MAKING THE NONDELEGATION DOCTRINE WORK: TOWARD A FUNCTIONAL TEST FOR DELEGATIONS

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I. INTRODUCTION

For many years, it was fair to say that "if Academy Awards were given in constitutional jurisprudence, nondelegation claims against regulatory statutes would win the prize for Most Sympathetic Judicial Rhetoric in a Hopeless Case."[1] Not anymore. The separate opinions in *Gundy v. United States*, combined with Justice Kavanaugh's statement regarding denial of certiorari in *Paul v. United States*, make clear that reports of the nondelegation doctrine's demise have been greatly exaggerated.[2]

Once that fact became clear, the response was immediate. Commentators claimed that "government regulation as we know it was cast into doubt," and that "the conservative wing of the Supreme Court called into question the whole project of modern American governance."[3] One professor analyzing Justice Gorsuch's dissent argued that his standard would "hamstring and perhaps eventually dismantle much of the administrative state."[4] The *Gundy* plurality joined the apocalyptic predictions, claiming that if the statute in *Gundy* violated the nondelegation doctrine, then "most of Government is unconstitutional."[5]

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[1] Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J. OF L. & PUB. POL'Y 87, 87 (2010); *see also id.* at 88 ("Like the Ninth Amendment and the Guaranty Clause, nondelegation appears to be a constitutional lost cause.").

[2] Gundy v. United States, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring); *id.* at 2131 (Gorsuch, J., dissenting); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting denial of cert.). *See* Nicholas Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1294 (2021) ("[F]or the first time in nearly a century, the Supreme Court is poised to reformulate the nondelegation doctrine, opening the possibility of a revolution in separation of powers and administrative law."); *see also* Gary Lawson, *Mr. Gorsuch, Meet Mr. Marshall: A Private-Law Framework for the Public-Law Puzzle of Subdelegation*, No. 20-16 B.U. PUB. L. & LEGAL THEORY 1, 6 (2020) (forthcoming publication in American Enterprise Institute) ("That sounds a lot like five Justices at least willing to think carefully about reviving some kind of non-subdelegation doctrine."). Justice Barrett's arrival at the Court may increase that likelihood, though she has addressed only one narrow nondelegation issue in her academic writings. *See* Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 256 (2014) (contending that the "default, permissive rules of the nondelegation doctrine" should not apply to delegations of the power to suspend habeas corpus).

[3] Evan Zoldan, Gundy v. United States*: A Peek Into the Future of Government Regulation*, THE HILL (June 21, 2019, 12:24 PM), https://thehill.com/opinion/judiciary/449687-gundy-v-united-states-a-peek-into-the-future-of-government-regulation [perma.cc/35Z2-DHC4]; Nicholas Bagley, *Most of Government is Unconstitutional*, N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/opinion/sunday/gundy-united-states.html [https://perma.cc/XUN5-SVKM].

[4] Wayne Logan, Gundy v. United States*: Gunning for the Administrative State*, 17 OHIO STATE J. OF CRIM. L. 185, 202 (2019).

[5] *Gundy*, 139 S. Ct. at 2130 (plurality opinion).

Scholars who oppose the nondelegation doctrine moved quickly to try to persuade the justices to leave it dead.[6] Its proponents responded, giving rise to a debate as to whether the nondelegation doctrine exists as a matter of the Constitution's original meaning.[7] This piece leaves that debate to other combatants and focuses instead on a different inquiry.[8] For all of the ink spilled about the prospect of the nondelegation doctrine's revival, few have delved into what it should look like on its resurrection.[9] Answering that question is essential to ensuring that lower courts can apply the doctrine consistently instead of arbitrarily enjoining executive actions. Having a clear test matters. In other areas of the law, badly formulated tests have created immense uncertainty.[10] If the courts begin to police the limits on Congress's ability to hand off power to other branches, then they will need a clear test from the start.

This piece seeks to demonstrate how the *Gundy* dissent's framework, fully explained and with one crucial addition, can fit that need. It accepts as a premise that the Supreme Court will resuscitate the nondelegation doctrine and focuses on the necessary subsequent question: what should the doctrine look like when it does? First, it develops a clear test for applying the nondelegation doctrine from the framework that the *Gundy* dissent offers. In doing so, it accepts the dissent's three categories of protected statutes.[11] It then takes seriously Supreme Court justices' and scholars' statements that the nondelegation doctrine applies only to exercises of

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[6] *E.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282 (2021); Parrillo, *supra* note 2, at 1296; Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, GEO. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654564.

[7] *E.g.*, Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L. J. 1490, 1494 (2021); Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88, 90 (2020); Aaron Gordon, *A Rebuttal to 'Delegation at the Founding'*, (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561062 [perma.cc/9B8G-9ZGE].

[8] In Part III, I do draw on Mortenson and Bagley's research into statutes that the First Congress passed to demonstrate some aspects of this test. I do so not as a refutation of their claim that the nondelegation doctrine does not exist, but because the Founding-era statutes that they discuss help demonstrate that the test is consistent with original meaning.

[9] Lawson's *Mr. Gorsuch, Meet Mr. Marshall* is the only comprehensive attempt I have seen so far. *See* Lawson, *supra* note 2.

[10] *See* Crawford v. Washington, 541 U.S. 36, 63 (2004) (describing the earlier *Roberts v. Ohio* framework for Confrontation Clause analysis as "so unpredictable that it fails to provide meaningful protection from even core confrontation violations."); Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 565 U.S. 994, 994 (2011) (Thomas, J., dissenting from denial of certiorari) (describing Establishment Clause jurisprudence under the *Lemon* test as "in shambles"); Steven Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PA. ST. L. REV. 601, 602 (2014) (explaining how the regulatory taking doctrine "has become a compilation of moving parts that are neither individually coherent nor collectively compatible.").

[11] Gundy v. United States, 139 S. Ct. 2116, 2136–37 (2019) (Gorsuch, J., dissenting).

legislative power—the power to bind private rights—and incorporates that into the *Gundy* dissent's framework. After developing the test, the piece applies it to past nondelegation cases and existing statutes, both to demonstrate how the test would work and to gauge the claims that a revived nondelegation doctrine would "cast a pall over thousands upon thousands of statutory provisions."[12]

Part II provides background on the constitutional origins of the nondelegation doctrine and scholars' proposals to revitalize it. Part III explains the test, using cases to illustrate each component. Part IV applies that test to a few major nondelegation cases—*Whitman v. American Trucking Association* for a recent vintage, and three cases from the 1940s pentalogy that the Supreme Court often holds up as examples of broad delegations that pass muster under the nondelegation doctrine for more classic questions.[13] It also offers a chart showing my predictions as to how the Court's major nondelegation cases would come out under this test. Finally, Part V discusses three statutory provisions that would fail the test and ways Congress can work with agencies to fix them.

II. THE NONDELEGATION DOCTRINE

Article I vests "all legislative Powers herein granted" in Congress; from that Vesting Clause, the Court has derived the nondelegation doctrine.[14] The doctrine's "fundamental precept" is that the "lawmaking function belongs

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[12] Andrew Coan, *Eight Futures of the Nondelegation Doctrine*, 2020 WIS. L. REV. 141, 146; *see also* David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J. OF L. & PUB. POL'Y 213, 236 (2020) (claiming that "[m]any, if not most, of the regulatory statutes in the United States Code would fail to comply with the [doctrine] as originally understood.").

[13] Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001). *See, e.g.*, *Gundy*, 139 S. Ct. 2116 (plurality opinion); Mistretta v. United States, 488 U.S. 361, 374 (1989) ("In light of our approval of these broad delegations, we harbor no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements.").

[14] U.S. CONST. art. I, §1; *Whitman*, 531 U.S. at 472; Jennifer Mascott, Gundy v. United States*: Reflections on the Court and the State of the Nondelegation Doctrine*, 26 GEO. MASON L. REV. 1, 1 (2018). *But see* Jennifer Mascott, *Early Customs Laws & Delegation*, 87 GEO. WASH. L. REV. 1388, 1395 (2019) ("[N]ondelegation limitations might not be inherent in the Article I Vesting Clause alone, but may be innate to the structural design of the federal government itself.").

to Congress . . . and may not be conveyed to another branch or entity."[15] The Court continues to reaffirm that rule in nondelegation cases.[16]

Yet despite the Court's consistent reaffirmation of the formal rule, in recent years, it has become, according to then-professor Elena Kagan, "a commonplace that the nondelegation doctrine is no doctrine at all."[17] Even those who favor a strong nondelegation doctrine have accepted that "the so-called nondelegation doctrine" is "more aptly styled the 'delegation non-doctrine.'"[18]

In part, the nondelegation doctrine's ineffectiveness stems from the line-drawing problems it presents. Before the Constitution's ratification, James Madison said 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."[19] Since then, the Court has echoed Madison's concerns.[20]

The Court's current solution to the line-drawing problem is the "intelligible principle" standard.[21] That standard requires that Congress "lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform."[22] Over time, the intelligible principle standard "has become so ephemeral and elastic as to lose its meaning."[23] Its elasticity has led the Court to reject every nondelegation challenge that it has addressed since 1935.[24] Now five

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[15] Loving v. United States, 517 U.S. 748, 758 (1996); *see also* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810) ("It is the peculiar province of the legislature to prescribe general rules for the government of society.").

