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Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation

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RETHINKING ARTICLE I, SECTION 1: FROM NONDELEGATION TO EXCLUSIVE DELEGATION

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The first substantive clause of the Constitution—providing that "[a]ll legislative Powers herein granted shall be vested in a Congress"—is associated with two postulates about the allocation of legislative power. The first is the nondelegation doctrine, which says that Congress may not delegate legislative power. The second is the exclusive delegation doctrine, which says that only Congress may delegate legislative power. This Article explores the textual, historical, and judicial support for these two readings of Article I, Section 1, as well as the practical consequences of starting from one postulate as opposed to the other. The Article concludes that exclusive delegation is superior to the nondelegation doctrine, either in its present unenforced version, or if it were enforced more strictly. The nondelegation doctrine demands that Congress constrain the discretion of agencies by resolving, at some level, specific policy disputes. The exclusive delegation doctrine requires that Congress consider who is to resolve policy disputes and over what domain of controversies. Given the realities of modern government, Congress is better suited to answer questions about which institution should make policy than it is to make policy itself. The exclusive delegation doctrine would reorient understanding of the allocation of legislative power in a way that provides a better fit with institutional realities, and yet would also preserve an important measure of exclusive power to Congress as the first branch of our national government.

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INTRODUCTION

The first substantive clause of the United States Constitution, appearing immediately after the Preamble, provides, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[1] This "Vesting Clause" (as it is sometimes called) of Article I, Section 1 is associated with two postulates about the allocation of legislative power. The first says, "Congress may not constitutionally delegate its legislative power to an-

1. U.S. Const. art. I, § 1. Subsequent references in quotation marks to "all" "legislative power" and "legislative powers" all refer to the words "All legislative Powers" in Article I, Section I. Brackets denoting a missing "s" or a change in capitalization are omitted to avoid undue clutter.

other branch of Government."[2] The second says, "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."[3] Both postulates ascribe exclusive authority to Congress with respect to the exercise of legislative power. Otherwise, the two postulates are in significant tension with one another. The first says only Congress may exercise legislative power. The second says only Congress may delegate legislative power. In short, Article I, Section 1 has been read as imposing both a nondelegation doctrine and what may be called an "exclusive delegation doctrine."

The tension between these postulates has long been recognized—up to a point. What has been recognized is the difficulty of squaring the first postulate (that Congress may not delegate legislative power) with the fact that Congress has massively delegated legislative rulemaking authority to administrative agencies. The Supreme Court has tried to resolve this particular tension by defining "legislative power" for purposes of nondelegation challenges to mean the exercise of *unconstrained discretion* in making rules.[4] Thus, Congress would be guilty of delegating the legislative power only if it gave something approaching blank-check legislative rulemaking authority to an agency. As long as an agency's discretion is somewhat confined—the favored formula is to ask whether Congress has laid down an "intelligible principle" for the agency to follow[5]—then there has been no delegation of "legislative power." This doctrinal solution has been coupled with a judicial attitude of great deference in determining whether any particular statute confers too much discretion. The net result is that the nondelegation doctrine, while still formally considered part of our structural Constitution, is effectively unenforceable.

What has not been recognized is that the second postulate (that agencies may not engage in legislative rulemaking unless Congress has clearly authorized them to do so) rests on different assumptions from the first. The most obvious difference is that this second postulate presumes that Congress *is* permitted to delegate something that can be called legislative power, whereas the first postulate posits that it may not. But there is an even deeper dissonance in that the second postulate implicitly incorporates a different definition of "legislative power." When courts say that agencies have no power to make legislative rules unless such power has been delegated to them by Congress, they are not referring to how much *discretion* an agency exercises. What they mean by "legislative power" in this context is the power to make rules that are *legally binding* on the pub-

2. Touby v. United States, 500 U.S. 160, 165 (1991).

3. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

4. See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–76 (2001); Loving v. United States, 517 U.S. 748, 771–72 (1996); *Touby*, 500 U.S. at 165; Mistretta v. United States, 488 U.S. 361, 372–73 (1989).

5. The formula dates from J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928), and has subsequently become boilerplate doctrine. E.g., *American Trucking*, 531 U.S. at 472; *Loving*, 517 U.S. at 771; *Touby*, 500 U.S. at 165; *Mistretta*, 488 U.S. at 372.

lic. Further, the judicial attitude associated with the second postulate is different. It is not so much one of extreme deference as one of inattention.[6] Thus, the second postulate, although often overlooked, could at least in theory be enforced quite strictly.

Although the two postulates rest on different definitions of legislative power and different conceptions about how far that power can be shared, they do not generate inconsistent doctrinal requirements. The nondelegation postulate generates the (unenforced) requirement that Congress must *constrain the discretion* of an agency when it is given authority to make legislative rules. The exclusive delegation postulate generates the (often ignored) requirement that Congress must *clearly authorize* an agency to make legislative rules. These propositions—that discretion must be confined and that authority must be clearly granted—obviously can, and do, coexist. For practically minded lawyers and judges, therefore, there has been no urgency about developing a coherent understanding of Article I, Section 1, because whatever inconsistencies may exist in theory do not translate into contradictory commands in terms of everyday practice.

Still, the unresolved tension between nondelegation and exclusive delegation matters. One problem is that the prominence given to the nondelegation postulate has obscured the importance of the exclusive delegation doctrine as a bedrock principle of the administrative state. As I will explain, exclusive delegation plays an important role in preserving checks and balances, brings important clarification to questions about judicial review of agency action, provides a secure constitutional foundation for the *Chevron* doctrine, and helps us sort out questions about the scope of inherent executive and judicial authority.[7] But exclusive delegation receives relatively little emphasis in constitutional and administrative law, and is often ignored by courts—in significant measure because it is so difficult to square with nondelegation.

Another and potentially more serious problem is that the prominence given to nondelegation, combined with the courts' unwillingness to enforce that postulate, has generated a low-level but persistent crisis of legitimacy for modern government.[8] If we take seriously the idea that Congress may not delegate legislative power—as the nondelegation doctrine seems to invite us to do—then all three branches of government appear to be engaged in unconstitutional behavior. Congress is shirking its duty to legislate, executive agencies are exercising forbidden authority, and judges are violating their oaths by letting both of them get away with it. This massive breach of the Constitution can only encourage cynicism

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6. For a partial history of the exclusive delegation doctrine in the context of rulemaking, see Thomas W. Merrill & Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Convention, 116 Harv. L. Rev. 467, 545–70 (2002).

7. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); see infra Parts IV.A.4, VI.C, VI.E.

8. See generally James O. Freedman, Crisis and Legitimacy: The Administrative Process and American Government (1978).

about government. If, however, it turns out that Article I, Section 1 is correctly understood to incorporate the exclusive delegation postulate rather than the nondelegation postulate, this legitimacy problem largely goes away. Congress has created the administrative state and has given its far-flung agencies extensive powers to adopt legislative rules. But there is nothing constitutionally problematic about this if Article 1, Section 1 tells us not that only Congress can legislate, but only Congress can delegate.

In this Article, I argue that Article I, Section 1 should be construed as mandating the exclusive delegation doctrine, not the nondelegation doctrine. Such an exclusive delegation doctrine would entail two subsidiary principles. First, that executive and judicial officers have no inherent authority to act with the force of law, but must trace any such authority to some provision of enacted law. I call this the anti-inherency principle. Second, that Congress has the power to vest executive and judicial officers with authority to act with the force of law, including the authority to promulgate legislative regulations functionally indistinguishable from statutes. I call this the transferability principle.

The exclusive delegation doctrine with its two subsidiary principles can be derived from Article I, Section 1 through a series of interpretive moves. First, "legislative power" can be read to mean the power to adopt any measure having the force and effect of a statute. Second, the vesting in Congress of all legislative powers can be read to mean that all *constitutional* power to legislate is given to Congress. In other words, the Vesting Clause constitutionalizes the anti-inherency principle by making it clear that neither the executive branch nor the judicial branch has any power *derived directly from the Constitution* (as opposed to a statute) to make legislative rules on the subjects enumerated in Article I. Third, the Necessary and Proper Clause can be read to give Congress authority to transfer legislative power to actors located in the other branches of government in order to "carry[ ] into Execution" the enumerated powers granted to Congress in Article I, Section 8.[9] Finally, the reference to legislative powers "herein" granted can be understood to limit the anti-inherency principle to those powers granted in Article I itself. On this reading, the Vesting Clause would not foreclose the possibility that Article II and Article III contain specific grants of power to act with the force of law running to the executive or judicial branches—grants that constitute partial exceptions to the anti-inherency principle recognized in Article I, Section 1.

I shall argue that these interpretive moves are not only consistent with the text of Article I, Section 1; they also enjoy at least as much support in terms of the structure, original understanding, and evolved interpretation of the Constitution as the traditional nondelegation doctrine does. More conclusively, I will argue that the exclusive delegation doctrine would have practical consequences superior to those of the

9. U.S. Const. art I, § 8, cl. 18.

nondelegation doctrine, whether that doctrine is applied in its present unenforced form, or if it were enforced quite strictly.

The Article is organized as follows. Part I provides further background about the two postulates concerning the meaning of Article I, Section I—nondelegation and exclusive delegation. Part II undertakes a textualist analysis of Article I, Section 1, to show that the constitutional language is susceptible to a wide range of possible meanings, including both the traditional nondelegation doctrine and the exclusive delegation doctrine. In order to narrow the field of possible readings further, Part III considers how much support these meanings enjoy in terms of the structure, original understanding, and interpretational history of Article I, Section 1. This inquiry yields one nontrivial conclusion: The Supreme Court's current doctrine, which assumes legislative power is nondelegable but imposes no enforceable limit on legislative delegation, is more difficult to support than either a strictly enforced nondelegation doctrine or the exclusive delegation doctrine. Part IV continues the narrowing process, examining a bevy of consequentialist arguments that have been advanced both by proponents of strict nondelegation and proponents of broad delegation. Many of these arguments are inconclusive because they rest on debatable normative premises or because we lack sufficient empirical evidence to evaluate them. But on balance the practical effects of exclusive delegation appear to be superior to those of its principal rivals. Part V elaborates further on why it is important to develop a substitute for the nondelegation doctrine to secure the place of Congress as the first branch of government. Part VI wraps things up by considering some specific doctrinal implications of interpreting Article I, Section 1 as incorporating the exclusive delegation doctrine.

I. Two Postulates About Legislative Power

Before taking a fresh look at Article I, Section 1, it is appropriate to review existing decisional law bearing on the meaning of that clause. This will help orient the ensuing discussion and provide some sense of potential judicial receptiveness to different interpretations.

The story of the rise and fall of the first postulate—the nondelegation doctrine—has been told many times.[10] I offer here only the most capsule summary, together with some observations about how that story fits into the themes of this Article. The story of the second postulate—the exclusive delegation doctrine—is less familiar. Here, however, there is less to say, so I can be relatively brief on this subject too.

10. See, e.g., Martin H. Redish, The Constitution as Political Structure 138–43 (1995); David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation 25–46 (1993); Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 355–72 (2002) [hereinafter Lawson, Delegation].

A. *The First Postulate—Nondelegation*

The idea that the Constitution forbids Congress from delegating legislative power made a cameo appearance in two decisions rendered by the Marshall Court, with neither case resulting in the invalidation of a statute.[11] After a period of relative quiet in the middle decades of the nineteenth century, the nondelegation idea reemerged late in the century, but again with no invalidations of statutes by the Supreme Court.[12] Only in 1935, when confronted with two hastily drafted provisions of the National Industrial Recovery Act, did the Court actually strike down federal legislation as an unconstitutional delegation of legislative power.[13] After President Roosevelt threatened to pack the Court if it persisted in rendering such decisions, the Justices changed their tune, and nondelegation challenges were thereafter uniformly rejected.[14] Notwithstanding the modern Court's occasional flirtation with stricter enforcement of separation-of-powers requirements, this pattern continues today.[15] The only arguable imprint of the nondelegation doctrine in recent years has been as a canon of interpretation supporting narrow constructions of statutes so as to "avoid" the constitutional question of excessive delegation.[16] But

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11. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–49 (1825) (upholding delegation to courts to adopt rules of process); The Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388 (1813) (upholding delegation to President to revive trading privileges with certain countries upon a finding that they had ceased to interfere with neutral commerce).

12. See, e.g., Buttfield v. Stranahan, 192 U.S. 470, 496 (1904); Field v. Clark, 143 U.S. 649, 692–94 (1892); cf. United States v. Eaton, 144 U.S. 677, 688 (1892) (invalidating prosecution for violating an agency rule in part on nondelegation grounds but also relying on the doctrine of lenity).

13. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–42 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 420–30 (1935).

14. E.g., Fahey v. Mallonee, 332 U.S. 245, 249–50 (1947); Yakus v. United States, 321 U.S. 414, 425–27 (1944) (upholding Emergency Price Control Act of 1942). On the Court-packing episode, see William E. Leuchtenberg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt 132–62 (1995).

15. See, e.g., Loving v. United States, 517 U.S. 748, 771–74 (1996); Touby v. United States, 500 U.S. 160, 167 (1991); Mistretta v. United States, 488 U.S. 361, 371–79 (1989).

16. See *Mistretta*, 488 U.S. at 373 n.7 ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."). The principal examples of the use of nondelegation as a canon of avoidance are Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 645–46 (1980) (adopting a construction limiting OSHA discretion in regulating toxic substances) and National Cable Television Ass'n v. United States, 415 U.S. 336, 340–41 (1974) (finding FCC levy on certain television providers to be a "fee" rather than a "tax" to avoid nondelegation problem). See generally Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 315 (2000) (arguing that nondelegation doctrine now consists of a set of canons subject to "principled judicial adjudication"). For skepticism about the claim that the doctrine has played a significant role in statutory interpretation, see David M. Driesen, Loose Canons: Statutory Construction and the New Nondelegation Doctrine, 64 U. Pitt. L. Rev. 1, 18–38 (2002).

even this use of the doctrine is fading and has recently come under attack as pointless or counterproductive.[17]

One significant recent development is that the nondelegation doctrine has become firmly implanted in the Vesting Clause of Article I. Early judicial decisions were vague about the constitutional source of the nondelegation doctrine, the most common refrain being that it was required by general principles of separation of powers.[18] With the emergence of greater formalism in constitutional law in the late 1980s, however, the Court began confidently to assert that the doctrine derives from Article I, Section 1.[19] These statements have not been accompanied by any detailed examination of the constitutional language or other historical materials.[20] Moreover, the discovery of a textual basis for the

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17. See John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup. Ct. Rev. 223, 260 [hereinafter Manning, Nondelegation] (arguing that it is counterproductive to allow courts to rewrite statutes in name of protecting congressional prerogatives); Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1761 (2002) [hereinafter Posner & Vermeule, Interring] (arguing that it is pointless to avoid a constitutional principle never enforced).

18. See, e.g., Field v. Clark, 143 U.S. 649, 692–94 (1892); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825). The doctrine was also sometimes grounded in a maxim of agency law, *delegata potestas non potest delegari* (a delegated authority cannot be delegated), especially in state court cases. See generally Patrick W. Duff & Horace E. Whiteside, Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law, 14 Cornell L.Q. 168 (1929).

19. 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 . . . ."); *Loving*, 517 U.S. at 758 ("The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity." (citation omitted)); *Touby*, 500 U.S. at 164–65 (noting that the Constitution "provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.' From this language the Court has derived the nondelegation doctrine. . . ." (citation omitted)); *Mistretta*, 488 U.S. at 371–72 ("The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,' and we long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." (citations omitted)).

Not all commentators have been paying attention. See J.R. DeShazo & Jody Freeman, The Congressional Competition to Control Delegated Power, 81 Tex. L. Rev. 1443, 1514 n.211 (2003) (stating that the nondelegation doctrine "is derived from Article I, Section 7 and the Due Process Clause").

20. As with other newly discovered textualist claims, the fixing of the nondelegation doctrine in Article I, Section 1 appears to be due in significant part to the influence of Justice Scalia. Although he is at least as deferential to Congress in nondelegation cases as any other Justice, Justice Scalia has insisted in a series of opinions that it is not proper to speak of Congress "delegating legislative power." His reasons are spelled out most clearly in a concurring opinion:

> While it has become the practice in our opinions to refer to "unconstitutional delegations of legislative authority" versus "lawful delegations of legislative authority," in fact the latter category does not exist. Legislative power is nondelegable. Congress can no more "delegate" some of its Article I power to the Executive than it could "delegate" some to one of its committees. What

nondelegation doctrine has done nothing to secure its enforcement. In virtually the same breath as the contemporary Court cites Article I, Section 1 as the constitutional foundation of the nondelegation doctrine, it immediately notes the practical necessity of broad delegations of powers to administrative agencies.[21]

Another interesting aspect of the recent history is that the nondelegation doctrine refuses to go away. The Court has not ruled in favor of a nondelegation claim since 1935—"the nondelegation doctrine's only good year."[22] The decisions are unanimous or attract at most one or two dissenters. Yet lower courts at irregular intervals persist in invalidating federal legislation on nondelegation grounds, resulting in a continuing trickle of cases reaching the Supreme Court.[23]

Part of the explanation for this pattern of behavior may be the repeated waves of enthusiasm for "revival" of the nondelegation doctrine among academics in the latter decades of the twentieth century. The motivation for this advocacy has varied,[24] but the net effect may have been to

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> Congress does is to assign responsibilities to the Executive; and when the Executive undertakes those assigned responsibilities it acts, not as the "delegate" of Congress, but as the agent of the People. At some point the responsibilities assigned can become so extensive and so unconstrained that Congress has in effect delegated its legislative power; but until that point of excess is reached there exists, not a "lawful" delegation, but no delegation at all.

Loving, 517 U.S. at 776–77 (Scalia, J., concurring in part and in the judgment).

At first it may seem like a semantic quibble to insist that a broad transfer of power is not a "delegation." Substantively, Justice Scalia accepts the intelligible principle doctrine and the tradition of judicial deference to Congress associated with it. See *American Trucking*, 531 U.S. at 474–75 (Scalia, J.) (noting "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law'" (citation omitted)). One possible reason for Justice Scalia's insistence that legislative power may never be delegated is that this reinforces his campaign against the use of legislative history in statutory interpretation. Justice Scalia has argued that courts should not rely on legislative history because, among other things, this amounts to delegating legislative power from Congress as a whole to the member of Congress or the committee that authors the legislative history. See Antonin Scalia, A Matter of Interpretation 35 (1997). He may think that this argnment is weakened if the legislative power is understood to be delegable. For criticism of Justice Scalia's constitutional argument against legislative history, see John C. Roberts, Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process, 52 Case W. Res. L. Rev. 489, 503–11 (2001).

21. See *Loving*, 517 U.S. at 758 ("To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government."); *Mistretta*, 488 U.S. at 372 ("[I]n 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.").

22. Cass R. Sunstein, Is the Clean Air Act Unconstitutional?, 98 Mich. L. Rev. 303, 332 (1999) [hereinafter Sunstein, Clean Air].

23. For discussion of lower court decisions accepting nondelegation arguments, see id. at 334–35.

24. In the 1970s, the antidelegation position was associated with liberal public-interest theorists, who saw the doctrine as a potential antidote to capture of administrative agencies

encourage litigants to experiment with nondelegation arguments in the lower courts, with this experimentation generating just enough success to bring the issue before the Supreme Court from time to time.

The Court's most recent nondelegation decision, *American Trucking*,[25] illustrates the process. The case involved an attempt by the Clinton Administration to tighten the National Ambient Air Quality Standards (NAAQS) for two air pollutants—particulate matter and ozone. This initiative was opposed by much of the chemical industry. Industry lawyers sought to build support for a challenge to the new regulations, in part by publishing articles and sponsoring public forums in Washington, D.C. advocating a revival of the nondelegation doctrine.[26] This effort was reinforced by briefs filed in the D.C. Circuit, urging the court to interpret the Clean Air Act in such a way as to "adequately constrain [the Environmental Protection Agency's (EPA)] rule-making discretion under the non-delegation doctrine."[27] A divided panel of the court of appeals obliged, after a fashion. The majority reasoned that the Clean Air Act would be unconstitutional under the nondelegation doctrine, unless *the EPA* developed a narrowing construction providing an intelligible principle for determining the appropriate levels of ambient air pollution.[28] The idea that agencies can cure nondelegation problems was not new. It too had been proposed by academics, first by Kenneth Culp Davis in the late

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by big business. See Theodore J. Lowi, The End of Liberalism: The Second Republic of the United States 92–126 (2d ed. 1979); see also Carl McGowan, Congress, Court, and Control of Delegated Power, 77 Colum. L. Rev. 1119, 1166 (1977) (article by D.C. Circuit judge suggesting that nondelegation be taken more seriously); J. Skelly Wright, Beyond Discretionary Justice, 81 Yale L.J. 575, 579–87 (1972) (book review by another D.C. Circuit judge discussing and urging revival of nondelegation doctrine). David Schoenbrod, the leading legal proponent of revival today, appears also to have started out in this camp. See Schoenbrod, supra note 10, at ix (noting that the author came to "distrust agencies" in the 1970s when working for the National Resources Defense Council). Later, strict enforcement of the nondelegation idea was endorsed by constitutional scholars who wanted to perfect the democratic features of American constitutionalism. See John Hart Ely, Democracy and Distrust 131–34 (1980); Redish, supra note 10, at 142–43. Most recently, the position has been associated with public-choice influenced commentators, who appear to be attracted to the doctrine as a potential brake on growth of the administrative state. See, e.g., Peter H. Aranson et al., A Theory of Legislative Delegation, 68 Cornell L. Rev. 1, 63–67 (1982); Jonathan R. Macey, Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory, 74 Va. L. Rev. 471, 513–16 (1988).

25. *American Trucking*, 531 U.S. at 457.

26. See Edward W. Warren & Gary E. Marchant, "More Good than Harm": A First Principle for Environmental Agencies and Reviewing Courts, 20 Ecology L.Q. 379, nn.* & ** (1993) (article coauthored by lead counsel for industry petitioners in *American Trucking*).

27. Brief of Amicus Curiae Congressman Tom Bliley at 23, 34, Am. Trucking Assn's v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) (No. 97-1441) (on file with the *Columbia Law Review*); Brief of Amicus Curiae Senator Orrin Hatch at 14, 17, 20–23, *American Trucking*, 175 F.3d 1027 (No. 97-1440) (on file with the *Columbia Law Review*).

28. *American Trucking*, 175 F.3d at 1034 (per curiam).

1960s and more recently by Lisa Schultz Bressman.[29] But the Supreme Court, as usual, was not interested in the revival of the nondelegation doctrine in any form. It restated established doctrine and unanimously reversed.[30]

A third aspect of the recent history, which for our purposes is potentially the most significant, is that support for the nondelegation doctrine appears to be breaking down. Consider the opinions of the Justices in *American Trucking*. Justice Scalia, writing for the Court, repeated the catechism associated with the doctrine in its modern form: Congress may not delegate the legislative power; there is no forbidden delegation as long as Congress has supplied an intelligible principle; the intelligible principle can be extremely vague; as long as the intelligible principle is no more vague than those previously upheld by the Court, the nondelegation doctrine is not violated.[31] But signs of disquiet emerged in concurring opinions by Justices Thomas and Stevens.

Justice Thomas, writing only for himself, expressed frustration that the Court's jurisprudence has permitted too much delegation of legislative power. He agreed that the Clean Air Act provision challenged in *American Trucking* satisfied the intelligible-principle requirement.[32] But he observed that the Constitution does not mention "intelligible principles":

> Rather, it speaks in much simpler terms: "*All* legislative Powers herein granted shall be vested in a Congress." U.S. Const., Art. I, § 1 (emphasis added). I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative."[33]

He then issued an invitation:

> [N]one of the parties to these cases has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.[34]

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29. See Lisa Schultz Bressman, *Schechter Poultry* at the Millennium: A Delegation Doctrine for the Administrative State, 109 Yale L.J. 1399, 1415–16 (2000); Kenneth Culp Davis, A New Approach to Delegation, 36 U. Chi. L. Rev. 713, 728–29 (1969).

30. *American Trucking*, 531 U.S. at 475–76.

31. Id. at 472–76. Gary Lawson has captured the flavor of the typical modern nondelegation opinion, noting that the Supreme Court simply recites the "many utterly vacuous statutes" upheld in post-New Deal nondelegation decisions "and wearily move[s] on." Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1240 (1994) [hereinafter Lawson, Rise and Rise].

32. *American Trucking*, 531 U.S. at 487 (Thomas, J., concurring).

33. Id.

34. Id.

Justice Stevens, joined by Justice Souter, wrote separately to espouse in effect the opposite position: In Justice Stevens's view, the Constitution in fact does *not* forbid delegation of "legislative power." Justice Stevens said the Court was just "pretend[ing]" when it held that Congress had not delegated "legislative power" in conferring authority on the EPA to set NAAQS:[35]

> The proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it. . . . If the NAAQS that the EPA promulgated had been prescribed by Congress, everyone would agree that those rules would be the product of an exercise of "legislative power." The same characterization is appropriate when an agency exercises rulemaking authority pursuant to a permissible delegation from Congress.[36]

Justice Stevens further noted that there was nothing in the Vesting Clauses of either Article I or Article II "purport[ing] to limit the authority of either recipient of power to delegate authority to others."[37] Thus, just as the "executive power" vested in the President by Article II may be "granted to members of the Cabinet and federal law enforcement agents," so there should be no constitutional impediment to delegation of "legislative powers" vested in Congress by Article I.[38]

Disquiet about the nondelegation doctrine can also be found in academic commentary. Most prominently, Eric Posner and Adrian Vermeule have recently argued that it is time to lay the traditional nondelegation doctrine to rest.[39] They claim the doctrine is a dubious invention of the late nineteenth century, lacking any sound basis in original understanding or political and economic theory. In their view, Article I, Section 1 is more plausibly read as incorporating a "naïve view" that would prohibit any attempt by Congress or its individual members to cede formal power to enact statutes. But, they argue, the clause should not be read as imposing any limitation on legislative rulemaking by agencies "pursuant to an otherwise valid grant of statutory authority."[40]

This revisionism has not gone unchallenged. Larry Alexander and Sai Prakash have written a response arguing that the Posner/Vermeule definition of legislative power as the exercise of de jure powers of legisla-

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35. Id. at 488 (Stevens, J., concurring).

