of constitutional law at all but merely a principle of statutory interpretation that a text too vague to construe cannot have legal import. Setting aside that canons of statutory interpretation can sometimes have constitutional rationales, there is an obvious respect in which the nondelegation doctrine is indeed a constitutional principle that follows from Article I: a statute saying that “the President shall exercise the legislative power” would clearly violate the Article I Vesting Clause.

Nevertheless, the question about the relationship of the nondelegation doctrine to statutory interpretation is an important one. Indeed, scholarship and doctrine alike have coalesced on the view that the nondelegation doctrine is largely implemented through statutory interpretation. The Court in *Mistretta* recognized that courts have advanced nondelegation concerns primarily through statutory interpretation.<sup>39</sup> Cass Sunstein argues that the nondelegation doctrine “has

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N.Y.U. J.L. & LIBERTY 718, 729 (2019) (arguing that original understanding rejected delegation of legislative authority); Ian Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1494 (2021) (claiming that “none of the statutory delegations examined by Mortenson and Bagley, Parrillo, and Chabot necessarily refute the proposition that Congress cannot delegate decisions involving private rights”).

36. See, e.g., *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825) (“It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”).

37. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1729 (2002) (arguing that “the Article I Vesting Clause . . . simply does not speak to the point at issue”); Farina, *supra* note 6, at 90 (noting the “conspicuous absence of typical constitutional interpretive concerns with text, intent, and purpose” in early courts’ discussions of delegation).

38. Posner & Vermeule, *supra* note 37, at 1730.

39. See *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (“In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of

been relocated rather than abandoned,” its impulse harnessed in a set of canons of statutory construction that aim to ensure executive fidelity to legislative mandates.<sup>40</sup> Jim Rossi observes that this is an approach “serving primarily to limit the executive branch, not Congress.”<sup>41</sup> John Manning concurs with much of Sunstein’s analysis, but unlike Sunstein, Manning also advances a normative objection to this approach, arguing that nondelegation canons fail to advance the central purpose of the nondelegation doctrine, ensuring that Congress makes important policy choices.<sup>42</sup> More recently, the Court has devised a new nondelegation canon in the invention of a “major questions doctrine” under *Chevron*.<sup>43</sup> While nondelegation canons have an important place in nondelegation analysis, they can also run up against limits: language can sometimes be so vague that it provides no limiting principle on any reasonable construction.

Despite the questions that scholars have raised about its legal basis, the Supreme Court has, at least since 1935, repeatedly and consistently insisted that there is a nondelegation doctrine. And there are structural reasons to think that this makes sense. A long line of cases has sought to prevent Congress from controlling the execution of the laws it passes.<sup>44</sup> It makes just as much sense to prevent Congress’s executive agents from supplanting Congress as legislators. Even if the relevant constitutional text is vague, inferences from constitutional structure are also an appropriate

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statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.”) *See also* *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (“[A] nondelegation inquiry always begins (and often almost ends) with statutory interpretation.”).

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

41. Jim Rossi, *Nondelegation Doctrine*, in *ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES* 437-38 (David S. Tanenhaus ed., 2008).

42. *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228 (“If the point of the nondelegation doctrine is to ensure that Congress makes important statutory policy, a strategy that requires the judiciary, in effect, to rewrite the terms of a duly enacted statute cannot be said to serve the interests of that doctrine.”); *see also* David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 15 (2002). But this objection proves too much: if statutory interpretation were an imposition of judicial policy choices, then the legitimacy of statutory interpretation much more broadly, including its ubiquitous canons of construction, would be thrown into question.

43. *See* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (reasoning that a court should not understand Congress “to delegate a policy decision of such economic and political magnitude to an administrative agency” in the absence of a clear statement); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014); *King v. Burwell*, 576 U.S. 473, 485 (2015); *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting) (“Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.”).

44. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 959 (1983) (preventing Congress from exercising a legislative veto that bypasses the presentment requirement for legislation); *Buckley v. Valeo*, 424 U.S. 1, 127 (1976) (preventing Congress from assigning to itself power to appoint members of an executive commission); *Bowsher v. Synar*, 478 U.S. 714, 715 (1986) (preventing Congress from assigning to itself removal power over an executive officer).

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basis for constitutional doctrine.<sup>45</sup> Indeed, calls for strengthening the nondelegation doctrine have been dominated by functionalist arguments. They tend to focus on the value of pushing policy choices into the onerous requirements of Article I, Section 7, rather than on what the Constitution actually has to say about legislative delegation.<sup>46</sup>

Offering a contrasting perspective on the import of Article I, Section 7, John Manning has argued that U.S. constitutional design along with modern separation-of-powers doctrine “creates a structurally enforced nondelegation doctrine”: because Congress cannot control the manner in which its agents will exercise authority delegated in vague terms, Congress has an incentive to delegate with precision in order to achieve its policy objectives.<sup>47</sup> Congress’s incentives may already do the work that some proponents of an enhanced nondelegation doctrine seek to achieve.

From a functional perspective, we should be concerned about whether Congress retains legislative supremacy. The import of the Article I Vesting Clause is that Congress is to be supreme in the realm of ordinary law (that is to say, setting aside constitutional law). Executive implementation and both executive and judicial interpretation of statutes should not supplant legislative instructions. This interpretation also comports with Article II’s injunction that the President’s role is to “take Care that the Laws be faithfully executed.”<sup>48</sup> And, fortuitously, the traditional formalistic test

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45. See generally CHARLES L. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969) (defending the method of drawing inferences about institutional powers and constraints from abstract structural provisions of the Constitution).

46. E.g., *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) (“Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President. And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice.”); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1301-02 (2003) (expressing concern that vague delegations allow policymaking to bypass bicameralism and presentment).

47. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 711-12 (1997) (identifying as contributing structural features, (1) the distinct election of the President, (2) Congress’s inability to diminish the current President’s compensation, (3) Congress’s inability to nominate executive officers or judges, (4 and 5) Congress’s inability to remove executive officers or judges short of the onerous impeachment mechanism, and (6) Congress’s inability to “seed the executive or judiciary with its own members”). See also *Mistretta v. United States*, 488 U.S. 361, 421 (1989) (Scalia, J., dissenting) (suggesting that Congress will be wary about delegating because it cedes control over policy in doing so).

48. U.S. CONST. art. 2, § 3. See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that ‘All legislative Powers herein granted shall be vested in a Congress of the United States . . .’ After granting many powers to the Congress, Article I goes on to provide that Congress may ‘make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.’”).

performs this function. As the Court has continually reaffirmed, what it is for Congress to articulate an intelligible principle is to provide sufficient policy guidance to its agents to make their exercise of statutorily conferred discretion meaningfully follow from a legislative instruction.

A related idea that the Court has sometimes invoked is to view judicial review of executive action as an instrument that helps to ensure executive fidelity to congressional purposes and hence prevents the alienation of legislative authority.<sup>49</sup> Viewing the nondelegation doctrine as the Constitution's injunction that Congress's agents perform only those functions that Congress has authorized, the real concern should be whether the terms of a delegation contain sufficiently administrable standards to enable meaningful judicial review. If a statute is so vague that it is impossible to judge whether its enforcers have acted in accordance with it, then executive action purportedly in furtherance of the statute is not meaningfully different from action that is *ultra vires*. A reviewing court must at least be able to assess whether Congress's agent is doing the kind of thing that Congress authorized it to do.

The central concern of the Article I Vesting Clause is the agglomeration of power outside of Congress. Agglomeration of policymaking power outside of Congress is particularly concerning because it suggests alienation of legislative power rather than executive assistance in developing a congressional scheme. The further along the continuum Congress goes toward saying that another actor may exercise legislative power, the more concerning the delegation becomes under the Vesting Clause.<sup>50</sup> Some scholars have developed related due-process theories of the defects of vague delegations. While these are plausible and salutary, they move the focus of nondelegation analysis away from the core function of the Vesting Clause. For instance, Evan Criddle develops a Fifth Amendment theory of nondelegation, claiming that the nondelegation doctrine "aims to conserve liberty through checks and balances."<sup>51</sup> Cary Coglianese's suggestion that the possibility of criminal penalties should trigger heightened nondelegation concerns<sup>52</sup> similarly sounds in due process rather than the Vesting Clause. This Article, by contrast, embraces

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49. See, e.g., *Touby v. United States*, 500 U.S. 160, 168 (1991) ("[T]he purpose of requiring an 'intelligible principle' is to permit a court to 'ascertain whether the will of Congress has been obeyed.'" (quoting *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989))). See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 605 (1992) (Blackmun, J., dissenting) ("[T]his Court has previously justified a relaxed review of congressional delegation to the Executive on grounds that Congress, in turn, has subjected the exercise of that power to judicial review.").

50. See Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1873 (2019) (arguing that the nondelegation doctrine prevents the alienation of the entirety of a power that the Constitution confers on Congress, like the Commerce Clause power, but not subsets of such a power).

51. Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 140 (2011).

52. Coglianese, *supra* note 50, at 1867.

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the traditional Vesting Clause analysis. The distinctive nondelegation question is whether Congress has been divested of its legislative power.

The essential connection between the nondelegation doctrine and the Article I Vesting Clause is particularly worth stressing in view of arguments about delegation that are rooted in Article II rather than Article I. Douglas Ginsburg and Steven Menashi, for instance, allege that “[i]t is the demise of [the nondelegation] doctrine that has allowed the Congress both to augment and to fragment the executive branch by establishing federal agencies within the executive tasked with making policy pursuant to broad mandates from the Congress, agencies that effectively exercise legislative power through rulemaking.”<sup>53</sup> Against the conventional wisdom that understands the constitutional problem with overbroad legislative delegations to the executive as the alienation of legislative authority, Ginsburg and Menashi view the problem as the expansion of legislative power at the expense of the President.<sup>54</sup> The problem is that “the congressional delegations displace unitary executive leadership.”<sup>55</sup> In fact, Ginsburg and Menashi are not engaged in Article I analysis at all. As a consequence, their analysis converts the nondelegation doctrine into a restraint on Congress’s legislative power rather than its guardian. The powers vested in Congress by Article I are not mere adjuncts of Article II—but in fact, quite the contrary.

The remainder of this Article is dedicated to arguing that Congress faces a greater risk of alienating its legislative power when it delegates to the President directly and hence that nondelegation analysis must incorporate a Step Zero distinction between delegations to the President and delegations to agencies, imposing more rigorous scrutiny of delegations to the President in order to comport with the Article I Vesting Clause. Scholarship on the nondelegation doctrine has not generally recognized the Step Zero distinction, even where it has addressed relevant themes.<sup>56</sup> Some scholars claim, without offering analysis, that the distinction does not exist.<sup>57</sup> Others claim that delegation to agencies is particularly concerning,<sup>58</sup> a view that the Supreme Court seems poised to adopt.<sup>59</sup> And scholars who have noted that the nondelegation doctrine

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53. Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 254 (2010).

54. *Id.* at 269.

55. *Id.* at 273.

56. *E.g.*, Coglianese, *supra* note 50; Criddle, *supra* note 51; Note, *supra* note 3.

57. *E.g.*, Posner & Vermeule, *supra* note 37, at 1725 n.9 (claiming that “nothing . . . turns on the identity of the delegate”).

58. *E.g.*, Ginsburg & Menashi, *supra* note 53. Ginsburg and Menashi locate the constitutional source of their concern in the Article II Vesting Clause rather than the Article I Vesting Clause, suggesting that their concern is not in fact a nondelegation problem of the traditional kind.

59. *See* Note, *supra* note 3, at 1159 (“[T]he current conservative Justices appear inclined toward a nondelegation framework that can accommodate both presidential power and their campaign against the modern administrative state.”).

historically seemed to apply more stringently to delegations to the President<sup>60</sup> have not given the distinction much analysis. Before engaging in constitutional analysis of the distinction, the Article turns to the distinction's neglected history.