[16] *See, e.g.*, *Whitman*, 531 U.S. at 472; Touby v. United States, 500 U.S. 160, 165 (1991). *But see Whitman*, 531 U.S. at 477–490 (Stevens, J., concurring) (arguing that Congress can and does delegate legislative power).

[17] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2364 (2001).

[18] Larry Alexander & Sai Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1036 (2007).

[19] THE FEDERALIST NO. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961).

[20] Wayman v. Southard, 23 U.S. (10 Wheat) 1, 46 (1825) ("[T]he 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."); *see also, e.g.*, United States v. Grimaud, 220 U.S. 506, 517 (1911) ("It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations.").

[21] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality opinion); *Whitman*, 531 U.S. at 472.

[22] Mistretta v. United States, 488 U.S. 361, 372 (1989) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)).

[23] David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1231 (1985).

[24] Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 323 (2000).

justices seem willing to enforce a stricter nondelegation doctrine.[25] To do so, they must solve Madison's dilemma.

In the years before *Gundy*, scholars who favored a revitalized nondelegation doctrine spent many pages attempting to offer such a test. But all of their formulations are too imprecise to effectively guide lower courts and agencies.[26] So the *Gundy* dissent declined to rely on them.[27] Instead, it created the general structure of a new test, one that is sufficiently precise to render it enforceable in the lower courts and comprehensible to Congress, agencies, and regulated entities. In Part III, I add flesh to the bones of that general structure to create a relatively clear, enforceable test.

III. THE TEST

In *Wayman v. Southard*, Chief Justice Marshall explained that a test for unconstitutional delegation must distinguish between the "powers which are strictly and exclusively" legislative and the powers which "the legislature may rightfully exercise itself" but does not have to.[28] Only the former compose the legislative power that Article I vests exclusively in Congress and to which the nondelegation doctrine applies. So the first step in deriving a test for the nondelegation doctrine is defining the legislative power. In taking that step, Will Baude's recent approach to interpreting the judicial power proves helpful.[29] As he puts it, "[i]t is not always necessary to return to first principles, but when one is lost, sometimes it can be helpful to consult the map."[30]

First principles show that not every power that Congress can exercise is part of the legislative power that only it can wield.[31] Rather, "[t]o the

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[25] *See* Justin Walker, *The Kavanaugh Court and the* Schechter-Chevron *Spectrum*, 95 IND. L. J. 923, 938 (2020).

[26] *E.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 376 (2002) ("Congress must make whatever decisions are sufficiently important to the relevant statutory scheme that Congress must make them."); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 5–16 (1995) (offering a similarly imprecise "political commitment" principle, wherein a delegation is permissible if legislators make a "normative political commitment" that allows the electorate to "judge its representatives"); Schoenbrod, *supra* note 23, at 1227 (requiring Congress to state "the general rules of conduct" rather than "merely recite regulatory goals and leave it to an agency to promulgate the rules to achieve those goals.").

[27] Lawson, *supra* note 2, at 6 (noting that the dissent "conspicuously avoid[ed] endorsing Lawson's earlier formulations of a nondelegation test").

[28] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

[29] William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511 (2020).

[30] *Id.* at 1513.

[31] Larry Alexander & Sai Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1298 ("Moreover, as an original matter, we believe that Locke

framers, each of the[] vested powers [legislative, executive, and judicial] had a distinct content."[32] The legislative power's distinct content determines whether a power is of the strictly and exclusively legislative variety.[33]

In *Gundy*, Justice Gorsuch defines the legislative power as "the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' or the power to 'prescribe general rules for the government of society.'"[34] Justice Thomas agrees, defining legislative power in "the Blackstonian sense of generally applicable rules of private conduct."[35]

From that definition of legislative power, and the further analysis the *Gundy* dissent offers, we can develop our test. Each component follows logically from the definition of legislative power, but separating the test into clear, discrete parts will prevent the kind of uncertainty some commentators fear a revived nondelegation doctrine could cause.[36] In effect, the test provides four conditions for a nondelegation violation, each of

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and the Constitution used the phrase 'the legislative power' to refer to the power to make rules for society and not the ability to exercise the de jure powers of legislators."). *Cf.* Baude, *supra* note 29, at 1515 ("Yet from the beginning of the Constitution, it has been accepted that not every case that *can* be decided by the federal courts must be decided *only* by the federal courts.").

[32] Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting); *see* Baude, *supra* note 29, at 1513–14 (looking to the "substance of the judicial power," the power to bind parties and authorize deprivations of private rights, to define the judicial power).

[33] *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 594–95 (2007) ("From the First Congress on, of course, it had been common for Congress to give the President or other executive officials broad authority to make certain kinds of decisions–how money in the public Treasury should be spent, which inventions were 'sufficiently useful and important' to merit patents, who should receive grants of federal land, who should be licensed to trade with Indian tribes, and the like. But outside of the special fields of taxation and the regulation of foreign commerce, these delegations did not intersect much with core private rights; at the time that the executive branch was acting, the only vested rights in the picture belonged to the public as a whole."). Michael Rappaport also explains that the nondelegation doctrine does not apply "uniformly across different areas of law," though he does not apply it through the lens of the definition of legislative power. Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265, 345 (2001) ("In my view, the nondelegation doctrine is selective, applying to certain areas, but not to others.").

[34] *Gundy*, 139 S. Ct. at 2133. (Gorsuch, J., dissenting) (first quoting THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961), and then quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810)).

[35] Dept. of Transp. v. Ass'n of Am. Railroads, 575 U.S. 43, 76 (2015). *See also* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 86–110 (2014) (focusing on whether government action binds private rights); JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 74–79 (2017) (discussing the absence of evidence that the early Congress granted discretion to bind private individuals); Schoenbrod, *supra* note 23, at 1260, 1265.

[36] *See* Schoenbrod, *supra* note 12, at 237–38; Coan, *supra* note 12, at 146.

which functions as an "off-ramp."[37] If a statute fits into one of the off-ramps, it is constitutional.[38] If not, it poses nondelegation problems. Under the expanded-*Gundy*-dissent test, a statute does not pose a nondelegation problem if it:

1. Does not bind private persons, does not bind the exercise of private rights, or does not operate through generally applicable rules;[39]
2. Authorizes action in an area of overlapping power; [40]
3. Premises the enforcement of a rule on the finding of a contingent fact;[41] or
4. Only requires the recipient of Congress's grant of power to "fill up the details." [42]

To demonstrate how each off-ramp works, I will apply it to past Supreme Court cases. And because "longstanding practice and precedent are given longstanding weight, even by many originalists," I will also apply it to statutes from the Founding-era.[43]

A. Not the Legislative Power

The first off-ramp has three distinct components: 1) not binding private persons; 2) not binding the exercise of private rights; and 3) not using generally applicable rules. An exercise of power must meet all three

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[37] Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 177 (2019) (Bamzai and Justice Gorsuch explain the off-ramps, and their work thus far constitutes the body of analysis on the question). For an originalist argument that disagrees with Justice Gorsuch, *see* Lawson, *supra* note 2, at 30–40.

[38] The *Gundy* dissenters said as much explicitly with regard to the second, third, and fourth off-ramps. *Gundy*, 139 S. Ct. at 2136–37. It doesn't say what happens when Congress provides a grant of power that does not bind private rights. With regard to the first, because such a grant is not a delegation of legislative power, the first off-ramp should also insulate a statute from constitutional challenge.

[39] *Gundy*, 139 S. Ct. at 2133. *See also* Bamzai, *supra* note 37, at 178 ("Nondelegation might apply in a more rigorous fashion where private 'rights' are at issue and more deferentially where 'privileges' are at stake.").

[40] *Gundy*, 139 S. Ct. at 2137.

[41] *Id.* at 2136.

[42] Throughout this piece, I use "grant of power" in place of "delegation" to ensure clarity—there are delegations of non-legislative power that are constitutionally permissible. So because the Court has failed to distinguish between them effectively, using grants of power avoids the confusion discussing acceptable delegations could cause. *see Gundy*, 139 S. Ct. at 2136.

[43] Baude, *supra* note 29, at 1517.

conditions to be legislative, so each effectively functions as its own miniature off-ramp.[44] As such, I will analyze them separately.

1. Does Not Bind Private Persons

The definition of legislative power makes clear that legislative power is the power to bind private individuals.[45] Thus, a grant of power that does not empower the recipient to bind private individuals is not an unconstitutional delegation. Applying this principle is often straightforward.[46] In *Panama Refining Co. v. Ryan*, for example, Congress delegated to the President the power to prohibit the transportation of petroleum.[47] His decision whether or not to do so would bind private persons who wished to transport petroleum. So the Supreme Court held that the executive branch actions taken under the statute were "without constitutional authority."[48]

At the other extreme, take a reorganization act. Congress could pass a statute that simply read: "The President may restructure the executive branch." That statute would grant the President total discretion. But because restructuring the executive branch would not grant the President power to bind private persons, the statute would not delegate legislative power.[49]

A similarly simple application comes from the First Congress. It authorized the President to "restructure the country's foreign debt on terms that he thought best, with parties he thought best, under conditions he thought best."[50] Of course, negotiating with America's creditors does not take any authority to bind private persons, so authorizing the President to do so does not grant him legislative power.

The harder question under this portion of the test would arise if Congress grants the President the power to bind the states. Could Congress avoid nondelegation problems in the future by granting the executive branch power to command the states to regulate private persons? That would likely be unconstitutional on other grounds, but it would not be a

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[44] *See Gundy*, 130 S. Ct. at 2136–37.

