Dimensions of delegation*

Dimensões da delegação

*Cary Coglianese***

ABSTRACT

How can the nondelegation doctrine still exist when the Supreme Court over decades has approved so many pieces of legislation that contain unintelligible principles? The answer to this puzzle emerges from recognition that the intelligibility of any principle dictating the basis for lawmaking is but one characteristic defining that authority. The Court has acknowledged five other characteristics that, taken together with the principle articulating the basis for executive decision-making, constitute the full dimensionality of any grant of lawmaking authority and hold the key to a more coherent rendering of the Court's application of the nondelegation doctrine. When understood in dimensional terms, the nondelegation doctrine remains alive, and is more manageable and coherent than alternatives recently suggested by Justice Gorsuch in his dissent in Gundy v. United States, even if the Court has almost never invoked the doctrine to strike down legislation authorizing lawmaking by executive officers. The Supreme Court's infrequent use of the doctrine to invalidate legislation — even when these laws impose minimal constraints

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** University of Pennsylvania Law School, Filadélfia, Pensilvânia, United States. E-mail: cary_coglianese@law.upenn.edu.

Edward B. Shils Professor of Law and Professor of Political Science, and Director of the Penn Program on Regulation, University of Pennsylvania Law School.

on executive decision-making — is not a function of judicial confusion or of the Court's abandonment of the doctrine. It is instead a function of the doctrine itself being grounded in more than just an intelligible principle test — and of the fact that legislation only infrequently seeks to effectuate grants of authority that reach the extremes on all of the relevant dimensions of delegation.

KEYWORDS

Delegation — nondelegation doctrine — regulatory decisionmaking

RESUMO

Como a doutrina da não delegação ainda existe considerando que a Suprema Corte, ao longo de décadas, aprovou tantas leis que contêm princípios ininteligíveis? A resposta para esse quebra-cabeça surge do reconhecimento de que a inteligibilidade de qualquer princípio que dite a base para a legislação é apenas uma característica que define essa autoridade. O Tribunal reconheceu cinco outras características que, tomadas em conjunto com o princípio que articula a base da tomada de decisões executivas, constituem a dimensionalidade total de qualquer concessão de autoridade legislativa e mantêm a chave para uma interpretação mais coerente da aplicação da doutrina de não delegação pelo Tribunal. Quando entendida em termos dimensionais, a doutrina da não delegação permanece viva e é mais gerenciável e coerente do que as alternativas recentemente sugeridas pelo juiz Gorsuch, em sua dissidência em Gundy v. Estados Unidos, mesmo que o Tribunal quase nunca tenha invocado a doutrina para derrubar a legislação que autoriza a tomada de decisão pelos diretores executivos. O uso infrequente da doutrina da Suprema Corte para invalidar a legislação — mesmo quando essas leis impõem restrições mínimas à tomada de decisões executivas — não é uma função de confusão judicial ou do abandono da doutrina pela Corte. Em vez disso, é uma função da própria doutrina ser fundamentada em mais do que apenas um teste de princípio inteligível — e do fato de que a legislação raramente procura efetuar concessões de autoridade que atingem os extremos em todas as dimensões relevantes da delegação.

PALAVRAS-CHAVE

Delegação — doutrina de não delegação — tomada de decisão regulatória

The nondelegation doctrine has mattered more in U.S. constitutional history for what courts have *not* done with it than for what they have. This doctrine, which ostensibly constrains Congress in its ability to authorize executive officers to make rules, has been fundamental to the development of the modern administrative state mainly because the Supreme Court has almost never invoked it to invalidate congressional legislation authorizing rulemaking by executive officers. With the exception of the Court's disapproval of the National Industrial Recovery Act in 1935,[1] the Court has rejected all other challenges to legislation based on the nondelegation doctrine,[2] leading many judges and scholars to surmise that the doctrine is "dead," "moribund," or a "failure."[3]

As a formal matter, the nondelegation doctrine is widely thought to require that any statute that authorizes agencies to make legally binding rules must contain an "intelligible principle" to cabin the exercise of governmental authority.[4] But for decades the Supreme Court has "upheld, without

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1 *See* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Pan. Refining Co. v. Ryan, 293 U.S. 388 (1935).

2 In one other case, the Court has held unconstitutional the delegation of authority to private parties. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936). But the Court's underlying reasoning in that case sounded decidedly in due process considerations more than the nondelegation doctrine. *See id.* at 311 ("[A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly . . . a denial of rights safeguarded by the due process clause of the Fifth Amendment . . . .").

3 *See, e.g.*, Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 352-54 (1974) (Marshall, J., dissenting) (describing the nondelegation doctrine that "was briefly in vogue in the 1930's" as being "surely as moribund as the substantive due process approach of the same era"); Synar v. United States, 626 F. Supp. 1374, 1383 (D.D.C.), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986) ("[T]he Supreme Court's failure to use the delegation doctrine to strike down a statute in fiftyyears . . . led some to conclude that the delegation doctrine is dead, or at least 'moribund.'"); Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Diffi culty*, 145 U. PA. L. REV. 759, 839 (1997) (noting that "we live in a constitutional world where the nondelegation doctrine remains dead"); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 713 (1969) ("The non-delegation doctrine is almost a complete failure."); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 419 (2015) ("After the Court's unanimous decision [in Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001)], it would be fair to say this of the nondelegation doctrine: dead again."). It should be acknowledged, of course, that not everyone thinks the nondelegation doctrine is an entirely failed or moribund experiment. *See generally* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003); Jason Iuliano & Keith E. Whittington, *The Non-Delegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619 (2017); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000). As subsequently explained in the body of this Article, I join with those who see the doctrine as still alive.

4 *See* J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to

exception, delegations under standards phrased in sweeping terms."[5] Among the approved statutory authorizations have been those accompanied by principles such as those of "public convenience, interest, or necessity," which seem far from intelligible in any ordinary sense.[6] As a result, administrative agencies today possess a considerable accumulation of rulemaking authority.[7]

Recognition of the sweeping quality of the rulemaking authorizations approved by the Supreme Court, however, does not necessarily mean that the nondelegation doctrine has died, nor that the Court has failed to apply it faithfully, as some scholars and judges assert.[8] On the contrary, the Court continues to affirm the existence of the nondelegation doctrine. Moreover, it has also applied it with greater consistency and coherence than generally recognized. But this coherence only becomes evident in light of what I call the "dimensionality" of authority: that is, not only the degree of constraint that legislation places on the exercise of governmental authority, as called for by the intelligible principle test, but also the extent of the power authorized.

My principal aim in this Article is positive and conceptual. After introducing the core question underlying the nondelegation doctrine and

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[act] is directed to conform, such legislative action is not a forbidden delegation of legislative power."). *See generally infra* Part II.

5 Loving v. United States, 517 U.S. 748, 771 (1996); *see also* KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE 132 (6th ed. 2019) ("The Court has become increasingly candid in recognizing its inability to enforce any meaningful limitation on Congress' power to delegate its legislative power to an appropriate institution.").

6 Nat'l Broad. Co. v. United States, 319 U.S. 190, 225-26 (1943). *See also* Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266, 285 (1933) ("In granting licenses the Commission is required to act 'as public convenience, interest or necessity requires.'"). Richard Pierce has characterized such standards as "empty" ones, explaining that Congress could alternatively provide agencies with standards that are "functionally equivalent" in their emptiness, such as unranked lists of decisional factors or contradictory standards. Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 474-478 (1985).

7 For a vigorous critique of this administrative authority, see generally DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993).

8 *See, e.g.*, Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 855 (2018) (arguing that "[t]he Supreme Court has decided not to enforce the constitutional principle against subdelegation"); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 807 (1999) (accusing the Court of "avoiding its own constitutional obligation to keep the branches within the Constitution's prescribed parameters" by "declin[ing] to enforce the Constitution's rule requiring the legislature to make the laws"); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2097 (2004) (describing the current version of the nondelegation doctrine as "unenforced"); David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1231 (1985) (noting that "the Court has seemed prepared to uphold almost any statute as acceptable delegation").

explaining how the intelligible principle test is supposed to answer that question, I show that the dominant emphasis on intelligibility only gives rise to a further doctrinal puzzle: How can the nondelegation doctrine still exist when the Court over decades has approved so many pieces of legislation with fairly *un*intelligible principles? The answer to this puzzle emerges from recognition that the intelligibility of any principle dictating the basis for lawmaking is but one characteristic defining that authority. The Court has acknowledged five other characteristics that, taken together with the intelligible principle, constitute the full dimensionality of any grant of lawmaking authority and hold the key to a more coherent rendering of the Court's application of the nondelegation doctrine.

Simplifying, I illustrate how the nondelegation doctrine, properly understood, concerns both the degree of *discretion* afforded to the holder of lawmaking power and the extent of the underlying *power* itself. I also show how a textual commitment to the Constitution's Vesting Clause calls for judges to consider how lawmaking authority conferred by a statute compares with a specific legislative power "herein granted" in Article I. The proper test for the nondelegation doctrine, I thus explain, calls upon a judge to invalidate only those statutory grants of lawmaking authority that approximate one of Congress's enumerated powers along both the discretion and power dimensions.

So understood, the nondelegation doctrine remains alive, and is more manageable and coherent too, even if it has almost never been invoked to strike down legislation authorizing lawmaking by executive officers. Its infrequent use to invalidate legislation—even when these laws impose minimal decisionmaking constraint—is not a function of judicial confusion or of the Supreme Court's abandonment of the doctrine. It is instead a function of the doctrine itself being grounded in more than just an intelligible principle test—and of the fact that legislation only infrequently seeks to effectuate grants of authority that reach the extremes on both dimensions of delegation.

I. The nondelegation issue

The Constitution expressly acknowledges that the U.S. government comprises executive departments and officers—and, by extension, it

acknowledges that these departments and officers possess discretion.[9] But the text and structure of the Constitution also places primacy on Congress as the source of legislative authority: "All legislative Powers herein granted shall be vested in a Congress of the United States."[10] The Supreme Court has long recognized that this Vesting Clause contained in Article I, Section 1 means that Congress may not transfer its legislative powers to another governmental body or official.[11] If Congress were to transfer its legislative powers, then it could, by itself, override the Constitution's express scheme for bicameralism and presentment in lawmaking—not to mention the prescribed means for amending the Constitution.

Yet these long-settled doctrinal propositions do not lead to any automatic conclusion about the authorization of rulemaking by executive officials. The potential for the exercise of rulemaking authority by departments and executive officers is not expressly addressed in the text of the Constitution. Is administrative rulemaking a species of the "legislative powers herein granted" that Article I, Section 1 vests in Congress? The Constitution does not explicitly say. It does, though, authorize Congress to adopt all laws that are "necessary and proper" to carry out its powers. Congress has deemed it to be "necessary" from the earliest days of the Republic to grant other governmental

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9 Executive departments and officers are acknowledged twice in Section 2 of Article II of the Constitution, and officers are recognized in Sections 3 and 4 of Article II. *See* U.S. CONST. art. II, § 2, cls. 1-2; U.S. CONST. art. II, §§ 3, 4. Departments and officers are also mentioned in the Necessary and Proper Clause of Article I. *See* U.S. CONST. art. I, § 8, cl. 18. That the heads of these departments would possess some degree of discretion in their actions seems implicitly acknowledged in the Take Care Clause of Article II. *See* U.S. CONST. art. II, § 3. The Take Care Clause does not by its terms directly impose an obligation on the President to execute the laws faithfully—that duty follows from the oath of office provided elsewhere in Article II. *See* U.S. CONST. art. II, § 1. Rather, the President's "take care" duty is to make sure that the laws *are* faithfully executed, namely by those other officers who make up the executive branch in the exercise of their discretion. *See* Peter Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 703 (2007).