## II. Underappreciated Integrity

The canned history of the nondelegation doctrine sees it as a *Lochner*-era device, part and parcel of the pre-New Deal Court's deregulatory jurisprudence, that has been rightly abandoned in the age of the administrative state.<sup>61</sup> Julian Davis Mortenson and Nicholas Bagley, for instance, contend that the nondelegation doctrine "was never alive to begin with."<sup>62</sup> The Supreme Court only ever invoked the nondelegation doctrine twice, early in the New Deal, as a basis for striking down legislation.<sup>63</sup> After 1935, the Court never again invoked the nondelegation doctrine as the rationale for striking down a statute.<sup>64</sup> Scholars have tended to view the 1935 nondelegation cases as being of a piece with the contemporaneous Commerce Clause jurisprudence.<sup>65</sup> Yet Jason Iuliano and Keith Whittington argue that, whereas 1937 saw a sea change in Commerce Clause doctrine, there was no such transformation in enforcement of the nondelegation doctrine, which after 1935 was enforced much the same as it had been in the preceding decades.<sup>66</sup> Indeed, the nondelegation doctrine has a distinctively structural purpose that is neglected in the conventional presentation.

It is certainly true—if viewed as a purely textual matter—that the Court applied a more stringent standard in scrutinizing the delegations at issue in the infamous 1935 cases than it applied subsequently in cases

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60. See Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 982 (1997) (observing that the two cases in which the Supreme Court invoked the nondelegation doctrine to strike down statutes both involved delegations to the President); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2364-65 (2001) (same); Gerard N. Magliocca, *Robert Jackson's Nondelegation Doctrine*, 25 GREEN BAG 2D 95, 95-96 (2022) (recounting Robert Jackson's argument, made during his tenure as Solicitor General, that the nondelegation doctrine applied only to delegations to the President).

61. Mortenson & Bagley, *supra* note 35, at 284 ("[T]he 1935 cases were of a piece with the Supreme Court's contemporaneous efforts to cabin Congress's power to regulate interstate commerce.").

62. *Id.* at 285.

63. See *Panama Refining Co. v. Ryan*, 293 U.S. 389 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

64. The Court also mentioned the nondelegation doctrine the following year in *Carter v. Carter Coal*, but *Carter Coal* was decided on due-process grounds. 298 U.S. 238, 311 (1936).

65. See, e.g., Mortenson & Bagley, *supra* note 35, at 284; DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* 59-60 (2014).

66. Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 632 (2018) ("The evidence suggests that the principle of nondelegation of legislative power was largely unaffected by the events of the 1930s. Contrary to conventional wisdom, the doctrine was not cast into exile. It continued to play a role in American constitutional law no different from the one it had played before the New Deal.").

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challenging agency authority on nondelegation grounds. But the apparent tension between the vigorous application of the nondelegation doctrine in the 1930s and the Court's subsequent tolerance for broad delegations can best be resolved by recognizing that the doctrine applies a more stringent standard in reviewing delegations to the President than delegations to agencies.<sup>67</sup> This is why the Court has only ever invoked the nondelegation doctrine to strike down delegations of power to the President directly, and it has rightly declined to invoke the nondelegation doctrine in cases challenging delegations to agencies. Elena Kagan observed, offhand, in her landmark study of presidential administration that the 1935 cases appear to reflect a particular suspicion of the President as a policymaker.<sup>68</sup> In Kagan's apt phrase, "the nondelegation doctrine has had countless good delegees and only one bad delegee (the President)."<sup>69</sup>

It has become scholarly commonplace to say that the nondelegation doctrine had one—and only one—good year.<sup>70</sup> But it would be more apt to say that delegation had one very bad year. That year was not 1935, the year of the nondelegation cases, but 1933, the year of the passage of the National Industrial Recovery Act (NIRA),<sup>71</sup> the statute challenged in both of the 1935 nondelegation cases. The NIRA was a distinctively substantial abdication of legislative responsibility. In the years following the 1935 cases, Congress recalibrated its approach to delegation. Attending to the structural differences between the delegations at issue in the 1935 cases and those at issue in subsequent cases reveals more continuity than rupture in the constitutional law of delegation. Previous accounts have inadequately recognized that structures and procedures established by a statutory regime matter in assessing the breadth of a delegation.

### A. The 1935 Cases

Analysis of the 1935 cases makes this clear. Both *Panama Refining* and *Schechter Poultry*, the only two instances in which the Court ever invoked the nondelegation doctrine as a basis for striking down a statute, centered on structural considerations. Plaintiffs in both cases brought both nondelegation and Commerce Clause claims. But the Court did not reach the Commerce Clause claim at all in *Panama Refining*.<sup>72</sup> And while *Schechter Poultry* found a violation of the Commerce Clause in addition to a violation of the nondelegation doctrine, it elaborated the distinctively

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67. See *infra* note 77 and accompanying text.

68. Kagan, *supra* note 60, at 2365. Kagan argued that this is a mistake, since she regarded the President as more responsive than Congress to popular will. *Id.* at 2367.

69. *Id.* at 2365.

70. See Sunstein, *supra* note 40, at 322 ("We might say that the conventional [nondelegation] doctrine has had one good year, and 211 bad ones (and counting).").

71. National Industrial Recovery Act, 15 U.S.C. § 703 (1933).

72. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935).



structural reasoning underlying its nondelegation analysis to a greater degree than *Panama Refining*. Moreover, *Panama Refining* was decided 8-1 and *Schechter Poultry* 9-0, margins very different from many of the *Lochner*-era decisions on economic regulation.<sup>73</sup>

*Schechter Poultry* came down on the same day as *Humphrey's Executor*,<sup>74</sup> and both cases imposed significant curtailments of presidential power. What has been less appreciated is that the two cases are straightforwardly complementary: both signaled constitutional support for segmentation in the structure of the executive branch. *Humphrey's Executor* upheld Congress's power to immunize agency heads from presidential removal in order to protect agency independence.<sup>75</sup> Delegations of power to independent agencies resist the agglomeration of executive power in the hands of the President. *Schechter Poultry*, correspondingly, found constitutional fault with a statute because it agglomerated too much power in the President.<sup>76</sup> The alignment between the Court's most important nondelegation case and its most important statement about congressional power to protect executive officials from presidential control provides more evidence that the Court's 1935 nondelegation decisions had a distinctively structural purpose.

In *Panama Refining*, plaintiffs challenged section 9(c) of the NIRA, which authorized the President "to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law,"<sup>77</sup> as violating the nondelegation doctrine. The Court determined that section 9(c) lacked any intelligible principle guiding executive implementation and that no other section of the NIRA provided a limiting principle. In one sense, however, NIRA section 9(c) provided more constraint on discretion than do many statutes that have been upheld under nondelegation analysis, since it provided a numerical constraint on the President's authority to regulate the transportation of oil: the President was not permitted to prohibit the transportation of oil in quantities permitted to be produced by the states. This numerical constraint was perhaps problematic in that it was supplied by existing state law rather than by Congress. But the Court focused not on the statutory constraint but on what it did not constrain, observing that, "[a]s to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid

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73. *E.g.*, *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (striking down, in a 5-4 decision, a minimum-wage law under the Due Process Clause), *rev'd* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding, in a 5-4 decision, a minimum-wage law against a Due Process Clause challenge).

74. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

75. *Id.*

76. *See infra* notes 80-85 and accompanying text.

77. 15 U.S.C. § 709(c).

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down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.”<sup>78</sup> The judgment that there was not an “intelligible principle” was zealous in the extreme, particularly by the standard of later nondelegation cases. *Panama Refining* then may stand for the proposition that the intelligible principle test applies more stringently in reviewing delegations to the President.

*Schechter Poultry*, decided later the same year, provides a more detailed structural analysis of the features distinguishing a delegation to the President from alternative schemes delegating authority to executive agencies. *Schechter Poultry* concerned a challenge to section 3 of the NIRA, which authorized the President to issue “codes of fair competition” to regulate industries.<sup>79</sup> *Schechter Poultry* was in some ways a more complicated case than *Panama Refining*, because it involved delegation to private actors as well as to executive agents; industry representatives were prominently involved in the drafting of the codes. Nevertheless, the final action under review was the President’s approval of a code, and the central constitutional issue concerned the breadth of the President’s discretion under the statute. *Schechter Poultry* was also simpler in that, as Cardozo observed in concurrence, there was no statutory provision whatsoever cabining presidential discretion.<sup>80</sup>

The Court’s analysis began with the vagueness of the central phrase at issue, “fair competition,” but it did not end there. The Court found the delegation so concerning not only because of the vagueness of its language but also because of the absence of attendant circumstances that had rescued similarly vague language in other contexts. After raising concern about the potentially limitless discretion afforded by the statutory language, the Court proceeded to spend several pages contrasting other cases in which it had upheld similarly vague statutory grants of authority using language not yet liquidated by the common law. For instance, the Court had upheld the Federal Trade Commission Act’s authorization of the Federal Trade Commission to regulate “unfair methods of competition,” a phrase that “does not admit of precise definition, its scope being left to judicial determination as controversies arise . . . to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest.”<sup>81</sup>

In comparing the discretion conferred upon the President by the NIRA with the discretion that various statutes had conferred on agencies,

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78. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935).

79. 15 U.S.C. § 703.

80. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

81. *Id.* at 532-33.

both substance and procedure mattered. The Court adduced four central points of comparison, marking the NIRA as an unusually and dramatically unconstrained delegation:

- (1) The statute provided no meaningful textual guidance for the executive's exercise of discretion under its auspices.<sup>82</sup>
- (2) The statute was unlimited in its substantive scope.<sup>83</sup>
- (3) The statute did not provide any structures that would constrain the sole discretion of an individual.<sup>84</sup>
- (4) The statute did not provide for robust administrative procedures to routinize its administration and to protect due process.<sup>85</sup>

Only the first concerned the precision of the textual grant of discretionary authority. Contemporary discussion of the state of the nondelegation doctrine focuses on this first dimension, which is certainly important. But more attention should be paid to the others.

### B. Delegation after 1935

In a series of decisions after 1935, the Court approved of delegations to agencies with broad statutory language, such as the requirement that agency action be “fair and equitable”<sup>86</sup> or in the “public interest, convenience, or necessity.”<sup>87</sup> Recent calls for expanded application of the nondelegation doctrine against regulatory statutes focus on the breadth of this kind of statutory language.<sup>88</sup> But a myopic focus on the language describing the criteria according to which an executive official is to issue rules misses important structural features influencing the scope of a delegation, as the *Schechter Poultry* Court had recognized. Indeed, the

82. *Id.* at 538 (“While this is called a finding, it is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws.”).

83. *Id.* at 539 (“And this authority relates to a host of different trades and industries, thus extending the President’s discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country.”).

84. *Id.* (“The Act provides for the creation by the President of administrative agencies to assist him, but the action or reports of such agencies, or of his other assistants—their recommendations and findings in relation to the making of codes—have no sanction beyond the will of the President, who may accept, modify, or reject them as he pleases.”).

85. *Id.* at 533. The *Schechter Poultry* Court contrasted the NIRA with the Federal Trade Commission Act, through which “[a] Commission, a quasi-judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within its statutory authority.” The NIRA, on the other hand, “dispenses with this administrative procedure and with any administrative procedure of an analogous character.”

86. *Yakus v. United States*, 321 U.S. 414, 424 (1944) (rejecting a nondelegation challenge to the Emergency Price Control Act of 1942).

87. *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 226 (1943) (rejecting a challenge to the Communications Act of 1934 alleging unconstitutional vagueness).

88. *See, e.g., Gundy v. United States*, 139 S. Ct. 2116, 2140 (2019) (Gorsuch, J., dissenting) (suggesting that the intelligible principle standard “has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional” and characterizing examples of statutory language upheld under the intelligible principle standard as “gibberish”).

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departmental design of the modern administrative state is in part a consequence of the nondelegation doctrine. The 1935 cases were not primarily about economic ordering but about political structure. Commentators have focused on the shift from a corporatist approach under the NIRA to a regulatory approach after 1935.<sup>89</sup> But the change in political structure was more constitutionally salient. The most exuberant proponents of the NIRA had predicted that it would obviate the need for specialized agencies.<sup>90</sup> After 1935, however, Congress has consistently delegated regulatory authority to specialized agencies in particular policy areas. The shift to dispersal and specialization of authority reflected the structural concerns that animated *Schechter Poultry's* application of the nondelegation doctrine.

