

WHO CONSTRAINS PRESIDENTIAL EXERCISE OF DELEGATED POWERS?

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I have an Article II, where I have the right to do whatever I want as President.

—President Donald J. Trump¹

Until now, for the most part, the death of the nondelegation doctrine has been discussed mostly in the context of delegations to administrative agencies.² For reasons that sometimes appear partisan or policy-driven, arguments about the nondelegation doctrine have often focused on whether administrative agencies are a good thing for our democracy.³ Those who tend to favor regulation in the name of broad social objectives like environmental protection or consumer safety have tended to support the laxity of the nondelegation doctrine in the pursuit of robust administrative missions in the common good.⁴ Those who worry about fairness to regulated parties and overreach of government into the marketplace have, symmetrically, tended to lament the demise of the nondelegation doctrine and the correlative regulatory freedom that it has engendered for administrative agencies.⁵ This dance has illuminated two versions of liberty and two versions of the general welfare for an entire generation of law scholarship, with the nondelegation doctrine under a central spotlight.

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¹ Remarks at Turning Point U.S.A.'s Teen Student Action Summit 2019, 2019 DAILY COMP. PRES. DOC. 504 (July 23, 2019); see also Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him 'the Right to Do Whatever I Want,'* WASH. POST (July 23, 2019, 9:46 PM), <https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-what-ever-i-want/> [<https://perma.cc/6SXL-WWQQ>] (discussing the context of the President's remarks and the scope of the Article II grant of executive power).

² See, e.g., ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 354–57 (6th ed. 2019); 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3:2–3:3 (2d ed. 1978); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 57–72 (1965).

³ See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L., ECON., & ORG. 81, 95–99 (1985) (arguing that delegation to administrative agencies facilitates responsiveness to changes in voter preferences); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 14, 99–106 (1993) (arguing that delegation to administrative agencies short-circuits democratic accountability).

⁴ See, e.g., Mashaw, *supra* note 3, at 91–99; 1 DAVIS, *supra* note 2, § 3:3.

⁵ See, e.g., Mashaw, *supra* note 3, at 85; SCHOENBROD, *supra* note 3, at 49–57.

But it is not just about agencies anymore. The time has come for all sides of that debate to rally around a specific concern about delegation that has been insufficiently scrutinized. This Article looks specifically at one kind of delegation, the direct delegation to the President alone. It sounds the alarm about a recent confluence of judicial, legislative, and political developments that have, together, erected a dangerous citadel of government action essentially immune from all traditional forms of constraint that we have previously relied on to protect the rule of law and individual rights. When Congress broadly delegates authority to the President himself, the same or greater risks of arbitrariness that have animated the advocates of a revived nondelegation doctrine apply at least as pointedly, but the structural and norm-based constraints that the defenders of agency delegations have offered are largely absent when the President alone is authorized to act.⁶

In a much-noted dissent in the October 2018 Term, Justice Gorsuch called attention to the general nondelegation principle in *Gundy v. United States*: “The separation of powers . . . requires Congress to assemble a social consensus before choosing our nation’s course on policy questions . . . [And it] requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution.”⁷

Gorsuch’s opinion gave new life to an argument that has been raised intermittently and passionately for decades about agencies, ever since the Court began to indicate that the nondelegation doctrine would not enjoy a robust existence in the life of its separation-of-powers jurisprudence.⁸ He explicitly tied the principle of nondelegation to the protection of individual liberty.⁹ This Article will show that the Court should, indeed, take steps to constrain broad delegations—not to dismantle the entire administrative state, which is well structured to absorb them within familiar contours of the rule of law—but to cabin unlimited and virtually unreviewable decisions made by the President alone, unfettered by the trappings of the rule of law.

The nondelegation doctrine posits that, when Congress delegates power to the executive branch by statute, it must provide an “intelligible principle” to the agency to follow in implementing that power,¹⁰ which serves at least three important functions. First, it means that the Congress—the constitutional font of policy-making under Article I—has formulated the policy to be served by the provision, as Justice Gorsuch emphasized in the quoted material above.¹¹ Second, it gives courts

⁶ See *infra* Section I.B.

⁷ 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting).

⁸ See, e.g., SCHOENBROD, *supra* note 3, at 14–16, 107–18; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 332, 335–43 (2002).

⁹ See *Gundy*, 139 S. Ct. at 2144–45 (Gorsuch, J., dissenting); cf. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1513–14 (1991) (arguing that the separation of powers is a significant structural protection for liberty).

¹⁰ *Gundy*, 139 S. Ct. at 2123 (plurality opinion).

¹¹ See CHEMERINSKY, *supra* note 2, at 352–53.

a limit to use when they review the agency action to see if the agency has exceeded the statutory authority given to it.¹² Finally, this rule supplies a guide to the agency in judging how to exercise the authority given it.¹³ Together, these three objectives have served to ameliorate, if not eliminate, many concerns about the uncomfortable notion of whether Congress can, constitutionally, give away the legislative power that Article I vests in it.

When the Court struck down two provisions of the National Industrial Recovery Act in 1935 on delegation grounds,¹⁴ it revealed a discomfort with the beginning of the age of administrative agencies, a discomfort that soon dissipated in the cases. The “intelligible principle” requirement imposed in those two cases was never explicitly lifted but subsequently never supplied the basis for a finding of a faulty delegation that the Congress had made.¹⁵

There are many reasons for the relaxation of the “intelligible principle” requirement, and much has been written about whether the relaxation is good or bad.¹⁶ Most of these reasons supporting a tolerance of broader delegation revolve around the nature of administrative agencies themselves, whose structural characteristics and judicial oversight serve to counteract the dangers of unprincipled delegation.¹⁷ But in this Article, I wish to shine a light on the particular subset of delegations in which the President is given a power to be triggered upon his finding of a specified factual condition. In that situation, much of the ameliorating edifice relied on to defend delegation is absent.¹⁸

Building on the work of administrative law scholars who have identified and illuminated the several components of the problem over the years, this Article will seek to show what has happened when a cluster of separate circumstances have come together to create a new and serious threat to individual liberty when the President exercises expansive delegated authority. Several doctrinal components lead to this confluence: First, the moribund “intelligible principle” test has evolved to provide little or no constraint on this or any other delegation.¹⁹ Second, a delegation to the President, specifically, is not subject to the procedural requirements of the Administrative Procedure Act (APA), leaving no extrinsic, enforceable obligation to avoid arbitrary action.²⁰ Third, the Supreme Court has barred from review the correctness

¹² See *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (discussing the application of the “intelligible principle” test to congressional grants of legislative discretion).

¹³ See, e.g., *id.* at 391 (comparing the statutory range for sentencing guidelines to “the rules of procedure [that] bind judges and courts in the proper management of the cases before them”).

¹⁴ See generally *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

¹⁵ CHEMERINSKY, *supra* note 2, at 353–54.

¹⁶ See, e.g., 1 DAVIS, *supra* note 2, §§ 3:2–3:7.

¹⁷ See, e.g., 1 *id.* at § 3:3; Mashaw, *supra* note 3, at 92–93.

¹⁸ See *infra* Section I.B.

¹⁹ See *infra* text accompanying notes 23–41.

²⁰ See *infra* Section I.B.1.

of any factual finding by the President that provides the statutory trigger for his own power.²¹ Finally, a new presidential attitude, reflected in the quote that opened this Article, has ushered in a collapse of the voluntary or informal norms of self-restraint that once offered some modicum of constraint on presidential power.²²

Developments in the Court's separation-of-powers jurisprudence over decades have opened up a dangerous lacuna in the overall constitutional protection against arbitrary government action, ready to be exploited by any President who might show an inclination to read his or her power as unlimited and unchecked, undeterred by the norms of historical practice. When a President walks upon the stage thus set by prior doctrine, the combination creates a perfect storm for a threat to individual liberty. The following discussion will first examine each element of the problem in the case law as fleshed out by earlier scholars, and then examine the ramifications for the protection of rights today in the center of the storm. I will conclude by suggesting that the nondelegation doctrine should indeed be revived, but specifically for the purpose of limiting, constraining, and reviewing the actions of a President pursuant to direct delegated authority.

I. THE SETTING OF THE STAGE

A. *The Nondelegation Principle*

There has long been a debate among scholars about the rise and demise of the nondelegation doctrine.²³ Without any semblance of agreement on this general topic, clarity has been achieved on at least two specific factual elements of the narrative: in 1935, the Supreme Court struck down two provisions of the National Industrial Recovery Act on the ground that a congressional delegation lacked sufficient guidance,²⁴ and it has not struck down a federal law on this stated ground since.²⁵

In one of the cases that form this origin story for the nondelegation doctrine, Congress had authorized the President to prohibit the transportation in interstate commerce of petroleum produced in excess of quotas under state law, sometimes

²¹ See *infra* Section I.B.2.

²² See *infra* text accompanying notes 126–32.