10 U.S. CONST. art. I, § 1.

11 *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 test permits no delegation of those powers . . . ."); *see also* Touby v. United States, 500 U.S. 160, 165 (1991) (noting that the Court "has derived the nondelegation doctrine" from the Vesting Clause); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) ("The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."); Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

actors authority to establish rules.[12] The Supreme Court has also recognized the necessity of such congressional empowerment.[13]

Even if necessary, are congressional grants of rulemaking authority also "proper?" Certainly nothing in the Constitution expressly precludes Congress from authorizing the heads of departments to create rules, even though it does impose a series of other clear prohibitions on Congress in Article I, Section 9.[14] But if rulemaking is an Article I "legislative power," then Congress may not permissibly authorize others to exercise it.

In one sense, rulemaking certainly *looks* legislative, because it results in binding rules that are fully enforceable as law. These binding rules are even called "legislative rules."[15] Yet despite these similarities in semantics as well as form, rulemaking power is not necessarily the same as a "legislative power," at least not for purposes of the Vesting Clause.[16] Administrative rulemaking,

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[12] As other scholars have amply pointed out, starting with the earliest Congresses, legislation has expressly authorized the President or other officers to establish rules and policies with respect to various matters. *See, e.g.*, JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 43-47 (2012) (discussing early legislation that authorized executive officers to establish certain rules related to postal services, pensions, and banking); Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 738-39 (1994) (providing examples of early congressional delegations of power over areas such as patents, military patents, and trade with Indian tribes); Eric Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1735-36 (2002) (listing early statutes delegating power to the executive); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 331-32 (1999) ("[E]arly practice suggested considerable willingness to 'delegate' authority.").

[13] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 372 (1989) ("Congress simply cannot do its job absent an ability to delegate power under broad general directives."); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility.").

[14] U.S. CONST. art. I, § 9; *see also, e.g.*, Cass R. Sunstein, *supra* note 3, at 322 ("The Constitution does grant legislative power to Congress, but it does not in terms forbid delegations of that power . . . .").

[15] *E.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015) ("Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'" (citation omitted)).

[16] *See, e.g.*, United States v. Grimaud, 220 U.S. 506, 516 (1911) ("Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power."); *see also* Loving v. United States, 517 U.S. 748, 776-77 (1996) (Scalia, J., concurring) ("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 . . . . What Congress does is to assign responsibilities to the Executive."). Of course, Justice John Paul Stevens called it mere "pretend" to think administrative rulemaking is anything but the exercise of legislative power. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 488 (2001) (Stevens, J., concurring) ("I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is 'legislative power.'"). Stevens still accepted that a grant of rulemaking authority must be "adequately limited by the terms of the authorizing statute," suggesting that the

after all, can constitute a type of executive power. Undeniably, executive officers responsible for implementing legislation must often create rules to carry out their duties.[17] Even one of the "purest" of executive functions—the delivery of mail—depends on a postmaster's power to create binding rules.[18] Congress has recognized the need for administrators to make rules by repeatedly authorizing executive officials to make them in the course of carrying out their executive responsibilities.[19]

The Court thus has had to reconcile two seemingly competing propositions: first, that Article I's vesting of legislative powers in Congress does not permit Congress to transfer those powers to another entity; and, second, that Congress may (and frequently does) authorize rulemaking by the President or administrative agencies. The judicial challenge has been to

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underlying nondelegation doctrine analysis does not hinge on what label one places on the lawmaking authority granted to an agency. *Id*. at 458. But Stevens's view does not reflect the Court's accepted position.

17 *See* City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013) ("Agencies make rules . . . and have done so since the beginning of the Republic . . . but they are exercises of—indeed, under our constitutional structure they must be exercises of—the 'executive Power.'"); *Am. Trucking*, 531 U.S. at 475 (majority opinion) ("[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action." (quoting *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting))); *see also, e.g.,* Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1005 (2015) (noting that "the Court insists . . . that rulemaking activities by administrative agencies must constitute exercises of the 'executive Power' found in Article II of the Constitution"); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2020 (2011) (noting that it is "no less accurate to say that when an agency implements an organic act by promulgating rules pursuant to an intelligible principle, that agency is, in fact, executing the law"); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2094 (2005) (noting that the implementation of legislation "necessarily involves a considerable amount of policymaking").

18 *See* Myers v. United States, 272 U.S. 52, 106 (1926) (treating a postmaster as an executive officer); *see also* Humphrey's Executor v. United States, 295 U.S. 602, 632 (1935) (describing a postmaster as a "purely executive officer"). For an earlier treatment of postal rulemaking authority, see Rosen v. United States, 245 U.S. 467 (1918), and MASHAW, *supra* note 12, at 46 (describing authority given by the Second Congress to the Postmaster General to "provide for additional post roads and to decide where to set up post offices . . . and to prescribe regulations for his subordinates as he found necessary").

19 Such rulemaking, like other executive powers, is of course always subordinate to legislative power in the sense that legislation always prevails in the event of conflicts between administrative rules and legislation. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."); *see also* Merrill, *supra* note 8, at 2112 ("[A]gency regulations have the force of law only if Congress has delegated authority to promulgate them."). As discussed in Part IV, Merrill views rulemaking's subordination to legislation as pivotal to resolving the constitutional issues implicated by the nondelegation doctrine; however, as I explain there, the subordinated status of executive rulemaking does not adequately explain the Court's approach in nondelegation cases.

distinguish Congress's permissible authorizations of executive authority to make rules from any impermissible delegations of legislative powers vested in Congress by Article I. That is the very issue that the nondelegation doctrine seeks to address, drawing the line between permissible and impermissible grants of lawmaking authority by Congress to executive officers.[20] When a grant to executive officers accords with the nondelegation doctrine, it will be deemed, by definition, a grant of constitutionally permissible rulemaking authority—an executive power—not the transfer of a legislative power vested in Congress.

II. The intelligible principle test

To determine the permissibility of a grant of lawmaking authority to executive officers, the Supreme Court has long invoked the intelligible principle test.[21] Under this test, a grant of lawmaking authority will not be deemed tantamount to "legislative power" vested in Congress if an executive officer's discretion in exercising that authority is sufficiently constrained by some fairly cognizable criterion.

Congress's Article I legislative powers are, after all, virtually *un*constrained in terms of any decisionmaking criterion that Congress must follow. The Constitution does provide minimal procedural constraints and substantive limits, such as those in Article I, Section 9 or in the Bill of Rights. Yet in exercising its enumerated powers in Article I, Congress is not

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[20] The nondelegation doctrine applies to congressional grants of lawmaking authority to judicial officers as well. *See* Margaret Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. Cal. L. Rev. 405 (2008). As most grants of lawmaking authority are made to executive officers, and almost all relevant cases have arisen in the context of grants to executive officers, this Article simplifies its analysis by focusing just on executive officers. The analysis provided here, though, would also apply to grants of lawmaking authority to the judiciary.

[21] *See, e.g.*, Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 236 (2005) (describing "the dominant modern formulation . . . that regards an 'intelligible principle' as the touchstone for a constitutional grant of discretion" to an executive officer); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 240 (2000) ("Under black-letter law, the Court will uphold any organic statute that supplies an 'intelligible principle' to channel agency discretion."); Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1189 (2018) ("Above all, the standard [nondelegation] doctrine is designed to ensure that Congress does not 'delegate' its lawmaking functions and that it supplies an 'intelligible principle' for the executive branch to follow.").

constrained by an additional principle telling it the basis on which it must decide whether or how to exercise those powers, such as when or how it can regulate interstate commerce. Indeed, in most cases the justification for, or basis of, Congress's exercise of its legislative power must simply meet an extremely minimal threshold of rationality. As long as government lawyers later can provide a court with some reason to justify a piece of legislation, it will pass muster under a rational basis standard that some commentators consider to be effectively no standard at all.[22]

By contrast, when Congress authorizes lawmaking by executive officers under the terms of an intelligible principle, the officials' discretion will be cabined by that principle which indicates the appropriate rationale or basis for the officials' decisionmaking. Authorized executive rulemaking authority will thus be both subordinate to legislation and constrained in a way that makes it unlike a legislative power of the type Article I vests in Congress.

From its earliest cases on the subject, the Supreme Court has accepted legislation authorizing other governmental actors to make rules, as such rulemaking authority has been constrained to a degree that Congress is never constrained. In 1825, Chief Justice John Marshall described a statutory grant of rulemaking authority as merely constituting a power "to fill up the details."[23] The Court later upheld presidential tariff authority in 1892 because it viewed the relevant legislation as simply calling for the President to make a "contingent" factual determination.[24]

By 1928, in *J.W. Hampton, Jr. & Co. v. United States*,[25] another case involving presidential tariff authority, the Court first articulated constraints on rulemaking authority in terms of an "intelligible principle." The Court in *Hampton* upheld legislation granting the President authority to increase tariffs because the statute stated that the exercise of this authority was to "equalize costs of production in the United States and the principal competing

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22 *See, e.g.*, Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 493 (2011) ("By allowing any plausible reason for legislation to suffice, whether or not it was a true reason for the legislation, the Court has essentially made the rational basis test the equivalent to no test at all.").

23 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825); *see also* United States v. Grimaud, 220 U.S. 506, 517 (1911) (invoking an agency's "power to fill up the details" in upholding a statute against a nondelegation challenge).

24 Marshall Field & Co. v. Clark, 143 U.S. 649, 699 (1892).

25 276 U.S. 394 (1928).

country."[26] The statute, in articulating the basis on which Presidents could make tariff decisions in terms of equalizing costs, thus placed constraints on those decisions in a manner unlike the unbounded nature of a "legislative power" vested in Congress. Article I of the Constitution simply states that "Congress shall have the power to lay and collect . . . duties, imposts, and excises" and "to regulate commerce with foreign nations."[27] It does not limit the basis for Congress's exercise of these powers to equalizing costs across nations.[28]

When the Court struck down the National Industrial Recovery Act in 1935, it likewise considered whether the statute contained a principle or standard to constrain decisionmaking in the exercise of the granted authority.[29] The Act authorized the President to approve codes of "fair competition" for various industry sectors.[30] The unanimous *Schechter Poultry* Court concluded that the Act provided "no standards" to guide presidential approval of such codes, leaving the President's discretion "virtually unfettered."[31] Justice Benjamin Cardozo, writing in concurrence, vividly observed that the lawmaking authority Congress had authorized in the Act was "not canalized within banks that keep it from overflowing."[32]

In the years since *Schechter Poultry*, the Court has repeatedly quoted the *Hampton* Court's formulation of the need for a statutory grant of rulemaking authority to be accompanied by an intelligible principle.[33] The Court has

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[26] *Id.* at 401.

[27] U.S. CONST. art. I, § 8.

[28] The only way Article I limits Congress's tariff authority is by requiring that any established tariffs be uniform across all the states. U.S. CONST. art. I, § 8.

[29] *See* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935) ("[W]e look to the statute to see . . . whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others."); Pan. Refining Co. v. Ryan, 293 U.S. 388, 415 (1935) (noting that the Court looks to the statute to see "whether the Congress has declared a policy with respect to that subject" and "whether the Congress has set up a standard for the President's action").

[30] *Schechter Poultry*, 295 U.S. at 530.

[31] *Id.* at 541-42.

[32] *Id.* at 551 (Cardozo, J., concurring).

