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I. INTRODUCTION

The current federal government, with its burgeoning administrative agencies, does not embody what most Americans would recognize as the constitutional doctrine of separation of powers. This is, in part, due to the Congress's frequent practice of delegating legislative powers to the executive branch, i.e., giving administrative agencies the power to promulgate rules regulating private behavior and having the force of law. Legislative delegation has been the subject of academic, legal, and political wrangling since the early congresses and clearly calls into question whether modern practice adheres to constitutional norms. This article discusses legislative delegation in terms of some core ideas that informed the writing and ratification of the Constitution, and then look at debates on legislative delegation from the early republic, the Progressive era, and modern times. Ultimately, this article argues that the nondelegation doctrine – that legislative power cannot be delegated to the executive consistently with the Constitution – should be viewed as an important protector of constitutional values whose judicial enforcement is both desirable and practicable. In Part II, I discuss how the change in the conception of law and legislative power over the eighteenth century ought to influence how one appraises the propriety of legislative delegation. In Part III, I consider important debates over delegation occurring at critical moments in the history of delegation. Instead of focusing on the relatively familiar historical narrative of Supreme Court cases, I concentrate on the unchanging themes underlying arguments about delegation. In Part IV, I consider the main point of contention in modern discussions of delegation, namely judicial review, and evaluate assertions regarding its practicability and clarity.

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II. CONCEPTIONS OF LAW AND THE NONDELEGATION DOCTRINE

A. *Law as Restraint of Princes*

1. *Divided Power – Legislative Power as Defense*

The idea that government power should somehow be divided in order to prevent its abuse is very old. Various versions of the idea have appeared going back to classical antiquity.[1] How successive thinkers fashioned from older models new paradigms for dividing power indicates the changing perceptions regarding the most worrisome abuses of power. The Glorious Revolution was a profoundly important event in Anglo-American history, and the philosophy of the Glorious Revolution, as expressed by the writings of various English commentators of the era, proved highly influential on American political philosophy up through the American Revolution. The Glorious Revolution is therefore a fine place to begin an exploration into how conceptions of law and legislative power impinge on an understanding of the separation of powers doctrine and legislative delegation.

To English writers of the time, the most important theme in English legal history was the establishment of law constraining the monarch. The divine right of kings had justified the crown's claim of prerogative, which amounted to arbitrary and unchecked discretionary power. Law was its opposite, in the sense that it was known, fixed, and applicable to all – not even the king was "above" the law. Magna Carta, but one example, was celebrated as the first major, lasting, written charter establishing limits to the king's power; for example, it provides that: "No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed – nor will [the King] go upon or send upon him – save by the lawful judgment of his peers or by the law of the land."[2] The struggles for judicial independence, the rise of the common law courts and the demise of the Star Chamber, the rise of Parliament as a check on the king's power to levy taxes at will, etc., all illustrate the same notion that the fundamental purpose of law was to constrain the king. The Glorious Revolution was the capstone to this historical edifice, and greatly influenced American thinking, especially with respect to the separation of powers doctrine.

Locke's *Second Treatise of Government* was written in the years prior to the Glorious Revolution and attempted to justify the philosophy of Parliamentary supremacy. Locke posited three powers, a legislative, an ex-

1. *See e.g.* T. Gilby, *Principality and Polity* 292 (Longmans 1958); M.J.C. Vile, *Constitutionalism and Separation of Powers* (2d ed., Liberty Fund 1998); Kurt von Fritz, *The Theory of the Mixed Constitution in Antiquity* (Arno Press 1975).

2. Magna Carta cl. 39 (1215).

ecutive, and a federative. The first two are essentially those we recognize by the same names today; the last we might today describe as the power to conduct foreign affairs. The legislative power was the power to restrain the king by making law. Law received its legitimacy by the consent of the people, and the body representing the people was Parliament. English liberty, which meant government under the rule of law, meant the supremacy of law over the king and *a fortiori* the supremacy of Parliament over the king. Parliament, as the representative body representing the people, could constrain the king's power of prerogative.[3]

For English thinkers in the seventeenth and eighteenth centuries, the theoretical argument for division of power was predicated on the historical depredations of an unchecked king wielding his power of discretion. Legislative power and legislative supremacy were instruments of defense, protecting the people against arbitrary rule of the executive. After the Glorious Revolution, the king, in theory, acted only with the ongoing consent of Parliament.

Yet Parliament was not empowered to make new law in the modern sense. The legislative power was not understood as the power to promulgate any set of rules regulating private activity in order to refashion society; it was the power to curb the arbitrariness of royal administration in order that it better comport with established notions of justice.[4] A change in the meaning of Parliamentary supremacy was, in fact, a source of the dispute that matured into the American Revolutionary controversy, as English and American conceptions of legislative supremacy and the rights of Englishmen diverged considerably by the mid-1760s.[5]

2. *Legislative Delegation as Claim of Supremacy*

The concept of legislative power, of course, preceded the Glorious Revolution. In previous centuries, Parliament had used the concept in order to assert itself as the principal vessel in which legislative power resided. In these contexts, the language of legislative delegation was used to assert that regulatory and rulemaking power exercised by the king derived from Parliament's power of giving consent.

In this regard, Cecil Carr's early twentieth century historical account of the English practice of legislative delegation points to Parliamentary Acts

3. John Locke, *Second Treatise of Government*, in Ernest Barker, *Social Contract* ch. XI-XII (Oxford U. Press 1947); Vile, *supra* n. 1, at 64-70.

4. *See* Jack N. Rakove, *Original Meanings* 209 (Vintage Books 1997); Vile, *supra* n. 1, at 70; Gordon S. Wood, *The creation of the American Republic, 1776-1787* 262-65 (U.N.C. Press 1998).

5. Bernard Bailyn, *Ideological Origins of the American Revolution* Ch. V (Belknap Press of Harvard U. Press 1992).

dating as far back as the reign of Henry VIII. These Acts are significant not so much as precedent for delegation or guideposts for what should be accepted practice today, but rather as an illustration of the fact that legislative delegation must be viewed in the context of essential contests over power. The Statute of Proclamations in 1539, for example, stated that proclamations of the King in Council were to have the validity of Acts of Parliament.[6] Clearly, Parliament was distinguishing between statutory law and royal proclamations, and assuming the superior legitimacy of the former.[7]

The purpose of this is evident given the importance of precedent in English constitutional argument.[8] As Carr notes, one can view this ancient example of delegation as having a dual nature – the Act "looks like the concession to the Crown by Parliament of unlimited legislative authority. Yet it can also be looked upon as a surrender by the Crown of the old unlimited prerogative power."[9] That is, it can be viewed as a claim of Parliamentary supremacy, that the king acts only with the imprimatur of Parliament. Recognizing this duality is relevant to modern debates because it shows how the propriety of delegation depends on the existing conception of the legislative power in the constitutional scheme. In the aforementioned early times, delegation was a fiction that recognized the fact of kingly power while rejecting the justification of kingly prerogative. After the death of Henry VIII, the Statute of Proclamations was repealed; the ensuing decades witnessed a retrenchment of prerogative, as noted in the Petition for Redress of Grievances of 1610: "It is apparent . . . that proclamations have been of late years much more frequent than heretofore . . ."[10] The contest over legislative supremacy, of course, would not end until 1688.

After the Glorious Revolution, delegation continued as Parliament came to appreciate both its convenience and its necessity amidst wars, disease outbreaks, and social changes.[11] But acceptance of legislative supremacy meant that exercises of delegation were viewed differently from

6. Statute of Proclamations, 31 Hen. 8, ch. 8 (Eng.); *see also* Cecil T. Carr, *Delegated Legislation* 50 (Cambridge U. Press 1921); David C. Elliot, *The Origins of Statutes: Extracts from various sources about the origins of Statute Law*, http://www.davidelliott.ca/papers/origins.htm (Sept. 1989); Joaquin Varela Suanzes, *Sovereignty in British Legal Doctrine*, http://www.murdoch.edu.au/elaw/issues/v6n3/suanzes63nf.html (accessed May 22, 2006). Interestingly, the Act also included what would today be called a notice requirement: within fourteen days, sheriffs and other officers were to read and post, in towns and villages, the substance of the king's proclamation.

7. *See* Carr, *supra* n. 6, at 22-23 (discussing, generally, statutes versus proclamations).

8. *See* John Phillip Reid, *Constitutional History of the American Revolution* 11-13 (U. of Wis. Press 1995) (discussing the importance of precedent in constitutional argument).

9. *See* Carr, *supra* n. 6, at 52.

10. *See id.* at 53.

11. *See id*. at 54-55.

those of eras past. Even though a small and shifting minority periodically denounced acts of legislative delegation, English commentators like Carr could remain confident in the safety of the people's liberty, blithely pointing out the irony in the fact that Parliament reigned in the discretion of the king only to establish discretion in the administrative agency. Though "[t]he idea that . . . any branch of the executive . . . has power to prescribe or alter the law . . . is out of harmony with the principles of our constitution," it is not a matter of concern because executive power to make rules "derive[s] . . . from the statute which creates the power and not from the executive body [itself]."[12] Carr was writing in early twentieth century England. One wonders if he would be so sanguine today, when government is vastly different from what it was then.

3. *Defense and the Constitution*

The conception of legislative power as a restraint on the executive can be seen in the Constitution, which, for example, grants to Congress "the power to make rules for the government."[13] Explicitly placing in the legislature the power to make rules regulating government action affirms the fundamental principle of the Glorious Revolution, that the executive is subject to constraint by the legislature. Such a power is a defensive one, for regulating the executive is essentially a responsive action. At least in the first instance, most rulemaking regulating the executive takes place internally within the executive department. The head of the executive, the President, can exercise discretion in creating rules for his subordinates. Legislated rules regulating the executive department are only necessary in response to abusive or arbitrary action.

In this context, then, delegation of that specific enumerated power approximates to some extent the division of powers created by the Glorious Revolution. The legislature sits in wait of excess; the executive acts with a presumption of legitimacy. The only difference is that an affirmative legislative act requiring execution is required in the first place in order to instantiate executive action potentially requiring regulation.

Most examples of legislative delegation in the early years of the republic are delegations of this power to regulate the executive.[14] Not surprisingly, then, delegating language was somewhat common in the early congresses, which established various cabinet departments and administrative bodies. The First Congress passed statutes giving cabinet members author-

12. *See id*. at 55.