²³ Early cases recognized the existence of such an issue as excessive delegation, but the Supreme Court was reluctant to enter unnecessarily into the complex inquiry that would be required to enforce the precise boundaries of a delegation and consistently upheld laws challenged on this ground until 1935. See, e.g., *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–46 (1825). See generally 1 DAVIS, *supra* note 2, §§ 3:1–3:18 (providing a broad overview of delegation law); JAFFE, *supra* note 2, at 28–86 (discussing the issues posed by delegations).

²⁴ See *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (holding section 9(c) of the National Industrial Recovery Act invalid); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935) (holding section 3 of the National Industrial Recovery Act invalid).

²⁵ Lawson, *supra* note 8, at 371 (“After 1935, the Court abandoned any serious nondelegation analysis.”).

referred to as “hot oil.”²⁶ The President’s executive order had, in turn, delegated his power to the Secretary of the Interior to issue regulations for carrying out the mandate.²⁷ The regulations, which were the focus of the challenge by petroleum companies in *Panama Refining Company v. Ryan*, imposed obligations on all producers to keep records showing their compliance with the applicable state rules.²⁸ Among other constitutional challenges, the companies argued to the Supreme Court that these departmental regulations rested on an unconstitutional statutory delegation.²⁹ The Court agreed: Because Congress had not undertaken to decide explicitly that *all* so-called “hot oil” is injurious or likely to cause unfair competition, nor had it specified the criteria affecting *when* such oil might be considered injurious, the Court found that Congress had left too much to the President’s judgment to make policy choices about which “hot oil” would be prohibited from interstate shipment.³⁰ With no “intelligible principle” to limit the exercise of the delegated power, the law transcended the limits of delegation of the lawmaking function and went down in the history books as one of the principal exemplars of the nondelegation doctrine at work.³¹

In the subsequent decades, some calls arose in support of bringing back the nondelegation doctrine.³² By 1993, the movement for a revitalized nondelegation doctrine had taken important steps forward in scholarship. In an influential book, David Schoenbrod argued that delegation allows Congress to shirk responsibility for making hard policy choices and may lead to lessened accountability.³³ Other scholars began weighing in with policy and constitutional arguments against delegation.³⁴ More

²⁶ *Panama Refin. Co.*, 293 U.S. at 406, 418.

²⁷ *Id.* at 406–07.

²⁸ *Id.* at 407–08.

²⁹ *Id.* at 414–15.

³⁰ *Id.* at 418.

³¹ *See id.* at 429–30. The other case, *A.L.A. Schechter Poultry Corp. v. United States*, authorized the President to approve “codes of fair competition” for the poultry industry without defining what fair competition would entail. 295 U.S. 495, 521–22, 530–31 (1935). The Court found this exceeded Congress’s power to delegate, as well as its power to regulate interstate commerce. *Id.* at 551. There are many articles showing the nondelegation principle in prior cases as well, starting even from the early history of the republic. *See, e.g.*, *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (“The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.”).

³² *See, e.g.*, 1 DAVIS, *supra* note 2, § 3:13 (noting a number of post-1935 Supreme Court cases where nondelegation was favorably mentioned or where *Panama Refining Co.* or *Schechter Poultry* were cited as authority).

³³ SCHOENBROD, *supra* note 3, at 4, 8–9, 14–15.

³⁴ *See* MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 136–38 (1995) (arguing that the abandonment of the nondelegation doctrine undermines lawmaker accountability); 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*

recently, those arguments have been supplemented by further attacks on delegation based on original intentions and original public meaning of the Constitution.³⁵ Even, perhaps counterintuitively, those who champion the Unitary Executive theory of total presidential control over the executive branch have offered arguments against congressional delegation to executive agencies.³⁶ Their concern is that delegation cleaves the agencies from the President, and they lament that each agency “carries out a mandate from the Congress directly to the agency, and the congressional delegations displace unitary executive leadership.”³⁷ Justice Scalia was a frequent critic of delegation, worrying that it empowers agencies to make “value judgments” and “policy assessments,” a job reserved by the Constitution for the Congress.³⁸ Justice Rehnquist voiced a similar view.³⁹ More sophisticated critiques suggest that the vagueness that delegation encourages will result in worse laws.⁴⁰ The objectors to delegation, and with them, the crescendo of voices calling for a revival of the non-delegation doctrine, have pressed their case for decades without success in a holding of the Supreme Court.⁴¹

Defenses of delegation to administrative agencies have engendered a variety of models of the administrative state to help justify these denizens of a “fourth branch” in our constitutional scheme.⁴² One early model of the administrative state envisioned

New York, 76 TUL. L. REV. 265, 303–12 (2001) (arguing that the Constitution’s structure and purpose support a narrow interpretation of executive power, prohibiting the delegation of policy-making discretion).

³⁵ See, e.g., Lawson, *supra* note 8, at 333–34 (asserting that legislative delegations are inconsistent with the original meaning of the Constitution, which may provide some justification for the nondelegation doctrine).

³⁶ See Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 252 (2010).

³⁷ *Id.* at 273.

³⁸ See *Mistretta v. United States*, 488 U.S. 361, 414–15 (1989) (Scalia, J., dissenting).

³⁹ See *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 543–48 (1981) (Rehnquist, J., dissenting).

⁴⁰ See Mashaw, *supra* note 3, at 85–91 (describing claims of other critics of delegation and showing them to be misplaced).

⁴¹ Accord does not exist even on the question of whether there ever was an actual nondelegation doctrine with bite. Keith Whittington and Jason Iuliano have argued that nondelegation has never been an actual constraint on expansive delegations of power and that the narrative of a “Constitution-in-exile” waiting to be restored is mythical. See Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 382–83 (2017); see also Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (arguing nondelegation has had “one good year, and 211 bad ones (and counting)”).

⁴² See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 575–79 (1984) (defending the independent regulators under a functionalist analysis because each agency has relationships with the named branches that provide assurances that they will not pass out of control).

agencies as “mere transmission belt[s] for implementing legislative directives.”⁴³ This early concept is consistent, of course, with a need for a robust nondelegation doctrine such as that which the Court employed on those two occasions in the early days.⁴⁴ The model rests on the ability of an agency to follow a policy directive that comes from Congress—the heart of what the “intelligible principle” requirement was supposed to achieve.⁴⁵ This conception also underlies Justice Gorsuch’s paean, quoted at the opening of this Article, in which he called for a robust nondelegation doctrine for the protection of individual liberty.⁴⁶ The kind of legislative control that Justice Gorsuch envisions seeks to conscript the features of the legislative branch upon which we rely to justify impairment of liberty—accountability, representative deliberation, consent of the governed, and public process—and ensure that they are not evaded by exporting the making of policy to an agency unencumbered by those features.⁴⁷ Even in the absence of a robust nondelegation doctrine, courts can police its underlying values through various interpretative methods such as clear-statement rules.⁴⁸

Early criticism of the administrative state for its failure to achieve some of these goals was quelled, for a time, by the unanimous passage of the APA in 1946.⁴⁹ By providing important procedural safeguards for the actions of agencies in both rule-making and adjudicative roles⁵⁰—most significantly, allowing judicial review of

⁴³ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

⁴⁴ See *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 421 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935).

⁴⁵ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (noting that valid delegation requires Congress to “lay down by legislative act an intelligible principle to which the person or body authorized to [regulate] is directed to conform”).

⁴⁶ See also *Brown*, *supra* note 9, at 1553 (linking nondelegation to due process).

⁴⁷ See *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

⁴⁸ See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2110–15 (1990) [hereinafter Sunstein, *Law and Administration*]. Sunstein urges the use of the Avoidance Canon to provide a structural function in the allocation of power and review. Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1184–86 (2018). “It insists that Congress, with its distinctive form of democratic accountability and its special constitutional status, must specifically choose to act in a way that raises serious constitutional problems, whether the issue involves individual rights, federalism, or presidential power.” *Id.* at 1185.

⁴⁹ Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1265 & n.244 (1986) (describing the political history of the passage of the APA); see also McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L., ECON., & ORG. 180, 180–83 (1999) (offering a positive political theory account of the passage of the APA, depicting it as a measure to protect the legacy of the New Deal from possible Republican retrenchment). McNollgast is a pseudonym for a team comprising Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast. Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 LAW & CONTEMP. PROBS. 127, 127 n.1 (1994).