[33] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) ("[W]e 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 removed)); *see also* Clinton v. City of New York, 524 U.S. 417, 484 (1998) (quoting *Hampton*, 276 U.S. at 409) ("[T]he Constitution permits only those delegations where Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" (emphasis removed)).

even subsequently described this as "[t]he intelligible-principle rule."[34] Yet the Court has not since 1935 found any other piece of legislation to offend this rule. The upshot of this widely accepted account of the nondelegation doctrine is that, as Cass Sunstein has put it, Congress violates the doctrine only if it gives the President or agencies a completely "'blank check,' or states no intelligible principle" whatsoever.[35]

III. The intelligibility puzzle

Despite the Court's longstanding claim that the intelligible principle test constitutes the core of the nondelegation doctrine, what the test actually demands in terms of the intelligibility of a principle is far from clear. What exactly makes a principle "intelligible?" How intelligible is intelligible enough?

The answers to these questions have never been entirely clear—or, one might say, fully intelligible. In addition to intrinsic difficulties in drawing lines based on the concept of intelligibility, the Court has never clearly articulated how it could approve statutes containing decisionmaking principles that seem as sweeping or vague as those in the National Industrial Recovery Act, if not more so. The intelligibility test has thus led to an intelligibility puzzle.[36]

This puzzle arises because, in the first instance, the National Industrial Recovery Act did in fact contain criteria purporting to guide presidential decisionmaking. The Supreme Court in *Schechter Poultry* recognized that the statute required the President, before approving any code, to make specific findings about the fairness of the process by which the proposed code had been developed and to find that the proposed code would neither "promote monopolies" nor "eliminate or oppress small enterprises."[37] In addition, as the Court also noted, before approving a proposed industry code the President needed to find that the code would "'tend to effectuate the policy' of Title I of the Act."[38] That policy, in the 166-word opening section

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[34] Loving v. United States, 517 U.S. 748, 771 (1996).
[35] Sunstein, *supra* note 12, at 331.
[36] *See* Sunstein, *supra* note 3, at 315, 318 n.15 (describing the nondelegation cases as creating a "puzzling line of doctrine").
[37] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 522 (1935).
[38] *Id.* at 523 (quoting National Industrial Recovery Act, Pub. L. No. 73-67, § 3, 48 Stat. 195, 195 (1933)).

of the Act, stated that the Act was intended, among other things, to "remove obstructions to the free flow of interstate and foreign commerce," "eliminate unfair competitive practices," "increase the consumption of industrial and agricultural products," "reduce and relieve unemployment," "improve standards of labor," and "conserve natural resources."[39]

The specification of these policies in the statute belies the inference that the Act contained absolutely "no standards" whatsoever—at least not literally so. Still, these phrases are admittedly quite spongy. They do not really limit the basis upon which a President could justify the adoption of nearly any industry code. Does not what constitutes an "unfair" business practice lie in the eye of the beholder? How much "obstruction" of commerce is enough to justify regulation? Will not a President always think that new labor rules will "improve" existing standards?

Not only did such vague terms provide no meaningful constraint, but the Act only required the President to find that a new code would "tend" to promote one or more of these stated policies. Clearly, the presence of numerous words in the Act did not keep it from amounting to the functional equivalent of a blank check.

The puzzle of intelligibility arises, though, when the effectively vacuous standards of the National Industrial Recovery Act are compared with their counterparts in various statutes that the Court has *upheld* in the face of nondelegation challenges, even though these counterparts also seem functionally equivalent to a blank check.[40] In addition to upholding the Federal Communications Commission's authority to regulate broadcasting based only on "the public interest, convenience, or necessity,"[41] the Court has upheld the congressional authorization of price controls at levels that the government administrator merely deems "generally fair and equitable."[42]

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[39] *Id.* at 534-35 (quoting National Industrial Recovery Act § 3).

[40] In cases before and after *Schechter Poultry*, the Supreme Court has also held that Congress need not provide a principle for exercising delegated authority that is any more specific than is "reasonably practicable." *See, e.g.*, United States v. Royal Rock Co-Operative, Inc., 307 U.S. 533, 574 (1939) ("Congress needs specify only so far as is reasonably practicable."); Buttfield v. Stranahan, 192 U.S. 470, 496 (1904) ("Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."); *see also* Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) ("Necessity . . . fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules . . . .").

[41] Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943).

[42] Yakus v. United States, 321 U.S. 414, 420 (1944).

It has upheld administratively imposed milk price controls at levels that simply "reflect" various economic conditions, provide for a "sufficient" volume of milk, and are found to advance "the public interest."[43] It has allowed Congress to authorize the Attorney General to designate a drug as a controlled substance—a designation backed up with criminal sanctions for unlawful possession — as long as doing so is "necessary to avoid an imminent hazard."[44]

In its *American Trucking* decision in 2001, the Court approved Congress's decision in the Clean Air Act to authorize the Administrator of the Environmental Protection Agency to set air quality standards which, in the Administrator's "judgment," would be "requisite to protect the public health" and would "allow[] an adequate margin of safety."[45] The Agency had assumed that adverse health effects would occur from any non-zero level of ozone and particulate matter pollution in the ambient air, which led the lower court to conclude that the statute, as understood by the agency, contained no "determinate criteria for drawing lines" and thus lacked any intelligible guidance as to how the Administrator should set standards.[46] On review, the Supreme Court reversed, dismissing the lower court's concerns about the lack of a principle to guide the agency in drawing a line. According to Justice

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43 *Royal Rock Co-Operative*, 307 U.S. at 539-40, 542 n. 4, 575-77.

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

45 42 U.S.C. § 7409(b) (2012). Until 2019, the unanimous *American Trucking* decision had been the Supreme Court's latest major treatment of the nondelegation doctrine. Despite speculation that the Court would use *Gundy v. United States* to change its analytic approach to the nondelegation doctrine, it did not do so when that decision was handed down in June 2019. *See* Gundy v. United States, 139 S. Ct. 2116 (2019). As of this writing, months after the Court handed down its decision in *Gundy*, the Court has yet to rule on a post-decision petition in that case urging the Court to rehear the case. *See* John Elwood, SCOTUSBLOG (OCT. 9, 2019, 3:38 PM), https://www.scotusblog.com/2019/10/relist-watch-150 [https:// perma.cc/B4WL-LQ3U]. Gundy's lawyers have argued in their petition for rehearing that, due to a vacancy created by the retirement of Justice Anthony Kennedy, the Court had only eight members when *Gundy* was argued, and further that the current approach to the nondelegation doctrine has been questioned by four of the eight Justices participating in the Court's decision, including Justice Samuel Alito, who authored a decisive concurring opinion in the case. *See* Petition for Rehearing at 1-4, *Gundy*, 139 S. Ct. 2116 (2019) (No. 17-6086), 2019 WL 3202508, at *1-4. Justice Alito's concurrence expressed a willingness on his part to "support" a reconsideration of the Court's approach to the nondelegation doctrine "[i]f a majority of this Court were willing" to do so. *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring). Justice Neil Gorsuch's dissenting opinion, joined by Chief Justice John Roberts and Justice Clarence Thomas, raised concerns with the Court's current approach to the nondelegation doctrine. *Id.* at 2135-36, 2141-42 (Gorsuch, J., dissenting). I discuss Justice Gorsuch's critique and suggested alternative approach *infra* in Part VIII.

46 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472, 475 (2001) (quoting Am. Trucking Ass'ns v. U.S. EPA, 175 F.3d 1027, 1034 (1999)).

Antonin Scalia's opinion for the unanimous Court, the Clean Air Act's principle—"requisite to protect the public health" with an "adequate" margin of protection—was sufficiently intelligible, sitting "comfortably within the scope of discretion permitted by our precedent."[47]

The Court was surely correct about how the Clean Air Act's principle fit with post-*Schechter Poultry* precedent, but what does that say about the National Industrial Recovery Act? In light of the Court's decisions since the 1930s, was *Schechter Poultry* wrongly decided because the New Deal statute's constraints were no more vacuous than those the Court has since approved? Or has the Court simply abandoned a doctrine that it previously thought proper to apply in *Schechter Poultry*? These questions reveal the seeming inconsistency that has led commentators to decry the Court's incoherent application of the nondelegation doctrine, and even its total abandonment.

Indeed, the Court's disapproval of the National Industrial Recovery Act cannot be squared with its subsequent approval of other legislation with comparably spongy principles by looking solely through the lens of the intelligible principle test—that is, by examining statutes' stated principles guiding the exercise of rulemaking authority. The problem is that this is too narrow of a view of these statutes. What looks incoherent or puzzling from the sole standpoint of the intelligible principle test—which itself cannot be made all that intelligible—need not look so puzzling from a broader perspective.[48]

IV. The insufficiency of inherency and derivation

The path toward a broader and clearer perspective begins by distinguishing between three distinct but interrelated concepts: (1) action; (2) power or authority; and (3) discretion. Government agencies or officials can take a variety of *actions*, one of which is to make laws. When an agency or official has been duly granted legal authorization to undertake an action, then that agency or official can be said to have the *power* or *authority* to take

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47 *Id.* at 472, 476.

48 *Cf.* Cary Coglianese, *Bounded Evaluation: Cognition, Incoherence, and Regulatory Policy*, 54 STAN. L. REV. 1217, 1219 (2002) (showing that policies that seem incoherent on the surface can be coherent once other factors are considered).

that action. In determining whether and how to exercise power or authority, decision makers possess varying degrees of *discretion*, depending on how tightly their choices about taking the authorized action are constrained by rules or principles.[49] In its typical formulation, the intelligible principle test is said to demand that legislation sufficiently constrain an executive officer's choices about exercising authority to issue rules on a particular subject—that is, the officer's discretion.

These three concepts help illuminate the typical (albeit narrow) articulation of the nondelegation doctrine. Judges and scholars appear to assume that nontransferable "legislative powers" are simply any powers to undertake the action of making law. This assumption no doubt stems from the fact that, from a certain vantage point, executive rulemaking looks like the same kind of action the Constitution grants to Congress: namely, lawmaking. If both rulemaking authority and legislative power are functionally identical, then that would seem to leave only the amount of discretion possessed by the lawmaker as the way to distinguish a permissible grant of rulemaking authority from an impermissible delegation of legislative power. The intelligible principle test is supposed to measure, so to speak, that amount of discretion. A statute will be constitutional as long as an executive officer's discretion is not unbounded in the way that Congress's is.

The emphasis on discretion comes through in the Court's canonical statement of the intelligible principle test in *Hampton*: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[50] The Court made clear in that case that the *action* involved the establishment of binding tariff rates, with the statute's principle of cost equalization serving to constrain the President's *discretion* in undertaking that action.

In subsequent cases, the Court has similarly described the intelligible principle as a purported constraint on discretion in the exercise of authorized action.[51] The *Touby* Court, for example, spoke of "restrictions on the Attorney General's discretion to define criminal conduct."[52] In *Mistretta*, the Court

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[49] *See* Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J. L. & PUB. POL'Y 645, 652-653 (1991).

[50] J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[51] *See* Sunstein, *supra* note 3, at 318; Manning, *supra* note 21, at 240.

