REVITALIZING THE NONDELEGATION DOCTRINE[*]

PAUL J. LARKIN[**]

A Review of *The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine* (Peter J. Wallison & John Yoo eds., Am. Enter. Inst. 2022).

Administrative law lies at the intersection of civics, political science, and constitutional law, with each field contributing to the structure of and justification for the administrative state that governs much of contemporary life. Fortunately, administrative law attracts some of the brightest and most prolific scholars in the academy and legal profession. Through books, articles, and blog posts, they regularly debate the competing positions on how the regulatory state should be structured and how a particular architecture advances the public interest while remaining faithful (or not) to the tenets of the three fields noted above. There is an enormous body of literature in this field, and, given the subject's importance, there is no reason to believe that this scholarly output will slow down in the foreseeable future.[1]

---

[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

[**] John, Barbara & Victoria Rumpel Senior Legal Research Fellow, The Heritage Foundation. The views expressed in this article are the author's own and should not be construed as representing any official position of The Heritage Foundation. I am grateful to GianCarlo Canaparo, Jack Fitzhenry, John G. Malcolm, Saikrishna Bangalore Prakash, Paul Ray, Richard Reinsch, David Schoenbrod, Peter Wallison, and Zack White for helpful comments on an earlier iteration of this book review. Any errors are mine. In the interest of full disclosure, I was one of the lawyers who represented the federal government in a case cited below, *Mistretta v. United States*, 488 U.S. 361 (1989).

[1] Numerous excellent books and articles grace the shelves in law libraries. For a very small sample of them, see RICHARD A. EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW (2020); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE (Dean Reuter & John Yoo eds. 2016); CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE

A recently published book—*The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine*—is a timely and valuable contribution to that literature.[2] It addresses a subject of intense scrutiny in today's administrative law scholarship: the Nondelegation Doctrine.[3] Nondelegation literature focuses on the issue of what limits, if any, there are on Congress's ability to delegate to agencies the power to adopt rules that bind the public.[4] The editors, Peter Wallison and John Yoo, persuaded more than

---

ADMINISTRATIVE STATE (2020); PETER WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE (2018); Christopher DeMuth, *The Regulatory State*, 31 NAT'L AFFAIRS 70 (Summer 2012); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Gillian E. Metzger, Foreword: *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852 (2020); Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987); James Q. Wilson, *The Rise of the Bureaucratic State*, 31 PUB. INTEREST 77 (Fall 1975).

[2] THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE (Peter J. Wallison & John Yoo eds. Am. Enter. Inst. 2022) (hereafter NONDELEGATION PERSPECTIVES).

[3] Several other issues are also the subject of ongoing debate. One is what deference, if any, should the courts afford an agency's interpretation of a statute or agency rule. *See*, *e.g.*, Chevron U.S.A. Inc v. Nat. Res. Def. Council, 467 U.S. 837 (1984) (statute); Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (agency rule). Another is what limitations, if any, may Congress place on the President's authority to remove agency officials. *See*, *e.g.*, Collins v. Yellen, 141 S. Ct. 1761 (2021) (presidential removal); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (same). A third issue is the clarity and specificity required of Congress to grant agencies broad authority to decide major economic- and social-policy issues. *See*, *e.g.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022); Nat'l Fed'n Indep. Business (NFIB) v. OSHA, 142 S. Ct. 661 (2022); Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 1485 (2021); Utility Air Reg'y Grp. v. EPA, 573 U.S. 302 (2014). Still another issue is the application of the Seventh Amendment civil jury trial guarantee to common law actions that an agency seeks to litigate before an administrative law judge rather than in federal district court. *See* Jarkesy v. SEC, 34 F.4th 445, 451-59 (5th Cir. 2022). Finally, there is the issue of what, if any, limitations there are on a legislature's power to delegate lawmaking authority to private parties. *See*, *e.g.*, Carter v. Carter Coal, 298 U.S. 238 (1936); Eubank v. Richmond, 226 U.S. 137 (1912). For a sample of the literature discussing those issues, see THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE (2022); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017); Paul J. Larkin, Jr., *The Private Delegation Doctrine*, 73 FLA. L. REV. 31 (2021). These topics are beyond the scope of this book review.

[4] A classic work in this field is DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993). For supporters of a revitalized Nondelegation Doctrine, see, for example, THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 125-26 (2d ed. 2009); Larry Alexander &

a dozen scholars and practitioners to examine the Nondelegation Doctrine and draft predictions about its future. The authors do not disappoint. The collection of essays brings to mind a remark made by President John F. Kennedy at a White House dinner for Nobel laureates. With his typical eloquence, President Kennedy said that "this is the most extraordinary collection of talent . . . that has ever been gathered together at the White House, with the possible exception of when Thomas Jefferson dined alone."[5] The same could be said about *Nondelegation Perspectives*. The goal of this book review is to do justice to the essayists and their work in this valuable book.

The vitality of the Nondelegation Doctrine is an important public policy issue. Statutes and rules reflect a tradeoff between often-conflicting values, such as "human health versus economic growth."[6] Different people balance those interests differently, and the theory of our system is that the electorate chooses representatives to express its different views. But the citizenry elects none of the executive agency officials whom Congress vests with the authority to manage the national government's business, which perennially raises

---

Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147 (2017); Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718 (2019); Gary Lawson, *"I'm Leavin' It (All) Up to You":* Gundy *and the (Sort of) Resurrection of the Subdelegation Doctrine*, 2018-2019 CATO SUP. CT. REV. 33; Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015); David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213 (2020); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021). For some critics of the doctrine who would prefer to see it dead (or prefer that the courts be honest about its demise and give it a decent burial), see Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021); Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 264 (2012); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017). *Compare* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (arguing that nondelegation principles are relevant to statutory interpretation, but should not serve as a freestanding constitutional challenge to statutes).

[5] Univ. of Calif. at Santa Barbara, The American Presidency Project, President John F. Kennedy's Remarks at a Dinner Honoring Nobel Prize Winners of the Western Hemisphere, Apr. 29, 1962, https://www.presidency.ucsb.edu/documents/remarks-dinner-honoring-nobel-prize-winners-the-western-hemisphere (last accessed May 24, 2022).

[6] Douglas H. Ginsburg, *Reviving the Nondelegation Principle in the US Constitution*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 26 (footnote omitted).

questions about the administrative state's legitimate role in governance.[7] Moreover, "[a]dministrative agencies are issuing about 3,000 regulations with the force of law each year, roughly 28 times the number of public laws enacted annually by the Congress."[8] The legitimacy of delegated administrative governance, therefore, is no small potatoes matter. The Supreme Court has allowed Congress to use broadly and imprecisely written laws to substitute appointed for elected officials as policymakers. A vibrant Nondelegation Doctrine would return to the public a sizeable portion of its ability to choose its lawmakers.

Part I of this review will summarize the Nondelegation Doctrine for the benefit of readers who are unfamiliar with it. (Administrative law professors, scholars, practitioners, and buffs can skip ahead to Part II). Part II will summarize the essays in *Nondelegation Perspectives* and discuss how they hope not only to advance the ball down the field, but also to persuade the most important potential participants—the Justices of the Supreme Court of the United States—to play the game. Part III will offer an observation from a fan of the game.

I. NONDELEGATION STIRRINGS

The Constitution is a delegation of "Powers"[9] from "We the People of the United States"[10] to three different branches of a newly created national government.[11] Article I vests "all legislative Power" over specified issues[12] in a Congress comprised of a Senate and a House of Representatives;[13] both chambers must agree to pass a law, and then persuade the President to sign it.[14] To ensure that most law-making happens in state legislatures and state courts, Article I makes the federal legislative process slow, deliberate, and

---

[7] *See generally, e.g.*, JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978).