13. U.S. Const. art. I, § 8, cl. 14.

14. John P. Comer, *Legislative Functions of National Administrative Authorities* 52-55 (Columbia U. Press 1927).

ity to "prescribe rules and regulations" for their respective departments;[15] empowering the President to spell out and carry out the details for erecting a lighthouse at the mouth of the Chesapeake Bay;[16] directing the President to continue payments established under the Articles of Confederation to wounded veterans of the Revolutionary War "under such regulations as the President of the United States may direct";[17] and allowing the President to establish "fit and proper regulations for estimating duties on [imported] goods, wares, and merchandise."[18]

Even where delegations varied from this sort in the early years of the republic, they were usually not delegations of power to regulate private domestic activity, but rather, things like contingent tariffs, discussed below, and licensing of trade with the Indian tribes.[19] Still, delegation could prove problematic and difficult to contain. Comer writes that "it is a fact that this very provision [for making internal rules and regulations] has served as a basis for a great deal of legislation framed in the absence of specific delegations."[20] This suggests the importance of identifying the contexts in which delegation is appropriate and of limiting delegation to those contexts.

B. *Law as Command of the Sovereign*

1. *Law and Legislation*

The "modern" conception of the legislative power espouses a positivist understanding of law, according to which there is an acknowledged source of power, the sovereign, and law is the command of the sovereign.[21] By supposition, the sovereign cannot be bound, and what the sovereign establishes as law must be recognized as such and obeyed.[22]

The Glorious Revolution established Parliament's supremacy to the king, but only gradually was Parliamentary supremacy understood in the absolute terms of Hobbesian sovereignty. By the second half of the eight-

15. *Id*. at 52.
16. *Id.*
17. Gary Lawson, *Federal Administrative Law* 51 (West Publg. Co. 1998).
18. *Id.*
19. *Id.*
20. *Id.*
21. Variations on positivism are unimportant here. Whether the essential concept is the sovereign command or the rule of recognition or something else, what matters is that whatever is posited by the proper person or procedure is accepted as law.
22. The root of the word "legislation" encapsulates the legislative power inhering in the positivist's sovereign: the bringing forth of law.

eenth century, however, numerous English commentators could write of the "uncontrollable" power of Parliament.[23] For example,

> [i]n the year of the Stamp Act . . . Blackstone . . . wrote in his *Commentaries* that 'there is and must be in all [forms of government] a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty reside,' and that in England this 'sovereignty of the British constitution' was lodged in Parliament . . . whose actions 'no power on earth can undo.'[24]

When Parliament began enacting new measures to regulate colonial affairs, Americans became aware of this changed understanding of Parliamentary supremacy. When Parliament nakedly declared its sovereignty over the colonies, in the Declaratory Act of 1766, Americans appreciated its import, but the defensive view of legislative power was still foremost in the minds of the Americans. This is not surprising given that the supremacy of the colonial assemblies was still disputed, and the royal colonial governors still exercised powers that had died out in England, like dissolving assemblies, suspending the application of laws, and removing judges at pleasure.[25] The rhetoric and philosophy of the Glorious Revolution therefore understandably colored the thinking of Americans during the 1760s and 1770s.[26]

Accepting Parliamentary jurisdiction without representation was problematic precisely because it was representation that breathed meaning into the legislature's ability to defend against executive encroachment. Consent through representation provided the necessary link between sovereignty and legislative power, and so Americans foresaw that Parliamentary sovereignty over the American colonies, in the absence of representation in Parliament, meant the loss of a defensive safeguard against executive arbitrariness. Thus, the Revolutionary theory that developed crystallized around the notion that sovereignty lay in the people, and that the legislative body only legislated by delegation from the people.[27]

In the view of the Americans, then, the Revolutionary struggle was a claim of the rights of Englishmen that were won in 1688. The Americans had not yet comprehended how legislative supremacy would produce a different type of legislature, or how, to paraphrase Rakove, "once lawmaking became the essential activity of [a legislature], [it would] become eas-

23. Wood, *supra* n. 4, at 265.
24. Bailyn, *supra* n. 5, at 202.
25. Rakove, *supra* n. 4, at 212.
26. *See generally The Declaration of Independence* (1776); Reid, *supra* n. 8.
27. *See* Bailyn, *supra* n. 5, at ch. V.

ier to abandon the traditional understanding which regarded law as a restraint on the capacity of the [executive] to act arbitrarily, and to accept in its place the modern notion which treat[s] law simply as the command of the . . . sovereign."[28]

2. *State and Federal Constitutions – The Ambiguous Legislative Power*

Americans at the time of the Revolution viewed the legislature as the proper source of law, but still viewed law as a defensive shield against the executive, even as legislative supremacy was already producing the modern conception of law, according to which law could be utilized where desired as an affirmative tool in economic and social development, organization, and control. In sum, there was an underlying ambiguity regarding the legislative power that, especially for constitution-making, was unappreciated in 1776 but better (if incompletely) sensed by 1787. As a result, one can see a pronounced difference between the design of the state constitutions in 1776 and the eventual structure of the federal Constitution in 1787. More specifically, one can see a major difference in the conception of separation of powers informing constitutional theory.

a. *Revolutionary Constitutional Experience – The Improvident Legislature, the Impetuous Vortex*

Once the colonies had declared their independence from Britain, the newly independent states needed to institute new governments. The theory of popular sovereignty meant not only that the new governments had to be created and legitimated by the freely given consent of the people, but also that those governments had to enshrine the supremacy of the representative legislatures over the executive. As a result, virtually all the state constitutions created dominant legislatures. Most new constitutions had the governor elected by the legislature and reduced the executive radically by eliminating its role in legislation and stripping it "of most of the badges of domination, called prerogatives," like controlling the meeting of the legislature, creating courts, levying taxes, and making war. No state constitution retained the executive's sole appointment power, instead forcing the executive to at least share the power with the legislature if not cede it entirely. In sum, the governors had been rendered "mere ciphers, almost totally dependent on the legislatures."[29]

28. Rakove, *supra* n. 4, at 211.
29. Wood, *supra* n. 4, at 407.

In the decade after the establishment of governments under dominant legislatures, problems emerged, and the source was the legislatures themselves:

> An excess of power in the people was leading not simply to licentiousness but to a new kind of tyranny, not by the traditional rules, but by the people themselves . . . . It was too much government, not the lack of it, that was so frightening to some . . . . [T]he people appeared more capable of oppression . . . . The people's will as expressed in their representative legislatures and so much trusted throughout the colonial period suddenly seemed capricious and arbitrary. It was not surprising now for good Whigs to declare that "a popular assembly not governed by fundamental laws . . . will commit more excess than an arbitrary monarch."[30]

In the eyes of republican Whigs, the legislatures were corrupting the law. Two conceptions of law were in direct conflict, and legislative supremacy implicitly embraced, or at least furthered, the positivist conception, which was not yet acknowledged or accepted.

As James Madison famously put it, the legislature was "drawing all power into its impetuous vortex,"[31] and the rule of law was suffering thereby. An example typifying the change in the meaning of legislative power was the change in the meaning of "grievances." As Wood notes, "grievances" had originally meant complaints regarding "excesses . . . of the executive power . . . [that] could not be remedied without the interposition of the people's representatives. In America, however, grievances had become simply the hardships which will always arise from the operation of general laws."[32]

The most explicit statement of the problems created by the legislative power came from James Wilson, who traced the problems to America's naïve trust in legislative supremacy. "[P]rejudices against the Executive . . . resulted from a misapplication of the adage that the parliament was the palladium of liberty," but in the American states, where executives were constitutionally eviscerated and legislatures were dominant, "legislature and tyranny . . . were more properly associated."[33] Though some argued that imperfections in representation had rendered legislatures detached from the people, the growing, and more troubling, realization was that the

30. Wood, *supra* n. 4, at 404-05.

31. *The Federalist No. 48*, 256-57 (James Madison) (George W. Carey & James McClellan eds., 2001).

32. *See* Wood, *supra* n. 4, at 408 (internal quotation marks omitted).

33. *See id*. at 409.

problem was with republican theory itself. As usual, it was Madison who expressed this new understanding most profoundly and succinctly.

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended . . . from acts in which the Government is the mere instrument of the major number of the constituents.[34]

One can see this ambivalence about the legislative power in the writings of numerous individuals throughout the era. Thomas Jefferson, who believed strongly in popular self-governance, who perhaps more than anyone else distrusted the ancient wisdom of the common law and believed in the living generation's moral right to change the law as it saw fit, nevertheless noted that "[o]ne hundred and seventy-three despots would surely be as oppressive as one."[35]

b. *Federal Constitutional Experiment – Legislative Power Confined*

The experience under the state constitutions encouraged the Founding generation to recognize the implicit reconception of law and legislative power that was taking place. In designing a replacement for the Articles of Confederation, the Founders understood that federal law would be mostly legislated, and their awareness of the perils of legislation is palpable in the Constitution. Various means of constraining the legislature appear. The reliance on enumeration is the foremost constraint and directly shows the Founders' perception of the threat to liberty that the legislature represented. The Tenth Amendment made explicit what enumeration implied, that Congress had no powers except those delegated. All other matters not delegated to coordinate branches were to be resolved at the state level, even the mischief of plenary state legislatures, which could be cabined by state constitutional means.

Other constitutional features are equally telling and impact the discussion of delegation. Most important here is that the Founders reconsidered the wisdom of legislative dominance. The Constitution that emerged put the legislative, executive, and judicial branches on equal footing, with each branch acting as a check on the others. Moreover, because the legislature, as the branch most closely connected to the people, would naturally gain the upper hand in constitutional conflicts, the Constitution embodied struc-

34. *Id*. at 410 (quoting Madison to Jefferson (Oct. 17, 1788)).

35. *The Federalist No. 48*, *supra* n. 31, at 257 (James Madison) (quoting Thomas Jefferson, *Notes on the State of Virginia* (1781-1785)).

tural inhibitions of the legislature. An important aspect of this was bicameralism. One house would retain close sympathy with the people – a necessity of a republican legislature – but splitting the legislative power by adding a second chamber would impede its exercise. This was true not only on account of the mere split itself, but also because the weaker chamber, the Senate, would have split allegiances, its interests aligned, in the case of treaty ratification and appointment of judges and cabinet members, with the weaker of the political branches, the executive.[36]

i. *Bicameralism and the Mixed Constitution*

The model for bicameralism (and separation of powers more broadly) was England's Parliament and the theory of the mixed constitution. Mixed constitutionalism, like separation of powers, divides power in order to constrain it. But whereas separation of powers divides power based on type and function, mixed constitutionalism (on an idealized view) divides power by utilizing different existing groupings of people to create multiple bodies, the consent of all of which is required to constitute legitimate government action. In England, the king, the nobles, and the commoners were respectively institutionalized in the crown, the House of Lords, and the House of Commons, sometimes romanticized as power, wisdom, and virtue, respectively; or the one, the few, and the many.