[52] Touby v. United States, 500 U.S. 160, 167 (1991).

considered whether "Congress has set forth sufficient standards for the exercise of the Commission's delegated authority"—or its "discretion."[53]

But the degree of discretion is not the only way to distinguish rulemaking authority from a legislative power. As Thomas Merrill has helpfully suggested, a legislative power of the kind vested in Congress can have other properties that make it different from rulemaking authority. Merrill notes that one key difference is what he calls the former's "inherency."[54] That is, legislative power derives inherently from the Constitution. By contrast, rulemaking authority is not inherent in an administrative agency but is instead derivative of and dependent upon statutory authorization.[55] The administrator's authority depends on Congress exercising its legislative power to authorize rulemaking action.[56] The derivative nature of rulemaking means that courts must confine the exercise of such authority to the terms of its underlying legislative grant. The derivative nature of rulemaking authority also means that Congress can use its legislative power to override or nullify the legal effect of any specific provision in an administrative rule—and can even use it to take back entirely any authorization of rulemaking authority.[57]

Merrill correctly distinguishes between derived and inherent powers, and his observations point in a helpful direction for anyone interested in the nondelegation doctrine because they highlight the need to focus more precisely on what "legislative power" means and how it differs from rulemaking authority. The need to distinguish nondelegable legislative power from a permissible grant of rulemaking authority is, after all, the need that the intelligible principle test has purported to fulfill.[58]

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[53] Mistretta v. United States, 488 U.S. 361, 379-80 (1989); *see also Industrial Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring) (noting that "the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion").

[54] Merrill, *supra* note 8, at 2101.

[55] This is, of course, putting to the side the separate possibility that some inherent powers might derive from Article II directly.

[56] Merrill, *supra* note 8, at 2101.

[57] *Cf*. Cary Coglianese & Kalypso Nicolaidis, *Securing Subsidiarity: The Institutional Design of Federalism in the United States and Europe*, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 277, 293-94 (Kalypso Nicolaidis & Robert Howse eds., 2001) (discussing principals' option of reversing the delegation of authority to their agents).

[58] *See supra* Part I.

Yet neither the inherency of legislative power nor the derivative nature of rulemaking authority will fully resolve the question of what distinguishes permissible from impermissible grants of lawmaking authority.[59] This is because the question underlying the nondelegation doctrine is already motivated by a recognition that legislative power is inherent, for that is what Article I's vesting accomplishes. The nondelegation question also necessarily accepts that even a transfer of legislative power would be derivative, for that is what it means *to delegate*.[60] What courts need, if they are to answer the question underlying the nondelegation doctrine, is a test or method separate from inherency and derivation by which to distinguish a permissible (derivative) grant of rulemaking power from an impermissible (but still derivative) authorization of the exercise of legislative power.

V. Six degrees of delegation

By looking again at the way that the Supreme Court has handled nondelegation cases throughout history, it is possible to discern a meaningful test at work that distinguishes between permissible and impermissible authorizations of lawmaking power. Such a test requires taking into account the totality of the relevant characteristics of a grant of lawmaking authority.

Lawmaking authority, after all, is not unlike property. The collection of rights in different types of property has long been compared to a "bundle of sticks."[61] A grant of lawmaking authority likewise consists of distinct sticks

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[59] Of course, Merrill uses these characteristics not so much to derive a principled, positive account of how the Court has applied the nondelegation doctrine (which is the principal goal of this Article). Instead, he argues for a doctrine of exclusive delegation which holds that Article I, Section 1 requires executive officers to possess delegated authority from Congress before they can exercise lawmaking authority. Merrill, *supra* note 8, at 2109-14. Merrill offers both constitutional and consequentialist arguments to reject the use of the nondelegation doctrine in favor of relying on an exclusive delegation reading of Article I, Section 1. *Id.* at 2165-66. These arguments merit attention but go beyond the present purpose of this Article.

[60] Coglianese & Nicolaidis, *supra* note 57.

[61] In raising the bundle metaphor, I recognize that some property law scholars now resist this conceptualization. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. S77, S82 (2011) (expressing concern with the implications of the bundle-of-rights conception as treating property merely "as a kind of master list of rights and duties set forth by some authoritative state institution for each type of property or indeed for each particular parcel of property"); Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 BROOKLYN L. REV. 681, 682-83 (2014) (dismissing the bundle of rights orientation as "a substantive theory of property as a formless and infinitely malleable collection of rules to be shaped in accordance with ad

or features which together are constitutive of that authority. The degree of intelligibility to a principle constraining discretion is one of those "sticks," but just one within a larger bundle that together can distinguish rulemaking authority from legislative power. Taking the larger bundle of characteristics into account, the Court's approach to the nondelegation doctrine—that is, invoking it to invalidate the National Industrial Recovery Act but not any other laws—no longer need seem incoherent at all.

Any grant of authority exhibits six key characteristics.[62] We might even refer to them as six degrees of delegation.[63] In this Part, I specify these characteristics—the sticks that make up the authority bundle—and then, in the next Part, I show how putting these characteristics together can allow judges to distinguish rulemaking authority from legislative power.

In elaborating on each of the characteristics below, I point out how statutory grants of authority to executive officers have included these features and how each relates to the nondelegation doctrine.[64] For ease of reference, I have divided the list of six characteristics into three groups—"nature of action," "extent of power," and "degree of discretion"—a division which is not crucial here but will be referred to again in the next Part of this Article. The basic intuition, developed more fully in the next Part of this Article, is that a grant of lawmaking authority to an executive officer will be

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hoc perceptions of public policy"). Even if the metaphor has grown out of fashion in some quarters, a more essentialist view of property cannot deny that different types of property arrangements come with different sets of rights and legal relationships, which is my main point. *See, e.g.*, Katrina Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183, 205 (2017) (arguing that "the new essentialist approach is considerably more open to multiple values and forms of property than the critics—and new essentialists—imply").

62 These core characteristics can also be said to delineate an agent's power in any principal-agent relationship. For general background on principal-agent theory and useful conceptual guides to delegation more broadly, see generally JEAN-JACQUES LAFFONT & DAVID MARTIMORT, THE THEORY OF INCENTIVES: THE PRINCIPAL-AGENT MODEL (2002); John W. Pratt & Richard J. Zeckhauser, *Principals and Agents: An Overview*, *in* PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 1 (John W. Pratt & Richard J. Zeckhauser eds., 1985); Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MGMT. REV. 57 (1989).

63 The parallel with the title of John Guare's play *Six Degrees of Separation* is intended, but only as one of form. However, given that the play is about connectedness, it is interesting to note a connection between it and the intelligible principle test: the play, like the test, grew out of a case involving a man named Hampton. *See* Larry McShane, *Con Man Who Sought Fame, Inspired Hit Play, Has Died*, MOBILE REG., July 20, 2003, at A18, 2003 WLNR 15732472.

64 Simply for ease of expression, each of the six characteristics of authority is presented here with a parenthetical example framed as a binary choice. In reality, only the first characteristic—the nature of action—is truly binary: that nature is either "legislative" in form or it is not. The other five characteristics array continuously along the relevant spectra.

unconstitutional only when the combination of its characteristics makes the authority comparable to a power vested in Congress under one of the enumerations in Article I.

Nature of action

1. Nature of Action (e.g., taking enforcement actions versus making binding rules)

The nature of action authorized by a piece of legislation constitutes a threshold characteristic for any application of the nondelegation doctrine. If a statute is to be unconstitutional on nondelegation grounds, it is a necessary (but not sufficient) condition that the statute authorizes an executive officer to make law in some fashion. A statute authorizing an executive officer to conduct a study or develop recommendations would be unproblematic on nondelegation grounds regardless of any other characteristic. Furthermore, if a statute authorizes other demonstrably executive actions—say, enforcement—then nondelegation concerns will also not be relevant to those authorizations. The Supreme Court has expressly affirmed that any grant of authority to an executive officer to initiate enforcement actions is subject to virtually no legal constraint whatsoever.[65] For an authorization to be even plausibly construed as a delegation of a legislative power, it must at a minimum authorize the making of law.

Extent of power

2. Range of Regulated Targets (e.g., single industry versus the entire economy)

Many statutes address a single industrial sector, whether it be telecommunications, nuclear energy, or milk production. Other statutes sweep across many or even all sectors of the economy by addressing concerns arising in many different types of businesses, such as environmental protection or worker safety. The more limited the range of possible regulated

[65] *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

targets under a lawmaking authorization in a statute, the less the authority granted to the administrative agency will look like the kind of legislative power "herein granted" by Article I to regulate virtually the entire domain of economic activity under the Commerce Clause.[66] It is notable in this regard that the statutory provision at issue in *Schechter Poultry* applied to the whole economy, authorizing the President to approve codes that could have addressed any industrial sector.[67] It is also striking that, more recently, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,[68] the Court appeared to have worried about the nondelegation issue in a dispute over the Occupational Safety and Health Administration's authority to impose standards on every workplace in the country.[69]

3. Scope of Regulated Activities (e.g., placing limits on air pollution versus requiring fair business practices of any kind)

Independent of the number of business firms or industrial sectors under potential regulatory control, a statute can authorize executive officers to make laws with respect to a narrow or wide range of *activities* undertaken by those firms or within those sectors.[70] For example, even though environmental and

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[66] U.S. CONST. art. 1, § 8, cl. 3.

[67] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring) ("The extension [of authority under the National Industrial Recovery Act] becomes as wide as the field of industrial regulation.").

[68] 448 U.S. 607 (1980).

[69] *Id.* at 611. Justice William Rehnquist would have used this case to invalidate the Occupational Safety and Health Act as violative of the nondelegation doctrine. *See id.* at 671-88 (Rehnquist, J., concurring). Although the Environmental Protection Agency's (EPA) ambient air quality standards at issue in *American Trucking* in 2001 held implications for any industrial sector with polluting facilities, the EPA's standard-setting authority under the Clean Air Act did not authorize the direct regulation of any private-sector actor. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473-74 (2001). Even if an expansive, economy-wide impact of the Clean Air Act standards were conceded, the other facets of the delegation discussed below more than amply explain the Court's rejection of the nondelegation challenge in *American Trucking*. *See infra* notes 93-98 and accompanying text.

[70] At this juncture, perhaps some readers may start to wonder whether a delegation's definition of regulated targets (the second characteristic) and activities (the third characteristic) might simply constitute part of the conventional intelligible principle. It is true that the delegation's definition of power in terms of targets and activities also necessarily constrains that power, something that could be said for any of a delegation's six characteristics, as together they are constitutive of an executive officer's authority. But, as discussed *supra* in Parts II and IV, and noted *infra* again in the present Part in connection with the fifth characteristic, the Court has treated the intelligible principle as a constraint on *discretion* in the exercise of delegated power—not as a means of determining the extent of that power itself. That said, if a reader prefers to think of the characteristics presented here as aspects of some new kind of all-encompassing intelligible principle, the important point would be to see that such a meta-principle would encompass all of these characteristics. All of the characteristics, however

occupational safety and health statutes authorize executive officers to make rules applicable across the entire economy, they still only authorize action addressing pollution or safe working conditions. They do not authorize actions that relate to other aspects of business operations or address other societal concerns. By contrast, the National Industrial Recovery Act authorized the President to approve codes addressing any and all aspects of economic activity: mergers and acquisitions, prices, purchasing decisions, employment practices, working conditions, and even environmental impacts—anything related to "fair competition" and the broad policies of the Act.[71]

4. Degree of Sanctions (e.g., small penalties versus large penalties)

Just as legislation can authorize the imposition of obligations on either a narrower or wider range of actors and actions, it can also provide for a range of penalties for violating these obligations. Congress can specify distinct types of penalties—e.g., civil versus criminal—as well as different maximum penalty levels or different penalty ranges. All other things being equal, a grant of authority will be more significant when penalties are more severe. The National Industrial Recovery Act, for example, provided for criminal penalties for those businesses or individuals found to violate the presidentially imposed business codes the Act authorized.[72] By contrast, the Clean Air Act provision at the heart of *American Trucking* did not put any business or individual at direct risk of any penalty, criminal or civil, because the provision imposed obligations on states which were backed up principally with the prospect of reductions in federal funding or federal preemptive action.[73] Of course, this difference between the National Industrial Recovery Act and the Clean Air Act was far from dispositive. The Court has upheld numerous

described, are collectively what turn out to be key to making better sense of how the Court has applied the nondelegation doctrine, as discussed in the next Part of this Article.