36. Id. at 488–89 (Stevens, J., concurring).

37. Id. at 489 (Stevens, J., concurring).

38. Id. Justice Stevens anticipated this position in an earlier separation-of-powers opinion. See Bowsher v. Synar, 478 U.S. 714, 752 (1986) (Stevens, J., concurring) ("Despite the statement in Article I of the Constitution that 'All legislative powers herein granted shall be vested in a Congress of the United States,' it is far from novel to acknowledge that independent agencies do indeed exercise legislative powers.").

39. Posner & Vermeule, Interring, supra note 17, at 1722–23.

40. Id. at 1726.

tors is idiosyncratic and implausible.[41] It makes little sense, they contend, to suppose that the Framers imposed elaborate limitations on how Congress is selected and how it enacts laws if the exercise of formal legislative powers could be easily evaded by broad delegations. Alexander and Prakash argue that the writings of the Framers and materials familiar to them reveal that they understood the legislative power to mean "the power to make rules for society."[42] If this is correct, and if one assumes the Constitution forbids delegation of the legislative power (an issue as to which, interestingly, they take no position[43]), then it is likely that the Framers had in mind a prohibition akin to the traditional nondelegation doctrine.

All in all, the first postulate about Article I, Section 1—the nondelegation doctrine—has remarkably little traction. It reflects the conventional wisdom about the meaning of the Clause, and has enduring appeal for some commentators and occasionally for lower courts. But as far as the Supreme Court is concerned, the nondelegation doctrine imposes no effective constraint on congressional legislation. Indeed, the Court's most recent decision applying the doctrine reveals that some Justices have come to question the doctrine, and respected academic commentators are openly urging that it be abandoned.

B. *The Second Postulate—Exclusive Delegation*

While constitutional lawyers have persisted in arguing that the legislative power may not be delegated, it is hornbook law among administrative lawyers that "an agency has the power to issue binding legislative rules only if and to the extent Congress has authorized it to do so."[44] This "exclusive delegation doctrine" includes both an anti-inherency principle—that agencies have no inherent authority to act with the force of law—and a transferability principle—that this inherent lack of authority can be filled by a delegation of power from Congress.

The most prominent statement of the idea that the executive branch has no inherent power to act "legislatively" is the Supreme Court's *Steel Seizure* decision.[45] The issue was whether President Truman could na-

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41. Larry Alexander & Saikrishna Prakash, Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated, 70 U. Chi. L. Rev. 1297, 1298 (2003). Posner and Vermeule have a rejoinder in the same issue. Eric A. Posner & Adrian Vermeule, Nondelegation: A Post-Mortem, 70 U. Chi. L. Rev. 1331 (2003) [hereinafter Posner & Vermeule, Post-Mortem].

42. Alexander & Prakash, supra note 41, at 1298.

43. Id. at 1329 ("[E]ven if one agreed with everything we have said, what remains to be answered is the important question of whether the Constitution actually authorizes the delegation of Congress's legislative powers.").

44. 1 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 6.3, at 234 (3d ed. 1994).

45. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952); see also James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("The Executive . . . , in addition to 'tak[ing] Care that the Laws be faithfully

tionalize steel mills in the midst of the Korean War to prevent a strike that would impair steel production. The federal takeover and operation of the mills was authorized by regulations issued by the Secretary of Commerce, whose authority was in turn based on an executive order of the President. Writing what was styled the opinion of the Court, Justice Black stated that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[46] Finding no statute delegating such power and no provision of the Constitution that conferred authority to issue such an order, Justice Black concluded that the seizure was unconstitutional. Justice Black's opinion presupposed that Congress could delegate seizure authority to the President, and if it had done so, the order would be lawful. But absent such a delegation, the President's act amounted to "legislation" and hence violated Article I, Section 1's vesting of all legislative power in Congress.[47] His opinion is therefore a clear endorsement of the anti-inherency principle that undergirds the exclusive delegation doctrine.

Whether this aspect of Justice Black's opinion in *Steel Seizure* in fact enjoyed majority support is debatable. Each of the five Justices who joined his opinion wrote a concurring opinion, many of which seemed to suggest that the President might have inherent power to act with the force of law in certain situations.[48] The concurring opinion most frequently cited today is that of Justice Jackson,[49] who offered his famous tripartite analysis of presidential power. According to this analysis, the President has the most authority when he acts "pursuant to an express or implied authorization of Congress,"[50] and the least authority when he takes measures "incompatible with the expressed or implied will of Congress."[51] In between lie situations where Congress has not spoken and the President "can only rely on his own independent powers."[52] In this so-called "zone of twilight," explained Justice Jackson, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[53] This was hardly a ringing endorsement of the idea that the President must trace his au-

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executed,' Art. II, § 3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute . . . ."); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (invalidating retroactive agency rule on the ground that it was not expressly authorized); supra note 3 and accompanying text (discussing *Bowen*).

46. *Steel Seizure*, 343 U.S. at 585.

47. Id. at 588.

48. See id. at 589; 593–628 (Frankfurter, J., concurring); id. at 629–34 (Douglas, J., concurring); id. at 634–55 (Jackson, J., concurring in judgment and opinion); id. at 655–60 (Burton, J., concurring in judgment and opinion); id. at 660–67 (Clark, J., concurring in judgment).

49. See, e.g., Clinton v. Jones, 520 U.S. 681, 696–97 (1997); Morrison v. Olson, 487 U.S. 654, 694 (1988); Dames & Moore v. Regan, 453 U.S. 654, 668–69 (1981).

50. *Steel Seizure*, 343 U.S. at 635 (Jackson, J., concurring in judgment and opinion).

51. Id. at 637 (Jackson, J., concurring in judgment and opinion).

52. Id.

53. Id.

thority to act to some source in enacted law. Since the Jackson concurrence appears to be what many Justices today regard as the enduring legacy of *Steel Seizure*,[54] the decision is at best a problematic authority for the exclusive delegation idea.

Uncovering decisions that actually enforce the exclusive delegation doctrine is more difficult but not impossible. The first candidate I would propose is the *Queen and Crescent Case*.[55] The original Interstate Commerce Act of 1887 gave the Interstate Commerce Commission (ICC) authority to hold railroad rates unlawful after a hearing, and gave it authority to enforce the Act in court. But the Act did not confer on the Commission authority to prescribe rates for the future. Rate prescription orders were then (and are now) regarded as a type of legislative rule.[56] The question in the *Queen and Crescent Case* was whether the Act had implicitly conferred authority on the Commission to issue such orders. After elaborate consideration of the issue over two years, the Supreme Court held that it did not. The Court observed that Congress had not expressly given the Commission authority to set rates by rule, and that the delegation of such power "is not to be presumed or implied from any doubtful and uncertain language."[57] Thus, the *Queen and Crescent Case* squarely holds that Congress must delegate the power to make legislative rules to an agency before such power can be exercised, and must do so in unequivocal language.

Why the *Queen and Crescent Case* did not become a landmark precedent is unclear. The issue decided was of the greatest contemporary importance, both legally and in terms of its economic impact on railroads. Part of the explanation for the decision's obscurity may be that Congress soon overruled its specific holding in the Hepburn Act of 1906, conferring on the ICC the power to prescribe rates.[58] But perhaps the more important reason was that the conceptual underpinnings of the decision—the exclusive delegation doctrine—were difficult to square with the nondelegation doctrine, which was enjoying a surge of support at the

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54. Chief Justice Rehnquist appears to be particularly fond of the Jackson opinion. See *Morrison*, 487 U.S. at 694 (Rehnquist, C.J.); *Dames & Moore*, 453 U.S. at 660 (Rehnquist, J.). He served as a law clerk to Justice Jackson when the *Steel Seizure* case was decided and has written about the decision in his books on the Supreme Court. See William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime 219 (1998); William H. Rehnquist, The Supreme Court: How It Was, How It Is 89–98 (1987).

55. Interstate Commerce Comm'n v. Cincinnati, New Orleans, & Tex. Pac. Ry. Co. (*Queen and Crescent*), 167 U.S. 479 (1897). The railroad involved connected Cincinnati (the "Queen City") and New Orleans (the "Crescent City"), and hence was colloquially known as the Queen and Crescent Line.

56. Id. at 500–01; see 5 U.S.C. § 551(4) (2000) ("'[R]ule' means the whole or part of an agency statement of general or particular applicability and future effect . . . and includes the approval or prescription for the future of rates . . . .").

57. *Queen and Crescent*, 167 U.S. at 505.

58. See Hepburn Act, ch. 3591, § 4, 34 Stat. 584, 589 (1906) (codified as amended at 49 U.S.C. § 10704 (2000)).

same time. Decisions like *Field v. Clark*[59] and constitutional law treatises[60] proclaimed that Congress could not delegate legislative power. The *Queen and Crescent Case* said the ICC could not prescribe rates because Congress had failed to delegate legislative power. Rather than try to sort out the underlying premises about the allocation of legislative power under the Constitution, the Court (and, it should be added, academic commentators for the next one hundred years) found it more convenient to ignore the *Queen and Crescent Case.*

A more recent holding that embodies the exclusive delegation doctrine is *Chrysler Corp. v. Brown.*[61] The question presented was whether a company that had given the Department of Labor information about its compliance with federal affirmative action guidelines could sue to prevent the agency from disclosing this information in response to a Freedom of Information Act request. The company relied on a federal criminal statute that prohibited federal employees from disclosing certain information "to any extent not authorized by law."[62] The government countered that disclosure was authorized by law because it was permitted by a Department regulation. The Court, speaking through then-Associate Justice Rehnquist, said that the regulation would be "law" only if Congress had delegated authority to the agency to make rules having the force of law. As he put it, "The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."[63] Justice Rehnquist considered a number of possible statutory sources for such authority, but found no clear intention to delegate power to issue regulations having the force of law, and hence held that the disclosure of the information was unlawful.[64]

Under *Chrysler* and the exclusive delegation doctrine, agency regulations have the force of law only if Congress has delegated authority to promulgate them. Moreover, a delegation to act with the force of law will not be presumed, but must be clearly intended by the legislature. Although cited somewhat more often today than the *Queen and Crescent Case, Chrysler* is also not well known, most likely because the delegation

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59. 143 U.S. 649, 692 (1892).

60. See, e.g., Charles K. Burdick, The Law of the American Constitution § 60, at 149–50 (1922) ("It is universally recognized as a fundamental principle of American constitutional law that the legislative branch of the government cannot delegate its essential legislative function to any other agency."); Thomas Cooley, Constitutional Limitations 224 (8th ed. 1927) ("One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.").

61. 441 U.S. 281 (1979).

62. See 18 U.S.C. § 1905 (2000).

63. *Chrysler*, 441 U.S. at 302.

64. Id. at 302–12.

issue was buried in an argument having multiple, complicated layers that defy easy extraction of the key point.

Lower courts have fairly consistently followed *Steel Seizure* (and *Queen and Crescent* and *Chrysler*) insofar as they assume that executive agencies have no inherent authority to promulgate legislative regulations.[65] They have not, however, consistently followed *Queen and Crescent* and *Chrysler* in requiring a demonstration of *clear intent* to delegate authority to make regulations with the force of law. In fact, leading decisions by the D.C. Circuit and the Second Circuit have construed ambiguous grants of authority to make "rules and regulations" as conferring broad legislative rulemaking authority on the Federal Trade Commission and the Food and Drug Administration respectively, even though in both cases the legislative history and unbroken decades of practice indicated that these grants were not intended to confer such authority.[66]

As a result of these sorts of decisions, lower courts today tend to assume that *any* grant of rulemaking authority delegates authority to act with the force of law, as opposed to authorizing only procedural rules or interpretive rules, and make no serious inquiry to determine Congress's delegatory intent.[67] But this lax attitude toward exclusive delegation is more a product of inattention than conscious design. The current indifference to the principle could be easily rectified by one or two Supreme Court decisions reaffirming that only Congress has authority to delegate power to act with the force of law, and holding that particular legislative rules are ultra vires for want of a clear delegation of such power.

The second subsidiary principle that makes up the exclusive delegation doctrine is the transferability principle: that Congress is free to transfer legislative rulemaking power to agencies and courts. This proposition has not been in doubt since 1911, when the Supreme Court held in *United States v. Grimaud* that Congress can authorize an agency to promulgate rules that are enforced by criminal sanctions.[68] Today, agency authority to make legislative rules enjoys an abundance of support. The understanding that Congress may delegate legislative power to agencies is stated explicitly from time to time.[69] Perhaps more importantly, it is im-

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65. See, e.g., Kelley v. EPA, 15 F.3d 1100, 1107 (D.C. Cir. 1994) (invalidating EPA's lender liability regulation for want of statutory authority to make legislative rules on the subject).

66. See Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 697–98 (D.C. Cir. 1973); Nat'l Ass'n of Pharm. Mfrs. v. FDA, 637 F.2d 877, 879 (2d Cir. 1981). The decisions were authored by Judges J. Skelly Wright and Henry Friendly, respectively, both of whom were strong proponents of expanded use of rulemaking by agencies. For further details, see Merrill & Watts, supra note 6, at 549–65.

67. See, e.g., Pronsolino v. Nastri, 291 F.3d 1123, 1131 (9th Cir. 2002) (finding general rulemaking grant in Clean Water Act to authorize legislative rules).

68. 220 U.S. 506, 521 (1911).

69. See, e.g., Mistretta v. United States, 488 U.S. 361, 386 n.14 (1989) ("[R]ulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch."); Indus. Union Dep't, AFL-CIO v.

plicitly acknowledged in every decision that enforces legislative rules adopted by agencies pursuant to delegated authority. Unfortunately, little effort has been made by the courts or commentators to spell out the source of congressional authority to confer such power on agencies. In that sense the transferability principle, although established in fact, is undertheorized.

In short, the second postulate—the exclusive delegation doctrine—is less prominent than the nondelegation doctrine. But it has enjoyed intermittent judicial support, and it could be strictly enforced without major modification of settled understandings about the distribution of legislative power under the Constitution.[70]

II. TEXTUAL POSSIBILITIES

Given its key location as the first substantive clause of the Constitution, remarkably little effort has been devoted to explaining the meaning of the Vesting Clause of Article I. In this Part, I consider the meaning of this clause independent of historically evolved understandings, constrained only by the rules of meaning and grammar. So viewed, we discover that the Vesting Clause will support a surprisingly large range of meanings.[71] Later, in Parts IV and V, I will attempt to reduce the range of plausible meanings by introducing conventional interpretive aids and a consideration of practical consequences as limits on the scope of linguistically possible meanings.

Let us then begin rethinking Article I, Section 1 by considering the words anew: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." From a textualist perspective, these words pose three important questions. The first and most obvious relates

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Am. Petroleum Inst., 448 U.S. 607, 663 (1980) (Burger, C.J., concurring) (stating that when an agency adopts regulations pursuant to "legislative authority delegated by Congress" it "exercises the prerogatives of the legislature"); Ariz. Grocery Co. v. Atchinson, Topeka & Santa Fe Ry. Co., 284 U.S. 370, 386 (1932) (holding that when the ICC prescribes a rate for the future pursuant to power delegated by Hepburn Act, "it speaks as the legislature, and its pronouncement has the force of a statute").

70. Other commentators have noted what I call the exclusive delegation doctrine. See, e.g., Posner & Vermeule, Post-Mortem, supra note 41, at 1333 (noting that exclusive delegation doctrine is an important attribute of separation of powers); Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory, 41 Duke L.J. 449, 480 (1991) (noting that executive branch is confined to "interpreting or enforcing a legislative choice or judgment; its actions cannot amount to the exercise of free-standing legislative power").

71. Textualism can be either liberating or constraining, depending on whether the range of meanings linguistically supported by the text is larger or smaller than the range of meanings that have been considered plausible as a matter of historical understanding. See Thomas W. Merrill, Textualism and the Future of the *Chevron* Doctrine, 72 Wash. U. L.Q. 351, 366–68 (1994) [hereinafter Merrill, Textualism]. As a comparison of Parts II and III of this Article demonstrates, I consider textualism to be liberating in this context in that it opens up a larger universe of interpretational possibilities. I suspect, but cannot prove, that this is true for most constitutional provisions.

to what sort of authority is encompassed within the exercise of "legislative powers." The second concerns how much sharing of legislative powers is possible, given the vesting of "all" such powers in the Congress. The third concerns the referent of the word "herein": Does this refer to the Constitution as a whole, or just to Article I itself?

A. *Legislative Power*

The first question concerns the meaning of "legislative powers." In light of recent debates over the meaning of Article I, Section 1, we can see that there are three conceptually distinct characterizations of legislative power consistent with these words.

One reading, which can be called the formal interpretation, is that legislative power simply refers to the power to *enact statutes* on subjects that fall within the scope of constitutional authority. Under this interpretation, the legislative power consists of the power to enact measures having a certain form. Article I, Section 1 vests all power in Congress to enact measures bearing the label "statute of the United States." As long as an edict does not have this label, it may be promulgated by some other entity without violating Article 1, Section 1.

This appears to be the interpretation recently advanced by Posner and Vermeule.[72] Under what they describe as the "naïve view" of legislative power, a delegation of legislative power would occur only "if Congress or its individual members attempted to cede to anyone else the members' *de jure* powers as federal legislative officers, such as the power to vote on proposed statutes."[73] Thus, a delegation of power to adopt rules that are the functional equivalent of statutes, no matter how legally binding the rules may be or how much discretion the promulgator may enjoy, can never be a delegation of legislative power—so long as such rules are not labeled statutes. Any such exercise of rulemaking authority would by definition be part of the "executive power" or the "judicial power," and hence would be immune from challenge on nondelegation grounds.

A second reading of legislative powers is that this refers to the power to enact statutes or rules that are *functionally similar* to statutes. Under this definition, the form of an enactment is not decisive. Instead, we should look beyond form by developing a functional conception of what it means to enact a statute or to legislate, and read the Constitution as vesting in the Congress all power to adopt measures that satisfy this functional definition.

Alexander and Prakash endorse what amounts to a functional definition when they assert that the legislative power entails the power to make rules for the governance of society.[74] This definition, obviously, is not

72. Posner & Vermeule, Interring, supra note 17.

73. Id. at 1726.

74. Alexander & Prakash, supra note 41, at 1305.

limited to enactments that are formally labeled statutes, but encompasses both statutes and other rules that have the same force and effect as statutes.[75]

A third reading, which can be called the discretionary interpretation, would be that legislative powers refer to the power to exercise *great discretion* in enacting statutes or rules that are functionally similar to statutes. This definition starts with the functional definition of legislation, but then dramatically restricts the universe of measures that fall within the legislative power by focusing on the degree of discretion that the rule promulgator exercises. Only if the promulgator has great discretion in determining the content of rules can we say that the promulgator exercises legislative power. This, of course, is the definition of legislative powers that the Supreme Court has adopted in order to defeat consistently claims that Congress has impermissibly delegated such powers.[76]

B. *Sharing Principles*

The second question concerns how far these legislative powers may be shared with other entities. Three aspects of the constitutional text are relevant here. First, there is the fact that Articles I, II, and III all contain individual Vesting Clauses, with each clause referencing a different governmental power. The first clause of Article I vests "legislative" powers in Congress, the first clause of Article II vests "executive" power in the President, and the first clause of Article III vests "judicial" power in the Supreme Court and such inferior federal courts as Congress creates.[77] This tripartite designation of powers raises the question whether, or to what extent, these powers are mutually exclusive, such that each type of power can be exercised only by the institution in which it is vested. Second, there is the potentially significant fact that the first clause of Article I vests "all" legislative powers in Congress, whereas the parallel clauses of Article II and Article III omit the word "all" and speak simply of executive and judicial power. Third, and perhaps most significantly, there is a textual silence. As others have observed, most prominently Justice Stevens in his concurring opinion in *American Trucking*,[78] Article I, Section 1 does not

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75. I do not think it necessary, at least for purposes of the present discussion, to pinpoint the correct functional definition of "legislative power." It is sufficient to say that under the functional approach, "legislative power" would be defined to mean the power to enact statutes or rules that are like statutes in terms of having a similar force and effect, whatever features we ultimately settle upon as satisfying this general criterion.

76. See supra note 4 and accompanying text.

77. U.S. Const. art. I, § 1, cl. 1; id. art. II, § 1, cl. 1; id. art. III, § 1, cl. 1.

78. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 489 (2001) (Stevens, J., concurring in part and in the judgment); see also Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 478 (1989) (noting that nondelegation doctrine is "not expressly grounded in the text of the Constitution"); Sunstein, Clean Air, supra note 22, at 303, 331 & n.131 (1999) (noting the silence of the U.S. Constitution on nondelegation and contrasting the German constitution).

specifically address the question of whether or to what extent Congress may delegate legislative powers to other actors or institutions.

There are many possibilities for how best to interpret these textual features in determining the permitted degree of sharing of legislative powers. Without being exhaustive, the possibilities that have been suggested include: (1) that Congress may not delegate legislative powers to the President but may delegate such powers to administrative agencies;[79] (2) that Congress may not delegate legislative powers to the executive branch but may delegate them to the judicial branch;[80] (3) that Congress generally may not delegate legislative powers but may delegate legislative power concerning certain restricted subjects;[81] (4) that Congress may delegate the power to regulate but not the power to tax;[82] (5) that the President may act with legislative force in default of congressional action, but must conform to any legislation that Congress does enact;[83] and (6) that the President may act with legislative force in an emergency, but must seek authority from Congress through appropriate legislation as soon as practicable.[84] In an attempt to keep the discussion manageable, I will again confine myself to three central and conceptually distinct possibilities.

The first may be called the legislative monopoly understanding. Under this conception, legislative powers may be exercised only by Congress and hence cannot be shared. Such an interpretation gives the strongest measure of exclusivity to Congress. The vesting of all legislative powers in Congress means that only Congress can exercise "legislative power," however that is defined.

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79. See Nathan D. Grundstein, Presidential Power, Administration and Administrative Law, 18 Geo. Wash. L. Rev. 285, 304–05 (1950); see also Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 39–41 (1994) (claiming that the Framers anticipated that Congress could vest significant administrative power in agencies independent of presidential control).

80. See Redish, supra note 10, at 140–41.

81. See Michael B. Rappaport, The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for *Clinton v. City of New York*, 76 Tul. L. Rev. 265, 265 (2001) (arguing on originalist grounds that the nondelegation doctrine does not apply to appropriations laws, foreign affairs issues, and perhaps other suhjects such as management of federal lands).

82. See Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 340–42 (1974) (dictum). This notion was rejected in Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 223–24 (1989).

83. See Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 700–04 (1952) (Vinson, C.J., dissenting). This appears to be the position reflected in President Theodore Roosevelt's "stewardship" theory of the Presidency, as described in Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1, 38–39 (1993) (quoting Roosevelt as saying, "'[T]he executive power [is] limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress.'") [hereinafter Monaghan, Protective].

84. This appears to be the position advanced hy the government in United States v. Midwest Oil Co., 236 U.S. 459, 474–75 (1915).

The second may be called the legislative first-mover understanding. Under this construction, executive and judicial actors have no inherent power to make legislative rules, but Congress can invest agencies or courts with the power to make such rules pursuant to a valid delegation of power. This reading gives an intermediate level of exclusivity to Congress. The vesting of all legislative powers in Congress means that only Congress can delegate "legislative power," however that is defined.[85]

The third may be called the legislative supremacy understanding. Under this position, executive and judicial actors must always conform to valid legislative rules promulgated by Congress. But if Congress is silent, executive and judicial entities have authority to promulgate legislative rules in areas where the federal government as a whole is competent to act. This gives the weakest measure of exclusivity to Congress. The vesting of all legislative powers in Congress means that Congress has the last word on what the legislative policy of the United States Government shall be on all issues.

C. *Herein*

The third question, which has received comparatively little attention, zeroes in on the word "herein" in the phrase, "All legislative Powers *herein* granted shall be vested in a Congress of the United States."[86] Specifically, what is the referent of "herein"? Is it "this Constitution," or is it "Article I"?

If "herein" means the Constitution as a whole, then the power to legislate, no matter where it is granted in the Constitution, can be exercised only by the Congress. Neither the President (the subject of Article II) nor the federal courts (the subject of Article III) nor any other governmental entity can exercise the federal power to legislate.

But it is also possible that herein simply means "Article I." On this reading, the various legislative powers enumerated in Article I—such as the power to tax, the power to borrow, the power to regulate commerce among the States, and so forth—are given exclusively to Congress, subject to whatever degree of sharing we conclude is permissible under Article I, Section 1. But other powers arguably of a legislative nature not enumerated in Article I might be exercised by entities besides Congress. For example, the President's power as Commander in Chief of the Armed

85. Hal Krent has perceived that this is a possible reading of the Constitution. See Harold J. Krent, Delegation and Its Discontents, 94 Colum. L. Rev. 710, 743 (1994) (reviewing David Schoenbrod, supra note 10) [hereinafter Krent, Discontents] (noting that the Constitution may "not claim for Congress the exclusive function of rule-making, but merely the authority to start the ball rolling by passing a law").

86. U.S. Const. art. I, § 1, cl. 1 (emphasis added). Schoenbrod briefly flags the issue in his book. See Schoenbrod, supra note 10, at 187.

Forces, set forth in Article II,[87] might serve as a valid basis for making legislative rules for the governance of the armed forces, even absent any legislation by Congress.