⁵⁰ See Rabin, *supra* note 49, at 1265–66 (describing the APA’s main features). These

agency action—the APA “ushered in a period of unprecedented [judicial] goodwill towards the regulatory system.”⁵¹ Concerns about individual liberty at the hands of unconstrained bureaucratic actors were abated, temporarily, because “[t]he Act was a formal articulation of agency due process in return for the newly recognized powers of wide-ranging administrative intervention in the economy.”⁵² The key functional test for legitimate agency delegation has been whether the enabling statute “sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.”⁵³ The constitutionality of the delegation is explicitly linked to the possibility of judicial review in support of due process standards.⁵⁴

Perhaps this trade-off, a broader realm for delegation that is disciplined by the due-process constraints of the APA, serves as at least a partial explanation for the Court’s willingness to retreat from its activist posture with regard to delegation that had characterized the cases of 1935.⁵⁵ Although there is danger in attributing specific motivation to Court actions—especially in that fraught period of its history—the Court’s failure to enforce the nondelegation doctrine invites speculation that the enactment of the APA may have diminished the rule-of-law concerns that had shadowed the administrative state from the start.⁵⁶

A second model of the administrative state sought to justify the discretion accorded agencies by recognizing the need of Congress to avail itself of assistance, broadly articulated, in carrying out its complex legislative tasks.⁵⁷ In particular, Congress must enlist and rely on the judgment of experts, whose decisions could be expected to rest on professionalism and science rather than political will.⁵⁸ “The

procedural safeguards included notice-and-comment requirements and an “arbitrary and capricious” standard of judicial review for informal rulemaking, as well as a relatively stringent “substantial evidence” standard of judicial review for adjudicative agency decisions. *Id.* The APA is codified at 5 U.S.C. §§ 551–559, 701–706.

⁵¹ Rabin, *supra* note 49, at 1266.

⁵² *See id.*

⁵³ *See Yakus v. United States*, 321 U.S. 414, 425 (1944).

⁵⁴ *Id.* at 426, 444.

⁵⁵ *See generally* *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁵⁶ There are pitfalls in leaping to intuitive conclusions about what the Court did and did not do during the New Deal and post–New Deal periods. There is no attempt here to wade into that fraught debate between the so-called “internalists,” who attribute Court motivations to their own jurisprudential or legal commitments, and the “externalists,” who look to outside considerations such as political landscape to explain Court behavior. *See generally* Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 *AM. HIST. REV.* 1052 (2005) (recounting the debates and seeking to deconstruct the labels).

⁵⁷ *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *see* *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) (“Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility.”).

⁵⁸ *See* JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 10–17 (1938) (presenting the

expertise model was the brainchild of the New Dealers who offered science and economics as a solution to the market failures that created the Depression.⁵⁹ The idea here is that delegation must be allowed in a world in which expertise is required to develop and implement policy, often in technical areas that would be well beyond the ability of Congress to master.⁶⁰ Expertise was not only acceptable and needed but actually well-designed to resist arbitrary political influence because it is intrinsically bound by the knowledge and ethics of the professions: “[P]ersons subject to the administrator’s control are no more liable to his arbitrary will than are patients remitted to the care of a skilled doctor.”⁶¹ Indeed, some go so far as to say that the reliance on experts to refine policy may contribute to better public decision-making because allowing administrators to elaborate facts with public involvement can have the potential to build a consensus that would otherwise be elusive and to infuse political decisions with the possibility for collective agreement.⁶² But overall, the expertise model was a way to lessen discomfort with giving discretion to agency officials.⁶³

Lisa Schultz Bressman has intriguingly suggested that these early models for justifying the administrative state were largely supplanted in the 1970s by a realism fueled by the interest-group representation focus of that period.⁶⁴ Under that view, legitimacy of agencies would be sought in a different kind of requirement—that they offer access to a wider range of affected interests, through an intensified obligation to articulate the factual and legal reasons for their actions, including why they rejected alternatives.⁶⁵ This change in the focus of the defenders of the administrative state carries with it an implicit commitment to a majoritarian paradigm that is skeptical of judicial review generally and of rights protection specifically.⁶⁶ Agencies were to be accepted and accommodated into our democracy by ensuring that

first notable comprehensive justification for the administrative state based on the expertise of professionals within the agencies).

⁵⁹ Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 471 & n.37 (2003) (describing the expertise idea and attributing it to James Landis).

⁶⁰ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 41–42 (1825). For particularly useful discussions of delegations, see generally 1 DAVIS, *supra* note 2, §§ 3:3–3:18, and JAFFE, *supra* note 2, at 28–86.

⁶¹ Stewart, *supra* note 43, at 1678.

⁶² See Mashaw, *supra* note 3, at 99 (seeking to refute some of the arguments favoring the nondelegation doctrine).

⁶³ See Bressman, *supra* note 59, at 471–72.

⁶⁴ *Id.* at 475.

⁶⁵ *Id.* at 475–76.

⁶⁶ *Id.* at 480. Bressman rightly notes the parallel between this move in administrative law and the rise of scholarly acceptance by constitutional theorists of Alexander Bickel’s description of judicial review as creating a counter-majoritarian difficulty. *Id.* at 482; see Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 531–32 (1998) (laying blame at the feet of Bickel for an impoverishment of constitutional theory due to a charge that courts are “deviant” in a democracy).

they were responsive to the majority's will.⁶⁷ "In short, the interest group representation model recreated the administrative process into one that would maximize the satisfaction of popular preferences."⁶⁸

This change in justification wrought a significant change in implications outside the immediate context of agencies. If satisfaction of majoritarian preference had indeed become the principal goal, then the natural next step would be to increase the role of the President, the one elected leader who, impressionistically,⁶⁹ represents the people at large. And so it was argued by the next wave of administrative law scholars who pressed a so-called "presidential control" model of agencies.⁷⁰

Then Professor Elena Kagan, for one, appeared to argue in favor of this kind of majoritarian paradigm for agency legitimacy when she wrote in favor of a model of presidential control of agency action.⁷¹ Accountability plays a significant role in Kagan's argument for what she called "presidential administration," which she argued would promote the values of administrative accountability.⁷² Her proposal—viewed as one of the pillars of the so-called "presidential control" theory—was directed to situations in which Presidents participate in agency decisions in "the exercise of *their* delegated authority."⁷³ "The President's involvement, at least if publicly disclosed, vests the action with an increased dose of accountability, which . . . renders the action less troublesome than solely bureaucratic measures from the standpoint of democratic values."⁷⁴ Thus, presidential control can be yet another mechanism by which to redeem the legitimacy of the administrative state.

But Kagan's argument begins and ends with presidential involvement in the decisions of agencies.⁷⁵ If pure accountability were indeed the sole yardstick by which delegations were to be measured, then theoretically delegations to the President him- or herself should be specially favored delegations, as Presidents presumably are more politically accountable than agencies.⁷⁶ But Kagan was careful to acknowledge that she did not go that far.⁷⁷ Indeed, she worried that such a direct delegation to the President would give rise to new and different issues related to the rule of law.⁷⁸ Rather, her thesis was at pains to distinguish her suggested presidential

⁶⁷ See, e.g., Bressman, *supra* note 59, at 483 & n.105 (quoting Stewart, *supra* note 43, at 1761).

⁶⁸ *Id.*

⁶⁹ This is true only in theory, of course, as the President is not selected by an at-large vote. See U.S. CONST. art. II, § 1; *id.* amend. XII.

⁷⁰ Bressman, *supra* note 59, at 504.

⁷¹ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251–52 (2001).

⁷² See *id.* at 2384.

⁷³ See *id.* at 2271 (emphasis added).

⁷⁴ *Id.* at 2369.

⁷⁵ See *id.* at 2365.

⁷⁶ See *id.* at 2372.

⁷⁷ See *id.* at 2369.

⁷⁸ *Id.* ("[P]residential participation gives rise to none of the rule of law issues that might

involvement in the exercise of power delegated to an agency from a direct delegation of power to a President.⁷⁹

Even with the caveat, the presidential control model's increased emphasis on accountability as a principal value to be served by administrative law is controversial.⁸⁰ The preeminent justification for agencies has never lain in their accountability as such, but in the consistent effort to cabin and control the exercise of arbitrary government action through various means related to rule of law.⁸¹ Seen that way, the move to increase the role of the President in the exercise of delegated power, as suggested by Kagan,⁸² probably goes in exactly the wrong direction by lessening control of arbitrariness. But Kagan stressed the ameliorative role, under her proposal, of vigorous participation by Congress, bureaucratic experts, and constituency groups, all overseen by a robust role for courts in allocating power among the various institutions vying for administrative power.⁸³ Thus there is, at least in theory, something for the judiciary to review, and her majoritarian-based theory does not altogether abandon the traditional commitment to the constraint of agencies based on rule of law.⁸⁴

Nevertheless, response to the presidential control model criticized it for privileging accountability at the expense of disciplined decision-making under the rule of law.⁸⁵ Nonarbitrariness, not pure accountability, was really at the heart of what administrative law needed to achieve, going full circle to argue that delegation is valid as long as it can be disciplined to conform to the norms of legitimate decision-making in a democracy.⁸⁶ Agencies should be understood to be a positive force in our democracy if they are compelled to cabin their own discretion through various limiting standards implemented through requirements of administrative law.⁸⁷ Thus, clear statement rules based on the constitutional role of Congress as policymaker can

loom large in the context of direct delegations.”). It is this latter category that is the subject of the present project.

⁷⁹ *See id.* at 2368.