71 National Industrial Recovery Act, Pub. L. No. 73-67, § 1, 48 Stat. 195, 195 (1933). As noted earlier, the Act authorized the President to approve codes that addressed the gamut of economic actions as long as doing so was consistent with a broad range of purposes, including "to conserve natural resources." *See supra* text accompanying notes 37-39.

72 *See* National Industrial Recovery Act § 3(f).

73 The Clean Air Act provisions authorized the EPA to establish national air quality standards that states were obligated to devise plans to meet, under the threat of a potential cutoff of federal highway funds or the imposition of a federal implementation plan. *See generally* 42 U.S.C. §§ 7413, 7477, 7509 (2012). Of course, indirectly the air quality standards do matter to private actors. Under the required state implementation plans, private actors can be subjected to subsequently imposed permit obligations backed up with civil penalties and, under certain circumstances, the possibility of criminal penalties.

other statutes against nondelegation challenges even though they did provide for direct penalties—both civil and criminal.[74]

Degree of discretion

5. Basis for Decisionmaking (e.g., clearly stated principle versus no principle)

This fifth characteristic of authority is the traditional intelligible principle test, which I have already discussed in Parts II and III. To the extent that the basis for exercising lawmaking authority is constrained by a narrow, well defined principle, executive officers will have less discretion. For example, the statute authorizing the Secretary of Transportation to establish air bag rules for automobiles provides that the Secretary should seek "to improve occupant protection for occupants of different sizes, belted and unbelted . . . while minimizing the risk to infants, children, and other occupants from injuries and deaths caused by air bags."[75] That is clearly more constraining than a decisionmaking standard that, as a basis for the exercise of lawmaking authority, merely calls for deciding what would protect the "public interest" or reduce "unfair competition."

6. Extent of Required Process (e.g., transparent and participatory process versus no required process at all)

Statutes will often require that executive officers follow specified procedures before exercising a grant of lawmaking authority, such as the rulemaking procedures contained in the Administrative Procedure Act (APA).[76] Some of these procedures can be more demanding and constraining than others. In *Schechter Poultry*, the Court found it notable that the National Industrial Recovery Act dispensed with normal "administrative procedure

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[74] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (upholding statute authorizing the Attorney General to establish by rule the application of sex offender notification to existing offenders, with criminal penalties possible for violation of the rule); Loving v. United States, 517 U.S. 748, 768-69 (1996) (upholding statute authorizing President to establish aggravating factors for the imposition on military personnel of capital punishment for murder); Touby v. United States, 500 U.S. 160, 162, 166 (1991) (upholding statute authorizing the Attorney General to define certain criminal conduct under the Controlled Substances Act); United States v. Grimaud, 220 U.S. 506, 518 (1911) (upholding statute authorizing the Secretary of Agriculture to establish regulations that can be enforced with criminal sanctions).

[75] National Highway Traffic Safety Administration Reauthorization Act of 1998, Pub. L. No. 105-178, § 7103(a)(1), 112 Stat. 465, 466.

[76] 5 U.S.C. § 553 (2012).

and with any administrative procedure of an analogous character" in authorizing presidential approval of industry codes.[77] This characteristic of authority has not subsequently figured into the reasoning of many other nondelegation cases in any significant way,[78] making it less certain how consequential the extent of required process should be, *ceteris paribus*, in the nondelegation context. Still, the Court did acknowledge it in *Schechter Poultry*.[79]

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This explication of six key characteristics of authority—and hence, characteristics of any delegation or grant of governmental authority—should on its own reveal the limited range of vision afforded by the intelligible principle test.[80] A principle that provides the basis for the exercise of authority—and thus the amount of discretion afforded to a decisionmaker—

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77 A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 533 (1935).

78 For a relatively recent exception, see Clinton v. City of New York, 524 U.S. 417, 489-90 (1998) (Breyer, J., dissenting).

79 The addition, since 1946, of the APA's procedural floor for agency rulemaking means that agencies should seldom find themselves in a procedural position like the President in *Schechter Poultry*. However, when authority is granted to the President, the APA affords no procedural constraint. Franklin v. Massachusetts, 505 U.S. 788 (1992); Dalton v. Specter, 511 U.S. 462 (1994). For this reason, plaintiffs in a recent nondelegation challenge to Section 232 of the Trade Expansion Act of 1962, which authorizes the President to adopt tariffs for broad national security reasons, have argued that the Supreme Court should either overrule or distinguish its earlier decision upholding this same statute in *Fed. Energy Administration v. Algonquin SNG, Inc*., 426 U.S. 548 (1976), as it was decided prior to *Franklin* and *Dalton*. *See generally* 19 U.S.C. § 1862 (2012); Am. Institute for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335 (Ct. Int'l Trade 2019), *cert. denied*, 139 S. Ct. 2748 (2019).

80 Of course, this recitation of six characteristics is hardly to suggest that no other characteristic of authority could be conceived. In fact, another possibility might be the delegation's duration (e.g., whether it is time-limited versus permanent). Time-limited authority will certainly be more constrained than permanent authority, *ceteris paribus*. Perhaps for this reason, the Supreme Court's plurality opinion in *Gundy* hints at the possible relevance of temporality in the nondelegation context. *See* Gundy v. United States, 139 S. Ct. 2116, 2129-30 (2019) (noting that "Congress conveyed that the Attorney General had only temporary authority"). But this characteristic did not factor into the Court's holding in *Gundy* and has not been relevant to the analysis of nondelegation questions in other decisions of the Court. The National Industrial Recovery Act, after all, was itself emergency legislation slated to sunset after two years. National Industrial Recovery Act, Pub. L. No. 73-67, § 2(c), 48 Stat. 195, 196 (1933). After those two years, any code of fair competition approved by the President under the statute would also no longer have enjoyed any legal effect. Yet, despite this clear time limitation, the Court still found that the statute unconstitutionally delegated legislative powers. This makes sense. After all, if a statute otherwise unconstitutionally authorizes the delegation of legislative power, its duration presumably should not matter; two-year violations of the Constitution are still constitutional violations. That same conclusion would apply to still shorter durations.

is but one of a variety of characteristics constituting a grant of authority. If the goal of the nondelegation doctrine is to determine whether a grant of rulemaking authority amounts to what is akin to a nondelegable "legislative power" vested in Congress, then courts by necessity will need to look beyond just a single characteristic. The only way to see if the authority granted by a statute is truly on par with a legislative power vested in Congress is to consider *all* of the grant's characteristics and compare them with the same characteristics of a relevant legislative power.

Courts misconceive legislative power if they overlook some of these characteristics when seeking to determine if Congress has impermissibly delegated to an executive officer one of its powers granted in Article I. A consideration of the full set of defining characteristics is also more faithful to the constitutional text and to the Court's own decisions. Article I does not just vest Congress merely with "legislative power." Rather, it vests in Congress those "legislative powers *herein granted*." The last two words indicate that the enumerated powers granted in Article I are what the Constitution says cannot be transferred to others. These are powers that possess multiple characteristics—not just an unbounded basis for decisionmaking, the one characteristic covered by the intelligible principle test. In fact, the importance of other characteristics is necessarily implied by the Constitution's very textual enumeration of specific legislative powers, instead of just vesting Congress with catchall "legislative power."

A single-minded focus of the intelligible principle test not only creates the kind of puzzle highlighted in Part III of this Article, but also misses so much of what constitutes a power "granted" to Congress under the Constitution. The legislative power granted to Congress to regulate interstate commerce, for example, is extremely broad in its range of regulated targets and the scope of activities it allows Congress to regulate.[81] It also affords Congress the ability to impose a full panoply of sanctions unconstrained by any special procedures beyond those ordinarily required for the passage of legislation.

A focus on the "intelligible principle" test—understood in terms of the basis for exercising discretion—simply misses these other characteristics of

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[81] *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (noting that, under the Commerce Clause, "[t]he power of Congress . . . is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere"); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 555 (2012) (acknowledging in dicta that, under the Commerce Clause, Congress "enjoys vast power to regulate much of what we do").

authority. That test implies that a grant of authority under a decisionmaking standard akin to the rational basis test would constitute an impermissible delegation. Yet, as noted, the Court has accepted lawmaking grants with standards surely as sweeping. That fact implies that there exists more to the legislative powers in the Vesting Clause than just the virtually unbounded decisionmaking discretion allowed under the rational basis standard.

Determining the permissibility of a grant of lawmaking authority to an executive officer calls for comparing the full set of characteristics of a legislative power "herein granted" in the Constitution with the same full set of characteristics of the lawmaking authority granted to the executive officer in a statute. For a statutory grant of lawmaking power to offend the nondelegation doctrine, the lawmaking authorized must be on par with one of the powers Congress has been granted under the Constitution.

VI. Dimensionality solves the intelligibility puzzle

Embracing the multiple characteristics of authority helps solve the puzzle created by trying to use the intelligible principle test alone to reconcile the Supreme Court's decisions over time. The solution to this puzzle rests with the full dimensionality of the granted authority: Is the full "shape" and "size" of the authority akin to that of an enumerated legislative power?

Perhaps an analogy to the way that airlines define permissible carry-on luggage will help illustrate. To ensure that luggage will fit into overhead compartments, airlines do not merely specify a single dimension of a suitcase—say, its width. Instead, they specify the permissible width, height, and depth of carry-on luggage. Some airlines even make available at airport check-in counters small pre-sized frames built to the permissible dimensions. Only if a suitcase can fit inside the frame can it be carried on an airplane.

In much the same way, the nondelegation doctrine defines the limits on any grant of lawmaking authority to executive officers. A permissible grant of authority to an agency or the President must fall within the limits set by the full dimensions of a legislative power enumerated in the Constitution. It must, in effect, be sized to fit into a metaphorical overhead compartment, capable of being transported from Congress to somewhere else.[82]

[82] Perhaps some readers would prefer a more abstract way to envision the dimensionality of delegation by simply thinking in terms of overall volume in a three-dimensional space.

This approach not only makes conceptual sense for the reasons I have offered, but it also reflects the attention the Court has paid in its decisions throughout the decades to a range of characteristics of authority, notwithstanding its simultaneous invocation of an intelligible principle rule. The better label to capture the essence of the nondelegation doctrine actually might be a "roving commission" rule[83] or even perhaps a "junior-varsity Congress" rule.[84]

In *Schechter Poultry*, for example, the problem was not merely that the National Industrial Recovery Act contained few, if any, meaningful standards for the exercise of authority; the problem also lay with the broad extent of the lawmaking powers given to the President. The Court stressed that the President's authority under the Act encompassed a "wide field of legislative possibilities"[85] and "relate[d] to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country."[86]

In his concurring opinion in *Schechter Poultry*, Justice Cardozo emphasized this same breadth of the power authorized by the statute, remarking that the Act authorizes the President to become "in effect . . . a roving commission to inquire into evils and upon discovery correct them."[87] He emphasized that the Act authorized presidential lawmaking authority "as wide as the field of

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For example, one might think of an authorization of lawmaking authority as spanning an inch wide, a foot high, and a mile deep, while an equivalent authorization might run a mile wide, a foot high, and an inch deep. It is tempting to say that the overall volume is what matters, such that a delegation might only be impermissible if it exceeded a specified volumetric threshold—say, if it ran a mile wide and a mile high, even if only still an inch deep. Such an alternative framing may help some readers visualize statutory grants of lawmaking authority in spatial terms, which would be useful. But I avoid relying on a pure volumetric test in the text because what matters is not an abstract number representing volume—(width x height x depth)—but instead the specific dimensions associated with an enumerated power "herein granted" to the Congress, such as the power to regulate interstate commerce. For example, legislation authorizing an administrative agency to regulate both interstate and purely *intra*state matters (say, a grant of authority that is a mile and a half wide) would be impermissible even if the decisionmaking discretion were severely cabined (say, at only an inch high and an inch deep). A permissible grant of authority must always fit easily inside the relevant frame, not just possess an equivalent volume.