D. *Mixing and Matching*

Note that the answers to these three questions are logically independent of one another. Thus, the three options in regard to the meaning of "legislative power" interact with the three options with respect to sharing of that power and with the two options with respect to the referent of "herein," to create a large number of theoretically possible interpretive packages. Eighteen to be exact (3 x 3 x 2). Some of these packages are rather far fetched and have never been advocated by any serious constitutional interpreter. For example, no one has ever advanced a 3-3-2 package, which would be the understanding that legislative power refers to the power to exercise unconstrained discretion in making rules (issue 1, option 3), combined with the legislative supremacy understanding of the sharing of this power (issue 2, option 3), combined with the understanding that this rule applies only to the powers conferred by Article 1 (issue 3, option 2). This package would reduce Congress to the role of a board of oversight with respect to the powers enumerated in Article I, Section 8. Nevertheless, it is instructive to consider several serious interpretive positions that have been advanced, and to note the package of answers they presuppose to our interpretational options.

The nondelegation doctrine, in the anything-goes version currently embraced by the Supreme Court, represents a 3-1-1 interpretive package. It is created by combining the discretionary meaning of "legislative power" (issue 1, option 3) with the principle that sharing of the legislative power is not permitted (issue 2, option 1) and the understanding that "herein" refers to the entire Constitution (issue 3, option 1). This construction preserves the nondelegation doctrine as an official part of the Constitution, but renders it effectively unenforceable, because the Court has given nearly conclusive deference to congressional judgments about how much discretion is too much.

Significant alterations in constitutional meaning can be achieved by changing the first variable, the definition of legislative power. Thus, Posner and Vermeule's "naïve view" of legislative delegation consists of a 1-1-1 interpretive package, that is, the formal understanding of legislative power as the power to enact statutes (issue 1, option 1), combined with the understanding that the power may not be delegated (issue 2, option 1), and the implicit understanding that herein refers to the entire Constitution (issue 3, option 1).[88] This combination has the effect of "inter-

87. U.S. Const. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .").

88. See supra notes 39–40 and accompanying text.

ring" the nondelegation doctrine, because the only thing prohibited by Article 1, Section 1 is the delegation of power to enact rules bearing the label "statute of the United States."

Alternatively, a nondelegation diehard like David Schoenbrod can be understood as advancing a 2-1-2 interpretive package. He combines the functional meaning of "legislative power" (issue 1, option 2) with the understanding that the legislative power may not be delegated (issue 2, option 1). He then tries to soften the impact of this a bit by appearing to endorse the understanding that "herein" refers only to the powers conferred by Article I (issue 3, option 2).[89] This package, if rigorously pursued, presumably would mean that any delegation of legislative rulemaking authority to the executive branch, at least as to subjects covered by Article I, would be unconstitutional.[90]

Compared to the definition of legislative powers, relatively little attention has been given to modifying the second and third interpretational issues. The position I endorse in the article is the 2-2-2 interpretive package. In other words, I agree with Alexander and Prakash, Schoenbrod, and others, that "legislative power" should be given a functional definition—the power to enact statutes or measures that are functionally similar to statutes (issue 1, option 2). But, in contrast to most commentators, I agree with Justice Stevens that this power may be legislatively delegated by Congress (issue 2, option 2). Finally, I agree with Schoenbrod that "herein" should be understood to refer only to the legislative power conferred in Article 1, not to all legislative powers found in the Constitution (issue 3, option 2).

The point is that the three ambiguities raised by Article I, Section 1 give rise to multiple interpretational possibilities, and the task is to choose the one that is most faithful to settled interpretational norms and would produce the best overall consequences. In Part III, I develop the case that the 2-2-2 interpretational package, if not compelled by traditional interpretive sources, is at least compatible with them. In Part IV, I argue that the 2-2-2 package is preferable on consequentialist grounds to the most plausible alternative packages.

III. Constitutional Structure, Original Understanding, Settled Meanings

The text of Article I, Section 1, considered without regard to historical context or evolved understandings, generates a wide range of possible

89. Schoenbrod, supra note 10, at 187.

90. It is not clear that this is in fact Schoenbrod's position. He says that Congress may not delegate the legislative power, and the legislative power is the power to make rules for the governance of private conduct. See id. at 16. It would appear to be a logical corollary of these propositions that only Congress can make legislative rules. But Schoenbrod never explicitly embraces this corollary. So it is possible that he would allow administrative agencies to promulgate subordinate or second-round legislative rules fleshing out or giving further content to first-round legislated rules promulgated by Congress.

meanings. In this Part, I inquire whether some discipline can be imposed on the options by going beyond the bare text of the Constitution to consider also its structure, the understandings of the framing generation, and the interpretive gloss that has been added with the passage of time.

A. *Is Article I, Section 1 Irrelevant?*

Before turning to the discrete interpretive questions presented by Article I, Section 1, let us consider a more radical possibility: that the Vesting Clause of Article I has nothing to do with the allocation of legislative power under the Constitution.[91] The argument for the irrelevance of Article I, Section 1 is based on differences in the wording of the Vesting Clause of Article I, as opposed to the parallel clauses of Articles II and III. Articles II and III begin by vesting "[t]he executive power" in a President of the United States and "[t]he judicial power" in the courts of the United States.[92] Article I, in contrast, begins by saying that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States." Commentators have suggested that the unqualified vesting clauses of Articles II and III were intended to confer on the President and the federal courts all of the powers traditionally exercised by executives and judges.[93] The variant language in Article I, in contrast, was intended to signal that the Congress does not exercise all the powers traditionally exercised by a legislature, but only those legislative powers specifically enumerated in Article I, Section 8.[94] Consequently, the argument goes, the wording of Article I, Section 1 has no substantive import, other than to confirm (or anticipate) the principle of enumerated powers. Since this is the sole purpose of the unique wording of Article I, Section 1, we cannot derive any conclusions from it about the power of Congress to delegate legislative powers. To answer that question, we must look elsewhere in the Constitution, such as the Necessary and Proper Clause, and consider whether the "executive" or the "judicial" power was understood to include the power to receive and implement a delegation of legislative power.

The words "all . . . powers herein granted" may well have been added to the Vesting Clause of Article I to avoid any inference that Congress was being given plenary legislative authority (although I would note that there is little documentary evidence—other than the text itself—to support this supposition). However, even if we accept that this was the motivating purpose of adding these words to Article I, it does not follow that

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91. Gary Lawson has suggested this possibility to me. E-mail from Gary Lawson, Professor of Law, Boston University School of Law to Author (July 28, 2004) (on file with the *Columbia Law Review*).

92. U.S. Const. art. II, § 1, cl. 1; id. art. III, § 1.

93. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1175–76 (1992).

94. Id.

the balance of Article I, Section 1 is irrelevant to the question of the allocation of legislative power under the Constitution.

First, Article I, Section 1 is the only place in the Constitution where the powers of Congress are identified as being *legislative.* Article 1, Section 8, where the enumerated powers are listed, simply tells us that "[t]he Congress shall have *Power* To" (emphasis added), and then lists eighteen different powers (spending, taxing, regulating interstate commerce, and so forth). In order to establish that the power exercised by Congress is *legislative* power, we must refer back to Article I, Section 1. Thus, Article I, Section 1 uniquely contributes the concept of "legislative power" to the Constitution, and requires that some meaning be attributed to that term.

Second, Article I, Section 1 uniquely *vests* the legislative power in Congress. Just as Article II vests the executive power in the President, and Article III vests the judicial power in the federal courts, Article I, Section 1 vests "all legislative powers herein granted" in the Congress. Congress in some sense is given exclusive power to legislate by Article I, Section 1, and this must be accounted for in any theory about the permissible degree of sharing of legislative power under the Constitution.

Third, whatever else one may think about the Supreme Court's performance in determining the allocation of legislative power, the Court has been steadfast in recent years in identifying Article I, Section 1 as the relevant constitutional text for determining the permissible scope of delegation of legislative powers.[95] If one is prepared to give any weight at all to such pronouncements in interpreting the Constitution, this consistent line of authority cuts against the position that Article I, Section 1 is irrelevant to the question of the proper allocation of legislative power.

B. *Legislative Power*

What then do the traditional tools of interpretation tell us about the meaning of "legislative power" as used in Article I, Section 1? Does the legislative power include only the power to enact statutes (the formal interpretation)? Or does it also include the power to enact statutes and other measures having the force and effect of a statute (the functional interpretation), or perhaps only the power to exercise unconstrained discretion in enacting measures having the force and effect of statutes (the discretionary interpretation)?

The text of Article I, Section 1, as we have seen, does not answer this question. But what about the more general structure of the Constitution?[96] Alexander and Prakash make much of the fact that the Constitu-

95. See supra note 19 and accompanying text.

96. The structural arguments I will consider draw heavily on comparisons across clauses of the Constitution, and thus correspond to what Akhil Amar has called "intratextualism." See generally Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747 (1999). This style of interpretation should be distinguished from an older structural tradition, associated with Charles Black, which largely ignores the text and instead focuses on functional arguments about the requirements of a federal system of government. See

tion appears to use the words "law," "rule," and "regulation" interchangeably, which they take to mean that the legislative power is broader than the power to enact statutes.[97] But I do not think this follows. Even if we grant that the Framers regarded "laws," "rules," and "regulations" to be synonyms, this does not tell us which of the three senses of a single juristic category (law/rule/regulation) they meant. Were they speaking of law/rule/regulation in the formal sense of statutes, in the functional sense of statutes and measures like statutes, or in the sense of having unconstrained discretion to enact statutes and measures like statutes?

Yet if structural considerations offer little basis to choose between the formal and functional interpretations, they do cast some doubt on the discretionary interpretation. The intellectual pedigree of the discretionary interpretation is unclear, but I suspect it has its roots in notions about the absolute sovereignty of Parliament familiar in English law[98] and adopted by many of the States in the United States with respect to the power of state legislatures.[99] The unstated argument is that the legislature is the supreme sovereign within the political system, and as such exercises virtually unconstrained discretion as to what sorts of policies it chooses to pursue. Therefore, any body that exercises "legislative power" is one that has very great discretion with respect to the content of the law it chooses to enact.[100]

The problem with this line of reasoning is that under Article I of the Constitution, the Congress does *not* have unlimited discretion in the exercise of legislative power. Congress must demonstrate that its enactments fall within one of the enumerated powers of Article I, Section 8 and do not transgress any of the substantive limits imposed by Article I, Section 9 and the Bill of Rights. During most of the post-New Deal era, when the Court broadly deferred to Congress's interpretation of the

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generally Charles L. Black, Jr., Structure and Relationship in Constitutional Law 3–32 (Ox Bow Press 1985) (1969).

97. Alexander & Prakash, supra note 41, at 1305–07.

98. See, e.g., 1 William Blackstone, Commentaries *156–57.

99. See Douglas L. Grant, Underpinnings of the Public Trust Doctrine: Lessons from *Illinois Central Railroad*, 33 Ariz. St. L.J. 849, 872–73 (2001) (discussing briefly the extent to wbich States adopted the Englisb conception of the legislature as a body of inherent and plenary power).

100. The first Supreme Court decision to articulate the discretionary conception of the legislative power drew upon a decision of the Ohio Supreme Court. See J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 407 (1928) (quoting Cincinnati, Wilmington & Zaneville R.R. Co. v. Comm'rs of Clinton County, 1 Ohio St. 77, 88–89 (1852)). The Ohio Supreme Court, in turn, relied on a definition of legislative power—*state* legislative power of course—that stressed the discretionary nature of legislative determinations:

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

Cincinnati, 1 Ohio St. at 88–89 (emphasis added).

scope of its enumerated powers (especially the Commerce Clause), it would have been easy to lapse into thinking that Congress, like Parliament, exercises unconstrained legislative discretion. But *United States v. Lopez* and ensuing decisions remind us that Congress does not exercise unconstrained discretion under the Constitution.[101] This feature of our written Constitution makes it unlikely that the Framers understood the "legislative power" to mean the power to exercise unconstrained discretion in making rules.[102]

Statements by political thinkers familiar to the Framers and statements made in the ratification debates also shed relatively little light on the meaning of legislative power. Alexander and Prakash collect a large number of these statements, nearly all of which say that the "legislative power" is the power to make laws, or something to that effect.[103] Again, however, these statements do not specify whether "making laws" was understood in the formal, functional, or discretionary sense. That being said, there are a handful of pronouncements that seem more consistent with the functional than the formal definition. For example, John Locke, in his *Second Treatise of Government*, defined the legislative power as the "right to direct how the Force of the Commonwealth shall be imploy'd for preserving the Community and the members of it."[104] This is a functional rather than a formal definition of legislative power. Alexander Hamilton, for his part, wrote in *The Federalist* that "[t]he essence of the legislative authority is to enact laws, or in other words to prescribe rules for the regulation of the society."[105] This too points more toward a functional definition (the power to enact statutes and measures like statutes) than a formal understanding (the power to enact statutes only).

The most directly relevant comment comes from no less an authority than James Madison, speaking in support of ratification in Virginia. He said, "If nothing more were required, in exercising a legislative trust, than a general conveyance of authority—without laying down any precise rules by which the authority conveyed should be carried into effect—it would follow that the whole power of legislation might be transferred by the

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101. 514 U.S. 549, 561 (1995) (invalidating the Gun-Free School Zones Act as exceeding the scope of the Commerce Clause); see also United States v. Morrison, 529 U.S. 598, 618 (2000) (invalidating portions of the Violence Against Women Act as going beyond permissible scope of commerce regulation).

102. Of course, even if the Framers did not conceive of Congress as having the same degree of discretion as Parliament, they still might have imagined that it would enjoy significantly more discretion than either the executive or judicial branches. So the inference from the enumerated nature of congressional power only rebuts the Court's current version of the nondelegation doctrine, which requires extreme delegations of discretion before it is violated.

103. Alexander & Prakash, supra note 41, at 1310–17.

104. John Locke, Two Treatises of Civil Government 364 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter Locke, Laslett].

105. The Federalist No. 75, at 504 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

legislature from itself."[106] This comment is primarily directed to whether legislative power may be shared, on which question it is equivocal. (Madison does not categorically oppose all delegations, only those not cabined by "precise rules"; the only thing he clearly opposes is the transfer of the "whole power of legislation.") But the comment is also telling on the meaning of legislative power, insofar as Madison seems to anticipate the modern notion that Article I, Section 1 forbids the transfer of authority "without laying down any precise rules by which the authority conveyed should be carried into effect"—in other words, the transfer of *great discretion* to enact rules like statutes. So Madison's comment provides a small measure of support for the discretionary interpretation of legislative power.

When we turn to the decided cases, one thing stands clear. There is no support in decisional law for the formal definition of legislative power as the power to enact statutes. Posner and Vermeule cite no federal or state cases adopting such a construction. To be sure, there is no decisional law rejecting this construction either. The possibility seems never to have occurred to anyone in a context in which it would have decisional significance. This strongly suggests that the formal interpretation is at the very least idiosyncratic, and probably would be rejected if presented to the courts.

Beyond this, the picture is complicated. As we have seen, the Supreme Court in its nondelegation decisions has adopted the discretionary definition of the legislative power. As Justice Scalia puts it, "The focus of controversy, in the long line of our so-called excessive delegation cases, has been whether the *degree* of generality contained in the authorization for exercise of executive or judicial powers in a particular field is so unacceptably high as to *amount* to a delegation of legislative powers."[107] Thus, if we look only to those cases, we would have to conclude that the Court has gravitated over time toward the discretionary definition.

But this is only part of the decisional picture. In other contexts, the Court has not adhered to the discretionary definition of the "legislative power," but instead has invoked a functional definition. Most prominently, in the legislative veto cases, the Court has considered what sort of action is sufficiently "legislative" that it must run the gauntlet of bicameral approval and presidential presentment that Article 1 prescribes for the enactment of valid laws. *INS v. Chadha*, the leading decision, holds that action is subject to these requirements when it is "essentially legislative in purpose and effect."[108] The Court further concluded that action

106. Madison's Report on the Virginia Resolutions, reprinted in 4 Debates on the Adoption of the Federal Constitution 546, 560 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1881).

107. Mistretta v. United States, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting).

108. 462 U.S. 919, 952 (1983); see also Bowsher v. Synar, 478 U.S. 714, 754–58 (1986) (Stevens, J., concurring in the judgment) (noting that Congress is subject to requirements of bicameral and presentment filter when it exercises legislative power).

by a legislative body meets this standard when it has "the purpose and effect of altering the legal . . . relations of persons . . . outside the Legislative Branch."[109] This is a purely functional definition of legislative power. The Court made clear that tbe bicameral and presentment requirements apply to any measure adopted by Congress or one of its agents that has the force and effect of a statute, without regard to the label the measure formally bears. Moreover, the Court made no mention of the degree of discretion that Congress or its agent exercises in promulgating a measure before it will be regarded as being sufficiently "legislative" to trigger these constitutional requirements.[110]

Decisions enforcing the exclusive delegation doctrine also implicitly rest on a functional definition of legislative power. For example, when the Court in *Chrysler Corp. v. Brown* held that the agency did not have authority to issue legislative regulations, what the Court meant was that the agency did not have authority to issue regulations that are legally binding the way a statute is.[111] There was no suggestion that the rule was not legislative because the agency did not have enough discretion in promulgating it. The Court's decisions holding that legislative rules promulgated by agencies can preempt state law[112] also reflect a functional definition of legislative power, insofar as agency rules are equated with statutes and both are deemed to be "Laws of the United States" under the Supremacy Clause.[113]

That the Court has endorsed different definitions of legislative power in different contexts does not tell us which one is correct. But

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

110. The Court in *Chadha* came close to acknowledging that it has employed different definitions of "legislative power" for legislative veto and nondelegation purposes. In a famous (or infamous) footnote, the Court admitted that executive rulemaking will often satisfy the functional definition of legislation that it endorsed for legislative veto purposes. Id. at 953 n.16. But the Court insisted that this kind of executive action is not properly classified as "legislative," because the constitutionality of such executive action "involves only a question of delegation doctrine." Id. The Court explained that this means such executive action "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." Id. at 953–54 n.16. In other words, the definition of "legislative action" for purposes of considering the constitutionality of the legislative veto (the functional definition) is different from the definition of "legislative action" under the nondelegation doctrine (the discretionary definition).

111. 441 U.S. 281, 295 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.'"). The decision is discussed supra text accompanying notes 61–64.

112. See, e.g., La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368–69 (1986) ("[A] federal agency acting within the scope of its congressionally delegated authority may preempt state regulation."); Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152–53 (1982) ("Federal regulations have no less preemptive effect than federal statutes.").

113. U.S. Const. art. VI, cl. 2; see City of New York v. FCC, 486 U.S. 57, 63 (1988) ("The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.").

given that the Court has enforced *Chadha*'s rule against legislative vetoes quite strictly and has broadly treated agency legislative rules as having the same force and effect as statutes, whereas it has failed to enforce the rule against delegations, perhaps we should take the Court's functional definitions of legislative power more seriously than the definition it has employed in order to reject nondelegation claims.[114]

The foregoing arguments drawn from the structure of Article I, originalist sources, and considerations of precedent do not indubitably prove that the correct definition of the legislative power is the functional one. But they strongly suggest that the functional definition is preferable to the formal definition, recently advocated by Posner and Vermeule,[115] and they also suggest that the functional definition enjoys somewhat more support than the discretionary definition, which the Supreme Court has seized upon as a device for rendering the nondelegation doctrine unenforceable.

C. *Sharing Principles*

The text of the Constitution is also silent on the question whether or to what extent legislative power may be shared. As Justice Stevens observed in his concurring opinion in *American Trucking*, the text of Article I, Section 1 does "not purport to limit the authority" of Congress "to delegate authority to others."[116] But silence on the immediate point in controversy does not mean that the Constitution is devoid of features that bear on the question of how far the legislative power may be shared.

For the proponent of the legislative monopoly position (that only Congress may legislate), there are three important bits of structural evidence. First, the Constitution specifically references three powers—the legislative, the executive, and the judicial—and specifically "vests" each of

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114. The tension between the recent executive nondelegation cases like Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001), and the *Chadha* line of cases is even greater if we interpret *Chadha* as resting on a principle that prohibits delegation of legislative power from Congress to one of its own units or agents. See John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673, 720–21 (1997) (arguing that use of legislative history allows for legislative self-delegation "condemned by *Chadha* and its progeny"). If *Chadha* rests on nondelegation, then we have to explain why delegations are policed strictly in one context (delegations to legislative agents) but not in another context (delegations to executive or judicial agents), and we have to explain why two different definitions of "legislative power" are used in enforcing the nondelegation rule. The tension is not so great if we interpret *Chadha* as resting on an antievasion principle grounded in the need to preserve the integrity of Article I, Section 7's bicameral and presentment requirements, procedural limitations that apply uniquely to action taken by the Legislative Branch. Under this theory, *Chadha* applies only to Congress and to subunits or agents that are controlled by Congress. Moreover, *Chadha* applies without regard to whether Congress has formally delegated legislative power; it also would apply if the subunit or agent has simply asserted the power on its own initiative.

115. See Posner & Vermeule, Interring, supra note 17.

116. *American Trucking*, 531 U.S. at 489 (Stevens, J., concurring in part and in the judgment).

these powers in a different branch of government. Surely this means the Framers viewed these powers as being distinct. Perhaps it means more. Perhaps it means that the Framers regarded these powers as being mutually exclusive.[117] If that were the case, then it would logically follow that no branch can exercise a power vested in another branch. Specifically, it would mean that the "legislative power" may never be shared with the executive or the judicial branches.

In addition, the legislative monopoly proponent can point to the fact that Article I, Section 1 says that "All" legislative powers "shall be vested in a Congress of the United States." It is possible that the addition of the qualifier "All"—which is not found in the Vesting Clauses of Article II and Article III—denotes exclusivity and hence precludes any sharing of legislative power among other branches.[118] Under this reading, Article I, Section 1 means, "only Congress may legislate."

Finally, the proponent of legislative monopoly can draw upon the detail with which Article I spells out how Members of Congress are to be selected and how, once selected, they are to go about enacting laws. Alexander and Prakash argue that it would make little sense for the Framers to specify a detailed process for selecting legislators "if those selected may transfer the substance of their legislative discretion to persons who are not selected by that process."[119] Similarly, it would make little sense to spell out the requirements of bicameral approval and presentment to the President if Congress could simply transfer "all substantive policy discretion to the executive" and evade these requirements.[120] Why would the Framers devote so much attention to the method of selecting legislators, and to the procedures for enacting statutes, if Congress could turn around and freely delegate legislative power to some executive agency or court that is not subject to these Article I limitations?

However, the proponent of the legislative first-mover interpretation (that only Congress may delegate) can offer rejoinders to each of these structural inferences. There is no conclusive evidence that the Framers deemed the three great powers of government mutually exclusive. It is just as likely that they viewed these three powers as being distinct yet overlapping to a degree.[121] If this is the case, then the vesting of different powers in different branches would not necessarily mean that a power

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117. See Lawson, Rise and Rise, supra note 31, at 1238–39. Mutual exclusivity of vested powers is a critical assumption of most proponents of the so-called formalist approach to separation of powers. See, e.g., Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 Nw. U. L. Rev. 1377, 1390–91 (1994).

118. See *American Trucking*, 531 U.S. at 487 (Thomas, J., concurring) (quoting U.S. Const. art. I, § 1 and underscoring the word "All").

119. Alexander & Prakash, supra note 41, at 1301.

120. Id.

121. See Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 80–87 (1985) (noting many deviations in state constitutions of the revolutionary era from Montesquieu's model of separation of powers); Gerhard Casper, An Essay on Separation of Powers: Some Early Versions and Practices, 30 Wm. & Mary L. Rev.

functionally equivalent to lawmaking cannot be exercised by the executive or the judicial branches.

For its part, the reference to "all" in the phrase "All legislative Powers herein granted" may have been inserted for reasons unrelated to the question of permissible sharing of powers. As previously discussed, the clause with the word "all" may have been added simply to make clear that Congress was being granted only enumerated legislative powers, as opposed to some single, undifferentiated "legislative power" parallel to the grant of "executive" power to the President or "judicial" power to the courts.[122]

Finally, the detail with which Article 1 specifies how legislators are to be selected and how statutes are to be enacted is in fact consistent with *either* the legislative monopoly or the legislative first-mover constructions. Decisions to create administrative structures and to confer legislative powers on them are of the highest political magnitude, and would fully warrant the Framers prescribing in detail who is to make these decisions and with what degree of deliberation. The only sharing theorem inconsistent with the detail of Article I is the legislative supremacy construction, which would allow agencies and courts to make law without any warrant for doing so from the body constituted by Article I.

The proponent of the legislative first-mover construction can also advance an affirmative argument based on the language of Article I, Section 1. If we consider the opening words, "[a]ll legislative Powers herein granted," it is possible that what the Clause means is that the *constitutional power* to legislate is given exclusively to Congress. In other words, entities other than Congress have no inherent power to legislate derived directly from Article I or the Constitution as a whole. On this reading, Article I, Section 1 constitutionalizes the anti-inherency principle, establishing that executive agencies and courts have no power to legislate on their own authority. But it does not speak to the question whether Congress can delegate legislative power to some other entity.

If Article I, Section 1 embodies the anti-inherency principle, then the transferability principle can be derived from the Necessary and Proper Clause.[123] There is, in fact, a direct implication in the Necessary and Proper Clause that Congress has the power to transfer significant powers of implementation to executive and judicial actors. The Clause reads in full,

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211, 216–24 (1989) (finding that state constitutions adopted between 1776 and 1787 "display an exceedingly weak version of separation of powers").

122. See supra Part III.A.

123. U.S. Const. art. 1, § 8, cl. 18. See Krent, Discontents, supra note 85, at 736 ("[A]s a textual matter, the constitutional authorization for Congress to make all laws 'necessary and proper for carrying into Execution the foregoing powers' could readily include delegating policymaking authority, whether in authorizing some other entity to fashion new rules, interpret preexisting rules, or apply rules to different factual situations.").