⁸⁰ *Cf.* Brown, *supra* note 66, at 536 (arguing that protection against tyranny or arbitrary action, and not accountability, is the principal goal of the structural Constitution).

⁸¹ Bressman, *supra* note 59, at 553–55.

⁸² *See* Kagan, *supra* note 71, at 2319.

⁸³ *Id.* at 2384–85.

⁸⁴ *Id.* (discussing the continued necessity for traditional rule of law through agency participation).

⁸⁵ Bressman, *supra* note 59, at 492 (“[A]dministrative law scholars should rethink whether the majoritarian paradigm provides an adequate metric for assessing the legitimacy of agency decisionmaking.”).

⁸⁶ *See id.* at 463–64.

⁸⁷ *See* Lisa Schultz Bressman, Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State, 109 YALE L.J. 1399, 1401–02 (2000); *see also* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 17 (1993) (describing the requirement that the government has a “public-regarding” reason for what it does as central to legitimacy).

stand in for lackluster nondelegation rules precisely because the principal concern is not accountability but rather transparency and fidelity to constitutional norms.⁸⁸

This quick tour through the major justifying theories of administrative law has a purpose unrelated to touting them as strong or weak, right or wrong. Its goal is to substantiate a revealing observation about the reasons that a range of scholars have offered for why they think that delegation is or is not legitimate. For each distinct position that has been put forward by a range of administrative law scholars on the propriety vel non of delegation, the positions that the authors have taken are tied to whether the author sees the exercise of delegated power as adequately cabined by the constraints associated with the rule of law.⁸⁹ Those who have consistently opposed delegation believe that it invites arbitrary and unaccountable policy-making.⁹⁰ Those who support delegation because agencies can be the “transmission belt” for Congress to implement its considered policies hold that belief because they have trust in the ability of Congress to insist on its policy-making role and on an agency to follow its instructions carefully or be held responsible if they do not.⁹¹ Those who believe in delegation because of reliance on the expertise of agency actors do so because they believe that the structure of agencies is such that political will can be filtered out and disciplined by scientific data.⁹² This school of belief relies heavily on the obligation of agencies to provide reasons for their actions, with judicial review often available as a disciplining device.⁹³

Even those who believe in the administrative state as a way to manage interest-group pluralism and maximize the preferences of a majority insist upon a structure that will hold agencies ultimately to show on the record which groups it listened to, which it rejected, and why.⁹⁴ This model counts on a chorus of different voices to constitute its conception of a democratically legitimate policy-making body through the pluralist battle of conflicting interests.⁹⁵ Again, the oversight of reasoned decision-making by courts provides an essential check.⁹⁶

Not one of these essential salutary structural features exists when the Congress delegates power directly to the President.⁹⁷

⁸⁸ See Bressman, *supra* note 87, at 1409; Sunstein, *Law and Administration*, *supra* note 48, at 2110–11.

⁸⁹ See *infra* notes 90–96 and accompanying text.

⁹⁰ See, e.g., SCHOENBROD, *supra* note 3, at 4, 8–9, 14–15; REDISH, *supra* note 34, at 135–60.

⁹¹ See, e.g., Stewart, *supra* note 43, at 1675; Strauss, *supra* note 42, at 579–80.

⁹² See, e.g., JAFFE, *supra* note 2, at 36.

⁹³ See *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2551, 2558–59 (2019) (remanding the Department of Commerce’s decision to include a citizenship question on the 2020 census to the agency for failure of the Secretary to offer plausible reasons for his decision).

⁹⁴ See Bressman, *supra* note 59, at 476–77; Stewart, *supra* note 43, at 1712.

⁹⁵ See Bressman, *supra* note 59, at 477; Stewart, *supra* note 43, at 1778–79, 1779 n.517 (discussing Charles A. Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1234–35 (1966)).

⁹⁶ See Stewart, *supra* note 43, at 1712–13, 1715.

⁹⁷ See discussion *infra* Section I.B.

B. The President as a Recipient of Delegated Power

1. No APA Coverage

In the administrative law arena, the APA plays an extraordinarily important role in protecting individual rights and promoting accountability of various kinds. Some have even argued that it is constitutionally required if administrative agencies are to be tolerated in our constitutional structure.⁹⁸ For a time after its passage in 1946, there was uncertainty about whether the APA's requirements of nonarbitrariness and checks of judicial review would apply to delegations directly to the President.⁹⁹ Some commentary discussing the House Judiciary Hearings suggested that, because the President was not specifically excluded from the APA's definition of "agency," the best interpretation was that "when the President acts in the capacity of an administrative office the Act applies to him."¹⁰⁰ The failure to exclude suggested inclusion.

Not until 1992 did the Supreme Court resolve this question, holding just the opposite in *Franklin v. Massachusetts*.¹⁰¹ The Court reasoned that "[o]ut of respect for the separation of powers and the unique constitutional position of the President, . . . textual silence is not enough to subject the President to the provisions of the APA" for abuse of discretion.¹⁰² Thus, one of the principal bulwarks protecting against devolution by a fourth branch of government, perhaps even the very reason that the courts have tolerated and expanded the administrative state in the constitutional scheme, is unavailable to secure limits or review for transfers of power directly from the Congress to the President.¹⁰³ For such delegations, neither a robust nondelegation doctrine nor the due-process-based protection of the APA is available.¹⁰⁴ Delegations to the President, therefore, should be considered with great caution and skepticism.

It is true that the Court had upheld some delegations to the President against nondelegation challenges, before its double-whammy of 1935—even before any APA was in existence or even contemplated.¹⁰⁵ These cases were of a discrete type:

⁹⁸ See, e.g., John G. Salatka, *The Agency of the President and Cabinet Members Under the Administrative Procedure Act*, 1 CATH. U. L. REV. 129, 130 (1951).

⁹⁹ *Id.* at 130.

¹⁰⁰ *Id.* at 132–33, 133 n.12 (quoting MILTON M. CARROW, *THE BACKGROUND OF ADMINISTRATIVE LAW* 44 (1948)) (arguing that the President, acting on delegated authority rather than his own constitutional authority, is an "agency" within the meaning of the APA).

¹⁰¹ 505 U.S. 788, 800–01 (1992).

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ See, e.g., *Cargo of the Brig Aurora v. United States (The Brig Aurora)*, 11 U.S. (7 Cranch) 382, 383 (1813) (upholding delegation to the President of power to suspend a trade embargo upon a finding that the countries had ceased violating the neutral commerce of the United States); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 410–11 (1928) (upholding delegation to the President to adjust tariffs upon a finding that rates do not fairly reflect differences in costs of production).

they tended to involve an articulated legislative policy, accompanied by a proviso allowing for its suspension in the event of a change in important circumstances, such as changes in relations with other countries—known as a contingency model of delegation.¹⁰⁶ In this type of case, often involving the levy or suspension of tariffs under a policy that the Congress had articulated through legislation, the Court was not concerned that placing the power in the President to determine the triggering condition was a dereliction of the legislature's job.¹⁰⁷

[I]t is often desirable, if not essential for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, in the interests of their people, to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.¹⁰⁸

These cases illustrate a distinct class of legislation: instead of authorizing the executive branch to supplement or interpret the congressional policy with detailed regulation, Congress instead directs whether its own policy will or will not be applied, depending on an external fact that the President must find.¹⁰⁹ This represents the strongest version of the “intelligible principle” at work because of its nature as an “on/off switch” controlling the imposition of the congressional policy.¹¹⁰ It is at least possible, perhaps even plausible, that the Court's tolerance of these early delegations entitling the President to conditionally lift congressionally designed restrictions, especially in areas where he enjoyed some degree of independent constitutional authority,

In *Field v. Clark*, 143 U.S. 649 (1892), the Court upheld a provision of the Tariff Act of 1890 on a similar theory. The Tariff Act authorized the President to suspend favorable tariff treatment for nations that imposed on American products any “exactions and duties . . . which he found to be . . . unequal and unreasonable.” *Id.* at 692. As in *The Brig Aurora*, the Court found that Congress could delegate the authority to determine whether a factual “contingency” had occurred . . . *Id.* at 692–93. Such administrative factfinding power differed in kind from legislative power to make law or set policy.

Bressman, *supra* note 87, at 1403 n.24 (first two alterations in original).

¹⁰⁶ See generally *The Brig Aurora*, 11 U.S. (7 Cranch) at 382–85; *J.W. Hampton, Jr., & Co.*, 276 U.S. at 394–95; *Field*, 143 U.S. at 649–50.

¹⁰⁷ See, e.g., *Field*, 143 U.S. at 692–93 (affirming the nondelegation principle but finding that it was not violated because “[n]othing involving the expediency or the just operation of such legislation was left to the determination of the President”).

¹⁰⁸ *Id.* at 691.

¹⁰⁹ See, e.g., *The Brig Aurora*, 11 U.S. (7 Cranch) at 386; *J.W. Hampton, Jr., & Co.*, 276 U.S. at 398–99; *Field*, 143 U.S. at 692–93.