83 A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

84 Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

85 *Schechter Poultry*, 295 U.S. at 538 (majority opinion).

86 *Id.* at 539; *cf. id.* at 537 (characterizing the authority granted to the President as "unfettered discretion").

87 *Id.* at 551 (Cardozo, J., concurring).

industrial regulation,"[88] noting that "anything that Congress may do within the limits of the [C]ommerce [C]lause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code."[89] It was this full "plenitude of power" that Cardozo reasoned could not be transferred to the executive branch.[90]

Fast forward to *American Trucking*. The importance of distinct characteristics of governmental authority figured prominently in Justice Scalia's unanimous opinion for the Court, where he matter-of-factly noted a relationship between two key features of a statutory grant of authority: "It is true enough that the *degree of agency discretion* that is acceptable varies according to the *scope of the power* congressionally conferred."[91] He further suggested that, "[w]hile Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,' which are to be exempt from new-stationary-source regulations governing grain elevators, . . . it must provide substantial guidance on setting air standards that affect the entire national economy."[92]

Justice Scalia recognized that governmental authority can vary in more than just the degree of constraint on decisionmaking. Authority can also vary in terms of its scope and importance. Now, the Court has not executed anything like an algebraic tradeoff of the kind that might be suggested by the language in Justice Scalia's opinion. Indeed, the Court acknowledged that, "even in sweeping regulatory schemes," it has "never demanded . . . that statutes provide a 'determinate criterion'" for decisionmaking.[93] Still, the Court's opinion in *American Trucking* does display judicial recognition of multiple characteristics of authority and it supports the appropriateness of taking into account these different characteristics for purposes of analyzing a statute's constitutionality.[94]

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88 *Id.* at 553.
89 *Id.*
90 *Id.*
91 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001) (emphasis added).
92 *Id.*
93 *Id.* (citation omitted).
94 Justice Elana Kagan's plurality opinion in *Gundy v. United States*, the Court's latest nondelegation decision, also emphasized that nondelegation doctrine analysis "requires construing the challenged statute to figure out *what task it delegates* and *what instructions it provides*." 139 S. Ct. 2116, 2123 (2019) (emphasis added). In addition, scholars have sometimes acknowledged these different characteristics. *See, e.g.*, Posner & Vermeule, *supra* note 12, at 1728 & n. 17 (distinguishing between the possibility of "excessive discretion" and

Toward that end, it is striking to compare how the Clean Air Act and the National Industrial Recovery Act stack up in terms of the six characteristics presented in the preceding Part of this Article. Both pieces of legislation authorized lawmaking by an executive officer, so in terms of the nature of the authorized action they were on par with each other. But in terms of every other characteristic, the National Industrial Recovery Act swept more expansively.

The delegated authority in the New Deal statute had direct legal implications for firms across the entire economy and could lead to obligations imposed on potentially any business and any aspect of economic activity. The Clean Air Act did have economy-wide impacts too—and the EPA's rules under it would affect the air every American would breathe—but, in the end, the Clean Air Act only concerned the issue of air pollution and authorized the imposition of related legal obligations only on polluting firms.[95] Moreover, the degree of constraint placed on the EPA by the Clean Air Act was greater than that imposed on the President by the National Industrial Recovery Act, both in terms of a more circumscribed basis for decisionmaking and in terms of the environmental statute's highly specified procedures for setting air quality standards, which actually applied on top of the normal requirements for notice-and-comment rulemaking.[96] Finally, *Schechter Poultry* arose from a criminal conviction on an eighteen-count indictment, while *American Trucking* involved a pre-enforcement judicial review of ambient air quality standards that, by themselves, did not give rise to the possibility of criminal sanctions.

These are major differences in the statutory grants of authority that were at issue in *Schechter Poultry* and *American Trucking*. Even if the intelligible principle in the Clean Air Act — "requisite to protect the public health"[97]—was far from precise, the other characteristics of the Clean Air Act's authorization were much less extreme than those of the National Industrial Recovery Act's.

"excessive breadth" to grants of authority). Todd Rakoff's notion of "omnicompetent" and "omnipowered" agencies is grounded in a similar recognition that the nondelegation doctrine is attentive to the scope of power as well as degree of discretion. Todd D. Rakoff, *The Shape of Law in the American Administrative State*, 11 TEL AVIV U. STUD. L. 9, 22-24 (1992) ("Omnicompetence, or something near it, cannot, it seems, be delegated.").

95 The provision of the Clean Air Act at issue in *American Trucking* was narrower still. It authorized the EPA Administrator to set national ambient air quality standards which did not directly affect any private actor. These air quality standards served as a benchmark used only indirectly by states and the federal EPA to make other decisions that impose obligations on private actors. *See id.* at 462.

96 42 U.S.C. § 7607(d) (2012).

97 *Id.* § 7409(b).

Taking into account all of these characteristics, the New Deal statute gave to the President authority akin to the expansive and unconstrained authority Congress has been granted under the Commerce Clause. The Clean Air Act clearly did not.

The other statutes the Court has reviewed since *Schechter Poultry* also never came close to approximating the Commerce Clause power. Admittedly, some characteristics in those statutes were expansive, but not all of the characteristics were—especially those related to the range of regulated targets and scope of regulated activities. The Communications Act of 1934, for example, contained a broad basis for the exercise of discretion—"public interest, convenience, or necessity"—but the regulated targets were limited to radio stations and other broadcasting entities.[98] Even with respect to just the broadcasting sector, the Court noted that the statute "did not give the Commission unfettered discretion to regulate all phases of the radio industry."[99]

Similarly, the 1938 Natural Gas Act directed the Federal Power Commission to base its decisions on what was "just and reasonable"—far from intelligible—but the authority granted to the Commission affected only the pricing decisions of natural gas companies.[100] The Controlled Substance Act of 1970 contained a somewhat broad "imminent hazard to public safety" principle, but the statute also imposed procedural steps that the Attorney General needed to follow and the scope of authority was limited to regulating drug users and their possession of illegal substances.[101] Put simply, no other statute has yet to come to the Court with anything like the breadth of the granted authority, across all of its characteristics, exhibited in the National Industrial Recovery Act.[102]

Without question, many statutes have given executive officers substantial authority over significant policy issues. But the existence of

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98 *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943).

99 *Id*. at 219.

100 *See* Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 595, 609-10 (1944) (noting that the Federal Power Commission was established for the purpose of "regulating the wholesale distribution to public service companies of natural gas moving interstate" and that it "was given no authority over 'the production or gathering of natural gas'").

101 Touby v. United States, 500 U.S. 160, 162-167 (1991) (noting that the statute limited the Attorney General to making scheduling decisions about controlled substances).

102 *Cf.* HICKMAN & PIERCE, *supra* note 3, at 137 ("[*Schechter Poultry*] involved the most sweeping congressional delegation of all time."). Perhaps tellingly, in its most recent nondelegation case, *Gundy v. United States*, the Court's plurality opinion made a point of observing that the statute in that case, when "compared to the delegations we have upheld in the past, is distinctly small-bore." 139 S. Ct. 2116, 2130 (2019).

substantial authority is not the test that fits with the Court's application of the nondelegation doctrine. Rather, the test which best accounts for the Court's nondelegation decisions incorporates the totality of the characteristics of a grant of authority to see if that grant approximates an enumerated legislative power in the way that the National Industrial Recovery Act's delegation did.[103]

How exactly each of these characteristics should be "measured," and then combined, is surely not as clear-cut as the requirements for carry-on luggage aboard airplanes. But conceptually the approach is the same. The idea is to look at the "shape" and "size" of the authority granted by a statute to an executive officer to see whether it matches the "shape" and "size" of a legislative power granted to Congress in the Constitution.

If it were possible to visualize authority in more than three dimensions, each of the six characteristics elaborated in Part V could be conceived of as a separate dimension that defines that authority's shape and size. Even though it is not humanly possible to visualize six dimensions, it is possible still to illustrate authority graphically. To do so, the authority's six characteristics first need to be grouped into three main categories, as indicated in Part V, based on whether they address (a) the nature of the authorized action, (b) its scope or impact (that is, the extent of the power authorized), or (c) the basis for exercising the authority (that is, the degree of discretion in exercising power).

The first grouping—the nature of the action—operates simply as a condition precedent. It is a binary threshold that constitutes a necessary condition for the applicability of the nondelegation doctrine. The nature of the authorized action will either be "legislative" in the colloquial sense of lawmaking, or it will not be. The nondelegation doctrine will only be implicated if the statute authorizes lawmaking. When Congress does authorize lawmaking, the analysis then focuses on the remaining two groupings of characteristics: "Extent of Power" (which captures the range of regulatory targets, actions, and sanctions), and "Degree of Discretion" (which focuses on the statute's intelligible principle and required decisionmaking procedures).

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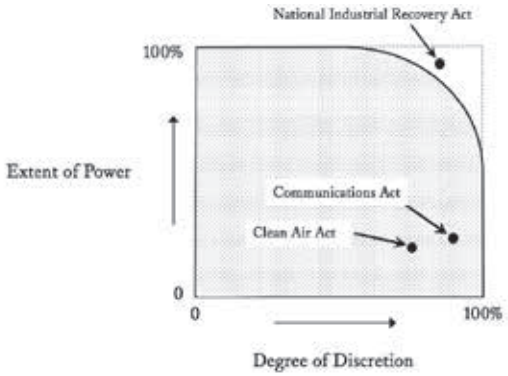
[103] The emphasis on totality—that is, on the ceding to another branch of government a whole constitutionally granted legislative power—is consistent with the Framers' understanding that the roles of different branches of government could overlap to some extent. Separation of powers "did not mean that these departments [i.e., branches of government] ought to have no *partial agency* in, or no *control* over, the acts of each other. . . . [But] where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." THE FEDERALIST No. 47, at 302-03 (James Madison) (Clinton Rossiter ed., 1961).

To illustrate, the multiple characteristics that fall in these two groupings can be combined and arrayed along two dimensions as indicated in Figure 1 on the next page, with one axis for the extent of power and the other for degree of discretion. For each dimension, the axis ends at the point that represents the extent of power or degree of discretion, respectively, that Congress possesses under the relevant legislative power granted in Article I. The shaded area in Figure 1 represents the domain for permissible statutory grants of authority.[104] I have offered some arguable placements for three statutes within this two-dimensional space, simply for the sake of illustration. Regardless of where exactly the Communications Act of 1934 and the Clean Air Act should be situated within the shaded part of Figure 1,[105] it is clear that the National Industrial Recovery Act falls within the very upper right portion of the diagram, where both the degree of discretion and the extent of power are extremely high.

Figure 1

Illustrative spatial mapping of the nondelegation doctrine



[104] The shape of the curve in Figure 1 and the precise point at which it starts to turn are heuristically established. They reflect the inherent imprecision any court will face in locating a grant in spatial terms and thus a degree of precaution a court will likely exercise when any grant of authority comes close to the extremes on both axes. Nothing essential turns on Figure 1's nonlinearity nor in the precise asymptotic relationship of each axis to the curve. The point is simply that, as the extent of power coupled with the degree of discretion reach a point approximating that of a legislative power granted in Article I, then it cannot be lawfully transferred.