> The Congress shall have Power To . . . make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Article 1, Section 8], *and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*[124]

In other words, Congress is directly authorized to make laws necessary and proper for carrying into execution "other Powers" originally vested in the executive branch and the judicial branch.[125] This direct authorization of cross-branch transfers of power in turn raises three questions as applied to congressional grants of legislative rulemaking powers.

First, are grants of legislative rulemaking authority "necessary" to carrying into execution various federal programs and policies? The Court in *M'Culloch v. Maryland* famously concluded that "necessary" here means useful and appropriate.[126] Given two centuries of delegations of legislative rulemaking power to executive agencies, there is no doubt that such grants are "necessary" as that term has been understood from *M'Culloch* to the present, i.e., useful and appropriate.

Second, are grants of legislative rulemaking authority a "proper" means of carrying out federal programs and policies? "Proper" here should be understood to mean otherwise in accordance with the structure and specific proscriptions of the Constitution.[127] The most plausible candidate for a clause that might specifically proscribe delegation of legislative power is, of course, Article I, Section 1. But if we interpret Article I, Section 1 to mean only that there is no *constitutionally conferred* power to legislate on the part of the executive and judicial branches—in other words, as constitutionalizing the anti-inherency principle—then there is nothing "improper" about Congress concluding that it is necessary to *delegate* legislative power to one of these other branches.[128]

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124. U.S. Const. art. I, § 8, cls. 1, 18 (emphasis added).

125. See William W. Van Alystyne, The Role of Congress in Determining Incidental Powers of the President and the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause, Law & Contemp. Probs., Spring 1976, at 102, 107 (arguing that Necessary and Proper Clause was intended to give Congress exclusive authority to augment by legislation the powers given to the executive and judicial branches by Articles II and III).

126. 17 U.S. (4 Wheat.) 316, 356 (1819).

127. See Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267, 291 (1993).

128. Lawson discusses at some length the possibility that the Necessary and Proper Clause could constitute a source of authority for delegation of legislative power, but he concludes that it cannot, since the Necessary and Proper Clause allows Congress to adopt only those additional means to permissible ends that are themselves "proper." See Lawson, Delegation, supra note 10, at 347–51. This presupposes, however, that Article I, Section 1 incorporates the legislative monopoly sharing principle. If, instead, that Clause incorporates the legislative first mover sharing principle, then there would be nothing in Article I, Section 1 that would render delegation pursuant to the Necessary and Proper Clause improper.

Third, are the "powers vested in" the executive and judicial branches the sort of powers that would make entities in these branches the proper objects of delegations of legislative rulemaking authority? Here the answer is more doubtful as an original matter. With respect to the courts, the matter remains doubtful. Article III courts have had only minimal involvement in rulemaking, primarily in promulgating rules of evidence and procedure and participating in formulating sentencing guidelines.[129] The dominant mode of judicial policymaking has always been through case-by-case decisionmaking. It is doubtful, therefore, that the "judicial power" referenced in Article III is broad enough to sustain a delegated grant of legislative rulemaking authority that would encompass rules designed to regulate private primary behavior.[130] But with respect to the executive branch, the lesson of history has clearly been that the "executive power" is broad enough to encompass the exercise of legislative rulemaking authority. The First Congress made several significant grants of rulemaking authority to President Washington,[131] and Congress has continued to make such grants ever since.[132] By the test of time, therefore, it is settled that the executive power is the sort of power that can properly be augmented by delegations of legislative rulemaking power from Congress.

What about evidence of original intent? The debates at the Convention and over ratification shed little light on the original understanding about the possibility of sharing of legislative powers. As to whether the three great powers of government are mutually exclusive, certain state constitutions of the founding era were explicit about this. As stated by one such document, "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time . . . ."[133] Whether the Framers intended the same result without saying so under the federal Constitution is highly debatable. Madison offered some famous observa-

129. See Mistretta v. United States, 488 U.S. 361, 384–88 (1989) (describing role of judges sitting on Sentencing Commission and under the Rules Enabling Act).

130. One important implication of identifying the Necessary and Proper Clause as the basis for the transferability principle is that this means delegation is a power restricted *to Congress*. See Van Alystyne, supra note 125. The President, for example, has no constitutional authority to delegate the power of the pardon or the veto, and the courts have no constitutional authority to delegate the power to render decisions within their jurisdiction. Congress, wielding the Necessary and Proper Clause, might authorize such presidential and judicial delegations. But these powers cannot be delegated by the President or the courts without authorizing legislation from Congress. See, e.g., infra Part VI.D (discussing subdelegation).

131. See Posner & Vermeule, Interring, supra note 17, at 1735–36.

132. See Merrill & Watts, supra note 6, at 472.

133. The Constitution of Virginia—1776, *in* 7 Francis Newton Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 3812, 3815 (1909).

tions in *The Federalist Papers* implying that strict differentiation among the three powers is not possible.[134] But later he proposed that a provision mandating strict separation be added to the Constitution as one of the articles of the Bill of Rights.[135] Although the proposal passed the House, it was rejected for unexplained reasons by the Senate.[136] The failure of the amendment could mean either that Congress opposed the idea of strict separation of powers or that it assumed the principle of strict separation was already reflected in the Constitution, making the amendment unnecessary.

As to the significance of the qualifier "all" in the Vesting Clause, the documentary record also sheds little light, since the qualifier was added late in the Convention by the Committee of Style, and the addition stimulated no recorded comment.[137] Throughout most of the deliberations, the powers of the three branches were described in parallel language that included no such differentiation.

Given the dearth of materials in the constitutional debates, the dispute over original understanding regarding delegation of legislative power has turned to a passage in John Locke's *Second Treatise of Government*.[138] The premise here is that the Framers were familiar with and largely approved of Locke's political philosophy. So if Locke supported the legislative monopoly position, the Framers presumably supported the legislative monopoly position. Locke's most pointed comment about legislative delegation was made in the course of discussing limitations on the extent of the legislative power that he said must be observed in all commonwealths:

> The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands.[139]

Posner and Vermeule engage in a spirited debate with Alexander and Prakash over what Locke meant in saying the legislature can make

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134. The Federalist No. 37, supra note 105, at 235 (James Madison).

135. Edward Dumbauld, The Bill of Rights and What It Means Today 46–47 (1957).

136. Id.

137. See David P. Currie, The Constitution in Congress: The Federalist Period 1789–1801, at 177 (1997); Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725, 1791 (1996) (arguing "the absence of debate" about Committee on Style's changes "does not signal a deliberative consensus so much as exhaustion and impatience").

138. In addition to the debate between Posner and Vermeule and Alexander and Prakash, see also, for example, Ernest Gellhorn, Returning to First Principles, 36 Am. U. L. Rev. 345, 347–48 (1987) (noting Locke's "insistence that legislators cannot delegate their legislative authority").

139. Locke, Laslett, supra note 104, at 375. The sound bite about "making Laws not Legislators" does not appear in the first edition of the work, as reproduced in John Locke, Two Treatises of Civil Government 189 (Everyman's ed. 1970) (1690) (reproducing first state of the first edition).

laws but not legislators. Posner and Vermeule say Locke was arguing only against the transfer of de jure powers of enacting legislation, as by granting third parties the right to vote in the legislature.[140] In other words, Locke was forbidding delegation only of the formal understanding of legislative power. Alexander and Prakash counter that Locke intended to proscribe any delegation of the making of rules for the governance of society.[141] That is, Locke would forbid any delegation of legislative power, understood in the functional sense of statutes or rules having the force and effect of statutes. Both sets of authors agree on one thing: Locke opposed any sharing of legislative power by the body the people elected to exercise it.

A fuller consideration of Locke's *Second Treatise on Government* reveals a more complex picture. The principal complication is that Locke in fact was not opposed to all sharing of legislative power in the functional sense, because he endorsed the concept of the executive prerogative. In a chapter entitled "Of Prerogative," Locke offered a sweeping definition of the prerogative, as the "[p]ower to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it . . . ."[142] Locke commended the idea of inherent executive power, because the legislature is not always in session and it is "impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick; or make such Laws, as will do no harm, if they are Executed with an inflexible rigour, on all occasions, and upon all Persons, that may come in their way . . . ."[143] Locke appears to have contemplated that this executive prerogative could be expanded or contracted by legislation.[144] But even with this qualification, his chapter on the prerogative makes clear that he was not so much in the option one camp (legislative monopoly) or the option two camp (legislative first mover) but rather in the option three camp (legislative supremacy): He believed the executive had inherent authority to act with the force of law, subject to being overridden by subsequent action of the legislature.

Locke's endorsement of the executive prerogative casts doubt on whether his statements about legislative delegation are a true guide to the Framers' intent for another reason. We can be confident that the executive prerogative endorsed by Locke was rejected by the Framers of our Constitution.[145] How then would the Framers have regarded the balance

140. Posner & Vermeule, Interring, supra note 17, at 1727–28.

141. Alexander & Prakash, supra note 41, at 1297–98.

142. Locke, Laslett, supra note 104, at 375.

143. Id.

144. Id. at 376.

145. See St. George Tucker, 2 Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government, and of the Commonwealth of Virginia 237 n.I (Lawbook Exch., Ltd. 1996) (1803) ("The title '*prerogative*' it is presumed was annihilated in America with the kingly government . . . ."); see also James Hart, The Ordinance Making Powers of the President of the United States 110–19 (1925) (arguing that grants of specific powers such as those of commander-in-chief demonstrate Framers'

of Locke's presentation? Would they have accepted the remainder without qualification, embracing legislative monopoly with no possibility of delegation? Or would they have modified the remainder by embracing something like the first-mover idea and permitting delegation? Obviously we do not know, but the latter possibility is surely at least as reasonable as the former.

A second complication concerns a passage at the beginning of the chapter "Of the Extent of the Legislative Power" that includes the famous statement about making laws not legislators. In introducing the topic, Locke writes,

> [The legislative power] is not only the supream power of the Common-wealth, but sacred and unalterable in the hands where the Community have once placed it; nor can *any Edict* of any Body else, in what Form soever conceived, or by what Power soever backed, have the force and obligation of a Law, *which has not its Sanction from that Legislative*, which the publick has chosen and appointed. For without this the Law could not have that, which is absolutely necessary to its being a Law, the consent of the Society, over whom no Body can have a power to make Laws, but by their own consent, and by Authority received from them . . . .[146]

The words "any Edict . . . which has not its Sanction from [the] Legislative" are ambiguous. Partisans of legislative monopoly might argue that they mean the edicts themselves must have the sanction of the legislature. That is, the edicts of others cannot under any circumstances have the force and obligation of law because they do not have the sanction of the legislature. But an alternative reading is that the edicts of others have the force and obligation of law if and only if the legislature so sanctions. On this interpretation, Locke was acknowledging that the legislature *does* have the power to confer authority on other persons to act with the force of law, provided it gives its "sanction" to this outcome, i.e., the first mover interpretation.[147] This alternative reading, moreover, is somewhat more consistent with the idea of an executive prerogative subject to legislative regulation, which, as we have seen, Locke explicitly endorsed.

The important point for present purposes is that we must exercise considerable caution before treating one dictum in Locke as the Rosetta Stone that unlocks the Framers' intent with regard to the sharing of legislative powers.[148]

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intent not to convey broad executive prerogative); William Howard Taft, Our Chief Magistrate and His Powers 139–40 (1916). See generally Monaghan, Protective, supra note 83, at 12–24 (describing consensus among early commentators that the President did not enjoy the powers exercised by the King).

146. Locke, Laslett, supra note 104, at 356 (emphasis added).

147. See Posner & Vermeule, Post-Mortem, supra note 41, at 1339.

148. This is not the only respect in which one must exercise caution about Locke's famous pronouncements. In the same chapter on the extent of legislative power, Locke also asserted that the legislature can never take someone's property without consent. This,

When we turn to evolved judicial understanding, we similarly find little basis for favoring either the legislative monopoly or legislative first-mover positions. The dilemma here is whether we heed what the Court says or what it does. The Court says that Article I, Section 1 precludes any delegation of legislative power.[149] But the Court has declined to enforce this understanding by invalidating any of Congress's numerous post-New Deal enactments that transfer to executive agencies broad power to make rules with the force of law.[150] If we look to what the Court does, it believes that legislative power can be delegated. This is probably true no matter which of the three definitions of legislative power we embrace—even the discretionary definition—for there is no doubt that Congress has been allowed to transfer discretionary authority subject to constraints so gossamer that the agency has virtually the same leeway that Congress itself enjoys when it legislates.[151]

The judicial performance is even more puzzling than this disjunction between rhetoric and holdings would suggest. In its more candid moments, the Court has recognized even in nondelegation cases that agency rulemaking reflects a form of delegated legislative power. In *Mistretta v. United States*, for example, the majority affirmed that "rulemaking pursuant to a legislative delegation is not the exclusive prerogative of the Executive. . . . On the contrary, rulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch."[152] In still other cases, the Court has gone so far as to describe the power to delegate as an inherent attribute of the powers vested in each branch of government.[153] Even Justice Scalia, who insists most vehemently that the legislative power can never be delegated, has otherwise acknowledged that "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial ac-

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of course, is inconsistent with the power of eminent domain, which the Framers implicitly acknowledged to exist when they adopted the Fifth Amendment's Just Compensation Clause. The Framers here followed more nuanced discussions of eminent domain found in Blackstone, Pufendorf, and Vattel rather than the simplistic assertion of Locke. See David A. Dana & Thomas W. Merrill, Property: Takings 19–25 (2002).

149. See supra note 19.

150. See supra notes 14–30 and accompanying text.

151. See United States v. Southwestern Cable Co., 392 U.S. 157, 172–78 (1968) (upholding FCC regulation of cable television industry even though Federal Communications Act contained no provision authorizing regulation of that industry); Zemel v. Rusk, 381 U.S. 1, 17–18 (1965) (upholding against nondelegation challenge a statute authorizing the Secretary of State to establish rules and regulations for issuing passports hut setting forth no criteria for their issuance); Yakus v. United States, 321 U.S. 414, 425–26 (1944) (upholding price controls under a statute that provided no guidance as to the factors to be used in setting prices).

152. 488 U.S. 361, 386 n.14 (1989).

153. See Lichter v. United States, 334 U.S. 742, 778 (1948) ("A constitutional power implies a power of delegation of authority under it sufficient to effect its purposes." (emphasis omitted)).

tion."[154] So even the Court's rhetorical commitment to the legislative monopoly position is open to question.

On one point, however, the lesson of evolved understanding is more decisive. There can be no claim grounded in history and tradition that the executive or the courts enjoy a general, inherent power to promulgate legislative rules absent some delegation by Congress. As my colleague Henry Monaghan concludes in his magisterial survey of historical understandings about the scope of inherent presidential powers, "Our tradition is that no official—from the President down—can invade private rights unless authorized by legislation."[155] Thus, if one is inclined to give significant weight in constitutional law to settled interpretational glosses, the third sharing option—legislative supremacy—must be rejected, at least as a general rule.

This does not mean that the legislative supremacy conception is inconsequential. Although history has rejected legislative supremacy as the appropriate characterization of the maximal degree of congressional exclusivity under Article I, Section 1, there is a bedrock consensus that it represents the minimal degree of congressional exclusivity in the exercise of legislative power. In other words, when Congress has legislated on a subject, the legislation is constitutional, and the legislation leaves no room for interpretation, all agree that the statute is binding on those who come within its terms—including of course the executive and judicial branches of government.[156] This is an extremely important axiom of American government, reflected in the Supremacy Clause of Article VI, but also, one can say, in Article I, Section 1.

D. *Herein*

The third interpretive question—whether "herein" refers to "this Constitution" or "this Article I"—has the thinnest backdrop of interpretive material available to help resolve it. In one other place where the Constitution uses "herein," the context clearly suggests that the referent is the Constitution as a whole, not a single article.[157] But the inferential value of this is weak, since the referent of herein is always heavily dependent on context.

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154. *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting).

155. Monaghan, Protective, supra note 83, at 61.

156. See, e.g., Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) (noting that "[o]nce the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end"); Little v. Barreme, 6 U.S. (2 Cranch) 170, 177–78 (1804) (holding that presidential order cannot contradict language of statute). See generally Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 Geo. L.J. 281 (1990).

157. See U.S. Const. art. II, § 2, cl 2. This Appointments Clause provides that the President shall appoint ambassadors, judges, "and all other Officers of the United States, whose Appointments are not *herein* otherwise provided for . . . ." Id. (emphasis added). The most likely referent of "herein otherwise provided for" would be the Members of Congress, whose method of appointment is detailed in Article I.

Arguably the overall structure of the Constitution makes more sense if we construe "herein" in Article 1, Section 1 to refer only to Article 1 itself. For example, the President's power to make treaties, set forth in Article II, seems to qualify as a type of legislative power.[158] It would be odd for the constitutional drafters to confer "all" legislative powers on Congress in Article I, and then grant a specific type of legislative power to the President in Article II. The anomaly disappears if we read "herein granted" to limit the "all" to powers enumerated in Article I.

Potentially offsetting this structural inference is the fact that the clearest instance of the President's participation in the legislative process—his exercise of the veto—is set forth in Article I itself.[159] If "herein" is designed to emphasize the exclusivity of the vesting of Article I powers to the Congress, what is the President's principal legislative function doing in Article I, rather than Article II?

But this counterinference is weak, given that the Framers could plausibly distinguish between "legislative powers" and "legislative functions" (including the veto).[160] Article I, Section 1 says that "[a]ll legislative *Powers* herein granted shall be vested in a Congress of the United States." Article I takes up the delineation of these powers in Article I, Section 8.[161] The President participates in legislative functions pursuant to Article I, Section 7—which does not mention powers—and the President is given no particular constitutional authority over the powers listed in Article I, Section 8. His constitutionally conferred powers, such as the power to make treaties or to act as Commander-in-Chief, appear in Article II. So the placement of the veto in Article I does not defeat the structural inference that "herein" refers to Article I powers.

The narrow reading of "herein granted" is also, roughly speaking, consistent with evolved institutional practice. The President has been acknowledged to have significant independent rulemaking powers with respect to the Commander-in-Chief function, the power to negotiate treaties, and the power to receive ambassadors. After reviewing the precedents, Professor Monaghan has concluded, "[T]he President's 'spe-

158. Id. ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."). Article VI provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land," a status otherwise accorded only to federal statutes and the Constitution itself. Id. art. VI, cl. 2.

159. Id. art I., § 7, cl. 2.

160. See Bernard W. Bell, Dead Again: The Nondelegation Doctrine, The Rules/Standards Dilemma, and the Line Item Veto, 44 Vill. L. Rev. 189, 221–22 (1999) (citing evidence that Framers did not regard the presidential veto as a type of "legislative authority"). I am not suggesting that the veto is not an important presidential power, using power in the sense of "clout." I am only suggesting that in the linguistic conventions of the Constitution, "power" is used more in the sense of subject matter jurisdiction, rather than in the sense of clout.

161. U.S. Const. art. I, § 8, cl. 1 (commanding that "[t]he Congress shall have Power To" do certain enumerated things).

cific' constitutional powers, such as the Commander-in-Chief power and the powers 'implied' from presidential duties, now (whatever the original understanding) imply some independent presidential law-making power."[162] Interestingly, the President has also been given broad inherent authority with respect to the management of territories and federal lands.[163] The power to manage the territories and other federal property is given by the Constitution to Congress. But it is given in Article IV,[164] not Article 1, and hence is not covered by the "herein granted" language—if we construe this language to refer to Article I rather than the Constitution as a whole. The narrow interpretation of "herein" thus gives the text a meaning that comports with the tradition of stronger inherent presidential powers in the areas of territorial governance and federal-land management as well.[165]

E. *Final Verdict on Traditional Tools of Interpretation*

We have made some headway in narrowing the plausible meanings of Article I, Section 1 using the traditional tools of constitutional interpretation. In particular, insofar as we wish to know whether the Supreme Court's current "anything goes" interpretation is sound, the traditional tools appear to favor other readings.

There are three different interpretive paths one can take to reach the result that no duly enacted statute of Congress ever violates Article I, Section 1, i.e., anything goes. Two of these paths entail selecting particular definitions of legislative power. The Court's preferred path is the 3-1-1 solution (to use the numbering system of Part III), that is, the discretionary interpretation of legislative power, coupled with the legislative monopoly interpretation of sharing, coupled with a broad construction of "herein." This results in anything goes because of the Court's extreme reluctance to disturb congressional judgments about how much discretion is too much discretion under the discretionary definition of legislative power. An alternative path to the same end would be the one endorsed by Posner and Vermeule—a 1-1-1 solution, substituting the formal definition of legislative power for the discretionary definition. This results in anything goes, so long as the challenged delegation is contained in a formally adopted statute. The third path to the current doctrine would be to embrace the legislative supremacy interpretation of sharing

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162. Monaghan, Protective, supra note 83, at 54.

163. With respect to territories, see Gary Lawson, Territorial Governments and the Limits of Formalism, 78 Cal. L. Rev. 853, 905 (1990) (discussing presidential power to govern occupied territory as part of Commander-in-Chief power); with respect to federal lands, see United States v. Midwest Oil Co., 236 U.S. 459, 469 (1915) (recognizing presidential power to close federal public-domain lands to further oil concessions in order to conserve military fuel reserves).

164. See U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to . . . make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

165. See Schoenbrod, supra note 10, at 186–89.

(any type of x-3-x solution). This results in anything goes because it would confer inherent authority on agencies to make legislative rules, the only question being whether the agency has complied with any legislation that Congress has enacted.

The evidence surveyed in this Part suggests that all three paths are problematic. As we have seen in subpart A, the functional definition of legislative power (meaning 2) is more plausible than either the formal definition (meaning 1) or the discretionary definition (meaning 3). Thus, there is reason to believe that either strict nondelegation (the Schoenbrod/Redish/Lawson position) or exclusive delegation—both of which embrace the functional definition of legislative power—represent sounder interpretations of Article I, Section 1 than current constitutional doctrine. As we have seen in subpart B, the legislative supremacy interpretation (meaning 3) is less plausible than either the legislative monopoly (meaning 1) or the legislative first-mover (meaning 2) interpretations. Consequently, the third path to anything goes is also less plausible on traditional legal grounds than either the strict nondelegation doctrine or the exclusive delegation doctrine. In short, each of the three paths to current doctrine (nonenforcement) is inferior to either strict nondelegation or exclusive delegation on traditional legal grounds. This conclusion is a modest but important payoff of considering traditional legal materials.

Unfortunately, when we turn to a comparison between strict nondelegation and exclusive delegation, the traditional tools lose their power to differentiate. A strict nondelegation doctrine would represent either a 2-1-1 or 2-1-2 solution; the exclusive delegation doctrine, at least my version, would represent a 2-2-2 solution. The difference lies in which sharing principle we adopt—legislative monopoly or legislative first-mover. The evidence surveyed in subpart B suggests that neither of these conceptions of permissible sharing clearly dominates the other. Thus, we cannot say, based at least on an analysis of traditional legal evidence, that either of these options is necessarily superior to the other.

IV. The Consequences of Interpretational Choice

Traditional interpretational sources—constitutional structure, original understanding, and settled precedent—take us only part of the way in our quest to narrow the plausible meanings of Article 1, Section 1. In these circumstances (not unusual in matters of constitutional law), it is important to consider the consequences of embracing one interpretation or another. Interpretation should remain faithful to the constraints discoverable using the traditional tools of interpretation. But when those tools leave room for choice, the sensible course is to try to choose the interpretation that has better overall consequences.[166]

166. For a sustained argument in support of this proposition, see Richard Posner, Law, Pragmatism, and Democracy 6–7 (2003). In undertaking any such consequentialist

In what follows, I briefly consider a number of consequentialist arguments thought at various times to bear on the constitutional allocation of legislative power. The inquiry with respect to many of these arguments is thwarted by the lack of relevant empirical data, so the discussion will necessarily be speculative. I will confine my comments to the three options that seem to have the strongest claims to legal plausibility. The first two options are versions of the nondelegation doctrine: a version in which the requirement of an intelligible principle (or its equivalent) would be strictly enforced by the courts, perhaps along the lines advocated by Schoenbrod, Redish, or Lawson ("strict nondelegation"), and the version reflected in current case law, which features such lax judicial enforcement that anything goes ("lax nondelegation"). The third option is what I have called exclusive delegation: the idea that agencies and courts have no inherent authority to make law (at least with respect to the matters covered by Article I), but that Congress may transfer such authority to them. These of course are not the only options imaginable. "Strict" and "lax" nondelegation describe points along a continuum rather than distinctively different approaches. And either mode of nondelegation (or anything in between) could be combined with exclusive delegation, since nondelegation and exclusive delegation are not incompatible at the level of doctrine, as opposed to the level of constitutional theory.[167] But the consequentialist inquiry is complex enough without adding more options for examination, and the conclusions we reach about these three points of reference should be enough to determine whether intermediate possibilities are preferable.[168]

I will begin with arguments advanced primarily by the proponents of strict nondelegation, and will then turn to arguments put forward by proponents of a broad power of delegation (which means in practice the proponents of lax nondelegation). Since no one to my knowledge has expressly argued for exclusive delegation, we will have to make do with

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inquiry, it is important to frame the choice in comparative terms: Given political and institutional realities, what would be the probable consequences of the different interpretational options if they were adopted and enforced by the courts? See David B. Spence & Frank Cross, A Public Choice Case for the Administrative State, 89 Geo. L.J. 97, 134 (2000). See generally Cass R. Sunstein & Adrian Vermeule, Interpretation and Institutions, 101 Mich. L. Rev. 885, 914 (2003) (arguing that "[i]t is impossible to derive interpretive rules directly from first-best principles, without answering second-best questions about institutional performance," in particular, questions about the capacities of judges to get things right, and about likely responses of other institutions to judicial rulings).