[8] Ginsburg, *supra* note 6, at 28 (footnote omitted).

[9] U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States[.]"); *id.* art. II, § 1 cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[10] U.S. CONST. Pmbl.

[11] U.S. CONST. arts. I-III. For a good telling of the story of the drafting, adoption, and ratification of the Constitution, see JACK RAKOVE, ORIGINAL MEANINGS (2010).

[12] U.S. CONST. art. I, § 8.

[13] U.S. CONST. art. I, § 1.

[14] U.S. CONST. art. I, § 7; INS v. Chadha, 462 U.S. 919 (1983).

onerous. To ensure that the electorate can hold legislators accountable for their votes, Article I also requires transparency by forcing each legislator's votes to be made public and requiring each chamber to keep a publicly available "Journal of its Proceedings."[15] The predominant 18th-century legal theory also held that a legislature could not hand its lawmaking responsibilities over to an executive official.[16] The theory was that the people had delegated that authority to elected officials, and those officials could not abandon their post by vesting it—and its attendant accountability—in someone else. At least that was the theory.[17]

From its earliest days, however, Congress empowered executive officials to find facts that triggered or eliminated the need for application of a particular law.[18] The Supreme Court saw no constitutional objection to that practice. As Chief Justice William Howard Taft wrote in *J.W. Hampton, Jr., & Co. v. United States*, Congress may delegate to the executive the power to find facts or apply the law to the facts as long as Congress affords the President an "intelligible principle" that he or she must use.[19] Over time, however,

---

[15] U.S. CONST. art. I, § 5, cl. 3.

[16] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 381 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("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."); *see also, e.g.*, Marshall Field & Co. v. Clark, 143 U.S. 649, 692-94 (1892) ("That Congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution . . . . 'The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion *as to its execution,* to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'" (emphasis added) (quoting Cincinnati, Wilmington etc. R.R. v. Commissioners, 1 Ohio St. 88 (1852))); Shankland v. Mayor of Wash., 30 U.S. (5 Pet.) 390, 395 (1831) (noting "the general rule of law is, that a delegated authority cannot be delegated").

[17] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131-32 (1980); SCHOENBROD, *supra* note 4, at 99.

[18] *See* Larkin, *supra* note 3, at 32 & n.3. For example, the Non-Intercourse Act of 1809, ch. 24, § 11, 2 Stat. 528, 530–31, imposed an embargo on trade with England and France but empowered the President to lift the embargo if he found that they had ceased to violate the declared neutrality of the United States in their war. *See* The Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813) (upholding that delegation). Congress later empowered the President to suspend the tariff-free importation of certain goods if he found that the exporting nation did not allow the tariff-free entry of those goods from the United States. *See Field*, 143 U.S. 649 (same).

[19] 276 U.S. 394, 409 (1935) (upholding over a delegation challenge a tariff act that empowered the President to waive customs duties on imported merchandise if their foreign production costs equaled those of like goods produced in this country); *see also*, *e.g.*, Whitman v. Am. Trucking

Congress began to expand the authority of executive officials beyond the fact-finding and law-applying responsibilities at issue in the Supreme Court's early decisions. Now, Congress sought to palm off difficult policy choices by delegating its lawmaking power to federal agencies with only the vaguest guidance as to how they should exercise it. Some delegations merely provide that an agency must act "in the public interest," a requirement that would seem to apply without Congress even saying it.[20] Despite the tectonic shift in the practice of delegation, the Supreme Court did not enforce separation of powers principles by demanding that Congress itself use its legislative power. In fact, but for two 1935 decisions holding unconstitutional delegations to executive officials,[21] the Court has sustained every federal law challenged on this ground.[22] The Court explained why in *Mistretta v. United States*, where it reasoned (if starting from a premise that assumes the conclusion counts as "reasoning") that "Congress simply cannot do its job absent an ability to

---

Ass'ns, 531 U.S. 457, 472 (2001) ("In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. 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 . . . and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'") (emphasis added in *Whitman*) (citations omitted).

[20] *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 194, 226 (1943) (upholding over a nondelegation challenge a law empowering the FCC to regulate in the "public interest, convenience, or necessity"); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 20–21, 27–29 (1932) (upholding a statute allowing the Interstate Commerce Commission to approve acquisitions that were "in the public interest").

[21] *See* Panama Refining Co. v. Ryan, 293 U.S. 388, 418, 433 (1935) (holding unconstitutional a provision in the National Industrial Recovery Act of 1933 (NIRA) granting the President authority to prohibit the distribution of oil produced in excess of a production quota (so-called "hot oil"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935) (holding unconstitutional a different NIRA provision delegating to trade or industrial groups the authority to define "unfair methods of competition" if the President subsequently approved the proposal). A third case holding a delegation unconstitutional—*Carter v. Carter Coal Co*., 298 U.S. 238 (1936)—involved a delegation to private parties. *See* Larkin, *supra* note 3, at 48-50.

[22] *See*, *e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. at 473–76 (2001); American Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946); Yakus v. United States, 321 U.S. 414, 420 (1944); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Panama Refining, 293 U.S. 388; Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825); Sunstein, *supra* note 4, at 322 ("We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).").

delegate power under broad general directives."[23] The Nondelegation Doctrine looked dead.[24]

Nonetheless, several commentators have attempted to revive the doctrine over the last few decades.[25] They have argued that the Nondelegation Doctrine can and should address the economic, social, and political ills that result from the relentless growth of the administrative state. Among those ills are the continually expanding power regulators have over public and private life; the unwillingness of Congress to do anything other than shovel more responsibility over to unelected executive officials to avoid taking responsibility for making hard choices; and the ceaseless parade of Presidents succumbing to their desire to undertake ever more regal governance of what they treat as *their* kingdom. Those baneful consequences, this insurgency notes, followed from the Supreme Court's willful refusal to enforce the separation of powers principles that a vital Nondelegation Doctrine would protect.

In 1980, the Supreme Court offered a tantalizing suggestion that there might be life left in the Nondelegation Doctrine.[26] Perhaps, the doctrine would become a phoenix rather than a corpse. But that hint was all we saw; there was nary a holding.[27] The Court declined several later opportunities to

---

[23] 488 U.S. 361, 372 (1989); *see also*, e.g., Opp Cotton Mills, Inc. v. Admn'r, 312 U.S. 126, 145 (1941) ("In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy"). As Professor Gary Lawson tartly but correctly put it, "Presumably, according to the Court, Congress's 'job' is to facilitate regulations with which a majority of the Court agrees rather than to exercise the powers actually granted to Congress by the Constitution. Just so we are clear." Lawson, *supra* note 4, at 68 n.70.

[24] Most of the academy formally pronounced it as such. *See*, *e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); *see supra* note 4.

[25] *See supra* note 4.

[26] In *Industrial Union Dep't v. Am. Petrol. Inst.*, 448 U.S. 607 (1980) (*Benzene Case*), then-Associate Justice William Rehnquist provided the fifth vote necessary to hold invalid a standard governing benzene issued by the Secretary of Labor under the Occupational Safety and Health Act of 1970 (OSHA). A plurality of the Court ruled that the standard was not supported by substantial evidence. *Id*. at 630-62 (plurality opinion). Justice Rehnquist concurred only in the judgment. He concluded that Congress had impermissibly delegated to the Secretary responsibility for defining the term "infeasible" in a provision of the Occupational Safety and Health Act of 1970. *Id.* at 671-88 (Rehnquist, J., concurring in the judgment).