The nondelegation doctrine was never simply about the vagueness of the language that Congress used in delegating power to agents. Telling an agent to “do this job well” provides wide discretion within the bounds of the job, but it cabins the agent’s discretion to carrying out the assigned job. What matters more is the breadth and potential vagueness of the job.<sup>91</sup> Nondelegation jurisprudence has always approved of congressional decisions to confer wide discretion upon agencies within the confines of their assigned tasks. There is an important distinction between imprecision about the means for carrying out an assigned task and imprecision about the nature or scope of the task itself. As the Court observed in *American Trucking*, an agent’s permissible discretion “varies according to the scope of the power congressionally conferred.”<sup>92</sup>

Delegations to specialized agencies that are assigned to carry out governance functions within specific issue areas are inherently bounded in precisely the way that the nondelegation doctrine has sought to encourage. Indeed, the assignment of a task to a particular agency is itself a constraint on the discretion of the executive, as the Court has recognized.<sup>93</sup> This is consistent with other features of our administrative law, which approves of broad discretion within a confined area that Congress has prescribed. For instance, the Administrative Procedure Act (APA) precludes judicial

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89. See, e.g., ERNST, *supra* note 65, at 56-63; ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 37-47 (1995).

90. BRINKLEY, *supra* note 89, at 38 (“Hugh Johnson, the NRA’s first director, envisioned such dramatic results that he told Secretary of Labor Frances Perkins in 1933: ‘When this crisis is over and we have the recovery program started, there won’t be any need for a Department of Labor or a Department of Commerce.’”).

91. See generally Coglianese, *supra* note 50 (distinguishing various dimensions on which the breadth of a delegation may vary).

92. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475 (2001).

93. See *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (observing that a delegation satisfies constitutional scrutiny “if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority”). See also *Mistretta v. United States*, 488 U.S. 361, 373 (1989) (reaffirming this language).

review of action “committed to agency discretion by law.”<sup>94</sup> In such contexts, absolute agency discretion is legitimated precisely because it is circumscribed by Congress’s statement of the limited purpose for which it is granted. And this was a principle of administrative law recognized even before the adoption of the APA. In *Yakus*, for example, the Court observed that “the doctrine of separation of powers [does not] deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command.”<sup>95</sup> Indeed, administrative discretion in the service of legislative purposes vindicates the legislative power that Article I vests in Congress.

### III. Distinguishing the President

The argument of this Part—that there are constitutionally significant structural differences between delegations of power to agencies and delegations of power to the President directly—may sound counterintuitive. That is because we are in an era in which the unitary executive theory is winning. It is winning most obviously in the current trend of removals jurisprudence.<sup>96</sup> It is also winning the rhetorical battle: it is common to hear law students and even law professors use the term “executive” to refer to the President. But as a matter of positive law, this is not how delegation generally operates. In delegating power to the executive, Congress generally confers authority on a particular agency (or an officer thereof, often the agency’s chief officer). Instances of delegation directly to the President are unusual, and their substance tends to be less well-defined. Delegations to the president are exceptional both numerically and substantively.

Regulatory statutes ordinarily confer no authority on the President beyond the power to appoint agency heads. For instance, the Social Security Act provides for presidential appointment of the members of the Social Security Board but otherwise confers no authority on the President.<sup>97</sup> The Fair Labor Standards Act provides for presidential appointment of the Administrator of the Wage and Hour Division of the

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94. 5 U.S.C. § 701(a)(2) (2018). For example, agencies have absolute discretion in spending a lump-sum appropriation, as long as the spending is consistent with permissible statutory objectives. *Lincoln v. Vigil*, 508 U.S. 182, 192-93 (1993).

95. *Yakus v. United States*, 321 U.S. 414, 425 (1944).

96. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010) (holding that multiple layers of for-cause tenure protection in an agency leadership structure violates separation of powers); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (holding that tenure protection for the single agency head of the Consumer Financial Protection Bureau violated the separation of powers); *Collins v. Yellen*, 141 S. Ct. 1761, 1783 (2021) (holding that tenure protection for the single agency head of the Federal Housing Finance Agency violated the separation of powers).

97. Social Security Act, 42 U.S.C. § 701 (1935).

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Department of Labor and for certain reporting by the Secretary to the President (and to Congress).<sup>98</sup> The Occupational Safety and Health Act provides for presidential appointment of the members of the Occupational Safety and Health Review Commission and for certain reporting by the Secretary of Labor and the Director of the National Institute for Occupational Safety and Health to the President (and to Congress).<sup>99</sup>

As the preceding Part observed, if Congress delegates little regulatory authority to the President directly, that may be evidence that the nondelegation doctrine is serving its purpose. The assignment of regulatory power to specialized and procedure-bound authorities serves the nondelegation doctrine's goal of dispersing and routinizing executive power in order to prevent the agglomeration of legislative power outside of Congress. It is interesting that Ginsburg and Menashi see the proliferation of executive departments as evidence of underenforcement of the nondelegation doctrine.<sup>100</sup> The contrary is true. Indeed, the more specifically Congress is required to delegate, the more specialized departments we might expect there to be. As Kevin Stack observes, however, there are also complex delegations that divide power between an agency and the President.<sup>101</sup> In these cases, provisions delegating authority to the President often lack the specificity of provisions authorizing agency action. For instance, the Clean Air Act, a wide-ranging regulatory statute, contains several provisions permitting the President to provide for exemptions from otherwise general rules that the EPA is authorized to make under the Act, simply upon a certain presidential determination.<sup>102</sup> Moreover, some of the delegations that run directly and exclusively to the President are among the most textually and procedurally unconstrained, particularly delegations concerning immigration, trade, and emergency powers.<sup>103</sup>

The purpose of the nondelegation doctrine is to prevent government by edict. It ensures that lawmaking occurs through the legislative process

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98. Fair Labor Standards Act, 29 U.S.C. §§ 204(a), 204(e) (1938).

99. Occupational Safety and Health Act, 29 U.S.C. §§ 661, 668(b), 671(f), 672(h), 675 (1970).

100. Ginsburg & Menashi, *supra* note 53, at 254.

101. Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 263 (2006).

102. *See, e.g.*, 42 U.S.C. § 7412(i)(4) (1999) ("The President may exempt any stationary source from compliance with any standard or limitation under this section for a period of not more than 2 years if the President determines that the technology to implement such standard is not available and that it is in the national-security interests of the United States to do so. An exemption under this paragraph may be extended for 1 or more additional periods, each period not to exceed 2 years. The President shall report to Congress with respect to each exemption (or extension thereof) made under this paragraph."); 42 U.S.C. § 7418(b) ("The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so . . .").

103. For consideration of some of the most egregious cases of broad delegations to the President, see *infra* Section IV.C.

and is carried out by executive agents through procedures that tether executive discretion to a legislative plan. But our administrative law does not seek to eliminate discretion on the part of Congress's agents. Rather, it seeks to harness discretion in the service of a legislative scheme. Delegations are constitutionally suspect insofar as they fail both the substantive criteria and the procedural requirements that ensure that a delegation provides sufficient guidance to the agents who will implement it. But when robust administrative procedures exist, courts have been appropriately approving of capacious statutory language. Scholars who identify advantages to grants of broad discretion to administrative agencies<sup>104</sup> are not out of step with our constitutional doctrine. Indeed, the nondelegation doctrine is properly understood as a constitutional vehicle for funneling the exercise of executive authority through the procedures that attach to administrative agencies—and not to the President.

There are three central features that distinguish authority exercised by the President from authority exercised by agencies as a constitutional matter.

- (1) Delegations to agencies facilitate the internal separation of powers within the executive branch by diffusing power across distinct departments, each with circumscribed authority and specialized competence. Delegations to agencies are inherently cabined in a way that many delegations to the President are not.
- (2) Agency decision-making is subject to far greater procedural constraints than presidential decision-making, including the procedural requirements of the APA, greater judicial review, and more potent congressional oversight.
- (3) The political incentives of the President encourage, and the political power of the President enables, much more legally adventurous action than agencies are ordinarily inclined to attempt.

The subsections of this Part take up each of these considerations in turn. Delegating authority to agencies diffuses government power, subjects administrative power to procedural constraints, and limits the ability of a single individual's will to supplant legislative policy by requiring coordination across multiple agents. It therefore reinforces Congress's role as the holder of legislative power, serving nondelegation purposes.

#### *A. Departmental Boundaries Diffuse Power*

Delegating to the President directly circumvents important internal constraints on executive action. Scholars have taken to referring to these internal constraints, which emerge from congressional decisions about the

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104. E.g., Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 86 (1985).

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internal structure of the executive branch, as “internal separation of powers.”<sup>105</sup> Delegating authority to agencies rather than to the President directly reinforces what Blake Emerson has recently referred to as the “departmental structure of executive power.”<sup>106</sup> Requiring coordination across multiple administrative actors is a powerful instrument for promoting administrative regularity and deliberation. When the President can only make policy through coordination with other executive officials, there exists a structural constraint on the power of a single individual to make policy unilaterally. This is one of the factors that the *Schechter Poultry* Court regarded as centrally important to nondelegation analysis.<sup>107</sup> The diffusion of power can also contribute to the quality of deliberation, helping to ensure that executive action is evidence-based and responsive to the considerations that Congress chose to make relevant. Involving more officials in the deliberative process of executive decision-making provides more opportunities for scrutiny of a proposed justification, and the dispersal of authority better protects officials who voice critical perspectives.

Even in an era of “presidential administration,”<sup>108</sup> internal diffusion of power within the executive still matters. A skeptic may suggest that, with the rise of executive orders and increasing ubiquity of the President’s power to remove executive officers, the President can simply direct agency officials to implement the President’s policy objectives, undermining any structural significance of the dispersal of authority.<sup>109</sup> This characterization neglects a number of salient features of executive institutional structure. The extent of internal separation of powers has certainly been attenuated by recent removals jurisprudence that has made significant inroads into

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105. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2314 (2005); see also Gillian Metzger, *The Interdependent Relationship between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 423 (2009); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 536 (2015); Cristina M. Rodríguez, *Complexity as Constraint*, 115 COLUM. L. REV. SIDEBAR 179, 180 (2015).

106. Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. ON REGUL. 90, 96-97 (2021) (“[D]epartments themselves place controls on executive power . . . . Departments do not merely follow orders, they make orders orderly. They help to ensure that we are governed not by the will of particular officials but by fairly predictable, minimally rational, and suitably general norms.”).

107. See *supra* Section II.A.

108. Kagan, *supra* note 60, at 2246.

109. I do not mean to contest that the President, in the current legal environment, has extensive—and growing—managerial power over the executive branch. For an overview of recent legal developments that have intensified the President’s power to control executive operations, see David Froomkin, *The Death of Administrative Law* (Working Paper, 2023), <https://papers.ssrn.com/abstract=4466397> [<https://perma.cc/9FLB-X2B9>]. The point is simply that the extent of the President’s managerial power depends on a legal architecture, and this legal architecture is a policy choice that is open to revision. To point to the President’s supervisory power as evidence that the structure of the executive branch is irrelevant is question-begging, because congressional choices about the structure of the executive branch are an important determinant of the extent to which the President’s attempts to exert managerial control will be effective.



Congress's power to structure agencies with independence from presidential control,<sup>110</sup> previously thought to be broad.<sup>111</sup> But removability of executive officials is not the only feature of the organization of the executive branch that has implications for internal separation of powers. Perhaps it is not even the most significant.

There need not be a contradiction between presidential supervision of administration and internal separation of powers.<sup>112</sup> Constitutional law can encourage Congress to subdivide executive power without challenging the core legal foundations of presidential administration.<sup>113</sup> Rather than thinking about the rules governing the distribution of authority within the executive as involving a choice between a plural and a unitary executive, we should think about them as involving a choice about the nature of the deliberative and consultative procedures that will be involved in the exercise of executive power. Moreover, presidential supervision of agencies can itself be an instrument of accountability to Congress and is indisputably constitutionally permissible insofar as its import is to "take Care that the Laws be faithfully executed."<sup>114</sup>

But there is a distinction between presidential supervision and presidential control. While Presidents have the formal power to fire many high-level officials, and increasingly so, this formal power does not imply that the President will, or should, achieve total, unilateral control of executive-branch activities. It is striking that removal doctrine has developed in such detail, considering that the Constitution makes no express statement about the removal power.<sup>115</sup> But even if one were to grant that the President possesses exclusive removal authority,<sup>116</sup> and even if one were to grant further that this removal authority must extend to most principal officers, it would not follow, as many scholars have imagined, that the President possesses the authority to direct principal officers.<sup>117</sup>

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110. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020); *Collins v. Yellen*, 141 S. Ct. 1761, 1783 (2021).

111. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

112. See Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 35 (2022) (arguing that the central figures in the development of the modern administrative state simultaneously endorsed robust presidential supervision of agency leaders and various forms of bureaucratic independence, including tenure protections for adjudicatory officials).

113. Whatever the force of the President's removal power (and whatever its constitutional basis), the extent of the President's removal power is not the only determinant of the extent to which managerial imperatives will dominate. See *supra* note 109. And the President may still play an important coordinating role even when formal decision-making authority is dispersed across multiple executive officials.

114. U.S. CONST. art. II, § 3.

115. See Jed Handelsman Shugerman, *Presidential Removal: The Marbury Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085, 2087 (2021) ("The Constitution is famously silent on removal . . .").

116. See *Myers v. United States*, 272 U.S. 52, 119 (1926).

117. See generally Stack, *supra* note 101 (arguing that the President only has authority to direct officers when Congress grants authority to the President in name).

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Presidential power to remove provides an insufficient foundation for putative presidential power to control. The realist theory of the President's power to direct executive officers is that the power to fire a subordinate implies the power to direct that subordinate's performance of her duties.<sup>118</sup> Yet one could draw a parallel inference from the inevitability of incomplete monitoring of subordinates<sup>119</sup> to the conclusion that the President's power to direct executive officers is necessarily limited. The ought-implies-can argument cuts two ways.

And even if the President did possess unbounded authority to direct principal officers, they do not have a legal obligation to comply.<sup>120</sup> Indeed, resignation is a potentially potent tool that executive officers can wield to promote executive accountability. The most dramatic historical example was the infamous "Saturday Night Massacre," the successive resignation of several Justice Department chiefs who refused to obey President Nixon's order to fire special prosecutor Archibald Cox.<sup>121</sup> In a more recent, albeit hypothetical, example, the Joint Chiefs of Staff developed a plan to resign one by one rather than obey illegal orders from President Trump following his election defeat.<sup>122</sup>

Short of resignation, there are a number of ways in which officials can, as a practical matter, impede a President's agenda. Foot-dragging can draw out the clock until there is a change of leadership.<sup>123</sup> Without expert input, poor drafting of rules or procedural irregularities can lead to problems in litigation. In *Department of Commerce v. New York*, for example, the Department's failure to establish an adequate administrative record to support the Secretary's decision to add a citizenship question to the Census led the Court to judge that the reason asserted in litigation was "pretextual."<sup>124</sup> Agency personnel can resist political directives through action as well as inaction, for instance by finding inconvenient facts.<sup>125</sup>

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118. See Kagan, *supra* note 60, at 2327 (inferring congressional intent to permit presidential directive authority over officials removable by the President from Congress's knowledge that such officials "stand in all other respects in a subordinate position to the President"). Although Kagan also notes that "the President often cannot make effective use of his removal power given the political costs of doing so." *Id.* at 2274.

119. Not to mention the political constraints on removal that Kagan identifies. See *id.* at 2274.

120. See Strauss, *supra* note 60, at 974 (observing that "events attending the dismissal of Archibald Cox . . . are sharply inconsistent with the proposition that the President's sole possession of constitutional 'executive power' means that any responsibility assigned to an executive department is his, and that he may exercise it.").

121. See *id.*

122. See Meghann Myers, *Top Generals Planned to Resign En Masse if Trump Refused to Leave Office: Reports*, MIL. TIMES (July 15, 2021), <https://www.militarytimes.com/news/your-military/2021/07/15/top-generals-planned-to-resign-en-masse-if-trump-refused-to-leave-office-reports> [<https://perma.cc/XLE3-8LFD>].

123. See Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 358, 378-81 (2019).

124. *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019).

125. See Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 164 (2018).

Developing policy through routine procedures rather than through irregular imposition can mitigate these challenges.

*B. The President Is Not an Agency*

In a context of judicial review of administrative-agency authority, the principle of constitutional avoidance counsels against raising nondelegation issues, because the existence of the Administrative Procedure Act obviates nondelegation problems. Indeed, the most plausible approach to applying the nondelegation doctrine more vigorously against agencies, Judge Williams's approach in *American Trucking*,<sup>126</sup> was largely duplicative of the work that the APA is already doing. Mark Seidenfeld and Jim Rossi observe that the D.C. Circuit's approach in *American Trucking* was redundant, as it would simply have converted the nondelegation doctrine into an adjunct of the APA's arbitrary-and-capricious test.<sup>127</sup>

The Administrative Procedure Act, however, does not apply to the President, so decisions made directly by the President are not subject to review under the APA.<sup>128</sup> As a result, presidential decision-making is peculiarly exempt from the procedural strictures that ordinarily apply to executive action. In particular, presidential decisions do not need to go through the consultation process prescribed by APA section 553.<sup>129</sup> Agency rulemakings, by contrast, must go through the notice-and-comment process, and final rules must respond to all significant comments.<sup>130</sup> Even more important, presidential decisions are not subject to the APA's arbitrary-and-capricious test. Agencies face *ex post* arbitrariness review of their decision-making processes.<sup>131</sup> In the absence

126. *Am. Trucking Ass'ns, v. EPA*, 175 F.3d 1027, 1034-40 (D.C. Cir. 1999), *rev'd* *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

127. Mark Seidenfeld & Jim Rossi, *The False Promise of the New Nondelegation Doctrine*, 76 NOTRE DAME L. REV. 1, 9 (2000); *see also id.* at 13 n.53 ("At least one environmental law scholar has concluded that, despite Judge Williams's nondelegation rhetoric, *American Trucking* is really a rejection of the EPA's rule as arbitrary and capricious.")

128. *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) (holding as a matter of statutory construction that "the President is not an agency" for purposes of the APA and thus does not fall within its coverage, despite the omission of the President from the offices expressly exempted from coverage). *But see* Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 63 (2020) (arguing that *Franklin* was wrongly decided).

129. 5 U.S.C. § 553 (prescribing procedures for agency rulemaking, including agency obligations to publish a notice of proposed rulemaking, to take public comments, and to give reasoned responses to all substantive comments).

130. The APA includes exceptions to the generally required notice-and-comment process. Some of these exceptions, in particular the exemption for rules relating to "a military or foreign affairs function of the United States," 5 U.S.C. § 553(a), would apply to important aspects of presidential decision-making.

131. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (establishing the content of the arbitrary-and-capricious test of APA § 706(2)(A): "the agency must examine the relevant data and articulate a satisfactory explanation

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of the APA, the primary source of meaningful judicial review is constraining language in an authorizing statute (with due process as a possible backstop), thus putting more pressure on the nondelegation doctrine. When a statute confers final decision-making authority on the President, agency action is not reviewable under the APA.<sup>132</sup> But when an agency makes the final decision, presidential input—at least to the extent it is consequential for the agency’s decision—becomes reviewable under the APA.<sup>133</sup> That is, an agency is not absolved of its obligation to provide comprehensive reasons for its decisions addressing the considerations that Congress chose to make relevant simply because the President’s policy preferences influenced the result it reached.<sup>134</sup>

The APA’s arbitrary-and-capricious test serves nondelegation purposes by constraining agents’ exercise of statutorily conferred discretion. Under the arbitrary-and-capricious test, an agency must make policy under its statutory mandate in a way that is sensitive to the considerations made relevant by the statute and is responsive to the best available evidence.<sup>135</sup> This enables Congress to delegate discretion to agents with the knowledge that their discretion will be exercised in ways that leverage evidence and expertise in service of statutory objectives. The Court’s nondelegation jurisprudence has consistently recognized that the attendant circumstances of a statutory delegation matter.<sup>136</sup> Because under the APA’s arbitrary-and-capricious test all administrative action must be evidence-based, it must involve precisely the factfinding activity on which permissible delegation turned under the classical nondelegation doctrine. Congress legislates, and its administrative agents apply the law to facts, which they must do in a way that is articulably tethered to the criteria Congress chose to make relevant. What an agency is doing in providing a well-reasoned justification of its policy choice is explaining how it vindicates the statutory desiderata that Congress identified.

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for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” (internal citations omitted)).

132. See *Dalton v. Specter*, 511 U.S. 462, 476 (1994) (holding that a recommendation of the Defense Base Closure and Realignment Commission to the President was not reviewable because it did not constitute “final agency action” under the APA).

133. See William Powell, *Policing Executive Teamwork: Rescuing the APA from Presidential Administration*, 85 MO. L. REV. 71, 121 (2020).

134. See Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 148 (2012).

135. See *State Farm*, 463 U.S. at 43.

136. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532-33 (1935); *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475 (2001). See also Coglianesi, *supra* note 50, at 1857.

Another benefit of APA review of agency action is that it enables a common law to develop over time, filling the interstices of the substantive statute. This statutory common law clarifies and routinizes the boundaries of agency authority and the considerations that agency officials must invoke in carrying out their statutory mandate. Even a vague standard like “in the public interest, convenience, or necessity” can enable a body of common law to develop that clarifies the particular considerations that agency officials should investigate.<sup>137</sup> These common-law constraints on agencies contribute to administrative regularity and hence to administrative accountability.

The procedural requirements of the APA can also increase the deliberative quality of executive decision-making quite apart from the effects of judicial review.<sup>138</sup> Provisions for public comment may yield information that officials deem relevant even in the absence of litigation concerns, and the obligation to provide reasoned justifications for policy choices induces officials to think carefully about them, even if they will ultimately be subject to fairly deferential review. Administrative procedures also help to construct an administrative record enabling meaningful judicial review.

### *C. Presidential Power Is of an Encroaching Nature*

Presidents face political incentives that encourage them to use their power in a muscular way, and they occupy an institutional role that facilitates expansive assertions of the legal authority they possess.<sup>139</sup> To some extent this is a good thing: it encourages action on pressing national issues. But it can also encourage legally adventurous action. And, of particular concern, it can induce congressional acquiescence to expansive assertions of presidential authority in the absence of clear legal foundations.

Justice Jackson’s famous language in *Youngstown* identifies two of the primary mechanisms. The first is the President’s public position as a coordinator of national opinion.<sup>140</sup> This mechanism corresponds to the

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137. *E.g.*, *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943).

138. The APA is not exclusive here. Agencies also have their own managerial reasons to develop internal procedures that may serve deliberative ends. See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1265 (2017).

139. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 14 (2011).

140. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653-54 (1952) (“Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality, his decisions so far overshadow any others that, almost alone, he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion, he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.”).

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classical view in political science of presidential power as the “power to persuade.”<sup>141</sup> And even if presidents cannot move public opinion, they can frequently claim its mantle through skilled issue framing.<sup>142</sup> The second mechanism is the President’s political position as leader of one of the major parties.<sup>143</sup> The President often has the ability to act unilaterally with political legitimacy<sup>144</sup> and, under unified party government, with little fear of congressional resistance.<sup>145</sup>

These problems are exacerbated by the transsubstantive scope of the President’s portfolio of authority, which enables presidents more easily to invoke statutory powers to enable activities remote from statutes’ purposes. For instance, President Trump invoked national-security authority for nativist and protectionist reasons: to order the construction of a wall on the nation’s southern border<sup>146</sup> and to impose tariffs as part of his “America First” agenda.<sup>147</sup>

Agencies, by contrast, can less easily abuse their statutory authority. This is in part because of the APA. The anticipation of litigation forces agencies to act cautiously, and judicial review can frustrate innovative theories.<sup>148</sup> In addition, courts have held that agencies are prohibited from taking into account factors beyond those required by statute, exercising judicial review to prevent agencies from going outside of the lines.<sup>149</sup> But it is also because the managerial imperatives of “internal administrative law” favor caution and incrementalism.<sup>150</sup> As James Q. Wilson observed,

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141. See RICHARD NEUSTADT, *PRESIDENTIAL POWER* 11 (1960).