[45] *See id.* at 2133.

[46] Because of its self-evidence, this principle has not required any analysis that I've seen in scholarship or jurisprudence.

[47] Panama Refining Co. v. Ryan, 293 U.S. 388, 406–07 (1935).

[48] *Id.* at 433.

[49] *See* Rappaport, *supra* note 33, at 335 ("Finally, a related area where delegations appear to be legitimate involves the delegation of discretion to executive agencies concerning internal operations, such as rules governing procedures and management.").

[50] Mortenson & Bagley, *supra* note 6, at 344.

delegation of legislative power.[51] The legislative power that is vested in Congress is the power to make rules governing the conduct of private individuals, not the power to make rules governing states.[52] Limitations on Congress's ability to authorize the President to do the latter must come from other parts of the Constitution.[53]

2. Does Not Bind the Exercise of Private Rights

The power to control the exercise of private rights lies at the heart of the legislative power.[54] As Justice Thomas has explained, at the heart of the liberty the Constitution protects are "the Lockean private rights: life, liberty, and property. If a person could be deprived of these private rights on the basis of a rule (or a will) not enacted by the legislature, then he was not truly free."[55] Thus, the nondelegation doctrine applies only to statutory authorization to enact such rules—it does not apply when rules do not affect private rights.[56]

What, then, is a private right? Because the label has long been essential to understanding the judicial power, Article III scholars and the Court have repeatedly sought to analyze that question.[57] And although the Court's jurisprudence can be described as "little more than a grab bag of miscellaneous results that have some historical roots but no underlying logic," scholarship in the area has done a better job of clarifying things.[58]

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[51] Depending on how it is structured it could, for example, raise anti-commandeering problems, *see* Murphy v. NCAA, 138 S. Ct. 1461, 1468 (2018); be an overly coercive use of the spending power, *see* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012); commandeer state officers, *see* Printz v. United States, 521 U.S. 898, 934–35 (1997); or simply violate federalism norms, *see* Shelby County v. Holder, 570 U.S. 529, 557 (2013); Gregory v. Ashcroft, 501 U.S. 452, 469 (1991).

[52] *See* Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting); Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 76 (2015) (Thomas, J., concurring).

[53] *See Gundy*, 139 S. Ct. at 2138 (Gorsuch, J., dissenting).

[54] *See* Bamzai, *supra* note 37, at 178.

[55] *Ass'n of Am. R.R.*, 575 U.S. at 76 (Thomas, J., concurring); *see also* United States v. Nichols, 784 F.3d 666, 671 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc) ("[A]t stake here isn't just the balance of power between the political branches who might be assumed capable of fighting it out among themselves. At stake is the principle that the scope of individual liberty may be reduced only according to the deliberately difficult processes prescribed by the Constitution . . . .").

[56] *See* Baude, *supra* note 29, at 1542; Nelson, *supra* note 33, at 561–62 ("Historically, Americans have concluded that the protection of individual rights to person and property—core 'private rights' of the sort that (on John Locke's influential account) government was instituted to safeguard—triggers different political calculations, and therefore requires different institutional arrangements, than the protection of 'public rights' belonging to the body politic.").

[57] Nelson, *supra* note 33, at 563–66.

[58] *Id.* at 564; Oil States Energy Servs., LLC v. Green's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018) (quoting Stern v. Marshall, 564 U.S. 462, 488 (2011)) (admitting that the Court's precedents

Caleb Nelson has expanded on the "life, liberty, and property" formulation that we often see.[59] The first is the "right of personal security," to be free of harm to life, limb, and reputation.[60] The second is the "right of personal liberty," which consists of the freedom from restraint or imprisonment without due process of law.[61] And the third is the "right of private property," which encompasses "the free use, enjoyment, and disposal of all [of one's] acquisitions, without any control or diminution, save only by the laws of the land."[62]

On the other side of private rights sit public rights and private privileges.[63] Harrison explains that "public rights were ownership interests of or controlled by the government, and private privileges were private interests in the favorable exercise of public rights."[64] Disposing of public lands or using the public roads, for example, are issues of public right.[65] Claims to federal benefit programs, licenses, and even services like the postal service are issues of private privilege.[66]

United States v. Grimaud illustrates this off-ramp.[67] In 1911, the Secretary of Agriculture had broad statutory authority to regulate federal forest reservations, and violators of his regulations could receive up to twelve months in prison.[68] Under that statutory authority, the Secretary promulgated a rule requiring permits to graze stock in a forest reserve; Grimaud and his co-defendants violated that rule.[69] The lower court found that the statute unconstitutionally delegated legislative power to the executive.[70] But the Supreme Court reversed.[71] It recognized that the regulations "do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities."[72] Instead, they regulated "the *privilege* of using" federal lands.[73] Using

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have "not been entirely consistent"). For helpful scholarship, *see* Baude, *supra* note 31; John Harrison, *Public Rights, Private Privileges, & Article III*, 54 GA. L. REV. 143, 161, 167–68 (2019).

[59] Baude, *supra* note 29, at 1541; Nelson, *supra* note 33, at 562–63.

[60] Nelson, *supra* note 33, at 567 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *129).

[61] *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *129, *134).

[62] *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *129, *138).

[63] Harrison, *supra* note 58, at 161, 168; Nelson *supra* note 33, at 567–68.

[64] Harrison, *supra* note 58, at 172.

[65] Nelson, *supra* note 33, at 566.

[66] *Id.* at 583–84; Baude, *supra* note 29, at 1545, 1578–79. I discuss the implications of the Supreme Court's disagreement with this common law principle (in Goldberg v. Kelly) below.

[67] United States v. Grimaud, 220 U.S. 506 (1911).

[68] *Id.* at 509.

[69] *Id.*

[70] *Id.* at 513.

[71] *Id.* at 523.

[72] *Id.* at 516.

[73] *Id.* at 521 (emphasis added).

federal land is an interest which "can be affected by, and so is correlated with, the government's power to dispose of the public lands, a power that comes with ownership."[74] So it does not implicate the legislative power.

The same logic applies to other types of government property like the Postal Service or Amtrak.[75] No one has a private right to the use of the Post Office.[76] So someone who disagrees with the Postal Service's rate setting decisions cannot argue that the Constitution requires Congress, and not the agency, to make the rules for postal rates. Rate decisions bind the exercise of the privilege of using federal mail services. Thus, they are not subject to a nondelegation challenge.

This rule also resolves an aspect of the nondelegation doctrine that has bedeviled scholars—why territorial governments can govern themselves. Scholars have advanced different explanations for why the nondelegation doctrine does not apply to regulation of the territories. Gary Lawson argues that Congress can delegate the power to administer federal lands because the grant of power in the Territories Clause of Article IV allows Congress to make all "needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[77] Needful, he contends, differs from the "necessary and proper" language of Article I.[78] So unlike the Necessary and Proper Clause, it carries an "implicit authorization to delegate legislative power."[79] David Schoenbrod, by contrast, makes a more structural argument. He claims that the Territories Clause's location outside of Article IV means that Article I's Vesting Clause does not apply to it.[80]

But those theories miss a more fundamental explanation. Congress can delegate the power to administer federal property because the power to administer public lands does not implicate private rights. And once the territorial government comes into existence, it exercises the "legislative power of the territory, not of the United States."[81] So our long tradition of territorial governance does not raise nondelegation problems.

Goldberg v. Kelly does not complicate analysis under this off-ramp. In *Goldberg*, the Supreme Court decided that individuals have some level of

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[74] Harrison, *supra* note 58, at 168.

[75] *See* Lawson, *supra* note 26, at 392.

[76] *See* Baude, *supra* note 29, at 1545. Although, as Baude acknowledges the treatment of post access became more confusing over time, that original understanding will likely govern the Court's approach. *Id.* at 1546.

[77] Lawson, *supra* note 26, at 392–94 (quoting U.S. CONST., art. IV, § 3, cl. 2).

[78] *Id.* at 393.

[79] *Id.*

[80] DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 187 (1993).

[81] Baude, *supra* note 29, at 1351.

property interest in government benefits for the purpose of the Due Process Clause.[82] But more recently, in *Stern v. Marshall*, the Court reaffirmed that there is a constitutionally meaningful difference, at least as it pertains to the judicial power, between "public rights" (like the property interest in *Goldberg*), and "matters 'of private right.'"[83] That difference should apply in this context as well. Agencies that "traffic in legal privilege" should not have to concern themselves with the nondelegation doctrine.[84] In fact, *Goldberg* itself did not declare government benefits a matter of private right; it just said that "the interest of the eligible recipient in uninterrupted receipt of public assistance" is weighty enough to warrant some level of procedural due process.[85] Thus, for nondelegation purposes, *Goldberg* changes nothing.

The distinction between public and private rights explains a number of statutes from the First Congress as well. For example, the First Congress gave the Executive branch enormous discretion in issuing patents.[86] A patent exists only by merit of a statutory scheme and is a public right, as the Supreme Court has long recognized.[87] So creating the rules around patent issuance is not legislative. The First Congress could grant the executive significant discretion in administering veterans benefits for the same reason—federal benefits do not implicate private rights.[88]

The First Congress also offers a more complex version of this rule, a statute that banned all trade and "intercourse" with the Indian tribes without a license from the Executive Branch.[89] There, Congress had created the rule binding private rights: "it is illegal to trade with the tribes."[90] Then, it created a defense to violations of that rule: possession of a license granted by the executive branch.[91] The grant of such a license was a determination

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[82] Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970).