[27] One year after the *Benzene Case*, a majority of the Court in *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981) (*Cotton Dust Case*), upheld a different OSHA standard, this one addressing cotton dust, under the same "feasibility" provision discussed in the *Benzene Case*. In the course of doing so, the *Cotton Dust Case* majority implicitly rejected Justice Rehnquist's position that a "feasibility" standard was unconstitutional. *See id*. at 548 (Rehnquist, J., dissenting).

revive the doctrine.[28] The Court did so even in a case asking whether Congress could delegate taxation authority to an agency, a subject of particular interest to the Founding Generation.[29] At the beginning of the new century, Justice Antonin Scalia seemed to dash all hope for a rebirth of the Nondelegation Doctrine. Writing for the Court in 2001 in *Whitman v. American Trucking Associations*, he rejected the argument that Congress had unconstitutionally delegated lawmaking power to the Environmental Protection Agency Administrator by allowing her to set an ambient air quality standard containing "an adequate margin of safety" that is "requisite to protect the public health."[30] With the *American Trucking* decision, whatever hope there was for a rebirth of the Nondelegation Doctrine seemed to have vanished.

But in 2019, five Justices expressed a willingness in two different cases—*Gundy v. United States*[31] and *Paul v. United States*[32]—to reconsider the Court's Nondelegation Doctrine precedents. *Gundy* was a nondelegation challenge to a provision in the Sex Offender Registration and Notification Act (SORNA)[33] directing the U.S. Attorney General to decide whether the act's provisions should apply to offenders convicted before the act became law.[34] The nondelegation issue arose because SORNA did not identify any factors that the Attorney General should consider or any finding that the Attorney General must make when deciding whether to apply SORNA

---

[28] *See* Loving v. United States, 517 U.S. 748 (1996) (upholding Congress's delegation of authority to the President to define aggravating factors for use at capital sentencing); Touby v. United States, 500 U.S. 160 (1991) (upholding a delegation to the U.S. Attorney General of authority to list new controlled substances on an emergency basis); Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989) (upholding Congress's delegation to the Secretary of Transportation of the power to adopt a system of user fees to underwrite pipeline safety programs); *Mistretta*, 488 U.S. 361 (upholding Congress's delegation to the U.S. Sentencing Commission of the power to adopt binding sentencing guidelines). *See generally* Lawson, *supra* note 4, at 48-49 & nn.78-79.

[29] *See Mid-America Pipeline Co.*, 490 U.S. at 223-24 ("We find no support, then, for Mid–America's contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power.").

[30] 531 U.S. 457. *See* 42 U.S.C. § 7409(b)(1) (2018).

[31] 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring in the judgment); *id.* at 2131–48 (Gorsuch, J., joined by Roberts, C.J., & Thomas, J., dissenting).

[32] 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

[33] 34 U.S.C. 20901-20962 (2018).

[34] SORNA required parties convicted of particular sex offenses to provide certain identifying information (name, address, etc.) in every state where they live, work, or study. 34 U.S.C. §§ 20913(a), 20914(a). The House of Representatives and the Senate disagreed over whether the registration requirements should apply to those convicted before the act took effect, and Congress directed the U.S. Attorney General to answer that question. *Id.* § 20913(d).

retroactively. Put into Nondelegation Doctrine terms, SORNA identified no "intelligible principle" for the Attorney General to use, even though the presence of some such standard had been critical to the Supreme Court's jurisprudence. Only eight Justices participated in the *Gundy* decision because Justice Brett Kavanaugh had not yet joined the Court. The Court upheld the SORNA delegation to the Attorney General by a 5-3 vote, but Justice Samuel Alito, who voted with the majority, wrote separately to express his willingness to reconsider the Nondelegation Doctrine in a different case.[35] The three dissenters would have struck down this provision of SORNA as a violation of the Nondelegation Doctrine.[36] That made four Justices willing to breathe life into the doctrine. *Paul* was a different case involving the same statute, but this time Justice Kavanaugh had joined the Court. In an opinion accompanying the denial of review in *Paul* given the Court's ruling in *Gundy*, Justice Kavanaugh also signaled a willingness to reconsider the Nondelegation Doctrine. That made five Justices willing to revisit the subject. Atop that, another new member, Justice Amy Coney Barrett, joined the roster in 2020, and she has not yet expressed her views on the subject. As a result, there is reason to believe that the Court is now willing to decide whether the Nondelegation Doctrine is a living part of our law or just a phantasm like Jacob Marley's ghost.

Nondelegation Perspectives therefore appears at an auspicious time. It no longer is a hopeless task to argue the Nondelegation Doctrine should be given new life.[37] The book's essayists make an impressive case that the Court should do just that.

---

[35] *Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring in the judgment).

[36] *Id.* 2131–48 (Gorsuch, J., joined by Roberts, C.J., & Thomas, J., dissenting).

[37] *Compare* Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87, 87 (2010) ("If Academy Awards were given in constitutional jurisprudence, nondelegation claims against regulatory statutes would win the prize for Most Sympathetic Judicial Rhetoric in a Hopeless Case."), *with* Pojanowski, *supra* note 1, at 855–56 ("Rumblings at the Supreme Court also suggest that the current balance is becoming unstable. . . . All told, hornbook doctrine on judicial review is under fire for being both too timid and too intrusive.").

II. LAYING OUT THE PLAYING FIELD, DEFINING THE RULES OF THE GAME, AND ENCOURAGING PEOPLE TO PLAY

The essays in *Nondelegation Perspectives* fit neatly into three categories. Two of them—the ones by Professors Jonathan Adler and John Harrison[38]—demarcate the playing field within which the Nondelegation Doctrine should operate, thereby limiting its reach. Another group of essays—by Professors Gary Lawson, Michael Rappaport, and David Schoenbrod, as well as by litigators Todd Gaziano and Ethan Bevins of the Pacific Legal Foundation (PLF) and Mark Chenoweth and Richard Samp of the New Civil Liberties Alliance (NCLA)—offer different rules by which the game should be played.[39] The remaining essays—by Professors Saikrishna Bangalore Prakash and Joseph Postell (along with brief repeat performances by Schoenbrod, Gaziano, and Blevins)—encourage people (read: Supreme Court Justices) to play the game by arguing that the consequences of revitalizing the Nondelegation Doctrine would not be as disastrous as supporters of today's administrative state would claim.[40]

A. Laying Out the Playing Field

Rather than start by suggesting an alternative to the *J.W. Hampton* "intelligible principle" test, Professor Adler takes a step back to consider what should be the boundaries of the Nondelegation Doctrine. Borrowing language from the analysis used in cases applying the *Chevron* Doctrine, he proposes that the Supreme Court start its nondelegation analysis at what he calls "Step Zero" and ask whether Congress intended to authorize an agency to

---

[38] Jonathan H. Adler, *A "Step Zero" for Delegation*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 161; John Harrison, *Executive Administration of the Government's Resources and the Delegation Problem*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 232.

[39] Mark Chenoweth & Richard Samp, *Reinvigorating Nondelegation with Core Legislative Power*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 81-122; Gary Lawson, *A Private-Law Framework for Subdelegation*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 123; Michael B. Rappaport, *A Two-Tiered and Categorical Approach to the Nondelegation Doctrine*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 195; Todd Gaziano & Ethan Bevins, *The Nondelegation Test Hiding in Plain Sight: The Void-for-Vagueness Doctrine Gets the Job Done*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 45.

[40] Saikrishna Bangalore Prakash, *The Sky Will Not Fall: Managing the Transition to a Revitalized Nondelegation Doctrine*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 274; Joseph Postell, *Can the Supreme Court Learn from the State Nondelegation Doctrines?*, *in* NONDELEGATION PERSPECTIVES, *supra* note 2, at 315. The Gaziano-Bevins essay also serves the same goal.