167. See supra text after note 6.

168. Specifically, and to anticipate, if exclusive delegation is superior to either version of nondelegation, then it is difficult to see how any blending or pairing of nondelegation and exclusive delegation would fare better than simply adopting exclusive delegation. Pairing strict nondelegation with exclusive delegation would merely dilute the comparative advantage of exclusive delegation, whereas pairing lax nondelegation with exclusive delegation would neither add nor subtract from the comparative advantage of exclusive delegation.

guesses as to how it would fare in light of arguments put forward by proponents of strict and lax nondelegation.

A. *Antidelegation Policies*

1. *Democratic Accountability.* — The most prominent argument advanced by the proponents of strict nondelegation is the desirability of having public policy made by actors who are accountable to the people.[169] Indeed, this is typically offered as the trump card in the case for strict nondelegation. Congress, it is argued, is the most democratically accountable political institution; hence, if we want policy made by actors accountable to the people, we should require that policy (at least "important" policy) be made by Congress rather than by unelected administrators.[170] More recently, revisionist thinkers, led by Jerry Mashaw, have called into question whether Congress is in fact more accountable than are administrative agencies.[171] They argue that agencies actually rate more highly on the accountability scale because agencies must answer to the President, who is elected by all the people.

As Elizabeth Magill has observed, the debate over which is more accountable—Congress or an agency—is normatively confused because each side means something different by "accountability."[172] For the proponents of strict nondelegation, accountability refers to "the relationship between government and citizens."[173] From this perspective, the Members of Congress are more accountable because they must personally stand for election by citizens. Mashaw and the other revisionists, in contrast, define accountability differently, focusing on whether the person who actually exercises policymaking authority "can be monitored and controlled."[174] From this perspective, Congress is not especially account-

169. See, e.g., Ely, supra note 24, at 132; Redish, supra note 10, at 142; Schoenbrod, supra note 10, at 8–12; Marci A. Hamilton, Representation and Nondelegation: Back to Basics, 20 Cardozo L. Rev. 807, 820 (1999).

170. This is an argument based on the legitimacy of different governmental forms. Although legitimacy arguments can be either consequentialist or nonconsequentialist, for present purposes we can consider public accountability a type of consequentialist claim. It is plausible that government forms that are more legitimate are more acceptable to the public and hence more effective. It is also plausible that government forms that are more legitimate increase public satisfaction with decisions, independent of their content.

171. See Jerry L. Mashaw, Greed, Chaos, & Governance 132 (1997) [hereinafter Mashaw, Greed]; Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. Econ. & Org. 81, 95–99 (1985); see also Peter H. Schuck, Delegation and Democracy: Comments on David Schoenbrod, 20 Cardozo L. Rev. 775, 783–90 (1999) (noting variety of mechanisms making agencies accountable).

172. M. Elizabeth Magill, The Real Separation in Separation of Powers Law, 86 Va. L. Rev. 1127, 1180–81 (2000) [hereinafter Magill, Real Separation]; see also Dan M. Kahan, Democracy Schmemocracy, 20 Cardozo L. Rev. 795, 795–96 (1999) (arguing that either nondelegation or prodelegation can be derived from the idea of furthering democratic decisionmaking, because democracy has multiple contested meanings).

173. Magill, Real Separation, supra note 172, at 1181.

174. Id.

able, since responsibility for enacting statutes is diffusely spread among 100 Senators and 435 Representatives. Moreover, in the age of omnibus legislation, policy issues are commonly bundled together, and individual votes on each policy are often impossible.[175] So individual legislators can often disclaim responsibility for controversial legislation, even if they cast their vote in favor of the final measure in which it was adopted. In contrast, executive policymakers can be monitored and controlled by the White House, giving them a degree of "accountability" that is absent when Congress makes policy.

The normative debate about what constitutes accountability is compounded by empirical uncertainties about whether and when legislators are likely to seek to avoid accountability (in the sense of being directly responsible for policy choices). Some authors have asserted that legislators seek to shirk responsibility when regulation would impose concentrated costs on particular interest groups.[176] Others have claimed that shirking is most common when regulation will produce diffuse as opposed to concentrated benefits.[177] Still others have claimed that shirking is to be expected most whenever two or more interest groups are at odds over a proposed law.[178] No one has suggested a workable empirical test that would distinguish among these hypotheses, or that would distinguish between legislative shirking and decisions to delegate taken for reasons other than a desire to avoid accountability.

The accountability issue ultimately turns on complicated normative and empirical questions that remain unresolved. Given this impasse, we cannot award decisive points to any of the three options on accountability grounds. To the extent it turns out that direct election is more important in assuring accountability, strict nondelegation is clearly the winner, since it would assure that the largest amount of policymaking is made by the directly accountable Congress. Exclusive delegation would presumably be second, since on this approach Congress would at least be required clearly to delegate agency authority to act legislatively and to delineate the scope of authority to be exercised. Lax nondelegation would come out last. To the extent it turns out that monitoring and control are more important in assuring accountability, the order of preference would be reversed.

2. *Policy Drift.* — Another variable that has loomed large in the delegation literature is the danger that agencies will promote policies that diverge from those intended by the enacting legislature. A variety of "pol-

175. See Barbara Sinclair, Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress 71 (2d ed. 2000).

176. See Aranson et al., supra note 24, at 24–27.

177. See David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers 201–06 (1999) [hereinafter Epstein & O'Halloran, Delegating Powers].

178. See Scott Baker & Kimberly D. Krawiec, The Penalty Default Canon, 72 Geo. Wash. L. Rev. 663, 674–75 (2004).

icy drift" arguments have been advanced, some of them mutually exclusive. Analysts have posited that agencies will pursue their own interests, such as expanding the size of agency budgets, at the expense of policies they were established to pursue.[179] Others have suggested that agencies are susceptible to lock-in effects, as the political values of the first generation of agency officials are continuously replicated over time, even as the values of the public and the legislature change.[180] Still others have hypothesized that agencies are dominated by powerful congressional committees, with the result that agency policy reflects the preferences of current legislative committees, as opposed to the preferences of the enacting Congress.[181]

By far the most prominent problem of drift emphasized in the literature, however, is what is called "agency capture."[182] Much of the call to arms by the strict nondelegation camp has been driven by the belief that agencies are more prone to capture than legislative bodies. This belief, unfortunately, has been more often assumed than demonstrated, and so is difficult to evaluate.

The earliest incarnation of the agency capture thesis was based on a kind of relational theory of contract.[183] Agencies were depicted as existing in a reciprocal long-term relationship with particular industries, with the result that they tend to develop norms of cooperation with the industry. Industry will supply agencies with needed information and suggestions for workable policies; agency personnel who adopt policies favored by industry are rewarded with lucrative employment or consulting contracts after leaving office. Thus, it was said, the agency's policy over time will come to resemble the preferences of industry, rather than the values reflected in the agency's legislative mandate. More recent versions of the agency capture thesis appear to be loosely based on the interest-group theory of politics, which posits that different groups have different degrees of influence on policymakers based on their costs of organizing for effective political action.[184] The argument—or at least the assumption[185]—appears to be that powerful interest groups will enjoy greater

179. William A. Niskanen, Jr., Bureaucracy and Representative Government 38–41 (1971).

180. See Spence & Cross, supra note 166, at 114–15 (citing to literature).

181. For an overview of this literature, see David B. Spence, Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control, 14 Yale J. on Reg. 407 (1997).

182. For further discussion, see generally Thomas W. Merrill, Capture Theory and the Courts: 1967–1983, 72 Chi.-Kent L. Rev. 1039, 1050–52 (1997) [hereinafter Merrill, Capture Theory]; Spence & Cross, supra note 166, at 121–22.

183. See Marver H. Bernstein, Regulating Business by Independent Commission 157–60 (1955).

184. See, e.g., Neil Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy 54–58 (1994); Mancur Olson, The Logic of Collective Action 10–12, 46–47 (1965).

185. How proponents of the interest-group theory of politics came to assume that agencies are more prone to capture than legislatures remains largely unexplained—at least

influence with agencies than they do with legislatures, presumably because the costs of capturing the agency are lower than costs of capturing the legislature.

All the arguments based on the asserted tendency of agencies toward policy drift are open to serious objections. As numerous political scientists have pointed out, agencies are subject to multiple external constraints on their behavior, ranging from legislative oversight to executive oversight to judicial oversight.[186] Indeed, the checks on agency behavior are so numerous and powerful that some have complained the problem is not agency drift, but agency paralysis.[187] The argument relying on drift also ignores internal constraints that militate against problems of aggrandizement, lock-ins, or capture. One is the lower cost of participating in agency proceedings relative to legislative proceedings, which may mean that a wider variety of interests participate in agency policymaking relative to legislative policymaking.[188] Another is the constraint imposed by the deliberative norms of the administrative process (the "hard look doctrine" and the like), which probably cuts down on the degree to which agencies can embrace solutions to policy problems favored by agency insiders or narrow interest groups.[189] Given all these constraints, it is not surprising that empirical support for policy drift as a general problem of administrative governance is weak.[190]

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by political scientists. For the effort of a lawyer who champions the nondelegation doctrine to derive such an explanation, see Schoenbrod, supra note 10, at 111–12 (arguing that "diffuse interests typically find it more difficult to press their case before an agency than before the legislature"). For discussion of the significance of the assumption of agency capture in the development of administrative law, see Merrill, Capture Theory, supra note 182, at 1043.

186. See, e.g., James Q. Wilson, Bureaucracy 235–94 (1989); Thomas H. Hammond & Jack H. Knott, Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making, 12 J.L. Econ. & Org. 119, 119–20 (1996); Terry Moe, The Politics of Bureaucratic Structure, *in* Can the Government Govern? 267, 324–25 (John Chubb & Paul Peterson eds., 1989) (noting complicated procedural and judicial checks on EPA and OSHA).

187. See, e.g., Richard J. Lazarus, The Tragedy of Distrust in the Implementation of Federal Environmental Law, Law & Contemp. Probs., Autumn 1991, at 311, 313–15.

188. See generally Thomas W. Merrill, Does Public Choice Theory Justify Judicial Activism After All?, 21 Harv. J.L. & Pub. Pol'y 219 (1997) (setting forth an analogous argument about judicial policymaking).

189. For example, federal regulatory agencies were in the vanguard—not the rearguard—of the movement to deregulate transportation and public utilities industries in the 1980s and 1990s. See Joseph D. Kearney & Thomas W. Merrill, The Great Transformation of Regulated Industries Law, 98 Colum. L. Rev. 1323, 1365–69 (1998).

190. For reviews of the weak empirical evidence in support of the agency capture thesis, see Paul J. Quirk, Industry Influence in Federal Regulatory Agencies 4–21 (1981); Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 98 Colum. L. Rev. 1, 52–56 (1998); Mark Kelman, On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement, 74 Va. L. Rev. 199, 238–68 (1988).

Some of the more prominent drift arguments suffer from additional implausibilities. For example, the relational contract theory of agency capture undoubtedly contains a grain of truth as a descriptive matter. But it is not clear why the same factors are not also at work in the relationship between the chairs of congressional subcommittees and the industries they regulate.[191] Similarly, it is undoubtedly true that interest-group capture is more likely where the costs of reaching a deal with political actors are lower. But again, it is not clear that an interest group must secure a deal with a majority of the members of both houses in order to capture Congress; it may be enough to gain support of key committee chairs, who then get what they want via logrolling.[192] Moreover, because elected officials "depend on campaign contributions for their continued existence" whereas agency officials do not,[193] it is plausible to think that elected politicians will be more, rather than less, attentive to interest group entreaties than agency officials.

Finally, all policy drift arguments, like accountability arguments, are based on legitimacy. Drift arguments assume that the original legislated policy is legitimate, and hence any deviations from that policy by the agency over time are illegitimate. From a broader consequentialist perspective this is open to question. It is possible that the original legislative policy is defective, and that the departures move in the direction of better policy. To illustrate: The legislature may adopt an ill-conceived populist measure, which the agency then ameliorates under the influence of prolonged exposure to industry views advocating a more pragmatic solution. Thus, even if it were proven that broad delegation leads to policy drift, it would still be necessary from a broad consequentialist perspective to show that this leads to a less desirable state of affairs. No one has even begun to develop the information that would allow this kind of demonstration to be made.

Given these objections and unresolved questions, I find it impossible to give any weight to the alleged proclivities of agencies toward policy drift in assessing different conceptions of the allocation of legislative power. Certainly the claim that imposing a strict nondelegation requirement would reduce the overall level of policy drift is unproven,[194] as is the implicit assumption that policy drift is ultimately a bad thing.

3. *The Bicameral and Presentment Filter.* — Another factor in support of strict nondelegation that has been cited more recently by public-

191. See Epstein & O'Halloran, Delegating Powers, supra note 177, at 237–38 (concluding that enhanced enforcement of nondelegation doctrine would magnify the power of congressional subcommittees).

192. David Epstein & Sharyn O'Halloran, The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach, 20 Cardozo L. Rev. 947, 952–54 (1999) [hereinafter Epstein & O'Halloran, Political Science].

193. Spence & Cross, supra note 166, at 123.

194. Posner & Vermeule, Interring, supra note 17, at 1745–48; see Daniel A. Farber & Philip P. Frickey, Law and Public Choice 85–86 (1991).

choice-influenced scholars is the difficulty of enacting congressional legislation.[195] Specifically, the bicameral enactment and presidential presentment requirements of Article I serve as important barriers to new laws. The justification for these barriers is that they promote legislative deliberation and constitute a functional supermajority requirement, thereby filtering out a certain percentage of ill-conceived or faction-driven measures before they become law.[196] Whether the bicameral and presentment filter (B&P filter) in fact promotes legislative deliberation is debatable, as is whether it eliminates more impurities than desirable elements from the legislative stream. But there can be no doubt that the filter has the effect of restricting the amount of legislating that can take place in any given session. The question is how much governmental policymaking should be subject to the B&P filter.

The choice among conceptions of the allocation of legislative power has a direct bearing on this question. Strict nondelegation would impose the B&P filter before any legislative rulemaking takes place, or at least before any *important* rulemaking takes place. This would impose a significant chokehold on federal policymaking relative to current arrangements and would constrict the total volume of new federal regulation.[197] The result would be a shift toward more state regulation, state tort law, and unregulated market ordering. Lax nondelegation permits much more policymaking to bypass the filter, giving us a significantly larger quantum of federal regulation. Exclusive delegation would presumably have a somewhat intermediate effect. Any decision to delegate legislative power would have to pass througb the filter, as would the demarcation of the scope of authority so granted. But the content of the policymaking authority so delegated would not be subject to the filter; as to the content of federal regulatory policy, the B&P filter could be bypassed—as is presently the case for practical purposes under the current regime of lax nondelegation.

Two large normative questions, both of which entail empirical judgments for which we have woefully insufficient data, are implicated by the choice among these three allocations of the B&P filter. The first concerns the balance between good and bad federal legislation, as compared to state regulation, tort law, and market ordering. By "good" I mean legislation that, at a reasonable cost, corrects market failures or redistributes wealth in a way that enjoys widespread public support. By "bad" I mean

195. See, e.g., Aranson et al., supra note 24, at 21 (noting argument that "absent delegation, the quality and quantity of legislation, as well as congressional oversight and investigation, would suffer"); Macey, supra note 24, at 513 (citing Aranson et al.).

196. Manning has the best discussion of the functional reasons for the B&P filter. See Manning, Nondelegation, supra note 17; see also John O. McGinnis & Michael B. Rappaport, Our Supermajoritarian Constitution, 80 Tex. L. Rev. 703, 770–80 (2002) (characterizing B&P filter as a type of supermajority rule that functions to eliminate legislation with merely majoritarian support).

197. See Harold H. Bruff, Judicial Review and the President's Statutory Powers, 68 Va. L. Rev. 1, 28 (1982).

legislation that produces costs that exceed benefits, or transfers economic rents to interest groups. If bad federal law predominates over good federal law, relative to state regulation, tort law, and market ordering, then we would want to raise the barrier to federal lawmaking. Conversely, if the good predominates over the bad, then we would want to lower it.[198]

The second normative question concerns the effectiveness of the B&P filter in discriminating between good and bad legislation. If the B&P filter accurately discriminates between market-correcting and rent-seeking schemes, then we should be eager to employ it as a barrier to federal regulation. If the B&P filter just randomly blocks proposed laws, or allows more bad laws to get through than good ones,[199] then we should probably look elsewhere for our barrier to federal regulation.[200]

I have no special insights into the correct answers to these questions. The extreme answers—that federal regulation is almost all bad or all good—seem impossible to defend. Some federal regulation (airline safety, antiterrorism laws) is almost surely good; other federal regulation (the Smoot-Hawley tariff[201]) is almost certainly bad. It seems likely that the B&P filter will kill off some bad ideas, if only because it slows things down and allows some public debate to take place before laws are enacted. But it is also likely that the B&P filter allows interest groups to kill off legislation that would be in the public interest, by exploiting procedural bottlenecks in the legislative process.

My own guess—and it's just a guess—is that the B&P filter acts as a modestly effective screening device that is appropriately imposed before delegation of legislative power takes place. This would be achieved by the exclusive delegation doctrine. But I am more skeptical about claims that the filter needs to be applied before every significant federal policy judgment is made, or that the filter should be subject to ready evasion on congressional say-so.

4. *Checks and Balances.* — A different argument sometimes advanced in support of strict nondelegation is the desirability of maintaining a vi-

198. As Mashaw points out, the argument against delegation in Aranson et al., supra note 24, is driven by the assumption that federal regulation is mostly malign. Mashaw, Greed, supra note 171, at 142–43. Other commentators, who insist that strict nondelegation would impose an inefficient barrier to federal lawmaking, implicitly assume that most federal legislation is benign. See generally, e.g., Richard J. Pierce, Jr., Political Accountability and Delegated Power: A Response to Professor Lowi, 36 Am. U. L. Rev. 391 (1987).

199. See Posner & Vermeule, Interring, supra note 17, at 1751 (noting that "if members of Congress believe that transfers to supporters are the priority, increasing decision costs will interfere only with low-priority public-interest legislation and not with high-priority interest-group legislation").

200. Aggressive judicial enforcement of property rights would be an example of an alternative. See Thomas W. Merrill, Rent Seeking and the Compensation Principle, 80 Nw. U. L. Rev. 1561, 1589–90 (1986) (reviewing Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985)).

201. Smoot-Hawley Tariff Act of 1930, Pub. L. No. 71-361, 49 Stat. 590 (codified as amended in scattered sections of 14 U.S.C.).

brant system of checks and balances among the branches of government, in order to secure personal liberty more effectively.[202] The argument usually goes that without strict nondelegation, Congress will be tempted to give away too much of its power, paving the way for an all-powerful Executive Leviathan. Only by forcing Congress to make key policy judgments can we ensure that Congress will continue to serve as an effective check on the imperial presidency.

This argument, however, faces serious objections. The most obvious is that it is implausible that Congress—the historical rival of the Executive—would give away all or even most of its powers.[203] A more fundamental objection is that strict nondelegation is unnecessary to achieve lively checks and balances among the branches of government.[204] All that is needed is fidelity to three less-exalted propositions: (1) the executive and judicial branches have no general inherent power to act with the force of law (the anti-inherency principle); (2) Congress is free to delegate as much power as it wants to the executive and judicial branches (the transferability principle); and (3) Congress must delegate legislative power either to the executive or judicial branches, i.e., it cannot delegate

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202. See, e.g., Schoenbrod, supra note 10, at 107–18.

203. See Farber & Frickey, supra note 194, at 84 (calling "unthinkable" idea that Congress would ever delegate all of its legislative authority "since to do so would leave Congress impotent"); Epstein & O'Halloran, Political Science, supra note 192, at 950.

204. For a more complete exposition of the argument, see Thomas W. Merrill, The Constitutional Principle of Separation of Powers, 1991 Sup. Ct. Rev. 225, 251–55 [hereinafter Merrill, Constitutional Principle]. This place is as good as any to offer a partial qualification of my previous essay. I argued there that the benefits of checks and balances could be achieved without recognizing any judicial role in enforcing the meaning of "legislative," "executive," or "judicial" power. All that is needed, I argued, is recognition that every governmental unit must be located in one of three branches of government, and that each branch must comply with specific constitutional limitations on its exercise of governmental power. I continue to believe that there is little to be gained by developing fully specified definitions of "legislative," "executive," and "judicial" powers, and asking courts to strike down legislation that allocates governmental power in ways that deviate from these definitions. But to the extent my earlier essay suggested that *any* definition of these powers could be adopted without adversely affecting the system of checks and balances, I now qualify what I said there. In particular, I now believe that it is necessary, at a minimum, that Article I, Section 1 be understood to incorporate the anti-inherency and transferability principles, i.e., the exclusive delegation doctrine. In my previous essay, I attempted to derive the anti-inherency principle with respect to the executive branch from the Take Care Clause of Article II. But this begs the question of the source of the "laws" that the President is enjoined faithfully to execute. If the President has a general inherent authority to make law as part of the "executive" power, then the Take Care Clause would impose no limit on the Executive. Moreover, there is no textual basis for the anti-inherency principle as applied to courts. History of course presents a strong argument against inherent powers of lawmaking by federal courts. See generally Thomas W. Merrill, The Judicial Prerogative, 12 Pace L. Rev. 327 (1992). But it is preferable to ground this understanding in constitutional text, and the most obvious candidate for a text-based argument is the Vesting Clause of Article I.

such power to its own agent (the *Chadha* principle), and it cannot create a fourth branch of government.[205]

As long as these three propositions stand, Congress will have a built-in incentive to maintain a diffusion of power that will maintain a dynamic tension among the branches. Because of the B&P filter, Congress cannot do everything itself; it must give significant powers away. If Congress cannot delegate governmental power to its own agent or create a fourth branch of government, then it must delegate to the Executive and the courts. Given its rivalry with the President, Congress would want to provide for a substantial measure of judicial review of executive action. Yet because courts cannot govern other than through cases or controversies, Congress cannot dispense with the Executive for most of what we regard as executive functions. Congress therefore must share power with both of the other branches. This dynamic ensures that each branch is sufficiently powerful to act as a counterweight to the others.[206]

Notice that under this alternative conception of how to maintain a diffusion of power among the branches, strict nondelegation is not necessary. Indeed, such an understanding could get in the way of promoting a proper diffusion of power, by inviting courts to meddle with congressional efforts to distribute governmental power. The exclusive delegation conception, in contrast, *is* necessary to make this conception of self-regulating checks and balances work. Indeed, the two subsidiary principles of the exclusive delegation doctrine—the anti-inherency and transferability principles—comprise two of the three propositions on which this alternative conception rests. The argument for checks and balances, therefore, gives us one clear reason to accept exclusive delegation as the preferred understanding of the constitutional allocation of legislative power.

5. *Facilitating Judicial Review.* — A final argument advanced in support of strict nondelegation is that it is necessary for full and effective judicial review of administrative action. Courts review agency actions in order to determine whether they are contrary to law. If Congress has set forth a reasonably determinate standard to guide agency action, then courts can review that action in order to ascertain if it conforms to this

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205. I assume here that independent agencies are sufficiently subject to control by the White House, whether through the appointments process, the budgetary process, Office of Management and Budget review of proposed regulations, or informal jawboning, that they can be regarded as part of the executive branch. See generally Geoffrey P. Miller, Independent Agencies, 1986 Sup. Ct. Rev. 41.

206. Merrill, Constitutional Principle, supra note 204, at 255. To achieve genuine checks and balances, it is important that power not be too diffuse or too concentrated. This is the principal criticism I have of the proposal advanced by Liz Magill, who would rely on diffusion of power among myriad institutions and subinstitutions to promote the purposes of a system of checks and balances. M. Elizabeth Magill, Beyond Powers and Branches in Separation of Powers Law, 150 U. Pa. L. Rev. 603, 603–06 (2001). If power is too diffuse, then the result may not be a tension or equilibrium among power centers, but rather a balkanization that permits many little isolated tyrannies to coexist.

standard.[207] In contrast, if Congress has simply conferred power to act with the force of law, but has provided no clear standard to guide the agency, then the court will be at a loss to know whether the agency's action is lawful or not. Judicial review will become weak and meaningless.[208]

This point has some force. The denser the backdrop of statutory law, the more opportunities there will be for judicial review of agency action based on alleged conflicts with the agency's statutory mandate. Yet the point should not be overstated. Courts set aside agency action not only when it is contrary to statute, but also when it is "arbitrary, capricious, [or] an abuse of discretion."[209] Judges have shown great ingenuity in building on this standard of review to ensure a fairly significant measure of judicial review. For example, agencies have been required to adhere to their own regulations, to explain deviations from past precedents, to disclose to interested parties the factual assumptions underlying their decisions, and to respond to material comments by parties who object to the proposed course of action.[210] The result has been vigorous judicial review that serves as a check on agency action, without regard to whether Congress has laid down any particular statutory standard to structure the agency's action. So judicial review is and will continue to be available, whether or not Congress is required to include an "intelligible principle" in every delegation of power to act with the force of law.

Here, as elsewhere, the exclusive delegation option would take up an intermediate position somewhere between strict and lax nondelegation. In addition to the various reasoned decisionmaking requirements available under lax nondelegation, the exclusive delegation understanding would require courts to determine whether agencies have been delegated power to act with force of law, and whether they are acting within the

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207. Justice Rehnquist cited this as one of the purposes that would be served by strict nondelegation in his concurring opinion in Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 686 (1980). See also Redish, supra note 10, at 138–43 (discussing effect of nondelegation doctrine on judicial review).