[83] Stern v. Marshall, 564 U.S. 462, 489 (2011) (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).

[84] Baude, *supra* note 29, at 1579.

[85] *Goldberg*, 397 U.S. at 266.

[86] Mortenson & Bagley, *supra* note 6, at 339.

[87] In the Article III context, the Court has repeatedly applied that characterization to hold that patents fall within the "public-rights doctrine." Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018) ("As this Court has long recognized, the grant of a patent is a matter between "'the public, who are the grantors, and . . . the patentee.'" (quoting United States v. Duell, 172 U.S. 576, 586 (1899))).

[88] *See* Mortenson & Bagley, *supra* note 6, at 342–43 (describing the veteran's benefits statute); Nelson, *supra* note 33, at 583–84 (explaining that deprivation of benefits does not affect private rights).

[89] *Id.* at 340–41.

[90] Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137.

[91] *Id.*

of public, not private, right.[92] That is why the executive could handle it. Similarly, Congress could give "any common law court" the power to grant citizenship to anyone who had lived in America for two years and could prove "that he is a person of good character" because that did not infringe on anyone's private rights.[93]

3. Through Generally Applicable Rules of Conduct

This off-ramp is fairly self-explanatory: a law is a "generally applicable rule of conduct."[94] A determination that affects the rights of only one person cannot pose a nondelegation problem. IThat is definitional.[95] Determinations as to how the law applies to individuals are inherently executive and judicial.[96] This off-ramp accords with a statute from the First Congress as well.[97] There, Congress granted port-of-entry collectors and tax supervisors broad investigatory discretion.[98] Allowing investigators to investigate obviously does not empower them to create generally applicable rules of private conduct.

B. Areas of Overlapping Power

The second off-ramp, that Congress has broad latitude to delegate in areas of overlapping power, is already an accepted part of the Supreme Court's jurisprudence.[99] It makes sense. The nondelegation doctrine prohibits delegation of powers that are "strictly and exclusively legislative."[100] The Constitution does not grant the power to create generally applicable rules binding private rights to other branches. So if Congress

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[92] *See* Baude, *supra* note 29, at 1579 ("noting that an exemption from [a] ban is a privilege, not a private right.").

[93] Act of March 26, 1790, ch. III, § 1, 1 Stat. 103.

[94] *See* Gundy v. United States, 139 S. Ct. 2116, 2133 (2019).

[95] *See* Lawson, *supra* note 26, at 334.

[96] *See* Union Bridge Co. v. United States, 204 U.S. 364, 386 (1907) ("He could not be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under the general rules prescribed by Congress, are entitled to pensions.").

[97] Act of Aug. 4, 1790, ch. 35, § 30, 1 Stat. 145, 164 (repealed 1799).

[98] Mortenson & Bagley, *supra* note 6, at 345–46.

[99] *See* Loving v. United States, 517 U.S. 748, 771–72 (1996); United States v. Mazurie, 419 U.S. 544, 557 (1975).

[100] Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (quoting Wayman v. Southard, 23 U.S. 1, 42 (1825)); *id.* at 2133 (Gorsuch, J., dissenting).

shares a power with another branch, or with another government, then it is not clear that Congress granted any power at all—if the other entity already had the power, then Congress did nothing more than support that entity in exercising it. For that reason, Michael Rappaport "maintains that the nondelegation doctrine probably does not extend to foreign and military affairs, foreign commerce, [and] rules governing the internal operations of the judiciary and the executive."[101]

Loving v. United States illustrates this off-ramp perfectly.[102] In *Loving*, the Court dealt with the President's power to determine aggravating factors for the death penalty in the court-martial system.[103] The statutory scheme there provided that a court-martial "'may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the UCMJ], including the penalty of death when specifically authorized by' the Code."[104] Another section of the Uniform Code of Military Justice provides that "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."[105] That framework does not offer any principle, let alone an intelligible one, to guide the president's choice of aggravating factors.

Yet the Court rejected the nondelegation challenge.[106] It determined that the "question to be asked is not whether there was any explicit principle telling the president how to select aggravating factors."[107] Rather, the question was "whether any guidance was needed, given the nature of the delegation and the officer who is to exercise the delegated authority."[108] Because Congress left the decision to the President as Commander in Chief role, it did not have to constrain his discretion to choose the aggravating factors.[109]

As the *Gundy* dissent points out, this rule also explains *Wayman v. Southard*.[110] There, Congress authorized the judiciary, not the executive, to

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[101] Rappaport, *supra* note 33, at 265. A recent Note in the Harvard Law Review persuasively challenges the scope of the foreign-affairs component of this off-ramp, at least insofar as it has been misunderstood to extend beyond powers that the Constitution actually grants the executive. Note, *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132 (2021).

[102] *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) (citing *Loving* to illustrate this part of his test).

[103] *Loving*, 517 U.S. at 751.

[104] *Id.* (quoting 10 U.S.C. § 818).

[105] *Id.* (quoting 10 U.S.C. § 856).

[106] *Id.* at 768.

[107] *Id.* at 772.

[108] *Id.*

[109] *Id.* at 772–73; *see also* Rappaport, *supra* note 33, at 265; Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. & PUB. POL'Y 147, 186–87 (2017).

[110] Gundy v. United States, 139 S. Ct. 2116, 2137 (2019).

act.[111] But the rule applied in the same way.[112] Because the "regulation of the conduct of the officer of the Court in giving effects to its judgments" fell squarely "within the judicial province, and has always been so considered," Congress could leave it to the judiciary to regulate that conduct as it pleased.[113] For the same reason, Congress could grant the courts the power to make procedural rules.[114] Courts already have that power, so they can wield it as they please.[115]

Two statutes from the First Congress also fit squarely within this off-ramp. One granted the President authority to call forth the militias; the other, the judiciary the power to make rules for the orderly conduct of business in the courts.[116] Those rules fall squarely within the second off-ramp, as they grant power in areas that the Executive and Judiciary have independent power.

The same rule applies when Congress cooperates with other governments. Congress, state legislatures, and tribal governments all exercise legislative power within their respective spheres. Take *United States v. Mazurie*.[117] There, the Court dealt with a statute that allowed Indian tribes to "regulate the introduction of liquor into Indian country."[118] To decide the case, it was "necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce . . . with the Indian tribes.'"[119] The tribes' possession of "independent authority over matters that affect the internal and social relations of tribal life" made them appropriate recipients of a standardless authorization to act.[120]

That conclusion makes sense. The states possess a similar independent authority, so the off-ramp should apply to them equally.[121] However, it applies only in areas where the states do have that authority—longstanding Supreme Court precedent also recognizes that Congress cannot authorize a state to do anything that it has no independent authority for.[122] In *Knickerbocker Ice Co. v. Stewart*, for example, the Court held that Congress

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[111] Wayman v. Southard, 23 U.S. 1, 42 (1825).
[112] *Id.*
[113] *Id.* at 45.
[114] *Id.* at 50; Rappaport, *supra* note 33, at 354.
[115] *Wayman*, 23 U.S. at 50.
[116] Mortenson & Bagley, *supra* note 6, at 348.
[117] United States v. Mazurie, 419 U.S. 544, 545 (1975).
[118] *Id.* at 547.
[119] *Id.* at 557 (quoting U.S. CONST. art. I, §8, cl. 3).
[120] *Id.*
[121] *Id.* (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–22 (1936)).
[122] *See, e.g.*, Washington v. W.C. Dawson & Co., 264 U.S. 219, 226 (1924).

could not delegate the power to make rules for maritime cases to the states.[123] The Constitution gives Congress exclusive authority over maritime law, so the states have no independent power to wield.[124]

In short, when Congress legislates in an area of shared power, it is not clear that it is granting any power at all. If Congress does little more than offer an expression of support or an indication that it will not interfere, it cannot have delegated legislative power.

C. Contingent Legislation

Another off-ramp applies for contingent legislation: when Congress legislates a rule but makes the applicability of that rule turn on executive fact finding.[125] In that case, even though the law does not have force until the executive recognizes that the necessary fact exists, Congress still creates the rule binding private rights.

The Supreme Court has approved of contingent legislation since its first nondelegation case.[126] In the *Aurora* Case, the Court addressed a law permitting the renewal of trade if "France or Great Britain shall so revoke or modify her edicts, as that they shall cease to violate the neutral commerce of the United States."[127] Congress did not delegate legislative power by making the law conditional.[128] It just "prescribed evidence which should be admitted of a fact, upon which the law should go into effect."[129]

The other contingent legislation case that the *Gundy* dissent cites approvingly, *Miller v. City of New York*, shows this off-ramp's potential scope.[130] There, Congress had passed a law authorizing a bridge across the East river if the Secretary of War certified that it did not "obstruct, impair, or injuriously modify the navigation of the river."[131] The Court held that Congress had done nothing more than "declare[] that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the secretary of war as an agent to ascertain that fact."[132]

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[123] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164 (1920).

[124] *Id.*

[125] Gundy v. United States, 139 S. Ct. 2116, 2136 (2019).

[126] *See* Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813).

[127] *Id.* at 383.

[128] *Id.* at 384.

[129] *Id.* at 387. One could read the *Aurora* case to fall within the President's foreign affairs power, but because the drafters of the law framed it as contingent, it fits more neatly here.

[130] *Gundy*, 139 S. Ct. at 2136–37.