For the reader's ease, henceforth I will forgo Bluebook conventions, citing only the author and appropriate page references.

engage in *internal* or *external* regulation. That is, the threshold question should be whether Congress merely empowered government officials to regulate their own performance of the government's business or instead empowered an agency to regulate the conduct of private parties or the private market. The first kind of delegation concerns the internal operation of (for example) the Postal Service, while the other allows officials to direct the conduct of private parties so that the Post Office can execute its mail delivery responsibilities.[41] The former would allow a Postmaster to decide when to be open for business and whom to hire as a Pony Express rider; the latter, to fix the size and sturdiness of mailboxes for home delivery.[42] The latter is far more intrusive, so it makes sense for courts to decide whether Congress intended to allow agencies to order compliance with federal dictates and, if so, just how far agencies may go.

Professor Harrison steps back even further. Like Prof. Adler, he wants courts to distinguish between regulations governing the conduct of government officials and regulations directing the actions of nongovernment parties in the private sector. But he simply would not apply the Nondelegation Doctrine to the former type of actions. The federal government owns and manages property just as private individuals do, as the Constitution recognizes.[43]

---

[41] Professor Adler also would have Congress address the back end of the regulatory process by using sunset provisions to force Congress to re-examine whether regulatory programs make sense given new technological, societal, and legal developments since the members last voted on the relevant regulatory scheme. Adler 166-71. Professor Adler elaborated on that point in Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931 (2020). For example, by 2022, the internet has completely upended the foundation of the Telecommunications Act of 1996, Pub. L. No. 101-104, 110 Stat. 56 (codified at 47 U.S.C. ch. 5 (2018)). Adler argued that Congress should reconsider whether that law remains a sensible regulation of private conduct. The same is true in the area of environmental law. Congress last revised the Clean Air Act in 1990. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2468 (codified at 42 U.S.C. ch. 85 (2018)). At that time, Congress did not adopt rules specifically governing greenhouse gases such as carbon dioxide. Nonetheless, a 5-4 majority of the Supreme Court held that the EPA could regulate greenhouse gases under that act in *Massachusetts v. EPA*, 549 U.S. 497 (2007). Sunset provisions in regulatory schemes would force Congress to revisit such governing statutes on a regular basis and update or repeal them as necessary. A sunset provision is an excellent idea, but the Supreme Court cannot impose it on Congress under the Nondelegation Doctrine or any other. The Constitution contains but one statutory sunset provision: appropriations for the army cannot extend more than two years. U.S. CONST. art. 1, § 8, cl. 12. Congress itself must adopt any others.

[42] A Brief History of Mailboxes, National Mailboxes, https://www.nationalmailboxes.com/learn/ (last visited June 20, 2022).

[43] Article I empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises," as well as to "coin Money." U.S. CONST. art. I, § 8, cls. 1 & 5. Article IV states that the federal government may own real estate and personal property. U.S. CONST. art. IV, § 3, cl. 1 ("New States may be admitted by Congress into this Union . . . ."); *id.* cl. 2 ("The Congress shall have Power to dispose

Professor Harrison asks whether it makes sense for the Nondelegation Doctrine—developed to address Congress's decisions to vest executive officials with the power to regulate *private conduct and private property*—to govern how the national government regulates *public conduct and public property*. He answers that question, "No."[44]

Professors Adler and Harrison are spot-on about their proposals.

Consider the way Professor Adler's Step Zero proposal is analogous to the common law. The laws of contracts, torts, and crime affect how individuals live and work, but the rules of civil and criminal procedure do not have that effect unless someone is involved in litigation. While it makes sense for Congress to adopt substantive legal rules, Congress could reasonably empower the courts to regulate their own operations, even when the rules they make affect private parties. Deciding what should be contained in a complaint or indictment, an answer or arraignment, or a judgment is precisely the type of task that the Framers might reasonably have believed the judiciary is better suited to than are members of Congress, who are not all lawyers. Professor Adler's Step Zero proposal asks the Supreme Court to pursue just that type of analysis. It also helps make sense of two Marshall Court decisions that went in different directions regarding delegation. On the one hand, in *Wayman v. Southard*, Chief Justice John Marshall found unobjectionable a provision in the Judiciary Act of 1789[45] that delegated to the courts the authority to define the necessary elements and format of a judgment;[46] on the other hand, Justice William Johnson, Jr., concluded in *United States v. Hudson and Goodwin* that the federal courts could not define federal crimes.[47] Step Zero analysis resolves

---

of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."). Try to steal the government's coins or other property, and you will learn the hard way who owns it. *See*, *e.g.*, 18 U.S.C. § 641 (2018) (making it a crime to steal "any . . . money . . . of the United States or of any department or agency thereof"). Article II implicitly directs the President to serve as a trustee of federal property for the public's benefit. U.S. CONST. art. II, § 1, cl. 1 (vesting "the executive Power" in the President); *id.* § 3 (directing the President to "take care that the Laws be faithfully executed"); *see* GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017).

[44] "Spending programs and government services are not rules about private conduct. Executive agents that implement such programs fill in many details, but not in rules that tell private parties what they may and may not do." Harrison 235. *See generally id.* at 232-73.

[45] Judiciary Act of 1789, ch. 20, 1 Stat. 73, § 17 (authorizing the federal courts "to make and establish all necessary rules for the orderly conducting [*sic*] business in the said Courts").

[46] Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

[47] 11 U.S. (7 Cranch) 32 (1812).

the apparent tension between these decisions by applying the Nondelegation Doctrine to defining substantive crimes, but not to creating procedural rules.

Professor Harrison's essay also offers a valuable insight. Congress's purpose is to exercise the authority vested in its members to create new federal law to govern the private conduct of the entire nation or some subset of its members in one of the categories set forth in Article I, Section 8 of the Constitution. Once Congress has completed its task, executive officials carry those laws into effect, and courts adjudicate disputes arising under them.[48] But when an executive official manages federal property or money, he or she is not regulating the conduct of private parties. On the contrary, that official is acting as a landlord, caretaker, or trustee charged with the proper management of whatever property the national government holds in the public's name for its use. That property might be real estate in the form of a forest or open land that will be used to construct federal ships or buildings, or it might be the ships and buildings after they are built. Congress can tell executive officials not to allow that property to waste away, which is a sufficiently intelligible principle for that purpose. Indeed, Congress might not need to do even that because that duty would be an implicit requirement of the responsibility for managing it. Either way, as Professor Harrison explains, the *J.W. Hampton* intelligible principle standard (and a healthy dose of common sense) is a sufficient guideline for the President to know what to do in this regard.

The issue is more complicated when the property is characterized as a "license," as it is in the case of radio and television broadcast licenses, or as the "intangible right" to freely navigate interstate waterways, rather than as realty or personalty. Nonetheless, as Professor Harrison maintains, the same principle should govern.[49] If the Privileges and Immunities Clause of Article IV[50] guarantees the freedom to travel by water from one state to another,[51] to the 18th-century mind, that right would be protected as a communal form of

---

[48] Harrison 239.

[49] *Id.* at 247-59; *see, e.g.*, Penn. v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1855).

[50] U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities in the several States.").

[51] And it certainly does; otherwise, the prohibition on discriminating against citizens of other states would be senseless.

"property" that the national government would manage for the benefit of all.[52]

Adler and Harrison do the helpful preliminary work of establishing where a revived Nondelegation Doctrine should and should not apply—of setting the foul lines. The doctrine is meant to protect citizens from an overzealous executive branch hampering their freedom without democratic warrant or accountability, not to make it difficult for the executive branch to set rules for itself.