¹¹⁰ See *The Brig Aurora*, 11 U.S. (7 Cranch) at 386; *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409; *Field*, 143 U.S. at 692–93.

reflected a belief that these presidential decisions were not likely to result in arbitrary decision-making and were merely gatekeeping measures for the application of congressional policy.¹¹¹

The 1935 cases, by contrast, involved grants of authority to the President to initiate policy, perhaps creating “particularly intolerable opportunities for arbitrariness, given the extraordinary breadth of the delegations. Perhaps the grant of authority directly to the President made the opportunities for regulatory policy to favor private interest groups particularly easy, and the scope of that authority made the impact of those opportunities particularly menacing.”¹¹² These distinctions offer a grounding consistency between the old cases and the revolutionary holdings of 1935.

2. No Review of Factual Findings that Trigger Power

While some decisions that the President makes, in theory, are amenable to limited judicial review for alleged constitutional or specific statutory violations,¹¹³ the lack of APA coverage of the President has meant that there can be no review for abuse of discretion or exceeding authority granted by statutes.¹¹⁴ Moreover, the Court expanded its ruling in *Franklin* to provide that if a statute delegates a decision to the discretion of the President, then judicial review outside the parameters of the APA is also not available.¹¹⁵

¹¹¹ See *Field*, 143 U.S. at 692–693 (noting that “Congress itself prescribed, in advance, the duties to be levied . . . Nothing involving the expediency or the just operation of such legislation was left to the determination of the President”).

¹¹² Bressman, *supra* note 59, at 525.

¹¹³ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, 343 U.S. 579, 587–89 (1952) (finding that the President lacked the constitutional authority to issue an executive order to seize steel mills). Typically, these challenges are framed as suits against the executive official who carried out the President’s order. See *Franklin v. Massachusetts*, 505 U.S. 788, 828–29 (1992) (Scalia, J., concurring in part and concurring in the judgment) (pointing out this approach to challenging the legality of presidential action). The Court has accepted challenges alleging that the President has exceeded statutory limits on his authority or violated express restrictions on it. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (noting that the Court must determine whether the President has acted “in contravention of the will of Congress”); *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (noting that “[e]xecutive action” pursuant to delegated authority is subject to review to ensure it is not exceeded); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196–97 (2012).

¹¹⁴ See *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) (anticipating the result in *Franklin*). Even for agencies exercising discretion, which is specifically granted to them by statute, the APA precludes review as a matter “committed to agency discretion by law.” 5 U.S.C. § 701. This category of essentially nonreviewable agency action has remained, for obvious reasons, a very narrow one, invoked only when congressional intent to accord discretion is very clear. See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 n.23 (1971), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977).

¹¹⁵ See *Dalton v. Specter*, 511 U.S. 462, 462–63 (1994).

In conjunction with the lack of constraints on the breadth of the delegation itself, then the passage of power from Congress to the President, along with the consequent implementation of that power, evades constraint under the statutory and common-law rules traditionally imposed to advance rule of law ideals by preventing abuse and arbitrariness.¹¹⁶ Thus topples the first of the assurances discussed earlier that have served, for many, to assuage concerns about delegation to agencies: the opportunity for judicial review to oversee the fidelity of the recipient's implementation of the power delegated to it and to protect the due process interests of affected individuals.¹¹⁷ The President has no such oversight over his fidelity.

An acute contributor to the problem of lack of oversight lies in the form that direct delegations to the President often take. Unlike the contingency model of delegation, discussed above, in which the President switches on or off a statutory plan based on a specific factual contingency,¹¹⁸ the problematic case is that in which Congress specifies a very broad condition that will trigger an authority given to the President. For example, the statute might provide hypothetically that, in the event that the President declares a national emergency, he shall have the authority to suspend the operations of the postal service. There are typically no statutory guidelines describing what kind or degree of events might justify a finding of a national emergency and its concomitant invocation of the particular authority.¹¹⁹ The significant increase in presidential power, accordingly, rests on a factual judgment that could literally rest on anything from a whim to a comprehensive expert report, and under current law, there is no way for a person harmed by such an act to obtain review of it.¹²⁰ Reasons are not required, nor is even an explanatory statement providing a basis for the President's conclusions.¹²¹

In his trenchant discussion of this phenomenon, Kevin Stack describes an early example.¹²² The Congress had authorized the President to assume the control of telephone and telegraph systems "during the continuance of the present war [World War I] . . . , whenever he shall deem it necessary for the national security or defense."¹²³ When the President used this authority to assume control of the telephone and telegraph systems, and then later to authorize rate increases after the war had ended, the Court rejected the ensuing challenge on the ground that the justifying

¹¹⁶ See *id.* at 471–73, 473 n.5; *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 184 (1919).

¹¹⁷ See Rabin, *supra* note 49, at 1265–66.

¹¹⁸ See *supra* Section I.B.1.

¹¹⁹ See L. ELAINE HALCHIN, CONG. RSCH. SERV., 98-505, NATIONAL EMERGENCY POWERS 1 (2020).

¹²⁰ See *id.* at 10.

¹²¹ See *id.* at 1.

¹²² Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, 1173–74, 1184–86 (2009).

¹²³ *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 181 (1919).

conditions or “motives which . . . induced the exercise of the power” were “considerations . . . beyond the reach” of the judiciary.¹²⁴ This sweeping rejection, ostensibly on constitutional grounds, of any role in supervising the exercise of delegated power, has had a lasting impact on the landscape of presidential constraint.¹²⁵

In a somewhat obscure but significant line of follow-on cases, the Court has only hardened its unyielding hostility toward reviewing any determinations or findings that a President makes to trigger the authority to implement a statutory power, on the ground that it cannot review questions about whether the President’s actions exceeded the scope of the authority granted.¹²⁶ This is a consequential posture for the Court to make, resting, as it does, on an elusive distinction between claims that the President lacked power to do what he did (potentially reviewable) and claims charging an abuse of discretion in exercising a power given (not reviewable)—even though the alleged abuse of discretion comes in the form of finding a fact that is the legal prerequisite to the existence of presidential power to act.¹²⁷ As Stack noted in 2009 and is still true today, the Court’s “curious authority versus excess-in-exercise distinction is alive and well.”¹²⁸

For decades, this system was built on trust of the Executive to constrain itself and to respond to public pressure to exercise the delegated powers carefully.¹²⁹ Public accountability had become the only check.¹³⁰ Yet even public accountability imposes no specific constraints, unlike the APA, which was designed to further certain kinds of accountability through notice- and comment-requirements and obligations for agencies to provide reasons for their more significant actions.¹³¹ Despite the wide recognition that reasons are essential to legitimate administrative lawmaking,¹³² exercise of power by the President alone pursuant to direct delegation are subject to no requirement of public reasons or justifying rationales.

¹²⁴ *Id.* at 184.

¹²⁵ *See id.*; *see also* Stack, *supra* note 122, at 1185–87, 1197.

¹²⁶ *See* Stack, *supra* note 122, at 1185–87, 1197 (identifying this line of cases and documenting the widespread use of the delegation device by Congress from the early days of the republic). Stack points out the irony that it was the statutory condition that helped to validate this type of statute from invalidation on nondelegation grounds. *See id.* at 1175 n.22. By specifying the triggering condition, the legislature was appropriately making the policy determination that was required for a valid delegation. *See id.*

¹²⁷ *See id.* at 1173, 1193.

¹²⁸ *Id.* at 1197.

¹²⁹ *See generally* Edward Cantu, *The Separation-of-Powers and the Least Dangerous Branch*, 13 *GEO. J.L. & PUB. POL’Y* 1 (2015).

¹³⁰ *See generally id.* (arguing that a combination of several judicial doctrines in the separation-of-powers area has contributed to a relegation of enforcement of such principles to the political process).

¹³¹ Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 *SUP. CT. REV.* 177, 181–83, 199–200.

¹³² *See id.* at 181–83 (describing requirements imposed to facilitate review of the reasonableness of the exercise of agency discretion, which include “detailed explanations” of their actions).

3. No Expertise

One change occasioned by the expansion of delegation in the New Deal was that, while delegations to agencies were linked to the need for expertise in the crafting of policy for an increasingly complex society,¹³³ delegations directly to the President showed no sign of the link to expertise. Perhaps the only claim of “expertise” a President could make simply by virtue of holding the office would lie in areas that the Constitution reserves to the President, such as foreign relations.¹³⁴ Expertise has never been cited, however, as a justification for the many statutes delegating power to the President to make policy in areas as diverse as land use, the military, public health, trade, federal pay schedules, agriculture, transportation, communications, and criminal law—all of which topics can be regulated as the result of an emergency declaration by the President.¹³⁵ Thus, the legitimating effects of expertise in the agency context, whatever they may be, do not extend to direct delegations to the President.