142. See JAMES N. DRUCKMAN & LAWRENCE R. JACOBS, *WHO GOVERNS? PRESIDENTS, PUBLIC OPINION, AND MANIPULATION* 5 (2015).

143. See *Youngstown*, 343 U.S. at 654 (“Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.”).

144. See WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 24 (2003).

145. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2354 (2006) (noting Justice Jackson’s observation in *Youngstown* that Congress is more likely to defer to unilateral presidential action under unified government).

146. See Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> [https://perma.cc/B2Y7-NSZP].

147. See Ana Swanson & Brad Plumer, *Trump Slaps Steep Tariffs on Foreign Washing Machines and Solar Products*, N.Y. TIMES (Jan. 22, 2018), <https://www.nytimes.com/2018/01/22/business/trump-tariffs-washing-machines-solar-panels.html> [https://perma.cc/ZJY7-XXKE]; Glenn Thrush, *Trump’s Use of National Security to Impose Tariffs Faces Court Test*, N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/us/politics/trump-national-security-tariffs.html> [https://perma.cc/8TFD-88AQ].

148. E.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131 (2000).

149. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 465-68 (2001) (holding that the EPA may only consider costs in implementing the Clean Air Act when it has clear statutory authorization to do so).

150. See Metzger & Stack, *supra* note 138, at 1265.

administrators tend to prioritize maintaining regular continuity of operations over aggrandizing their jurisdiction.<sup>151</sup>

The object of this Part has been to explain the significance of Congress's choice to vest decision-making authority in an executive official other than the President, as a structural matter. Whatever power the President has over executive-branch operations via the President's power—whether granted by the Constitution or by statute—to remove other executive officials, there are other important determinants of the extent to which the executive process will respond to the will of the President. Vesting formal authority in officials other than the President establishes a check on the President's managerial power through a mechanism entirely separate from the scope of the removal power.<sup>152</sup> Establishing such a structure serves the aims of the nondelegation doctrine by fostering a more deliberative and consultative executive process, which is more likely to result in the routinization of executive power and to limit the power of individuals over policy. When the executive serves an administrative role, it does not exercise legislative power.

#### IV. Implementing Presidential Nondelegation

As the preceding Parts have indicated, the nondelegation doctrine historically has treated delegations to the President with more suspicion than delegations to agencies,<sup>153</sup> and it has done so for good reason.<sup>154</sup> But the doctrine has not yet formally acknowledged the distinction, even as it has implemented it as a practical matter. This Part suggests how the distinction might be formalized in nondelegation analysis. Failing to formalize the distinction creates two risks. On the one hand, the perception that the nondelegation doctrine has been underenforced may in the coming years contribute to an inappropriate application of the nondelegation doctrine to strike down delegations to regulatory agencies of the kind habitually, and correctly, approved in the modern period. On the other hand, in some cases the nondelegation doctrine has in fact been underenforced, although these cases are quite different from those on which ostensible nondelegation revivalists have focused. The nondelegation doctrine has been underenforced only in present doctrine's solicitude for broad presidential power.

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151. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 154 (1991).

152. And for this reason, the argument of this Article about the proper import of the nondelegation doctrine is orthogonal to conventional debates in separation-of-powers theory about the unitary or disunitary character of the executive, as those debates have centered on the scope of the President's removal power. See Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 117 (2020).

153. See *supra* Part II.

154. See *supra* Part III.

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### A. Nondelegation Step Zero

The nondelegation doctrine treats delegations to the President differently from delegations to administrative agencies. In keeping with the current trend of “stepification,”<sup>155</sup> we might formalize this distinction as involving a nondelegation Step Zero, asking whether the statute delegates authority directly to the President. If it does, then the nondelegation doctrine’s intelligible principle test is applied more vigorously, in the manner of the 1935 cases. If the statute delegates to an agency, however, then the intelligible principle test is appropriately applied in the deferential manner typified by *Mistretta*. As the Court there recognized, “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”<sup>156</sup> Whereas delegations to agencies elicit technical expertise in order to realize statutory objectives, delegations to the President more readily permit extraneous political considerations to supplant congressional judgment.<sup>157</sup> Courts should therefore recognize more expressly that applying the nondelegation doctrine requires a Step Zero, which asks whether the statute delegates to the President or to an agency.

Then, in Step One, when reviewing delegations to the President, courts should apply an *intelligible principle with bite* test to determine whether a delegation passes constitutional muster.<sup>158</sup> My claim is not that the nondelegation doctrine applies exclusively to the President but simply that the appropriate test differs when statutes delegate to the President.<sup>159</sup>

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155. Mitchell Chervu Johnston, *Stepification*, 116 NW. U. L. REV. 383, 386 (2021).

156. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

157. See *supra* Part III.

158. This formulation draws inspiration from some Supreme Court decisions in the equal-protection context that have struck down discriminatory legislation under rational basis review on the theory that merely discriminatory legislation lacks even a rational basis. Scholars have referred to these decisions as applying a “rational basis with bite” standard of review, recognizing that the invalidation of a law in the absence of a suspect classification suggests that the Court engaged in more searching review than it ordinarily would be expected to perform in an equal-protection case. See Raphael Holoszyc-Pimentel, *Reconciling Rational Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2072 (2015). Some scholars suggest that “rational basis with bite” is functionally equivalent to intermediate scrutiny. See Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 801 (1987). But in the nondelegation context, at least, precedent is best respected by preserving the nomenclature that the Supreme Court has used in all of its major nondelegation decisions. The “intelligible principle with bite” formulation respects precedent while explaining how the same standard can operate differently depending on the context. In the nondelegation context, the relevant context is whether the statute provides structural constraints.

159. Unlike Jackson’s view, as recounted by Magliocca, *supra* note 60, this Article does not claim that the nondelegation doctrine applies only to delegations to the President but rather that it applies more forcefully to them. The Court has consistently recognized that the nondelegation doctrine applies to delegations to agencies as well as those to the President. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001). But for the reasons examined in Part III, *supra*, the magnitude of nondelegation concerns is intrinsically lessened when considering delegations to agencies, such that it is appropriate to place delegations to agencies in a separate category of nondelegation analysis.



That is what the doctrine has been doing all along; this Article’s doctrinal proposal is merely to formalize it. The crux of the difference is that the intelligible principle standard as applied to agencies takes into account structural features of the delegation. Delegations to the President, by contrast, lack these structural features, and so the basis of review must be exclusively textual. Unlike the forgiving intelligible principle standard employed in assessing delegations to agencies, the intelligible principle with bite standard requires Congress to identify conditions *ex ante* under which the President may exercise his or her statutory authority, rather than leaving these conditions open to determination merely on the basis of factors provided by statute.<sup>160</sup> Nevertheless, we might view the existence of a condition that must be satisfied to enable presidential action as a safe harbor for nondelegation scrutiny<sup>161</sup>—at least as long as the condition is articulated with sufficient precision that a reviewing court could determine whether it is satisfied.<sup>162</sup> It is worth noting that the nondelegation doctrine only has teeth in extreme cases of statutory vagueness, cases where the discretion conferred on the President by statute is truly unconstrained, as the examples of *Panama Refining* and *Schechter Poultry* attest.

By the same token, the nondelegation doctrine ought to continue to apply as it has done to delegations to administrative agencies. This is not a toothless constraint. One can easily imagine hypothetical delegations to agencies that would fail nondelegation scrutiny. Imagine, for instance, a statute establishing the Public Interest Agency, authorized to make any

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160. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 431-32 (1935) (“If it could be said that from the four corners of the statute any possible inference could be drawn of particular circumstances or conditions which were to govern the exercise of the authority conferred, the President could not act validly without having regard to those circumstances and conditions. And findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual . . . . To hold that [the President] is free to select as he chooses from the many and various objects generally described in the first section [of the NIRA], and then to act without making any finding with respect to any object that he does select, and the circumstances properly related to that object, would be in effect to make the conditions inoperative and to invest him with an uncontrolled legislative power.”). See also Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 861-62 (2019) (“[I]n the nondelegation doctrine domain . . . the Court has repeatedly upheld delegations of factfinding authorities on the notion that the President had to ‘ascertain’ the relevant fact in order to exercise the authority . . . . In short, Congress has a long history of delegating authority to the President contingent on finding facts, and the Court has held that such factfinding authority is constitutional precisely because it viewed the President as obligated to be honest and engage in reasonable inquiry in finding the relevant facts.”).

161. See Shalev Roisman, *Presidential Law*, 105 MINN. L. REV. 1269, 1298-99 (2021) (“The Court has frequently upheld delegations to the President precisely because it viewed the President as under an implied duty to gather relevant information about conditions triggering power and make a reasonable judgment based on such information. The nondelegation doctrine is thus built on a premise of the existence of a duty to deliberate. After all, if the President could exercise power completely arbitrarily—on a whim—then the doctrine would be pointless: the conditions the President must find would be rendered meaningless. The President would then be able to exercise power based on her own will, rather than that of Congress—the precise opposite of the purpose of the non-delegation doctrine.”).

162. See *infra* Section IV.C.

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regulation “in the public interest.” This would surely violate the nondelegation doctrine.<sup>163</sup> Similarly, if Congress tried to delegate to the executive the power to declare war, the delegation would not become permissible simply because Congress delegated authority to the Secretary of Defense rather than to the President.<sup>164</sup> But the nondelegation doctrine is unlikely to become relevant as a constraint on delegations to agencies, because Congress does not delegate to agencies with such abandon.

Moreover, the considerations that counsel against permitting vague delegations to agencies often would be better managed by more robust due-process analysis.<sup>165</sup> *Gundy*, for instance, would have been better analyzed as a due-process case (although the Court did not certify that question for review). *Gundy* concerned a challenge to the Sex Offender Registration and Notification Act’s (SORNA) authorization of the Attorney General to make rules establishing criteria under which SORNA would be applied retroactively to conduct that took place before SORNA’s passage. The problem at the heart of *Gundy* was not a structural one, the divesting of Congress’s legislative power, but rather the retroactive application of law to individuals. The distinctive purpose of the nondelegation doctrine was not implicated. The hijacking of the language of nondelegation to address due-process concerns disserves both areas of law, by misdirecting nondelegation analysis away from its core structural concern about the agglomeration of legislative power outside of Congress and by contributing to the languishing of due-process doctrine.

Recognition of nondelegation’s Step Zero solves what would otherwise be a difficult doctrinal puzzle: why did the substance of the intelligible principle test appear to change after 1935? The answer is that there are two different intelligible principle tests, one that is appropriately applied to the President, as in the 1935 cases, and another that is appropriately applied to agencies, as in most of the post-1935 cases.<sup>166</sup>

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163. When courts uphold grants of authority to agencies to regulate “in the public interest,” it is because the breadth of the delegation is cabined by other features of the agency design prescribed by statute, including its limited scope of authority. See *supra* Section II.B.

164. See *Coglianesi*, *supra* note 50, at 1873 (noting that Congress’s attempt to alienate completely one of its enumerated powers to the executive would violate the nondelegation doctrine).

165. *But cf.* Criddle, *supra* note 51, at 121 (developing a theory of nondelegation rooted in due process). In contrast to Criddle’s proposal, the suggestion of this Article is to distinguish more emphatically between nondelegation analysis and due-process analysis.

166. Some nondelegation challenges have concerned grants of authority to private or quasi-private entities. See *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 46 (2015). Some have concerned grants of authority to the President that implicated the President’s constitutionally committed authority. See *Loving v. United States*, 517 U.S. 748, 751 (1996). On the relationship between the nondelegation doctrine and the President’s constitutional authority, see *infra* Section IV.B.

