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## ARTICLES

# THE OTHER DELEGATE: JUDICIALLY ADMINISTERED STATUTES AND THE NONDELEGATION DOCTRINE

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### ABSTRACT

*The nondelegation doctrine is the subject of a vast and ever-expanding body of scholarship. But nondelegation literature, like nondelegation law, focuses almost exclusively on delegations of power to administrative agencies. It ignores Congress's other delegate—the federal judiciary.*

*This Article brings courts into the delegation picture. It demonstrates that, just as agencies exercise a lawmaking function when they fill in the gaps left by broad statutory delegations of power, so too do courts. The nondelegation doctrine purports to limit the amount of lawmaking authority Congress can cede to another institution without violating the separation of powers. Although typically considered only with respect to agencies, the constitutional principles underlying the doctrine apply with full force to delegations to courts. In principle, then, the nondelegation doctrine extends equally to both of Congress's delegates. In practice, matters are more complicated. Despite judicial rhetoric to the contrary, virtually unlimited delegations to agencies long have been tolerated, even*

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welcomed. To the extent the modern Court has enforced the nondelegation doctrine in the administrative context, it has been through narrow statutory construction rather than constitutional decree. The narrow-construction strategy does not make sense as a means of limiting courts' own discretion, however. Nor do the functional arguments that have been offered in defense of a hands-off attitude toward broad delegations to agencies work when applied to courts. Far from justifying nondelegation law's inattention to courts, considerations of institutional structure and capacity suggest the need for careful evaluation of statutes administered by unelected, generalist judges.

To be sure, the features that set courts apart from agencies also may make them particularly valuable delegates in certain areas of the law. The goal of this Article is not to condemn all delegations to courts, but rather to demonstrate that they warrant more attention than they currently receive. There has been a robust debate about the constitutional permissibility and functional desirability of delegations to agencies. We need to have a similar conversation about delegations to courts.

#### TABLE OF CONTENTS

|  |     |
|--|-----|
| I. INTRODUCTION.....   | 407 |
| II. SEPARATION OF POWERS AND THE CHALLENGE OF THE<br>ADMINISTRATIVE STATE..... | 410 |
| A. SEPARATE POWERS, SHARED POWERS .....  | 410 |
| B. THE NONDELEGATION DOCTRINE.....   | 413 |
| III. JUDICIAL LAWMAKING.....   | 421 |
| A. THE NONDELEGATION DOCTRINE IN CONTEXT.....                                  | 422 |
| B. DELEGATIONS TO COURTS .....   | 428 |
| IV. DELEGATIONS TO COURTS AND NONDELEGATION<br>PRINCIPLE AND PRACTICE .....    | 435 |
| A. THE CONSTITUTIONAL CONSTRAINTS ON DELEGATIONS TO<br>COURTS.....             | 435 |
| B. NONENFORCEMENT OF THE NONDELEGATION DOCTRINE.....                           | 443 |
| 1. Expertise .....   | 445 |
| 2. Accountability .....  | 448 |
| 3. Accessibility .....   | 450 |
| 4. Flexibility .....   | 453 |
| C. INDIRECT ENFORCEMENT THROUGH NARROW STATUTORY<br>CONSTRUCTION .....         | 455 |
| V. IMPLICATIONS .....  | 461 |

|   |     |
|---|-----|
| A. THE NONDELEGATION DOCTRINE APPLIED: THE SHERMAN<br>ACT ..... | 461 |
| B. COURTS AS DELEGATES .....                                    | 469 |
| VI. CONCLUSION .....  | 475 |

## I. INTRODUCTION

Although the Constitution vests the “legislative” power in Congress,<sup>1</sup> Congress is not the sole source of federal law. It has long been recognized that some measure of lawmaking outside of Congress is permissible, even desirable. But there are limits. While Congress is free to seek help from the other branches, there is a core of legislative power that Congress cannot give away without violating the constitutional separation of powers. Or, at least, so holds the nondelegation doctrine, which in its present form requires Congress to supply an “intelligible principle” to guide and constrain whatever policymaking discretion it cedes to another institution.<sup>2</sup>

The nondelegation doctrine came to life as a response to the rise of the administrative state in the early twentieth century.<sup>3</sup> Despite recent calls for its interment,<sup>4</sup> the doctrine lives on today. The Supreme Court has not enforced the doctrine directly in decades, but neither has it abandoned it entirely.<sup>5</sup> Commentators continue to debate the wisdom, effectiveness, and constitutional status of the nondelegation doctrine.<sup>6</sup> Once described as the “Energizer Bunny” of constitutional law,<sup>7</sup> the doctrine shows no signs of slowing down.

The nondelegation doctrine has a significant blind spot, however. Nondelegation cases and commentary focus overwhelmingly on

1. U.S. CONST. art. I, § 1.

2. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (internal citation and quotation marks omitted).

3. See discussion *infra* Part III.A.

4. See generally Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

5. See *infra* notes 62–73 and accompanying text.

6. Notable recent commentary includes Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035 (2007); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002) [hereinafter Lawson, *Original Meaning*]; Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004); Posner & Vermeule, *supra* note 4; Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. CHI. L. REV. 1331 (2003).

7. Lawson, *Original Meaning*, *supra* note 6, at 330.

delegations of lawmaking authority to administrative agencies.<sup>8</sup> But the federal government has three branches, not two. Congress delegates authority not only to agencies, but to courts as well.<sup>9</sup> Yet virtually no effort has been made to fit delegations to courts into nondelegation theory or practice.<sup>10</sup>

This Article seeks to fill that gap. Although courts and agencies are by no means identical, they share a common status as recipients of congressional delegations. Just as agencies exercise a lawmaking function when they fill in the gaps left by broad delegations of power, so too do courts. And, to the extent that lawmaking by agencies triggers constitutional anxieties about the proper allocation of power among the three branches,<sup>11</sup> so too should delegated lawmaking by courts. Indeed,

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8. For rare exceptions, see MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 140–41 (1995) (arguing that delegations to courts are unproblematic so long as they authorize courts to make law only in the context of a case or controversy); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 41 & n.182 (1985) (recognizing that there may be limits on Congress's ability to delegate common lawmaking power to federal courts). Cf. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003) [hereinafter Manning, *Absurdity Doctrine*] (invoking nondelegation principles to argue against court practice of interpreting statutes to avoid absurd results); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) [hereinafter Manning, *Textualism*] (arguing that courts' reliance on legislative history permits Congress to engage in an invalid form of self-delegation).

9. See *infra* Part III.B. For recent scholarship focused on the *fact* of delegations to courts, see Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006) [hereinafter Stephenson, *Allocation of Delegated Power*]; Daniel A. Farber, *Modeling Coherence, Stability, and Risk Aversion in Legislative Delegation Decisions*, 119 HARV. L. REV. F. 157 (2006), <http://www.harvardlawreview.org/forum/issues/119/feb06/farber.pdf>; Matthew C. Stephenson, *The Legislative Choice Between Agencies and Courts: A Response to Farber and Vermeule*, 119 HARV. L. REV. F. 173 (2006), <http://www.harvardlawreview.org/forum/issues/119/feb06/stephenson.pdf>; Adrian Vermeule, *The Delegation Lottery*, 119 HARV. L. REV. F. 105 (2006), <http://www.harvardlawreview.org/forum/issues/119/feb06/vermeule.pdf>.

10. That is not to say that delegations to courts have been ignored altogether. Neither commentators nor courts could fail to notice the Rules Enabling Act, for example, which delegated to the Court the power to “prescribe general rules of practice and procedure and rules of evidence” for cases in the federal courts. 28 U.S.C. § 2072(a) (2000). However, courts' authority to make rules for the governance of their own proceedings presents a special, and particularly easy, case for the nondelegation doctrine. See *infra* notes 32–51 and accompanying text. The more difficult question concerns the constitutional status of statutes that delegate to courts the authority to establish norms that apply outside the context of litigation, governing the primary conduct of private citizens. See *Mistretta v. United States*, 488 U.S. 361, 396 (1989) (distinguishing between procedural rules and rules that “bind or regulate the primary conduct of the public”). That question has gone largely unnoticed in the vast nondelegation literature, and it is the focus of this Article.

11. Congress delegates power to agencies housed in the executive branch as well as to so-called “independent agencies” that are outside the direct control of the President. See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (holding that Congress may create independent agencies subject only to a limited power of removal by the President). This Article focuses on executive agencies, leaving aside the distinctive issues presented by independent agencies.

delegations to courts may be particularly problematic given the considerable differences between courts and agencies in terms of institutional design and capacity. Many commentators have applauded the modern Court's refusal to use the nondelegation doctrine to invalidate broad delegations to agencies, pointing to characteristics of agencies that make administrative lawmaking attractive and useful. But those arguments simply do not work as applied to courts. If anything, they suggest that judicially administered statutes should be cause for special concern. Thus, even if there are good reasons for the Court's hands-off approach to agency-administered statutes, the usual lines of defense cannot be used to justify broad delegations to courts.

To say that delegations to courts cannot be defended on the same grounds as delegations to agencies is not, of course, to say that they cannot be defended at all. The features that set courts apart from agencies also may make them particularly valuable delegates with respect to certain types of legal questions. The goal of this Article is not to condemn all delegations to courts, but to demonstrate why they warrant attention. There has been a robust debate about the constitutional permissibility and functional desirability of delegations to agencies. We need to have a similar conversation about delegations to courts.

This Article proceeds in four Parts. Part II describes the current state of the nondelegation doctrine, exposing its single-minded focus on delegations to agencies. Part III brings courts into the picture. It begins by recounting the historical shift of lawmaking authority from courts to agencies—a shift that led to the Court's most vigorous deployment of the nondelegation doctrine. The doctrine provided a means of limiting the amount of lawmaking power enjoyed by the new crop of administrative agencies. Importantly, however, lawmaking by agencies had not necessarily replaced legislation by *Congress*. In many respects, it replaced lawmaking by *courts*. Although the Court's decision in *Erie Railroad Co. v. Tompkins*<sup>12</sup> marked the end of much federal common law, federal courts continue to enjoy lawmaking power delegated from Congress. As Part III.B explains, Congress regularly enacts statutes that explicitly or implicitly cede to courts the authority to fill in gaps or supply meaning to vague statutory terms.

Part IV takes up the question raised by the discussion in the previous Parts: If agencies and courts are doing similar work as delegates, does the nondelegation doctrine apply equally to both? Part IV.A demonstrates that

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12. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

the constitutional principles on which the doctrine is based can be transplanted easily from the administrative to the judicial sphere. In principle, then, the nondelegation doctrine should be applied to courts as well as to agencies. Parts IV.B and C move from principle to practice, focusing on how the Court has implemented the doctrine in fact. Here the differences between courts and agencies begin to loom large. The functional arguments that have been offered in defense of broad delegations to agencies fall flat when applied to judicially administered statutes. Similarly, while the Court has made use of subconstitutional rules of statutory construction to effectuate nondelegation principles in the agency context, that approach does not make sense as a check on courts themselves.

Part V concludes by sketching some possible implications for judicially administered statutes. It begins by applying the nondelegation doctrine to an example that runs throughout the Article—the Sherman Act. As Part V.A explains, the Sherman Act stands on shaky constitutional ground. It delegates virtually boundless discretion to the federal courts to craft substantive antitrust rules, and that broad delegation is difficult to defend in practical terms. Evaluating the Sherman Act through the lens of the nondelegation doctrine reveals the problems with the current institutional arrangement and the need for caution before we replicate the same model elsewhere in the law. It does not follow, however, that all delegations to courts are equally problematic. Part V.B suggests some potential advantages of judicially administered statutes and, more broadly, of attention to courts in their roles as delegates.

## II. SEPARATION OF POWERS AND THE CHALLENGE OF THE ADMINISTRATIVE STATE

### A. SEPARATE POWERS, SHARED POWERS

The first three Articles of the Constitution divide the powers of the federal government into separate categories and allocate them among the three branches. Congress is vested with the “legislative Power[],”<sup>13</sup> the president with “[t]he executive Power,”<sup>14</sup> and the Court with “[t]he judicial Power.”<sup>15</sup> The purpose of separated powers is to prevent an undue

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13. U.S. CONST. art. I, § 1.

14. *Id.* art. II, § 1.

15. *Id.* art. III, § 1.

accumulation of powers in the hands of any person or group.<sup>16</sup> But the separation has never been absolute.<sup>17</sup> The Constitution itself calls for some mixing of powers—obvious examples include the president’s role in approving or vetoing legislation<sup>18</sup> and the Senate’s advice-and-consent functions<sup>19</sup>—hence the famous notion of checks and balances. The powers of the federal government are dispersed, but not entirely so. The Constitution limits, or “checks,” the power of each branch, while giving each branch power to “balance” that of the others.<sup>20</sup> The motivating theory is one of competition, with each branch jealously guarding its own authority against encroachments by its rivals.<sup>21</sup>

Although the Framers believed that the “ambition” of each branch could be counted on to “counteract [the] ambition” of the others,<sup>22</sup> the reality has not always matched the theory. From the early days of the Republic, Congress voluntarily has ceded—“delegated,” in common parlance—substantial lawmaking powers to members of both the executive and judicial branches. For example, the first Congress enacted a statute providing for military pensions “under such regulations as the President of the United States may direct.”<sup>23</sup> Another statute authorized executive officers to license “any proper person” to engage in trade with Native

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16. See THE FEDERALIST No. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961) (“The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny.”); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1148 (2000) (“[C]ourts and commentators agree on the following objective: The system of separation of powers is intended to prevent a single governmental institution from possessing and exercising too much power.”). For a compelling argument linking structural separation of powers to the protection of individual rights, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991). For an historical account of how American constitutionalists arrived at the separation of powers enshrined in Articles I, II, and III, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1755–1810 (1996).

17. See *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (“[T]he Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”); Flaherty, *supra* note 16, at 1766–67.

18. U.S. CONST. art. I, § 7.

19. *Id.* art. II, § 2.

20. See Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1258–72 (1988) (describing the theory of checks and balances).

21. See Magill, *supra* note 16, at 1149 (describing widespread consensus among courts and commentators that the system of separated powers, with checks and balances, “will facilitate competitive tension among the branches[,] which, in theory, yields an equilibrium among them, preventing one from becoming dominant”).

22. THE FEDERALIST No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

23. Act of Sept. 29, 1789, ch. 24, § 1, 1 Stat. 95, 95 (1789).

American tribes under “such rules and regulations as the President shall prescribe.”<sup>24</sup> The Judiciary Act of 1789 directed the federal courts to “make and establish all necessary rules for the orderly conducting [of] business in the said courts, provided such rules are not repugnant to the laws of the United States.”<sup>25</sup>

As the country grew and developed, and Congress took on an ever-larger role in regulating public and private conduct, legislators increasingly began to rely on third parties to fill out the details of regulatory schemes. And so was born the administrative state. It began with the establishment of the Interstate Commerce Commission in 1887, enjoyed a growth spurt during the Progressive Era, and came into full bloom during the New Deal.<sup>26</sup> Today, agencies make rules that touch on virtually every aspect of American life and business.<sup>27</sup>

Massive delegations of power to administrative agencies put substantial pressure on the formal model of separation of powers embodied in the Constitution. Yet some degree of delegation always has been understood to be necessary.<sup>28</sup> Congress lacks the capacity—the expertise, the resources, the time, the foresight, the flexibility—to address every detail that might prove to be relevant to any given legislative scheme.<sup>29</sup> In

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24. Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137 (1790).

25. Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83 (1789).

26. The end of the nineteenth century marked the beginning of the administrative state as we know it today, *see, e.g.*, 1 KENNETH C. DAVIS, *ADMINISTRATIVE LAW TREATISE* 17–18 (2d ed. 1978); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1671–72 (1975), not the beginning of all administrative regulation at the federal level. For discussions of the federal government’s early experiences with administrative law, *see* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636 (2007).

27. *See, e.g.*, Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 710 (1994) (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993)). For a sense of the scope of modern agency power, *see* generally the Federal Register, *available at* <http://www.archives.gov/federal-register/public-inspection> (last visited Mar. 18, 2008) (listing notices and proposed rules available for public inspection for seventy different federal agencies, the regulations of which affect activities and issues ranging from commodities trading to family law to nuclear activity).

28. *See* *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[I]n our increasingly complex society, replete with ever[-]changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

29. *See, e.g.*, David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 954 (1999) (noting that “one of the primary reasons for delegating” is “the ability of agencies to respond flexibly to changing conditions”); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 135–36 (2000) (explaining why it is difficult for Congress to legislate with specificity). For a more detailed description of the functional advantages of delegations to agencies, *see infra* Part

order to function effectively, Congress must be able to leave the resolution of some questions, including potentially important policy questions, to the institution charged with implementing the law.<sup>30</sup>

#### B. THE NONDELEGATION DOCTRINE

Despite widespread recognition that Congress must be able to delegate some of its lawmaking powers in order to govern effectively, the Court long has held that there are limits on the scope of permissible delegations. By vesting Congress with the “legislative” power, Article I of the Constitution necessarily (if implicitly) constrains Congress’s ability to transfer legislative power to the other branches. The line between proper delegations and prohibited transfers of “legislative” power is not a bright one, as the Court acknowledged early on. Nevertheless, the basic notion that the Constitution imposes some restrictions on Congress’s ability to delegate lawmaking authority away is deeply entrenched in constitutional law and widely accepted in constitutional commentary.<sup>31</sup>

Notably, the Court’s first major encounter with the nondelegation principle was in a case involving a delegation to the judiciary. In *Wayman v. Southard*, the Court considered a challenge to the Process Act, which authorized the Court to promulgate rules for service of process and execution of judgments in federal courts.<sup>32</sup> As noted above, the first Judiciary Act had empowered the judiciary to “make and establish all necessary rules for the orderly conducting [of] business in the . . . courts.”<sup>33</sup> The Process Act required federal courts in common law actions to apply the procedural rules that existed as of 1789 in the states in which they sat, “subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court shall think proper from time to time by rule to prescribe to any circuit or district court . . . .”<sup>34</sup> The question in *Wayman* was whether execution of a judgment in the District of Kentucky was

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#### IV.B.

30. See, e.g., Merrill, *supra* note 6, at 2153–54 (discussing the common argument that the scale of modern government makes delegations necessary); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 404 (1987) (“Given the nature and level of governmental intervention that Congress now authorizes, it could not possibly make the hundreds, or perhaps thousands, of important policy decisions that agencies make annually.”).