[131] Miller v. City of New York, 109 U.S. 385, 392 (1883).

[132] *Id.* at 393.

The step from the *Aurora* to *Miller* shows where a line-drawing problem arises under this off-ramp: when does the determination of a fact's existence become authorization for the executive to choose whether to apply a law?[133] Deciding whether a bridge will "injuriously modify" navigation of a river involves some discretion, but it remains a factual inquiry.[134] What about a law doubling the tax rate "if circumstances necessitate it?" That must be too far—it effectively authorizes the President to double the tax rate as he pleases. So the Court will have to place the line somewhere in the middle.

Drawing that line will require the Court to create "some further theory of 'factfinding' and 'policymaking.'"[135] Aditya Bamzai suggests looking to judicial review of agency action for guidance.[136] There, too, the Court must classify differentiate between "factfinding," "law-interpretation," or "policymaking."[137] That makes it an excellent starting point. As in that context, common sense will get courts far in applying this off-ramp. After all, there is a meaningful difference between making factual determinations that may require value judgments—like whether a bridge is injurious to the public—and a wholesale grant of discretion as to whether or not to apply the law. As long as contingent legislation does not slip into the latter form, this off-ramp will allow Congress to plan for future possibilities by creating rules ahead of time.

D. Filling Up the Details

Last but not least, a law is safe from a nondelegation challenge if it does nothing more than "authorize another branch to 'fill up the details.'"[138] That standard is meant to distinguish between executive application of the law, which is necessary, and impermissible executive policymaking. On its face, the "fill up the details" off-ramp is no more definite than the intelligible-principle test it will help replace. The two approaches "appear to converge in their fundamental analyses."[139] They analyze the same factors: the importance of the power granted and the limitations Congress has imposed

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[133] *See* Bamzai, *supra* note 37, at 184.

[134] *See Miller*, 109 U.S. at 392.

[135] Bamzai, *supra* note 37, at 184.

[136] *Id.*

[137] *Id.*

[138] Gundy v. United States, 139 S. Ct. 2116, 2136 (1989) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 44 (1825)).

[139] Bamzai, *supra* note 37, at 185.

on executive discretion.[140] But the *Gundy* dissent makes clear that a "fill up the details" standard will apply a more exacting version of that analysis.[141] It will require Congress to "set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed."[142] The cases that the *Gundy* dissent cites in this context offer some guidance as to how much more exacting the analysis will be.[143]

The clearest example of a statute that only required the executive to "fill up the details" comes from *In re Kollock*.[144] There, the statute imposed labeling requirements for oleomargarine and left it to the IRS Commissioner to design "the particular marks, stamps, and brands to be used."[145] Within the statutory scheme, "the designation by the commissioner of the particular marks and brands to be used was a mere matter of detail."[146] As such, Congress could leave it to the IRS.[147]

J.W. Hampton, the source of the intelligible principle standard, also appears (in the *Gundy* dissenters' eyes) to "pass[] muster under the traditional tests."[148] The statute at issue there ordered the President to change tariff rates to equalize the costs of production between the U.S. and a "competing country."[149] It provided four detailed factors for the President to apply in determining the differences in costs of production, significantly cabining his discretion.[150] As Chief Justice Taft explained, Congress "described with clearness what its policy and plan was," then authorized "a member of the executive branch to carry out its policy and plan and to find the changing difference from time to time and to make the adjustments necessary to conform the duties to the standard underlying that policy and plan."[151] Of course, making those adjustments "required intricate calculations."[152] But because the executive made calculations instead of

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[140] *Id.*

[141] *Gundy*, 139 S. Ct. at 2136.

[142] *Id.* (quoting Yakus v. United States, 321 U.S. 414, 464 (1944)).

[143] *Id.*

[144] In re Kollock, 165 U.S. 526 (1897).

[145] *Id.* at 533.

[146] *Id.*

[147] *Id.* at 536. *See also* Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 215 (1912) (holding that allowing the Interstate Commerce Commission to choose an accounting method for mandatory annual reports did not pose a nondelegation problem).

[148] *Gundy*, 139 S. Ct. at 2139.

[149] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 401 (1928).

[150] *Id.* at 401–02.

[151] *Id.* at 405.

[152] *Gundy*, 139 S. Ct. at 2139.

policy choices, adjusting tariff rates amounted only to filling up the details of Congress's statutory plan.[153]

Finally, both the *Gundy* dissenters and then-Judge Gorsuch when he was on the Tenth Circuit cited *Touby v. United States* as an example of an appropriately constrained delegation.[154] The provision of the Controlled Substances Act at issue there empowers the Attorney General to add a drug to one of the Act's schedules, potentially making possessing it a criminal offense.[155] In *Touby*, for example, the DEA (exercising the Attorney General's statutory power), had classified a new designer drug called euphoria as a schedule-one drug, so the defendants faced ten- to twenty-year jail sentences.[156] Facially, that is similar to a facet of *Gundy* that so concerned the dissenters: allowing "the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing."[157]

Yet that same dissent approved of *Touby*, making it an excellent example of what "filling up the details" looks like.[158] In his dissent from denial of rehearing en banc in *United States v. Nichols*, then-Judge Gorsuch "distill[ed] *Touby* to its essence."[159] Congress made the rule: unauthorized persons cannot possess dangerous drugs.[160] It then made the application of that rule to particular drugs turn on a factual finding by the Executive about whether the drug poses an imminent hazard.[161] And it provided clear criteria to govern the factual inquiry.[162] Those criteria provide insight into the kind of legislative guidance that Congress must provide to pass muster under this part of the test.

To place a substance on the Controlled Substances Act's schedules using the expedited procedure at issue in *Touby*, the Attorney General must find that doing so is "necessary to avoid an imminent hazard to the public safety."[163] In making that finding, he must consider three factors:

1. The drug's history and current pattern of abuse;
2. The scope, duration, and significance of abuse; and

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[153] *J.W. Hampton, Jr. & Co.*, 276 U.S. at 409.

[154] *Gundy*, 139 S. Ct. at 2141; United States v. Nichols, 784 F.3d at 666, 673 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).

[155] Touby v. United States, 500 U.S. 160, 162 (1991) (citing 21 U.S.C. § 811(a)).

[156] *Id.* at 164. *See* 21 U.S.C. § 841.

[157] *Gundy*, 139 S. Ct. at 2144.

[158] *Id.* at 2141.

[159] *Nichols*, 784 F.3d at 673 (Gorsuch, J., dissenting from denial of rehearing en banc).

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] Touby v. United States, 500 U.S. 160, 166 (1991).

3. What risk, if any, it poses to the public health.[164]

Within those three factors, the statute provides three additional considerations:

1. Actual abuse;
2. Diversion from legitimate channels; and
3. Clandestine importation, manufacture, or distribution.[165]

Further, the Act has three requirements to add a drug to Schedule One, which carries the heaviest penalties:

1. High potential for abuse;
2. No currently accepted medical use in treatment in the United States; and
3. A lack of accepted safety for use of the drug under medical supervision.[166]

These factors are detailed and thorough. They ensure that the Attorney General can determine whether a drug is one that Congress wants to make illegal rather than one the Attorney General feels should be illegal. Making that determination, then, is just filling up the details of the statutory scheme.

The *Gundy* dissent's analogy to vagueness further shows what filling up the details looks like.[167] A void-for-vagueness argument effectively amounts to a claim that a law is so indeterminate that it "delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis."[168] A law that impermissibly delegates legislative power does the same; it just gives the power to the President or administrative agencies rather than the police and the courts. We can look to Justice Gorsuch's statement in *Dimaya* that "the Constitution looks unkindly on any law so vague that reasonable people cannot understand its terms and judges do not know where to begin in applying it" as a point of reference for determining when a law allows the executive branch to do more than fill up the details.[169]

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[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch & Thomas, JJ. dissenting).

[168] *Id.* (quoting Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)).

[169] Sessions v. Dimaya, 138 S. Ct. 1204, 1234 (2018) (Gorsuch, J., concurring in part and concurring in the judgment).

From those cases, we know the kind of statute that will pass muster under the "fill up the details" off-ramp.[170] It must enable reasonable people to understand it and judges to judge the executive's application of it by providing specific directions governing its implementation. The specificity needed for those directions will vary with the scope of the task at issue. When telling the IRS to design a stamp, for example, Congress need not provide any direction at all.[171] When empowering the Attorney General to ban the possession and manufacture of a drug, on the other hand, Congress must provide specific and detailed directions.[172]

But what is specific enough? That is an issue that the courts need to resolve as this off-ramp is litigated. To start, though, Gary Lawson's recent piece analyzing the nondelegation doctrine through the common law of agency may prove helpful.[173] His argument stems from the in-vogue theory of fiduciary constitutionalism, which scholars already challenge, and it goes beyond just interpreting this component of the *Gundy* dissent's test.[174] But the Court need not accept Lawson's constitutional theory wholesale to recognize that his agency analogy helps with this off-ramp—after all, Lawson bases it on Chief Justice Marshall's distinction between "important subjects" that Congress must decide and "matters of less interest" that it can leave to others, which is the heart of the inquiry under this off-ramp.[175] So, if only by analogy, his analysis of the common law exceptions to the rule against subdelegation for acts that are "*ministerial* or minor aspects of the tasks" at hand can further narrow courts' discretion in applying this off-ramp.[176]

Nevertheless, the inquiry under this off-ramp will always require some level of subjective judgment. One judge's filling up the details may be another judge's exercise of policy discretion. But making those tough choices is what judges do in all areas of law. And in this context, in the face of that indeterminacy, a court can always read a statute narrowly instead of holding that it is altogether unconstitutional.[177]

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[170] *Gundy*, 139 S. Ct. at 2136.