*B. Reviewing Presidential Action*

The prevailing framework for judicial review of presidential action is the *Youngstown* framework.<sup>167</sup> It is seldom noted that *Youngstown* was not, fundamentally, a constitutional case. This is because the Constitution generally provides little guidance in discerning the scope of presidential authority. There is little express constitutional text enumerating presidential powers.<sup>168</sup> The President's constitutional powers, under current doctrine, are almost entirely inferred—and often tenuously—from vague text, or indeed from no text whatsoever. For the most part, presidential power is whatever Congress decides. The *Youngstown* Court disposed of the case on the grounds that Congress had expressly precluded the presidential action at issue, in the absence of inherent constitutional authority for the President to act. Justice Jackson's celebrated dicta notwithstanding, *Youngstown* did not confront the question of whether there exists a “zone of twilight” within which the President can act unilaterally in the absence of congressional authorization, much less whether such a circumstance existed in the steel-seizure context. *Youngstown* held that the President cannot act in the absence of either authorization from Congress or express constitutional authority.<sup>169</sup> While this was an important restraint on unilateral presidential action, the devil is in the details. Because *Youngstown* did not involve a situation with vague or ambiguous statutory authorization, it did not confront the nondelegation question.

Cases following *Youngstown*, in confronting situations with a less clear congressional statement, have encountered more difficulty. The Court has often presumed broad presidential authority from vague statutory language and has even sometimes taken post-enactment congressional silence to indicate congressional approval of adventurous presidential conduct.<sup>170</sup> In a post-*Chadha* world, especially one with a thoroughgoing “separation of parties,”<sup>171</sup> relying on congressional silence to legitimate presidential action is particularly perverse, because the President has the power to prevent Congress from acting by using the

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167. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

168. See *infra* text accompanying notes 224-230.

169. See *Youngstown*, 343 U.S. at 585 (“The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”).

170. See *Dames & Moore v. Regan*, 453 U.S. 654, 678-79 (1981) (invoking “a history of congressional acquiescence in conduct of the sort engaged in by the President”). The Court apparently unanimously approved of this methodology. Powell dissented on a separate issue. See *id.* at 690-91 (Powell, J., concurring in part and dissenting in part) (expressing concern that President Reagan's order constituted a taking requiring just compensation under the Fifth Amendment).

171. Levinson & Pildes, *supra* note 145, at 2312.

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presidential veto.<sup>172</sup> Indeed, the Court itself has contributed greatly to the problem through its *Chadha* decision, which severed legislative-veto provisions from statutes like the National Emergencies Act. Before *Chadha*, these provisions had limited the President's ability to act unilaterally by providing Congress a role in reviewing particular presidential invocations of a statute's broad terms.<sup>173</sup>

*Chadha* creates a one-way ratchet problem. Broad delegations of authority to the President change the balance of power between Congress and the President by shifting the location of the status quo, made particularly sticky because of the presidential veto. Congress can only overcome this default by passing legislation through bicameral approval with sufficient support to override the presidential veto.<sup>174</sup> If the President is defining the nature of problems meriting government response in a manner that Congress cannot, for practical purposes, override, then Congress is not in effect functioning as the holder of legislative power.

The application of the major questions doctrine under *Chevron* analysis illustrates how an inquiry into congressional intent could be performed quite differently, leveraging judicial review to, in effect, reset the position of the default balance of power. In cases applying the major questions doctrine, a court first assumes that ambiguous statutory language does not permit an unprecedented assertion of substantial executive authority and then searches post-enactment legislative history for a clear statement to the contrary rather than for acquiescence.<sup>175</sup> Both techniques—beginning with a negative presumption and then searching for congressional activity rather than inactivity—reverse the approach taken in *Dames & Moore*.

While the Court has recently deployed major-questions analysis in reviewing routine delegations to administrative agencies,<sup>176</sup> this Article suggests that such analysis is more appropriate in reviewing delegations to the President directly. In the absence of clear indicia of contradictory legislative intent, as in *Brown & Williamson*, administrative agencies should continue to receive *Chevron* deference in the adjudication of

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172. See Kristen E. Eichensehr, *The Youngstown Canon: Vetoed Bills and the Separation of Powers*, 70 DUKE L.J. 1245, 1247 (2021). Moreover, even when the Court draws an inference from the passage of a statute that appears to sanctify the President's action, as was the case in *Dames & Moore*, the Court is not observing the counterfactual statutes that Congress might have passed but for the presidential veto.

173. See Richard H. Pildes, *The Supreme Court's Contribution to the Confrontation over Emergency Powers*, LAWFARE (Feb. 19, 2019, 11:20 AM EST), <https://www.lawfareblog.com/supreme-courts-contribution-confrontation-over-emergency-powers> [<https://perma.cc/8736-Z4JS>].

174. See Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 128 (1994).

175. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). See also Manning, *supra* note 42, at 261 (criticizing *Brown & Williamson*'s heavy reliance on post-enactment legislative history).

176. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022).

ambiguous statutory delegations, and it is even more clear that courts should respect congressional choices to delegate broad administrative authority when Congress does so unambiguously.<sup>177</sup> But the Article has established that there are good reasons to treat delegations to the President differently.<sup>178</sup>

The Court has generally extended special solicitude to presidential action where the President's supposed inherent powers are concerned.<sup>179</sup> Indeed, William Eskridge and John Ferejohn suggest that we should understand *Dames & Moore* as such a case.<sup>180</sup> *Curtiss-Wright* may suggest that there should be more tolerance for broad delegations in foreign-affairs matters.<sup>181</sup> More recently, in *Loving v. United States*, the Court applied similar reasoning in reviewing a delegation that involved the President's role as Commander in Chief.<sup>182</sup> There is a coherent, although contestable, constitutional theory that the President's enumerated powers suggest some implied powers in the realms of foreign policy<sup>183</sup> and national security<sup>184</sup> that are independent of the President's statutory authority. As a matter of constitutional text and original understanding, this approach is somewhat dubious. Indeed, the President's role as Commander in Chief certainly cannot justify any unilateral authority over national-security policy on an originalist approach; David Baron and Martin Lederman show that the term "Commander in Chief" originally referred to a purely military

177. See Mashaw, *supra* note 104, at 86.

178. See *supra* Part III.

179. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316, 319-20 (1936) (holding that the President possesses inherent powers in the area of foreign affairs that are neither express nor implied in the constitutional text). See also Louis Fisher, *The Unitary Executive and Inherent Executive Power*, 12 J. CONST. L. 569, 586 (2010) (criticizing the invention of "inherent powers" of the presidency which, unlike "implied" powers inferred from the President's express powers, are unenumerated in the constitutional text). But see Note, *supra* note 3, at 1161 (arguing that there is no principled formalist reason to treat delegations of foreign-affairs authority differently from delegations of domestic authority under nondelegation analysis).

180. Eskridge & Ferejohn, *supra* note 30, at 561-62 ("We would reinterpret *Dames & Moore*, not as a delegation to the President by reason of Congress' inaction and acquiescence, but as a decision that the President has at least some inherent powers to settle claims under Article II of the Constitution.").

181. See *Curtiss-Wright*, 299 U.S. at 319-20 ("It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress"). But see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 n.2 (1952) ("[*Curtiss-Wright*] involved not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress. The constitutionality of the Act under which the President had proceeded was assailed on the ground that it delegated legislative powers to the President.").

182. See *Loving v. United States*, 517 U.S. 748, 768 (1996) (asserting that "it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority" in making regulations governing the army).

183. Stemming from the treaty power, U.S. CONST. art. 2, § 2, cl. 2.

184. Stemming from the President's role as Commander in Chief, U.S. CONST. art. 2, § 2, cl. 1.

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office.<sup>185</sup> Nevertheless, the President typically receives more judicial deference in matters relating to foreign affairs and probably would continue to do so under nondelegation analysis. Dubious constitutional credentials notwithstanding, this is a policy area where presidential discretion and the ability to respond quickly to exigencies may be most important. Perhaps consequently, courts' inclination to detect congressional acquiescence tends to be greatest in this domain.<sup>186</sup>

But it is important to distinguish between judicial deference on policy questions and judicial abdication in statutory construction.<sup>187</sup> Judicial deference to executive policy judgments in foreign-affairs matters should not be conflated with judicial tolerance for vague statutory language. Indeed, it is precisely because of the compelling reasons for deference to presidential judgment on policy questions within the President's statutory and constitutional authority that courts should be more zealous in identifying whether in fact they are confronting an instance of the statutory authority that would trigger policy deference. Courts are understandably reluctant to countermand executive policy judgments, particularly when an assertion of authority involves claims of emergency or national-security stakes. Anticipating that ex post review will be attenuated, it would therefore be preferable to conduct more searching ex ante review. Requiring more precise presidential findings before statutory authority is triggered would not inhibit the President's discretion to judge whether the factual predicate was satisfied in a given case.<sup>188</sup>

A significant problem with contemporary presidential power is that national-security justifications have bled over into domestic policy. President Trump, for instance, invoked the International Emergency Economic Powers Act (IEEPA) to impose sanctions for reasons having more to do with domestic politics than national-security policy.<sup>189</sup> While the Court understandably prefers not to suspend the presumption of

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185. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 772 (2008).

186. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 420 (2012) (“Invocations of historical practice are particularly common in constitutional controversies implicating foreign relations. . . . Relatedly, historical practice is frequently invoked in debates over the wartime and national security powers of the President.”).

187. See *Japan Whaling Ass’n v. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (“[U]nder the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.”).

188. See *id.* (deferring to a factual finding by the Secretary of Commerce that involved policy judgment, after being assured that the finding was within the scope of the Secretary’s statutory discretion). See also Roisman, *supra* note 160, at 901 (advocating deference to the substance of presidential factfindings).

189. See Andrew Boyle, *Checking the President’s Sanction Powers*, BRENNAN CTR. FOR JUST. (June 10, 2021), <https://www.brennancenter.org/sites/default/files/2021-06/BCJ-128%20IEEPA%20report.pdf> [<https://perma.cc/5ZWD-ALYQ>].

regularity afforded to executive policy rationales,<sup>190</sup> its hesitance to invoke the nondelegation doctrine in reviewing the scope of presidential authority threatens to deprive it of any basis to review pretextual rationales of this nature. Even if courts decide to extend more deference to presidential authority in foreign-affairs matters, they must guard against overly credulous invocations of foreign-affairs powers to justify domestic policymaking that seeks to bypass Congress.

Some of the devices that courts have employed to obviate nondelegation problems in the agency context are likely to be of less help in reviewing vague delegations to the President. When a delegation concerns a delimited subject matter and is implemented by an agency in a routinized manner, once-vague language like “in the public interest, convenience, or necessity” can over time become a term of art as statutory common law develops, sometimes with the assistance of “nondelegation canons.”<sup>191</sup> Statutory interpretation is likely to be of less help in cabining vague delegations to the President, as there will not be a common-law-like process of elaboration if the exigent circumstances prompting challenged presidential decisions seem unrelated.<sup>192</sup>

Under a regime of presidential nondelegation, Congress would have two choices: either to delegate authority to agencies, structuring executive power in a segmented and procedurally regularized way, or to delegate authority to the President in more precise terms.<sup>193</sup> Presidential nondelegation would thus provide a constitutional means for nudging delegated authority into discrete agencies, upholding the departmental structure of executive power. Pushing authority into agencies, rather than concentrating it in the hands of the President directly offers a number of structural benefits.<sup>194</sup> In particular, it subjects executive power to procedural hurdles, including those of the APA and those produced by internal executive-branch coordination, and, as a consequence, it makes executive decision-making more deliberative and more consistent with the rule of law and with due process.

### *C. Applying Presidential Nondelegation*

Delegations to the President tend to rely on a presidential determination that takes the form of a factfinding. Even the *Gundy* dissenters regard executive findings of fact as categorically unproblematic

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190. See Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431, 2433 (2018).

191. Sunstein, *supra* note 40, at 324.

192. See *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) (“[T]he decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases.”).

193. For instance, Congress could prescribe the kind of specific factual finding examined in *Cetacean Society*.

194. See *supra* Part III.

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under nondelegation analysis.<sup>195</sup> The problem is that ostensible factual findings can be so vague that they amount to unfettered policy discretion.<sup>196</sup> When a statute empowers the President to take a certain action when she deems it to be “in the national interest,” it is in effect delegating *carte blanche*. Presidential nondelegation would subject such language to more searching constitutional scrutiny. Importantly, unlike delegations to agencies with similarly vague language, where the scope of discretion is cabined by considerations that the agency is required to investigate and procedures that the agency is required to observe, delegations to the President tend to lack these guardrails.