31. See Posner & Vermeule, *supra* note 4, at 1723 (describing the “standard view in the literature”).

32. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825).

33. Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83 (1789).

34. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (1792).

governed by Kentucky statutes or by federal law. If Kentucky law governed, the plaintiff would be obligated to accept payment in the form of bank notes from the Bank of Kentucky or the Bank of the Commonwealth of Kentucky; he could not insist on payment in hard currency.<sup>35</sup>

Both the Court and the parties in *Wayman* assumed that Congress could regulate the practice of federal courts and delegate to federal courts the power to regulate their own proceedings.<sup>36</sup> But specifying the form of payment for the satisfaction of judgments seemed to go beyond that, raising a more difficult question.<sup>37</sup> Thus, the defendant (who preferred the state rules) contended that the Process Act constituted an unconstitutional delegation of legislative power to the judiciary because it “extended beyond the mere regulation of practice in the Court . . . .”<sup>38</sup>

Writing for the Court, Chief Justice Marshall rejected the notion that “Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”<sup>39</sup> It did not follow, however, that every delegation of lawmaking power was impermissible. Chief Justice Marshall acknowledged that the difference between a proper and improper delegation is subtle, requiring a “delicate and difficult inquiry.”<sup>40</sup> In a now-famous passage, he explained that

[t]he 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 provision to fill up the details.<sup>41</sup>

Chief Justice Marshall concluded that the statute at issue in *Wayman* fell on the constitutional side of the line, as it delegated only “a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution.”<sup>42</sup> The delegation, in other words, was limited to matters “of less interest.” The “important subjects” had been resolved by Congress itself.

*Wayman* established two important principles. First, nothing in the

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35. See *Wayman*, 23 U.S. at 1.

36. See *id.* at 43.

37. See *id.* at 42 (acknowledging that the Process Act went beyond “matters of practice”); *id.* at 44–46 (describing a continuum of issues ranging from pure procedure to more “legislative” matters).

38. *Id.* at 42.

39. *Id.*

40. *Id.* at 46.

41. *Id.* at 43.

42. *Id.* at 45.

Constitution prevents Congress from delegating to courts the power to establish rules governing their own procedures.<sup>43</sup> Although Chief Justice Marshall did not offer a detailed defense of that principle,<sup>44</sup> his opinion in *Wayman* makes clear that the power to regulate court practice is not “strictly and exclusively legislative.”<sup>45</sup> There is a longstanding academic debate over the precise division of labor between Congress and the courts when it comes to procedural rules.<sup>46</sup> Some commentators contend that matters of procedure not only are *not* exclusively legislative, but are also inherently and exclusively part of the *judicial* function.<sup>47</sup> Others take the view that Congress and the courts largely share responsibility for procedural rules, subject to the proviso that Congress cannot legislate in a way that destroys powers “indispensable to the integrity and independent functioning of the judiciary.”<sup>48</sup> Still others maintain that Congress has plenary power to govern the procedures of federal courts.<sup>49</sup> The key point for our purposes, however, is that virtually everyone<sup>50</sup> agrees that

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43. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 387 (1989) (citing *Wayman* for the proposition that Congress may delegate to courts “rulemaking power pertaining to the Judicial Branch”); *Chandler v. Judicial Council*, 398 U.S. 74, 86 n.7 (1970) (recognizing that Congress may delegate to judicial councils authority to “make all necessary orders for the effective and expeditious administration of the business of the courts”); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941) (rejecting a constitutional challenge to the Rules Enabling Act on the ground that “Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States” (citing *Wayman*, 23 U.S. at 42)).

44. See Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 759 n.100 (2001) (noting that the Court has never fully explained why procedural rulemaking powers can be delegated to courts without raising any constitutional questions).

45. *Wayman*, 23 U.S. at 42.

46. See Pushaw, *supra* note 44, at 787–92 (summarizing the relevant literature).

47. See, e.g., Abraham Gertner, *The Inherent Power of Courts to Make Rules*, 10 U. CIN. L. REV. 32, 34–35, 44–48 (1936); Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 628–30, 645–48 (1957); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993); John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 276–79 (1928).

48. Pushaw, *supra* note 44, at 742. See also, e.g., William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 782–98 (1997) (arguing that courts’ power trumps Congress’s only where Congress has attempted to interfere unduly with courts’ inherent power to render decisions in contested cases).

49. See, e.g., JACK B. WEINSTEIN, *REFORM OF COURT RULE-MAKING PROCEDURES* (1977); Charles E. Clark, *The Proper Function of the Supreme Court’s Federal Rules Committee*, 28 A.B.A. J. 521 (1942).

50. The only arguments to the contrary of which I am aware focus on the fact that statutes like the Rules Enabling Act authorize courts to make law outside the confines of a case or controversy. See MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 20–22 (2d ed. 1990); Thomas J. Walsh, *Rule-Making Power on the Law Side of Federal Practice*, 6 OR. L.

procedural rulemaking by federal courts does not constitute an unconstitutional exercise of the legislative power.<sup>51</sup>

The second principle established in *Wayman* goes beyond the specialized question of judicial procedure and applies to delegations generally. It rests on a distinction between the sort of policy judgments that motivate a statute and define its core goals, and those that must be made on the way to reaching those goals. Congress itself must resolve the critical, constitutive questions, though it may leave the details of implementation to its delegate. As Gary Lawson has put it, “Congress must make whatever decisions are important enough to the statutory scheme in question so that Congress must make them.”<sup>52</sup>

Vague and circular as it may be, the understanding of the limits on permissible delegations introduced in *Wayman* became cemented in nondelegation doctrine by the Court’s subsequent decision in *J.W. Hampton, Jr. & Co. v. United States*.<sup>53</sup> *Hampton* involved a tariff act that authorized the president to alter the amount of a duty on certain imports in order to “equalize the . . . costs of production in the United States and the principal competing country . . .”<sup>54</sup> In upholding the act, the Court announced what is now the prevailing rule for assessing limits on permissible delegations: “If Congress shall lay down by legislative act an

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REV. 1, 13–15 (1926).

51. Even if one rejects the inherent-power view discussed in the text, it is well settled that whatever limitations the Constitution imposes on delegations of the “legislative” power are relaxed when the subject matter of the delegation is within the special competence of the recipient branch. See Posner & Vermeule, *supra* note 4, at 1731. That principle, often used to justify delegations to the president with respect to foreign affairs, see, e.g., *Loving v. United States*, 517 U.S. 748 (1996); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), applies comfortably to statutes authorizing courts to create rules governing their own procedures.

52. Lawson, *Original Meaning*, *supra* note 6, at 361. Eric Posner and Adrian Vermeule argue that *Wayman* has nothing to do with the nondelegation doctrine as we know it, but instead rests on a distinction between “exclusive” powers and “powers that Congress may choose either to exercise itself or to delegate to its agents.” Posner & Vermeule, *supra* note 4, at 1378. The latter point might be right, but it does not follow that *Wayman* is not a nondelegation case. The nondelegation doctrine has always been burdened by an unfortunate formalism, under which the critical question is not whether Congress has delegated away *too much* “legislative” power, but whether the power Congress has delegated is “legislative” at all. As described in more detail below, see *infra* notes 60–61 and 148–50 and accompanying text, the modern formulation of the test holds that (1) Congress may not delegate away *any* legislative power, and (2) Congress has not ceded any legislative power so long as the statute in question contains an intelligible principle to guide and limit agency discretion. That formulation is entirely consistent with *Wayman*, which suggests that Congress itself must resolve certain “important subjects”—that power is nondelegable or, in Posner and Vermeule’s terminology, “exclusive”—but may delegate away responsibility for lesser details. For a similar reading of *Wayman*, see Lawson, *Original Meaning*, *supra* note 6, at 355–61.

53. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

54. *Id.* at 401.

intelligible principle to which the person or body authorized [to implement the statute] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”<sup>55</sup> Thus, the Court made clear that the relevant inquiry in delegation cases is the quality of policymaking discretion given to third parties. Congress may delegate away the authority to make choices, choices that create “binding rules of conduct.”<sup>56</sup> Choices, in other words, that create *law*. But delegated authority must be bounded in a significant sense. Congress must make the key choices and establish the “primary standards.”<sup>57</sup>

The so-called “intelligible principle” requirement is grounded in notions of democratic legitimacy.<sup>58</sup> Building on John Locke’s contractarian theory of government, proponents of the nondelegation doctrine on the bench and in the academy argue that Congress cannot delegate away the power to make laws governing private conduct because the people gave that power to Congress and Congress alone.<sup>59</sup> Although that reasoning would seem to suggest an absolute ban on any delegations of lawmaking power, recognition of Congress’s need to “see[k] assistance from another branch”<sup>60</sup> has tempered its bite. So long as Congress has specified the general policy and standards that motivate the law, it has not ceded the essential “legislative power” that it alone holds, and citizens affected by the statute can respond in the voting booth if they disagree with the policy choices Congress made.

To be sure, the intelligible principle requirement often leaves some important choices to the discretion of Congress’s delegate. It does not insist that Congress must be the sole source of all federal law. The constitutional question—the distinction between permissible “assistance” and

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55. *Id.* at 409.

56. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 428 (1935).

57. *Id.* at 426.

58. The requirement also is thought to facilitate judicial review. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 486 (1989) (arguing that “the constitutionally relevant inquiry is [not] whether Congress resolved certain types of issues, but whether it supplied enough policy structure that someone can police what its delegate is doing”).

59. *See* John Locke, *The Second Treatise of Civil Government*, in *THE TRADITION OF FREEDOM* 201, 244 (Milton Mayer ed., 1957) (“The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others.”). *See also* Louis L. Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COLUM. L. REV. 359, 359–60 (1947) (identifying a “fundamental democratic concern” that “large decisions of policy should be grounded in consent”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1672 (1975) (describing the link between the nondelegation doctrine and contractarian political theory).

60. *J.W. Hampton, Jr. & Co.*, 276 U.S. at 406.

impermissible “legislation”—is one of degree. In the words of then-Justice Rehnquist, “It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress . . . .”<sup>61</sup>

The nondelegation doctrine’s theoretical pedigree—though by no means uncontroversial<sup>62</sup>—is significantly more impressive than its record in practice. As Cass Sunstein has observed, the doctrine enjoyed only “one good year.”<sup>63</sup> In 1935, the Court relied on the nondelegation doctrine in *Panama Refining Co. v. Ryan*<sup>64</sup> and *A.L.A. Schechter Poultry Corp. v. United States*<sup>65</sup> to strike down provisions of the National Industrial Recovery Act that gave the president “virtually unfettered” discretion to regulate troubled industries in service of the Act’s broad goals of “fair competition” and “industrial recovery.”<sup>66</sup> But the Court has never since invalidated a federal statute on the ground that it delegates excessive lawmaking authority to an agency.<sup>67</sup>

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61. *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment) [hereinafter *The Benzene Case*].

62. For commentary critical of the doctrine’s theoretical underpinnings, see generally Posner & Vermeule, *supra* note 4. A larger body of scholarship critiques the nondelegation doctrine on functional grounds, arguing that delegations to agencies are a positive development—or at least not something that can be restrained in any principled way. See, e.g., David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947 (1999); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81 (1985); discussion *infra* Part IV.B.

63. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

64. *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). *Panama Refining* concerned a provision of the Recovery Act authorizing the president to prohibit the interstate transportation of petroleum produced in excess of state allowances. As the Court explained, the relevant provision “d[id] not state whether or in what circumstances or under what conditions” the president was to act. *Id.* at 415. The statute “establishe[d] no criterion to govern the President’s course,” but rather “g[ave] to the President an unlimited authority to determine the policy and to lay down the prohibition, or not lay it down, as he [saw] fit.” *Id.* Thus, although the Court acknowledged that the Constitution permits Congress to delegate the authority to make “subordinate rules . . . within the framework of the policy which the Legislature has . . . defined,” it found that the challenged provision crossed the constitutional line because Congress “ha[d] declared no policy” with respect to the petroleum in question. *Id.* at 429–30.

65. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *Schechter* involved another provision of the Recovery Act, this one empowering the president to approve “codes of fair competition” to govern a particular trade or industry. Again the Court found a lack of governing standards, deeming the statutory goals of “fair competition” and “industrial recovery” too vague to set meaningful limits on the president’s authority. *Id.* at 530–42.

66. See *id.* at 523, 537, 536. See also *Panama Refining*, 293 U.S. at 406. The Court also emphasized that the provision at issue in *Schechter* effectively delegated rulemaking power to private parties. *Schechter Poultry*, 295 U.S. at 537.

67. See Lawson, *Original Meaning*, *supra* note 6, at 328–29 (“After 1935, the Court has steadfastly . . . found intelligible principles where less discerning readers find gibberish.”).

Nevertheless, it would be a mistake to say that the nondelegation doctrine is dead.<sup>68</sup> Individual Justices repeatedly have invoked the nondelegation doctrine in separate opinions.<sup>69</sup> Although they have failed to persuade a majority of the Court to strike down the statutes in question, on several occasions the Court has relied on the nondelegation doctrine as a reason for narrowly construing statutes that might otherwise pose a constitutional problem because of the lack of an intelligible principle to cabin agency discretion.<sup>70</sup> The Court also has relied on the nondelegation principle to invalidate federal statutes that sought to circumvent the “finely wrought” procedure for the enactment of legislation<sup>71</sup> by vesting power in the president to “cancel” select portions of a duly enacted bill,<sup>72</sup> or by giving a single chamber of Congress authority to invalidate executive action under a statutory delegation.<sup>73</sup> Moreover, to the extent the Court has attempted to explain its lackluster enforcement of the doctrine, it has pointed to functional reasons—such as the difficulty of drawing a coherent line between permissible and impermissible delegations—rather than any rejection of the constitutional principle itself.<sup>74</sup>

Nor has the nondelegation doctrine died out in academic commentary. Scholars continue to debate the wisdom and constitutional status of the

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68. See Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 17 (1982) (contending that the nondelegation doctrine “continues to live a fugitive existence at the edge of constitutional jurisprudence”).

69. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring); *Am. Textile Mfrs. Inst., Inc. v. Donovan* (The Cotton Dust Case), 452 U.S. 490, 548 (1984) (Rehnquist, J., dissenting); *The Benzene Case*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring in the judgment); *California Bankers Ass’n v. Shultz*, 416 U.S. 21, 93 (1974) (Brennan, J., dissenting); *McGautha v. California*, 402 U.S. 183, 273 (1971) (Brennan, J., concurring); *United States v. Robel*, 389 U.S. 258, 274–75 (1967) (Brennan, J., concurring in the result); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

70. See *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (“In recent years, our application of the nondelegation doctrine principally has been limited to . . . giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.” (citing *The Benzene Case*, 448 U.S. at 646; *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 342 (1974))). See also *infra* Part IV.C (discussing narrow-construction cases).

71. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

72. *Clinton v. City of New York*, 524 U.S. 417, 418 (1998). See Marci A. Hamilton, *Representation and Delegation: Back to Basics*, 20 CARDOZO L. REV. 807, 819–20 (1999) (characterizing *Clinton* as resting on “the most important nondelegation principle: The legislature holds primary responsibility to make the national policy choices, and the President may not take on those choices”).

73. *Chadha*, 462 U.S. at 927–28. See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 877 n.230 (2001) (describing *Chadha* in nondelegation terms).

74. See *Whitman*, 531 U.S. at 474–75 (“[W]e have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’” (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting))).

doctrine, with many calling for stricter enforcement of the intelligible principle requirement or some other rule designed to police excessive delegations.<sup>75</sup> Other commentators argue that the nondelegation doctrine is in fact alive and well in current case law, only living under a different name. Sunstein, for example, maintains that the Court is enforcing something like the nondelegation doctrine through certain canons of statutory construction.<sup>76</sup> Kevin Stack believes that the so-called *Chenery* doctrine—which requires agencies to state the reasons behind their rules and prohibits courts from upholding agency action except on the basis of the agency’s stated reasons—is grounded in nondelegation norms.<sup>77</sup> And Lisa Bressman has suggested that, to the extent agencies are required to enact regulations to limit their own discretion, such a requirement serves the goals of the nondelegation doctrine.<sup>78</sup>

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75. See generally, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM* (1969); REDISH, *supra* note 8; SCHOENBROD, *supra* note 27; Aranson et al., *supra* note 68; Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345 (1987); Hamilton, *supra* note 72; Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295 (1987); 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 (2001); David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731 (1999); David Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355 (1987). Cf. Lawson, *Original Meaning*, *supra* note 6 (arguing that the Constitution prohibits broad delegations to agencies, but reserving the question whether the Court should enforce the constitutional prohibition).

76. See Sunstein, *supra* note 63. Courts apply some of Sunstein’s “nondelegation canons,” such as the canon of constitutional avoidance, to statutes administered by courts as well as statutes administered by agencies. See *id.* at 337–38. Sunstein does not attempt to rationalize such application to courts. Indeed, he notes that “[i]t would be necessary to look elsewhere” than the nondelegation doctrine “to justify canons that do not involve an exercise of discretion by administrative agencies.” *Id.* at 340. But if Sunstein is right that some canons serve the goals of the nondelegation doctrine when applied to statutory interpretation by agencies, the same may be true when a court relies on one of those canons to limit its own range of construction. Although a full analysis of Sunstein’s arguments is beyond the scope of this Article, the notion that different modes of statutory interpretation may promote (or undermine) the principles underlying the nondelegation doctrine is an important one. Sunstein addresses the issue only with respect to agency-administered statutes. That approach is consistent with nondelegation law’s focus on delegations to agencies. As this Article demonstrates, however, similar nondelegation problems can arise with respect to statutes left in the care of the courts. It is worth asking whether such problems can be ameliorated effectively through the use of certain canons of construction.

77. See Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 958 (2007). Stack explains that the *Chenery* doctrine promotes democratic accountability by ensuring that “accountable agency decision-makers, not merely courts and agency lawyers, have embraced the grounds for the agency’s actions, and that the agency decision-makers have exercised their judgment on the issue in the first instance.” *Id.* at 958–59. Given that it operates to compel decisionmaking by the (accountable and expert) agency rather than reviewing courts, the *Chenery* doctrine cannot easily be applied to judicially-administered statutes.