B. Defining the Rules of the Game

The English and American common law was the canvas upon which the Framers painted. Professor Lawson extracts from that canvas principles of agency law that distinguish between what the principals—members of the public—expect that their agents—Representatives and Senators—must carry out themselves and what those agents may subdelegate to others—executive and judicial branch officials.[53]

As Professor Lawson explains, the Constitution contains a delegation from "We the People" of the "legislative Power" to the "Congress." Eighteenth-century law governing the relationship between principals and agents was strict. An agent could not subdelegate his or her responsibilities to third

---

[52] Paul J. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 MARQ. L. REV. 1, 18-19 (2016) (footnotes omitted):

> The term "right" acquired its modern understanding in the seventeenth century. Originally, that term referred only to a valid title of ownership, such as the title to real estate. The terms "liberty" or "privilege" were more commonly used than "right." They referred either to the protections all enjoyed against the arbitrary actions of the Crown or to a benefit bestowed on particular individuals by the king. Yet, the modern-day notion of a "right" as an enforceable legal guarantee arose during the great religious and political battles between the Crown and Parliament during the seventeenth century. Parliament, for example, opposed the efforts of the Stuart kings to raise revenue without authorization from Parliament by arguing that the king's actions undercut the right of the people to be governed by their elected representatives. Defenders of religious and political dissenters also argued that individuals have a fundamental right of freedom of conscience that disabled the government from coercing them to adopt a particular belief.
>
> The understanding of a "right" therefore changed in two important ways during that period. The first was that the concept of "right" had expanded "to embrace and even subsume the variety of claims and activities formerly classified as 'liberties and privileges.'" The second change was that "the notion of ownership that lay at the core of the original meaning of right now described just what it was that the holders of rights enjoyed." Unlike a liberty or privilege that the state could withdraw, a right was something that its possessor owned, just as he owned land.

[53] Lawson 123-60.

parties whom the principal did not select for an assigned job.[54] There was, however, a small amount of wiggle room. Atop their assigned powers, agents possessed certain ancillary powers, limited in number and scope, that were necessary to complete their assigned tasks.[55] Assign John Doe the job of building a barn or a ship, and he may hire carpenters and purchase supplies.[56] Chief Justice Marshall drew on those principal-agent rules in his opinion in *Wayman*, which upheld a delegation allowing the federal court to draft rules of procedure.[57]

Applying these principles to the Constitution, Professor Lawson explains, Congress could assign nonlegislative tasks to executive officials and judges for the proper execution and smooth operation of the government's business.[58] Among them would be making factual findings (such as deciding whether Tom Roe was a soldier in General George Washington's colonial army and therefore is entitled to a pension); applying the law to the facts (such as determining the amount of customs due to the government from a particular shipment[59]); and deciding what to do when the facts and law are clear but do not answer a given question (such as deciding what to do with people convicted of a crime and sentenced to incarceration[60]). Relying on common-law agency principles might not provide as bright a line for delegation purposes as might be available in other areas of constitutional law—the Sixth Amendment begins with the phrase "In all criminal prosecutions," so its

---

[54] "Generally speaking, the principal would specify what the agent was entrusted to do, and the agent could not pass that responsibility on to someone else because the principal chose a particular assignment for a specific task." *Id*. at 143.

[55] "But the agency agreement could expressly or impliedly allow for Subdelegation given the nature of the instrument, the task, or both." *Id*.

[56] "Under founding-era agency-law principles, agents could authorize subagents to 'fill up the details' of powers granted to the agents, but only with respect to incidental matters, and under founding-era principles of government, federal executive and judicial officials applying congressional laws were subagents to the background rules of agency law." *Id*. at 126 (citation omitted).

[57] *Supra* text accompanying notes 45-47.

[58] "The Marshallian formulation [in *Wayman*] can be seen as a shorthand reference to this private-law doctrine." Lawson 143.

[59] Congress might set the rate per ton, but somebody else must weigh the cargo and calculate the payment.

[60] Congress must pass criminal laws that authorize imprisonment, but somebody else must decide where a prisoner should be confined and when to let him go. That was not as readily answerable a question as it would be today. Early in our history, there were no federal prisons. Federal courts sentenced convicted offenders to confinement in any in-state prison willing to accept them. Otherwise, the federal marshal had to rent space elsewhere as a temporary jail until other arrangements could be made. Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 308 & nn.21-22 (2013).

requirements do not apply to ordinary civil contract disputes—but it is miles from drawing an arbitrary line and also from the type of line-drawing that divided Judges Benjamin Cardozo and William Andrews in *Palsgraf*.[61]

Professor Rappaport offers a two-tiered approach to delegation questions, an approach that will be familiar to anyone who has dealt with equal protection law. Just as equal protection law applies strict scrutiny for classifications based on race or lineage and a less exacting review to economic legislation,[62] the professor would employ strict or lenient review for different types of delegations. Strict review is appropriate for "rules that regulate the private rights of individuals in the domestic sphere."[63] The effect of applying strict scrutiny would be to bar executive officials from "exercising *any* policymaking discretion."[64] Three types of activities lie outside of "policymaking": (1) finding the facts, (2) interpreting the law, and (3) applying the law to the facts.[65] Those exceptions, in my opinion, certainly make sense. After all, the Constitution and Bill of Rights require a jury trial in criminal and (most) civil cases, and the first and third categories just mentioned are the classic roles for a jury to fill.[66] The second activity is inherent in the President's sworn obligation to enforce the law.[67] To do so, he must decide, with the advice of his chief lieutenants, what that law is.[68] Accordingly, the category for which strict nondelegation review is appropriate is internally coherent. It also parallels the "private rights" doctrine under which a party is entitled to have an Article III

---

[61] *Compare* Palsgraf v. Long Island R. Co., 248 N.Y. 339, 340-47 (1928) (majority opinion of Cardozo, J.), *with* 248 N.Y. at 347-56 (opinion of Andrews, J., dissenting).

[62] *See*, *e.g.*, United States v. Vaello Madero, 142 S. Ct. 1539, 1542-44 (2022); Wis. Legis v. Wis. Elections Comm'n, 142 S. Ct. 1245, 1248 (2022). Classifications based on sex are subject to an intermediate standard of review that is closer to strict scrutiny than to rational basis review. *See*, *e.g.*, United States v. Virginia, 518 U.S. 515, 524, 531 (1996).

[63] Rappaport 196.

[64] *Id*. Professor Rappaport does not say whether his rule would apply when lives are at stake and there is literally no opportunity and time to await congressional action. I agree with his general rule, but would not go so far as to preclude such an exception. Professor Rappaport also says that ordinary statutory interpretation by executive officials is permissible, but the *Chevron* Doctrine would not survive under his test. *See id*. at 208.

[65] *Id*. at 196, 203.

[66] *See* Sparf v. United States, 156 U.S. 51, 102-03 (1895) ("We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be.").

[67] U.S. CONST. art. II, § 1, cl. 6 (presidential Oath of Office); *id*. § 3 (Take Care Clause).

[68] U.S. CONST. art. II, § 2, cl. 1 (Opinion Clause).

judge act as ultimate decisionmaker, rather allow an Article II official to have the final say.[69]

By contrast, lenient review is appropriate for subjects that fall within traditional executive responsibilities.[70] Among them are regulation of the military;[71] the conduct of foreign affairs, including foreign commerce;[72] managing federal property;[73] and spending appropriated funds.[74] Professor Rappaport's approach avoids requiring the type of undirected line-drawing that has scared off the Supreme Court for nearly 90 years, and it also has the virtue of exempting subject matters that fit comfortably with the powers that the Framers expressly vested in the President.

NCLA's Chenoweth and Samp offer a similar proposal. They say that the "intelligible principle" test has "gradually expanded with repeated use—like a worn-out elastic band"—so that every imaginable statutory formulation satisfies it.[75] They propose instead a three-step inquiry. First, if Congress has literally or effectively provided the agency with no standard at all other than a vacuous goal, the delegation should be held per se invalid. A directive to regulate "in the public interest," say Chenoweth and Samp, is equivalent to having no standard at all because an agency would be obliged to pursue that goal even if Congress wrote nothing in the statute to focus the agency's conduct.[76]

Second, they would require Congress to provide guidance to executive officials that is sufficiently clear that a reviewing court can discern whether the agency has complied with its directive. That "clear statement principle" would "shift the focus from whether Congress has given an 'intelligible principle' *to the executive* (which judges may be ill-equipped to ascertain) to ask

---

[69] Rappaport 200-02 (referring to Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 566 (2007)); *see also*, *e.g.*, Oil States Energy Servs., LLC v. Greene's Energy Group, LLC, 138 S. Ct. 1365, 1372-79 (2018) (discussing the "private rights" and "public rights" doctrines).