Consider, for instance, the provision of the Immigration and Nationality Act (INA) at issue in *Trump v. Hawaii*,<sup>197</sup> which grants the President the authority to restrict the entry of aliens if the President finds that their entry “would be detrimental to the interests of the United States.”<sup>198</sup> The finding required by this provision lacks any concrete substance; it confers pure, unbridled discretion upon the President. The Supreme Court in *Trump v. Hawaii* did not analyze the nondelegation problem (even as it noted that the provision “exudes deference to the President in every clause”),<sup>199</sup> although the Fourth Circuit had observed that “[t]he INA provisions invoked by the Proclamation are similar in critical respects to the statute at issue in *Panama Refining*, which the Court invalidated on nondelegation grounds.”<sup>200</sup> Indeed, the delegation disapproved in *Panama Refining* was more constrained, in that it imposed at least a numerical upper bound on the President’s authority to select a policy.<sup>201</sup> Under INA section 1182, by contrast, the President could in principle restrict the entry of aliens entirely. Nondelegation analysis ought

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195. See *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019).

196. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538 (1935) (requiring scrutiny beyond the formal characterization of a determination as a finding of fact).

197. 138 S. Ct. 2392, 2407 (2018) (holding that President Trump’s Muslim travel ban did not exceed his authority under the Immigration and Nationality Act and did not violate the Constitution).

198. See 8 U.S.C. § 1182(f) (2013) (“Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”). See also Cristina M. Rodríguez, *Trump v. Hawaii and the Future of Presidential Power over Immigration*, in *ACS SUPREME COURT REVIEW 2017-2018* 161, 173 (Steven D. Schwinn ed., 2d ed. 2018) (“The statutory problem with President Trump’s orders stemmed not from his interpretation of his authority, but from the very breadth of the authority Congress had delegated. . . . [I]n light of what President Trump’s executive orders have revealed to us about the potential of section 212(f), it seems prudent if not urgent for Congress to scale back the power it once gave.”).

199. *Hawaii*, 138 S. Ct. at 2408.

200. *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 294 n.15 (4th Cir. 2018) (Gregory, C.J., concurring). The Fourth Circuit implicitly recognized, in citing *Panama Refining* rather than more recent cases, that precedents applying the nondelegation doctrine in a permissive way to agency rulemaking were not apposite in reviewing broad statutory delegations to the President.

201. See *supra* text accompanying notes 77-78.



to approach a provision of this kind by carrying out the two steps described above. The Step Zero conclusion is that the provision delegates unilateral authority to the President. Therefore, a reviewing court should apply a higher level of nondelegation scrutiny in its textual analysis, akin to the 1935 cases. Here, there is a strong case that the provision lacks an intelligible principle, under *Panama Refining* and *Schechter Poultry*.

The INA contains other provisions that confer broad discretion on the President directly. For instance, section 1157 authorizes the President to admit any number of refugees that “is justified by humanitarian concerns or is otherwise in the national interest.”<sup>202</sup> The only procedural constraint on this authority is that the President must engage in “appropriate consultation,” defined as “discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives” and including certain reporting requirements. This provision triggers heightened scrutiny under Step Zero, as it delegates unilateral decision-making authority to the President, but nonetheless probably withstands scrutiny under Step One, although it is a close question. The language of the delegation is somewhat more capable of definition, and the breadth of the delegation is mitigated by accompanying procedural constraints, although the constraints are only soft ones. While merely soft constraints, such as consultation requirements, would not in themselves be sufficient to rescue a standardless delegation, the language of section 1157 does not seem to constitute a genuinely standardless delegation akin to those at issue in the 1935 cases.

Another area in which Congress has conferred broad policy discretion on the President directly is in setting tariffs. Particular interest of late has concerned section 232 of the Trade Expansion Act of 1962, in view of President Trump’s invocation of this authority to impose tariffs on steel and aluminum imports. Section 232 authorizes the President to restore tariffs that would otherwise be reduced under the Trade Expansion Act “if the President determines that such reduction or elimination would threaten to impair the national security.”<sup>203</sup> The Supreme Court upheld section 232 in the *Algonquin* case against a nondelegation challenge, finding that the statute contained an intelligible principle to guide the President’s exercise of discretion.<sup>204</sup> It paid particular attention to two features of the statute, in addition to its requirement that the President identify a national-security rationale: first, that the statute “establishes clear preconditions to Presidential action” by conditioning the President’s authority on a prior finding by a Cabinet official, and second, that the statute “articulates a series of specific factors to be considered by the

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202. 8 U.S.C. § 1157 (2005).

203. 19 U.S.C. § 1862 (1962).

204. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976).

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President in exercising his authority.”<sup>205</sup> These procedural constraints helped to cabin discretion that might have risked a constitutional problem judging on the text alone. Recently, in *American Institute for International Steel*, a case challenging President Trump’s invocation of section 232, the Federal Circuit declined to find a violation of the nondelegation doctrine, citing *Algonquin*.<sup>206</sup> Nevertheless, there is reason to think that section 232 poses nondelegation concerns.<sup>207</sup> As a purely textual matter, Cameron Silverberg would probably be right that the constitutionality of section 232 hinges on the construction of the phrase “national security”: if the phrase encompasses anything that the President deems detrimental to the national interest, then the provision clearly poses a nondelegation problem.<sup>208</sup> But it is not clear that section 232 implicates heightened nondelegation scrutiny under Step Zero in the first place. Even though it delegates authority to the President, that authority can only be exercised upon a prior finding by another executive official, the Secretary of Commerce (and only after the Secretary of Commerce has consulted with the Secretary of Defense).<sup>209</sup> Indeed, this was an important aspect of the Supreme Court’s reasoning in upholding the statute against a nondelegation challenge.<sup>210</sup> Section 232 provides for a bifurcated delegation rather than an exclusive delegation to the President. This is precisely the kind of dispersal of authority that the nondelegation doctrine seeks to promote, and a provision of this kind provides strong grounds for concluding that the statute satisfies the requirements of the nondelegation doctrine.

Perhaps the most significant area in which Congress has delegated vast discretionary authority to the President without any standards is in emergency powers, another domain the boundaries of which were tested during the Trump administration. Plaintiffs did not challenge President Trump’s declaration of a national emergency to build a border wall on nondelegation grounds,<sup>211</sup> but emergency powers present a strong case for a nondelegation challenge. The International Emergency Economic Powers Act, the most frequently invoked of the President’s emergency

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205. *Id.*

206. *Am. Inst. for Int’l Steel, Inc. v. United States*, 806 F. App’x 982, 989 (Fed. Cir. 2020).

207. See Cameron Silverberg, Note, *Trading Power: Tariffs and the Nondelegation Doctrine*, 73 STAN. L. REV. 1289, 1293 (2021) (“These factors are so broad—and the trade remedies available to the President so sweeping—that the statute could conceivably allow the President to tax or block any imported item under the guise of national security.”).

208. *Id.* at 1325 (proposing resolving the nondelegation problem by interpreting section 232 narrowly to include only threats implicating the military, such that it only “deals with a specific sector and specific imports relevant to that sector”).

209. See 19 U.S.C. § 1862(b).

210. *Algonquin*, 426 U.S. at 559.

211. See *Sierra Club v. Trump*, 963 F.3d 874, 886 (9th Cir. 2020) (holding the transfer of funds for border-wall construction illegal under the unambiguous terms of the Department of Defense Appropriations Act).

powers,<sup>212</sup> authorizes the President to prohibit transactions involving foreign entities when the President deems it necessary “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”<sup>213</sup> IEEPA imposes certain reporting requirements but otherwise does not impose procedural constraints on presidential discretion.

The framework statute for regulating presidential emergency declarations is the National Emergencies Act (NEA), which prescribes procedures for declaring a national emergency. All that the NEA says is that the President must declare that there exists a national emergency.<sup>214</sup> The only procedural constraints on this power are that the President must reauthorize the emergency declaration annually, that Congress must meet every six months to consider whether to terminate the emergency declaration, and that Congress can override an emergency declaration by passage of a joint resolution (which must be presented to the President for approval)<sup>215</sup>—something that Congress could equally well do in the absence of the NEA. The NEA fails to provide any meaningful procedural constraints that would limit the otherwise unbounded discretion conferred by statutes like IEEPA.

Moreover, the determination that IEEPA requires is presented as a factfinding but in fact amounts to unfettered policymaking discretion. The President need only identify an “unusual or extraordinary threat” in order to trigger IEEPA’s vast powers. And unlike many other emergency powers conferred on the executive that the President can trigger but not personally execute,<sup>216</sup> IEEPA’s powers are conferred on the President unilaterally. In assessing the breadth of the statutory language, a comparison to disaster relief is instructive. A “disaster” is a concrete event that must have occurred in order to permit the triggering of the statutory authority. Moreover, the Stafford Act, the governing framework for federal disaster relief, prescribes detailed procedures that include conditioning presidential authority on a prior request by a state governor and parceling response authority among federal officers.<sup>217</sup>

The statute under which President Trump claimed authority to transfer funds for the construction of a border wall provides another helpful contrast. In reviewing a challenge to the transfer, the Ninth Circuit

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212. See *Declared National Emergencies Under the National Emergencies Act*, BRENNAN CTR. FOR JUST. (2021), <https://www.brennancenter.org/sites/default/files/2021-09/Declared%20Emergencies%20under%20NEA090721.pdf> [https://perma.cc/4SGZ-9X36].

213. 50 U.S.C. § 1701 (1977).

214. 50 U.S.C. § 1621 (1976).

215. 50 U.S.C. § 1622 (1985).

216. See *A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST. (2019), [https://www.brennancenter.org/sites/default/files/2019-10/2019\\_10\\_15\\_EmergencyPowersFULL.pdf](https://www.brennancenter.org/sites/default/files/2019-10/2019_10_15_EmergencyPowersFULL.pdf) [https://perma.cc/XM8E-HGXD].

217. 42 U.S.C. §§ 5121-5207 (2019).

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interpreted section 8005 of the Department of Defense Appropriations Act of 2019, which permitted a transfer of funds “[u]pon determination by the Secretary of Defense that such action is necessary in the national interest” but provided that “authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress.”<sup>218</sup> The court concluded that “Section 8005 did not authorize the transfer of funds at issue here because the border wall was not an unforeseen military requirement, and funding for the wall had been denied by Congress.”<sup>219</sup> When a statute provides precise conditions of this nature, a reviewing court can assess whether the factual predicate is plausibly satisfied, without scrutinizing the executive’s policy reasoning.

In contrast to these more tailored delegations, the wholly standardless character of the finding required by IEEPA, in the absence of any procedural constraints, just like INA section 1182, makes it a strong candidate for application of the nondelegation doctrine. President Trump regarded the entry of Mexican immigrants and Muslim travelers into the United States as national emergencies, and there is no basis in the emergency statutes to reject these judgments. The unbridled discretion conferred on the President by emergency statutes like IEEPA presents a clear violation of the nondelegation doctrine.<sup>220</sup>

### V. Procedural Alternatives to Presidential Nondelegation

Constitutional invalidation of a statute should not be taken lightly, something that the Supreme Court has recognized in reserving its application of the nondelegation doctrine to truly extraordinary cases of legislative divestment. Where Congress has prescribed procedures that constrain agents’ exercise of discretion in ways that can be routinized and monitored, the Court has been appropriately approving of vague language defining the nature of an agent’s task. To some extent, perhaps, similar procedural constraints might help to save capacious delegations to the President. Nevertheless, the background constitutional rule can facilitate the development of statutory frameworks that provide adequate procedural constraints. There is no tension between formalizing a nondelegation Step Zero and exploring various promising institutional avenues for constraining presidential power.

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218. *Sierra Club v. Trump*, 963 F.3d 874, 881-82 (9th Cir. 2020).

219. *Id.* at 886 (internal quotation marks omitted) (quoting *California v. Trump*, 963 F.3d 926, 944 (9th Cir. 2020)).