[105] These placements largely reflect just the permitted substantive basis for decisionmaking (i.e., the intelligible principle). Taking into account the rulemaking procedures imposed on agencies like the Federal Communications Commission and the Environmental Protection Agency would justify situating their underlying statutes still farther to the left on the horizontal axis in Figure 1 in terms of the degree of discretion.

Figure 1's representation of the dimensions of authority fits with the Court's treatment of statutes under the nondelegation doctrine. It shows that there exists substantial room for Congress to authorize lawmaking by executive officers—even with only the thinnest constraint on discretion in terms of the intelligibility of the statute's basis for decisionmaking.[106] But where a statute grants an executive officer power coterminous with an Article I legislative power, such as the regulation of interstate commerce, and where the exercise of that power also lacks any meaningful constraint, then the authority granted by the statute impermissibly falls in the upper right corner of Figure 1 and can be said to have taken a shape and size that is equivalent to a legislative power.

Given how much shaded space exists in Figure 1, Congress has considerable room to authorize rulemaking by executive officers—which is undoubtedly why the nondelegation doctrine has seemed to fall out of usage. Congress usually passes legislation focused on particular problems, which means that rulemaking authorizations will often be naturally circumscribed and thus will rarely reach the upper-right portion of Figure 1.[107]

VII. Advantages of dimensionality

Although the basic dynamics of the political process may keep Congress from venturing close to the space which would make legislation unconstitutional, the nondelegation doctrine remains alive. A dimensional understanding of nondelegation not only accommodates the continued existence of the doctrine, but it also holds at least three advantages from the standpoint of constitutional doctrine over an understanding based solely on the intelligible principle: it does a better job of making the Court's past decisions coherent; it provides a more manageable and disciplined basis for

[106] Although the space for permissible authorization of lawmaking by executive officers may be relatively large, Congress's power does still have limits. This contrasts with what Posner and Vermeule have characterized as the "naïve view" of the nondelegation doctrine, which they say treats any authorization as permissible and would only prohibit "Congress or its individual members [from] attempt[ing] to cede to anyone else the members' *de jure* powers as federal legislative officers, such as the power to vote on proposed statutes." Posner & Vermeule, *supra* note 12, at 1726. For a discussion of an existing statute that would almost certainly fail the dimensionality test but would presumably pass muster under the naïve view, see *infra* notes 137-145 and accompanying text.

[107] For a discussion of how specific problems motivate the policy agenda in Washington, D.C., see generally JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 2010).

judicial decisionmaking; and it offers insights relevant to the application of so-called nondelegation canons.

Doctrinal Coherence. From an internal perspective, the first advantage of a dimensional account of nondelegation is that it fits better with the Court's actual decisions than declaring the doctrine dead or claiming that the Court has failed to enforce the doctrine. For the reasons presented in Part VI, the dimensional account avoids the incoherence that arises from an exclusive emphasis on the intelligible principle test, and it does so while still showing that the doctrine remains alive, as the Court continues to acknowledge. The Court's decision in *Schechter Poultry* makes sense given the degree to which the National Industrial Recovery Act's provisions approximated, in terms of all of the Act's characteristics, the kind of authority given to Congress under the Interstate Commerce Clause. No subsequent case to come before the Court has been even close along both dimensions of authority illustrated in Figure 1.

This is not to deny that one of the Court's opinions might not be easily reconciled with the dimensional account. *Panama Refining Co. v. Ryan*,[108] decided about five months before *Schechter Poultry*, might well be seen as running in tension with the dimensional approach. That case arose under section 9(c) of the National Industrial Recovery Act, which gave the President authority to prohibit interstate oil sales to reinforce state quotas. The range of targets—i.e., oil companies—and scope of actions—i.e., the transportation of oil—were circumscribed. Even though the effects of energy regulation can carry through most parts of the economy, section 9(c) was certainly no grant of legislative power in its full dimensions. It clearly did not authorize the President to regulate virtually all sectors of the economy.

Despite that lack of a sweeping extent of power, the majority in *Panama Refining* held that section 9(c) offended the nondelegation doctrine. Yet it never clearly explained why, nor did it distinguish section 9(c) from other statutory authorizations that the Court had upheld in prior cases. The weak reasoning in the majority opinion in *Panama Refining* might by itself justify discounting the decision. In one part, for instance, the opinion appears to be squarely grounded in due process considerations rather than the nondelegation doctrine.[109]

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[108] 293 U.S. 388 (1935).

[109] *See id*. at 432 ("To repeat, we are concerned with the delegation of legislative power. If the citizen is to be punished for the crime of violating a legislative order of an executive officer . . . due process of law requires that . . . the order is within the authority of the officer . . . .").

Although the *Panama Refining* majority seemed to focus on two characteristics of the authorization given to the President—the lack of a need for a principled basis for decisionmaking, and the limited extent of required process—the Justices were certainly not unaware of the overall sweeping authority Congress had granted the President elsewhere in the statute. To the extent the Justices in *Panama Refining* were in fact reacting to the National Industrial Recovery Act's overall breadth, that would itself be consistent with the dimensional account, even if the section strictly before the Court was more limited.

Still, if in the end *Panama Refining* cannot be reconciled with the dimensional understanding of the nondelegation doctrine, I am prepared to accept that it is because the decision, rather than the dimensional understanding, is what is wrong. After all, that seems to have been Justice Cardozo's position. The reasoning he provided in his *Panama Refining* dissent is tellingly consistent with the dimensional understanding of the nondelegation doctrine. Cardozo made much of the limited extent of the power granted to the President under section 9(c), reasoning that "[t]here has been no grant to the Executive of any roving commission to inquire into evils and then, upon discovering them, do anything he pleases."[110] Cardozo was attentive to both the degree of discretion and the extent of power—the latter which was narrower than a legislative power granted to Congress.

Notwithstanding *Panama Refining*, the dimensional understanding fares better overall, as a positive matter, compared with the alternatives of either declaring the nondelegation doctrine dead (which effectively rejects both *Panama Refining* and *Schechter Poultry*) or "rejuvenating" the doctrine (which effectively charges that the Court has incorrectly decided at least several of its nondelegation cases since *Schechter Poultry*). It is for this reason that the first virtue of the dimensional account rests with its ability to provide a more coherent account of the Supreme Court's application of the nondelegation doctrine than the alternatives.

Judicial Manageability. A second advantage of the dimensional account is that it makes applying the doctrine easier and more disciplined. The intelligible principle test's lack of intelligibility has meant that it offers judges no meaningful guidance. In fact, "[t]he modern Court has repeatedly expressed concern about the lack of manageable standards for enforcing the

[110] *Id*. at 435 (Cardozo, J., dissenting).

nondelegation doctrine.[111] But a dimensional understanding of the doctrine does better.

Admittedly, this advantage may be difficult to see at first. A dimensional approach might even initially seem to be more complex, if for no reason other than because it contains more variables than the single-variable intelligible principle test. If judges already struggle with a one-variable test, how, it might be asked, are judges to sort out and weigh multiple variables to make practical decisions? Will not more variables leave more room for discretion by unelected judges?

The dimensionality test is not one of balancing the multiple characteristics or weighing them against one another. It does not call for combining these characteristics so as to make an exceedingly difficult judgment about whether a piece of legislation grants an executive officer in the abstract "too much" authority, or is "too broad" or "too open-ended." Judgment calls like these, completely untethered from anything but perhaps the judge's own gut instincts, would indeed prove unworkable if not also unwise. That is exactly what makes reliance solely on the intelligible principle test neither intelligible nor principled.

But a multidimensional test asks straightforwardly whether the entirety of a grant of authority, in both its extent of power and degree of discretion, tends to match the entirety of a legislative power that Article I vests in Congress. How close, in other words, is the grant of authority in size and shape to the power to regulate interstate commerce? Rather than leaving judicial decisionmaking completely untethered, the dimensional test grounds the judicial inquiry in a concrete comparison with a legislative power "herein granted."

Focusing on the multiple dimensions of a statutory grant of authority provides courts with a conceptual vocabulary and checklist for distinguishing between lawful grants of rulemaking authority and unconstitutional transfers of legislative power. The test for a court is to run through each point on the checklist and ask, for each of the characteristics of a grant of authority, whether it approximates that same characteristic as reflected in one of Congress's enumerated powers. If the multiple characteristics match, the grant of authority is unconstitutional.

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[111] Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1508 (2015).

Undoubtedly, there can still arise differing judgments about determining exactly how broad or narrow, unbounded or constrained, any single characteristic might be. Beyond that reality, though, the dimensional understanding, with its benchmark in the Constitution's enumerations, actually leaves less room overall for judicial discretion—because at least judges have some benchmark for their decisionmaking. In addition, with a dimensional test defined by a *set of* characteristics, presumably in most cases there will be a greater likelihood of agreement across judges in terms of how they characterize some, if not most, of the relevant characteristics. As long as it is clear that some characteristics of a legislative grant do *not* match the corresponding characteristic of an enumerated power, then the grant of authority will be constitutional.

Clarifying Canons. Although the nondelegation doctrine has seldom provided a basis for the Supreme Court to invalidate legislation, it has more frequently influenced judicial interpretation of statutes, especially in light of the canon of constitutional avoidance.[112] The dimensional understanding of the nondelegation doctrine offers a third advantage by way of clarifying the role of this canon and suggesting additional options for courts when interpreting statutes in response to nondelegation concerns.

In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, for example, the Court appears to have construed, for constitutional avoidance purposes, the underlying statute to require that the agency make a finding of "significant risk".[113] But a dimensional understanding would have suggested little need to invoke constitutional avoidance in that case. The Court's constitutional question should have answered itself easily, just in the asking: Is an occupational safety and health statute even plausibly unconstitutional if it does not demand "that the risk from a toxic substance [is] quantified . . . as significant in an understandable way"?[114] Surely the answer should be "no," because the statute only governed workplace health and safety risks.

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[112] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 373 n. 7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."); Lisa Shultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1409 (2000) ("The Court has used clear-statement rules and the canon of avoidance as surrogates for the nondelegation doctrine."); Sunstein, *supra* note 3.

[113] 448 U.S. 607, 607 (1980).

[114] *Id.* at 646.

It did not give the Occupational Safety and Health Administration (OSHA) sweeping authority to regulate all types of actions across the entire market economy—a power akin to one that is enumerated in Article I. OSHA quite clearly could not have used its authority to regulate securities fraud, radio spectrum licensing, railroad shipping rates, electricity transmission, or any number of other entities and activities that Congress could regulate under a legislative power granted under Article I.

But when the avoidance canon does indeed become relevant—and it would whenever a grant of authority starts to look like it falls close to the upper-right corner of Figure 1—attentiveness to dimensionality makes clear that a court possesses multiple levers to avoid constitutional concern. It could construe the statute in such a way that, as the Court did in *Industrial Union*, narrows the basis for the administrator's judgment—such as by requiring an administrator to make a finding of "significant risk."[115] But it could also instead construe the statute to authorize lawmaking over a narrower regulatory range or to a smaller subset of firms or business activities. In other words, tightening up on *any* of the characteristics of the authority granted will serve to shrink its overall size if a court seeks to avoid any question about whether the rulemaking authority, in its full dimensions, approximates a power that Congress possesses under Article I.