208. I will not venture into a discussion of whether judicial review of agency action is a good thing. Most observers, including the author, agree that judicial review is necessary to assure that executive actors adhere to the rule of law. See Thomas W. Merrill, *Marbury v. Madison* as the First Great Administrative Law Decision, 37 J. Marshall L. Rev. 481, 481 (2004). It is when courts go beyond upholding what the law clearly requires, and start meddling with policy, that judicial review of executive action becomes controversial.

209. 5 U.S.C. § 706(2)(A) (2000).

210. These are the elements that constitute the modern "hard look" paradigm of reasoned decisionmaking. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 31 (1983) (requiring agency to give reasoned explanation for rejecting alternatives to proposed action); Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (requiring agency to explain departure from prior norms); Conn. Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 530–31 (D.C. Cir. 1982) (requiring that agency disclose technical basis for proposed rules in order to afford meaningful basis for comment). See generally Alfred C. Aman, Jr. & William T. Mayton, Administrative Law 519–29 (2d ed. 2001).

scope of their delegated powers. Thus, the grounds for judicial invalidation would be expanded relative to what they are under lax nondelegation.[211] Indeed, under the exclusive delegation conception, searching judicial review of these issues would be necessary in order to enforce Article I, Section 1. Exclusive delegation would therefore establish a constitutional backdrop for judicial review considerably more powerful than exists under lax delegation, although admittedly not as powerful as would be required under a strict nondelegation doctrine.

In the end, it is difficult to award decisive points to any of the conceptions of Article I, Section 1 in terms of their impact on judicial review. Some judicial review is a good thing; too much judicial review is not, especially when it arrives in large, unpredictable doses.[212] What we most need is not more judicial review, but better judicial review. The exclusive delegation doctrine would focus judicial review on questions of boundary maintenance that courts are thought to be well suited to perform,[213] and might modestly reorient judicial review in a salutary direction.

6. *Antidelegation Policies: Summing Up.* — The clear verdict of this overview of antidelegation arguments is that the consequentialist case for strict nondelegation cannot be sustained. Each argument for strict nondelegation is either opposed by an equally plausible counterargument (accountability), rests on unsubstantiated normative/empirical claims (policy drift and the B&P filter), or is unnecessary and possibly counterproductive to achieve the stated aim (checks and balances, facilitating judicial review). The closer question is what the survey tells us about the choice between the other two options—lax nondelegation and exclusive delegation. Here we find that in some dimensions there is a modest case for preferring exclusive delegation to lax nondelegation (B&P filter, facilitating judicial review). With respect to one argument—promotion of checks and balances—exclusive delegation appears to come out on top.

B. *Prodelegation Policies*

Let us now turn to some arguments advanced by the partisans of broad delegation to see what light they shed on the choice among interpretive options.

1. *Expertise.* — Perhaps the argument most commonly invoked in support of broad delegation is the desirability of having policy formulated by persons who have expertise in the subject matter. Administrative agencies typically have large professional staffs, protected by civil service laws, who have specialized training and extensive experience with particu-

211. The doctrinal implications of the exclusive delegation reading of Article 1, Section 1 are spelled out more fully in Part VI.

212. See Richard J. Pierce, Jr., Judicial Review of Agency Actions in a Period of Diminishing Agency Resources, 49 Admin. L. Rev. 61, 84–85 (1997).

213. For defense of this conception of judicial review of agency action, see Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 6 (1983).

lar regulatory issues. Congress has a much smaller staff, which tends to be selected under pressure from interest groups and party members rather than on the basis of expertise.[214] Thus, to the extent we want policy made by persons who know what they are doing, it is better that policymaking be centered in the administrative agencies rather than in Congress.[215]

On closer examination, the argument here is open to question to a greater degree than the traditional literature assumes. One problem is that the current allocation of expert staff between agencies and Congress may be a contingent feature of American politics that could always be changed.[216] Thus, if Congress were required to make fundamental policy decisions about the safety of nuclear power plants or the money supply, it could beef up the size and quality of the legislative staff—and could then defer to the judgment of the staff (as presumably happens when heads of agencies make these decisions). Another problem is that if we ignore the staff and focus on the principals, it is not clear that agency heads have greater experience on average than do Members of Congress. Certainly, the average Member of Congress—and especially the average chair of a legislative committee—has a longer tenure in office than do agency heads, who tend to be short-term "in and out" political appointees.[217] So the expertise gap between agencies and Congress at the level of principals (rather than staff) may be small or nonexistent.

Still, there is a measure of truth in the generalization that agencies have greater expertise than Congress, certainly under current institutional arrangements. This provides a strike against strict nondelegation. Between lax nondelegation and exclusive delegation, there is less room to choose. Exclusive delegation might in theory come out on top, since under this approach Congress would not feel any obligation (even a judicially unenforced one) to supply an "intelligible principle" constraining agency action. There are many examples of regulatory statutes in which Congress has imposed an "intelligible principle" that turns out to be misguided—such as the Delaney Clauses of the Food, Drug and Cosmetic Acts, with their absolute prohibitions on carcinogens in food additives and cosmetics,[218] and the Clean Air Act, with its injunction to ignore

214. See Steven S. Smith, The American Congress 125–28 (2d ed. 1999).

215. For a recent defense of delegation to administrative agencies that puts great weight on the superior information of agencies, see Spence & Cross, supra note 166, at 124–28.

216. Schoenbrod, supra note 10, at 120.

217. Political appointees in the executive branch have an average tenure of about two years. See James P. Pfiffner, Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century, *in* The American Constitution and the Administrative State: Constitutionalism in the Late 20th Century 141, 149 (Richard J. Stillman II ed., 1989).

218. See Richard A. Merrill, FDA's Implementation of the Delaney Clause: Repudiation of Congressional Choice or Reasoned Adaptation to Scientific Progress?, 5 Yale J. on Reg. 1, 1 (1988).

costs in setting ambient air quality standards.[219] Regulatory policy might be improved if Congress felt it could simply delegate authority to designated agencies to promote public health and safety with respect to food additives or air quality.[220] But in practice the difference between lax nondelegation and exclusive delegation would probably not be great, given that courts have shown no sign of enforcing the intelligible principle requirement of lax nondelegation. Thus, both lax nondelegation and strict delegation should permit significant amounts of policy to be made by relatively more expert agencies.

2. *Scale.* — Closely associated with expertise, but conceptually distinct, is the idea that broad delegation is necessary if government is to realize the ambitious agenda it has set for itself. The focus here is not on the technical complexity of issues, but the scale of government operations. Congress, an old-fashioned legislative body operating under cumbersome procedures (most prominently the B&P filter), can enact at most a couple hundred statutes per year. Given the enormous demand for government intervention, the modern regulatory state must crank out thousands of new and revised laws each year. Broad delegation is necessary, therefore, to leverage up the lawmaking function of government in order to generate the volume of regulations necessary to carry out the wide-ranging functions of modern government. Courts and commentators have often alluded to this idea in justifying a lax approach to nondelegation challenges.[221] As the Court observed in *Mistretta*, "Congress simply cannot do its job absent an ability to delegate power under broad general directives."[222]

Proponents of strict nondelegation complain that the Court has failed to offer empirical evidence supporting the claim that broad delegation is necessary for government to operate at its current scale.[223] But the argument from scale is surely correct, at least if we want the government to perform with a reasonable degree of coherence most of the functions it is currently committed to performing. One can see this by comparing the U.S. Code and the Code of Federal Regulations (CFR) in any given regulatory area. In terms of page numbers, the CFR dwarfs the U.S. Code many times over, suggesting that more legislative rules are generated by the implementing agency than by Congress. Moreover, although

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219. This is the intelligible principle upheld in Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001).

220. See Bruce A. Ackerman & William T. Hassler, Clean Coal/Dirty Air 54–58 (1981) (using case study of Clean Air Act to suggest that broad delegations to agencies may produce policy results superior to detailed legislated solutions, in part because of interest group influence on Congress).

221. See, e.g., Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) ("The judicial approval accorded these 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems."); Baker & Krawiec, supra note 178, at 707.

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

223. See Schoenbrod, supra note 10, at 174.

longer, the CFR is typically much easier to follow. The U.S. Code, patched together from layers of legislative enactments that are often poorly integrated, frequently is incomprehensible to anyone not an expert in the area; the CFR, periodically revised by agencies under their broad delegated authority with an eye to making the law more accessible and improving voluntary compliance, is something that even nonlawyers can often follow.

If Congress were not permitted to delegate broadly, we would likely see some combination of a reduced volume of federal regulation and less coherent federal regulation. Libertarians and public-choice influenced scholars who believe most federal regulatory law is bad would not be unhappy with this outcome. But the median American voter supports most of the undertakings of the modern regulatory state, whether it be for environmental protection, transportation safety, or homeland security.[224] The argument from scale thus lands yet another blow against the proponents of strict nondelegation.

The argument from scale, however, provides little basis to differentiate between exclusive delegation and lax nondelegation. Exclusive delegation would slow down the engine of delegation somewhat, by requiring clear authority from Congress and by confining agencies within the scope of their delegated authority. But it would place no constraint on Congress in terms of how far Congress hands over authority to agencies to determine the details of policy. Lax nondelegation, of course, imposes no constraint at all. Neither conception should put much of a barrier in the way of leveraging up the ability of government to generate new law.

3. *Deliberation.* — Also related to but distinct from expertise is the desirability of assuring adequate deliberation before policies are adopted as law. "Deliberation" is a rather indefinite concept. Here, I take deliberation to mean both public input into the policymaking process, and give and take among the experts and their principals who are responsible for formulation of the policy. Partisans of strict nondelegation have sometimes argued that their position would promote greater deliberation, and perhaps it would in the legislative arena.[225] But unless we stack the deck by defining deliberation to mean legislative deliberation, there is not

224. See, e.g., Riley Dunlap, Public Opinion and Environmental Policy, *in* Environmental Politics and Policy 87, 87–93 (James Lester ed., 1995) (noting widespread public support for environmental protection measures even at expense of economic growth).

225. This proposition has been endorsed by the Supreme Court as a central justification for the (unenforced) nondelegation doctrine. See Loving v. United States, 517 U.S. 748, 757–58 (1996) ("Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking.").

much doubt that promoting deliberation is a policy that more generally favors broad delegation.[226]

This can be seen by comparing the procedural rules that govern legislative statutemaking and administrative rulemaking. Legislative statutemaking may be preceded by wide-ranging hearings and public debate and may undergo significant internal revision in response to concerns raised in the hearings, by staff, by constituents, and by other legislators. But none of these features is required. Often hearings are contrived exercises put on for show rather than to gather information. And more and more often, important statutes are rammed through as appropriation riders or in omnibus statutes without any significant deliberation at all. Administrative rulemaking, at least in its modern guise, is subject to a much more unyielding set of procedural requirements, including advance notice to the public, disclosure of studies and data on which the agency relies, extensive opportunity for public comment, and a requirement that agencies respond to and explain their disagreement with material comments submitted from any quarter.[227] What gives these procedural rules bite, and truly differentiates administrative rulemaking from legislative statute-making, is judicial review. Agencies know that courts stand ready to invalidate agency rules if the agency cuts corners in complying with the norms of deliberation. So agencies tend to comply with these norms.[228]

Even if we concede that agency decisionmaking is more deliberative than congressional decisionmaking, what implications does this have for the constitutional allocation of legislative power? The superficial assumption might be that the more we delegate, the more we deliberate. But there may be a more subtle interaction at work here. My colleague Peter Strauss, for one, believes that the nondelegation doctrine, even in its lax version, reinforces the background understanding that an agency must "be prepared to justify its behavior to outside assessors in accordance with principles of regularity and legality."[229] In other words, the nondelegation doctrine is an important element in the tradition of searching judicial review of agency action, which, among other things, promotes greater deliberation by agencies before they make policy. I think there is an important element of truth in this argument. Courts act with greater confi-

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226. For a defense of this position, see Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 Harv. L. Rev. 1512, 1541–62 (1992); see also Schuck, supra note 171, *passim*.

227. See Richard B. Stewart, Beyond Delegation Doctrine, 36 Am. U. L. Rev. 323, 333–34 (1987).

228. Indeed, if anything, the complaint is increasingly that agency rulemaking suffers from too much deliberation, which creates pressures to make policy in more informal modes that avoid the procedural rules designed to ensure deliberation. See Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385, 1396–1436 (1992).

229. Peter L. Strauss, Legislative Theory and the Rule of Law: Some Comments on Rubin, 89 Colum. L. Rev. 427, 443 (1989).

dence and assertiveness when they think important constitutional principles lurk in the not-too-distant background.[230]

But this insight does not get us very far in choosing among the various conceptions of the constitutional allocation of legislative power. If lax nondelegation serves an important function in supporting judicial review, would strict nondelegation do better, or would this be overkill? More intriguingly, would exclusive delegation provide an adequate substitute for lax nondelegation in creating the appropriate sense that there are important constitutional stakes at issue in judicial review of agency action? My sense is that it would. Courts would be constitutionally required to identify clear evidence that legislative power has been delegated, and that the agency is acting within the sphere of its delegated authority. This would lend a sense of gravity to the process of review, which would have spillover effects for the judicial attitude in reviewing the legality of the agency's compliance with rulemaking procedures and its fidelity to any statutory directions Congress has provided.

4. *Judicial Administrability.* — A final argument, which has traditionally been the trump card of the proponents of broad delegation, is that this is the only approach to the allocation of legislative power that courts can administer in a consistent and predictable manner. The focus here has been entirely negative, highlighting the shortcomings of the strict nondelegation approach.[231] The notion that Congress must provide an intelligible principle to guide agency action has been rightly derided as unworkably vague. Commentators have struggled to come up with a better rubric. Contenders include Schoenbrod's distinction between rules statutes and goals statutes, Redish's call for statutes that incorporate a "recognizable normative commitment," and Lawson's admittedly circular requirement that Congress resolve matters sufficiently important to require resolution by Congress.[232] Yet each of these alternatives also suffers from vagueness and indeterminacy, and it is doubtful that any of these could be applied in a consistent and predictable fashion.

The basic problem is that the partisans of strict nondelegation have been unwilling to say that all legislative rulemaking by executive branch

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230. For example, courts will not defer to agency interpretations of statutes if they think these interpretations raise serious constitutional questions. See, e.g., Solid Waste Agencies v. United States Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574–75 (1988).

231. For critiques of strict nondelegation that emphasize the lack of judicially administrable criteria for determining how much delegation is too much delegation, see, for example, Bell, supra note 160, at 192–98; Richard J. Pierce, Jr., The Role of the Judiciary in Implementing an Agency Theory of Government, 64 N.Y.U. L. Rev. 1239, 1255–60 (1989); Jim Rossi & Mark Seidenfeld, The False Promise of the "New" Nondelegation Doctrine, 76 Notre Dame L. Rev. 1, 5–6 (2000); Stewart, supra note 227, at 324.

232. Redish, supra note 10, at 154–57; Schoenbrod, supra note 10, at 182–85; Lawson, Delegation, supra note 10, at 361.

agencies is unconstitutional. Although they are disturbed by the notion that important or controversial policy judgments are being made by agencies rather than Congress, they are unwilling to say that agencies should forgo all legislative rulemaking and confine themselves to interpretive rules, policy statements, and enforcement actions. The result is that strict nondelegation partisans are forced to draw a line within a general phenomenon—agency legislative rulemaking—past which there is too much discretion, too much controversy, too much importance, etc., to allow the agency to make the judgment alone. As Justice Scalia has observed, "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree."[233] Sometimes courts will wade in where questions are a matter of degree. But where the basic allocation of power in government is concerned, and, I might add, where the arguments in support of wading in are so lacking in normative and empirical support, this is unlikely to happen.

Instead of wading in, courts have retreated to the position of nonenforcement, that is, to lax nondelegation. There is no question that lax nondelegation can be administered in a consistent and predictable manner. Whatever Congress says, goes. The more interesting question is whether similar problems of administrability would arise if instead courts adopted the exclusive delegation conception of the allocation of legislative powers. No doubt exclusive delegation would present more problems of administrability than lax nondelegation; any rule enforced by courts presents more problems than a rule not enforced. Still, I think there is reason to be more optimistic about the administrability of exclusive delegation than of strict nondelegation.

The basic reason to be encouraged is that exclusive delegation presents an either/or question rather than a question of degree. Either Congress has delegated power to act with the force or law, or it has not delegated such power. Either/or inquiries are generally more amenable to the tools of judicial resolution than inquiries that ask whether an exercise of power goes too far along one or more dimensions. In addition, as Kathryn Watts and I have discussed at length elsewhere, there is an historical convention for signaling when legislative power is being transferred to an agency.[234] Throughout much of the modern era, Congress has signaled its intent to transfer power to make rules with the force of law by conferring power to make "rules or regulations" and coupling this grant with a statutory provision imposing some sanction or other adverse legal consequence on persons who fail to abide by the resulting rules.[235] This convention could be used without difficulty in most cases as a canon of interpretation for determining whether the required delegation has been made.[236] So I am cautiously optimistic that the administrative costs of

233. Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).
234. See Merrill & Watts, supra note 6, at 472.
235. Id. at 503–26.
236. Id. at 582–86.

exclusive delegation, although inevitably higher than lax delegation, would not reach the unworkable level that has vexed strict nondelegation.

5. *Prodelegation Policies: Summing Up.* — The policies that have been advanced in support of broad delegation provide significant support for lax delegation relative to strict nondelegation. But, interestingly, it appears that these policies provide nearly as much support for a rule of exclusive delegation. Exclusive delegation lags only slightly behind lax nondelegation in terms of promoting expertise and permitting growth in the scale of government, and exclusive delegation would likely do more to encourage deliberation. Moreover, although exclusive delegation would raise issues of administrability to a greater degree than would lax nondelegation, there is reason to believe that the added costs would be significantly less severe than those associated with strict nondelegation.

C. *Final Verdict on Consequences*

The main message of this excursion into consequences is that the factors to weigh in the balance are highly complex, and we lack adequate information to determine how much weight to give to any particular factor. Still, given that traditional legal materials provide no decisive basis for choice, the choice must be made, as best we can make it, on consequentialist grounds.

My own judgment is that exclusive delegation is preferable on consequentialist grounds to either strict nondelegation or lax nondelegation. I would summarize the arguments this way. The principal arguments in support of strict nondelegation (accountability, policy drift, B&P filter, checks and balances, facilitating judicial review) are either debatable, unproven, overkill, or unnecessary. Moreover, strict nondelegation would reduce the quality and scale of government, and has proven to be unadministrable by courts. Exclusive delegation, by contrast, furthers some of the goals of accountability, provides a more measured application of the B&P filter, should do at least as well in maintaining checks and balances, advances some of the goals that strict nondelegation frustrates (expertise, scale, and deliberation), and is more administrable. So in a head-to-head consequentialist competition between strict nondelegation and exclusive delegation, exclusive delegation clearly wins.

On the other side of the ledger, lax nondelegation serves important goals, including promoting expertise, facilitating the growth of government, and enhancing deliberation in policymaking. Moreover, as a nonrule, it is easy to administer. But lax nondelegation probably results in underuse of the B&P filter, and it does nothing to promote checks and balances. Exclusive delegation does virtually as well as lax nondelegation on the expertise, scale, and deliberation fronts, better in terms of the B&P filter and checks and balances, and only somewhat worse in terms of administrability. Recall, too, as shown in Part III, that exclusive delegation comes out ahead of lax nondelegation on conventional legal

grounds, providing an additional reason to prefer exclusive delegation to the Court's current "anything goes" approach. So exclusive delegation also prevails in a head-to-head competition against lax nondelegation.

This kind of qualified conclusion is obviously not enough to justify some kind of legal revolution. But we are not talking about a legal revolution. We are talking about the choice between constitutional postulates, one of which is currently unenforced (but many believe should be strictly enforced), the other of which is irregularly asserted and often overlooked. In these circumstances, if the consequential case for the second postulate is significantly stronger than the first—whether enforced or not—we should abandon the first and stake our faith on the second.

V. CONSTITUTIONAL ARCHITECTURE

There is another, arguably more fundamental, reason to reconsider the meaning of Article I, Section 1. This concerns what might be called constitutional architecture. Without doubt the Framers regarded Congress as the most important branch of the federal government. Congress is the first governmental institution mentioned in the U.S. Constitution and is the subject of the first and by far the longest article in that document. Charles Black may have exaggerated when he claimed that "[w]ith some changes in detail . . . a complete, ongoing government, with all necessary organs, could have been formed, and could have functioned down to now, if the Constitution had ended at the end of Article I."[237] But he exaggerated only a little.

For most of our history, political reality conformed to this constitutional design. Except in wartime, Congress was the dominant power.[238] Then, starting around the time of the New Deal, the relative power of Congress and the Executive began to shift. Today, the executive branch is ascendant and Congress much diminished. On virtually all matters of legislative policy, the Executive leads, and Congress follows.[239] Sometimes Congress can frustrate or impede the Executive by refusing to enact legislation sought by the President, rejecting presidential appointments, or modifying presidential appropriations requests. But only rarely does Congress take the initiative in setting national policy.

The reasons for the eclipse of Congress as the dominant policymaking institution are complex. One important factor, already mentioned, is the enormous growth in the scale and complexity of the federal govern-

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237. Charles L. Black, Jr., The Presidency and Congress, 32 Wash. & Lee L. Rev. 841, 842 (1975).

238. See, e.g., Woodrow Wilson, Congressional Government: A Study in American Politics 52 (Boston, Houghton Mifflin 1885) ("For all practical purposes . . . Congress [is] predominant over its so-called coördinate branches." (citation omitted)).

239. See William N. Eskridge, Jr. et al., Legislation: Statutes and the Creation of Public Policy 26 (3d ed. 2001) ("The executive proposes or drafts much of the important legislation considered by the legislature.").

ment.[240] This makes it impossible for individual Members of Congress to remain conversant with more than a fraction of the important policy issues on the agenda at any one time. Another factor is the persistence of war in the modern era, including first the Cold War and now the war on terrorism, which has further expanded the size of government and enhanced the power of the President relative to Congress. A third factor, largely a product of imperfect campaign finance laws, is the imperative of nonstop fundraising activity by Members of Congress. This tends to channel the time and effort of Members toward symbolic gestures, constituent services, and fundraising appeals, and away from legislative activity.[241] A fourth factor might be the growth of the national news media, which has tended to magnify the power of the President and other national figures, and to reduce in relative terms the stature and visibility of Members of Congress, who owe their positions to statewide or even more local elections.[242]

Congress's relative decline in political importance has been mirrored by a decline in public regard. Both popular and scholarly commentaries tend to depict Congress in extremely unflattering terms.[243] Members of Congress, perhaps not unrealistically, are assumed to be driven almost exclusively by a desire to secure reelection.[244] The President and the Justices of the Supreme Court, in contrast, are more typically portrayed as being motivated by sincere policy convictions. Not surprisingly, given these depictions, opinion polls regularly show that the public holds Congress as an institution in lower regard than either the President or the Supreme Court.[245]

Judicial doctrine, as usual, tends to follow public opinion—especially elite opinion.[246] Thus, it should come as no surprise that the Supreme

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240. See supra Part IV.B.2.

241. See Morris P. Fiorina, Congress: Keystone of the Washington Establishment 37–47 (2d ed. 1989).

242. See Theodore J. Lowi, The Personal President 138–40, 156 (1985).

243. See, e.g., John Hibbing & Elizabeth Theiss-Morse, Congress as Public Enemy 33–36 (1995).

244. See David R. Mayhew, Congress: The Electoral Connection 13 (1974). Since the publication of Mayhew's study, this assumption has dominated political science literature on Congress.

245. Each year the Harris Poll conducts a survey in which it asks Americans how much confidence they have in different institutions. Congress nearly always lags behind the President and the Supreme Court. Over the last twelve years the average percentage responding that they have a "great deal of confidence" in each of these institutions has been approximately 33% for the Supreme Court, 24% for the President, and 14% for Congress. See Humphrey Taylor, The Harris Poll #4 (Jan. 22, 2003), at http://www.harrisinteractive.com/harris_poll/index.asp?PID=351 (on file with the *Columbia Law Review*) (author's calculations based on yearly numbers for 1992–2003). Interestingly, the level of confidence in "[t]he executive branch of the federal government," i.e., federal agencies exercising delegated power, has averaged 17%, closer to the average score of Congress than the score for the head of the executive branch. Id.

246. See William Mishler & Reginald S. Sheehan, The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court

Court has been busy trimming the powers of Congress.[247] The scope of congressional powers under the Commerce Clause and Section 5 of the Fourteenth Amendment have been cut,[248] while the scope of immunity of state governments from congressional enactments has been expanded.[249] The overall rate of invalidations of congressional legislation under various constitutional rubrics has risen to record levels.[250] And in matters of statutory interpretation, the Supreme Court, and lower courts by emulation, have shifted away from a faithful-agent model of interpretation, which seeks to enforce the intentions of Congress, toward a textualist or plain-meaning model.[251] Various justifications have been given for this shift, the most prominent theme being that congressional lawmaking is too incoherent and manipulative to produce anything that could be characterized as an institutional intent.[252] In other words, Congress is a principal unworthy of the courts' service as faithful agents.[253]

Decisions, 87 Am. Pol. Sci. Rev. 87, 96–97 (1993) ("For most of the period since 1956, a reciprocal relationship appears to have existed between the ideology of the public mood . . . and the broad ideological tenor of Supreme Court decisions.").

247. See Ruth Colker & James J. Brudney, Dissing Congress, 100 Mich. L. Rev. 80, 80–87 (2001); Christopher H. Schroeder, Causes of the Recent Turn in Constitutional Interpretation, 51 Duke L.J. 307, 336–38 (2001) (discussing common perception that Congress does not have interests of constituents in mind). See generally Neal Devins, Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade, 51 Duke L.J. 435, 436 (2001) (arguing that Congress has encouraged judicial encroachment "by signaling its indifference to the constitutional fate of its handiwork"); John Ferejohn, Judicializing Politics, Politicizing Law, Law & Contemp. Probs., Summer 2002, at 41, 59–60 (arguing that political gridlock leads to judicial takeovers of legislative prerogatives).