[70] Rappaport 199-203.

[71] The Article II Commander-in-Chief Clause authorizes the President to manage the armed forces even in the absence of any legislation. U.S. CONST. art. II, § 2, cl. 6.

[72] The Article II Ambassadors Clause authorizes the President to "receive Ambassadors and other public Ministers," which also empowers him to decide whether to recognize a foreign government as legitimate. U.S. CONST. art. II, § 2; Zivotofsky v. Kerry, 576 U.S. 1 (2015).

[73] *Supra* notes 41-43 & 48 and accompanying text.

[74] Postell 199. Appropriated funds, as noted above, are federal property until disbursed. *Supra* text following note 48.

[75] Chenoweth & Samp 89.

[76] *Id*. at 89-92.

instead whether Congress has provided sufficient standards *to the judiciary*" for judges to determine whether an agency has gone off on a frolic and detour of its own devise.[77]

Finally, they argue certain core legislative powers should be deemed nondelegable. Rather than ask whether an issue is sufficiently important that a court would expect that Congress would have resolved it rather than delegate it to an agency—the essence of the Supreme Court's Major Questions Doctrine[78]—Chenoweth and Samp urge the Court to identify "core legislative functions" that Congress cannot hand over to executive officials. The taxing power, the spending power (at least as to the amount and source of appropriated funds), the power to define criminal laws, the authority to make policy-based tradeoffs, the ability to engage in oversight of the executive branch—those are core legislative functions that Congress should not be allowed to pass off to the executive, regardless of whether an agency has superior expertise in the field at issue or the members want to avoid accountability for taking a politically unpopular position.[79]

PLF's Gaziano and Blevins argue that the answer to our nondelegation conundrum has been standing there right before our eyes all along. The Void-for-Vagueness Doctrine is the offspring of the marriage of criminal and constitutional law. The century-plus-old doctrine provides that a statute must afford "ordinary people"[80]— people of "common"[81] or "ordinary" intelligence[82]—fair notice of what is a crime.[83] A criminal law is impermissibly vague when its text "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"[84] or its "mandates are so uncertain that they will reasonably admit of different constructions."[85] The Void-for-Vagueness and Nondelegation Doctrines share a common denominator: "A law must

---

[77] *Id*. at 93 (emphasis in original); *see also id*. at 93-95.

[78] *See*, *e.g.*, King v. Burwell, 576 U.S. 473, 484-86 (2015); *Utility Air Reg'y Grp.*, 573 U.S. at 323-34; FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000); *infra* text accompanying notes 123-25.

[79] Chenoweth & Samp 98-107.

[80] *Id.*

[81] Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

[82] Harriss v. United States, 347 U.S. 612, 617 (1954).

[83] *See, e.g.*, Paul J. Larkin, *The Clean Water Act and the Void-for-Vagueness Doctrine*, 20 GEO. J.L. & PUB. POL'Y 639 (2022).

[84] *Connally*, 269 U.S. at 391.

[85] *Id.* at 393; *see also*, *e.g.*, United States v. Davis, 139 S. Ct. 2319, 2325 (2019).

not allow those enforcing it to essentially make it up as they go along."[86] An added feature of this argument is that, if a regulatory scheme can be enforced through the criminal law, the Supreme Court must apply the Void-for-Vagueness Doctrine to the substantive provisions of the underlying statute to satisfy the notice concerns that doctrine enforces.[87]

Finally, Professor Schoenbrod, a 30-year student of the Nondelegation Doctrine, comes at the issue from a unique direction. Rather than address nondelegation concerns by tightening the "intelligible principle" standard or by enhancing the degree of scrutiny that the courts should use to review delegated rulemaking, he suggests that courts approach the problem by capping the costs that an agency should be able to impose on the nation at $100 million. That amount didn't come from nowhere. Under the last five Presidents, any rule that would have an annual effect on the national economy of $100 million or more is a "significant regulatory action" that must be submitted to the Office of Information and Regulatory Affairs for review.[88] That standard also defines a "major" rule for purposes of the Congressional Review Act,[89] which requires new agency rules to be submitted to Congress for its review.[90] Schoenbrod urges the Supreme Court to use that dollar amount as the limit of a permissible delegation. If the President and Congress have made it clear by executive order and statute that they—the political branches—must review "significant" or "major" rules before they can take effect, the Court will only be enforcing what the other branches of government have already found to be a reasonable dividing line.

The bottom line is this: The essays discussed above offer the Supreme Court a handful of different nondelegation standards to use to ensure that Congress and agencies respect the limitations on Articles I and II. The Court could even combine two or more of them. Collectively, they answer the argument that there is no principled way to decide which delegations are in the field of play and which are out of bounds.

---

[86] Gaziano & Blevins 55.

[87] *See* Larkin, *supra* note 83.

[88] Schoenbrod 358-59 & 372 n.89 (discussing Exec. Order No. 12,866, § 3(f)(1), 3 C.F.R. 638, 641-42 (1994)).

[89] The Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Tit. II, Subtit. E, 110 Stat. 871 (1996) (codified at 5 U.S.C. §§ 801-08 (2012)). Some members of Congress have proposed that remedy in legislation known as the Regulations from the Executive in Need of Scrutiny Act (REINS Act), S.68, 117th Cong. (2021). The bill would require Congress to pass every agency rule with an effect on the economy of $100 million or more.

[90] *See* Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 44 HARV. J.L. & PUB. POL'Y 187 (2018) (discussing the operation of the CRA).

C. Encouraging People to Play the Game

The essays discussed above matter little if a majority of Supreme Court Justices proves unwilling to awaken the slumbering Nondelegation Doctrine. As I noted earlier, the Court has not held unconstitutional any congressional delegation to an executive agency since *Panama Refining* and *Schechter Poultry* in 1935, but five of the current Justices have signaled a willingness to reconsider the Court's precedents. Add in the fact that the newest member—Justice Barrett—has not opined publicly on the issue, and you see a possibility that the Court might revisit the doctrine. The burden of the remaining essays is to give the Court a reason to take that step. They do so by addressing a claim that always arises whenever the Court is asked to reject or modify a longstanding body of case law: namely, that the roof will fall in if the Court removes even one of the columns supporting it.

It is sensible for the courts to be concerned about the potentially destabilizing consequences of revitalizing the Nondelegation Doctrine. But the risk that Congress's ability to do its job would collapse is not a severe one.

There is federal precedent to support that conclusion. The Supreme Court has ample experience deciding when a legislature has punted its responsibility to draft an easily understandable law under the Void-for-Vagueness Doctrine.[91] The successful application of that doctrine shows that the Court is capable of making reasoned judgments of this kind, and that the sky won't fall when the Court holds a statute unconstitutional.

Besides, says Professor Postell, chaos hasn't befallen the states that have enforced their own versions of a Nondelegation Doctrine. Professor Postell reaches that conclusion after surveying what state courts have done when resolving nondelegation claims.[92] In his opinion, the state decisions have generally adopted a standard similar to the "intelligible principle" test adopted in *J.W. Hampton* and found in the Supreme Court's later case law.[93] Moreover, the "prevailing" approach in the "vast" majority of the states has been to follow the U.S. Supreme Court's practice of applying a rather "lax" review to

---

[91] *See generally* Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 LIBERTY U. L. REV. 335, 343–45 & n.35 (2018) (collecting cases).