[171] In re Kollock, 165 U.S. 526, 533 (1897).

[172] *See supra* notes 144–48, 163–67 and accompanying text.

[173] *See* Lawson, *supra* note 2.

[174] *See id.* at 13 n.33 (noting the arguments against fiduciary constitutionalism in Samuel Bray & Paul Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479 (2020)).

[175] *Id.* at 29.

[176] *Id.* at 19, 21–26 (applying that standard through the lens of common-law agency cases).

[177] *See* Sunstein, *supra* note 24, at 316.

Now that the test is clearer, I will apply it to major nondelegation cases to demonstrate how the inquiry will work under the new test. Part IV will also show that many cases that survived challenge under the intelligible principle standard will similarly survive under my test, albeit for different reasons.

IV. CASE DEMONSTRATIONS

For the past eighty years, credible nondelegation challenges (at the national level) have been few and far between.[178] In *Whitman v. American Trucking Association*, part of the Clean Air Act presented a close enough question, even under the intelligible principle standard, that the D.C. Circuit held that it violated the nondelegation doctrine (the Supreme Court disagreed).[179] That makes it a good case to demonstrate that this test offers a clearer inquiry than a test that looks to the degree of discretion a statute confers, like the intelligible principle standard. I will also discuss other aspects of the Clean Air Act in my analysis of *Whitman*, as it is the kind of statute that many opponents of a robust nondelegation doctrine are most concerned about protecting.[180] After *Whitman*, I will discuss three examples from the pentalogy of 1940s cases that scholars use as examples of how toothless the nondelegation doctrine is. I look to those cases because in more recent cases, the Supreme Court often string cites those five before saying something like "in light of our approval of these broad delegations, we harbor no doubt that" the statute before it also passes muster.[181] They are useful case studies for two reasons. First, they present a variety of different statutory frameworks. Second, the Supreme Court's consistent treatment of them as capacious delegations that mark the outer edge of what even the intelligible principle standard can permit makes them good markers by which to judge the effect this test would have on the Supreme Court's precedent.

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[178] *See* Jalon Iuliano & Keith Whittington, *The Nondelegation Doctrine: Alive & Well*, 93 NOTRE DAME L. REV. 619, 620 ("[D]espite the doctrine's disappearance at the federal level, it has become an increasingly important part of state constitutional law.").

[179] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 463, 472 (2001).

[180] *See* William Ariza, *Toward a Non-Delegation Doctrine That (Even) Progressives Could Like*, AM. CONST. SOC'Y SUP. CT. REV. 211, 233 (2019) (noting the concern that a strong nondelegation doctrine "could threaten the type of proactive and effective regulation progressives favor" on topics like "environmental, securities, worker and product safety, and economic regulation[s]").

[181] *See Mistretta*, 488 U.S. at 374; *see also Gundy*, 139 S. Ct. at 2129 (plurality opinion) ("[W]e have over and over upheld even very broad delegations. Here is a sample."); *Whitman*, 531 U.S. at 474.

In addition to analyzing those cases, I provide a table in Part IV.E that shows which of the Supreme Court's other nondelegation precedents would pass this test and which off-ramp they would take. It is not comprehensive, but it may prove useful to scholars who wish to further explore the effect a revitalized nondelegation doctrine could have.

A. Whitman *and the Clean Air Act*

Whitman involved a nondelegation challenge to a provision of the Clean Air Act that instructed the EPA Administrator to set national ambient air quality standards.[182] That provision defined NAAQS as "standards 'the attainment and maintenance of which . . . are requisite to protect the public health' with 'an adequate margin of safety.'"[183] The American Trucking Associations argued that the provision constituted an unconstitutional delegation of legislative power.[184] They were incorrect.

The provision does not implicate legislative power at all. As discussed above, for a government action to be legislative, it must affect private persons.[185] And as Cary Coglianese explains, § 109(b)(1) "did not put any business or individual at direct risk of any penalty, criminal or civil, because the provision imposed obligations on states which were backed up principally with the prospect of reductions in federal funding or federal preemptive action."[186] The Court recognized as much in *Whitman*, explaining that "[i]t is to the States that the CAA assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources."[187] So considered as Congress designed it to function within the statutory scheme, § 109 does not bind private parties.[188] Instead, it governs the allocation of federal funds, and the EPA's efforts are, as the Court put it, effectively a "research program to assist States in choosing the means through which they would implement" the standards.[189] When the statute functions in that way, it does not pose a nondelegation problem. Thus, the outcome in *Whitman* would not change. In fact, this test's clarity would have ensured that the D.C. Circuit did not find a nondelegation

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[182] *Whitman*, 531 U.S. at 465.
[183] *Id.* (quoting 42 U.S.C. § 7409(b)(1)).
[184] *Id.* at 462.
[185] *Gundy*, 139 S. Ct. at 2133.
[186] Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1867 (2019).
[187] *Whitman*, 531 U.S. at 470.
[188] *Id.* at 471.
[189] *Id.*

problem in the first place, an improvement on the intelligible principle standard.

Looking at the Clean Air Act more broadly, one major component raises a nondelegation problem. If a state fails to develop a plan that the EPA Administrator finds satisfactory, then he can impose a federal plan.[190] In that case, the EPA would make rules of general applicability that directly bind private persons' exercise of their private property rights, so it could not take the first off-ramp. The second is also unavailable because environmental regulation is not within the executive branch's inherent power.[191] The statute also does not require the finding of a contingent fact to apply the rules.[192] Finally, Congress did not offer much guidance.[193] Instead, the statute lets the Administrator make important policy decisions about how to allocate the burden of reducing emissions.[194] So letting the Administrator create plans delegates legislative power.[195]

Finding the grant of power to create federal implementation plans unconstitutional would have some practical implications. Right now, nine states and two tribal lands have partial federal implementation plans in place.[196] A court could enjoin the EPA's enforcement of those plans. But that reduction in regulation is a far cry from the dramatic effect that *Whitman* coming out the other way could have had.

The CAA also offers a useful demonstration of the role that severability will play in limiting the impact of the modern nondelegation doctrine. In the above example, for instance, finding the grant of power to impose a federal plan unconstitutional would not affect other aspects of the CAA. The EPA could still use the sanctions provided in § 7509(b) to get the states to develop implementation plans.[197] So the centerpiece of the CAA would

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[190] 42 U.S.C. § 7410(c).

[191] *Id.*

[192] *See id.* If, by contrast, Congress had legislated a scheme of environmental regulation that kicked in if the EPA Administrator finds that a state failed to provide an adequate plan, then it would be a classic case of contingent legislation.

[193] *See id.*

[194] 42 U.S.C. § 7410(c)(3).

[195] While this difference may seem formalistic—after all, private emitters of particulate matter are regulated either way—it is a constitutionally relevant difference. When the state implements the plan, the EPA Administrator merely determines whether to withhold federal funds from the state. The state decides which emitters must cap their emissions and by how much. Under a federal plan, the Administrator makes those same decisions and promulgates a regulation that binds the emitters directly.

[196] *Basic Information About Air Quality FIPs*, EPA (last updated Aug. 5, 2021), https://www.epa.gov/air-quality-implementation-plans/basic-information-about-air-quality-fips [https://perma.cc/4FXQ-E8CV].

[197] *See* 42 U.S.C. §7410(m) (granting the EPA Administrator power to impose the sanctions in 42 U.S.C. §7509(b) on recalcitrant states).

remain intact. And there are innumerable other small pieces of the CAA, where the EPA is granted a research function or where Congress has adequately legislated the rules it will impose on private actors, that will remain in force as well.[198] For example, §§ 7403 and 7404 instruct the Administrator to develop an elaborate research and development program to find better means of controlling air pollution.[199] That would not, of course, bind anyone's private rights, so it poses no nondelegation problem. And § 7411, which requires the EPA Administrator to develop standards of performance for new stationary sources, adequately constrains his discretion so as to grant no power other than to fill up the details.[200]

B. Lichter v. United States

Turning the clock back many decades, *Lichter* dealt with a nondelegation challenge to the World War II-era Renegotiation Act. Congress was concerned that defense contractors would overcharge the War Department, but it did not want to set a fixed price for materiel or constrain the War Department's ability to negotiate prices.[201] So the Act created a cause of action for the War Department to recover "excessive profits" from defense contractors.[202] That provision passes muster under the first and fourth off-ramps.[203]

The analysis under the first off-ramp is straightforward. Only the power to create rules of general applicability can be legislative.[204] The relevant provision of the Renegotiation Act did not authorize the War Department to create generally applicable rules.[205] The Act just gave the War Department a cause of action against defense contractors.[206] So it did not grant legislative power.

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[198] 42 U.S.C. §§ 7403–7404.

[199] *Id.*

[200] 42 U.S.C. § 7411.

[201] Lichter v. United States, 334 U.S. 742, 746 (1948).

[202] *Id.*

[203] There may be an argument that because this happened in wartime, it falls within the President's Commander in Chief power and therefore fits in off-ramp two as well. But as the Court pointed out in *Youngstown*, the Commander in Chief does not have "the ultimate power as such to take possession of private property" at home, even during a war. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

[204] *See* discussion *supra* Part II.A.3.