78. See Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399 (2000) [hereinafter Bressman, *Schechter Poultry at the Millennium*]. But cf. Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American*

Despite all their differences, the cases and commentary on the nondelegation doctrine share a unifying feature: they focus on constitutional limits on Congress's ability to delegate lawmaking authority to *agencies*. But agencies are not the only possible recipients of such congressional delegations; Congress delegates lawmaking power to courts as well. Yet, notwithstanding the robust and ever-growing body of law and commentary on the boundaries of permissible delegations to agencies, we lack any account of the constitutional status of delegations of lawmaking authority to courts.<sup>79</sup>

### III. JUDICIAL LAWMAKING

The nondelegation doctrine rests on the view that agencies administering broadly worded federal statutes make some measure of federal *law*, and that there are limits on how much law can be made outside of Congress without running afoul of the constitutional structure of separated powers. But if, as everyone seems to agree, some degree of lawmaking inheres in the task of statutory interpretation and application, it is hard to understand the single-minded focus of nondelegation law and literature on agencies. If agencies must make some law when they interpret

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Trucking Ass'ns, 87 CORNELL L. REV. 452 (2002) (linking agency-generated limiting principles to the requirements of the Administrative Procedure Act rather than the nondelegation doctrine). This Article discusses the discretion-limiting approach, and whether it can sensibly be used to cabin delegations to courts, *infra* Part IV.C.

79. Just as commentators have argued that nondelegation principles currently are being enforced against agencies under doctrines not commonly understood in nondelegation terms, one might argue that the nondelegation doctrine already is being applied to courts—just not in so many words. The most likely candidate for that job probably is the void-for-vagueness doctrine. See Sunstein, *supra* note 63, at 320 (describing the void-for-vagueness doctrine as similar to a nondelegation doctrine). The void-for-vagueness doctrine operates to invalidate statutes when “vagueness permeates the text . . . .” *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999). The doctrine has not been explained in nondelegation terms, but rather based on concerns about notice, arbitrary enforcement, and the chilling of constitutional rights. See, e.g., *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Nevertheless, it may serve the principles of the nondelegation doctrine by forcing courts to remit to Congress excessively vague statutes rather than attempting to supply meaning to such statutes themselves. Cf. *McGautha v. California*, 402 U.S. 183, 258 (1971) (Brennan, J., dissenting) (“[T]he doctrine of vagueness is premised upon the fundamental notion that due process requires governments to make explicit their choices among competing social policies . . . .”). Notably, however, the void-for-vagueness doctrine does not apply across the board. It is meaningfully enforced only with respect to criminal statutes and statutes that trench on fundamental constitutional rights. See *Village of Hoffman Estates*, 455 U.S. at 498 (“The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment.”); David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1356–61, 1364–72 (2005) (describing application of the doctrine); Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (same). If indeed the doctrine does advance nondelegation norms, its limited scope may merit reconsideration.

and administer broadly-worded statutes, the same is true for courts. The inevitability of lawmaking has nothing to do with Congress's choice of delegate; it has to do with the nature of the delegated task. Therefore, delegations to courts would seem to raise precisely the same concerns as delegations to agencies.

This Part begins by placing the modern nondelegation doctrine in context, as a response to the shift of lawmaking authority from courts to agencies. It then demonstrates that, despite that shift, courts continue to exercise lawmaking authority delegated from Congress. Statutory implementation by courts involves the same sort of policymaking as administration by agencies. As such, it gives rise to the question this Article addresses in Part IV: If Congress delegates lawmaking power to courts as well as agencies, does the nondelegation doctrine apply equally to both?

#### A. THE NONDELEGATION DOCTRINE IN CONTEXT

When the Court deployed the nondelegation doctrine to strike down federal legislation in 1935, it was responding to vast increases in the number and power of administrative agencies in the early twentieth century. The administrative state itself was a response to recent changes in legal theory and in the needs of the nation. Most important for our purposes, the administrative state represented a self-conscious effort to transfer lawmaking responsibility from courts to expert agencies—a move precipitated in no small part by a growing recognition among legal thinkers that what courts were doing was not merely legal, but also, in an important sense, political.

For most of the first century of the nation's existence, most of the law governing private affairs was generated at the state level.<sup>80</sup> To the extent there was federal law on issues such as torts or contracts or property rights, the bulk of it was created by federal courts.<sup>81</sup> The Court had yet to adopt the expansive interpretations of Congress's Article I powers that emerged during the New Deal, and Congress largely abstained from exercising its powers even when it had clear constitutional authority to act. The courts were another matter. In *Swift v. Tyson*, the Court had authorized federal

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80. See generally PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA (1997).

81. See Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1040 (1961) (“[T]hroughout the nineteenth century, the courts were left largely to their own devices. Our private law was, overwhelmingly, judge-made law.”).

courts to create “general” common law to resolve commercial disputes.<sup>82</sup> Although *Swift* itself involved a narrow question of creditor rights,<sup>83</sup> federal common law soon expanded beyond commercial law to cover many other areas of common-law jurisprudence, touching on issues affecting “not just merchants but most Americans . . . .”<sup>84</sup>

The creation of common law by federal courts was not controversial—at least not at first. Many legal thinkers in the 1800s subscribed to the view that judges decided cases by reasoning deductively from a relatively fixed set of principles.<sup>85</sup> Under that formalist model, common law was not “made” so much as “discovered.”<sup>86</sup> Even in hard cases, the “right answers [were] *there*,” to be teased out “by indubitable (even if complex) reasoning.”<sup>87</sup>

The formalist model of judging gave way in the late nineteenth and early twentieth centuries. Building on the work of earlier critics such as

82. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842), *overruled by* *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

83. *Id.* at 2–3.

84. See Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in *CIVIL PROCEDURE STORIES* 21, 24 (2004) (Kevin M. Clermont ed., 2004). On the expansion of general federal common law, see, for example, JAMES MCCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT* 183–84 (1971); Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 *HARV. L. REV.* 1785, 1792–93 (1997).

85. Frederick Schauer, *Do Cases Make Bad Law?*, 73 *U. CHI. L. REV.* 883, 885 (2006) (“Common law decisionmaking was widely understood prior to the twentieth century as the process of discovering the rules and principles immanent in the existing law, such discovery being assisted by logical deduction from earlier cases as well as the less deductive but no less constrained application of that mysterious array of skills then and now known as ‘legal reasoning.’”). It bears emphasis that the formalist conception of judging was not universally accepted even in the nineteenth century. Indeed, some judges were quite explicit about the role considerations of “justice” and “policy” played in their decisionmaking. See, e.g., *Farwell v. Boston & Worcester R.R.*, 45 *Mass. (4 Met.)* 49, 57–58 (1849) (Shaw, J.).

86. The “discovery” or “declaratory” theory of adjudication dates back to Blackstone, who saw the law as “something to be ascertained and applied, rather than made.” Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 *COLUM. L. REV.* 1024, 1069 (1967) (citing WILLIAM BLACKSTONE, 1 *COMMENTARIES* \*69–70). See also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, at 4–9 (1977); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *STAN. L. REV.* 395, 427–29 (1995); Merrill, *supra* note 8, at 64. Larry Kramer explains that the early understanding of common law was not quite as simplistic as the discovered or made dichotomy suggests:

Common law was not a product of judicial will and imagination, but neither was it a fully determined body of invariant rules, found by the judge in the same way that you or I might find a dictionary definition. It was an evolving set of principles, ‘out there’ in a sense, but nonetheless shaped by judges called upon to apply the principles to particular circumstances.

Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 *PACE L. REV.* 263, 282 (1992).

87. Thomas C. Grey, *Langdell’s Orthodoxy*, 45 *U. PITT. L. REV.* 1, 9, 32 (1983) (emphasis in original).

Justice Oliver Wendell Holmes,<sup>88</sup> proponents of a new Legal Realism stressed the inherent indeterminacy of legal rules and insisted that policymaking was a necessary and inevitable component of legal decisionmaking.<sup>89</sup> The notion that cases could be resolved through deductive and apolitical reasoning was “transcendental nonsense”<sup>90</sup> serving only to mask the value judgments that were doing the real work.<sup>91</sup> The upshot was that the common law was not something judges found but something that judges *made*, using the same sorts of policy judgments that legislators rely on when making law.

The realist critique was not limited to the making of common law. The early twentieth century saw a sharp rise in the number of federal statutes, as Congress lurched into action to address industrialization, war, and, later, the economic crisis.<sup>92</sup> As statutes proliferated, legal theorists turned their

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88. Holmes rejected the notion that legal reasoning could be formal and scientific, arguing instead that judges had no choice but to resolve cases by balancing the relevant policy concerns. At least in hard cases, the neutral concepts so revered by formalists were not sufficient to decide the dispute. Rather, judges had no choice but to exercise the “sovereign prerogative of choice,” guided by their “views of public policy” and “considerations of social advantage.” OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 239 (1920); OLIVER WENDELL HOLMES, *THE COMMON LAW* 32 (Mark D. Howe ed., 1963); OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 184 (1920). Sociological jurisprudence scholars like Roscoe Pound offered a related critique based on the notion that law should take account of actual facts and strive for practical utility rather than scientific precision. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609, 610 (1908) (calling for “a pragmatic, a sociological legal science” and urging a “march . . . away from the method of deduction from predetermined conceptions”).

89. See Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1252 (1931) (“If deduction does not solve cases, but only shows the effect of a given premise; and if there is available a competing but equally authoritative premise that leads to a different conclusion—then there is a choice in the case; a choice to be justified; a choice which *can* be justified only as a question of policy . . .”) (emphasis in original).

90. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935).

91. See Llewellyn, *supra* note 89, at 1237 (explaining that the realist movement was marked by “[d]istrust of traditional legal rules and concepts insofar as they purport to *describe* what either courts or people are actually doing,” and “distrust of the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court decisions”) (emphasis in original). For the Realists, “[g]enerally stated rules of law [did] not so much explain as conceal the bases of judicial decision.” Gilmore, *supra* note 81, at 1038. See also Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 358 (1925) (“Instead of working backward at principles and standard cases,” judges “worked forward at results”).

92. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977) (“Between 1900 and 1950 the greater part of the substantive law, which before 1900 had been left to the judges for decision in the light of common law principles, was recast in statutory form.”); Lessig, *supra* note 86, at 433 (“Images of *Lochner* notwithstanding, the turn of the century was filled with progressive economic regulation in a wide range of areas. Beginning with the Interstate Commerce Commission’s railroad regulation, the federal government grew rapidly in its efforts to professionalize regulation in many areas of American

attention to the task of statutory interpretation, and what they found was similar to what they had observed with respect to the common law: interpretations were driven not by statutory text or sterile canons of construction, but by judges' views of sound policy.<sup>93</sup>

The realist assault on formalism contributed to two shifts in lawmaking authority away from federal courts. One was *Erie*, which moved power from federal courts to the states. As formalism withered away, so too had the theoretical foundations for *Swift*.<sup>94</sup> If federal judges were making law rather than finding it when they decided cases involving the general federal common law, it became difficult to explain why federal courts, rather than state courts or legislatures, were doing that work. In 1938, the Court in *Erie Railroad Co. v. Tompkins* abandoned the nearly century-old doctrine of *Swift*, declaring that its rule was based on a "fallacy."<sup>95</sup> Federal courts were no longer to rely on their own judgments of the common law but were to follow the decisions of the states in which they sat.<sup>96</sup>

The second shift was the birth of the modern administrative state. The "struggle for primacy between courts and administrators" began in 1887 with the enactment of the Interstate Commerce Act and the creation of the

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life.").

93. See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, in *AMERICAN LEGAL REALISM* 228 (William W. Fisher III et al. eds., 1993) (demonstrating that every canon of statutory construction has an equal and opposite countercanon that supports the contrary result); Max Radin, *Statutory Interpretation*, 43 *HARV. L. REV.* 863, 864 (1930) ("[Courts] scarcely conceal from themselves or from their readers that . . . a choice has for one reason or another been made and that sections of the code have then been sought to justify that choice: that an ambiguity has been discovered and an interpretation selected after—rather than before—the effect of such an interpretation on the decision was known.").

94. Lessig, *supra* note 86, at 430–32. For a discussion of the theoretical underpinnings of *Erie* and their link to legal realism, see generally Purcell, *supra* note 84. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Swift v. Tyson*, 41 U.S. 1 (1842). Of course, the retreat from *Swift* cannot be explained solely in terms of formalism versus realism. *Erie* also rests in large part on notions of positivism. Whereas earlier thinkers had conceived of the common law as something "out there" in the ether, not tethered to the positive law of any particular government, by the time *Erie* was decided it was widely recognized that "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified . . ." *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). See *Erie*, 304 U.S. at 79 ("[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State . . ."). It followed that any common law created by the federal courts must be *federal* law, and therefore could not extend to subjects (such as insurance) not entrusted by the Constitution to the federal government. See, e.g., Peter L. Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 *ALA. L. REV.* 891, 911–17 (2001).

95. *Erie*, 304 U.S. at 79.

96. *Id.* at 78.

Interstate Commerce Commission.<sup>97</sup> But the administrative state did not get underway in earnest until the early twentieth century, as more and more industries were committed to the care of agencies. Then came the New Deal, during which a “perplexed state relied almost entirely upon the administrative approach to its many and staggering problems.”<sup>98</sup> Increasingly, issues that previously had been governed by judicial decisions were controlled by administrative regulation.

The movement from judicial to agency lawmaking was fueled in significant part by an enthusiasm for expertise that had its roots in the work of the legal realists.<sup>99</sup> Writing in 1938, James Landis explained:

With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.<sup>100</sup>

Courts possessed none of those skills. Generalist judges were “jacks-of-all-trades and masters of none,”<sup>101</sup> unable to understand the “incredible areas of fact” relevant to many contemporary legal problems—problems whose resolution called “not only for legal intelligence but also for wisdom in the ways of industrial operation.”<sup>102</sup>

Landis also linked the proliferation of agencies to the realists’ recognition of the inevitable role of policy judgment in legal decisionmaking.<sup>103</sup> Judges are unelected, unaccountable. Once it became clear that the work of judges was political in critical respects, their involvement in the controversial economic issues of the day began to come under fire.<sup>104</sup> The result was a massive transfer of lawmaking responsibility

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97. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 222–23 (1992).

98. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 14 (1938).

99. See Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 *YALE L.J.* 2580, 2593–94 (2006) (“There is an evident link between the realists’ emphasis on the policy-driven nature of interpretation and the New Deal’s enthusiasm for administrators, who were to be both expert and accountable.”).

100. LANDIS, *supra* note 98, at 23–24.

101. *Id.* at 31.

102. *Id.*

103. *Id.* at 6–7. See also Cass R. Sunstein, *Chevron Step Zero*, 92 *VA. L. REV.* 187, 206 (2006) (linking the shift from judge-made law to administrative regulation to concerns about democratic accountability).

104. See HORWITZ, *supra* note 97, at 221 (discussing the “critical view of courts as unfair and inefficient forums”); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF*

from courts to agencies, prompting the American Bar Association to declare in 1934 that “[t]he judicial branch of the federal government is being rapidly and seriously undermined . . . .”<sup>105</sup>

It was against this backdrop that the Court decided *Panama Refining* and *Schechter Poultry* in 1935, using the nondelegation doctrine for the first and last time to strike down federal legislation on the ground that it ceded too much lawmaking authority to an agency. As described in Part II, *supra*, the Court in those cases sought to control the growing phenomenon of agency lawmaking by drawing a line between permissible gap-filling and unlawful legislation.<sup>106</sup> But while the new model of agency-dominated law to which the Court was responding was indeed a recent innovation, the model it replaced was not the one suggested by the intelligible principle requirement—that is, one in which all important policy choices were made by Congress. On the contrary, the rise of administrative agencies displaced a model of lawmaking under which congressional enactments were interpreted and supplemented by common lawmaking *by courts*. Thus, the problem the nondelegation doctrine was designed to discipline—lawmaking by a branch of the federal government other than Congress—was by no means new. The administrative state did not create a separation-of-powers problem; it moved it. Courts had been making law for years, and everyone now recognized it.

When the nondelegation doctrine is viewed in this context, the focus of courts and commentators on delegations to agencies is quite puzzling. If agencies assumed power that previously had been exercised by courts, and if agencies’ possession of such power raises constitutional concerns, why is the same not true for courts? The answer cannot be that courts no longer have the power to make law. Although the New Deal inaugurated a meaningful shift in authority from courts to agencies, Congress continues to enact statutes that are administered by courts. Now, as ever, interpretation and implementation of those statutes is not wholly apolitical

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NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920, at 253 (1982) (discussing how distrust of courts as “archenem[ies] of the forces of populism” drove the decision to create the Interstate Commerce Commission to regulate railroads); David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 406 (2002) (“[L]egal realists saw agencies as the antidote to courts run amok.”); Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 233 (1999) (“In the first part of this century, we went through a period of struggle between the political parts of our government and the courts, in which the courts substantially resisted political changes influencing legislation . . . . This led to the development of alternative institutions for deciding some legal questions, to the creation of a considerable bureaucracy for administration.”).

105. *Report of the Special Committee on Administrative Law*, 59 A.B.A. REP. 539, 549 (1934).

106. *See supra* notes 63–66 and accompanying text.

and mechanical. Like agencies, courts make policy choices. They make law.

## B. DELEGATIONS TO COURTS

Just as judges did not “discover” the common law, they do not “discover” the answers to difficult questions of statutory interpretation. One need not subscribe to an extreme version of legal realism to recognize that judges make policy when they interpret vague, ambiguous, or gap-filled statutes, just as agencies do. “[L]egislation is the process of competition among policy interests.”<sup>107</sup> When Congress enacts a statute, it inevitably resolves some policy disputes and leaves others open.<sup>108</sup> All legislation leaves some residuum of policymaking power to the institution—court or agency—charged with administering it.<sup>109</sup>

Indeed, that insight was at the heart of the Court’s landmark decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>110</sup> *Chevron* established a presumption that ambiguity in an agency-administered statute disclosed a congressional desire to delegate interpretive authority to the agency.<sup>111</sup> Under *Chevron*’s famous two-step rule, the reviewing court must first ask “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . .”<sup>112</sup> If, however, “the statute is silent or ambiguous with respect to the specific issue,” the court must defer to the agency’s answer to the question so long as it is reasonable.<sup>113</sup> Critical to the Court’s decision was its recognition that an agency’s resolution of statutory ambiguity inevitably will involve an exercise of discretion.<sup>114</sup> The Court

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107. Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 280–81 (1988).

108. Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2228 (1997) (“[T]he legislative process always leaves some policy disputes unresolved . . .”).

109. See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 241.

110. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

111. See *id.* at 843–44.

112. *Id.* at 842.

113. *Id.* at 843.

114. See Merrill & Hickman, *supra* note 73, at 880–81 (“The central insight of *Chevron* is that any question of statutory interpretation where the answer is not compelled by traditional tools of interpretation entails the exercise of discretionary policy.”); Pierce, *supra* note 108, at 2228 (“The [*Chevron*] Court recognized that any time Congress enacts a statute that does not resolve an interpretive question that arises in the process of administering the statute, Congress has created the need for some other institution to resolve a policy dispute.”); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2087 (1990) (“*Chevron* reflects . . . a distinctive theory of interpretation. In the last generation it has frequently been suggested that the process of interpretation is

explained that “[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left . . . by Congress.”<sup>115</sup> When Congress’s intent is not clear, the agency has no choice but to make “policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute . . . .”<sup>116</sup>

Although *Chevron* was concerned with statutory implementation by administrative agencies, there is no good reason to think that courts are not cast into the same policymaking role when Congress chooses them as its delegates. Consider, for example, the Sherman Act, which broadly prohibits “[e]very contract, combination, . . . or conspiracy[] in restraint of trade,” leaving it to courts to work out the details.<sup>117</sup> That interpretive process necessarily requires an exercise of policymaking discretion.<sup>118</sup> And that appears to be precisely what Congress intended. As the Court has acknowledged, “the legislative history [of the Sherman Act] makes it perfectly clear that [Congress] expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.”<sup>119</sup>

The Sherman Act is a clear-cut and self-conscious delegation of lawmaking power to courts. But, as the Court recognized in *Chevron*, not all delegations are so explicit.<sup>120</sup> Under *Chevron*, courts treat ambiguity in an agency-administered statute as implicit evidence of Congress’s intention to delegate lawmaking authority to the agency.<sup>121</sup> That rule takes a great many statutes out of courts’ hands, but leaves all the statutes that are not administered by any agency, or by several.<sup>122</sup> Predictably, such statutes are

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often not merely a mechanical reconstruction of legislative desires. Instead that process sometimes calls for an inquiry into questions of both policy and principle.”)

115. *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

116. *Id.* at 865. If the reasoning of *Chevron* sounds familiar, it should. The notion that statutory interpretation inevitably requires policy judgment was a key prong of the realist critique of legal formalism. For that reason, Cass Sunstein has equated *Chevron* with *Erie*—“as a suggestion that law and interpretation often involve no ‘brooding omnipresence in the sky’ but instead discretionary judgments to be made by appropriate institutions.” Sunstein, *supra* note 103, at 206 (quoting *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)).

117. 15 U.S.C. § 1 (2000).

118. *See* *United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 553 (1944) (“Language more comprehensive [than that used in the Act] is difficult to conceive [of].”); *Spence & Cross*, *supra* note 29, at 139 (describing the standard set out in Section 1 of the Sherman Act as “about as nonspecific as that found in any regulatory statute”).

119. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978).

120. *Chevron*, 467 U.S. at 844.

121. *Id.* at 843–44.

122. Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 3

riddled with the same gaps and imperfections as statutes entrusted to agency care, leading Judge Edwards to complain that courts are “choking on . . . ambiguous and internally inconsistent statutes.”<sup>123</sup>

Of course, one might argue that courts and agencies respond differently to statutory ambiguity. For an agency, statutory ambiguity creates a “policy space”<sup>124</sup> within which the agency may act. Once the agency determines that Congress did not dictate a particular resolution of an issue, the agency is free to come up with its own answer. The relevant decisions are made by the agency’s policymakers, not its lawyers.<sup>125</sup> Courts, the argument would go, deal differently with statutory ambiguity or silence. Rather than asking, How would I like to resolve this issue?, a court instead asks, How would Congress like to resolve this issue? In other

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(2004) (“If the statute is addressed to an agency, then the agency has discretion; if the statute is addressed to a judge, then the judge has discretion.”). For examples of other broadly worded statutes administered by courts, see Securities Act of 1934, 15 U.S.C. § 78j(b) (2000) (prohibiting the use of “any manipulative or deceptive device or contrivance” in connection with the purchase or sale of securities); Copyright Act, 17 U.S.C. § 107 (2000) (stating that “the fair use of a copyrighted work” does not constitute copyright infringement); 20 U.S.C. §§ 1400(d), 1403(a) (2000) (creating a federal right of action to enforce handicapped children’s right to “free appropriate public education”); Voting Rights Act, 42 U.S.C. § 1973(a) (2000) (prohibiting any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color”); *id.* § 1988(b) (authorizing courts to award “a reasonable attorney’s fee” to the prevailing party in civil rights cases); Title VII, *id.* § 2000e-2(a) (creating a federal cause of action to remedy “discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment because of” race, gender, religion, or national origin); Federal Employers’ Liability Act, 45 U.S.C. § 51 (2000) (creating a federal tort remedy for railroad workers injured by their employers’ “negligence”); *Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957) (interpreting § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), which grants federal courts jurisdiction over contract disputes between employers and unions, as authorizing courts to develop a substantive law regarding enforcement of collective bargaining agreements); *Kirschbaum v. Walling*, 316 U.S. 517, 523 (1942) (“[T]he Fair Labor Standards Act[, 29 U.S.C. § 201–19 (2000),] puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations.”). *See also* Krent, *supra* note 27, at 741 n.132 (describing the oral argument before the D.C. Circuit at which Judge Silberman asked whether the Freedom of Information Act, which directs the government to exempt from disclosure “investigatory records compiled for law enforcement purposes, . . . but only to the extent that the production of such records . . . would . . . constitute an unwarranted invasion of personal privacy,” 5 U.S.C. § 552b(c)(7) (2000), violates the nondelegation doctrine by ceding too much discretion to courts).

123. Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 424–25 (1983–84). *See also* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1392 (1988) (“[A]ren’t most statutes common law statutes, to the extent that they have gaps and ambiguities which Congress fully expects the judiciary to fill?”).

124. Sunstein, *supra* note 99, at 2599.

125. *See id.* *But cf. infra* Part IV.B.2 (discussing mechanisms by which Congress and the president can rein in agency discretion).

words, while agencies are free to fall back on their own policy judgment as long as it is within the range permitted by statutes, courts consider themselves bound to come up with the “best” reading of the statute—and “best” means “what Congress most likely intended.” On that view, courts are merely giving effect to Congress’s will; they are not making law themselves.

The notion that statutory interpretation by courts does not require resort to the sort of policymaking discretion that agencies enjoy has overtones of legal formalism, under which judges “found” the law rather than creating it. As such, it is subject to many of the same critiques.<sup>126</sup> In many cases, whatever evidence of congressional intent judges are able to discern will permit several different interpretations, leaving the judges to decide the case by their own best lights.<sup>127</sup> In others, there will be no evidence at all because Congress did not consider the issue, perhaps intentionally avoiding it. Just as the formal model of judicial decisionmaking failed accurately to describe what judges did or could do, so too does any model in which judges grappling with ambiguous statutes impose only Congress’s will and never their own. Rather, as Judge Edwards acknowledged, ambiguity in court-administered statutes often gives judges “no choice but frankly to exercise [their] discretion and interpret a contested provision as [they] see fit.”<sup>128</sup>

Moreover, sometimes the only thing one can know for certain about Congress’s intent is that Congress wanted the courts to work out the relevant details. The Sherman Act is an easy and obvious example,<sup>129</sup> but

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126. In an empirical study of courts’ application of the *Chevron* doctrine, Thomas Miles and Cass Sunstein found that judges’ and Justices’ “political convictions” exerted a “strong influence” on their analysis of agencies’ interpretations of statutory law. Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826 (2006). To the extent that is so, it strains reason to suggest that judges will be blind to political and policy concerns when interpreting statutes over which they have been delegated primary authority.

127. See Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1420 (1987) (The will of the national legislature is too often expressed in “commands that are unclear, imprecise, or gap-ridden; in too many cases, . . . [t]he effort to determine congressional intent . . . might better be entrusted to a detective than to a judge.” (quoting *Harrison v. PPG Indus.*, 446 U.S. 578, 595 (1980) (Rehnquist, J., dissenting))).

128. Edwards, *supra* note 123, at 425.

129. See *supra* note 119 and accompanying text. The Copyright Act is a similar example. The legislative history of the Copyright Act makes it clear that Congress consciously left some issues—most notably the question of “fair use,” see 17 U.S.C. § 107 (2000), to the courts. See WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 261–365 (2d ed. 1995) (describing the legislative history of the “fair use” privilege under the Copyright Act). Cf. Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can’t and Legislators Who Won’t*, 63 COLUM. L. REV. 787, 793 (1963) (“Anyone who has had to deal with the Copyright Act of 1909 must stand in awe at the ability of the framers to toss off a sentence that can have any number of meanings.”).

the same likely would be true of any statute that created plausible nondelegation concerns. The whole point of the nondelegation doctrine is to set limits on Congress's ability *voluntarily* to cede lawmaking authority to other actors. Accordingly, the cases in which one might worry about excessive delegations are precisely those where Congress *wanted* someone else to decide how to deal with some thorny issue. In such cases, courts can hardly avoid policymaking by falling back on congressional intent.

The Court's recent decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*<sup>130</sup> illustrates the inevitable role that policy discretion plays in judicial decisionmaking when Congress chooses courts as its delegates. *Leegin* overruled a nearly century-old antitrust precedent that had established a *per se* rule prohibiting manufacturers and retailers from entering into vertical agreements to fix a minimum resale price for products.<sup>131</sup> Writing for a five-Justice majority, Justice Kennedy described the *per se* rule as "inefficient"<sup>132</sup> and explained that "respected economic analysts" had concluded that vertical price restraints can have pro-competitive effects.<sup>133</sup> Justice Kennedy's opinion reads less like the work of a judge than the work of an economist. The Court's focus was quite obviously not on the text of the Sherman Act—Justice Kennedy was quick to note that "the Court has never 'taken a literal approach to [the Act's] language'"<sup>134</sup>—but on the real-world consequences of the conduct in question.<sup>135</sup> As Justice Breyer argued in dissent, however, the economic arguments on which the majority relied had been "well known in the antitrust literature for close to half a century."<sup>136</sup> The Court's decision was prompted not by changed circumstances, but by changed views of economic policy.<sup>137</sup> What was *new* was the fact that a majority of Justices had been persuaded that the benefits of vertical price restraints could, in some circumstances, outweigh the costs.<sup>138</sup> It should come as no surprise,

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130. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

131. *Id.* at 2725.

132. *Id.* at 2724.

133. *Id.* at 2710.

134. *Id.* at 2712 (quoting *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006)).

135. *See, e.g., id.* at 2715 (noting that "[m]inimum resale price maintenance can stimulate interbrand competition . . . by reducing intrabrand competition"); *id.* at 2715–16 (explaining that minimum price agreements can help prevent free-riding); *id.* at 2716 (emphasizing that resale price maintenance can facilitate new entry and that "[n]ew products and new brands are essential to a dynamic economy").

136. *Id.* at 2725–26 (Breyer, J., dissenting).

137. *See id.* at 2731 ("I can find no change in circumstances in the past several decades that helps the majority's position.").

138. Indeed, *all* the Justices may well have agreed on the relevant economic theory. *See id.* at 2728–29 (acknowledging arguments in favor of vertical price controls). What divided the Justices was

then, when Judge Easterbrook describes “what judges have done” with antitrust as “little different from what the [Federal Trade Commission] does as one political party or another acquires control of that agency and endows it with a different economic perspective.”<sup>139</sup>

Although antitrust may present the most extreme case, the policy-driven nature of statutory interpretation can be seen in countless other areas of the law. Consider, for example, the Court’s controversial decisions to exempt the providers of video recording devices from contributory liability for copyright infringement,<sup>140</sup> to deny relief under the securities laws to potential investors who are misled into *not* purchasing shares,<sup>141</sup> and to allow voluntary affirmative action programs under Title VII;<sup>142</sup> or (for an esoteric turn) its recent and unsuccessful effort to prescribe an interest rate formula for use in connection with the Bankruptcy Code’s “cramdown”

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not the economic theory itself, but the question whether such theory justified overruling longstanding precedent.

139. Easterbrook, *supra* note 122, at 6.

140. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). *See id.* at 431 (acknowledging that “Congress ha[d] not plainly marked [the Court’s] course” in the Copyright Act); *id.* at 442–56 (emphasizing functional considerations such as the likelihood that substantial numbers of copyright holders would not object to having their works recorded by private viewers, and that time-shifting is unlikely to cause substantial harm to the relevant markets). As William Eskridge has documented, “dozens of bills were introduced [in Congress] in anticipation of and in response to [Sony], . . . but the motion picture industry and other groups were able to head off override bills.” William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 366 n.102 (1991).

141. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). *See id.* at 737 (describing the body of law governing private actions under Section 10(b) of the Securities and Exchange Act, 15 U.S.C. § 78j(b), and Securities and Exchange Commission (“SEC”) Rule 10b-5 as “a judicial oak which has grown from little more than a legislative acorn”); *id.* (acknowledging the impossibility of “divin[ing] . . . the express ‘intent of Congress’ as to the contours of a private cause of action under [SEC] Rule 10b-5” and explaining that “[i]t is therefore proper that we consider . . . what may be described as policy considerations”); *id.* at 739 (noting policy arguments against the rule in question, but stating that “we are of the opinion that there are countervailing advantages to the . . . rule, purely as a matter of policy”).

142. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979). *Cf.* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 250–51 (1994) (discussing Congress’s response to several other controversial Title VII decisions). Title VII prohibits “discriminat[ion]” on the basis of race, but is silent on the question of affirmative action. *See* 42 U.S.C. § 2000e-2 (2000); Krent, *supra* note 27, at 729. Justice Rehnquist argued in his dissent in *Weber* that the Court’s decision was inconsistent with the intent of the enacting Congress. *Weber*, 443 U.S. at 226–30 (Rehnquist, J., dissenting). *See also id.* at 213 (Blackmun, J., concurring) (conceding Rehnquist’s point). Most commentators agree that Justice Rehnquist was correct about legislative intent. *See, e.g.*, Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 303 (1989); Bernard D. Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 445 (1980). Others contend that Congress simply never focused on the issue of affirmative action. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1490–91 (1987); Burt Neuborne, *Observations on Weber*, 54 N.Y.U. L. REV. 546, 553–54 (1979).

provision.<sup>143</sup> In each of those cases, involving vastly different legal issues, the Justices were not giving effect to Congress's intent so much as forging their own path, guided as best they could be by their understanding of the relevant evidence and the likely consequences of their decisions. The Court was acting, in other words, very much like an agency.

The claim here need not be a strong one about the spot where courts (or agencies, for that matter) stop enforcing the will expressed by Congress and start making their own choices about what the law should be.<sup>144</sup> It is sufficient for present purposes that *some* degree of policymaking inheres in statutory interpretation by courts, just as it does when Congress delegates interpretive authority to agencies.<sup>145</sup> Most observers agree that *some* policymaking outside of Congress is both inevitable and unproblematic.<sup>146</sup> Yet, many also believe that the Constitution imposes limits on Congress's ability to delegate away its power to make important policy decisions—at least when the recipient is an agency. If that is correct, it begs the question whether the same limitations apply when Congress chooses to delegate to courts.

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143. *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). *See id.* at 473–74 (explaining that the Bankruptcy Code “provides little guidance” on the question). The Justices in *Till* could not agree on which of the four possible interest rate formulas made the most sense in practice and in light of the goals of the Bankruptcy Code; accordingly, the Court split 4-1-4, with no majority opinion. *Id.* at 480, 491, 492.

144. Nor is the claim that “what courts, the archetypal interpreters, do when they construe a law is really no different than what legislatures, the archetypal lawmakers, do when they create a law . . . .” Farina, *supra* note 58, at 477. The argument, rather, is that to the extent one believes that agencies enjoy some measure of lawmaking discretion when they implement broad statutory schemes, it becomes difficult to insist that matters are meaningfully different when Congress delegates to courts instead. That is not to say that courts *always* make law (rather than interpret it) in statutory cases. The point is merely that courts, like agencies, *sometimes* do make law. Plainly, the ratio of lawmaking to law interpretation increases with the breadth and ambiguity of the statutory scheme in question.

145. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (“[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.” (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 190 (1992) (acknowledging that, “under almost any theory of statutory interpretation,” interpretation and lawmaking “overlap”); Sunstein, *supra* note 63, at 330 (“[W]hen statutory terms are ambiguous, there is no escaping delegation. . . . The recipient of the delegation will be either agencies or courts.”).

146. *See, e.g., Kramer, supra* note 86, at 269 (arguing that “courts must make a certain amount of common law simply because there is no clear line between ‘making’ and ‘applying’ law,” and that “[t]he power to clarify legislation through interstitial lawmaking is . . . an implicit but important part of the judicial function”); Krent, *supra* note 27, at 742 (“Given the inevitable rule-making of courts hearing cases and controversies, agencies resolving disputes, and the President enforcing the laws, . . . some rule-making of private conduct outside Congress seems unavoidable.”).

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#### IV. DELEGATIONS TO COURTS AND NONDELEGATION PRINCIPLE AND PRACTICE

Nondelegation law and literature focus overwhelmingly on administrative agencies; no effort has been made to consider the constitutionality or wisdom of delegations to courts. As the previous Part demonstrated, however, courts cannot be ignored. Congress delegates to courts both implicitly and explicitly, just as it does to agencies. And, although delegations to agencies are far more common today, advocates of robust enforcement of the nondelegation doctrine against agencies would do well to consider the likely consequences. If Congress were barred from delegating to agencies, would it suddenly start drafting highly specified statutes? Or, more likely, would it return to the practice common before the rise of the administrative state, enacting vaguely worded statutes and leaving the details to courts?<sup>147</sup>

What, then, is the constitutional status of delegations to courts? If the Constitution restricts the permissible scope of delegations to agencies, are delegations to courts subject to the same constraints? If so, can our current practice with respect to the nondelegation doctrine simply be extended to judicially administered statutes?