The mixed constitution of England, based on hereditary social classes, was antithetical to the American ethic that "all men are created equal." Instead, the bicameral American Congress, together with presentment to the president, splices political equality and democratic elections into mixed constitutionalism by splitting the legislative branch into two separate chambers, both ultimately deriving their authority from the people, yet effecting representation in distinct ways that recognize and utilize different existing groupings. The House of Representatives keeps closer to the democratic ideal of representation by focusing on individuals according to the one-man-one-vote principle, thereby emphasizing sympathy between constituents and representatives via direct election, short (two-year) terms, and election districts of (approximately) equal (and, for as long as was practicable, small) population. The Senate purports to represent all citizens as well, but in a very different sense. It strays from the popular democratic representational scheme dramatically by focusing instead on the interests of citizens in maintaining some amount of political sovereignty at the state level. It therefore relies on the existing grouping of people into their separate polities (the several states), has longer (six-year) terms, and originally

36. *See The Federalist No. 51*, *supra* n. 31 (James Madison).

achieved election via state legislative election, thus giving the state governments representation as such.

The Founders believed in democracy and the capacity of the people for self-government, yet they also feared both temporary passions and legislation for private gain rather than public good. They saw the Senate's longer terms, older age requirement, and indirect method of election as inhibiting temporary passions from affecting public policy.[37] And they believed the differences in electoral make-up and electoral method placed the chambers of Congress on different foundations that would thereby reduce the likelihood of factious capture of the legislature.[38] That Senators had different constituencies from Representatives, at least in the first instance, meant greater difficulty for special interests in controlling both houses of the legislature and the legislation that got passed.[39] Even if the Senate failed to become a more deliberative, wiser body than the House, the differences in electoral make-up were still of value.

Bicameralism is best viewed, therefore, as an instrument that helps ensure that legislation is truly in the public interest. By requiring a majority in each house of a multi-chamber legislature, where each house is differently elected by a different division of the people, bicameralism requires legislation to have truly broad appeal beyond what a simple numerical majority could effect in a direct democracy. It is therefore similar in aim to super-majoritarian voting systems, but still adheres in some sense to the majoritarian premise.

The importance of this view of bicameralism can be better understood by allusion to a theory of law that views legislation as an inherently suspect source of law. Consider, therefore, Hayek's view of law and legislation and John O. McGinnis's discussion of its relation to super-majoritarianism.[40] Hayek saw society as a "spontaneous order" requiring no centralized decision-making authority but exhibiting localized adherence to general rules of behavior. The bulk of these rules make up customary practices and even customary law, and some of this customary law becomes ossified into official state-enforced law, such as the common law. The important thesis here is that the common law, through case-by-case

37. *See e.g*. *The Federalist No. 62*, *supra* n. 31 (James Madison).

38. *See e.g. id*. This was a point of contention, but as Madison makes clear, it was understood as a theoretical matter.

39. *See e.g.* Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 247-49 (1986); Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 Clev. St. L. Rev. 165, 176-79 (1997).

40. F.A. Hayek, *Law, Legislation and Liberty* 94-144 (U. of Chi. Press 1973); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 Cal. L. Rev. 485 (2002).

adjudication and jury participation, in theory, or ideally, tracks the organically grown customary law. If true, then such law has greater legitimacy because custom is, by definition, broadly adhered to and accepted as a matter of fact; its ossification into state-sanctioned law will likely have broad support within the society. Moreover, because custom evolves, so too, in theory, should the common law. Legislation, however, was, for Hayek, very different, in that it was a highly centralized method of creating new rules governing individual behavior; and it guarantees no more than majority support. For a variety of reasons stemming from this fact, legislation is therefore arguably less credible a source of law in that the influences that create it are less likely to be those that espouse or embody values or norms held broadly by the people as a whole. This is true to some extent even in a localized population, but it is especially true in a large, pluralistic society.

McGinnis argues that the legitimacy problem of centrally planned legal rules is sufficient to explain supermajority voting requirements in various situations; supermajorities create a reasonable check on attempts to create or impose social norms on the whole of society. Since the Founders believed in the power of the majority to control the law, they sought in bicameralism a way to achieve the aims of super-majoritarianism without jettisoning, for ordinary legislation, majority voting rules. It does so in a subtle and complicated – and imperfect – way.[41]

C. *Delegation – Harmless Convenience, Modern Necessity, or Dangerous Anachronism?*

The experience of the Founding generation led them to embrace two principles that gradually came to pose a potential conflict – popular sovereignty and limited government. The former idea worked to secure the latter while law was conceived as a constraint on executive discretion and sovereignty meant something closer to supremacy or superior legitimacy. Popular sovereignty was a way of inhibiting a legislature's claim over people who lacked the ability to voice consent through representation. But once sovereignty became Hobbesian and the positivist conception of law became the implicit predicate of legislative enactments, popular sovereignty potentially conflicted with limited government insofar as the legislature purported to voice the will of the sovereign people, for how could law established by the sovereign be limited?

41. One way in which the impediments to legislative action might operate imperfectly is by impeding equally different species of legislation. There might be good arguments for treating differently statutes limiting the executive, those establishing new general rules of private conduct, those codifying common law rules, and those correcting mischiefs in the common law.

The development of constraints on the legislature as a reaction to the legislative excesses under the state constitutions intimates the relative worth of the two ideas. The Constitution was written to create a limited government; sovereignty was a conceptual abstraction that was difficult to cast off, and popular sovereignty in particular was more a response to counter claims of legislative sovereignty than it was a predicate to a coherent theory of government. Therefore, given that limitations of legislative power were of inherent importance to the Constitution, it is appropriate to adhere to structural constraints on the legislative power, even where based on formal distinctions like that between legislative and executive power. This is ever more true today, where legislation almost entirely embraces the modern conception of the legislative power, and is used as an engine of social change and economic regulation. As we shall see, in the decades surrounding the turn of the twentieth century, the nature of the powers delegated to the executive changed in character, so that, with the rise of the administrative state, delegations increasingly empowered the executive to establish rules of private behavior rather than merely to exercise discretion in executing the laws. Yet the Supreme Court applied a line of precedent sanctioning delegations in the latter context to uphold delegations in the private behavior-regulating, administrative rulemaking context. This was a mistake. As a general matter, new rules regulating private activity and having the force of law ought to pass through Congress.

Arguments in favor of the constitutionality of delegation have at their base the idea that delegation is unproblematic because, if the delegated power is improperly used, Congress can always undelegate. This foundational argument is a return to the view of the legislative power that predominated in the years immediately following the Glorious Revolution – the legislative power as a defensive mechanism. The executive, given the speed and energy with which it can get things done, gets first crack at governance, and only when its efforts run afoul should the legislature intervene to protect the people. On this view, the American Constitution primarily does two important things regarding the legislative power (aside from limiting its powers by enumeration). First, as the Revolutionary state constitutions did, it vests certain prerogative-like powers in Congress rather than the president, thereby establishing in writing what the Glorious Revolution established in the minds of Englishmen, that the government receives its legitimacy from the ongoing consent of the governed as exhibited through their representatives. Second, because the legislative power originally resides in Congress, it predicates executive action in the domestic sphere on congressional delegation, thus making consent an explicit *pre*-condition to executive action, rather than an assumed fact that is only meaningful when taken away.

While law was conceived as the opposite of discretion, this view may have been unremarkable. But once law became a tool of social organization, once law became nothing other than the command of the sovereign, the defensive view of Congress implicit in these pro-delegation arguments became suspect.

Arguments against delegation accept modern legislative power and the positivist view that creation of new law is its quintessence. Because of the enormous influence and coercive nature of law and the legal apparatus, the ability to create law out of whole cloth is an awesome power. The defensive view of the legislative power cannot be wedded to the positivist understanding of law as the command of the sovereign while still maintaining adherence to constitutional norms. The power to make rules governing private individuals ought to be kept in the hands of the legislature, where it was conscientiously placed, because the very design of the legislature is instrumental in limiting the bounds of legislation. The importance of separating the powers of government and reducing the legislature through enumeration, bicameralism, and other mechanisms militates against removing the law-making power to agencies administered by the executive department. The fact that the Founders were aware of the problems created by a legislature exercising a modern legislative power means that constitutional impediments to the exercise of that power should be taken seriously, including and especially where convenience provides the justification for skirting those impediments. On this view, delegation is *anachronistic*, appropriate to a time when the legislative power was a defensive counterbalance to the executive threat of tyranny, but inappropriate to a time when the executive power is well constrained but the legislative power constitutes the more probable source of government excess.

III. DEBATING DELEGATION

A. *Separation of Powers in the Ratification Debates*

Legislative delegation was not a major topic during the ratification debates because more fundamental questions regarding separation of powers remained highly controversial. Arguments focused primarily on the extent to which the three branches of government ought to be kept separate from one another. The Anti-Federalists balked at the intermingling of the branches, the overlap of functions, and the sharing of powers.[42] Citing

42. *See generally* Herbert J. Storing, *The Anti-Federalist* (U. of Chi. Press 1985). Examples include the lack of participation of the House in the treaty-making power, the Senate sitting in judgment of president, and the President having a role in legislation via the veto.

Montesquieu, they argued that the aggregation of legislative, executive, and judicial powers into the same hands was the very definition of tyranny.[43] Madison, in a series of essays in *The Federalist*,[44] acknowledged Montesquieu's authority but otherwise exploded the logic of the Anti-Federalists. As a practical matter, he painstakingly surveyed the state constitutions, none of which achieved anything like the full separation called for by the Anti-Federalists. As a theoretical matter, he argued that, although *complete* aggregation of the legislative, executive, and judicial powers in one hand would indeed produce tyranny, the judicious marbling together of various responsibilities linking one branch to another would not. Rather, it would provide the government with an internal structure in which each branch would have procedural *mechanisms* enabling it to defend its own power.[45]

Madison's argument was predicated on successfully identifying "the interest of the man with the constitutional rights of the office."[46] If that could be done, then ambition would counteract ambition because officers would be jealous of their own powers and so watchful of attempts at usurpation. But delegation *gives away* power. If Madison's theory is correct, the advent of delegation implies a lack of "interest convergence" between the interests of legislators and the constitutional rights of their office.