248. See, e.g., City of Boerne v. Flores, 521 U.S. 507, 507–08 (1997) (cutting back on Section 5 power); United States v. Lopez, 514 U.S. 549, 549–50 (1995) (cutting back on scope of commerce power).

249. See, e.g., Alden v. Maine, 527 U.S. 706, 706 (1999) (constitutionalizing state sovereign immunity as inherent-design principle of the Constitution); Printz v. United States, 521 U.S. 898, 898–99 (1997) (invalidating federal statute that coerced state administrative agents).

250. See Seth P. Waxman, Defending Congress, 79 N.C. L. Rev. 1073, 1074 (2001) (providing data showing that rate of invalidation of federal statutes from 1995–2000 was about seven times that of the first 200 years following Constitution's ratification).

251. See Merrill, Textualism, supra note 71, at 354. Academic proponents of textualism have begun to hedge a bit as to whether considerations of purpose may enter into statutory interpretation. See, e.g., John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2408 (2003). See generally Caleb Nelson, What is Textualism? (2004) (unpublished manuscript, on file with the *Columbia Law Review*) (arguing that textualist judges do not in fact abjure the faithful agent perspective). But much of the rhetorical assault on intentionalism and the use of legislative history continues to emphasize the irrationality and manipulability of the legislative process.

252. See Scalia, supra note 20, at 16–18, 29–32 (arguing that concept of legislative intent as "something that exists" is "contrary to all reality").

253. Law professors, for their part, have also contributed to the demise of Congress as the principal policymaking voice of government. Commentators regularly explain how the Constitution confers sweeping powers on the President, see, e.g., Vasan Kesavan & J. Gregory Sidak, The Legislator-in-Chief, 44 Wm. & Mary L. Rev. 1, 4 (2002) (arguing that the President is not just in practice but also in constitutional theory the most significant actor in the legislative process), and why it is important for the courts to extend their

The decline of Congress, whatever the causes, has produced a quiet crisis in constitutional law. The Constitution clearly presupposes that Congress is the most important policymaking institution. The reality is that Congress has become subordinate to the Executive and for many purposes even to the courts. The result is a growing gap between the law on the books and the law in action. Nowhere do we see this gap more clearly than with respect to the allocation of legislative power. The official line, as we have seen, is that Congress has a monopoly on the legislative power. The reality, as we have also seen, is that the Court has stood aside while Congress has delegated legislative power at will.

Gaps between law on the books and law in action are not uncommon.[254] Why should we be concerned about this one? One reason is that it exacerbates cynicism about government. Congress is declared to be the exclusive organ of legislation. But courts, perceiving the impracticality of this proposition, refuse to enforce it. Since the courts will not enforce it, legislators will not abide by it either, since they feel the demands of practicality even more insistently than the courts.[255] The net result is that our system of government is seen as resting on a kind of massive constitutional violation. Agencies are depicted as exercising unconstitutional powers. Courts are regarded as lacking the courage to enforce the Constitution. Legislators are condemned for shirking the duty they were elected to perform.

A second reason to be concerned about such a gap is that it is dangerous. Gaps between law on the books and law in action can give rise to sudden avulsions in legal understanding, as the tension between official doctrine and everyday practice becomes too great to tolerate any longer. At some point, official doctrine is apt to be wrenched aside and replaced with some new conception more consonant with institutional reality. Such avulsions are dangerous, especially when we are talking about basic constitutional architecture. Here, the principal danger I foresee is that the Court will suddenly disclaim the legislative monopoly construction of Article I, Section 1 and adopt by default the legislative supremacy

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influence into new areas of social policy. Although these arguments are not explicitly designed to devalue the role of Congress, they inevitably have that effect.

254. See Roscoe Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 15 (1910).

255. Morris Fiorina has even posited that Congress delegates broadly in order to stimulate demand for constituent services, which are a more reliable and less controversial means of securing reelection. Specifically, Congress knows that agencies will make mistakes in implementing broad delegated authority; this generates complaints by constituents, allowing individual Members of Congress to intervene to correct the mistakes and thereby gain credit with constituents and contributors. Fiorina, supra note 241, at 44–45. Schoenbrod offers a similar analysis. Schoenbrod, supra note 10, at 85–86; cf. Epstein & O'Halloran, Delegating Powers, supra note 177, at 117–18 (presenting data suggesting that the aggregate level of discretion given to executive agencies has remained largely unchanged in the post-war era).

model.[256] Such a shift in understanding of the allocation of lawmaking power would massively transfer power to the executive and judicial branches, giving them inherent power to make law on any subject within the competence of the federal government. This would undermine a number of advantages associated with congressional participation in policymaking discussed in Part IV—such as the B&P filter and checks and balances. Moreover, such a shift would be tempting because the federal courts would be the beneficiaries of such an avulsion in understanding as much as the executive branch.[257]

A far better device for closing the gap between legal doctrine and reality would be to adopt the exclusive delegation doctrine—the understanding that only Congress can delegate legislative power. Such an understanding of Article I, Section 1 would provide a secure constitutional foundation for the administrative state in most of its manifestations. As long as Congress has acted within the scope of its enumerated powers, has clearly delegated legislative power to an agency, and the agency is clearly acting within the scope of its delegated power, there would be no constitutional defect in the resulting allocation of legislative power. Accordingly, there would be no reason to impugn the constitutionality of federal administrative agencies, to question the fidelity of the courts to the Constitution (on this score at least), or to suggest that legislators are being unfaithful to their duties when they delegate broad powers to agencies.

In addition, the exclusive delegation construction would preserve an important measure of continuity with the original architecture of the Constitution because it accords significant exclusive power to Congress in the formulation of public policy. Under exclusive delegation, although Congress would not be the sole mover in the exercise of legislative power, it would at least be the *first mover* in establishing any governmental regime that acts with the force of law. This would provide greater fidelity to the original understanding of the power and importance of the three branches of government than lax nondelegation—or the legislative supremacy construction—would.

I do not suggest that the exclusive delegation understanding would reverse the marasmus currently afflicting Congress. Congress's decline is rooted in historical and structural forces far too entrenched to be reversed by changing a proposition of constitutional law. Indeed, the les-

256. For a discussion of different models for permissible sharing of legislative power, see supra Part II.B.

257. Courts and commentators have from time to time asserted that federal courts should have inherent authority to make federal common law in areas where Congress is silent and there is perceived to be a strong interest in a federal rule. I argue against this view in Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 20–24 (1985) [hereinafter Merrill, Common Law]. What I call the "legislative supremacy sharing principle" would in effect recognize a general power on the part of agencies and courts to make federal common law.

son of Part IV is that we should not *want* to reverse Congress's relinquishment of power, if that would mean restoring Congress to the role of primary policymaker. Given the scale and complexity of the federal government—a condition that shows no sign of abating—Congress is not the optimal institution to make federal policy on many and perhaps most issues. We do not want Congress setting ambient air quality standards, targets for monetary growth, or safety procedures for commercial airplane flights. Agencies, notwithstanding all their flaws, are far better at doing these things. What we need is an understanding of constitutional architecture that solidifies and encourages this allocation of authority, not one that continually calls its legitimacy into question and breeds cynicism about every branch of government.

The exclusive delegation understanding would cast Congress in a role it is well suited to perform. The nondelegation doctrine—whether in its current anything-goes version or in a more strictly enforced version—demands that Congress directly engage in resolving contested issues of policy. The nondelegation doctrine focuses on *what* policy should be. Exclusive delegation, in contrast, demands that Congress determine whether to transfer power to other government actors and if so over what domain of policy. Exclusive delegation focuses on *who* is to decide what policy is to be. Exclusive delegation would require Congress to determine whether to create a federal agency, what kinds of powers to give it, and what sorts of controversies it should resolve. Congress, as a body of generalists whose principal area of expertise is politics, should be able to resolve such questions of institutional choice more effectively than determining the substance of specific policies.

In this respect, the exclusive delegation doctrine is also superior to the most common proposal advanced by commentators for restoring balance to the constitutional architecture: reversing *Chadha* and allowing Congress to exercise some kind of legislative veto over executive branch legislative regulations.[258] Proposals to revive the legislative veto share the same vice as proposals to revive the nondelegation doctrine: They demand that Congress inject itself into the details of particular policy disputes. It is far from clear that this cure would be better than the disease. The legislative veto would enhance the power of particular units of Congress (most likely the chairs of subcommittees), and it would do so primarily with respect to controversies over narrow points of policy—those that have crystallized at the end of the administrative rulemaking process. It would not necessarily require or even encourage Congress to deliberate

258. See, e.g., Daryl J. Levinson, Framing Transactions in Constitutional Law, 111 Yale L.J. 1311, 1367 (2002) ("[T]he legislative veto or congressional limitations on the President's removal power . . . would shift some power back from the executive to Congress."); Peter B. McCutchen, Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best, 80 Cornell L. Rev. 1, 3 (1994) (arguing that legislative veto acts as "a surrogate for the bicameral approval required to enact legislation").

about the larger and more general questions of institutional choice. In any event, the Supreme Court is just as firmly opposed to the legislative veto as it is firmly indifferent to the nondelegation doctrine, so this proposal has no realistic prospect of being adopted.[259]

The architecture of the Constitution is not fixed for all time, but evolves as institutions change and understandings of the document change. Continuity with the past is important, as is congruence among institutions and understandings. Article I, Section 1 is an important cornerstone of constitutional architecture. It will be a stronger cornerstone—providing better congruence with institutions and more continuity with our history—if interpreted as incorporating the exclusive delegation doctrine rather than the nondelegation doctrine.

VI. IMPLICATIONS

In this Part, I will briefly consider some concrete doctrinal implications that flow from embracing what I have called the exclusive delegation understanding of Article I, Section 1.

A. *Repudiating the Nondelegation Doctrine*

The first and most evident implication is that the nondelegation doctrine, as a general requirement that Congress must circumscribe the discretion of administrative agencies, should be rejected. Certainly the Court should repudiate the idea that Article I, Section 1 precludes any congressional sharing of legislative power. As long as the nondelegation understanding persists, it clouds the ability of courts to perceive the potential of the exclusive delegation doctrine. I would go further and would urge the Court to jettison both the requirement that Congress lay down an intelligible principle to constrain executive discretion and the canon favoring narrow constructions of statutes to avoid nondelegation questions.[260] If there were evidence that these understandings play a valuable role in law, then there might be some point in salvaging them,

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259. The Court has twice reaffirmed the ruling of INS v. Chadha, 462 U.S. 919 (1983). See Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 255 (1991); Bowsher v. Synar, 478 U.S. 714, 726–27 (1986); see also Clinton v. City of New York, 524 U.S. 417, 448–49 (1998) (invalidating Line Item Veto Act authorizing President unilaterally to modify statutory provisions as being inconsistent with Article I, Section 7).

260. It is important not to overstate the matter by saying the Constitution is indifferent to the delegation of powers. Given that the transferability principle of the exclusive delegation doctrine rests on the Necessary and Proper Clause, see supra text accompanying notes 123–128, and given that only Congress can invoke the Necessary and Proper Clause, it would seem that neither the President nor the Article III courts enjoy any power of delegation, unless it is given to them by Congress. See also infra Part VI.D (discussing subdelegation). Similarly, it is doubtful that the Senate, acting on its own authority, could delegate the power to confirm appointments, ratify treaties, or try impeachments. And the *Chadha* doctrine, which I believe is necessary to preserve healthy checks and balances, see supra Part IV.A.4, although it is not limited to delegations,

perhaps under the Due Process Clause or some metaconstitutional rule-of-law norm.[261] But they are not worth preserving. Neither doctrine imposes any real constraint on Congress, the agencies, or the courts. And each may do real damage by suggesting that the courts are serious about preserving an important role for Congress under the Constitution, when in fact the position of Congress is steadily eroding.

Brief mention should be made of two possible fallback positions that would preserve narrowed versions of the nondelegation doctrine. The first, which has been suggested by Todd Rakoff, would permit grants of legislative power to agencies in delimited fields of regulation, but would deem unconstitutional any delegation of "omnicompetent" legislative power that replicates the wide-ranging authority that Congress itself enjoys.[262] Inferential support for this fallback position is provided by the 1935 invalidations of the National Industrial Recovery Act.[263] The Act authorized the imposition of codes of "fair competition" on virtually all segments of the American economy, and thus could be said to constitute an omnicompetent delegation in a way that the numerous regulatory statutes the Court has upheld against nondelegation challenges do not. More recently, the Court threw off a dictum in *American Trucking* to the effect that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[264] This too might be cited in support of a rule against extremely broad delegations of discretionary power.

I am not persuaded, however, that a rule prohibiting very broad delegations of legislative power is worth preserving. Some "omnicompetent" delegations may be desirable. In a moment we will encounter important delegations permitting the President to reorganize agencies and subdelegate agency functions.[265] These delegations, which could be described as omnicompetent, have become an integral feature of our system of government and have probably played a salutary role in improving the efficiency of the far-flung federal establishment. Another example might be a future delegation permitting the President to decline to enforce spend-

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prohibits Congress from delegating legislative power to a subunit of Congress or a congressional agent.

261. In his concurring opinion in *American Trucking*, Justice Stevens indicated that he would continue to support the intelligible principle requirement. See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 489–90 (2001) (Stevens, J., concurring in part and concurring in the judgment) ("As long as the delegation provides a sufficiently intelligible principle, there is nothing inherently unconstitutional about it."). However, having rejected the understanding that Article I, Section 1 prohibits delegation of legislative power, Justice Stevens did not indicate what provision of the Constitution requires that Congress lay down an intelligible principle for the agency to follow.

262. See Todd D. Rakoff, The Shape of Law in the American Administrative State, 11 Tel Aviv U. Stud. L. 9, 22 (1992).

263. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935).

264. *American Trucking*, 531 U.S. at 475.

265. See infra Part VI.D.

ing or tax preference measures he deems inappropriate—a line item veto by delegation.[266] In addition, a distinction between delimited and omnicompetent delegations would seem to raise problems of administrability similar to those that have doomed the more general nondelegation doctrine (how broad is too broad?). Finally, the price of preserving the hypothetical possibility of future invalidations of omnicompetent delegations would appear to be continued adherence to the Court's current understandings of the meaning of legislative power and of the permissible sharing of legislative power—understandings that have been impediments to adopting the exclusive delegation interpretation of Article I, Section 1, which is better all around.

A second possible fallback position would be that even if delegations running to federal agencies and courts are permissible, delegations running to private entities and perhaps to state officials are not.[267] Here again, the invalidations of the National Industrial Recovery Act provide some inferential support, insofar as the regulations authorized by the Act were initially drafted by private trade associations before being promulgated by the President.[268] Many commentators have perceived that this "private delegation" aspect of the Act may have been especially troubling to the Court.[269] This limiting principle might also explain some recent decisions invalidating agency schemes that would transfer federal regula-

266. In *Clinton v. City of New York*, the majority opinion, written by Justice Stevens, invalidated the Line Item Veto Act as violating the constitutional procedures for the enactment of legislation under Article I, Section 7. 524 U.S. 417, 447–49 (1998). But the majority did not suggest the Act would violate the nondelegation doctrine if it had merely delegated authority to the President to decline to enforce specific expenditure and tax preference items. Id. Three Justices would have upheld the Act as a valid delegation even though it appeared to authorize the President unilaterally to amend the text of a statute. Id. at 468–69 (Scalia, J., joined by O'Connor, J., and in relevant part by Breyer, J., concurring in part and dissenting in part) ("Had the Line Item Veto Act authorized the President to 'decline to spend' any item of spending contained in the Balanced Budget Act of 1997, there is not the slightest doubt that authorization would have been constitutional."); id. at 473–80 (Breyer, J., joined by O'Connor, J., and in relevant part by Scalia, J., dissenting).

267. See generally Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1437–45 (2003) (discussing private delegation doctrine). Delegations to state entities may be permissible in circumstances in which delegations to private entities would not be. For example, it is well established that state courts may be given authority to enforce federal law. See Testa v. Katt, 330 U.S. 386, 390–91 (1947). I do not explore this refinement any further here.

268. See cases cited supra note 263; see also Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (invalidating private delegation to set wage and hour limits on due process grounds).

269. See, e.g., 1 Lawrence H. Tribe, American Constitutional Law § 5-19, at 991–92 (3d ed. 2000); James O. Freedman, Delegation of Power and Institutional Competence, 43 U. Chi. L. Rev. 307, 332–33 (1976).

tory power to largely unsupervised local governments and citizens' organizations.[270]

Delegations of federal legislative power to private actors or state government officials are troubling. But I cannot see how Article I, Section 1 can be interpreted to distinguish between different recipients of delegated legislative power. The language of Article I, Section 1 permits different interpretations of legislative power, and different interpretations of how far Congress can share that power. But it does not contain language that would permit courts to limit the recipient of delegated legislative power to federal officials.

A more plausible source of constraint on delegations to nonfederal actors is the Constitution's implicit design principle limiting the federal government to three branches. If all federal government activity is confined to three branches, then Congress cannot delegate governmental authority (i.e., the authority to act with the force of law) to a fourth branch.[271] A delegation of legislative power to a private entity or state official would violate this design principle. Alternatively, if such a delegation were deemed to be an attempt to expand the scope of either the federal executive or judicial branch, it would likely violate other constitutional provisions, such as the Appointments Clause,[272] Article III's guarantee of judicial independence,[273] or the Due Process Clause.[274]

Any principle forbidding delegation to actors outside the Executive or judicial branches would presumably extend only to powers that are "governmental," in the sense of having the force of law. Roughly speaking, this means legislative regulations and binding adjudications.[275] Other action that lacks this quality could presumably be assigned to private actors. For example, a statute directing the Department of Justice to turn its cafeteria over to an outside contractor would not seem to constitute an attempt to create a fourth branch of government. Thus, this de-

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270. See, e.g., Nat'l Park & Conservation Ass'n v. Stanton, 54 F. Supp. 2d 7, 20–21 (D.D.C. 1999) (invalidating governing council established by the National Park Service for regulating a wild and scenic river in Nebraska).

271. See Merrill, Constitutional Principle, supra note 204, at 228.

272. U.S. Const. art. II, § 2, cl. 2 (providing for presidential appointment of principal officers and restricting basis for appointment of inferior officers).

273. Id. art. III, § 1 (requiring that judges exercising the "judicial Power of the United States" shall hold their offices during good behavior and may not have their compensation diminished while in office).

274. Id. amend. V. Due process would be violated, for example, if the private delegatee did not afford the same notice and hearing opportunities to affected parties that would be required if ordinary executive branch employees exercised the power.

275. Gillian Metzger proposes a somewhat broader formulation: Transfers of authority to private entities constitute delegations when the private entity exists in an agency relationship to a governmental agency, which in turn exercises governmental power. See Metzger, supra note 267, at 1462–70. For a review of delegations to states and private parties that are arguably governmental, see Harold J. Krent, Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government, 85 Nw. U. L. Rev. 62, 80–93 (1990).

sign principle would not interfere with a good deal of what goes by the name of "privatization" in government, in the sense of contracting out support functions and information-gathering functions to nongovernmental entities.[276]

B. *The Limits of Agency Authority*

Under the exclusive delegation interpretation of Article I, Section 1, agencies generally should be denied authority to act with the force of law unless Congress has delegated such power to them. This entails two subsidiary inquiries: (1) Has Congress delegated legislative power to the agency? and (2) What is the scope of this delegation? The first is a question of agency power; the second is a question of agency jurisdiction. Both questions must be answered affirmatively before agencies can act in a governmental capacity, that is, with the force of law.

The two questions about delegated legislative power—Does it exist? What is its scope?—are sometime elided. In particular, courts and commentators sometimes forget that agencies can be given authority to study, investigate, or issue advisory opinions in an area, without being given power to issue regulations and/or adjudicatory decisions that have the force of law. The Equal Employment Opportunity Commission, for example, with respect to its authority under the Civil Rights Acts of 1964, can issue interpretations of the Act and right-to-sue letters, but it has no authority to render binding adjudications or legislative rules.[277] This is an example of an agency that has jurisdiction over a set of issues (employment discrimination), but does not have delegated power to act with the force of law.

Courts and commentators are less likely to ignore the question of agency jurisdiction or scope of authority.[278] But even here there have been some spectacular breaches of principle, such as the Supreme Court's decisions authorizing the Federal Communications Commission to regulate cable television based on the theory that such regulation was "reasonably ancillary" to its statutory authority over broadcast televi-

276. I recognize that this paragraph glosses over a great deal of complexity in the world of privatization. For a sense of the manifold nature of privatization, see generally Jody Freeman, Extending Public Law Norms Through Privatization, 116 Harv. L. Rev. 1285 (2003); Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543 (2000).

277. See 42 U.S.C. § 2000e-12(a) (2000) (authorizing EEOC to seek to resolve complaints by conciliation and to file civil charges against nongovernmental parties, but providing for reference to the Attorney General for potential suit against governmental parties, and issuance of private "right to sue" letters if the EEOC or the Attorney General decline to file charges); id. § 2000e-5(b), (f) (authorizing EEOC to seek to resolve complaints by conciliation, but providing for reference to the Attorney General for potential suit or issuance of private "right to sue" letter if conciliation fails).

278. See, e.g., Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990) ("[I]t is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" (citation omitted)).

sion.[279] The FCC had been delegated authority to issue legislative rules that regulate broadcasters.[280] But when the FCC first asserted authority over cable operators, Congress had not given the agency any delegated power to regulate cable television.[281] This is an example of an agency having power to act legislatively but using those powers outside the area of its delegated jurisdiction.

The difficult issue here is not identifying the relevant questions but specifying how clearly Congress must answer them. If we were writing on a blank slate, the best answer might be that Congress should answer these questions *expressly*, that is, Congress should in so many statutory words convey power to act with the force of law and demarcate the sphere in which this power may be exercised.[282] Such a rule would maximally preserve the power and authority of Congress under Article I, Section 1, as interpreted in accordance with the exclusive delegation doctrine. And it would provide unequivocal notice to agencies, courts, states, and interest groups that legislative power has been transferred. Unfortunately, such a standard of proof would have the effect of invalidating virtually all existing delegations of legislative power, and hence would be radically destabilizing.[283]

A better standard, given existing institutional realities, is probably one that would require a showing of a *clear intent* on the part of Congress.[284] This standard would not require that Congress use any particular words or phrases in the delegatory statute. It would permit an inference of delegation to be drawn based on the logic and structure of the legislation together with the deployment of certain canons or conventions. Legislative history materials could also be consulted, if the interpreter otherwise decides it is appropriate to consult such materials. As with any clear intent standard, the interpreter would have to be firmly

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279. See United States v. Midwest Video Corp., 406 U.S. 649, 657–58 (1972); United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

280. See 47 U.S.C. § 303(f), (i), (j) (2000). See generally Merrill & Watts, supra note 6, at 517–19 (discussing FCC rulemaking grants).

281. Congress subsequently amended the Communications Act to provide expressly for FCC regulation of cable systems. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended at 47 U.S.C. § 521).

282. For examples of express statement standards, see Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (requiring "plain statement" from Congress before statute will be interpreted as interfering with traditional state prerogatives in setting conditions of employment for state officials); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (requiring that any abrogation of state sovereign immunity be effected through statutory language that targets the issue in specific language). See generally William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 597 (1992) (discussing recent development of "'super-strong clear statement rules' protecting constitutional structures").

283. See Merrill and Watts, supra note 6, at 582 ("Effectively, an express-statement rule would be the undoing of the administrative state.").

284. For an example of a clear intent standard of this nature, see Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1981) (stating that conditions attached to federal grants affecting state programs will be enforced only if clearly set forth).

convinced by these materials that Congress did in fact decide to delegate the required authority. More than a preponderance of the evidence would be necessary; how much more is impossible to delineate with any kind of mathematical precision.

Adoption of the clear intent standard would have real bite in certain contexts. It would mean, most prominently, that courts would have to repudiate decisions adopting a casual attitude toward whether agencies can engage in legislative rulemaking. The assumption has arisen in recent decades that any agency that has been given authority to make "rules and regulations" has been delegated power to issue rules with the force of law, as opposed to merely procedural or interpretive rules.[285] But if agencies have no inherent lawmaking authority and must derive any authority to engage in legislative rulemaking from an affirmative grant from Congress, then something more than an ambiguous grant of rulemaking power should be required before agencies are allowed to exercise legislative power. At a minimum, courts should demand some kind of signal—such as a legislative specification of sanctions for those who violate agency rules—indicating a clear intent on the part of Congress that the required delegation has been made.[286]

C. *How* Chevron *Fits In*

The exclusive delegation conception of Article I, Section 1 also dovetails nicely with the Supreme Court's recent jurisprudence on the allocation of interpretational authority between courts and agencies. As first enunciated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[287] and elaborated in *United States v. Mead Corp.*,[288] that jurisprudence is based on congressional delegation of legislative power to agencies. If Congress has delegated power to an agency to act with the force of law, and the agency interprets an ambiguity in the statute while exercising that delegated authority, then the agency interpretation must be accepted by the court if it is a reasonable one.[289] If Congress has not given the agency power to act with the force of law, or if the agency is not exercising that power when it interprets the statute, then the agency interpretation will be adopted by the court only if the court finds it persuasive based on multiple contextual factors.[290] It is difficult to overstate the

285. See supra notes 66–67 and accompanying text.

286. For further discussion, see Thomas W. Merrill, The *Mead* Doctrine: Rules and Standards, Meta-Rules and Meta-Standards, 54 Admin. L. Rev. 807, 823–25 (2002); Merrill & Watts, supra note 6, at 576–87.

287. 467 U.S. 837 (1984).

288. 533 U.S. 218 (2001).