##### A. THE CONSTITUTIONAL CONSTRAINTS ON DELEGATIONS TO COURTS

The nondelegation doctrine holds that Congress violates the constitutional separation of powers when it delegates excessive authority to agencies. By vesting the “legislative” power in Congress, Article I of the Constitution restricts Congress’s ability to cede such power to the other branches. Congress is free to transfer some lawmaking power to agencies, just not too much; the delegated power is not “legislative” as long as it is cabined appropriately.<sup>148</sup> Only if Congress empowers an agency to make

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147. See Spence & Cross, *supra* note 29, at 138 (arguing that a Congress barred from delegating to agencies would be more likely to rely on courts to specify broadly worded statutes than it would be to enact highly specified statutes itself).

148. See *supra* notes 55–61 and accompanying text. Eric Posner and Adrian Vermeule argue that the nondelegation doctrine is simply wrong to hold that Congress can violate the separation of powers by delegating too much lawmaking discretion to a coordinate branch. See generally Posner & Vermeule, *supra* note 4. Posner and Vermeule maintain that Congress impermissibly delegates away its “legislative” power only if it or any of its members delegates to someone else “the authority to vote on federal statutes or to exercise other *de jure* powers of federal legislators.” *Id.* at 1723. Although Posner and Vermeule are not clear on this point, their argument may turn not only on their understanding of the “legislative” power, but also the “executive” power. For example, they defend their view that the president does not exercise legislative power when enacting rules pursuant to a delegation from Congress on the ground that “the authority that the president exercises . . . is executive authority in the

law without supplying an “intelligible principle” has Congress crossed the constitutional line by giving away the nondelegable core of legislative power.<sup>149</sup> That rule leaves substantial room for agency discretion, but it requires Congress to make the foundational decisions about statutory policy. As such, it serves the core goal of the nondelegation doctrine—to preserve democratic responsibility and accountability by ensuring that critical decisions are made by the people’s representatives in Congress.

Although typically associated with delegations to agencies, the constitutional principles on which the nondelegation doctrine is based apply with full force to delegations to courts. The focus of the intelligible principle requirement is not on the characteristics of Congress’s chosen delegate, but on Congress itself and the choices it must make.<sup>150</sup> In other words, application of the nondelegation doctrine does not turn on the limitations of the “executive” power, but rather on the infeasible aspects of the “legislative” power. Accordingly, it should make no difference for purposes of the intelligible principle requirement whether Congress delegates to a court or an agency.<sup>151</sup> Either way, the operative question has

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core sense. The president is simply executing the statute according to its terms, and in obedience to the constitutional obligation to “take Care that the laws be faithfully executed.” *Id.* at 1725 (internal citation omitted). If that reading is correct, then it suggests that there may be limits on Congress’s ability to delegate lawmaking responsibilities to courts even if no such limits apply to delegations to executive agencies.

149. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Commentators disagree on exactly where to draw the constitutional line. David Schoenbrod, for example, has argued that the intelligible principle requirement is inadequate, and that Congress should be required to enact “rules” statutes rather than “goals” statutes, SCHOENBROD, *supra* note 27, at 181–85, and Martin Redish has argued that statutes must contain a “recognizable normative commitment.” REDISH, *supra* note 8, at 154–57. For purposes of this Article, it is not necessary to specify the precise limits on Congress’s ability to delegate lawmaking authority to agencies. The important point is that *there are limits*.

150. See Posner & Vermeule, *supra* note 4, at 1731 (“[I]f Congress has illicitly given away legislative power, why should it matter who the recipient is?”). Building on their recognition that what is true of delegations to agencies should also be true of delegations to courts, Posner and Vermeule argue that the Court’s failure to enforce the intelligible principle requirement against delegations to courts is “a grievous puzzle” for the conventional view. *Id.* Thus, Posner and Vermeule accept one aspect of the Court’s nondelegation doctrine as a given—its failure to account for delegations to courts—and use it to call into question the rest of what the Court has said and done. *Id.* at 1731–32. They do not explain why they rule out the possibility that the widespread inattention to delegations to courts is itself a mistake.

151. Of course, Congress might violate other aspects of the separation of powers by giving tasks to the judiciary that do not fit within the scope of the “judicial power.” Such would be the case, presumably, if Congress enacted a statute instructing the federal judiciary to promulgate legislative-type rules prohibiting racial discrimination in the workplace. Even if the statute contained an intelligible principle, it might well violate the separation of powers by requiring courts to act in the absence of a case or controversy. *Cf. Mistretta v. United States*, 488 U.S. 361, 393–94 & n.20 (1989) (rejecting a challenge to the Sentencing Commission, an independent agency housed in the judicial branch and staffed, in part, by judges, but suggesting that the question would be closer if Congress had delegated

to do with what *Congress* has given away.

But perhaps that view is too simple. Courts and agencies are hardly identical—indeed, I argue below that their differences may make delegations to courts problematic, from a practical perspective, even if delegations to agencies are not.<sup>152</sup> Perhaps, however, differences between the judicial and the executive branches are such that whatever constitutional limits govern transfers of power from Congress to the executive do not apply to delegations to the judiciary.

The most common—and easily dismissed—argument for treating delegations to courts as constitutionally permissible (even if delegations to agencies are not) is that the Court has never applied the nondelegation doctrine against itself.<sup>153</sup> That claim is not entirely accurate to begin with. *Wayman v. Southard*,<sup>154</sup> discussed *supra* Part II.B, involved a delegation to the judiciary. The Court stated unequivocally that Congress may not “delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”<sup>155</sup>

*Wayman* is not a complete answer to the question under consideration here, however, because it involved a different type of delegation. The statute at issue in *Wayman* empowered the federal courts to make what are

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the authority to enact sentencing guidelines to courts); *Morrison v. Olson*, 487 U.S. 654, 677 (1988) (noting that ““executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution”” (quoting *Buckley v. Valeo*, 424 U.S. 1, 123 (1976))); Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Interpretations*, 90 MINN. L. REV. 1303, 1324 (2006) (arguing that the Rules Enabling Act, which authorizes the Court to promulgate legislative-type rules of procedure, “is simply a blatant circumvention of the case-or-controversy requirement”).

152. See *infra* Part IV.B.

153. See, e.g., Krent, *supra* note 27, at 740–41 (“[T]here is no historical support for applying the nondelegation test to delegation to courts. There has never been any judicial determination, even during the New Deal, explicitly restricting delegation to courts . . . .”); Posner & Vermeule, *supra* note 4, at 1730–31 (“Analogous delegation problems arise under Article III, but the Supreme Court case law conspicuously lacks any suggestion that the delegation metaphor or the concomitant intelligible principle test constrains congressional delegations to the judges rather than the executive.”).

154. *Wayman v. Southard*, 23 U.S. (10 Wheat. ) 1 (1825).

155. *Id.* at 42–43. See also *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 464–65 (1957) (Frankfurter, J., dissenting) (suggesting that the Court’s interpretation of § 301 of the Labor Management Relations Act as delegating substantive lawmaking powers to the federal judiciary rendered the Act unconstitutional). It is true that the Court in *Wayman* did not strike down the statute in question, nor has it ever invalidated, on nondelegation grounds, a judicially administered statute. But given that only one statute—the National Industrial Recovery Act—has ever been declared unconstitutional as an excessive delegation, see *supra* notes 64–67 and accompanying text, the sample size seems entirely too small to support any broad claims about the constitutional status of delegations to courts.

known as legislative rules—that is, rules of prospective and general application.<sup>156</sup> The delegations discussed *supra* Part III, which call on courts to interpret vague statutory language or fill in statutory gaps in the course of case-by-case adjudication, do not operate in the same way. Part III demonstrated that such delegations cast courts into a role similar to that enjoyed by agencies. But, while agencies and courts are making equivalent policy decisions, their outputs may be different. Agencies can, and often do, make law in the form of prospective and generally applicable rules.<sup>157</sup> Such rules operate just like statutes.<sup>158</sup> They “create binding legal duties where none had existed before . . . .”<sup>159</sup> The rules established through judicial adjudications take a different form. Judicial decisions technically apply only to the parties to the case. They do not, as a formal matter, create new rules governing primary behavior; they determine what the statute in question already requires.<sup>160</sup> One might argue, therefore, that Congress cannot possibly violate the nondelegation doctrine by delegating “legislative” power to courts because, rhetoric about activist judges notwithstanding, courts cannot “legislate” as agencies can.

Although agency rulemaking and judicial adjudications are different in several important respects, those differences are immaterial from the perspective of the nondelegation doctrine. After all, agencies make law through adjudications as well as rulemaking.<sup>161</sup> If statutes that delegate to courts should be excluded from the nondelegation doctrine because of the nature of adjudication, then so too should statutes that are given effect through agency adjudication. But there is no suggestion in nondelegation law or literature that the constitutional constraints on delegations can be ignored so long as the relevant agency opts for adjudication over

156. See Herz, *supra* note 145, at 191 (describing legislative rules).

157. See Administrative Procedure Act, 5 U.S.C. § 553 (2000) (detailing the procedural requirements for formal agency rulemaking).

158. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 576 (1984) (“Validly adopted legislative rules are identical to statutes in their impact on all relevant legal actors . . .”).

159. Herz, *supra* note 145, at 200. Not all agency rules take this form. The Administrative Procedure Act defines “rule” to include norms of both general and particular applicability. § 551(4). Moreover, agency rules may be “interpretive” rather than “legislative”—that is, they may purport to describe the requirements of the relevant statute rather than create new law. See Herz, *supra* note 145, at 190–93.

160. Cf. Herz, *supra* note 145, at 190–93 (discussing the difference between legislative and interpretive rules).

161. See Pierce, *supra* note 30, at 401. Cf. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 415–16 (1999) (holding that *Chevron* deference applies to agencies’ statutory interpretations developed through case-by-case adjudication).

rulemaking.<sup>162</sup>

Not only is a distinction between rulemaking and adjudication inconsistent with existing nondelegation law, it also ignores the principles underlying the nondelegation doctrine. What matters is which institution is empowered to make important policy decisions with important consequences for citizens' lives, not the precise form in which those decisions are made. Both rulemaking and adjudication generate law in some sense, law that otherwise could be made by Congress.<sup>163</sup> Although a judicial decision may technically apply only to the parties to the case, the fact remains that unless and until the relevant court changes the relevant rule, that rule stands. It may not bind nonparties as a formal matter, but as a practical matter anyone within the court's jurisdiction will have to adjust his or her behavior to comply with the law as interpreted, or face the consequences.<sup>164</sup> When the relevant court is the Supreme Court, the real-

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162. See Stack, *supra* note 77, at 1000–01. Although I am not aware of any argument in the nondelegation literature that statutes administered through agency adjudication should be exempt from the nondelegation doctrine, several commentators have argued that agency rules adopted through litigation should receive less deference. These commentators have criticized agencies' resort to adjudications rather than rulemaking precisely because the former *do* create law, albeit via procedures less suited to law development than notice-and-comment rulemaking. See, e.g., RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 286–87 (4th ed. 2004) (arguing that adjudication is an inefficient way to develop broad rules and that the rules that emerge frequently are unclear); Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 254–55 (1986) (describing how rulemaking is better suited than adjudication to produce rational policies); Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 757 (1961) (criticizing adjudication as a mechanism for policy development); discussion *infra* note 225. That critique is particularly common with respect to the National Labor Relations Board, which proceeds exclusively through adjudication. See, e.g., Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 578 (1970); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 173 (1985).

163. See, e.g., Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387, 408–11 (noting that legal actors routinely “speak of cases as embodying rules of law,” and that the *Erie* doctrine rests on the view that judicial decisions can create “law”); Schauer, *supra* note 85, at 886–87 (“It is . . . no longer especially controversial to insist that common law judges make law. . . . So too when the venue for lawmaking is . . . the judicial construction of doctrine against the background of a largely indeterminate authorizing statute.”). Cf. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 44, 69 (1993) (arguing that judicial opinions “are simply legal essays that provide information useful in predicting what judgments courts will enter in future controversies,” but acknowledging that opinions nevertheless stand as a form of “law”).

164. It is true that an individual who defies an interpretation reflected in a judicial decision in a case to which that individual is not a party will be free in any subsequent action to argue that the interpretation is incorrect or should be abandoned for policy reasons. See Merrill, *supra* note 163, at 66. The fact that litigants can argue for changes or exceptions to judge-made law, however, does not categorically exclude such law from the concerns of the nondelegation doctrine—though perhaps it provides a reason to think differently about delegations to courts.

world consequences of a judicial decision are essentially indistinguishable from the effects of an agency rule.<sup>165</sup>

But if judges inevitably make some law in the course of deciding cases, perhaps that itself is reason to distinguish between courts and agencies for purposes of the nondelegation doctrine. For example, given the Framers' experience with the common law tradition, it may be tempting to suggest that the phrase "the judicial power" in Article III necessarily connotes a lawmaking function. Yet those who have studied the issue have denied that anything useful can be gleaned about the founding generation's understanding of "the judicial power." The problem is in part a paucity of relevant evidence<sup>166</sup> and in part changed understandings. Recall that, at the time the Constitution was adopted, the prevailing understanding of common law judging was that common law principles were out there, waiting to be "discovered" and applied by judges.<sup>167</sup> Accordingly, even if it were clear that the Framers believed that the judicial power included the power to render decisions in the common law tradition, there would still be reason to doubt that their understanding of the judicial power included the capacity to *make law* in the creative, policy-driven way that we understand that term today.<sup>168</sup>

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165. See Eskridge, *supra* note 123, at 1367 ("Once a statute is authoritatively interpreted by the Supreme Court, . . . private parties will arrange their conduct to take account of the Court's interpretation—that is what makes the Court's interpretation effectively 'legislative.'"). That is so, most obviously, when the Court announces bright-line rules, such as rules that make certain conduct per se illegal under the antitrust laws. See, e.g., *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (invalidating horizontal agreements among competitors to fix prices); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990) (per curiam) (invalidating horizontal agreements to divide markets). But "whether what a court offers is a rule or a standard, the court's announcement still serves as the presumptively governing norm for future cases." Schauer, *supra* note 85, at 888–89. Cf. Strauss, *supra* note 104, at 234–35 (distinguishing our legal system from that in civil law countries on the ground that American judges' interpretations of statutes stand as law until overruled or overridden by new legislation); *id.* at 244 ("Once interpretations acquire the force of precedent, the statute changes with the act of interpretation. It can be revised only by a fresh legislative act, which is not easy to come by, or by a judicial overruling . . .").

166. See Posner & Vermeule, *supra* note 4, at 1733–34 (discussing the absence of helpful evidence of original intent with respect to delegations in the Federalist and ratifications debates); Kramer, *supra* note 86, at 275 ("[T]he claim that federal courts have no independent lawmaking authority cannot be settled by reference to the text of the Constitution—not because texts are always indeterminate or anything quite so post-modern, but because on this particular question the Constitution really is ambiguous.").

167. See *supra* notes 85–87 and accompanying text.

168. See Kramer, *supra* note 86, at 281–84 (arguing that differences between the common law of today, and how we understand it, and the common law of 1789, "shift[] our understanding in a way that renders questions of original intent unhelpful"). Cf. Merrill, *supra* note 8, at 13 n.53 (acknowledging the possibility that "[t]he framers may have understood the 'judicial power' to include the power, to be exercised concurrently with the state courts, to explicate rules of decision in the common law tradition," but concluding that any suggestion that federal courts had power to make federal common law binding

A more promising argument is that, given that courts inevitably make law in the course of adjudication, such lawmaking must be a judicial—and not strictly legislative—function. Martin Redish has defended delegations to courts in those terms.<sup>169</sup> He begins with the premise that some measure of lawmaking is a necessary incident of courts' obligation to decide the cases before them:

*Some* rule of decision must be ascertained in order that the court may choose between the parties to the dispute . . . .

. . . [W]hen the legislature has not spoken to the specific issue raised by an individualized dispute, if only as a matter of necessity a court must be able to fashion substantive common law rules to fill the gaps left by the statutes. If no other governing body of substantive law is applicable, a court cannot resolve the dispute without fashioning its own substantive rules.<sup>170</sup>

For Redish, when courts devise substantive rules of decision in order to resolve cases or controversies, they are simply exercising the “judicial power.”<sup>171</sup> Thus, he argues, when Congress passes a broad statute and leaves it to courts to fill in the blanks, “Congress has not delegated ‘legislative’ power to the judiciary; it has merely authorized the federal courts to create law incident to performance of [their] adjudicatory function in specified contexts.”<sup>172</sup>

Redish has made the only serious effort of which I am aware to distinguish, constitutionally, between delegations to courts and delegations to agencies. As such, his argument warrants careful consideration. Ultimately, however, Redish puts the cart before the horse. It may be true that courts must make substantive policy choices in order to decide the cases before them, and, therefore, that some measure of policymaking is part of the judicial function. It does not follow that delegations from Congress to the courts are necessarily and always constitutional. Consider

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on the states “would be inconsistent with the framers’ commitment to separation of powers and the delegation of the federal lawmaking function to Congress”).

169. REDISH, *supra* note 8, at 140–41.

170. *Id.* at 140.

171. *Id.* at 140–41. Martha Field has hinted at a similar argument. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 937–38 (1986) (“As long as Congress does not ask courts to do things that are ‘not judicial,’ which is clearly not the case with making common law generally, the objection to . . . explicit delegation is difficult to accept.”). Cf. Frank E. Horack, Jr., *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247, 250–51 (1947) (contending that judicial interpretations of ambiguous statutes constitute a form of “legislative” activity, but one that may be justified as an “inescapable product of the judicial process”).

172. REDISH, *supra* note 8, at 141.

the case of antitrust, discussed above.<sup>173</sup> A federal judge does not simply wake up one morning confronted, as if by magic, with an antitrust case. If such a case is on the docket, it is because the parties are of diverse citizenship and the claim is based on state law, or because Congress has enacted a statute creating a federal cause of action for individuals harmed by anticompetitive conduct. The first possibility is irrelevant for our purposes because the judge would have no occasion to create gap-filling federal law. The second possibility is, of course, the reality. As explained in Part III, *supra*, the Sherman Act prohibits all contracts or combinations “in restraint of trade”<sup>174</sup> and permits suit by any person “injured in his business or property by reason of anything forbidden in the antitrust laws . . . .”<sup>175</sup> Assuming that the complaint states a cause of action under the Sherman Act, our judge will be compelled to hear the case and may be required to supply some meaning to the vague phrase “restraint of trade.” But, to repeat, that is only because Congress enacted the Sherman Act. In the absence of the statute, there would be no case, and no need for gap-filling. It is hopelessly circular to argue that Congress must be able to enact statutes like the Sherman Act, delegating broad lawmaking authority to courts, because *if* Congress does all that, *then* courts will have no choice but to make law. Redish effectively assumes his conclusion by presupposing that courts are called upon to enforce the very statutes whose constitutionality is in question.