Why might the Constitution have failed to align the interests of the man with the constitutional rights of the office? One public-choice explanation might be that a politician's ambition, for reelection or for "higher" office rather than for power, works in favor of delegation because it benefits the legislator by costlessly eliminating accountability for bad governance.[47] The benefits accrue because, by voting for a legislative program but delegating specific rulemaking authority to the executive, the legislator can claim credit for directing the government toward popular ends while plausibly denying responsibility for unpopular rules. The costs are minimal because voters might care less about where the rules are being created than about what the content of the rules are, so that unpopular rules will elicit reprisals against the administrative agency that promulgated them, rather than the legislators who voted to empower the agency. Other explanations abound as well.[48] Whether or not such explanations fully capture reality, certainly the public-choice model helps us appreciate the difficulty of es-

43. *Id.*; *see also The Federalist No. 47, supra* n. 31, at 249 (James Madison).
44. *The Federalist Nos. 47-51, supra* n. 31 (James Madison).
45. *The Federalist No. 51, supra* n. 31 (James Madison).
46. *Id.*
47. *See e.g.* David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 Am. U. L. Rev. 355 (1987).
48. *See e.g.* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1982).

tablishing the accountability and sympathy that was so important to the Founding generation.

Madison's arguments about institutional design ought to be understood alongside the fact that distinguishing among categories of governmental power was of fundamental importance to the Founders. Categorical distinctions are explicit in the text of the Constitution and important to its design – each article begins by depositing a type of power in a set of specific institutions.[49] Of course, there was, as noted above, disagreement over the precise boundaries between the legislative, executive, and judicial powers, but the existence of these separable core concepts was unquestioned. As a result, reliance of the Constitution on notional distinctions between types of government power, despite dissent over the boundaries, is helpful to understanding the nature of the debate today over the nondelegation doctrine. Most helpful here is *Federalist No. 37*, in which Madison philosophizes on the difficulties of establishing exact definitions of various institutional competencies. "Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces – the legislative, executive, and judiciary." He posits three sources of ambiguity: first, the "indistinctness of the object of study," i.e., man-made institutions; second, the "imperfection of the organ of conception," the inexactitude of human discernment and abstraction; and third, the inadequacy of descriptive language. "Any one of these must produce a certain degree of obscurity. The [Constitutional] [C]onvention . . . must have experienced the full effect of them all."[50] And yet, the Constitution was written and agreed upon by the vast majority of the delegates, despite their many and passionate disagreements, an "astonish[ing]" feat that Madison uncharacteristically attributes, in part, to divine intervention.[51]

Madison's essay suggests that marginal ambiguities, the difficulty of line-drawing, ought not to obscure core distinctions recognized by the Constitution and critical to its design. This point, as will be seen in the remainder of this article, is central to the nondelegation debate, for the most trenchant criticism of nondelegation doctrine is the indefiniteness of its application, the difficulty in limning precise boundaries.

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49. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1; "The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1; "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1.

50. *The Federalist No. 37*, *supra* n. 31 (James Madison).

51. *Id.*

B. *The Early Years – The Postal Roads Debate*

If the ratification debates were silent on delegation, congressional practice after ratification was not. But, as mentioned above, the implications are unclear because most early delegations were arguably of a different sort than what concerns modern commentators. Even so, many viewed delegation as a cause for concern at the time, including President Washington.[52]

The first extended congressional debate about delegation of legislative powers took place in the Second Congress,[53] when the House was considering a bill establishing particular postal routes, pursuant to its power under Article I, Section 8, Clause 7. Representative Sedgwick proffered an amendment that would have allowed the future establishment "from time to time" of postal routes by designation of the president. Several members objected to the amendment on the grounds that it would unwisely and unconstitutionally delegate to the president powers that were specifically granted by the Constitution to Congress. The debate covered the essential arguments that are still made today.

1. *Check on the Executive*

Several arguments related primarily to the ability to check the executive. Representative Livermore argued that post offices and roads were an important conduit of information, particularly about the operation of the federal government, whose great distance from the people was a great concern to anti-federalists. Control over the post roads by a single individual was therefore dangerous and inappropriate, for "the dissemination of intelligence might be impeded, and the people kept entirely in the dark with respect to the transactions of Government."[54] Representative Hartley worried about the executive's ability to raise revenue through the post offices. The post office bill, he argued, "has the complexion of a perpetual law . . . [and] revenue will be thrown into the power of the Executive."[55] The British and continental European governments

> count upon [the post office] as a considerable branch of revenue . . . .We must not suppose that this country will always remain incorrupt; we shall share the fate of other nations. Through the medium of the post office a weighty influence may be obtained by the Ex-

52. *See* Annals of Cong. vol. 1, 234 (1849).
53. *Id*. at 229 et seq.
54. *Id*. at 230.
55. *Id*. at 231.

> ecutive; . . . we are unnecessarily parting with our revenues, and throwing an improper balance into the Executive scale.[56]

And Representative White, also seeing in the amendment an "approximation to the custom of Engl[ish]" practice, worried about influence. The president, he reasoned, might use the post office to coerce the election of friends, or to intercept letters and interrupt communication where advantageous."[57]

Representative Bourne responded with the defensive theory of the legislative power – if the delegation upsets the balance of power, Congress can always retract the delegation. Legislative supremacy was what mattered in a constitutional republic. "The Constitution meant no more than that Congress should possess the exclusive right of [exercising the enumerated powers], by themselves or by any other person, which amounts to the same thing."[58] Consistent with this approach, he accepted the wisdom of a limitation on the duration of the bill's delegation, so that the question would force revisitation by Congress.

2. *Expertise and Accountability*

Other arguments focused on the institutional competence and democratic accountability of the legislature and the executive. Arguing for the superior expertise of the executive, Sedgwick pointed to his own ignorance of particular local circumstances, and, tying accountability to expertise, challenged his colleagues "whether they understood the subject so thoroughly as the Executive officer would, who being responsible to [all] the people . . . must use his utmost diligence in order to a satisfactory execution of the delegated power."[59] Hartley challenged the possibility of greater expertise by appealing to the greater sympathy of representatives – if representation meant anything, the House would have the best knowledge of the "people's interests and circumstances."[60] Representative White echoed this judgment on the basis of collective knowledge, saying that "[n]o individual could possess an equal share of information with [the] House on the subject of the geography of the United States."[61] Any one representative might be ignorant of the circumstances obtaining in the district of another, he argued, but the sum of knowledge would surpass what

56. *Id.*
57. *Id.* at 233.
58. *Id.* at 232.
59. *Id.* at 230.
60. *Id.* at 231.
61. *Id.* at 233.

the unitary executive was capable of ascertaining.[62] Representative Page called it a "paradox" to assert otherwise, and repudiated Sedgwick's reasoning linking accountability and expertise by noting that the greater frequency and directness of elections of representatives defeated the suggestion that the president's responsibility to the people as a whole was somehow greater than the responsibility of the House as a whole.[63]

Focusing more closely on accountability, Livermore pointed to the costs and benefits to be weighed, implying that the representative body would be best able to decide what would produce a net public benefit.

> The Post-master, if vested with the power [to establish post offices and post roads], might branch out the offices to such a degree as to make them a heavy burden to the United States. In many instances the expense is productive of a benefit sufficient to counterbalance it; in others, no public benefit arises, but some individuals reap a private advantage from the institution, whilst it is injurious to others.[64]

As noted above, Sedgwick's position was that the president's responsibility to the people as a whole made him more sensitive to the true quality and balance of dispersed local interests. Representative Barnwell explicated this further, offering delegation as a way to avoid the problem posed by parochialism – disparate views were inevitable, and the unitary executive would offer a solution to the gridlock because it was less partial.[65] Representative Benson continued this line of thought, recognizing that under the Articles of Confederation, bills were often defeated by the numerous "partial and local" causes proposed.[66]

Madison the realist responded to the worries about parochialism by noting that it was not a major concern. Rather, the problem was one of "accommodating the regulations to the various interests of the different parts of the Union." He recalled that similar "embarrassments" were feared when deliberating on impost and tonnage bills, "business of much greater importance and difficulty than this," yet "it was accomplished." There, Congress depended on "mutual information and reciprocal confidence." Each member provided information regarding the particulars of his own jurisdiction and trusted the information provided by the other members regarding theirs.[67]

62. *Id*. at 237.
63. *Id*. at 234.
64. *Id*. at 237.
65. *Id.* at 235-36.
66. *Id.*
67. *Id*. at 238.

3. *Constitutional Formalism*

Peppered throughout the debate were arguments over the proper implication of constitutional authority placing the power to establish post offices and roads in the hands of the legislature. Page appealed to the logic of republicanism, suggesting that delegation was both unconstitutional and "contrary to the interest and spirit of free Government." Even if the people agreed with the logic of delegation, nevertheless, they "were too wise to make the experiment." The constitutional separation of powers scheme should be followed, he argued, precisely because the people created the scheme in order to prevent the government from expediencies like delegation. Indeed, noted Page, the people already "complain[ed] that Congress too often commits to Heads of the Departments what the Constitution requires at their hands."[68]

The debate therefore settled on the important distinction between necessity and convenience. Hartley certainly viewed the delegation as unnecessary and therefore unwise, but couldn't decide whether even necessity would justify delegation. His advice, therefore, was to reject the (delegating) amendment,

> try [the unamended bill] for a few years, [and] [i]f, upon experience, we find ourselves incompetent to the duty, we must (if the Constitution will admit) grant the power to the Executive; or, if the Constitution will not allow such a delegation, submit the article for amendment in a constitutional way.[69]

Bourne accepted necessity as a justification and pointed to delegation precedent in an excise bill.[70] Madison admitted that Congress had previously delegated the power to create offices in an excise bill, but said that the necessity of that situation was absent here. No necessity existed here justifying departure from constitutional principles, for "should there be a necessity for additional post roads, they can be provided for by supplementary laws." That, to him, was sufficient to decide the matter: "[T]here [does] not appear to be any necessity for alienating the powers of the House . . . if [that] should take place, it would be a violation of the Constitution."[71] The pro-delegation arguments "admit of such construction as will lead to blending those powers so as to leave no line of separation whatever."[72] Sedgwick responded that creation of offices was not "less

68. *Id*. at 234.
69. *Id*. at 232.
70. *Id.*
71. *Id*. at 238-39.
72. *Id*. at 238.

necessary in the multifarious arrangements of post offices," and therefore that the conclusion "that the necessity . . . justifie[s] the expedients . . . might be drawn on the present occasion."[73] In some sense, Sedgwick was arguing that necessity was in the eye of the beholder. No necessity, he continued, could justify a usurpation of power; either the amendment was unconstitutional, in which case the excise bill was too, or both were constitutional.