II. NEW CONCERNS FOR INDIVIDUAL RIGHTS

It is against this backdrop of doctrines and developments in the law that an invitation to take part in this Symposium on the topic of The Presidency and Individual Rights came to me. The stage had been set by many decades of law, motivated by a whole variety of intuitions and contexts. Each development has been very well identified and ably discussed by the most creative administrative law scholars in the country, to whose work I have only tipped a hat in this Article, and even so, have not here had the occasion to highlight many important contributions to the debates.

But what is new is a genuine fear that, in confluence, these various doctrines create a tapestry of law built on the trust that a President accountable to all the people will always act in good faith for the common good. Yet such a set of doctrines is not equipped to impose meaningful checks in the event that such trust is betrayed. Individual rights are in the crosshairs.

A. A Proliferation of Statutory Delegations

Running alongside the popular notion of a constrained executive—held in check by a vigilant Congress and overseen by a principled judiciary¹³⁶—lies a shadowy

¹³³ See *supra* notes 57–63 and accompanying text.

¹³⁴ As discussed above, this could perhaps explain the early cases that upheld statutes permitting Presidents to lift congressional tariffs or embargos if facts relating to the target countries were to change.

¹³⁵ See *Declared National Emergencies Under the National Emergencies Act*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act> [<https://perma.cc/U88T-Q6J5>] (Jan. 26, 2021).

¹³⁶ See Cantu, *supra* note 129, at 4, 30–31, 46–47 (providing examples of when the legislature and the judiciary have constrained the executive).

realm in which constraints are largely absent and the limits on government as we know it depend, in large part, on a choice by the President whether to abide by them or not. This netherworld is the world of the “national emergency.” The following discussion rests heavily on a study by the Brennan Center for Justice, which found 136 provisions in federal law, as of 2019, that bestowed extra powers on the President in the event of a national emergency.¹³⁷

The Constitution’s drafters and the Supreme Court that has interpreted it over time were intentional about omitting a specific power in the executive branch to deal with emergencies.¹³⁸ Supreme Court Justice Robert Jackson famously attributed to the framers the suspicion that “emergency powers would tend to kindle emergencies.”¹³⁹ But Congress has filled the breach by passing numerous laws allowing the President to act either under a broad declaration of a national emergency, which triggers powers located in dozens of other statutes,¹⁴⁰ or by making some specific factual finding that triggers a particular power to respond to the condition that the President has found to be true.¹⁴¹ While it is difficult to get a perfectly accurate and up-to-date count, the Brennan Center reports forty presidential emergency declarations under the National Emergencies Act of 1976 that are currently in effect.¹⁴²

One recent such emergency declaration has been prolific in sprouting litigation and provides an illuminating illustration of the way that direct delegation evades meaningful constraint. After Congress declined to vote for the full appropriation that President Trump requested to support the building of a border wall, the President declared a national emergency regarding the southern border of the United States, pursuant to his authority under the National Emergencies Act.¹⁴³ That declaration, in turn, triggered a second delegation under 10 U.S.C. § 2808(a), which provides that “[i]n the event of . . . the declaration . . . of a national emergency . . . that requires use of the armed forces, the Secretary of Defense . . . may undertake military construction projects . . . that are necessary to support such use of the armed

¹³⁷ *A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use> [<https://perma.cc/UK7B-X7JY>] (Apr. 24, 2020).

¹³⁸ Of course, the powers to declare war, suspend habeas corpus “when . . . the public safety may require it,” and calling forth the militia to suppress rebellions were all given to Congress. U.S. CONST. art. I, §§ 8–9.

¹³⁹ *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

¹⁴⁰ The two general emergency statutes commonly used by Presidents to confer power are the National Emergencies Act, 50 U.S.C. §§ 1601–51, and the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–06.

¹⁴¹ *See* §§ 1601–51.

¹⁴² *Declared National Emergencies Under the National Emergencies Act*, *supra* note 135 (counting national emergencies through Dec. 17, 2020).

¹⁴³ *See* Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019); EMILY E. ROBERTS, CONG. RSCH. SERV., LSB10252, DECLARATIONS UNDER THE NATIONAL EMERGENCIES ACT, PART I: DECLARATIONS CURRENTLY IN EFFECT 1 (2019).

forces.”¹⁴⁴ The President then invoked this power in directing the Secretary of the Treasury to reallocate funds to support the wall, in cooperation with the Departments of Defense and Homeland Security.¹⁴⁵ This decision was challenged in court by several different plaintiffs, under several theories.¹⁴⁶

Only one of the cases directly challenged the President’s exercise of his statutorily delegated authority to declare a national emergency.¹⁴⁷ The government responded that there is no judicial review of national emergency declarations, and the trial court never reached this argument.¹⁴⁸ It was almost a throwaway argument, to attack the beginning of the causal chain with the President’s national emergency declaration, with little hope that the court would credit it. The vast majority of argument in all three cases focused rather on claims that actions of the executive branch as a whole—aimed principally at the Departments of Defense, Homeland Security, and the Treasury—were in conflict with other statutes, in violation of the constitutional power of appropriation of Congress, or taken in violation of the APA.¹⁴⁹ While there are petitions for certiorari pending in these cases, the questions presented do not even mention a possible attack on the direct delegation to the President.¹⁵⁰ It is perhaps fortunate here that the President needed to enlist the actions of executive departments to implement his overall plan, which provides certain agency decision points that can provide the occasion for some judicial review under the APA.¹⁵¹ But the actual finding of the President of the existence of a national emergency is not reviewed.

Statutory delegations relating to national emergencies are a particularly salient and perhaps alarming type of direct delegation,¹⁵² but it is important to recognize

¹⁴⁴ 10 U.S.C. § 2808(a).

¹⁴⁵ See JENNIFER K. ELSEA & EDWARD C. LIU, CONG. RSCH. SERV., R45908, LEGAL AUTHORITY TO REPURPOSE FUNDS FOR BORDER BARRIER CONSTRUCTION 1–2, 4–6 (2019).

¹⁴⁶ See generally *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019), *stay granted*, 140 S. Ct. 1 (2019); *El Paso Cnty. v. Trump*, 408 F. Supp. 3d 840 (W.D. Tex. 2019), *petition for cert. filed*, No 20-298 (U.S. Sept. 2, 2020).

¹⁴⁷ See *El Paso Cnty.*, 408 F. Supp. 3d at 846.

¹⁴⁸ The District Court held that the funding plan violated the appropriations statute Congress had passed when it denied part of the president’s request for appropriation and specifically prohibited the use of appropriated funds for certain related purposes. *Id.* at 846, 856–60.

¹⁴⁹ See generally *U.S. House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 5739026, at *1 (D.C. Cir. Sept. 25, 2020); *Sierra Club*, 929 F.3d 670 (focusing on the Secretary of Defense’s statutory authority and compliance with section 8005 of the Department of Defense Appropriations Act). In addition, the plaintiffs attacked the National Emergencies Act as unconstitutional under the nondelegation doctrine. See *El Paso Cnty.*, 408 F. Supp. 3d at 850. The court did not reach this claim. See generally *id.*

¹⁵⁰ See, e.g., *Petition for Writ of Certiorari at *1, El Paso Cnty. v. Trump*, No. 20-298 (U.S. Sept. 2, 2020) (indicating that there are only two questions on appeal and neither of those questions address delegation to the President).

¹⁵¹ See, e.g., *Mnuchin*, 2020 WL 5739026, at *1 (showing that by using the Departments of Defense, the Interior, the Treasury, and Homeland Security, parts of the President’s plan became subject to review under the APA).

¹⁵² See *A Guide to Emergency Powers and Their Use*, *supra* note 137 (pointing out the

that there are numerous other provisions in the U.S. Code that delegate to the President the power to do something upon finding that a particular condition is satisfied.¹⁵³ For example, the Immigration and Nationality Act is a delegation of power conditioned upon a presidential finding that “the entry of any aliens . . . into the United States would be detrimental to the interests of the United States.”¹⁵⁴ The President invoked this power under § 1182(f) to support a Proclamation restricting entry into this country of persons from eight named countries, known as the Travel Ban.¹⁵⁵ The Proclamation was challenged on several grounds; exercise or abuse of a power that violates the nondelegation doctrine was not one of them.¹⁵⁶

The Court did not consider the possibility that this sweeping authority, which gives no indication of what the “interests of the United States” are or what kind of showing should accompany a finding that a person’s entry is “detrimental” to it, might be an improper delegation.¹⁵⁷ Rather, it upheld the Proclamation on the ground that “[b]y its terms, § 1182(f) exudes deference to the President in every clause.”¹⁵⁸ Indeed, by reading the statute as broadly as it did on the merits, the Court’s analysis actually intensifies the principal concern underlying the nondelegation doctrine—that Congress may authorize, and a President may employ, unbounded discretion to make policy with no guidance or accountability.¹⁵⁹

Thus, to the challengers’ claim that the Proclamation failed to “provide a persuasive rationale” for excluding the named nationalities from entry, the Court offered

particularly alarming potential of some of the emergency powers statutes, such as one that “would allow the president to suspend a law that prohibits government testing of chemical and biological agents on unwitting human subjects”).