An additional problem with Redish’s argument is that it mistakes a question of degree for a question of kind. Redish surely is correct that some measure of gap-filling authority inheres in the judicial function. But most would argue that the same is true of the *executive* function.<sup>176</sup> The operative question for purposes of the nondelegation doctrine is not whether, but *how much* lawmaking can occur outside of Congress. Recognition that some lawmaking by courts is permissible and inevitable does not mean that there is not a constitutional line past which enough becomes too much.

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173. See *supra* notes 117–20, 130–40 and accompanying text.

174. Sherman Act, 15 U.S.C. § 1 (2000).

175. *Id.* § 15(a).

176. See, e.g., Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS. 46, 47 (1976) (acknowledging that both the executive and the judiciary “have legitimate policy-making functions”); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994) (“A governmental function is not legislative . . . merely because it involves some element of policymaking discretion: it has long been understood that some such exercises of discretion can fall within the definition of the executive power.”).

In sum, there is no persuasive basis on which to exempt delegations to courts from the constitutional restrictions that apply to delegations to agencies. Although courts do not enact legislative rules, they do make federal law—just as agencies do. And while a substantial amount of judge-made law can fit comfortably within the “judicial power,” that does not distinguish courts from agencies. The nondelegation doctrine permits Congress to delegate significant lawmaking authority to agencies. Yet the doctrine also holds that there are limits to how much authority Congress can cede to agencies without running afoul of the constitutional structure of separated powers. If that is correct, there also must be limits on the permissible scope of delegations to courts.

#### B. NONENFORCEMENT OF THE NONDELEGATION DOCTRINE

The discussion thus far has sought to show that the principles underlying the nondelegation doctrine apply to the work of agencies and courts alike. In theory, then, delegations to courts should be treated as equivalent to delegations to agencies. In practice, however, delegations to agencies are not limited in any meaningful way. Although Congress continues to rely heavily on the assistance of administrative agencies, the Court has not invalidated a federal statute on nondelegation grounds in more than seventy years. To the extent that it has enforced the nondelegation doctrine at all, the modern Court has relied on statutory construction rather than constitutional invalidation. This and the following Section consider how nondelegation *practice*—as distinguished from principle—might be applied to delegations to courts.

Perhaps the most striking aspect of nondelegation practice today is the Court’s refusal to enforce the nondelegation doctrine directly against delegations to administrative agencies. The tradition of nonenforcement often is explained on the ground of judicial (in)competence. The line between permissible gap-filling and impermissible legislation is seldom clear, and courts rarely have “felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”<sup>177</sup> It is open to question whether the line-drawing problems posed by the nondelegation doctrine are significantly more pronounced than those problems courts encounter in countless other areas of the law.<sup>178</sup> Nevertheless, in this context as in

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

178. See Gewirtz, *supra* note 176, at 62 (acknowledging that “the line between fundamental policy-making (which is for Congress), and minor or interstitial policy-making (which may be left to

others, the fuzziness of the constitutional line calls into question courts' ability to enforce the relevant limits in a politically neutral manner.<sup>179</sup> Given that the nondelegation doctrine is based in large part on concerns about democratic accountability, and given that courts are "the least politically accountable branch of government," judicial enforcement of the nondelegation doctrine against broad delegations to agencies may be worse than the problem it is trying to solve.<sup>180</sup>

Although concerns about the difficulties of judicial administration would seem to apply with equal force to delegations to courts as to agencies, the conclusion that the costs of enforcement outweigh the potential benefits does not. First, and most obviously, strict enforcement of the nondelegation doctrine in the administrative context would be extremely costly given the vast amount of work that currently is being done by agencies.<sup>181</sup> Simply put, we have traveled too far down the road toward government-by-agency to turn back now. The situation is not so stark with respect to delegations to courts. To be sure, courts enjoy a great deal of discretion in interpreting and implementing a great number of statutes. But the sorts of broad and open-ended delegations that might trigger application of the nondelegation doctrine are relatively rare in the judicial context, far more rare than equivalent delegations to agencies.<sup>182</sup> Thus, even if one believes that enforcement of the nondelegation doctrine in the administrative context would lead to disastrous consequences, that concern does not justify a hands-off attitude toward judicially administered statutes.

Second, the potential benefits of enforcement look very different for courts and for agencies. A growing body of commentary argues that broad delegations to agencies are not just something to be tolerated, but something to be desired. Pro-delegation commentators offer functional arguments in defense of agency lawmaking, focusing on institutional characteristics of agencies that make them valuable partners in the lawmaking enterprise—and in some respects better lawmakers than Congress.<sup>183</sup> For them, the Court's refusal to enforce the nondelegation doctrine directly in the administrative context is not a necessary evil but a

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the executive and agencies) is a somewhat blurry and subjective one," but questioning whether it is "significantly more so than the lines that courts often draw and work around").

179. See *Pierce*, *supra* note 30, at 394.

180. *Id.* at 394–95.

181. See *id.* at 404; Spence & Cross, *supra* note 29, at 135–36.

182. See Easterbrook, *supra* note 122, at 7.

183. See, e.g., JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 148–56 (1997); Mashaw, *supra* note 62, at 82; Spence & Cross, *supra* note 29, at 101–02; Spence, *supra* note 104, at 398; sources cited *infra* note 185.

positive good.

Though there may be good reasons to permit—even value—delegations to agencies, those reasons do not extend to delegations to courts. Delegations to courts cannot be defended on the same functional grounds as delegations to agencies for the simple reason that courts are different from agencies in ways that are critical to the nondelegation debate. Indeed, the Supreme Court has acknowledged as much. The Court’s decision in *Chevron*, establishing a rule of judicial deference to agency decisionmaking, rested on a self-conscious recognition that key differences between agencies and courts make the former the more appropriate institution to exercise the policymaking discretion inherent in the administration of most modern statutes.<sup>184</sup> In the years since *Chevron* was decided, commentators have fleshed out the Court’s analysis, supplying additional reasons to minimize the role of courts vis-à-vis agencies when it comes to resolving statutory ambiguity.<sup>185</sup> Those reasons—including agency expertise, accountability, accessibility, and flexibility—do not support delegated lawmaking by courts. If anything, they suggest that delegations to courts should be especially disfavored. If broad delegations to courts are to be tolerated, it must be on grounds other than those typically used to defend the work of agencies.

### 1. Expertise

One of the most common defenses of delegation to agencies is that agencies possess technical expertise that Congress lacks.<sup>186</sup> Agencies can be staffed by experts in the field and, over time, they accumulate substantial experience with the issues devoted to their care. The same is not true of courts, at least not in any across-the-board way. Judges are generalists, not experts.<sup>187</sup> They may develop unique insights into

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184. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

185. See, e.g., Easterbrook, *supra* note 122, at 7–9; Kmiec, *supra* note 107, at 281–82; Merrill & Hickman, *supra* note 73, at 861–62; Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1251 (1989); Sunstein, *supra* note 99, at 2587–88. Cf. Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 126–43 (2005) (using similar functional arguments as reasons why agencies and not courts should have responsibility for determining whether to imply private rights of action from ambiguous statutory language).

186. See, e.g., Spence & Cross, *supra* note 29, at 109 (“[B]ecause elected politicians are generalists within the field of policymaking, they are in turn less informed/more ignorant than administrative agencies about policy matters within the agencies’ jurisdiction. Not only do agency bureaucrats have more time to devote to specific policy matters, they often bring more specialized expertise to the problem as well.”).

187. See *Chevron*, 467 U.S. at 865 (“Judges are not experts in the field . . .”); Sunstein, *supra*

particular areas that they encounter frequently,<sup>188</sup> but they lack the ability to focus single-mindedly on a particular field (or subfield) in the same way that agencies do.<sup>189</sup>

The nature of the litigation process also may restrict the ability of courts, as compared to Congress and agencies, to understand and respond to complex issues. Courts encounter issues one case at a time, which may make it hard for them to see the big picture.<sup>190</sup> Moreover, because their authority is limited to the resolution of concrete cases and controversies, courts typically will not be able to deal with the multiple and potentially cross-cutting aspects of an issue at once.<sup>191</sup> Instead, they will approach the issue piece by piece, with little to no control over the order in which the questions are presented to them.<sup>192</sup> But the order can matter a great deal, as has been demonstrated by the extensive public choice literature regarding decisionmaking by multimember bodies.<sup>193</sup>

Courts' consideration of the issues they face also may be shaped in important ways by the contexts in which they arise.<sup>194</sup> "[T]he combination

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note 99, at 2583 ("For the resolution of ambiguities in statutory law, technical expertise . . . [is] highly relevant, and . . . the executive has significant advantages over courts.").

188. See *infra* note 320 and accompanying text.

189. See Spence & Cross, *supra* note 29, at 140 ("Judges do not possess the technical expertise that justify agency delegations, and courts are the poorest of all government institutions when it comes to independent information-gathering capabilities.").

190. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 147-48 (1993) ("[T]he focus on the litigated case makes it hard for judges to understand the complex, often unpredictable effects of legal intervention. Knowledge of these effects is crucial but sometimes inaccessible."); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1126 (1987) (comparing the "sporadic and case-specific character of judicial encounters with issues of statutory meaning" with "an agency's continuing responsibilities and policy-implementing perspectives").

191. See Merrill & Hickman, *supra* note 73, at 861 ("[F]ederal statutory programs have become so complex that it is beyond the capacity of most federal judges to understand the full ramifications of the narrowly framed interpretational questions that come before them."); Sunstein, *supra* note 114, at 2088 ("Often the regulatory process is confounded by the difficulty of coordinating numerous statutes with one another. . . . If the problems are treated separately, they will not be treated well.").

192. See Easterbrook, *supra* note 122, at 12 (noting that judicial decisionmaking may be skewed because courts often have to address issues one at a time and typically cannot control the order in which they consider issues).

193. See Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1258-71 (1994) (discussing public choice literature on the problem of cycling and linking that literature to decisionmaking in appellate courts, including the Supreme Court); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1319-50 (1995) [hereinafter Stearns, *Justiciability*] (same).

194. David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 940 (1965) (noting that the context of adjudication may "improperly color[] the larger issue [presented] and thwart[] fully informed and objective consideration").

of the salience of the particular case and the pull to decide it correctly may produce a rule that is unrepresentative of the full range of future cases that can be expected to be decided under it.”<sup>195</sup> To make matters worse, in crafting that rule courts must either rely on the information supplied by the parties and their amici or embark on their own independent investigation.<sup>196</sup> Neither option is ideal. Each party’s data is likely to be skewed in favor of its respective position,<sup>197</sup> and courts lack the time and expertise to work through much extra-record material.<sup>198</sup>

A related difference between agencies and courts is that agencies are able to craft uniform, national rules to govern the problems delegated to their charge. Not so for courts.<sup>199</sup> The Supreme Court’s ever-growing caseload makes it impossible for the Court to ensure uniformity among the thirteen Courts of Appeals and the many hundreds of district court

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195. Schauer, *supra* note 85, at 900. There is reason for concern, moreover, that the cases that present themselves to courts—especially appellate courts—will be unrepresentative of the many factual situations to which the rule in question may apply. As Frederick Schauer has put it, “If we want to know the full reach and import of a particular speed limit, we do not want to rely solely on instances in which drivers caught speeding challenge their citations . . . .” *Id.* at 916. *See also* Bernstein, *supra* note 162, at 577 (criticizing the NLRB’s commitment to adjudication rather than rulemaking on the ground that “[s]eeing only diseased conditions . . . is a dubious way of becoming acquainted with healthy labor relationships”); Strauss, *supra* note 190, at 1127 (noting the “often distorting character of the litigation perspective”).

196. *See* Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 TEX. L. REV. 1203, 1252–53 (2006) (explaining how the litigation perspective hampers courts’ capacity for dealing with complex issues).

197. *See* Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 209 (1971) (“A court may hear expert witnesses, but they are seldom more than special pleaders. The customary reliance is upon the lawyer’s brief . . . . [B]ut even in skilled hands, it hardly equips a court to decide which side is right about a highly controversial social or economic question—assuming that ‘rightness’ can be proved.”); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 105 (questioning whether judges are capable of reaching wise decisions when parties’ experts offer conflicting opinions).

198. *See, e.g.,* Cox, *supra* note 197, at 209 (“Courts have always found it hard to develop the background facts in constitutional cases. Judicial notice often means only intuition or prejudice.”); David L. Faigman, “Normative Constitutional Fact-finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 577–93 (1991) (critiquing cases in which the Court has misconstrued, misapplied, or ignored relevant scientific and empirical data); Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1211–18 (1975) (discussing problems that arise when the Court relies on data that has not been subjected to adversarial testing); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 1006 (1999) (“The review of facts is time-consuming. Unlike legislatures and agencies, judges do not have years to amass the huge factual records.”).

199. Of course, uniformity may be more important in some areas (such as tax, perhaps) than others. *Cf.* Strauss, *supra* note 190, at 1124 (suggesting that the “congressional choice to leave working out the solution to the geographically dispersed courts rather than to a national agency can be seen in some respects as a legislative statement about the relative importance of uniformity”).

judges.<sup>200</sup> The Court cannot hear every case that presents a circuit split on a question of statutory interpretation. The result is that, at least until the Court intervenes, judge-made law can be marred by substantial uncertainty and disuniformity.<sup>201</sup>

## 2. Accountability

Supporters of the Court's hands-off approach to delegations to agencies also maintain that agencies are democratically accountable, at least derivatively, because of their relationship with the president and Congress.<sup>202</sup> As the Court put it in *Chevron*, "While agencies are not directly accountable to the people, the Chief Executive is . . . ."<sup>203</sup> And the president has the means to exert significant control over executive agencies.<sup>204</sup> The president appoints agency heads (subject to the advice and consent of the Senate), and can remove them from their offices. The president also can exercise control through executive orders. President Reagan famously used executive orders to institute what some commentators have described as "an unprecedented level of control over the administrative apparatus."<sup>205</sup> Reagan's orders, the key provisions of

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200. See Strauss, *supra* note 190, at 1098–99. See also Easterbrook, *supra* note 122, at 7.

201. Indeed, the law may remain muddled even after the Court intervenes. See, e.g., Jonathan Lechter, Daniel Posner & George Morris, *Antitrust Violations*, 39 AM. CRIM. L. REV. 225, 235–37 (2002) (explaining that the Court's decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), which interpreted the Sherman Act's jurisdictional requirement of an effect on interstate commerce, created a circuit split that the Court failed to resolve in its subsequent decision in *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991)).

202. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978–79 (1992) ("[A]gency decisionmaking is always more democratic than judicial decisionmaking because all agencies are accountable (to some degree) to the President, and the President is elected by the people."); Merrill & Hickman, *supra* note 73, at 861 (noting that "agencies are more politically accountable than are courts"). But see Hamilton, *supra* note 72, at 818 ("Bureaucrats are accountable to the people neither through the voting booth nor the reporting requirements under which the President and the Congress labor."). Michael Herz has noted that "[e]mphasis on accountability as a characteristic of administrative agencies is a relatively recent phenomenon." Herz, *supra* note 145, at 189 n.13 (emphasis in original). Indeed, one of the most common critiques of agency lawmaking is that agencies are not accountable to the public in any meaningful way. *Id.*

203. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). Jerry Mashaw has offered a stronger form of this argument, based on his view that the president is more responsive to public preferences than Congress because there is "no particular constituency to which he or she has special responsibility to deliver benefits." MASHAW, *supra* note 183, at 152. Thus, Mashaw argues that "the delegation of political authority to administrators [may be seen] as a device for improving the responsiveness of government to the desires of the general electorate." *Id.*

204. The president's ability to control so-called independent agencies, with respect to which the president enjoys only limited removal power, is less certain. See Pierce, *supra* note 30, at 412–13.

205. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1263 (2006).

which have been adopted by subsequent presidents,<sup>206</sup> empowered the Office of Management and Budget (“OMB”) to review and approve proposed agency actions,<sup>207</sup> and required agencies to submit annual regulatory plans to the Office of Information and Regulatory Affairs (“OIRA”) to “assure consistency with the goals of the Administration . . . .”<sup>208</sup> The requirements of OMB and OIRA review provide the president with a “powerful tool” to shape agency policy to fit his or her political goals.<sup>209</sup>

Agencies also are subject to control by Congress. Congress has several mechanisms for steering agency policymaking, including budget control,<sup>210</sup> oversight hearings,<sup>211</sup> and informal interactions with agency decisionmakers.<sup>212</sup> Although more attenuated than the opportunities for presidential control, such mechanisms enable Congress to rein in agencies that stray too far from its desired policy directions.

Courts are not subject to the same controls.<sup>213</sup> Due to constitutional

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206. See Exec. Order No. 12,866, 3 C.F.R. 638, 641 (1993), *reprinted in* 5 U.S.C. § 601 (2000). President George W. Bush decided to operate under this order adopted by President Clinton. Bagley & Revesz, *supra* note 205, at 1267.

207. Exec. Order No. 12,291 § 3, 3 C.F.R. 127, 128–31 (1981), *reprinted in* 5 U.S.C. § 601 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (2000). See also Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3 (1995).

208. Exec. Order No. 12,498 § 1(d), 3 C.F.R. 323, 323 (1985), *reprinted in* 5 U.S.C. § 601 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638, 641 (1993), *reprinted in* 5 U.S.C. § 601 (2000). For a discussion of Executive Order 12,498 and its effects, see Pildes & Sunstein, *supra* note 207, at 3–7.

209. Bagley & Revesz, *supra* note 205, at 1267. See also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2281–309 (2001) (describing how President Clinton used administrative oversight to promote desired policy ends); Pierce, *supra* note 30, at 407–08 (noting that “the President has begun to exercise explicit control over agency policymaking”). Not everyone agrees that control by the president is a good thing. One of the most prominent arguments in favor of some enforcement of nondelegation limits is that, compared to Congress, the president can act too quickly, too easily. See Farina, *supra* note 58, at 516–26; Gewirtz, *supra* note 176, at 49 (“[L]eft on his own, the President can do dangerous things.”). For an empirical study of the ways agencies experience presidential control, see generally Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006).

210. Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 785 (1999) (“The appropriations process sharply constrains the authority and discretion of agencies.”). *But cf.* Farina, *supra* note 58, at 508 (noting that “while the appropriations power is sometimes used to modify agency behavior, congressional control of regulatory policy through the budget tends to be sporadic and very particularized . . .”).

211. See Schuck, *supra* note 210, at 785 (“While the nature, quality, and intensity of legislative oversight vary from committee to committee, it is often used to signal congressional preferences on agency policy issues and to extract policy commitments from agency officials.”).

212. See Farina, *supra* note 58, at 509–10.

213. See Manning, *supra* note 109, at 258–59 (“Congress has in its arsenal many ways of

protections of life tenure and guaranteed salary,<sup>214</sup> federal judges are insulated from direct political control.<sup>215</sup> And while members of Congress and the executive branch can and often do publicly criticize the work of the courts, they cannot translate that criticism into tangible, targeted pressure as they can with agency heads.<sup>216</sup> Nor, critically, can judges be removed from their positions for adopting policies with which Congress or the president disagree. “When judges make policy—which is, after all, what discretion in interpretation means—you can’t get rid of them.”<sup>217</sup>

### 3. Accessibility

Delegations of lawmaking authority to agencies also have been defended on the ground that administrative agencies offer the most “accessible,” “meaningful,” and “effective” site for public participation in lawmaking.<sup>218</sup> Peter Schuck, the most prominent advocate of this view,

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influencing the manner in which agencies perform their functions but relatively fewer methods of influencing the federal judiciary in its disposition of particular cases or controversies.”); Spence & Cross, *supra* note 29, at 140 (“The courts lack democratic accountability and are far more difficult for Congress and the President to check and correct than are agencies.”). *Cf.* Kmiec, *supra* note 107, at 281–82 (arguing that Congress has various mechanisms for overseeing the work of agencies but does not regularly engage in oversight of courts); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 973 (1995) (“[I]f political accountability for policymaking is desirable, adjudication may represent a poor vehicle for accomplishing it. The judiciary . . . is relatively insulated from the kind of refined public opinion to which legislators and agency policymakers are subject. Moreover, the narrow focus of adjudication tends to diminish the likelihood of political mobilization in response to imprudent or unjust policy decisions.”).

214. U.S. CONST. art. III, § 1.

215. *But see* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 313–16 (2005) (discussing various tools that Congress and the president can use to try to influence judicial decisionmaking).

216. They cannot, for example, contact judges, urge them to change their views, or threaten their jobs. *See* Manning, *supra* note 109, at 259 n.175 (“Congress has relatively ineffective tools at its disposal to discipline judges who do not construe statutes to the liking of its members.”). Of course, if Congress disagrees with a court’s interpretation of a statute, it can amend the statute to override the judicial reading. The same is true of disfavored agency interpretations. But legislative override is difficult. *See infra* notes 265–69 and accompanying text. It is certainly more difficult than the mechanisms for control of agencies. *See* Easterbrook, *supra* note 122, at 8 (explaining that if an agency head “strays from his master’s wishes, he can be reeled in (or replaced) at low cost. But if a judge strays, the only remedy is more legislation—which in political terms is *much* more costly”) (emphasis in original).

217. Easterbrook, *supra* note 122, at 9.

218. Schuck, *supra* note 210, at 781–82. This argument is subject to dispute. Commentators long have complained that agencies are subject to “capture” by certain narrow (but powerful) interest groups; such groups arguably are better able to command an agency’s attention than diffuse interests. *See, e.g.*, Daniel A. Farber, *Positive Theory as Normative Critique*, 68 S. CAL. L. REV. 1565, 1570 (1995). *But see* Spence, *supra* note 104, at 437 (arguing that “[t]he agency decisionmaking environment . . . [is] less susceptible to the interest group influence and strategic behavior that accompany the legislative decisionmaking environment”); Spence & Cross, *supra* note 29, at 122 (“No family of public choice

argues that agencies are accessible to the public because the costs of participating in agency proceedings “are likely to be lower than the costs of lobbying or otherwise seeking to influence Congress.”<sup>219</sup> An agency considering a new rule must publish notice of its proposed action, and any interested member of the public can comment.<sup>220</sup> Agencies have strong incentives to take seriously the comments they receive, because failure to consider particular points of view can subject an agency’s decision to judicial invalidation as arbitrary and capricious.<sup>221</sup>

Participation in agency lawmaking is meaningful, Schuck contends, because “the policy stakes for individuals and interest groups are most immediate, transparent, and well-defined at the agency level.”<sup>222</sup> “After all,” he explains, “it is only at the agency level that the generalities of legislation are broken down and concretized into discrete, specific issues with which affected parties can hope to deal.”<sup>223</sup> Finally, Schuck argues that public participation in agency lawmaking is effective because “the agency is where the public can best educate the government about the true nature of the problem that Congress has tried to address.”<sup>224</sup>

Compare decisionmaking by courts. While agencies can solicit the views of all interested persons,<sup>225</sup> courts hear only from the parties to the

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models seems more irrelevant yet is more widely cited than capture models.”). The same concerns about capture could well be applied to courts, however. As Harold Krent has argued, “lawmaking by judges may be just as prone to interest group influence as lawmaking by agencies. Concentrated interests possess a distinct advantage in the litigation process because of their access to the resources necessary to conduct skillful and frequent litigation.” Krent, *supra* note 27, at 730. *See also* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 66–68 (1991) (suggesting that the judicial process is not immune from the influence of concentrated interests); Paul H. Rubin, *Common Law and Statute Law*, 11 *J. LEGAL STUD.* 205, 211–13 (1982) (contending that judicial decisions tend to favor repeat-player organized interests); Spence & Cross, *supra* note 29, at 139–40 (arguing that “[w]hile courts may not be directly captured by special interests, they can be readily manipulated by those interests,” and noting that Congress created the Interstate Commerce Commission to deal with railroad regulation in part because “it feared that the big railroads would have an unfair advantage before the courts”).

219. Schuck, *supra* note 210, at 781.

220. 5 U.S.C. § 553 (2000). *But cf.* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 *HARV. L. REV.* 1511, 1562–76 (1992) (arguing that the opportunities for public participation in agency rulemaking may be limited in some circumstances, for example where an agency has its staff perform preliminary analyses of regulatory options or invites certain insider groups to participate before it initiates a rulemaking proceeding).

221. *See* § 706(2)(a) (providing for judicial review under the arbitrary and capricious standard); *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (describing arbitrary and capricious standard).

222. Schuck, *supra* note 210, at 781.

223. *Id.* at 782.

224. *Id.*

225. Agencies solicit viewpoints when they engage in notice-and-comment rulemaking. Agencies

case and their amici. Moreover, rules of standing, ripeness, and mootness limit who can get in the courthouse door, and when, and why. The door is not open to “the public” as such.<sup>226</sup>

Not only are courts less accessible, but participation in the process of lawmaking by courts is also less meaningful and effective than participation in notice-and-comment rulemaking by an agency. First, litigants rarely have an opportunity to respond to a court’s *proposed* course of action before a final decision is made.<sup>227</sup> Disappointed litigants can appeal an adverse decision, provided that the rendering court was not the Supreme Court. And there is always the possibility of reconsideration or, at the appellate level, en banc review. Appeals cost time and money, however. From the perspective of public participation, any decisionmaking system that requires participants to devote substantial resources in order to express their disagreement with a preliminary ruling should be cause for concern.

Second, the “policy stakes” of any given exercise of judicial lawmaking rarely are “transparent” or “well-defined” in a way that facilitates public input.<sup>228</sup> That is so, in part, for the reason just discussed.

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also can make law through adjudications. *See supra* note 161. Like litigation in court, agency adjudication provides only the most limited opportunities for public participation and input. Indeed, commentators have stressed the limited opportunities for public participation as a reason why agencies should rely on rulemaking rather than adjudication to develop rules. *See, e.g.,* Peck, *supra* note 162, at 757 (“[A]n agency [that] views as its role the formulation of policy solely upon an *ad hoc* basis may neglect entirely to seek the advice and comments of other interested parties in making a decision of momentous importance.”); Shapiro, *supra* note 194, at 930 (“Though a decision may have far-reaching significance by reason of the rule it lays down, and affect many persons besides the particular litigants, only the latter will have participated in the rule-making process . . . .” (quoting Statement of Basis and Purpose of Trade Regulation Rules, 29 Fed. Reg. 8325, 8366) (proposed July 2, 1964))).

226. It is possible that courts are more accessible to certain segments of the population than other potential sites of lawmaking. While agencies, like legislatures, can exercise a significant degree of control over their agendas, courts typically have no choice but to decide the cases that come before them. As Larry Kramer has argued, “[t]his in turn makes it more difficult for courts to avoid hard questions, and they therefore provide a useful means for sponsors of unpopular or unusual causes to get their issues onto the political agenda.” Kramer, *supra* note 86, at 270. Courts’ inability to control their dockets might not be entirely positive, however. One consequence is that a significant amount of lawmaking by courts occurs in the course of litigation initiated by private plaintiffs who *themselves* are not accountable “for the social impact of their enforcement decisions.” Stephenson, *supra* note 185, at 119. Agencies, by contrast, “are accountable to the electorate for their exercise of [prosecutorial] discretion through the President and, more indirectly, through congressional oversight.” *Id.*

227. Even when proceeding through adjudications rather than rulemaking, agencies must give interested parties an opportunity to submit proposed findings and to object to proposed agency decisions. *See* Administrative Procedure Act, 5 U.S.C. § 557(c) (2000); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1022 (2006) (describing procedural requirements that apply to agency adjudications and rulemaking).

228. *Cf. Schuck, supra* note 210, at 781 (describing agencies as a “meaningful site for public participation”).

At the moment of potential participation, the public cannot know what a court is going to do—not only in the sense of which side will win, but also, more importantly, how the court will explain its decision and what the wider ramifications of the court’s reasoning might be.<sup>229</sup> Even after the court hands down its decision, it often is not clear how the ruling might affect other parties or other issues. Far from clarifying the issues and their significance for various segments of the public, the process of judicial decisionmaking is more likely to confuse and obscure the ultimate stakes. Thus, Schuck’s claims about public participation in agency processes cannot be translated into a persuasive defense of lawmaking by courts.

#### 4. Flexibility

A final argument in favor of agency lawmaking—and nonenforcement of the nondelegation doctrine—is that agencies are better able than Congress to adapt rules to respond to new information or changed circumstances.<sup>230</sup> Judicial lawmaking tends to be less adaptable. Even if the Supreme Court feels free to modify its earlier rulings, lower courts cannot depart from interpretations that have been adopted by the Court.<sup>231</sup> Litigants are well aware of that fact, and as a result “most cases presenting an opportunity to modify an erroneous rule will simply not arise, or if they arise will settle” at some point along the long road to the Court.<sup>232</sup> Even in

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229. More often than not, the reasons for a decision, rather than the decision itself, have the most enduring effect as law. The importance of the reasoning in judicial opinions is illustrated by the efforts of judges on multi-member panels or courts to persuade their colleagues to join their opinions rather than simply their judgments. See Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1377–80 (1995). Judges believe that it is critical to have a majority for an opinion and not just a judgment, see *id.* at 1377, because they know that it is the reasoning of the opinion, even the precise words used, that matter. See Frederick Schauer, *Opinions As Rules*, 53 U. CHI. L. REV. 682, 683 (1986) (“[W]hen we are in the pit of actual application, we will discover that it is not what the Supreme Court held that matters, but what it *said*. In interpretive areas below the Supreme Court, one good quote is worth a hundred clever analyses of the holding.”) (emphasis in original); Wald, *supra*, at 1394–95 (discussing the importance of the precise words chosen to describe legal principles).

230. See GILMORE, *supra* note 92, at 95 (“One of the facts of legislative life . . . is that getting a statute enacted in the first place is much easier than getting the statute revised so that it will make sense in the light of changed conditions.”); Epstein & O’Halloran, *supra* note 29, at 709–12, 716 (stressing the importance of agency flexibility).

231. See *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994) (“It is this Court’s responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.”); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

232. Schauer, *supra* note 85, at 910.

the best of worlds, then, it takes some time for calls for change to reach the Court.<sup>233</sup>

The doctrine of stare decisis makes judicial lawmaking more rigid still. Courts purport to apply a “super-strong” version of stare decisis to their interpretations of statutes.<sup>234</sup> That practice occasionally has been relaxed in the case of broadly worded statutes that courts administer in something like the common law tradition.<sup>235</sup> Nevertheless, there is a heavy judicial thumb on the scale weighing against any significant change of course.<sup>236</sup>

Even when courts change their rules, they may do so for the wrong reasons. As noted above, judicial decisions may be unduly influenced by the “vividness” of the instant case.<sup>237</sup> Just as an initial rule may be skewed by the facts of the case that gave rise to it, so too may a rule change. Judges presented with a set of facts that starkly illustrate the problems with a rule may mistakenly assume that the rule operates poorly in many other cases as well.<sup>238</sup> Accordingly, if flexibility is a key attribute of delegated lawmaking, agencies seem to be significantly better suited to the job than courts.

In sum, although the costs of nonenforcement of the nondelegation doctrine may be outweighed by the benefits of the administrative state, the same is not necessarily true with respect to judicially administered statutes. Broad delegations to courts are not so common that the sky would fall if Congress were forced to abandon them. Nor do functional arguments about the advantages of agency lawmaking support an equivalent role for courts. On the contrary, such arguments suggest that scholars comfortable with

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233. Reaching the Supreme Court is only the first step; the Court also must agree to grant certiorari. The Court currently hears approximately 1 percent of the cases in which petitions for certiorari are filed. See David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 967 (2007).

234. See Eskridge, *supra* note 123, at 1362.

235. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (“[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress ‘expected courts to give shape to the statute’s broad mandate by drawing on common-law tradition.’” (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978))); Eskridge, *supra* note 123, at 1376–81.

236. Agencies, by contrast, are free to change their rules so long as they explain their reasons for doing so. See *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005). See also *Neal v. United States*, 516 U.S. 284, 295 (1996) (explaining that the Court “do[es] not have the same latitude [as an agency] to forsake prior interpretations of a statute”).

237. See Schauer, *supra* note 85, at 895; *supra* notes 194–96 and accompanying text.

238. See Schauer, *supra* note 85, at 907–08 (“A rule that gets it right 99 percent of the time may well be a very good rule, but a process that focuses only on the remaining 1 percent may be a process influenced to believe that some of these very good rules are in need of modification.”).

nonenforcement of the nondelegation doctrine as applied to delegations to agencies should think twice about delegations to courts. It may be that delegations to courts can be defended on *different* functional grounds, focusing on the unique institutional capacities of courts. But our current nondelegation law lacks such a theory, and the theories that have been offered to justify delegations to agencies do not work for courts.

### C. INDIRECT ENFORCEMENT THROUGH NARROW STATUTORY CONSTRUCTION

Although there is no ready defense for the Court's failure to apply the nondelegation doctrine to broad delegations to courts, direct enforcement may not be necessary to give effect to the doctrine's core commitments. In the agency context, the Court has experimented with the possibility of enforcing the intelligible principle requirement through statutory construction rather than constitutional decree.<sup>239</sup> Perhaps the same approach can work for judicially administered statutes.

On several occasions, the Court has adopted a narrow construction of a challenged statute as a means of corralling what might otherwise be a constitutionally excessive delegation of power. The most prominent example is *Industrial Union Department v. American Petroleum Institute*, better known as "the Benzene case."<sup>240</sup> At issue was the Occupational Safety and Health Act ("OSH Act"), which authorizes the Secretary of Labor to prescribe regulations governing the amount of "toxic materials or harmful physical agents" permitted in the workplace.<sup>241</sup> The OSH Act

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239. See *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (explaining that the Court enforces the nondelegation doctrine by "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional").

240. *The Benzene Case*, 448 U.S. 607 (1980) (plurality opinion). For other cases employing the same technique, see *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 341-42 (1974) (narrowly interpreting a statute so as to (1) preclude a finding that "Congress had bestowed on a federal agency the taxing power," and (2) "avoid constitutional problems"); *FPC v. New Eng. Power Co.*, 415 U.S. 345, 351 (1974) (finding the same). In another group of cases, the Court has narrowly construed agency-administered statutes in order to avoid delegations in areas of particular constitutional concern. See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-78 (1988) (rejecting the National Labor Relations Board's construction of a statute on the ground that it raised serious First Amendment concerns); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 115-16 (1976) (citing due process as reason to construe statute narrowly and invalidate Civil Service Commission regulation making resident aliens ineligible for many jobs); *Kent v. Dulles*, 357 U.S. 116, 128-30 (1958) (narrowly construing a statute that would have given the Secretary of State power to regulate the right to travel). Cf. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170-74 (2001) (rejecting an agency's construction of a statute on the ground that it pushed the outer boundaries of Congress's Commerce Clause authority).

241. 29 U.S.C. § 655(b)(5) (2000). See also *The Benzene Case*, 448 U.S. at 611.

specifies that the Secretary must “set the standard which most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard . . . .”<sup>242</sup> The government argued in the Benzene case that the requirement of feasibility was the only limitation on the Secretary’s discretion.<sup>243</sup> The Court rejected that reading, but not because it interpreted the relevant language differently. Instead, writing for a plurality, Justice Stevens explained that if limited only by the constraint of feasibility, the OSH Act “would make such a ‘sweeping delegation of legislative power’ that it might be unconstitutional . . . .”<sup>244</sup> The plurality’s solution was to limit the range of permissible agency action, requiring the Secretary to make a threshold finding of “significant risks” to employee health before regulating toxic substances such as benzene.<sup>245</sup>

The Court followed a similar approach in what are sometimes called the “major questions” cases—cases in which the Court used statutory interpretation to conclude that Congress had not delegated to an agency the power to make certain particularly important policy decisions.<sup>246</sup> In *MCI Telecommunications Corp. v. AT&T Corp.*, the Court struck down several Federal Communications Commission (“FCC”) orders that waived certain tariff requirements for nondominant long-distance carriers.<sup>247</sup> The consequence of the FCC’s new rules was to exempt every carrier except AT&T, which qualified as the only “dominant” carrier, from regulation of long-distance rates.<sup>248</sup> The Court interpreted the Communications Act—which empowered the FCC to “modify” the tariff requirement—to withhold authority to initiate such “major” and “fundamental” changes in telecommunications policy.<sup>249</sup>

More recently, the Court held in *FDA v. Brown & Williamson*

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242. § 655(b)(5).