[205] *Lichter*, 334 U.S. at 746.

[206] *Id.*

The inquiry under the fourth off-ramp is more interesting. It shows that Congress can use terms of art to limit the executive branch's discretion, leaving it to fill up the details of Congress's statutory scheme.

When Congress enacted the Act, the recovery of "excessive profits" was "already familiar to Congress."[207] Congress had used the standard for two decades, and the Court had upheld the recapture of excess income in the railroad context more than twenty years earlier in *Dayton Goose Creek Railway Co. v. United States*.[208] It was an established term with an understood meaning.[209] So even if the statute had granted the Secretary of War the power to make general rules about what profits are "excessive" in the national economy, he could not decide just anything was "excessive." He could only apply the existing understanding of "excessive profits."[210] What's more, Congress made the term even more precise by adding six statutory factors to consider in determining excessive profits, including things like the risk the supplier assumed, the amount of capital the contractor used, and the contractor's efficiency.[211] Together, the well established understanding of "excessive profits" and the statutory factors left the Secretary only the responsibility to fill in the details.

C. Federal Power Commission v. Hope Natural Gas Co.

This case was not actually a nondelegation challenge, but because the Supreme Court includes it in its string cite of broad delegations, I address it here all the same.[212] It is the only statutory provision of the New-Deal-era pentalogy that clearly fails this test.

The Natural Gas Act of 1938 granted the Federal Power Commission power to determine whether natural gas rates were "just and reasonable" and, if they were not, to fix a new rate that was "just and reasonable."[213] The statute cannot take off-ramps one through three: it allows for general

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[207] *Id.* at 784.

[208] Dayton-Goose C.R. Co. v. United States, 263 U.S. 456, 485 (1924); *see id.*

[209] *See Lichter*, 334 U.S. at 784.

[210] *See* Schoenbrod, *supra* note 23, at 1255.

[211] *Lichter*, 334 U.S. at 799.

[212] *See* Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 593–94 (1944). The case addressed the reasonableness of a particular ratemaking by the Federal Power Commission, not the statute's constitutionality. Justice Reed's dissent raised the delegation question, but only as a reason to construe the FPC's power narrowly. *Id.* at 623 (Reed, J., dissenting). Despite its original nature, the Supreme Court has since cited it for the proposition that "[w]e have sustained authorizations for agencies to set . . . 'just and reasonable' rates." Gundy v. United States, 139 S. Ct. 2116, 2129 (2019) (plurality opinion); Mistretta v. United States, 488 U.S. 361, 373–74 (1989) (same).

[213] *Hope Nat. Gas Co.*, 320 U.S. at 600.

rules that bind private rights, in an area where the executive has no independent power, without a legislated rule that turns on factfinding.[214] And in *Hope*, the Federal Power Commission was doing far more than filling in the details. Congress "provided no formula" for what is just and reasonable.[215] It had not "expressed in a specific rule the fixed principle of just and reasonable."[216] Instead, Congress let the Commission conduct the "balancing of the investor and consumer interests" that ratemaking required according to its policy judgments.[217] Thus, it unconstitutionally delegated legislative power.

D. National Broadcasting Co. v. United States

National Broadcasting dealt with the Federal Communication Commission's power to grant broadcast licenses and regulate license-holders for the "public interest, convenience, and necessity."[218] That standard seems capacious. But because that grant of power does not allow the FCC to bind the exercise of private rights, the statutory provision at issue in *National Broadcasting* can take the first off-ramp.

By 1943, Congress had forbidden the operation of a radio apparatus without a license.[219] That was the general rule binding private rights: people can't operate a radio apparatus.[220] Then Congress allowed the FCC to grant people an exception from that general rule in the form of a license, like the licenses to trade with Indian tribes that the First Congress authorized the executive to grant.[221] An exemption from a general ban is a "privilege, not a private right."[222] So Congress could leave it to the executive to determine whose exercise of that privilege would be in the public interest.

National Broadcasting is especially interesting for two reasons. First, it demonstrates what is functionally a loophole in the nondelegation rule: if Congress is willing to ban something, then authorize the executive to issue licenses that would exempt recipients from the ban, it can grant the executive great latitude without raising a nondelegation problem. Take *Hope* for example. Had Congress banned the sale of natural gas, then

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[214] At the time, as best I can tell, companies did not need federal licenses to sell natural gas.
[215] *Id.* at 600–01.
[216] *Id.* at 601.
[217] *Id.* at 603.
[218] Nat'l Broadcasting Co. v. United States, 319 U.S. 190, 193–94 (1943).
[219] *Id.* at 210.
[220] *Id.*
[221] *See supra* Part III.A.2.
[222] Baude, *supra* note 29, at 1579.

authorized the executive to impose rate requirements as a condition of receiving permission to sell gas, the statute would have passed constitutional muster like the statute in *National Broadcasting* does. That loophole seems, on its face, almost capacious enough to swallow the nondelegation rule. But it can only work in highly regulated industries like broadcasting or power, where no one would bat an eye at the imposition of a licensing scheme. In contexts where people take for granted their right to do something—to sell food, for example—it seems politically impossible to impose a ban and then afterward subject people to an onerous licensing scheme.

Second, *National Broadcasting* again demonstrates the increased clarity this test offers. Instead of asking whether the "public interest, convenience, and necessity" principle is "intelligible"—a fundamentally arbitrary inquiry—courts need only look to the nature of the power the statute grants. Doing so turns the freewheeling scope-of-discretion inquiry into a straightforward, two-paragraph analysis with a clear and concrete answer.

E. Table and Summation

The cases discussed above provide an example of how the nondelegation analysis should be conducted. Additionally, they demonstrate how many statutes upheld under the intelligible principle standard would survive under this test. For scholars who want to further explore the impact of a revitalized nondelegation doctrine that applies this test would have on Supreme Court precedent, here is a table:

Case Name	**Year**	**Citation**	**Constitutional?**	**Off-ramp**
Gundy	2019	139 S. Ct. 2116	No	
Whitman	2001	531 U.S. 457	Yes	1
Dep't of Interior v. South Dakota	1996	519 U.S. 919, 69 F.3d 878 (8th Cir. 1995)	Yes	1
Loving	1996	517 U.S. 748	Yes	2
Touby	1991	500 U.S. 160	Yes	4
Mistretta v. United States	1989	488 U.S. 361	Yes	1
Skinner v. Mid-Am. Pipeline Co.	1989	490 U.S. 212	Yes	1 and 3
Benzene Case	1980	488 U.S. 607	Yes	4
Mazurie	1975	419 .S. 544	Yes	2
National Cable Television Ass'n	1974	415 U.S. 336	Yes (as Construed by the Court)*	1
Lichter	1948	334 U.S. 742	Yes	1 and 4
American Power & Light Co.	1946	329 U.S. 90	No	
Yakus	1944	321 U.S. 414	Yes	4
Hope Natural Gas	1944	320 U.S. 591	No (but not a nondelegation case)	
National Broadcasting Co.	1943	319 U.S. 190	Yes	1
Opp Cotton Mills	1941	312 U.S. 126	Yes	4
Schechter Poultry	1935	295 U.S. 495	No (would affirm)**	
Panama Refining	1935	293 U.S. 388	No (would affirm)**	
New York Cent. Securities Corp.	1932	287 U.S. 12	No	
J.W. Hampton	1928	276 U.S. 394	Yes	4

Chemical Foundation	1926	272 U.S. 1	Yes	2
L. Cohen Grocery Co.	1921	255 U.S. 81	No (would affirm)**	
Knickerbocker Ice Co.	1920	253 U.S. 149	No (would affirm)**	
ICC v. Goodrich Transit Co.	1912	224 U.S. 194	Yes	4
Grimaud	1911	220 U.S. 506	Yes	1
Union Bridge Co.	1907	204 U.S. 364	Yes	4
Buttfield v. Stranahan	1904	192 U.S. 470	Yes	4
In re Kollock	1897	165 U.S. 526	Yes	4
Marshall Field & Co. v. Clark	1892	143 U.S. 649	Yes	2 and 3
Miller v. City of New York	1883	109 U.S. 385	Yes	3
Wayman v. Southard	1825	23 U.S. 1	Yes	3 and 4
The Aurora	1813	11 U.S. 382	Yes	2 and 3

* "As construed by the Court" means that the Court used constitutional avoidance to narrow the statute in a way that makes it constitutional.

** "No (would affirm)" indicates that finding the statute unconstitutional would affirm the Court's precedent.

As the table shows, applying the test to most cases would not alter their outcomes. It would only reverse the Court's decision on a statute's constitutionality in four of the thirty-two nondelegation cases I analyzed (including *Gundy*). In others, like *Whitman* and *National Broadcasting Co.*, it may change the reasoning, but it would leave the result intact. It would not be the first time the Court retconned its precedents.[223]

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[223] "Retcon" is shorthand for retroactive continuity. MERRIAM WEBSTER, *A Short History of 'Retcon'*, https://www.merriam-webster.com/words-at-play/retcon-history-and-meaning [https://perma.cc/J632-B9DD] (last visited Feb. 21, 2021). It refers to authors offering new information about the past to alter an earlier narrative. *Id.* Though normally used to describe fiction, it applies quite often to courts' treatment of their precedent. Take, for example, *Crawford v. Washington*, 541 U.S. 36, 58 (2004), where

More importantly, if the test would only alter the outcome for one eighth of the statutes that presented a close enough case to reach the Supreme Court, it certainly would not "generate enormous uncertainty about every aspect of government action" or "cast a pall over thousands upon thousands of statutory provisions."[224]

V. LOOKING FORWARD

While a revitalized nondelegation doctrine will not upend the law as we know it, it will bring some important statutory provisions into question. In this section, I will discuss three of those provisions, then briefly discuss ways Congress can address the nondelegation issues they raise.