¹⁵³ See, e.g., 8 U.S.C. § 1182(f) (illustrating a scenario in which the President receives the power to act if a particular condition is met).

¹⁵⁴ *Id.*

¹⁵⁵ See Dara Lind, *Supreme Court Rules in Favor of Trump’s Travel Ban*, VOX (June 26, 2018, 10:24 AM), <https://www.vox.com/2018/6/26/17492410/travel-muslim-ban-supreme-court-ruling> (explaining how Trump’s use of § 1182(f) was determinative for the Court majority in upholding the Trump Travel Ban against eight countries).

¹⁵⁶ See generally *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). The claims brought before the Supreme Court were whether the Court has the power to review the challenge to the Proclamation, whether the Proclamation exceeds the President’s authority under the Immigration and Nationality Act, whether it discriminates on the basis of nationality in violation of that same statute, whether it violates the Establishment Clause of the Constitution, and whether the scope of the injunction issued below was proper. Brief for Respondents at i, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965).

¹⁵⁷ See *Hawaii*, 138 S. Ct. at 2408 (quoting 8 U.S.C. § 1182(f)) (explaining that the Court found the Proclamation to be within the comprehensive delegation, but giving no suggestion that the delegation may have been problematic).

¹⁵⁸ *Id.*

¹⁵⁹ See *id.* By contrast, courts usually vindicate the constitutional principles of due process and separation of powers “by narrowly construing grants of policy-making power.” Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 470 (1989).

a consequential retort.¹⁶⁰ “Such arguments are grounded on the premise that [the statute] not only requires the President to *make* a finding . . . but also to explain that finding with sufficient detail to enable judicial review. That premise is questionable.”¹⁶¹ The Court’s stunning statement is, in effect, a rejection of the entire premise of the nondelegation doctrine itself, as well as that of the APA, that the rule of law is best served when acts of delegated authority are accompanied by guidance and reasons to show that the policies originating in Congress are being fulfilled in the executive branch. The Court expressly declined to consider whether the President’s action was beyond the power of judicial review on other grounds suggested by the government.¹⁶² But, even while purporting to exercise judicial review, the Court cemented bricks onto the fortress of presidential imperviousness to judicial oversight by according the utmost deference to the actions on the merits.¹⁶³ It requested no justification at all in support of the President’s finding that the entry of the targeted travelers would be detrimental to the United States.¹⁶⁴ Importantly, the Court accorded this massive deference despite claims of significant individual rights at stake in the case.¹⁶⁵

In light of the argument put forward in this Article, it should come as no surprise that there is a plausible claim that the statute under which the President acted is an excessively broad delegation that would be invalidated under any meaningful nondelegation doctrine applied to direct delegations. The delegation (unreviewable under a toothless nondelegation doctrine) produced a presidential finding (unreviewable under a vague barrier), which then gave rise to significant deference based on the breadth of the statutory language.¹⁶⁶ This is a house of cards to support the deference. Ilya Somin has, indeed, suggested that the very breadth in the statute that the majority used to support its deferential posture toward the President also makes the statute unconstitutional under the nondelegation doctrine.¹⁶⁷ Looking at the Court’s most recent discussion of that doctrine, he shows that even the plurality opinion in *Gundy*—which upholds a statute as against a nondelegation challenge—made clear that the statute at issue there would have been vulnerable to such a challenge if the Court had not narrowed it to avoid giving the President “unguided and unchecked

¹⁶⁰ *Hawaii*, 138 S. Ct. at 2409.

¹⁶¹ *Id.*

¹⁶² *Id.* at 2407. The President argued that the entire claim was nonjusticiable on the ground of consular immunity. *Id.* But the same question might apply to the lack of a basis for judicial review.

¹⁶³ *See id.* at 2409 (explaining that “a searching inquiry into the persuasiveness of the President’s justifications is inconsistent with the broad statutory text” and traditional deference to the President).

¹⁶⁴ *See id.*

¹⁶⁵ *See id.* at 2406 (discussing the plaintiff’s claims that the Proclamation violated the First Amendment’s Establishment Clause because it was motivated by religious animus).

¹⁶⁶ *See id.* at 2409.

¹⁶⁷ Ilya Somin, *A Nondelegation Challenge to Trump’s Travel Bans*, REASON:VOLOKH CONSPIRACY (Feb. 17, 2020, 4:27 PM), <https://reason.com/volokh/2020/02/17/a-nondelegation-challenge-to-trumps-travel-bans/>.

authority” to decide what class of persons would be subject to a criminal offense.¹⁶⁸ Indeed, instead of narrowing the statute at issue in the Travel Ban case, by contrast, the Court gave it “virtually unlimited discretion,”¹⁶⁹ which might be viewed as beyond the outer bounds of any meaningful nondelegation doctrine. While one might argue that the area of immigration is one in which Congress’s powers are especially strong,¹⁷⁰ that could also be used as a reason why Congress should be very clear and careful about giving it away to the executive without limiting guidance. The Constitution is clear that the power over immigration belongs to Congress.¹⁷¹

A final example is worth mentioning. The Authorization for Use of Military Force (AUMF) was passed by Congress in the immediate aftermath of the events of September 11th.¹⁷² It provided, in relevant part: “That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”¹⁷³ This authorization is an example of a delegation of power, based on Congress’s power to declare war, which is conditional upon the President’s own finding that certain entities had connections to the September 11th attack.¹⁷⁴ Even if that finding is unreasonable, there is no opportunity for judicial assessment of the President’s claims.¹⁷⁵ And there is no obvious time limit to the authority granted in the AUMF.¹⁷⁶

¹⁶⁸ *Id.* (quoting *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion)).

¹⁶⁹ *Id.*

¹⁷⁰ An argument of this nature was raised by Josh Blackman. Josh Blackman, *The Travel Ban, Article II, and the Nondelegation Doctrine*, LAWFARE (Feb. 22, 2018, 9:00 AM), <https://www.lawfareblog.com/travel-ban-article-ii-and-nondelegation-doctrine> [<https://perma.cc/JN5X-3Y8W>].

¹⁷¹ See U.S. CONST. art. I, § 8 (discussing the powers of Congress, including its authority over the naturalization process). Blackman relies heavily on a Red-Scare-era case purporting to recognize an “inherent” power in the Executive over immigration, *United States ex rel. Knauff v. Shaughnessy*, suggesting that perhaps the President did not even need a statute to support its Proclamation. See Blackman, *supra* note 170 (arguing that the proper reading of *Knauff* would allow the President to exclude immigrants regardless of whether Congress delegated the power). Suffice it to say for present purposes that the existence of an inherent immigration power in the President, independent of what is given to him by Congress, is controversial. See *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 617 (4th Cir.) (en banc) (Wynn, J., concurring) (describing that reading of *Knauff* as incorrect), *vacated*, 138 S. Ct. 353 (2017).

¹⁷² Charlie Savage, *Will Congress Ever Limit the Forever-Expanding 9/11 War?*, N.Y. TIMES (Oct. 28, 2017), <https://www.nytimes.com/2017/10/28/us/politics/aumf-congress-niger.html> [<https://perma.cc/KV7J-GMRH>].

¹⁷³ 50 U.S.C. § 1541(2)(a).

¹⁷⁴ See § 1541(2)(a)–(b) (declaring “that this section is intended to constitute specific statutory authorization” for the President to act).

¹⁷⁵ See § 1541(2)(b)(1)–(2) (discussing the direct statutory authorization of presidential action without explicitly creating any means for review).

¹⁷⁶ See § 1541(1)–(2) (delegating specific statutory authorization to the President without setting any clear termination date or time limitation to the authorization).

According to the Congressional Research Service, there have been forty-one reports of military operations in ten countries by the first three Presidents who have served since the passage of the AUMF, including against groups that did not exist in 2001.¹⁷⁷ This list does not include other, non-military efforts that have been justified on the basis of the AUMF, such as the defense of a warrantless wiretapping program by the Bush administration.¹⁷⁸ President Trump's spokespersons have, more recently, implied that the AUMF supplies authority for him to start a war with Iran, despite the fact that the commitments of the government of Iran are antagonistic to those responsible for the September 11th attacks.¹⁷⁹

III. THE PERFECT STORM

This Article has called attention to a patchwork of doctrines that have been in existence, and discussed in literature, for some time. But their message, in combination, may be newly significant: that the important values of accountability, individual rights, and rule of law—the values that Justice Gorsuch recently argued are at the heart of the nondelegation doctrine in a somewhat different context¹⁸⁰—have come to have no real protector in the law when the President is authorized to determine the factual predicates of his own authority with no external check. Courts would prefer to stay out of matters surrounding the allocation of authority between Congress and the President unless they absolutely have to do so.¹⁸¹ When they do intervene, they often resort to deference even where theory would call for more exacting scrutiny.¹⁸² As we have grown increasingly accustomed to broad delegations, reliance on congressional authorization as the way to shape executive power has blunted judicial vigilance, and executive power has inevitably continued to grow. Voices from the most respected quarters look to congressional action to validate the actions of the executive branch. Justice Jackson's famous classification from *Youngstown* places the actions of the executive, when taken pursuant to congressional directive, in an almost unassailable position—even when individual rights are impinged.¹⁸³

¹⁷⁷ See MATTHEW WEED, CONG. RES. SERV., 7-5700, PRESIDENTIAL REFERENCES TO THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE IN PUBLICLY AVAILABLE EXECUTIVE ACTIONS AND REPORTS TO CONGRESS 1, 5–40 (2018).