[92] Postell 315-45.

[93] *Id.* at 323. The states have, however, been far less willing to allow their legislatures to vest taxing authority in private parties. *Id.* at 321-22.

state legislative delegations.[94] What is different is that some states have been more willing to examine critically whether "statutes seem to have been carelessly drafted and have contained no limits on agency discretion" and whether "statutes adequately define an agency's scope of authority by examining whether the persons subject to the agency's authority are carefully identified in the statute."[95] State courts in Alaska, Florida, Illinois, Montana, Oklahoma, and Vermont have been more willing to scrutinize state legislative delegations. Even then, those states that use a slightly more rigorous analysis have not demanded the impossible from their legislatures.[96] Contra Justice Elena Kagan, those state courts have not declared that most of state government is unconstitutional.[97] Most importantly, nothing in Professor Postell's discussion of state law suggests that the sky has fallen in those states.

Professor Prakash offers a variety of ways that the Supreme Court could prevent the "chaos" that allegedly would arise from tasking Congress with doing its job.[98] To begin with, the Court could proceed incrementally, making clear that its initial ruling striking down a particular act on nondelegation grounds does not doom a host of other statutes.[99] A modest beginning might force the Court to consider a large number of cases, but the Court recently has been willing to follow that case-by-case or statute-by-statute course when deciding which agency appointment and removal provisions satisfy the Article II Appointments Clause.[100] That slow-but-steady approach does not mean that the Court is just putting off the inevitable, or that the roof will eventually collapse. In 1995, in *United States v. Lopez*, the Court held unconstitutional an act of Congress making it a crime to possess a firearm in the vicinity of a school, ruling that Congress had exceeded its authority under the Commerce

---

[94] *Id*. at 323. "Most states apply a weak nondelegation doctrine, similar to that of the US Supreme Court, which simply looks to statutes for vague standards or statements of policy to uphold them." *Id.* at 324.

[95] *Id*. at 323.

[96] *Id*. at 327-38.

[97] *Id*. at 338 (quoting *Gundy*, 139 S. Ct. at 2130 (plurality opinion) ("Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs.")).

[98] *Id*. at 274-307.

[99] Prakash 280.

[100] *See*, *e.g.*, Collins v. Yellen, 141 S. Ct. 1761 (2021) (removal); Seila Law LLC v. Cons. Financial Prot. Bureau, 140 S. Ct. 2183 (2020) (appointment); Lucia v. SEC, 138 S. Ct. 2044 (1018) (appointment); Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43 (2015) (appointment); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (removal).

Clause in criminalizing intrastate conduct.[101] Despite prophecies of impending doom, ten years later the Court held in *Gonzales v. Raich* that Congress could make it unlawful to possess cannabis grown and used entirely in-state.[102] A revived Nondelegation Doctrine does not mean that all statutes with delegations will be struck down. Some will; some won't.[103]

The Supreme Court also could delay the issuance of a nondelegation judgment to give Congress time to consider revising the offending statute and adopting all or some of the existing corpus of agency rules. The Court used its remedial power in this way when it held bankruptcy laws unconstitutional in 1982 in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*.[104] The Court issued its opinion on June 28, but stayed the issuance of its judgment until October 4 to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws."[105] On the latter date, the Court further stayed the issuance of its judgment until December 24.[106] The two stays gave Congress nearly six months to revise the bankruptcy laws in light of the Court's ruling in *Northern Pipeline*. The Court could do the same if it were to hold a congressional delegation unconstitutional to avoid potential deleterious disruption. Congress could then decide not only whether and how to revise the relevant statute, but also which agency rules to adopt as an act of Congress to avoid future challenges.[107]

Professor Prakash also reminds us that members of Congress and the President will be under intense political pressure from the electorate and

---

[101] 514 U.S. 549 (1995).

[102] 545 U.S. 1 (2005).

[103] Prakash 280-81.

[104] 458 U.S. 50 (1982).

[105] *Id*. at 88 (plurality opinion); *see also*, *e.g*., Buckley v. Valeo, 424 U.S. 1, 144 (1976).

[106] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 459 U.S. 813 (1982). The Court later declined a third extension of the stay past December 24. United States v. Marathon Pipeline Co., 459 U.S. 1094 (1982).

[107] Prakash 277-79, 282-84. Professor Prakash also suggests that Congress could adopt those rules as an act of Congress for Nondelegation Doctrine purposes only, and leave to the courts the authority to decide whether the underlying statute gave the agency the authority to promulgate those rules. *Id*. at 297. I doubt that the courts would allow Congress to slice the baloney that way because Article I, § 7, does not allow Congress and the President to decide what effect legislation should have. *Cf*. City of Boerne v. Flores, 521 U.S. 507, 516-36 (1997) (Congress cannot reverse a Supreme Court ruling by statute); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217-40 (1995) (Congress cannot alter the effect of an Article III court's judgment); United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872) (Congress cannot direct the Supreme Court how to enter judgment by manipulating the Court's appellate jurisdiction). No court, however, has resolved that issue.

various interest groups to prevent chaos and significant societal harm by allowing agency rules to disintegrate.[108] Both political branches will have a strong interest in responding quickly to a rebirth of the Nondelegation Doctrine by passing some legislation that codifies some of thousands of existing agency rules for some period of time, even if only as a stop-gap measure so that members and the President can negotiate a reasonable response to the Supreme Court's ruling. Congress and the President could take that burden up themselves or create a bipartisan and bicameral regulatory commission to offer its suggestions about which existing rules Congress ought to codify into law.

In making those decisions, Congress could consider all of an agency's rules in one omnibus bill—a "Congressional Adoption Act"[109]—or Congress could group rules into separate categories across multiple bills. Congress could also adopt agency rules for a limited period—say, one year, which is the standard life for an appropriations bill—rather than in perpetuity. That course would effectively sunset those rules.[110] To make matters easier for Congress, agencies could identify statutes they believe need clarification and postpone new rulemakings until the status of their current rules has been clarified.

Critics will contend that Congress could never pass legislation as clear, specific, and multifarious as would be necessary to consider an entire tranche of regulations, particularly in the Senate given the filibuster. But Professor Schoenbrod correctly notes that Congress has succeeded in that regard before by using a "fast-track" procedure that requires an "up or down" vote on an entire package of proposals. The Trade Act of 1974[111] and the Defense Base Closure and Realignment Act of 1990[112] use just such a procedure when Congress must vote on international trade agreements or the closure of domestic military bases. Another example is the Congressional Review Act, which gives the members of each chamber the opportunity to hold an up-or-down vote after limited debate on an agency's new rules.[113] That is a complete legal answer to the critics' argument that Congress could not expedite its consideration and hold a vote on an overall package of agency rules.

---

[108] Prakash 296-98, 303.

[109] *Id*. at 300-01.

[110] *Id*. at 303. Professor Adler independently suggested this. *See supra* note 41.

[111] Pub. L. No. 93-618 (codified as amended at 19 U.S.C. ch. 12 (2018)).

[112] Pub. L. No. 101-510, Tit. XXIX, Pts. A & B, §§ 2901-2911, 2921, 104 Stat. 1808 et seq. (codified as amended at 10 U.S.C. § 2687 (2018)).

[113] *See* Larkin, *supra* note 90.

Is there a guarantee that Congress would adopt predicate legislation establishing such an expedited procedure and up-or-down vote? No, of course not. Congress would need to pass that legislation before voting on a package of agency rules, and anyone who does not want to cast a vote on the latter bill certainly would use every available tool and trick, legitimate or not, to keep the predicate bill from becoming law. But if that were to happen, the blame for any ensuing chaos would fall on the members of Congress, not the Justices, for it would be the members who would be responsible for scuttling the agency rules.