4. *Indefiniteness and Exaggeration*

The final category reflects the tendency to exaggerate when discussing doctrines limited only by the woolly concept of necessity. In constitutional interpretation, virtually every limitation on power is open to exceptions for necessity, but some are more open than others. The nondelegation doctrine, based on a contested understanding of the separation of powers doctrine that posits an ill-defined legislative power, with an arguable exception for necessity, is among the least amenable to bright-line rulemaking.

Thus, Sedgwick applied the familiar *reductio ad absurdum* argument that if nondelegation is to be enforced strictly, government under the Constitution would be a farce – "is it understood that Congress [is] to go in a body to borrow every sum that may be requisite" to discharge the power to borrow money without delegation? Or "work in the Mint themselves?" Or even "act the part of executioners in punishing piracies . . . on the high seas?"[74] To this, the anti-delegation forces could retort, as Livermore did, by appeal to the slippery slope – "if the House [gives] up [determination of post roads], they might as well leave all the rest of the business to the discretion of the Postmaster."[75] Page's conclusion proved the equal of Sedgwick's in mockery:

> If the motion before the committee succeeds, I shall make one which will save a deal of time and money, by making a short session of it; for if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation; and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction.[76]

The debate ended with Sedgwick opining that the duty of the legislative power was confined to "the establishment of principles."[77] Sedg-

73. *Id*. at 239.
74. *Id*. at 230-31.
75. *Id*. at 230.
76. *Id*. at 233.
77. *Id*. at 240.

wick's amendment was defeated and the bill that prevailed expressly designated the various routes to be used for mail delivery.[78]

As with many reviews of legislative history, reading the post office bill debate does not yield a dispositive interpretation. Nevertheless, the debate does reveal general concerns and modes of thought of the period. Although the grouping of the arguments above doesn't follow the chronology of the debate, it does clarify the debate by separating the various arguments from one another and thereby sets out a framework of a debate that has remained fairly consistent over the years:

The first set of arguments covers the concerns typical of a defensive view of the legislative power. Both sides recognize the importance of constraining the executive, but the question is whether the nondelegation doctrine is essential to accomplish that end.

The second set of arguments exhibits concerns especially relevant to legislative power of the modern variety. If government action is predicated not simply on popular consent to executive administration but on popular will legitimizing affirmative changes to the laws, the means of ascertaining the latter are fundamental to the allocation of legislative power and depend in part on expertise and accountability. There are good reasons for preferring the legislative or the executive department for this or that exercise of law-making power. Yet leaving the question open in each case might be problematic for a variety of reasons; for example, the opportunism of a dominant faction or party, or an overestimation of the reach and efficacy of expertise resulting in a natural bias toward centralized regulation.

Thus, the third set of arguments, over constitutional norms, becomes necessary to explore the importance of *ex ante* "meta-rules" constraining expedient, case-specific distributions of power. A correlative question is whether necessity justifies exceptions to or relaxation of constitutional strictures, and how to identify necessity.

The fourth set of arguments, characterized by a kind of constitutional eschatology, shows how the indefiniteness of the nondelegation doctrine, the difficulty of consistent line-drawing in delegation cases, lends itself to slippery slope and farcical end-state arguments. Little possible room for consensus is left, at the end of debate, other than to agree that *something* ought to remain in the legislative power, and thus we are left with little more than the vague assertion that the legislature need provide, at the least, "principles" guiding further rulemaking.

This outline of argumentation proves fairly constant throughout time, and indeed, the Supreme Court, after repeated statements of the difficulty

78. *Id*. at 241-42.

of line-drawing, established as its test a vacuous version of Sedgwick's guiding principle.

C. The Wonder Years – Contingent Legislation

Delegating statutes in the first several decades of the nineteenth century did not significantly differ from those of these first two congresses.[79] Congress passed a variety of statutes empowering the president or a cabinet member to make regulations, but for the most part they pertained to the regulation of executive agents. An important exception was contingent legislation, and the contingent tariff in particular, which was the subject of the first delegation case to reach the Supreme Court. The Court's response to contingent legislation would establish a line of precedent that it would later depend on to uphold legislative delegations of a very different sort, delegations of authority to enact rules regulating private behavior and having the force of statutory law.

"Contingent legislation" is legislation in which Congress conditions the force of the new law on a determination to be made by the President. It alters the "rule of recognition"[80] identifying the formal passage of a statutory rule into law by adding the president's proclamation as determinative of the legal force of the statutory rule. Normally, Congress enacts legislation and, assuming it receives the President's signature within the requisite period, the rules of conduct within the statute thereby become law. The extent to which it is then enforced involves executive discretion, but even if enforcement is imperfect or nonexistent, the statute is still formal law, in the sense that it purports to be law and is consistent with the procedures for formally identifying law. One can violate the law even if one's violation has no practical consequences. Such an alteration of the rule of recognition seems relatively academic and inconsequential in the context of contingent legislation where the contingency is a fairly well-defined factual determination. Little seems to be at stake as far as notice and arbitrariness are concerned as long as the factual determination is fairly transparent and applicable to all.[81] And it has its benefits in that predicating the legal force of the rule on a proclamation of an executive finding of fact can increase

79. Comer, *supra* n. 14, at 50-56.

80. *See* H.L.A. Hart, *The Concept of Law* 94-95 (Oxford U. Press 1994).

81. Note too that if ascertaining the existence of fact situations is the common business of courts, even if fact-finding is a necessary appurtenant activity of administration of the laws, judicial review of the fact situation rather than the presidential proclamation seems more consonant with basic models of separated powers. Indeed, the tension between these two views regarding the meaning of the proclamation as a determinative finding of fact brings to the foreground the possibility that contingent legislation obfuscates not only a delegation of legislative power, but also, in some sense, a delegation of *judicial* power.

certainty regarding the force of the rule. One might conclude, then, that contingent legislation is properly understood simply in terms of the defensive view of the legislative power, which would only need exercise when factual determinations are made for inappropriate reasons like political patronage.

The first Supreme Court case involving contingent delegation was *Cargo of the Brig Aurora v. United States*,[82] which involved a fairly narrow factual determination by the President. Article I Section 8 of the Constitution empowers Congress to regulate commerce with foreign nations. Congress began in 1809 to restrict trade with Great Britain, and in 1811 legislated that the trade embargo would continue if the President declared that Great Britain continued to allow violations of United States shipping. To some, including the appellant, this amounted to an unconstitutional delegation of legislative power. "To make the revival of a law depend upon the President's proclamation is to give to that proclamation the force of a law."[83] The Court disagreed, seeing "no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct."[84] The contingency was part of the legislative will, and therefore was not actually a delegation of legislative power.

Contingent legislation, however, has greater implications as the breadth of discretion called for expands, or becomes more case-specific. Case-specific determinations especially can have the character of arbitrariness, and can even amount to giving the President context-specific rulemaking authority. Historical accounts of delegation highlight the fact that contingent delegations began with narrow factual determinations and gradually expanded the discretion involved. As Arthur Vanderbilt wrote,

> [t]he delegation of legislative power . . . [a]t first was confined to permitting the President to pass on simple facts requiring no discretion, then on more complicated facts requiring the exercise of discretion, and then on still more complicated facts that he could

82. 11 U.S. 382 (1813). For a recent colloquy of *Cargo of the Brig Aurora* arriving at some novel conclusions *see* Gary Lawson, Comment, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 Tex. L. Rev. 1373, 1379-80 (2005) (responding to Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *Was Rightly Decided, and Why* INS v. Chadha *Was Wrongly Reasoned*, 83 Tex. L. Rev. 1265 (2005)), and Seth Barrett Tillman, Reply, *The Domain of Constitutional Delegations Under the Orders, Resolutions, and Votes Clause*, 83 Tex. L. Rev. 1389, 1391 n. 6 (2005) (distinguishing intra-congressional from cross-branch congressional delegations).

83. *The Brig Aurora*, 11 U.S. at 386.

84. *Id*. at 388.

> arrive at only with expert administrative assistance. The trend was irresistible.[85]

Comer describes a similar storyline; over time, the scope of discretion increased, the subject matter broadened, and the legislative instruction and guidance attenuated.[86]

It is difficult to reach agreement on what counts as too much discretion. In the 1920s, the United States Tariff Commission recommended that, in order to create a more effective reciprocal tariff regime, in which import tariffs reflected the like tariffs and trade practices of other nations, the President ought to be given discretion to impose new duties, subject to general principles and statutory limitations. The resulting Tariff Act of 1922 gave the President power to levy tariffs of between ten and fifty percent in order to offset the benefits foreign goods received on account of "unfair" methods of competition. In extreme cases of unfair competition, the President could even ban importation of certain items where the interest of the country should require it. These restrictions were decried as a patent "inject[ion] into international relations [of] the principles upon which the Federal Trade Commission works for fairness and decency in domestic business."[87] Detractors viewed unfairness as so lacking in substantive content that the discretionary power of the executive amounted to legislation, especially given that the discretion involved the power to levy tariffs, which were seen as unambiguously legislative. Add to this the fact that the statute limited judicial review of questions of law to the Court of Customs Appeals, with final appeal to the Supreme Court, and the scope of delegation, to opponents of the bill, seemed breathtaking.

Given the gradual broadening of the contingencies on which contingent legislation depended, and the inability to pinpoint what constitutes "too much" discretion, it is perhaps reasonable to see congressional action and the Court's jurisprudence as exemplifying the slippery slope fears of Representative Livermore and his allies. Had early cases confronted legislation delegating broad rulemaking powers typical of modern delegating acts, the Court's nondelegation jurisprudence might have turned out significantly different today. On the other hand, the Progressive Era response to industrialized society wrought such fundamental change in perceptions about government that perhaps nothing would be different – any differences might have been washed away along with the jurisprudence of the *Lochner* era.

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85. Arthur T. Vanderbilt, *The Doctrine of the Separation of Powers and Its Present Day Significance* (U. of Neb. Press 1963).

86. *See generally* Comer, *supra* n. 14, at ch. III, VII, VIII.

87. *Id*. at 95 (quoting Wallace McClure, *A New American Commercial Policy* 57 (1922)).