¹⁷⁸ See GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, CONSTITUTIONAL LAW 415 (8th ed. 2018).

¹⁷⁹ See Eliana Johnson, *Trump Prepares to Bypass Congress to Take on Iran*, POLITICO, <https://www.politico.com/story/2019/06/18/trump-congress-iran-1366756> [<https://perma.cc/9793-W4RW>] (June 18, 2019, 8:40 AM) (quoting sources both laying groundwork for invocation of the authorization for the use of military force and denying its legitimacy).

¹⁸⁰ See *Gundy v. United States*, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting).

¹⁸¹ See Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1109–10 (2013) (stating that courts regularly avoid judicial review of presidential powers, unless important individual rights are involved).

¹⁸² See *id.* at 1111 (discussing a pattern of deference in judicial review for presidential actions).

¹⁸³ See *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, 343 U.S. 579,

All of this happens against a backdrop in which all incentives are on Congress to delegate broadly and without specificity or scrutiny.¹⁸⁴ And the movement of the Court has been away from serious oversight.¹⁸⁵ “This edifice of extraordinary powers has historically rested on the assumption that the president will act in the country’s best interest when using them. With a handful of noteworthy exceptions, this assumption has held up.”¹⁸⁶

It is becoming more and more common, however, for Presidents to claim unilateral authority to do what they want to do, in the absence of—or even in spite of—statutes relevant to their action.¹⁸⁷ And with increased polarization in Congress, there is little or no hope of thoughtful constraint originating from the legislative branch. As the two elected branches veer toward a merging that threatens the very idea of limited government, political responses are constantly in the air. But there is also a constitutional response, an arrow that is already lying within the quiver of the judiciary, with a long history in precedent and democratic theory to support it: the nondelegation doctrine. However, it must be a nondelegation doctrine of a different stripe.

We have long known that concerns about the delegation of power to the executive branch are grounded in the separation of powers but following a different genealogical branch from the issues that are typically resolved by considering whether one branch has aggrandized itself or encroached on the turf of a coordinate branch.¹⁸⁸ Instead, the Court has recognized that the problem of delegation, while stemming from separated powers, is assessed by whether it has been accompanied by sufficient standards.¹⁸⁹

635 (1952) (Jackson, J., concurring) (stating that when Congress authorizes the President to act “his authority is at its maximum”); *see also* *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (finding that the internment of citizens of Japanese ancestry was “nothing but an exclusion order,” which was justified, in part, by congressional authorization in times of war).

¹⁸⁴ *See supra* Section I.B.

¹⁸⁵ *See* David H. Moore, *Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power*, 90 NOTRE DAME L. REV. 1019, 1023–27, 1035–38 (2015) (discussing collective action problems).

¹⁸⁶ Elizabeth Goitein, *The Alarming Scope of the President’s Emergency Powers*, ATLANTIC (Jan./Feb. 2019), <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/> [<https://perma.cc/2WMA-P9QD>].

¹⁸⁷ *See* Adam Liptak & Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html> [<https://perma.cc/2Z78-GARL>] (explaining how the Court blocked an attempt to drastically change an Obama-era executive order that would overhaul immigration without congressional consent); Johnson, *supra* note 179 (commenting on the Trump administration belief that they did not need congressional approval to take military action against Iran).

¹⁸⁸ *See* *Mistretta v. United States*, 488 U.S. 361, 381–82 (1989) (discussing the separation of powers as a “safeguard against the encroachment or aggrandizement of one branch at the expense of the other” (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976))).

¹⁸⁹ *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42

It is time for meaningful judicial review of the scope and execution of delegations from the Congress to the President, particularly when these delegations impinge on important interests, especially individual rights. A revival of the nondelegation doctrine by itself, however, would not achieve the solution that is needed. It could drive a helpful wedge between those who wish to delegate and those who wish to receive unlimited power and provide incentives for Congress to act with more precision to avoid having their delegations invalidated. The remedy for an excessive delegation, however, is striking down the offending statute. While a regime of enforcement could eventually lead to fewer broad delegations on the books, it does not aim its ammunition at the manner in which the President carries out the delegated authority, which is at the heart of the issue addressed here. It is unlikely that any such rule would significantly inhibit Congress from delegating power or from providing for a future contingency that it cannot spell out with specificity in advance. Congress cannot be expected to anticipate with precision exactly what findings will be needed to equip a President acting in good faith to respond to the vicissitudes of fortune.

The nondelegation doctrine, even if reinvigorated, therefore, is not alone sufficient to solve the problem of how the President exercises discretion granted by Congress. The nondelegation doctrine allows the Court to speak to Congress regarding its vague guidance, but it does not extend to supervising the President in the exercise of his delegated authority.¹⁹⁰ But it can inspire a solution.

The concern—as it has always been—is with the arbitrary exercise of power,¹⁹¹ and the mechanism to provide the foundations of meaningful judicial review. What is needed is a means for preventing a President, for example, from fabricating or exaggerating a national emergency in order to achieve increased power to do something otherwise not within his or her powers. Thus it is time for the Court to reconsider its reluctance to affirm the age-old connection between separation of powers and due process. Separation of powers has given rise to a hesitation that courts feel when

(1935) (finding the Act to be an unconstitutional delegation of power because the standards were too broad and allowed too much executive discretion).

¹⁹⁰ See, e.g., *id.* (phrasing the issue as an unconstitutional delegation of congressional power and indicating that Congress was not thorough enough with their standards). The decision makes no mention of how an executive branch action could have changed the nature of the delegation. See generally *id.*

¹⁹¹ Both the legislative veto and the line-item veto cases illustrate a concern for arbitrariness, even though the Court in those two cases chose to fashion them as separation of powers cases. See *Clinton v. City of New York*, 524 U.S. 417, 436, 438, 448 (1998) (arguing that the line-item veto is unconstitutional because it overrides the procedural powers provided by the Constitution); *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951–55, 959 (1983) (finding that the one-House legislative veto is unconstitutional as it takes constitutionally granted power away from the Senate and President). A plausible explanation of the Court's intuitions in these cases is that vetoes give Congress or the President the power to exercise them in ways not rendered accountable by the constitutional structures, and they can be used to hurt or favor individual interests without any kind of explanation.

they review exercises of delegated authority by a President, in light of the Court's sense of its own limitations, and has led the Court to defer.¹⁹² But separation of powers should not be read to overcome the essential value of due process, which lies at the other end of the delegation, the execution. Rather, the two foundational constitutional principles of separated powers and due process are meant to complement each other as a means of protection against arbitrariness.¹⁹³ In modern times that have seen an explosion of delegations,¹⁹⁴ courts have become increasingly aware that review for abuse of discretion or arbitrariness in the execution of delegated authority has been critical to the acceptance of agencies in the constitutional scheme. There is simply no justification for exempting actions undertaken by the President alone from a regime of accountability for the exercise of delegated authority.

Making this type of presidential action subject to judicial review for abuse of discretion brings this significant bundle of government decision-making into line with the robust administrative state, while reining in a growing source of arbitrariness in our law that threatens liberty.¹⁹⁵ On both sides of the ideological divide, Justices could find common ground in the risks to liberty that excessive delegation brings, as Justice Gorsuch warned. But they need not shut down delegation altogether in order to make a meaningful inroad into the problem. Rather, they should acknowledge that the problem results from a confluence of delegation and execution—too much given and too much taken. The Court's own path of deference to presidential findings is a big contributor to the problem of arbitrariness, and so they can attack the problem from that side. They should dust off the classic tool of due process review and unleash its protections against presidential arbitrariness. After all, the President may “have an Article II,”¹⁹⁶ but the courts can go one better by pulling out their trusty Article III.

¹⁹² See *Franklin v. Massachusetts*, 505 U.S. 788, 795–96, 803–04, 806 (1992).

¹⁹³ See *Brown*, *supra* note 9, at 1557–58 (arguing that separated powers and ordered liberty are intertwined and complementary tools to support liberty).

¹⁹⁴ See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236 (1994) (arguing that in the mid-90s there was an outburst of power delegations that was set to continue well into the future).

¹⁹⁵ Whether this be done by amending the APA, by overruling judicial precedent such as *Franklin v. Massachusetts*, or by some other judicial device, is not the focus of my argument here.

¹⁹⁶ Brice-Saddler, *supra* note 1.