VIII. The future of the nondelegation doctrine

The dimensional understanding of the nondelegation doctrine presented here draws on the past, reconciling the Court's continued recognition of the viability of the nondelegation doctrine with the fact that the Court has not used it in over eighty years to invalidate legislation. Yet what, if anything, might the dimensional understanding have to say for the doctrine's future?

Several members of the current Court have recognized the incoherence of the intelligible principle test and have suggested using the doctrine to invalidate legislation. Situating the nondelegation doctrine in spatial terms can help to clarify the doctrine and contribute to debate over whether it should be invoked more frequently to strike down legislation. In particular, judges

[115] *Id*. For further background on the Court's approach in *Industrial Union*, see generally Cary Coglianese & Gabriel Scheffler, *Private Standards and the Benzene Case: A Teaching Guide*, 71 ADMIN. L. REV. 353 (2019).

and lawyers seeking a way of making the nondelegation doctrine meaningful should consider the advantages that the dimensional understanding offers in terms of improving doctrinal coherence and judicial manageability.

At least four Justices have endorsed the view that the Court has erred in not using the doctrine more vigorously to check grants of rulemaking authority. Justice Clarence Thomas, for example, has argued that the Court's prevailing approach in nondelegation doctrine cases "abdicates" responsibility for "adequately reinforc[ing] the Constitution's allocation of legislative power."[116] Justice Neil Gorsuch, in a dissenting opinion in *Gundy v. United States* that was joined by Justice Thomas and Chief Justice John Roberts, condemned "the intelligible principle misadventure" for having led the Court to "accelerate the flight of power from the legislative to the executive branch."[117] Justice Samuel Alito has also expressed his support for revisiting the Court's approach to the nondelegation doctrine at a suitable time.[118]

These Justices have correctly recognized the inability of the intelligible principle test to provide a coherent standard for judges to draw a line between permissible and impermissible grants of lawmaking authority to executive officers. Yet so far they have not been able to propose a standard that will likely prove any more manageable in practice. In his *Gundy* dissent, for example, Justice Gorsuch suggested that the intelligible principle test ought to be replaced by three alternative "guiding principles,"[119] any one of which would justify the authorization of rulemaking by an executive. First, he indicated that as long as legislation establishes the "controlling general policy,"[120] with "standards sufficiently definite and precise,"[121] then executive officers may rely on "residual" rulemaking authority to "fill up the details."[122] Second, he said that Congress can make the legal effect of statutory provisions contingent on "fact-finding" by an executive officer.[123] Finally, he argued that

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116 *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring).
117 139 S. Ct. 2116, 2141-42 (2019) (Gorsuch, J., dissenting).
118 *Id.* at 2130-31 (Alito, J., concurring).
119 *Id.* at 2135-36 (Gorsuch, J., dissenting). Justice Gorsuch asserts that these principles were supplied by "the framers." *Id.*
120 *Id.* at 2136. Justice Thomas has also argued that Congress may not allow an executive officer to exercise too much "policy judgment" when making rules. *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1251 (Thomas, J. concurring) ("[O]ur mistake lies in assuming that *any* degree of policy judgment is permissible when it comes to establishing generally applicable rules governing private conduct.").
121 *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (internal quotation marks omitted).
122 *Id.*
123 *Id.*

Congress may lawfully "confer[] wide discretion to the executive" to engage in rulemaking when the subject matter "overlaps" with the executive's own constitutional authority.[124]

Unfortunately, it is hard to see how these three principles can provide guidance any more meaningful than the intelligible principle test. Each of them would still leave judges with considerable uncertainty over their proper application.[125] Moreover, if any single one of them suffices to justify rulemaking authority, together they can never be more coherent than the least coherent of the three. This is undoubtedly why Kristin E. Hickman has observed, in commenting on Justice Gorsuch's suggested alternative framework, that "finding a better and more rigorous standard for discerning between acceptable from unacceptable grants of rulemaking authority is very, very hard."[126] The idea of "contrasting 'mere "details"' with rules governing final conduct," she has explained, "seems too susceptible to the whim of the moment."[127]

The Court's proponents of a reinvigorated nondelegation doctrine seem to favor replacing an intelligible principle test with one that hinges on having "policy" decisions made by Congress.[128] Yet as John Manning has noted,

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[124] *Id.* at 2137. On these grounds, for example, Justice Gorsuch surmises that Congress may be permitted to give the President the authority to make trade rules, because "many foreign affairs powers are constitutionally vested in the president under Article II." *Id.*

[125] Probably most observers will see Gorsuch's first principle as the least coherent or constraining, but the extent to which the other two principles provide judges with meaningful guidance should also not be overstated. The third principle appears question-begging because any time a statute directs an executive officer to implement a statute through rulemaking, then carrying out that statute would constitute one of the officer's "non-legislative responsibilities"—namely execution—that Justice Gorsuch admits that Congress may give to executive officers. *Id.* The second principle might appear to be the most constraining, but the "factual findings" called for by the statutes in the cases that Justice Gorsuch approvingly cites came along with normative or policy judgments: "neutral commerce," and "obstruct, impair, or injuriously modify the navigation of [a] river." *Id.* at 2136-37, 2141 (citing *Cargo of Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813), and *Miller v. Mayor of N.Y.*, 109 U.S. 385, 393 (1883)). How much normative or policy judgment can a statute allow before factfinding would cease to be deemed sufficiently dependent on the finding of facts? That question may well afford no clearer nor more constraining answer than one asking about the intelligibility of a principle. *Cf.* Cary Coglianese & Gary Marchant, *Shifting Sands: The Limits of Science in Setting Risk Standards*, 152 U. PA. L. REV. 1255, 1274-82 (2004) (discussing implicit normativity in supposedly scientific decisionmaking).

[126] Kristin E. Hickman, Gundy, *Nondelegation, and Never-Ending Hope*, THE REG. REVIEW (July 8, 2019), https://www.theregreview.org/2019/07/08/hickman-nondelegation/ [https://perma.cc/ 9KCC-RSZE].

[127] *Id.*

[128] Justice Gorsuch writes in his dissent that "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'" *Gundy*, 139 S. Ct. at 2136. Similarly, Justice Thomas has indicated that "policy determinations"

"[a]ll legislation necessarily leaves some measure of policy-making discretion to those who implement it."[129] For the same reason that the intelligible principle test fails on its own, judges will surely find themselves unable to make a principled determination of how much policy judgment in executive hands is too much. A unidimensional focus on the degree of policy discretion will run into the same problems as has a unidimensional focus on the degree of intelligibility. Indeed, perhaps for this reason the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[130]

In his concurring opinion in *Department of Transportation v. Association of American Railroads*, Justice Thomas has forthrightly acknowledged these difficulties and admitted that the Court's "reluctance to second-guess Congress on the *degree* of policy judgment is understandable."[131] But he has nonetheless asserted that the Court's "mistake lies in assuming that *any* degree of policy judgment is permissible."[132] Justice Thomas's assertion points to what may well be the most fashionable doctrinal argument that others have put forward for more robust judicial oversight of legislation under the nondelegation doctrine: an argument from the extreme.[133] Surely it would be unconstitutional, the argument goes, for Congress to go to the extreme of passing a law that, without anything more, authorizes the Secretary of Commerce to "regulate commerce with foreign nations, and among the several States, and with the Indian Tribes."[134] Given that such a hypothetical piece of legislation would be clearly unconstitutional, then naturally, the argument continues, the nondelegation doctrine cannot be dead and other delegations of substantial authority must also be unconstitutional.

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in the hands of an executive officer "pose a constitutional problem." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1248 (2015) (Thomas, J., concurring).

129 Manning, *supra* note 21, at 241.

130 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001) (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

131 *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1251.

132 *Id.* (emphasis in original).

133 *See, e.g.*, Larry Alexander and Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1038 (2007) (addressing "mind-blowing" scenarios of congressional delegations of enumerated authority to consent to treaties and judicial appointments, impeach officers, or propose constitutional amendments); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 339-340 (2002) (offering hypotheticals of a statute written in "gibberish" and of one "forbidding 'all transactions in interstate commerce that fail to promote goodness and niceness'"); *see also* Posner & Vermeule, *supra* note 12, at 1741 (describing extreme claims as among the "most popular" arguments for a vigorous nondelegation doctrine).

134 This language directly replicates that of the Commerce Clause. *See* U.S. CONST. art. 1, § 8, cl. 3.

The dimensional account offers a clear response to this kind of argument: yes, any statute that did nothing more than track the exact language of an Article I enumerated power (a legislative power "herein granted") would indeed be unconstitutional. The dimensional account also does more; it shows that any other statutory grant of lawmaking with full dimensions close to those of an enumerated legislative power would also be unconstitutional, no matter how such a grant were worded.

But this response does not necessarily support the conclusion of those who, arguing from the extreme, claim that the Court has let the nondelegation doctrine die and that it should be reinvigorated. On the contrary, it is simply to acknowledge that the prototypical extreme scenario is precisely where the nondelegation doctrine lives. What constitutes an impermissible delegation under current law is indeed any lawmaking authorization that reaches the extremes on both of the key dimensions: the extent of power, and the degree of discretion.

Acknowledging that the nondelegation doctrine may only make impermissible a statutory grant of authority that resides in a remote corner of the law does not necessarily mean that the nondelegation doctrine is trivial or irrelevant today. Congress may actually have gone too far on the extremes of both of the key dimensions of authority with at least one piece of existing legislation that has yet to be reviewed by the Court on nondelegation grounds: the Magnuson–Moss Act. Arguably this statute might figure into the nondelegation doctrine's future as a law that the Court does eventually invalidate. Yet even if a case challenging it never reaches the Court, a brief review of the characteristics of the Magnuson–Moss Act can at least help illustrate the application of the dimensionality test and show how that test can, in principle, still constrain Congress, even if most other pieces of legislation would continue to avoid invalidation under the nondelegation doctrine.

The Magnuson–Moss Act gives the Federal Trade Commission (FTC) authority to issue binding rules defining "acts or practices which are unfair or deceptive acts or practices in or affecting commerce."[135] On its face, this statutory provision bears a striking resemblance to the National Industrial Recovery Act's unconstitutional authorization of the President to adopt "codes of fair competition."[136] The extent of power that its terms grant to the

[135] Magnuson–Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975), 15 U.S.C. § 57a (2012).

[136] *Schechter Poultry*, 295 U.S. at 521-523. Indeed, it has been argued that the statute "ushers in a new era of N.R.A.-type industry." Katherine Gibbs Sch. (Inc.) v. FTC, 612 F.2d 658, 670, 683

FTC is sweeping. Like the President under the National Industrial Recovery Act, the FTC under the Magnuson–Moss Act can issue rules related to any and all sectors of the economy—anything "affecting commerce"—and addressing any type of business activity.[137] These FTC rules are backed up with the possibility of both civil and criminal penalties.[138] In short, as one commentator has noted, the statute appears to have made the FTC the "lawmaking body with the broadest legislative powers ever delegated to a federal agency since *Schechter Poultry*."[139]

(2d Cir. 1979) (Newman, J., dissenting) (noting the petitioner's unsuccessful nondelegation argument).

137 "Commerce" is defined in a manner comparable to Congress's interstate commerce power: "commerce among the several States." 15 U.S.C. § 44 (2012); *see also id.* § 45 (authorizing the FTC to address unfair business practices "in or affecting commerce").

138 *Id.* §§ 56(b), 57b(a).

139 Edward W. Lane, Jr., Schechter *and the FTC: A Roving Commission*, 39 BUS. LAW. 153, 159 (1983); *see also id.* at 154 (noting that "the Commission is invited to study any and all acts and practices in or affecting interstate commerce, and to make rules about those with are unfair or deceptive").