D. *The Mature Years – Administrative Agencies and Congress as Parliament*

The full history of the rise of the regulatory state is obviously beyond the scope of this article. But it suffices to say that, by the time the Supreme Court began reviewing modern administrative rulemaking, the Court could draw on almost a century of precedent deferring to legislative delegations of various sorts. Already in 1916, New York conservative Elihu Root could say that "[t]he old [nondelegation] doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight."[88]

The frequency of delegation, but more importantly the growing extent of it, troubled many at the turn of the twentieth century. With the rise of administrative agencies, legislative delegation took on a different character, for now the executive was increasingly being called upon to write the laws, in some cases almost *ex nihilo*, a far cry from the delegations of internally applicable rulemaking and narrower versions of contingent legislation. A slew of books and articles appeared early in the new century, both here and in Britain, questioning the propriety and wisdom of rampant delegation.[89] Yet even critics often admitted a need for delegation. The perceived solution to the dislocations of industrialization wedded arguments about institutional competence to claims of necessity.[90] Most felt that the increased complexity of modern industrialized society meant that government action needed to increase in complexity to keep apace. Given the era's growing belief in scientific expertise and utopian planning, administrative bodies promised the institutional capacity for the kind of central planning needed in the modern age. As a result, commentators wrung their hands about the implications for separation of powers doctrine and democratic accountability, but still generally accepted claims of the necessity of delegation. Like the Court in past decisions, they mentioned in passing the obvious existence of *some* limits on delegation, but no one was able to explain the substantive content of those limits, or how they could be identified.

Yet, as the post office debate showed, one man's necessity is another man's expedience. Given the modern retreat from other constitutional

88. Vanderbilt, *supra* n. 85, at 80 (quoting Elihu Root, *Addresses on Government and Citizenship* 534 (Bacon & Scott eds., 1916)).

89. *See e.g.* Carr, *supra* n. 6; Chen, *Parliamentary Opinion of Delegated Legislation* (Columbia U. Press 1933); Comer, *supra* n. 14, at 11-13 and accompanying notes; A.V. Dicey, *Law of the Constitution* (London, 1915).

90. *See e.g.* Comer, *supra* n. 14, at 11-13 and accompanying notes; *see also* John B. Cheadle, *The Delegation of Legislative Functions*, 27 Yale L.J. 892, 892-93, 900 (1917-1918).

changes that occurred or gained momentum in the Progressive era, it is worth questioning whether the claims of necessity and the Supreme Court's application of precedent led to a misguided acceptance of modern legislative delegation. A closer look at the political discourse of the age reveals that many were aware, even if they didn't make it explicit, that it was as much ideology as perceived necessity that influenced constitutional theorizing. No doubt fundamental changes in the inherent quality of modern society helped convince many to *accept* delegation as a modern necessity, but scientism, political theory and ideology, and a belief in planning and social change through law impelled others to affirmatively *desire* delegation.[91]

The 1870s had already seen agitation for a more vigorous public administration of the economic and social order when, for example, Woodrow Wilson, in 1879, published a paper expounding the virtues of cabinet government in England. His view was that a stronger executive was necessary to balance the legislature, which was a decidedly conservative insti-

91. *See generally* Daniel T. Rodgers, *In Search of Progressivism*, in *Reviews in American History* 113, 10 (The Johns Hopkins U. Press 1982) (discussing the various (and often conflicting) sources of Progressive Era calls for reform). As an example of the intellectual underpinnings, consider Woodrow Wilson, who wrote at length on the desirability of an expert administrative regime in *The Study of Administration*. His theory was one of instrumentalism and strident ideology. Typical of his writings are passages such as this:

> The problem is to make public opinion efficient without suffering it to be meddlesome. Directly exercised, in the oversight of the daily details and in the choice of the daily means of government, public criticism is of course a clumsy nuisance, a rustic handling delicate machinery. But as superintending the greater forces of formative policy alike in politics and administration, public criticism is altogether safe and beneficent, altogether indispensable. Let administrative study find the best means for giving public criticism this control and for shutting it out from all other interference.

Woodrow Wilson, *The Study of Administration*, http://teachingamericanhistory.org/library/index.asp?document=465 (Nov. 1, 1886). In contrast to the lengthy treatment he gives to the many reasons for desiring an administrative state, he merely asserts in passing that the administrative state is "a business necessity" and then moves on to pacify fears regarding the rise of a bureaucratic class. Considering the fact that breathtakingly vituperative views of bureaucracy were not unknown in the nineteenth century, the conclusory nature of Wilson's statement cannot be supposed to reflect a uniform acceptance of the necessity of bureaucracy. For an example of an anti-bureaucracy screed, consider the opening to John Henderson's *Considerations on the Constitutionality of the President's Proclamations*:

> The history of nations teaches one universal truth, – namely, that administrative power in Government has an eternal tendency to augmentation. The captivating bauble is ever being fondled and nursed into extension, and under pleas of necessity, the public good, or the bolder warrant of undisguised usurpation, its dimensions are enlarged, till, like the frog in the fable, its end is explosion. Deplore it as we may, the rule has no exception. Vigilance and integrity may do much to postpone the catastrophe, but the cankerous evil is never cured.

John Henderson, *Considerations on the Constitutionality of the President's Proclamations*, http://www.constitution.org/cmt/hendj/ccpp.txt (1854). Wilson's body of work is a self-consciously strident work of political science, not a rationalization of changes resignedly accepted out of necessity.

tution impeding progressive changes. Wilson conceived of the separation of powers as having isolated the branches of government, and viewed cabinet government as "a device for bringing the executive and legislative branches into harmony and co-operation without uniting or confusing their functions." [92] His model of government downplayed the importance of constitutional limitations on government action, whether Madison's idea of using ambition to counteract ambition or the use of indirect election to vary paths of accountability, instead preferring ease of governmental action through more direct democratic control by the people and fluid cooperation between branches.

Put simply, Progressives who advocated greater governmental action felt they could get more done in the agencies. Implicit in Wilson's argument was happy acceptance that delegation would circumvent the Founders attempts to create constraints on the legislature. Those constraints, to Wilson, were "conservative" impediments to progressivism rather than meta-rules embodying wisdom painfully learned through experience.

To give one example how delegation meshed with Progressives' predilection for economic and social planning, and how it could potentially make interest-group capture of policy much easier, consider the Tariff Commission Vice Chairman's statements in 1922 regarding the Commission's recommendations mentioned above. It is "evident that in some such flexible provision as this lies the only hope of an effective [protection] of American industry against the variety and subtlety of the attacks which may be included under the term unfair competition."[93] The increasing importance of trade in the nineteenth and twentieth centuries, and government efforts to support and protect American industry, explain why tariff bills were among the most likely to delegate discretion to the executive, as well as why such bills were frequently the subject of attack in the courts. Domestic interest groups clearly appreciated the fact that delegation helped circumvent structural impediments to legislation.

Time and again, the concentration of both rulemaking and executive power was tempered by concern for constitutional values regarding protection of liberty and restraint of power. Constitutional standards of notice and procedure were imported as models for constraining agency action. Thus, administrative due process and related concepts, even the idea of separating functions within agencies, arose, either judicially or by statute, to take the place of constitutional constraints circumvented by delegation. In some sense, there is a contradiction in the Wilsonian arguments against

92. *See* Vile, *supra* n. 1, at 296.

93. Comer, *supra* n. 14, at 97 (quoting McClure, *supra* n. 87, at 53-54 (quoting a 1922 address made before the American Manufacturing Export Association)).

formalist respect for constitutional separation of powers and its related procedural requirements. Such requirements are laid aside as anachronistic even as they are reinvented in more palatable forms. All that really happened, of course, was an extra-constitutional rebalancing in favor of weaker constraints and more government action. The nondelegation doctrine, as a result of its placement in the hands of the same legislative branch that it was theorized to constrain, was easily laid aside.

The real constitution of the modern administrative state is the corpus of delegating acts and the many congressional statutes regulating executive discretion and rulemaking power. Congress is the constitutional body of the administrative state – our Parliament. By 1950, Vanderbilt could write, "When we consider the aggregate amount of executive legislation, . . . , we are quickly impressed with the fact that the executive branch of the government, including here the administrative agencies, derives more power by delegation from Congress than it does from the Constitution itself."[94] It was at this time that the Administrative Procedure Act ("APA"), an elaborate blueprint aimed at regularizing executive action where the broadest discretion exists, was coming into the picture. The advent of the APA, along with the rise of judicial deference to agency interpretation and administrative adjudication, was the final major move that reduced the aims of procedure to mere notice, regularity, and transparency, rather than also substantive constraint on law-making. The role of Congress in the overall structure of the modern administrative state comports more with the older, defensive conception of the legislative power, even though the legislative power exercised by administrative agencies is decidedly modern and positivist.

IV. THE MODERN DEBATE

A. *Can Judicial Review Work?*

The modern arguments over delegation are mainly more elaborate and precise versions of the arguments from the early republic. Even though the nature of delegation has changed dramatically, democratic accountability, expertise, necessity, and concentration of power remain the primary points of contention. One major difference, though, is the primacy of judicial review in modern discussions. As Tocqueville noted, in America, virtually every dispute ultimately finds its way to and is resolved in a court.[95] This

94. Vanderbilt, *supra* n. 85, at 79.

95. Alexis de Tocqueville, *Democracy In America* 270 (J.P. Mayer ed., George Lawrence trans., Doubleday 1969).

is probably at least as true today as it was when he wrote. Certainly, the *dominance* of the judiciary in resolving *constitutional* questions is greater than it was in early American history. The Founders supposed that politics would sustain much of the constitutional balance, but where that has been perceived to have failed, the Court has taken upon itself to bolster the political efforts (or lack thereof) with judicial enforcement of various structural features of the Constitution.

Given the sheer extent of delegation today, however, and the current low regard for formalism (especially formal distinctions between legislative and executive powers), the Court's unwillingness to breathe life into the nondelegation doctrine is at least comprehensible. Judicial review of delegation is not unknown to the Court, but neither are its difficulties and the political reactions to it. The Court from the very beginning explicitly recognized the indefiniteness of distinctions between the legislative and executive powers.

In 1825, in *Wayman v. Southard*,[96] the Court considered legislative delegation to the judiciary of rulemaking powers governing judicial procedure. Arguably, this type of power is akin to the early delegations of rulemaking power governing executive officials rather than private individuals. The Court distinguished between powers that are "strictly and exclusively" legislative from powers that the legislature "may rightfully exercise itself."[97] By implication, the powers vested in Congress included a nondelegable core of exclusively legislative powers and a delegable periphery of powers exercisable by other branches of the government.