220. Note, though, that some other grants of emergency power (although not many) attach more meaningful procedural constraints on its exercise. *See A Guide to Emergency Powers and Their Use*, *supra* note 216.

*A. Ex Post Arbitrariness Review*

The observation that the presence of the APA in the agency context helps to obviate nondelegation problems might suggest that reversing *Franklin v. Massachusetts*—or amending the APA—would obviate presidential nondelegation problems. Indeed, perhaps Congress should consider amending the APA to apply expressly to the President.

The Supreme Court never held, in *Franklin* or its progeny, that the Constitution creates any bar to Congress's bringing the President under the coverage of the APA.<sup>221</sup> *Franklin* rested on statutory interpretation, reasoning under the avoidance canon that the APA would have to “expressly allow review of the President’s actions” in order for it be construed as permitting review of the President’s exercise of discretion.<sup>222</sup> That the President would seem to fall within the statute’s definition as a matter of logical construction and that Congress omitted the President from the list of actors excepted from the statute, the Court found insufficiently persuasive. The Court’s reasoning also rested in part on acknowledgment of “the unique constitutional position of the President,” but this was not viewed as deciding whether Congress could bring the President under the coverage of the APA if it expressly so required. Scalia, concurring in the judgment, would have gone further, to disclaim judicial authority to enjoin the President from any action.<sup>223</sup>

Congress arguably has limited power to impose procedural restrictions on powers that the Constitution commits to the President. But these powers are rather limited: vetoing legislation (lest it be approved by two-thirds of both houses of Congress),<sup>224</sup> serving as Commander in Chief of the armed forces,<sup>225</sup> requiring the opinion in writing of principal officers on matters within their authority,<sup>226</sup> issuing pardons,<sup>227</sup> making treaties (with the Senate’s advice and consent),<sup>228</sup> receiving ambassadors,<sup>229</sup> and appointing certain executive officers (with the Senate’s advice and consent in some cases).<sup>230</sup> Congressional imposition of procedural constraints on the exercise of these powers could be seen as impeding the President’s performance of constitutionally committed powers and hence

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221. *Franklin* did allude to “the separation of powers and the unique constitutional position of the President,” *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992), but this was only understood to require a congressional clear statement in order to bring the President under the coverage of the APA.

222. *Franklin*, 505 U.S. at 801.

223. *See Franklin*, 505 U.S. at 828 (Scalia, J., concurring).

224. U.S. CONST. art. 1, § 7, cl. 2.

225. *Id.* art. 2, § 2, cl. 1.

226. *Id.*

227. *Id.*

228. *Id.* art. 2, § 2, cl. 2.

229. *Id.* art. 2, § 3.

230. *Id.* art. 2, § 2, cl. 2.

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unconstitutional. However, there is also the Necessary and Proper Clause, which gives Congress the power to make laws “for carrying into Execution . . . all other Powers vested by this Constitution . . . in any Department or Officer” of the United States.<sup>231</sup> The language of the Necessary and Proper Clause strongly suggests that Congress can regulate the conditions under which other government actors, including the President, carry out powers vested in them by the Constitution. That the President must carry out constitutionally committed powers in the manner provided by Congress does not obviate the Constitution’s commitment of these powers.

Even if extending the APA to cover the President would be permissible as a constitutional matter, it is not clear that it would be optimal as a policy matter, at least in all cases. Courts are understandably reluctant, for example, to countermand presidential judgments about national-security matters. On the other hand, the carve-outs from the APA already largely accommodate these concerns.<sup>232</sup> And to the extent that presidents seek to invoke their foreign-affairs authority to make domestic policy, courts should be skeptical.<sup>233</sup> Ultimately, however, a full analysis of the merits of subjecting presidential decisions to arbitrariness review would require consideration of various particulars that are beyond the scope of this Article.

In contrast to bringing the President within the ambit of the APA for ex post judicial review, nondelegation review is an ex ante approach to constraining presidential discretion. Presidential nondelegation would put the onus on legislation rather than on courts to determine the scope of presidential authority. Legislative provision of clearer factfinding prerequisites would also remove pressure from courts to scrutinize presidential policy judgments by permitting an exclusively statutory inquiry to suffice as a constraint on presidential authority. When a court can be assured that the President is exercising discretion within the scope of congressionally conferred authority, there is less need for an ex post review of the merits of a policy decision.

Conversely, extending the APA to cover the President would to some extent mitigate concerns about broad delegations of authority to the President, putting less pressure on presidential nondelegation.<sup>234</sup> On the other hand, there are other important differences between presidential acts

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231. *Id.* art. 1, § 8, cl. 18; see also John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1046 (2013).

232. See, in particular, the exemption for rules relating to “a military or foreign affairs function of the United States,” 5 U.S.C. § 553(a)(1), and the exemption for adjudications involving “the conduct of military or foreign affairs functions,” 5 U.S.C. § 554(a)(4).

233. See *supra* Section IV.B.

234. Alternatively, Congress could include review provisions in particular individual statutes analogous to the APA provisions for review.

and agency acts besides the scope of judicial review,<sup>235</sup> so it is not clear that amending the APA alone would resolve the concerns involved in a presidential nondelegation inquiry. At least it could not do so in all cases. Most fundamentally, when a statute lacks an intelligible principle guiding presidential discretion, arbitrariness review cannot save it, because there exist no standards by which to assess the arbitrariness of a challenged presidential action.

### *B. Ex Ante Congressional Approval*

Many of the contemporary issues with overbroad delegations of authority to the President were created by the Supreme Court's decision in *Chadha* to eliminate legislative vetoes of executive decisions.<sup>236</sup> Prior to *Chadha*, Congress could construct statutory regimes that subjected presidential invocations of broad authority under vague statutory terms to ex post congressional review, with the prospect of a legislative veto to rein in presidential adventurism. *Chadha* detonated this balance.

Today, legislators are beginning to explore a promising statutory alternative to the legislative veto: requiring ex ante congressional approval for a presidential invocation of broad statutory authority, rather than providing for ex post congressional review. The 116th Congress saw proposals to amend the National Emergencies Act<sup>237</sup> and the International Emergency Economic Powers Act.<sup>238</sup> In the 117th Congress, Senators Chris Murphy, Mike Lee, and Bernie Sanders introduced the National Security Powers Act of 2021.<sup>239</sup> This bipartisan legislation would amend the War Powers Resolution, the Arms Export Control Act, the National Emergencies Act, and the International Emergency Economic Powers Act, in each case restricting the authority of the President to act before obtaining advance congressional approval. While this legislation did not pass during the 117th Congress, there is some cause for hope about its prospects. President Biden has expressed interest in establishing clearer constraints on presidential war powers,<sup>240</sup> and the Senate recently voted to repeal the 2002 Authorization for the Use of Military Force against Iraq.<sup>241</sup>

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235. See *supra* Sections III.A and III.C.

236. See Pildes, *supra* note 173.

237. See ARTICLE ONE Act, S. 764, 116th Cong. (2019).

238. See Trade Certainty Act of 2019, S. 2413, 116th Cong. (2019).

239. S. 2391, 117th Cong. (2021).

240. See Statement of Administration Policy, Office of Management and Budget, Executive Office of the President, H.R. 256–Repeal of Authorization for Use of Military Force Against Iraq Resolution of 2002 (June 14, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/SAP-HR-256.pdf> [<https://perma.cc/7V5H-FYW6>] (“[T]he President is committed to working with the Congress to ensure that outdated authorizations for the use of military force are replaced with a narrow and specific framework”).

241. Karoun Demirjian, *Decades Later, Senate Votes to Repeal Iraq Military Authorizations*, N.Y. TIMES (Mar. 29, 2023), <https://www.nytimes.com/2023/03/29/us/politics/congress-iraq-war-powers-authorization.html> [<https://perma.cc/MR3K-YSYX>].

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This formalist-friendly workaround would almost certainly be upheld as constitutional. In contrast to a legislative veto, which can be exercised by one or both houses of Congress without going through presentment, congressional preapproval would take place through Article I, Section 7. (Presidential approval would inevitably be forthcoming, since the President will have asked Congress for approval in the first place.) The preapproval procedure makes the exercise of delegated presidential power slightly more cumbersome and inefficient, but it is otherwise a perfect functional substitute for the legislative veto. While requiring congressional preapproval of routine rulemakings would clearly sap too much legislative energy,<sup>242</sup> presidential emergency and war powers declarations are sufficiently rare that Congress would likely be able to accommodate preapproval votes with little disruption.<sup>243</sup> And they are sufficiently weighty that this use of congressional capacity would be well-justified.

Like nondelegation review of existing statutes, congressional revision of statutory frameworks to introduce provisions for congressional approval is an *ex ante* approach to constraining overbroad delegations of authority to the President, but unlike nondelegation review it does not implicate the courts in delicate judgments about the appropriate scope of presidential authority. Largely, however, presidential nondelegation would complement congressional efforts to establish clearer guardrails on presidential power. The one-way ratchet problem produced by *Chadha* gives the President the power to block congressional attempts to scale back the scope of delegated power, absent large congressional supermajorities and hence absent a degree of bipartisan consensus that is unusual under present political conditions. Conversely, the inclusion of a congressional preapproval procedure in a statute conferring broad authority on the President would help significantly to obviate a nondelegation problem by imposing robust procedural constraints on the exercise of the conferred authority.

### Conclusion

Steven Calabresi recently opined that “[p]residential lawmaking ought to be eliminated altogether by the Supreme Court reviving the non-delegation doctrine, which the Court appears to be ready to do.”<sup>244</sup> The

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242. See CONG. RSCH. SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 1 (Sept. 3, 2019), <https://sgp.fas.org/crs/misc/R43056.pdf> [<https://perma.cc/N87U-ZT4Q>] (“[T]he number of final rules published each year is generally in the range of 3,000-4,500”).

243. See *Declared National Emergencies Under the National Emergencies Act*, *supra* note 212 (documenting only 71 presidential emergency declarations since the 1976 passage of the National Emergencies Act).

244. Steven Gow Calabresi, “*A Shining City on a Hill*”: *The Unitary Executive and the Deep State*, BALKINIZATION (Jul. 11, 2021), <https://balkin.blogspot.com/2021/07/a-shining-city-on-hill-unitary.html> [<https://perma.cc/9SQN-2AFV>].



recommendation of this Article embraces Calabresi's suggestion, taken literally. There is indeed a compelling argument for reviving the nondelegation doctrine—but the doctrine that should be revived is the traditional version rather than the imagined version presently being contemplated in some quarters. The dominant narrative of underenforcement and revival misunderstands the history and function of the nondelegation doctrine. And excessive focus on the language of particular statutory phrases describing the scope of an agent's authority neglects the structural features surrounding delegation that the Court has consistently regarded as significant, perhaps most of all in *Schechter Poultry*, the high-water mark of nondelegation enforcement. If the nondelegation doctrine has been underenforced it is, if anything, in the tendency of recent jurisprudence to be highly deferential to presidential power.

Previous accounts of the nondelegation doctrine have failed to draw an important distinction between agencies and the President, instead treating the executive branch as a black box for nondelegation analysis. The conventional approach fails to recognize both that the President-agency distinction helps to make sense of the nondelegation doctrine, as a matter of historical practice and constitutional structure, and that it coheres with the structure of administrative law. Agency authority is inherently limited by the diffuse structure of the executive branch, and administrative agency decisions are subject to procedural requirements and arbitrariness review under the APA, obviating for practical purposes the need to invoke the nondelegation doctrine in reviewing the scope of agency authority. By contrast, nondelegation finds its niche in confronting overbroad delegations of presidential power. Moreover, this understanding of the nondelegation doctrine helps to make sense of its limited historical application. Recognizing the particular relevance of the nondelegation doctrine to statutes conferring power on the President directly—nondelegation's Step Zero—preserves the integrity of the law while simultaneously yielding resources for adjudicating important legal issues that are becoming all the more relevant in the era of the unilateral presidency. Establishing workable constitutional constraints on presidential imperium need not impair effective governance. On the contrary, it will encourage the development of procedures that make governance more accountable, while also better serving values of democratic legitimacy and the rule of law.