289. Id. at 226–27, 237–38.

290. Id. at 234–35. This is the so-called *Skidmore* deference standard, named for Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that courts should weigh agency interpretations against a variety of factors and should defer to such interpretations if they are persuasive). Judge Posner has suggested that post-*Mead* decisions portend a merger of *Chevron* and *Skidmore*. Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7th Cir. 2002).

importance of this jurisprudence to modern administrative law. The *Chevron* doctrine, as clarified by *Mead*, is the template through which federal courts approach virtually all questions of statutory interpretation when reviewing agency action. The doctrine has been applied in thousands of cases[291] and serves as the metric by which the relative power of courts and agencies is sorted out at the retail level in the modern administrative state.

The first thing to note about the *Chevron* doctrine, as clarified by *Mead*, is that it presupposes that Congress *does* have authority to delegate the power to act with the force of law to agencies. The strict nondelegation doctrine, as espoused by Schoenbrod, Lawson, and others, denies this. Hence, strict enforcement of the nondelegation doctrine would seem to cut the legs out from under *Chevron*. Indeed, the premise of *Chevron* is that the more discretion Congress gives the agency, the more deference courts should give to agency interpretations of law.[292] The premise of the nondelegation doctrine, in contrast, is that the more discretion Congress gives the agency, the closer Congress comes to acting unconstitutionally, and hence the more important it becomes that *the courts* either supply a narrowing construction of the statute or remand the matter to Congress.[293] Thus, *Chevron* and the nondelegation doctrine, if not inconsistent, are at the very least pointed in opposite directions when it comes to determining the judicial response to discretionary agency power.[294]

Contra id. at 882 (Easterbrook, J., concurring) ("I do not perceive in *Walton* any 'merger' between *Chevron* and *Skidmore* . . . .") (citation omitted). But this is premature. The "eliding" decisions are all written by Justice Breyer, who has long disfavored *Chevron* and probably does not speak for the full Court on this matter. See Henry Paul Monaghan, Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases, 103 Colum. L. Rev. 1919, 1988 n.338 (2003).

291. *Chevron* is the most cited decision in all administrative law. See Stephen G. Breyer et al., Administrative Law and Regulatory Policy 289 (5th ed. 2002).

292. Under *Chevron*, courts exercise independent judgment when enforcing a statute only if its meaning is unambiguous. *Chevron*, 467 U.S. at 842–43. If there is a gap or ambiguity, the court is to defer to the agency interpretation, if it is reasonable. Consequently, the more discretionary (less clear) the statute, the more power flows to the agency. Id. at 842–44. In a famous passage in *Chevron*, Justice Stevens said that Congress's reasons for delegating authority to an agency are irrelevant in determining whether the agency or the judiciary is to exercise primary interpretational authority; it may even be that "Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency." Id. at 865. This concept, of course, is anathema to the proponents of a strict nondelegation doctrine, who rail against allowing Congress to shirk its legislative responsibilities.

293. See, e.g., Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (narrowing construction); id. at 687–88 (Rehnquist, J., concurring in judgment) (remanding to Congress).

294. For an early recognition of this point, see Douglas W. Kmiec, Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine, 2 Admin. L.J. 269, 269–70 (1988).

The exclusive delegation conception, in contrast, supplies a secure foundation for the *Chevron* doctrine and reinforces the basic soundness of its allocation of interpretational authority. Under the exclusive delegation doctrine, Congress is free to transfer legislative powers to another branch of the federal government. When Congress transfers such power to an administrative agency, and the agency exercises this power, this is appropriately viewed as a signal by Congress that it wants agencies, rather than the courts, to fill gaps and ambiguities in the statute.[295] Alternatively, when Congress delegates power to courts in broad language, this should be seen as a signal that Congress wants the court to do the gap-filling and ambiguity-resolving, not the agency.[296] When Congress declines to delegate legislative power to either an agency or the courts, but establishes a regime that calls for enforcement by the Executive and adjudication by the courts—criminal law is a prime example—then the appropriate inference should be that Congress wants the courts to interpret gaps and ambiguities as faithful agents of Congress; that is, Congress anticipates that the statute will be read the way that the enacting legislature would most likely want it to be read.

Although exclusive delegation synchronizes nicely with the jurisprudence of *Chevron*, there are certain *Chevron* issues that would be clarified by adopting this interpretation of Article I, Section 1. One important question concerns whether courts should give agencies *Chevron* deference with respect to interpretations that affect the scope of the agency's jurisdiction. The explicit debate among the Justices about this issue was short lived and inconclusive.[297] Some decisions have clearly applied *Chevron* to questions that affect the scope of an agency's regulatory power.[298] Others, perhaps most prominently *FDA v. Brown & Williamson Tobacco Corp.*,[299] have declined to defer to interpretations that would significantly change the scope of agency power, although they have not framed their inquiry in terms of expansion (or contraction) of agency jurisdiction.

The logic of the exclusive delegation doctrine suggests that courts should not give *Chevron* deference to agencies with respect to questions that implicate the scope of the agency's jurisdiction. If agencies have no

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295. See Thomas W. Merrill & Kristin E. Hickman, *Chevron*'s Domain, 89 Geo. L.J. 833, 877 (2001).

296. See Merrill, Common Law, supra note 257, at 40–46 (discussing decisions supporting inference that "'Congress has given the courts the power to develop substantive law'") (quoting Tex. Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).

297. See Miss. Power & Light v. Miss. ex rel. Moore, 487 U.S. 354, 381–82 (1988) (Scalia, J., concurring) ("[I]t is plain that giving deference to an administrative interpretation of [an agency's] statutory jurisdiction or authority or both is necessary and appropriate."); id. at 386–87 (Brennan, J., dissenting) ("[T]his Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its jurisdiction.").

298. See, e.g., United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985) (giving *Chevron* deference to agency definition of "navigable waters," which in turn defined the scope of its authority under the Clean Water Act).

299. 529 U.S. 120 (2000).

inherent authority to act with the force of law, but are dependent on a delegation from Congress for such authority, then it is important that courts enforce the limits of the delegation.[300]

The main counterargument has been that it is difficult, if not impossible, to differentiate between "jurisdictional" agency decisions and "ordinary" agency decisions. As Justice Scalia, the principal opponent of any jurisdictional exception, has put it, "there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority."[301] This may be right, if we conceive of the task as trying to develop some abstract definition that distinguishes between "jurisdictional" and "nonjurisdictional" questions. But there is no need to proceed this way. It is far more sensible to think of the question in historical terms: What has the agency done in the past, and what is it proposing to do now? Those who are familiar with an agency's regulatory history will usually have no difficulty identifying issues that fall within the scope of what the agency has done in the past.[302] This is the logical benchmark against which "jurisdiction-altering" proposals can be identified. When they are identified, courts should not necessarily invalidate the agency's proposed change in the scope of its regulatory authority. The question remains whether the agency's departure from past regulatory practice is or is not consistent with the scope of authority delegated to it by Congress; the court may ultimately conclude that the agency is respecting the boundaries established by Congress. But the court should not give *Chevron* deference to the agency's own view of whether its change of course is consistent with its delegated authority.

That courts should not give *Chevron* deference to jurisdiction-altering decisions does not mean they should give no heed to agency views about the appropriate scope of agency authority. This would appear to be an area where *Skidmore* deference rather than *Chevron* deference is appropriate.[303] That is, courts should consider the thoroughness of the

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300. Most of the academic commentary that has addressed the question concurs that *Chevron* should not apply to questions that implicate the scope of agency jurisdiction. See, e.g., Elizabeth Garrett, Legislating *Chevron*, 101 Mich. L. Rev. 2637, 2673–74 (2003); Ernest Gellhorn & Paul Verkuil, Controlling *Chevron*-Based Delegations, 20 Cardozo L. Rev. 989, 992–93 (1999); Michael Herz, Deference Running Riot: Separating Interpretation and Lawmaking Under *Chevron*, 6 Admin. L.J. Am. U. 187, 216–21 (1992); Cass R. Sunstein, Law and Administration after *Chevron*, 90 Colum. L. Rev. 2071, 2099 (1990).

301. *Miss. Power & Light*, 487 U.S. at 381 (Scalia, J., concurring in the judgment).

302. Indeed, in the very case in which Justice Scalia complained that it was impossible to distinguish between jurisdictional and nonjurisdictional issues, he discussed at length the question of whether FERC had jurisdiction to review the prudence of certain wholesale power pooling arrangements. Id. at 377–83. He clearly understood that to be within an agency's "jurisdiction" means to be within the scope of its authority, and he clearly recognized that there was a live debate about whether this type of prudence question was within or not within the scope of FERC's authority. See id. at 377–78. Once the question was resolved in favor of FERC's authority, he further recognized that it was a distinct question as to whether FERC had exercised that authority properly. Id. at 383.

303. See Merrill & Hickman, supra note 295, at 909–14.

agency's reasoning, the consistency of the agency's present view with its past practice, and other variables in determining whether to follow the agency's lead. This standard allows the court to tap into the agency's experience and expertise, while at the same time providing an independent check necessary to vindicate congressional supremacy in establishing the sphere in which the agency is permitted to exercise delegated legislative power.

D. *Subdelegation*[304]

There was once an active jurisprudence that addressed the question whether the President or the heads of departments have the power to subdelegate tasks that have been assigned to them by Congress.[305] The answer was never very clear, with some decisions suggesting that the President and department heads have inherent authority to delegate decisions to subordinate officers, and others suggesting that subdelegation is permissible only when authorized by Congress.[306] The issue has come to the fore again. A recent D.C. Circuit decision holds that the Federal Communications Commission has no authority to subdelegate federal regulatory authority to state administrative bodies.[307] And scholars have raised the possibility of limiting *Chevron* deference to exercises of primary authority, as opposed to subdelegated authority.[308] These developments raise the

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304. This subpart draws on an excellent paper by Aimee MacKay undertaken as part of a senior research project at Northwestern University School of Law in 2001–2002.

305. For an overview of older authorities, see generally Nathan D. Grundstein, Subdelegation of Administrative Authority, 13 Geo. Wash. L. Rev. 144 (1944). Professor Davis argued that agencies enjoy an inherent power of subdelegation, as long as the subordinate entity's or employee's discretion is governed by appropriate standards. Kenneth Culp Davis, Administrative Law Treatise § 3.17, at 219 (2d ed. 1978). Although early editions of his casebook contained a chapter on subdelegation, see, e.g., Kenneth Culp Davis, Administrative Law: Cases—Text—Problems 201–07 (1965), he later reduced coverage of the issue, announcing that "good lawyers are no longer making arguments in federal courts that power may not be subdelegated." Kenneth Culp Davis, Administrative Law: Cases—Text—Problems 51 (6th ed. 1977).

306. For decisions suggesting inherent authority, see, for example, Miller v. Mayor of New York, 109 U.S. 385, 394 (1883) (holding that Secretary of War could assign authority to subordinate officer to determine how high Brooklyn Bridge should be to avoid obstructing navigation in East River); Williams v. United States, 42 U.S. (1 How.) 290, 297 (1843) (stating that it would be "impossible" for the President personally to attend to the performance of every duty assigned him by statute). For decisions suggesting that subdelegation must be authorized by Congress, see, for example, Botany Worsted Mills v. United States, 278 U.S. 282, 288 (1929) (holding that authority of Commissioner of Internal Revenue Service to settle tax claims before suit could not be subdelegated absent clearer statutory authority to do so); Runkle v. United States, 122 U.S. 543, 557 (1887) (invalidating court martial during peace time authorized by the Secretary of War but not the President on the ground that the statute required presidential approval).

307. United States Telecom Ass'n v. FCC, 359 F.3d 554, 568 (D.C. Cir. 2004).

308. See David J. Barron & Elena Kagan, *Chevron*'s Nondelegation Doctrine, 2001 Sup. Ct. Rev. 201, 235–36.

question of whether or to what extent subdelegation is consistent with the exclusive delegation construction of Article 1, Section 1.

The exclusive delegation doctrine suggests that the President and executive branch agencies can subdelegate only if and to the extent Congress has authorized subdelegation. The exclusive delegation understanding tells us the Executive has no inherent authority to exercise legislative power. It would seem to follow that if Congress has transferred specific legislative authority to the President, or to a named department head or agency, the recipient of the delegated power has no inherent authority to retransfer the power to someone else. Responsibility for the exercise of the delegated power must rest where Congress has placed it, otherwise Congress has been deprived of its exclusive authority to delegate these powers. On the other hand, we know that Congress can transfer the power to exercise legislative power. So it would seem reasonable to conclude that Congress can also transfer the power to subdelegate delegated power.

If this is right, then subdelegation controversies present essentially the same two issues presented in a primary delegation controversy: Does power to subdelegate exist? And what is the scope of the power to subdelegate? Once again, courts should be able to say that Congress clearly intended an affirmative answer to both questions before permitting subdelegation of legislative power.

Would these understandings create insuperable difficulties for the administrative state? Perhaps they would have caused some problems in the early decades of the twentieth century, but almost certainly not today. In a series of general enactments traceable to the recommendations of the Hoover Commission of 1949,[309] Congress has delegated broad authority to the President and executive branch departments to subdelegate. Since 1951 the President has been authorized to subdelegate virtually any function he is required by law to perform to "the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate."[310] The President also has general authority, by executive reorganization order, to authorize any officer of any agency "to delegate any of his functions."[311] This general authority of the President to authorize subdelegations is supplemented by numerous specific provisions authorizing particular departments or agencies to subdelegate their au-

309. Comm'n on Org. of the Exec. Branch of the Gov't, The Hoover Commission Report on Organization of the Executive Branch of the Government 433–39 (1949).

310. 3 U.S.C. § 301 (2000).

311. 5 U.S.C. § 903(a)(5) (2000). This statute dates to the Reorganization Act of 1951, which was codified and made permanent in 1966. As enacted, the reorganization plans that were to be submitted to Congress could be vetoed by a majority resolution of either House. Such one-house vetoes were declared unconstitutional in INS v. Chadha, 462 U.S. 919, 928 (1983). The current version simply requires that the plan be submitted to Congress at least sixty legislative days before it takes effect, 5 U.S.C. § 903(c), apparently with the expectation that if there is a strong objection it will he withdrawn by the President.

thority. For example, the Attorney General is authorized to subdelegate as "he considers appropriate" any of his statutory functions to "any other officer, employee, or agency of the Department of Justice."[312] And the Federal Communications Act authorizes the Commission, when "necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business," to subdelegate "any of its functions" to "a panel of commissioners, an individual commissioner, an employee board, or an individual employee," subject to a variety of exceptions.[313]

The jurisprudence on authorizations of subdelegation, to the extent it exists, is broadly consistent with the exclusive delegation doctrine. It says that clear grants of authority to subdelegate should be enforced according to their terms, unless a more specific statute indicates a contrary intent to preclude subdelegation.[314] As always, there will be questions about how clear is clear. The Court arguably demanded too much clarity in *Cudahy Packing Co. v. Holland*, when it held that a statute authorizing the Administrator of the Wage and Hour Division of the Department of Labor to subdelegate investigatory functions did not authorize subdelegation of the power to issue subpoenas.[315] It probably went too far in the opposite direction five years later in *Fleming v. Mohawk Wrecking and Lumber Co.*, when it upheld the Administrator's power to subdelegate subpoena power under another statute based on statements contained only in the legislative history.[316] Understanding the logic of exclusive delegation should bring more clarity and coherence to the resolution of these sorts of questions about subdelegation.

E. *Inherent Presidential Powers*

Finally, the exclusive delegation interpretation of Article I, Section 1 has implications for the perennial debate over inherent Presidential powers. In recent years, two doctrinal battles have been fought over this subject. The large battle has been between the "formalist" approach associ-

312. 28 U.S.C. § 510 (2000) (originally part of a reorganization plan, codified in 1966).

313. 47 U.S.C. § 155(c)(1) (2000) (originally enacted in 1952).

314. See Touby v. United States, 500 U.S. 160, 169 (1991) (upholding subdelegation of Attorney General's authority to designate designer drugs to Drug Enforcement Agency based on the general authority of 21 U.S.C. § 871(a) (2000)); United States v. Giordano, 416 U.S. 505, 508 (1974) (invalidating subdelegation to executive assistant of Attorney General's authority to seek wiretap order, based on specific statutory language requiring that such a request be made by the Attorney General or a specially designated Assistant Attorney General).

315. 315 U.S. 357, 367 (1942).

316. 331 U.S. 111, 120–23 (1947). I am not suggesting that the outcome in *Fleming* was wrong. The statutory language was probably sufficient to support subdelegation of the subpoena power, but the Court, in seeking a way to uphold the subdelegation without overruling *Cudahy*, reached for an explanation that focused solely on the legislative history of the later Act. Its rationale therefore seemed to countenance subdelegation based solely on legislative history, which in my view falls short of showing Congress as a whole has clearly conferred the required power.

ated with Justice Black's opinion in the *Steel Seizure* decision,[317] and the "functionalist" approach allied with Justice Jackson's concurrence in that case.[318] Roughly speaking, the formalist position has been that any exercise of presidential power must be traceable to some source in enacted law—a statute, a treaty, or a provision of the Constitution. The functionalist position has been that this rule is too constraining, and that other factors, including longstanding practice, congressional acquiescence, and the exigencies of the day should also enter into determining the precise scope of presidential powers.[319] Within this large battle a narrower battle has also raged over the meaning of the Vesting Clause of Article II. Here, one school has asserted that the Vesting Clause is itself an affirmative grant of presidential power, above and beyond the individually listed powers of Article II.[320] An opposing school has insisted that the Vesting Clause is just descriptive of the functions of the President, and that the constitutional power of the President is limited to the specifically enumerated grants of power in Article II.[321]

I cannot begin to resolve these questions here. Instead, I will simply note three ways in which the exclusive delegation reading of Article I, Section I sheds additional light on the debate over inherent presidential powers. None of these illuminations significantly disturbs the existing consensus about the scope of inherent presidential powers, as explicated by Professor Monaghan.[322] But they may permit a more confident claim that the current consensus is consistent with the Constitution.

First, the anti-inherency principle of Article I, Section 1 precludes any claim of inherent presidential power to exercise legislative power over matters that fall within the scope of the enumerated powers granted to Congress in Article I. Thus, for example, the President has no inherent power to prescribe legislative rules for levying taxes, to borrow money, or to establish rules for the regulation of interstate commerce, immigration, or bankruptcy.[323] In this sense, Justice Black was right. This conclusion, of course, does not eliminate the possibility of claims of presidential power based solely on powers granted by Article II of the Constitution, including claims grounded in specific grants of power in Article II or even claims predicated on the understanding that the Vesting Clause of Article II is itself a grant of power. But it does impose a

317. See Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 585 (1952) (Black, J.).

318. Id. at 635 (Jackson, J., concurring).

319. For an overview, see generally Erwin Chemerinsky, Controlling Inherent Presidential Power: Providing a Framework for Judicial Review, 56 S. Cal. L. Rev. 863 (1983).

320. Calabresi, supra note 117, at 1389–1400; Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 570–78, 604–15 (1994).

321. Flaherty, supra note 137, at 1788–92.

322. See Monaghan, Protective, supra note 83, at 38–74.

323. U.S. Const. art. I, § 8.

substantial limitation on the outer reach of any claim of inherent presidential power.

Second, the exclusive delegation understanding of Article I, Section 1 eliminates any doubt about the propriety of Congress enacting laws that broadly transfer discretionary power to the President. Many controversies about inherent presidential power can be successfully resolved by identifying statutory delegations that confer adequate authority to support the challenged executive action.[324] The exclusive delegation understanding establishes that there is nothing constitutionally suspect about this, and indeed, makes this the preferred mode of resolving such controversies, since the challenged federal action has the support of two branches of government. In this sense, Justice Jackson was right.

Third, the proposed interpretation of "herein" in Article I, Section 1 suggests that action that can be characterized as "legislative" may be within the constitutional power of the President, even if not authorized by Congress, as long as it is grounded in a sound interpretation of one of the powers granted to the President by Article II. The classic example would be rules for the discipline of the armed forces. Article I, Section 8 authorizes Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces."[325] If Congress exercises this power, then the President is bound to enforce any rules Congress has laid down—this is the basic postulate of legislative supremacy on which all agree. But if Congress fails to exercise such power or fails to exercise it with respect to one or more issues of military conduct that arise, then it is possible that the President may invoke his power as "Commander in Chief of the Army and Navy of the United States"[326] to issue interim or supplementary rules, provided they are consistent with any code of conduct Congress has promulgated.[327] These Article II-based powers thus provide the President with greater authority to act in a legislative capacity than most formalist readings of the Constitution have acknowledged.

Whether these qualifications of inherent presidential powers would eliminate or solve many disputes is debatable. But at the very least, they would change the terms of the debate. Consider, as a possible illustration, the issue presented in *In re Neagle*.[328] Neagle was a U.S. Marshall assigned by the Attorney General to protect Justice Stephen Field while he was performing circuit duties in California. In the course of those duties, Neagle killed a man he reasonably believed to be threatening the

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324. See, e.g., Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639–41 (2004) (construing congressional authorization for use of military force as conferring authority on President to detain "enemy combatants" apprehended on field of battle); Dames & Moore v. Regan, 453 U.S. 654, 669–74 (1981) (construing multiple congressional enactments as conferring authority on President to abrogate private liens on Iranian assets).

325. U.S. Const. art. I, § 8, cl. 14.

326. Id. art. II, § 2, cl. 1.

327. See, e.g., Loving v. United States, 517 U.S. 748, 767 (1996); United States v. Eliason, 41 U.S. (1 Pet.) 291, 301 (1842).

328. 135 U.S. 1 (1890).

life of the Justice. Neagle was imprisoned by state authorities, and the question was whether his assignment to protect Justice Field was a "law of the United States," making Neagle eligible for release through a federal writ of habeas corpus.[329]

The majority held that Neagle was entitled to the writ. Much of its analysis seemed to suggest that the federal executive branch has inherent power to act to protect a threatened Justice.[330] The dissenters would have denied the writ, because they could discover no federal statute authorizing Neagle's assignment to protect Field. They argued that under Article 1, Section 1 of the Constitution, only Congress has the power to enact "laws." Since Congress had not legislated, there was no "law of the United States" to shield Neagle from state prosecution.[331]

It is worth considering how the issue might be resolved in light of the exclusive delegation construction of Article 1, Section 1. This construction suggests, on the one hand, that it is untenable to argue the President has inherent authority, without regard to enacted law, to prescribe rules for the protection of federal judges performing circuit duty. Such a rule would seem to fall within the Article I power of Congress to "constitute Tribunals inferior to the supreme Court,"[332] as augmented by the Necessary and Proper Clause. On the other hand, given that Congress had failed to enact such a statute, arguably the President has constitutional authority, based on his Article II duty to "take Care that the Laws be faithfully executed,"[333] to issue appropriate orders for the protection of federal judges threatened with violence. Moreover, such orders would arguably have the force of law. If these propositions could be established, then, contrary to the dissenters, Article I, Section 1 would not impose any barrier to considering these orders to be part of the "laws of the United States," and hence would not necessarily bar Neagle from obtaining habeas relief.

Viewing the controversy through the prism of the exclusive delegation doctrine would not provide all the answers to the puzzle about whether Neagle was being held in violation of the "laws of the United States." But it would possibly present more sharply focused questions,

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329. Id. at 40.

330. See, e.g., id. at 59 ("It would be a great reproach to the system of government of the United States . . . if there is . . . no means of protecting the judges . . . from the malice and hatred of those upon whom their judgments may operate unfavorably."). The majority at one point appeared to rely on a federal statute. See id. at 68 (citing a federal statute giving U.S. Marshalls the same authority in enforcing the law as sheriffs of the state in which they are located, and arguing that a sheriff in California would be empowered to commit a justifiable homicide in thwarting an attempted deadly assault). But this statute did not answer the objection as to the authority to assign Neagle to guard Justice Field in the first place.

331. Id. at 88–94 (Lamar, J., dissenting).

332. U.S. Const. art. I, § 8, cl. 9.

333. Id. art. II, § 3.

which might be resolved by more principled answers. This outcome would represent at least a small measure of progress.

CONCLUSION

The orthodox understanding of Article I, Section 1 has been that it prohibits delegation of the legislative power. This understanding, however, is in tension with the institutional reality that agencies routinely engage in legislative rulemaking. Courts have been able to reconcile the orthodox understanding with institutional reality only by adopting a peculiar definition of "legislative power" as the exercise of unconstrained discretion. But the line between constrained and unconstrained discretion is difficult to discern. This difficulty, together with persistent judicial fears about disrupting established institutional practice, has led to judicial refusal to enforce the orthodox understanding of Article 1, Section 1. The result, paradoxically, has been an interpretation that purports to give great constitutional significance to Congress, but actually serves to weaken its position within a system of separation of powers.

Another understanding, also associated with Article I, Section 1, is that agencies and courts have no inherent lawmaking authority and must derive any power to act with the force of law by a clear delegation from Congress. This understanding is much more congruent with institutional practices. Yet, perhaps because it is in serious tension with the orthodox understanding that the legislative power can never be delegated, it is less often invoked and often ignored by modern courts.

I have argued that it is time to rethink Article I, Section 1, and that the second tradition—exclusive delegation—provides a better foundation for understanding the role of Congress under the Constitution. The Constitution is about the allocation of power. Congress, as the first branch of government, is the primary source of governmental authority. At least with respect to the powers enumerated in Article I, only Congress can open the gates of power, and only Congress can direct where the power will flow. It does not follow, however, that Congress must make all federal policy, even on matters that are important, controversial, or entail significant discretion. It is vital to read the Constitution in a way that preserves the understanding that Congress is the source of most governmental power, while accommodating a system of government capable of dealing with problems of a magnitude and complexity far beyond anything imaginable when the document was ratified. The exclusive delegation doctrine promises to accomplish this, even as the nondelegation doctrine has failed.