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.[98]

The Court, after nodding to the principle of separation of powers but declining the opportunity to expound upon its contours, noted simply that "the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily."[99] Comer mockingly parades the various linguistic references to the nondelegable legislative power to show the impossibility of precision:

96. 23 U.S. 1 (1825).
97. *Id*. at 43.
98. *Id.*
99. *Id*. at 45-46.

> Chief Justice Marshall used the terms 'general principles,' 'great outlines,' 'important outlines' to express that part of legislation which, in his opinion, could not be delegated. Later the terms 'purpose,' 'criterion,' 'general provisions,' 'general rules,' 'terms of the statute,' 'predicate,' 'theory of the Act,' 'congressional intention,' 'purely legislative power,' 'legal principles that control,' 'policy of the law,' 'objects of the law,' 'vital provisions,' 'general scheme,' [and] 'primary standard' . . . have been used to express the same idea.[100]

Judicial forthrightness about the indefiniteness of distinctions is perhaps not surprising, and it certainly gives credence to the slippery slope explanation for the lack of an enforceable nondelegation doctrine. With a firm grounding in precedent on one side, and nothing but a diaphanous concept on the other, marginally broader delegations naturally appear more akin to previously accepted practice than not. Certainly legislative practice as much as judicial precedent supported *some* level of delegation. Although the Court in *The Brig Aurora* did not reflect upon early practice, a later Court would.

In *Field v. Clark*,[101] decided in 1892, the appellant made the abovementioned distinction between contingency on a fact and contingency on a proclamation of the executive. Here, though, the proclamation regarded not simply a proclaimed fact but a *judgment* of the President.[102] The Court spent little ink declaring that the argument in *The Brig Aurora* provided the rule that settled the matter. The Court also looked to contingent statutes from as early as 1794, passed with the approval of early presidents as celebrated as Washington, Adams, Jefferson, Madison, and Monroe; further enactments throughout the middle of the nineteenth century, passed under Jackson, Pierce, and others; and statutory proclamations by virtually every president of the nineteenth century. Though such legislative precedents would perhaps not have as much weight for the supreme judiciary today, at that time it provided "great weight in determining the question." The Court upheld the contingent legislation.

In *J.W. Hampton, Jr., & Co. v. United States*,[103] the Court sustained the President's discretion to raise tariffs on particular goods according to the statutory command to equalize the costs of production. Congress could have written the law to declare the amount of the tariff to be that differen-

100. Comer, *supra* n. 14, at 124 (citations omitted).
101. 143 U.S. 649 (1892).
102. *Id*. at 680. The judgment involved deciding whether another country's trade policies were "reciprocally unequal and unreasonable."
103. 276 U.S. 394 (1928).

tial between internal and external costs of production, rather than setting numerical amounts and empowering the President to vary them to achieve production-cost equality. But the Court did not look at the case so narrowly. Rather, the Court declared that Congress could delegate discretion to the executive "according to common sense and the inherent necessities of the governmental co-ordination."[104] In particular, the Court stated that legislative action that "lay[s] down . . . an intelligible principle" to which the executive official or agency must conform does not amount to "a forbidden delegation of legislative power."[105] This, then, is the articulated rule of the Court's nondelegation doctrine.

The "intelligible principle" principle did little for clarity. Certainly, delegating acts were criticized as vague from the beginning. Robert Reeder wrote of the various delegating acts pertaining to the Interstate Commerce Commission that "the statutes do not appear to use the word 'reasonable' in any other sense which is so definite that . . . a grant of power to name 'reasonable rates' would be constitutional."[106] Reeder accepted the argument that the legislature need only lay forth a "definite principle," but when such a principle is lacking, or when a term "is inextricably bound up with other terms which are indefinite, the entire clause seems to be unconstitutional. This is true in the case of the Interstate Commerce Act."[107] But clearly the courts did not agree.

The early decades of the twentieth century, through the New Deal, were the final battleground for the nondelegation doctrine. The number of cases coming before the Court increased for a variety of reasons, among them the practice of railroad price-setting and the war-time discretion given to President Wilson during World War I. Invariably, the delegations were upheld, whether on account of necessity and emergency or on the rationale that intelligible principles like reasonableness and public interest sufficiently guided, if they did not actually limit, the discretion of the executive. After the war, however, congressional debates were more common than at any time in history. Perhaps because of these debates, in the middle of the New Deal, the Court proved people like Elihu Root wrong by striking down central features of the National Industrial Recovery Act on nondelegation grounds (among others).

104. *Id*. at 406.
105. *Id*. at 409.
106. Reeder, *Rate Regulation as Affected by the Distribution of Governmental Powers in the Constitutions*, 57 U. Pa. L. Rev. 59, 99 (1908).
107. *Id*. at 100.

Panama Refining Co. v. Ryan[108] and *A.L.A. Schechter Poultry Corp. v. United States*[109] are famous today as the lone cases in which the Court enforced the nondelegation doctrine. Their story is too well-told to need summary here, but suffice it to say that the Court found in those two cases that the National Industrial Recovery Act offered virtually no guidance to the executive whatsoever. Given the ease of announcing some idea, however vague, that might be dressed up as an intelligible principle, those were rather remarkable rulings.

The Court has been unwilling to strike down delegations since those cases. One commentator sums up judicial attempts at enforcing nondelegation as having produced "among the most confused and confusing bodies of judicial thinking that one will ever encounter."[110] Occasional justices have written opinions in cases where they recognize a delegation of legis-

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

> [I]n every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that § 9 (c) [of the National Industrial Recovery Act] goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.
>
> If § 9 (c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function, the Congress could at will and as to such subjects as it chose transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government.

Id. at 430.

109. *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935).

> Section 3 of the [National Industrial] Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.

Id. at 541-42.

110. Lawson, *Federal Administrative Law*, *supra* n. 17, at 174.

lative power, but these have invariably failed to gain support.[111] Though the Court maintains a nondelegation doctrine in theory, it is one that is clearly unlikely to produce vigorous judicial review in fact. Many contemporary scholars no doubt view this as a good thing; to them, judicial review of delegation is impracticable because any judicial test would be inconsistent at best and arbitrary and political at worst. Others think it is high time for the courts to reconsider enforcing the nondelegation doctrine.

B. *Making the "Intelligible Principle" Principle Intelligible*

The argument against judicial review of delegation based on its arbitrariness, merits reconsideration. The difficulty of judicial line-drawing in enforcing the nondelegation doctrine doesn't justify abandoning the project altogether; strict enforcement (e.g., by requiring legislative enactment of regulatory codes before courts recognize them as law) is an option that avoids much of the difficulty while remaining consistent with the Constitution's vesting of all legislative power in Congress.[112] But it is also worth questioning whether judicial line-drawing is indeed so unguided as to be arbitrary, and further whether the unavoidable inconsistency really renders judicial enforcement a bad idea. This section explores the former question, the next section explores the latter.

The line of Supreme Court cases that led to an "intelligible principle" test (and then rendered it vacuous) began with cases of rather limited executive discretion different in kind from what is seen in modern delegating statutes, which give to agencies broad and almost unfettered rulemaking authority. These early precedents were applied without searching scrutiny into the aptness of the analogy between early and modern delegations. As a result, the courts have failed to give real, biting meaning to the "intelligible principle" test. The academic literature in recent years has attempted to fill in the void. David Schoenbrod's articles on delegation provides the most interesting and sustained attempt to make the "intelligible principle" principle intelligible.[113]

Schoenbrod resurrects the formalist, or categorical, mode of thought that focuses on whether an exercise of power is "legislative" or not. Inspired by Hayek's explication in *Law, Legislation & Liberty*, Schoenbrod

111. *See Indus. Union Dept. v. Am. Petroleum Inst*., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring in the judgment); *see also Field*, 143 U.S. at 699-700 (Lamar & Fuller, JJ., dissenting).

112. Justice Thomas appears to be open to the proposition that something of the kind is at least on its face more consistent with the explicit and implicit dictates of the Constitution. *See Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 486-88 (2001) (Thomas, J., concurring).

113. *See* David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance*?, 83 Mich. L. Rev. 1223 (1985).

begins from the premise introduced into the delegation debate by Sedgwick that there is a core of the legislative power – the ability to issue general rules of just conduct. Schoenbrod suggests that legislation today can be divided into two broad categories, which he calls "rules statutes" and "goal statutes." Statutes of the former type include within the legislation itself the rules of conduct individuals must obey; they define the difference between lawful and unlawful behavior. Statutes of the latter type spell out the governmental goals to be pursued and empower agencies to issue the actual rules of conduct. In Schoenbrod's schema, goals announce the purpose of the statutory enactment; somewhat like preambles, they are not a statutory enactment by themselves – only the rules are. Therefore, rules statutes are valid, in Schoenbrod's view, while goals statutes are an unconstitutional delegation of legislative power. For example, a tax statute listing tax brackets and rates is a rules statute and a valid exercise of legislative power without delegation; a tax statute naming a revenue target and empowering the tax commissioner to raise the target amount by establishing tax brackets and rates is a goals statute and a delegation of legislative power.[114]

Distinguishing between goals statutes and rules statutes is important, says Schoenbrod, because goals can conflict, and an axiom of democratic republicanism is that the difficult decisions regarding which goals should take precedence and to what extent, and how they should be translated into legal rules, are to be made by the representative body making up the legislature.[115] Goals statutes therefore delegate the core legislative power because the difficult decisions are not made by the legislature. As a result, otherwise represented interests are no longer represented when the difficult decisions are made; the benefits of a large republic that Madison outlined in *Federalist No. 51* are jettisoned by removing decisions from the nationally representative Congress. And representatives cannot be held accountable by their constituencies; they get the benefit of voting for laudable goals, but they avoid the costs of voting for or against particular rules which some will find unfavorable.

Of course, distinctions of the kind Schoenbrod proposes are always more easily made in illustrative hypotheticals than in practice. Legislative language is, and always has been, filled with imprecise language. Is "reasonableness" a goal or a rule? The principal argument against a judicial enforcement of nondelegation is that there is no coherent and consistent

114. *Id.* at 1252-60.