One provision of the Affordable Care Act instructs the Health Resources and Services Administration to promulgate "comprehensive guidelines" as to what "additional preventive care and screenings" insurers must provide for women.[225] It offers the HRSA no guidance as to what those guidelines should say, instead leaving the issue entirely to the agency's discretion.[226] Analyzed under this test, it faces a serious nondelegation challenge. First, it authorizes the executive to issue general rules governing the insurers' private rights.[227] Second, the executive has no independent power over healthcare. Third, Congress offered no general rule that left the HRSA only a contingent fact to find. And fourth, Congress offered no guidance that would sufficiently constrain the HRSA so that it only fills in the details.

Recognizing the scope of that grant of power, Justice Thomas asked at the oral argument in *Trump v. Pennsylvania*, a case addressing the manner in which the HRSA implemented the provision, whether that provision raises a nondelegation problem.[228] As the Solicitor General conceded, the law gave the HRSA total discretion to decide what insurers must do.[229] There, no party raised a nondelegation challenge.[230] But Justice Thomas's opinion, joined by the other four conservative justices, repeatedly

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the Court recognized that most of its Confrontation Clause cases—even those decided under *Ohio v. Roberts*'s uncertain rule—came to the right conclusion and needed only to have their reasons replaced.

[224] Bagley, *supra* note 3; Coan, *supra* note 12, at 146.

[225] *See* 42 U.S.C. § 300gg-13(a)(4).

[226] *Id.*

[227] *Id.*

[228] Transcript of Oral Argument at 13:16–17, Trump v. Pennsylvania, 140 S. Ct. 918 (2020) (No. 19-454), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/19-431_d1o2.pdf [https://perma.cc/87Q5-H2UP].

[229] *Id.* at 12:16–22.

[230] Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2382 (2020).

emphasizes the breadth of the power the ACA delegates and the absence of any constraints on HRSA's exercise of that power.[231] Those dicta led one commentator to conclude that the majority was inviting a nondelegation challenge in a future iteration of the case.[232]

Similarly, a provision in the Securities and Exchange Act makes it illegal to use a "manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."[233] Because that rule applies to people who do not depend on the Securities and Exchange Commission for licenses, it too faces a stiff nondelegation challenge.[234] It grants the SEC the authority to issue rules or regulations defining "manipulative device or contrivance," a choice that subjects violators to up to twenty years in prison.[235] Those generally applicable rules and regulations will bind private rights, and the executive lacks independent authority to issue them. Thus, unless "manipulative or deceptive device or contrivance" is such a clear term that the SEC is only filling in details when it promulgates implementing regulations, this provision does not fit within any off-ramp. That seems unlikely in light of the "necessary and appropriate in the public interest" language in the statute. Thus, Gary Lawson is probably right to call the provision "a naked delegation."[236]

In an even more extreme example, the Magnuson-Moss Act gives the Federal Trade Commission the power to issue rules defining "unfair or deceptive acts or practices in or affecting commerce."[237] Those rules carry criminal and civil penalties.[238] Under this grant of power, the FTC can address any sector of the economy and any type of activity it pleases as long as it, in its sole discretion, decides that the activity is "unfair or deceptive."[239] And nothing in the statute defines the phrase "unfair or

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[231] *See id.* at 2380 ("On its face, then, the provision grants sweeping authority to HRSA to craft a set of standards defining the preventive care that applicable health plans must cover. But the statute is completely silent as to what those 'comprehensive guidelines' must contain, or how HRSA must go about creating them.").

[232] James Phillips, *The Supreme Court Majority Seemingly Invites a Nondelegation Challenge to the ACA's Contraceptive Mandate*, YALE J. ON REG.: NOTICE & COMMENT BLOG (July 8, 2020), https://www.yalejreg.com/nc/the-supreme-court-majority-seemingly-invites-a-nondelegation-challenge-to-the-acas-contraceptive-mandate-by-james-c-phillips/ [https://perma.cc/YF7M-3LPE].

[233] 15 U.S.C. § 78j.

[234] *See* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008).

[235] 15 U.S.C. § 78ff.

[236] Lawson, *supra* note 26, at 379.

[237] 15 U.S.C. § 57a; *see also* Coglianese, *supra* note 186, at 1885.

[238] Coglianese, *supra* note 186, at 1885.

[239] *Id.*

deceptive acts or practices."[240] That makes it a breathtaking grant of discretion to the Executive Branch to create rules binding private rights in an area where it has no independent authority. Indeed, in looking at the Magnuson-Moss Act, Cary Coglianese concludes that "this statutory provision bears a striking resemblance to the National Industrial Recovery Act's unconstitutional authorization of the President to adopt 'codes of fair competition.'"[241] Like the NIRA provision that violated the nondelegation doctrine in *Schechter Poultry*, the Magnuson-Moss Act's provision would fail this test.

Those three provisions show that a revitalized nondelegation doctrine would have a not insignificant effect on the administrative state. That is inevitable. The doctrine actualizes the Constitution's requirement that Congress make important policy decisions binding private rights, and in the intelligible-principle era, the legislature has sometimes abdicated that responsibility.[242] But that does not mean that Congress cannot take advantage of the Executive Branch's "inherent expertise and flexibility in implementing complex regulatory schemes" in those areas.[243] It just means that Congress must have the last word.

Congress could meet that requirement by implementing the legislative approval process that then-Judge Breyer proposed to replace the legislative veto.[244] He proposed that Congress require some regulations be passed by a "confirmatory law" before the executive could enforce them.[245] The confirmatory law would go through a fast-track procedure in Congress, so it would not significantly delay regulations that received Congress's support.[246] Today, this approach is associated with the Regulations from the Executive In Need of Scrutiny Act.[247] But it doesn't need to have the myriad poison pills that REINS includes.[248] As evidenced by its progenitor, Justice Breyer, this is a proposal that could get bipartisan support. It will allow agencies to react to new developments while ensuring that Congress takes responsibility for exercises of legislative power.[249]

Another way Congress can take advantage of agencies' expertise without delegating legislative power is by further involving agencies in the

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[240] *Id.* at 1886.
[241] *Id.* at 1885.
[242] *See* Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (plurality opinion).
[243] *See* Ariza, *supra* note 180, at 249.
[244] *See* Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L. J. 785, 793–96 (1984).
[245] *Id.* at 793.
[246] *Id.* at 793–94.
[247] *See* Schoenbrod, *supra* note 12, at 245–46.
[248] *See id.* at 245 n.182.
[249] *See id.* at 241–42.

statutory drafting process. According to an Administrative Conference of the United States report, agencies are already "the chief architects of the statutes they administer."[250] The report found that agencies provide drafting support on "virtually all of the bills that ultimately get enacted that directly affect their agency."[251] So when Congress legislates, it can collaborate further with agencies on the front end to pass constitutional statutes that elected representatives agree to instead of leaving it to the agencies to exercise power that the Constitution has entrusted to Congress on the back end.

VI. CONCLUSION

The doctrine's focus on the legislative power—and the private rights that only the legislature can affect—belies the many claims that if the nondelegation doctrine returns, the whole administrative state will go up in smoke.[252] Although some important agency actions will be called into question, much of the work of agencies does not implicate legislative power.[253] Some agencies traffic entirely in privilege, others work mostly to distribute federal funds, and still others operate in areas of inherent executive power.[254] None exclusively operates to bind private individuals' exercise of their private rights. Understanding that the nondelegation doctrine applies only to the exercise of legislative power can help center nondelegation debate on the laws that raise true nondelegation problems.

The most compelling concerns about a revived nondelegation doctrine stem from the "years of uncertainty" it could create if the Court slowly fleshes out the test over the course of case-by-case adjudication.[255] Those concerns are not unfounded. If the Court simply adopts a stricter version of the intelligible principle standard—say a "clear direction" rule—then it really would "cast a pall over thousands upon thousands of statutory provisions."[256] But that need not happen. Instead, by recognizing the difference between the legislative power and the powers of Congress, and

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[250] Christopher Walker, *Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting* 1 (2015), https://www.acus.gov/sites/default/files/documents/technical-assistance-final-report.pdf [https://perma.cc/TU8Z-5YDG].

[251] *Id.* at 13–14.

[252] *See, e.g.*, Bagley, *supra* note 3; Parrillo, *supra* note 2, at 1295.

[253] *See* discussion *supra* Part III.

[254] The Social Security Administration and Veteran's Administration is an example of the first; the Department of Education, an example of the second; and the Department of Defense, an example of the third.

[255] Schoenbrod, *supra* note 14, at 236–37.

[256] Coan, *supra* note 12, at 146.

by having clear, applicable off-ramps for statutes that do not implicate the legislative power, the Court can create a functional test for Congress, the lower courts, and agencies to determine the constitutionality of a possible delegation. That the nondelegation doctrine will return in some form seems inevitable. When it does, the Supreme Court must adopt a clear test to prevent the years of uncertainty that some fear.