Would the absence of a guarantee that Congress will act responsibly influence how the Justices vote? The Justices' job is to give the public their honest interpretation of what the Constitution demands, not to anticipate whether members of Congress will engage in shenanigans to avoid having to cast a vote that would anger their constituents and cost them their sinecures. Still, the Justices could try to peer over the horizon to guess how Congress would respond and let that guess influence their decisionmaking. Only time will tell how that possibility plays out.

III. SUGGESTIONS FROM A FAN OF THE GAME

I have but three points to add to the perspectives of the fine essays discussed above. The first one is this: It makes sense to consider the potential relevance of Article 39 of Magna Carta to the mix of considerations discussed in *Nondelegation Perspectives*.[114]

Magna Carta was a peace treaty between the English barons and King John adopted to end a rebellion against the crown because of the king's abusive exercise of royal powers. The best-known provision of the Great Charter is Article 39, once described as "a plain, popular statement of the most elementary rights" of Englishmen.[115] It provided that "no free man is to be imprisoned, dispossessed, outlawed, exiled or damaged without lawful judgement of his peers or by the law of the land."[116] Chapter 39 placed the king under the "rule of law" by prohibiting him from taking the law into his own

[114] For a discussion of the background, provisions, and significance of Magna Carta, see DAVID CARPENTER, MAGNA CARTA (2015); J.C. HOLT, MAGNA CARTA (2d ed. 1992); A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968).

[115] Charles E. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property*," 4 HARV. L. REV. 365, 373 (1891).

[116] HOLT, *supra* note 114, at 2.

hands. It achieved that goal by guaranteeing that the Crown would be subject to "the law of the land,"[117] which, according to Sir Edward Coke, was "the Common Law, Statute Law, or Custome of England."[118] The First Congress carried that obligation forward in the Fifth Amendment Due Process Clause.[119] The phrases "law of the land" and "due process of law," integral to the English law, became equally central to the American understanding of the rule of law.[120] The First Congress incorporated those principles by including the Due Process Clause in the Fifth Amendment, added via the Bill of Rights.

Magna Carta bolsters the argument that the Constitution limits the type of lawmaking that nonelected federal officials may undertake. Would the English barons have understood the term "law of the land" to include diktats from King John, the very person that Chapter 39 was designed to restrain? If he could unilaterally change the common law by his own pronouncements, what good would Chapter 39 have been? Given the circumstances surrounding its adoption, Chapter 39 would have made no difference if the crown could make new law simply by signing a piece of parchment containing an order and the king's signature. When executive officials make new law without adequate congressional warrant, they are acting as King John did apart from the restraint of Magna Carta. Our Constitution—the descendant of the Great Charter—should be held to prevent them from doing so.

Second, a principal explanation for why the Court has been reluctant to hold congressional delegations invalid is the line-drawing problem that an aggressive application of that doctrine would require. At bottom, the Court does not want to substitute judicial lawmaking for executive lawmaking

---

[117] See JOHN PHILIP REED, RULE OF LAW 12 (2004).

[118] Ellis Sandoz, *Editor's Introduction: Fortescue, Coke, and Anglo-American Constitutionalism*, *in* THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW 1, 25 (Ellis Sandoz ed., 1993). Coke thought that the terms "due process of law" and "the law of the land" were interchangeable. *See* 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (London, W. Clarke & Sons 1817); *see also* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012) ("Fundamentally, 'due process' meant that the government may not interfere with established rights without legal authorization and according to law, with 'law' meaning the common law as customarily applied by courts and retrospectively declared by Parliament, or as modified prospectively by general acts of Parliament."). So too did the Founders. *See* Daniels v. Williams, 474 U.S. 327, 331 (1986); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911); Larkin, *supra* note 3, at 72-73.

[119] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."). Most discussion of the clause focuses on the words "due process" and ignores the equally important words "of law."

[120] *See*, *e.g.*, Larkin, *supra* note 3, at 72-73.

because the public cannot boot the courts out of office when they go too far. Deciding which delegations are just right and which ones are a tad too much is like deciding whether Helen Palsgraf proved her negligence claim.[121] There is no easy, neat, clean, and subjectivity-free way to slice that pie, the Supreme Court has concluded, so why even try?[122]

The answer is that it is the judiciary's job to force Congress and the President to do theirs. The Framers created a system that would compel elected officials to make the difficult policy decisions, tradeoffs, and compromises necessary for our government to make law, and to do so in a manner that allows the public to hold those officials electorally accountable for their votes. The judiciary must refrain from doing the work assigned to the elected branches and also avoid giving the public the impression that it has substituted government by judicial order for government by executive lawmaking. The essays in *Nondelegation Perspectives* give the Justices multiple nonexclusive options to force Congress to do its job, to prevent the President from doing Congress's work, and to avoid taking on that responsibility themselves. That's a trifecta worth accomplishing for the public's benefit.

My third point is this: In several decisions rendered over the last decade, including one handed down on the last day of the Supreme Court's October 2021 Term, the Court has restrained the adventurous campaigns of some federal agencies via what it has called the Major Questions Doctrine.[123] Under that doctrine, agencies cannot pursue regulatory initiatives with vast economic or social effects unless Congress has clearly authorized them to do so.[124] In other words, the doctrine directs the courts not to read broad, generally phrased statutory provisions as empowering agencies to make decisions of tremendous economic or social importance.[125] The effect of that doctrine is much the same as the effect of the Nondelegation Doctrine. Both require Congress to legislate with some level of specificity if it seeks to delegate power, both prevent agencies from manufacturing congressional authority by stretching the meanings of terms past their breaking point, and both send back to Congress the lawmaking responsibility that every member of

---

[121] *Compare Palsgraf*, 248 N.Y. at 340-47 (majority opinion of Cardozo, J.), *with id*. at 347-56 (opinion of Andrews, J., dissenting).

[122] *See supra* text accompanying note 61.

[123] *See*, *e.g.*, *West Virginia*, 142 S. Ct. 2587; *NFIB v. OSHA*, 142 S. Ct. 661; *Ala. Ass'n of Realtors*, 141 S. Ct. 1485; *King v. Burwell*, 576 U.S. 473; *Utility Air Reg'y Grp.*, 573 U.S. 302; *Brown & Williamson*, 529 U.S. 120.

[124] *See*, *e.g.*, *NFIB v. OSHA*, 142 S. Ct. at 664-66; *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

[125] *See*, *e.g.*, *NFIB v. OSHA*, 142 S. Ct. at 664-66.

Congress voluntarily sought and assumed. The Major Questions Doctrine only strikes down agency rules rather than holding statutory provisions unconstitutional, but it could force Congress to make the important but potentially unpopular decisions that our nation needs it to make. Even if it is only a second-best option, the Major Questions Doctrine gets us at least halfway to nondelegation.

IV. CONCLUSION

Nondelegation Perspectives deserves a place in the library of anyone interested either in the development of administrative law or in any of the three rivers that run together to create it. The authors who wrote the essays it contains are accomplished scholars or litigators, and their chapters illuminate a variety of different ways that the Supreme Court could revive the Nondelegation Doctrine without causing the administrative law world to come to an end. If you believe that the administrative state has grown too large for effective oversight and too powerful for a democratic republic to justify because Congress has grown too reluctant to do the heavy lifting that modern-day governance demands and too willing to punt difficult problems to regulators, you will find that *Nondelegation Perspectives* is an excellent discussion of how the Supreme Court could become re-engaged in the review of congressional delegations. The wisdom found in this book is well worth the time spent reading it.

Other Views:

- Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654564.
- Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021), *available at* https://columbialawreview.org/content/delegation-at-the-founding/.
- Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017), *available at* https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=9565&context=penn_law_review.