115. *Id.* One might add, with interpretive help from juries, the original instrument through which the people exercised the right to participate in the execution of the laws. Schoenbrod's view on legislation, it ought to be noted, does deviate from Hayek's; most notably, Hayek does not argue against delegation, saying the decision to delegate is a question of expedience.

way to police the distinction that Schoenbrod embraces, no way to distinguish between interpretation and policy-making where discretion is required in executing an ambiguous or imprecise law. Perhaps it is even a distinction without a difference, and all discretion is law-making, pure and simple.

Schoenbrod admits the inescapable imprecision of language, especially statutory language, but he responds by pointing out that otherwise ambiguous words can become infused with legal meaning sufficient to amount to a rule of behavior even if it is not entirely precise – "reasonableness" in tort law is the most obvious example of such a word. Schoenbrod's assertion is based on a background theory of customary law. Here, the influence of Hayek is palpable. Where there is a background social norm, otherwise ambiguous words can be understood by reference to it. Reference to custom can draw on widely accepted private practice, or on the body of legal rules in existence, the specific instances of which provide data points giving rise to inferences about the relative importance of various goals and interests. Thus, custom gives Schoenbrod an extra-textual tool to give meaning to otherwise ambiguous statements of law.

Speed limits provide an interesting example of how customary behavior (in the form of ordinary traffic patterns) can join technical engineering principles (such as road surface and width) to give guidance for the establishment of rules. On an ordinary roadway presenting no unusual safety concerns, speed limits are generally set at the 85th percentile speed based on studies showing that faster drivers have worse driving records and cause a disproportionate number of accidents.[116] The existence of technical and behavioral standards thus helps invest with meaning a statute's command to drive at a "reasonable and prudent" speed.

Nevertheless, it is still possible to object that the use of such background technical and behavioral principles is still insufficiently determinative or prescriptive, thus making the imposition of speed limits no better than any other example of administrative legislating. If one judge would require even speed limits to be numerically enacted by the legislature, while another judge would view a mere statutory preamble as providing sufficient guidance for administrative rulemaking, mustn't one despair of finding sufficient virtue in a judicially enforced nondelegation doctrine? Not necessarily.

116. *See e.g.* Road Commission for Oakland County, *How Fast is Too Fast*, *at* http://www.rcocweb.org/data/Speed.pdf (accessed May 22, 2006); *see also* Va. Dept. of Transp., *Speed Limits FAQ*, *at* http://www.virginiadot.org/comtravel/faq-speedlimits.asp (accessed May 22, 2006).

C. *Getting it Right – Don't Be Afraid to Be Wrong*

We should not shy away from the fact that formal categories are an important aspect of the Constitution, not to mention law more generally. The Founders viewed the separate powers of government as distinct and definable, even if agreement on their precise definitions or boundaries was elusive. Madison's *Federalist No. 37* stressed that core classifications in political science ought not to be undermined by borderline ambiguities. The Post Office debates show how Madison persisted in this view with regard to legislative delegation. Categorical thinking, later associated with legal formalism, may have fallen into disrepute with the rise of legal realism and, later, critical legal theory, but Madison's argument from *Federalist No. 37*, that marginal indefiniteness is not contrary to overall doctrinal coherence, remains an important consideration in understanding how the judiciary can give muscle to doctrines preserving the integrity of the constitutional scheme. A reassessment of the practicability of judicial line-drawing in the context of legislative delegation is in order.

The judicial enforcement of nondelegation is not as hopeless as some would suggest. Even if it is conceded to be inconsistent and even arbitrary, notwithstanding Schoenbrod's arguments, that does not imply that it would necessarily entail injustice, overall inaccuracy, or inefficacy. Arbitrariness in dispensing justice in individual cases (which the rule of law is aimed at eradicating) is a danger to liberty; but arbitrariness in enforcing constitutional limitations on government action is not necessarily a danger to liberty if the laws deemed valid must still be equally applied. Those who argue against judicial enforcement of nondelegation too quickly assume the evils of potential inconsistency in striking down instances of legislative delegation. By focusing too closely on the individual case, arguments against judicial enforcement of the nondelegation doctrine miss the forest for the trees.

Consider the distinction in scientific measurement between accuracy and precision. Precision means that repeated measurements vary little, irrespective of the reliability of the mean measurement (how close it is to the actual value). Accuracy, with respect to repeated measurements, means that the aggregated measurements approximate the true value fairly closely even though individual measurements might vary from one another substantially (repeated measurements produce a mean close to the actual value). One can conceivably have accuracy without precision or precision without accuracy.

In some areas of law, errant decision-making can effect great injustice, as with imprisonment for false criminal convictions. In those cases, the judicial system must, as a matter of justice, be both precise and accurate.

But in other legal contexts, precision may be less of a concern and the benefits of relaxing such a constraint become considerable. With delegating acts, errant judicial decisions arguably pose little harm; if a court vacates rules because they were not enacted by the legislature, those rules that are sufficiently desirable can be revisited and passed explicitly by the legislature.[117]

A potential objection is that arbitrary enforcement of nondelegation ultimately results in arbitrary results in individual cases. This objection is vitiated in three ways. First, it would depend on the narrowness of rulings regarding impermissible delegations. A broad ruling that invalidated a major provision of the regulatory code, or even a provision of the statute giving rise to the code, would present less inconsistency, or at least no inconsistency problems different from those of other common exercises of judicial review resulting in invalidations of statutes. A narrow holding on the other hand (e.g., that a rule, if held to reach a certain fact pattern, would amount to executive legislating because the defendant would have had no notice from the text of the statute that his behavior was colorably of questionable legality) might produce less guidance for and greater variance across future cases. But as-applied challenges (which are arguably more consistent with the classical model of judicially modest case-by-case adjudication) are obviously not uncommon in constitutional law.

Second, and more importantly, the inconsistency is in fact not of great concern because rules established by an administrative body ought to provide a kind of safe harbor, in that individuals abiding by those rules risk no liability. Any individual whose behavior falls within the gray area is on notice of and voluntarily assumes the risk that the court will view the rule in question not as impermissibly delegated legislative power but as a valid interpretive exercise of executive power.

Third, if concerns about legislative delegation are worth taking seriously, it would be a strange result to argue that the injustice arising from inconsistent application of the nondelegation doctrine should result in its nonapplication. If the Constitution requires laws be passed by the legislature in which "*all* legislative power . . . shall be vested," then demands for consistency ought to produce a jurisprudence that errs in favor of respecting the categorical distinctions recognized by the Constitution.

Thus, the major concern not ought to be the precision, but rather the overall accuracy of judicially enforced nondelegation, i.e., on the *aggre-*

117. One might argue that this is no different from the argument that rules created by agencies contradicting the will of the legislature can easily be overturned by the legislature. But the difference is in which presumption is more consistent with constitutional norms, and whether legislative inaction has recognizable meaning.

gate effect of the judicial decisions. Decisions will err in both directions (too strict and too lenient), but there is no reason to doubt that they will in the aggregate achieve the overall purpose of ensuring more legislative decisions are indeed made by the legislature. If that is true, judicial review of delegation on the whole would be effective even if indefinite and inconsistent. The costs of "errors" in specific cases, being small, would be outweighed by the overall effectiveness in forcing rulemaking back into the legislature.[118]

Legislative delegation is admittedly difficult to appraise in the abstract. No doubt there would be accusations of politically inspired adjudication. But again, although individual decisions may be prone to convincing attacks of result-oriented decision-making, nevertheless the aggregate effect of nondelegation decisions might well prove to be apolitical, because either party is prone to favoring or opposing delegation when advantageous or disadvantageous to its interests. Furthermore, if nondelegation decisions do not address the specific content of laws, then even politically motivated decisions have little political effect beyond readjusting the specificity required in legislation, the contents of which will be decided by the political branches.

Resurrecting the nondelegation doctrine would certainly cause friction and uncertainty for several years while legislative practice readjusts, but an equilibrium would likely evolve over time, and more rulemaking governing private behavior would have to pass through the legislature by the appropriate constitutional procedures, thereby better ensuring a greater degree of popular agreement and general public welfare from the laws than is currently achieved.

V. CONCLUSION

Originally, law was conceived primarily in terms of background principles of justice, and the legislative power was conceived as a restraint on arbitrariness in the particulars of executive administration of justice. The legislative power was a defensive, reactive power, and the executive remained the primary source of governmental regulatory activity. Legislative delegation was consistent with this view of law and legislative power because it was a formal recognition of the principle of legislative supremacy and the fact of executive dominance of governance.

118. Of course, the accuracy of judicial enforcement of the nondelegation doctrine is unknowable because the most prudent separation of legislation and execution is itself unknowable. But surely the aggregate effect of judicial review is to move us generally in the proper direction, since it can't lead us any further in the wrong direction.

Once legislative supremacy was established, law slowly came to be understood simply as the command of the sovereign legislature; whatever passed the legislature was law. Special interests lost no time in taking advantage of this fact, and the American experience under state constitutions predicated on legislative supremacy caused no shortage of difficulties. The Constitution, then, was designed with these difficulties in mind, and the result was limited government. Among the important aspects of the constitutional structure were the equality of the branches, the weakening of the legislature via bicameralism, and the distinctness between the composition of the two chambers of Congress. Legislative delegation is inimical to this conception of law and legislative power because it circumvents constitutional features designed to constrain the legislature.

The debate over delegation ought to focus on the importance of constitutionalism as systematized "meta-rules" constraining law and governmental action. Where the debate has focused on constitutionalism, decisionmakers and commentators alike have too quickly accepted necessity justifications of delegation, thereby short-circuiting the constitutional debate. But a reexamination of the philosophy of Progressives in particular shows that, although necessity rarely failed to appear in their rhetoric, it was as much a strident and well-developed ideological argument that truly undergirded their calls for expanding the scope of government in society. Moreover, there are strong theoretical reasons and convincing evidence to believe that delegation allows legislators to separate their personal ambitions from the constitutional rights of their office, so that political checks are insufficient to maintain the constitutionally designed system of separation of powers. The result is an increased desire among legal commentators to resurrect judicial review of delegation.

Judicial enforcement of the nondelegation doctrine is problematic because it is perhaps the most difficult area in which to draw lines demarcating what is and is not allowed. Nevertheless, resurrecting a categorical distinction between core legislative and non-legislative powers may yet be a reasonable way to reestablish a nondelegation doctrine consistent with the thinking of the Founders. Conceding its indefiniteness, one can still argue that such a formalist doctrine would, on the whole, produce intelligible limits on delegation without too much harm to the efficacy of government and the certainty and justice of the law. In sum, resurrecting the nondelegation doctrine in judicially enforced form would likely prove practicable and beneficial to American constitutional law and to American government and society.