243. See *The Benzene Case*, 448 U.S. at 639.

244. *Id.* at 646 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935)).

245. *Id.* at 641–42. Justice Rehnquist, who concurred in the judgment, would have invalidated the statute as an unconstitutional delegation of power to the Secretary of Labor. See *id.* at 671–88 (Rehnquist, J., concurring in the judgment).

246. See Sunstein, *supra* note 103, at 236. See also Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370–77 (1986) (suggesting a distinction, for purposes of *Chevron* deference, between “major questions” and “interstitial matters”).

247. *MCI Telecomms. Corp. v. AT&T Corp.*, 512 U.S. 218, 234 (1994).

248. See *id.* at 221–22. See also Sunstein, *supra* note 103, at 236–37.

249. *MCI*, 512 U.S. at 231 (“It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion . . .”).

*Tobacco Corp.*<sup>250</sup> that the Food and Drug Administration (“FDA”) lacks authority to regulate tobacco under the Food, Drug, and Cosmetics Act of 1938, even though—by its terms—the statute applies broadly to all “drugs.”<sup>251</sup> The Court did not deny that tobacco is a “drug” under the statutory definition, which reaches any “article[] (other than food) intended to affect the structure or any function of the body.”<sup>252</sup> Nevertheless, relying heavily (and uncharacteristically) on postenactment legislative activity, the Court concluded that Congress had not intended to cede to the FDA the hotly debated and intensely political question of regulation of tobacco.<sup>253</sup>

The “major questions” cases differ from the Benzene case and others like it in at least one important respect. In contrast to the Benzene case, the Court did not suggest in *MCI* or *Brown & Williamson* that Congress would have run afoul of the nondelegation doctrine if it *had* delegated authority to the agencies to resolve the policy issues involved. Instead, the Court relied on the importance of the relevant issues as a reason for abandoning its normal presumption (per *Chevron*) that when Congress does not speak clearly to an issue it intends to leave the issue to the agency’s resolution.<sup>254</sup> The result, however, is the same: the Court limited the range of issues on which the agency could act, based at least in part on its conclusion that the relevant decisions ought at least presumptively to be made by Congress.<sup>255</sup> In that sense, the major questions cases, like the Benzene case, serve to enforce the principles underlying the nondelegation doctrine without resort to constitutional invalidation.

Can the same approach to statutory construction work to cabin delegations to courts?<sup>256</sup> Not in any sensible way. Consider, first, the

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250. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

251. *Id.* at 125–26.

252. *Id.* at 126–27 (quoting 21 U.S.C. § 321(g)(1)(C) (1994)). The Court stated that it need not reach the question of whether tobacco is a drug because the FDA regulations at issue contravened the clear intent of Congress. *Id.* at 131–32.

253. See Manning, *supra* note 109, at 223–28 (arguing that *Brown & Williamson* can best be explained as part of the Court’s efforts to avoid nondelegation problems through statutory construction).

254. See *Brown & Williamson*, 529 U.S. at 159; *MCI*, 512 U.S. at 231; discussion *supra* notes 110–17 and accompanying text (describing the typical *Chevron* presumption).

255. The major question cases (especially *MCI*) also could be understood as *Chevron* Step One cases, resting on the Court’s conclusion that Congress *did* speak clearly to the issue in question. See Sunstein, *supra* note 103, at 244–47 (acknowledging that the major questions cases could be understood as implementing nondelegation doctrine, but arguing that they are “best read as Step One decisions”). Under either the nondelegation reading I have suggested or the Step One reading, the Court purports to limit the authority of both agencies and courts to resolve an issue, on the ground that Congress either must or already did address the issue itself.

256. There is some evidence that the Court already *does* apply the narrow-construction approach to statutes it administers, though without linking its actions to the nondelegation doctrine. In his study

Benzene case. There, the Court effectively amended the OSH Act with its addition of the “significant risk” requirement.<sup>257</sup> Such a requirement can be found nowhere in the OSH Act; it is, quite simply, the Court’s creation. Suppose the Court were to follow the same approach with respect to a statute entrusted to its own care—in effect creating its own intelligible principle. Doing so might serve to cabin judicial discretion in future cases,<sup>258</sup> but it would do nothing to ensure that Congress has made the important policy choices.<sup>259</sup> That is why the Court has firmly rejected the notion that agencies can cure excessive delegations by supplying their own limiting standards. As the Court explained in *Whitman v. American Trucking Associations, Inc.*:

The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority.<sup>260</sup>

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of congressional overrides of Court statutory interpretation decisions, William Eskridge noted that “the Court will sometimes refuse to interpret a statute broadly, especially when such an interpretation would represent a major policy decision that the Court would be more comfortable allowing Congress to make.” Eskridge, *supra* note 140, at 389 & n.175. As Eskridge notes, however, “such signals by the Court do not [always] result in congressional action.” *Id.* at 389.

257. See Manning, *supra* note 109, at 245 & n.117 (arguing that the Benzene plurality “seem[ed] to rewrite the OSH Act” and citing other commentators who share that view).

258. Lisa Schultz Bressman has argued that nondelegation norms are advanced when agencies come up with intelligible principles not specified by statute. Bressman, *Schechter Poultry at the Millennium*, *supra* note 78, at 1402. Bressman does not deny that an intelligible principle supplied by the agency itself does nothing to ensure that important policy decisions are made by Congress and not its delegate. See *id.* at 1423–27. Instead, she maintains that self-imposed limitations are valuable because they provide a means of controlling and monitoring agency discretion. See *id.* at 1424–27. *But cf.* Mark Seidenfeld & Jim Rossi, *The False Promise of the “New” Nondelegation Doctrine*, 76 NOTRE DAME L. REV. 1, 2 (2000) (arguing that “the benefits of the new nondelegation doctrine in promoting the values underlying the rule of law pale in comparison to that doctrine’s impact on agencies’ abilities to address the particularities of many problems that they are statutorily assigned to remedy”).

259. Commentators critical of the Court’s efforts to enforce the nondelegation doctrine through narrow tailoring of agency-administered statutes have offered a similar critique. See, e.g., Manning, *supra* note 109, at 228 (“If the point of the nondelegation doctrine is to ensure that Congress makes important statutory policy, a strategy that requires the judiciary, in effect, to rewrite the terms of a duly enacted statute cannot be said to serve the interests of that doctrine.”); Pierce, *supra* note 108, at 2231 n.29 (arguing that “this remedy has precisely the vice the Court decried and prohibited in *Chevron*—it confers on politically unaccountable judges the power to make fundamental policy decisions”); David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1271 (1985) (“When Congress has plainly delegated too broadly, construing the statute to avoid delegation problems can readily put the courts themselves in a legislative role.”). If anything, those arguments apply with more force to any effort to cure deficiencies in court-administered statutes through narrow construction.

260. *Whitman v. Am. Trucking Assn’s*, 531 U.S. 457, 473 (2001) (emphasis in original).

The same point holds for efforts by courts to cure statutes that delegate excessive authority to the judiciary by adopting a limiting construction.<sup>261</sup>

The “major questions” approach also aggrandizes the power of the Court, though in a somewhat more subtle manner. First, the line between “major” issues and less significant issues is at best fuzzy. Various commentators have seized on the difficulty of line-drawing as a reason why a court should not attempt to enforce a “majorness” exception to the typical presumption that Congress intended to delegate policymaking discretion to the administering agencies.<sup>262</sup> The point here is different. If a court’s determination of where a particular issue falls on the spectrum from inconsequential to critically important cannot realistically be controlled by objective criteria, then for courts to rely on the importance of an issue as a way of limiting their own policymaking discretion will be an exercise in futility. The court’s determination as to the importance of an issue will itself be a potentially important exercise of policy discretion. It may not make sense for courts to undertake that task even where agency-administered statutes are concerned, but it certainly does not work as a method of policing delegations to courts themselves.

Second, although what the Court *said* in the major questions cases was “this matter is for Congress to resolve,” what it *did* was set a default rule. In *MCI*, for example, the Court’s decision resulted in the continuation of rate regulation for nondominant carriers. In *Brown & Williamson*, the result was nonregulation of tobacco by the FDA. In effect, then, the Court *decided* the major questions itself.<sup>263</sup>

Of course, the Court’s decisions hold only unless, or until, Congress

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261. *Id.* at 473. The fact that the Court in the Benzene case believed it could avoid a nondelegation problem by supplying an intelligible principle itself—despite its reasoning to the contrary in *American Trucking*—exemplifies nondelegation law’s single-minded focus on delegations to agencies, and the problems with that narrow view.

262. See, e.g., Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Non-Interference (Or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. (forthcoming 2008) (manuscript at 16–17, on file with author); Sunstein, *supra* note 103, at 243–46.

263. See Moncrieff, *supra* note 262 (manuscript at 23) (“Unless the nondelegation advocates assume that Congress remains a viable institutional option, their proposed exception to *Chevron* merely elevates judicial policymaking over administrative policymaking, which is to strike at the very heart of *Chevron* theory.”). One could argue that the Court did not really decide anything itself; it simply enforced the status quo prior to the agency’s action. But there is no good reason to treat the pre-regulation status quo as natural or inevitable, especially where, as in *MCI*, the challenged agency action *reduced* regulation. Cf. Sunstein, *supra* note 103, at 246 (arguing that the major question cases create an “unhealthy status quo bias”).

steps in to change things.<sup>264</sup> But, as has been well documented elsewhere, congressional action in response to a court or agency decision is neither easy nor inevitable.<sup>265</sup> After all, Congress can overturn agency action as well, yet the possibility of congressional override has not erased concerns about excessive delegations of power. The problem is that Congress faces more obstacles to action than do agencies and courts.<sup>266</sup> Legislative inertia, veto-gates, and powerful congressional committees can derail responsive legislation even when a majority agrees on the need to act.<sup>267</sup> As a result, “[t]he [Supreme] Court’s most dramatic policymaking decisions have remained untouched by Congress . . . .”<sup>268</sup>

Thus, even if courts can use narrow statutory construction to avoid potentially excessive delegations to agencies, the same approach does not provide a promising method of constraining delegations to courts. The choices courts must make in order to avoid perceived nondelegation problems require so many difficult policy judgments—so many opportunities for judicial lawmaking—as to defeat the purpose. Here, too, it appears that the nondelegation doctrine we have in practice does not work when applied to courts.

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264. Congress effectively overruled the Court’s decision in *MCI* with the passage of the Telecommunications Act of 1996 (“1996 Act”), which, among many other things, explicitly authorized the FCC to omit nondominant carriers from the 1996 Act’s tariff requirements. See Telecommunications Act, 47 U.S.C. § 160 (2000). It bears emphasis, however, that the 1996 Act was a comprehensive overhaul of the existing telecommunications regime, prompted by many factors other than a desire to correct the Court’s mistake in *MCI*. For descriptions of the various forces behind the 1996 Act, see Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835 (1997); Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998). Congress did not respond to the Court’s decision in *Brown & Williamson*. For a description of the interaction of both decisions and Congress’s legislative efforts, see Moncrieff, *supra* note 262 (manuscript at 17–21).

265. See, e.g., Morris P. Fiorina, *Congressional Control of the Bureaucracy: A Mismatch of Incentives and Capabilities*, in CONGRESS RECONSIDERED 332, 343–46 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2d ed. 1981); Merrill, *supra* note 8, at 22–23; Schoenbrod, *supra* note 259, at 1245.

266. See Seidenfeld, *supra* note 220, at 1522 (explaining that an “agency not bogged down by the requirement of strict separation of powers or the need for majority approval by two large bodies of elected legislators can act more quickly and efficiently than Congress”).

267. See Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 482 (1999); Stephenson, *supra* note 185, at 140–41. See also Kenneth A. Shepsle & Barry R. Weingast, *Structure-induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 513–14 (1981) (describing obstacles to legislative action); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 10–11 (Winter & Spring 1994) (same). “[W]hen Congress does react to [judicial or] agency regulation, that reaction tends to be uncoordinated and responsive only to the most vociferous interest groups.” Seidenfeld, *supra*, at 482. See also Eskridge, *supra* note 140, at 359–67 (describing the importance of interest groups in congressional overrides of Supreme Court statutory interpretation decisions).

268. Eskridge, *supra* note 140, at 366. Overall, Eskridge found that Congress overrode approximately 5 percent of the Court’s statutory decisions each year in the 1980s. See *id.* at 377.

## V. IMPLICATIONS

The nondelegation doctrine has evolved as a way to cope with delegations of lawmaking authority to administrative agencies. It should not be surprising, therefore, that the doctrine in its current form does not translate smoothly to delegations to courts. Any effort to respond to delegations to courts must be on new terms. Although the work of courts and agencies is similar enough to trigger equivalent concerns about excessive delegations of lawmaking power, courts and agencies are different enough to require independent consideration.

This Part begins that project by painting in broad strokes some implications of a more complete view of the delegation picture, one that includes courts as well as agencies. The goal is not to answer the many questions posed by delegations to courts, but to demonstrate why they are worth asking. The first section takes up an example that has run throughout this Article—the Sherman Act—and indicates how a nondelegation analysis might play out in the antitrust field. The analysis reveals a number of deep pathologies traceable to Congress’s choice to delegate primary lawmaking authority to the federal judiciary. But, while the antitrust example illustrates some of the problems with delegations to courts, it does not discredit such delegations across the board. Part V.B suggests some of the possible benefits of judicially administered statutes, and considers more generally how focusing on courts in their roles as delegates might affect how we understand the relationship between courts and the statutes they administer.

### A. THE NONDELEGATION DOCTRINE APPLIED: THE SHERMAN ACT

The nondelegation doctrine condemns delegations that lack an “intelligible principle” to guide and constrain the delegated authority.<sup>269</sup> It is designed to ensure that important policy choices are made by the people’s elected representatives in Congress rather than unelected and relatively unaccountable administrators<sup>270</sup>—or, as I have argued, judges. The question of how much delegated discretion is too much necessarily is one of degree, giving rise to potentially difficult line-drawing problems.<sup>271</sup> Accordingly, any effort to apply the nondelegation doctrine to the range of judicially administered statutes lies well beyond the scope of this Article.

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269. See *supra* notes 55–57 and accompanying text.

270. See *supra* notes 58–61 and accompanying text.

271. See *supra* notes 177–81 and accompanying text.

This Section will focus on one particularly crisp example of a judicially administered statute that would appear to run afoul of the nondelegation doctrine in its canonical form: the Sherman Act.

As explained above, Section 1 of the Sherman Act prohibits all contracts, combinations, and conspiracies “in restraint of trade.”<sup>272</sup> The Act creates a private cause of action and provides for treble damages for injured private parties.<sup>273</sup> The prohibition on restraints of trade also is subject to public enforcement by the Antitrust Division of the Department of Justice (“DOJ”) and by the Federal Trade Commission (“FTC”).<sup>274</sup> The overwhelming majority of antitrust cases are private actions, however,<sup>275</sup> and regardless of whether enforcement is public or private, the ultimate responsibility for interpretation of the Sherman Act lies not with the DOJ or the FTC but with the federal courts.<sup>276</sup>

Does the prohibition on contracts, combinations, or conspiracies in restraint of trade provide an intelligible principle to channel courts’ interpretive discretion? Perhaps it could, if taken literally. But the Court long has held that the statute does not mean what it says.<sup>277</sup> After all, *all* contracts restrain trade— “[t]o bind, to restrain, is of their very essence.”<sup>278</sup> The operative question, the Court has explained, is not whether the conduct at issue restrained trade, but whether it did so unreasonably.<sup>279</sup> Neither the Sherman Act nor its legislative history provides any guidance to courts on that question.<sup>280</sup> If anything can be gleaned from the text of the statute and

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272. 15 U.S.C. § 1 (2000). Section 2 prohibits “monopoliz[ation]” of any part of interstate or international “trade or commerce.” *Id.* § 2. For the sake of simplicity, this Part will focus on Section 1 alone.

273. *Id.* § 15.

274. Technically speaking, the FTC enforces the Sherman Act only indirectly, by incorporation of its prohibitions into § 5 of the Federal Trade Commissions Act. *Id.* § 45.

275. See Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. (forthcoming 2008) (manuscript at 25 n.74, on file with author) (explaining that, between 1996 and 2005, private litigants filed over 800 federal antitrust cases per year, compared to approximately sixty-three cases filed by the DOJ Antitrust Division and a similar number of civil enforcement actions initiated by the FTC).

276. The FTC has the power to create substantive antitrust rules under the Federal Trade Commission Act, see 15 U.S.C. § 57a, but as a practical matter the FTC has not made use of that power, see Crane, *supra* note 275 (manuscript at 41–42).

277. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007) (explaining that “the Court has never taken a literal approach to [the Sherman Act’s] language” (internal quotation marks and citation omitted)). Cf. Daniel A. Farber & Brett H. McDonnell, “*Is There a Text in This Class?*” *The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 620 (2005) (“Antitrust cases generally discuss precedent and economic policy. They rarely include more than a passing citation to the statutory text.”).

278. *Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918).

279. *Id.*

280. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 39

what we know of its genesis, it is that Congress did not purport to resolve the many difficult puzzles of antitrust itself. Congress opted instead for “regulation by lawsuit,”<sup>281</sup> leaving it to the courts to strike the appropriate balance between competition and collusion.<sup>282</sup> The result is a statute “so open textured . . . that any standard the Court adopts is ultimately a judicial creation.”<sup>283</sup>

The choices left to courts, moreover, are not interstitial or technical; they are foundational. Courts, not Congress, have given content to the core concept of “competition”—thereby defining what the goal of antitrust law is and should be. In the 1960s and 1970s, the Court conceived of competition in terms of small business versus big business, and crafted antitrust rules with a view toward facilitating competition between those groups (even if the result was higher prices and less desirable products).<sup>284</sup> Due in large part to the theoretical influence of the Chicago School,<sup>285</sup> antitrust law underwent a “counterrevolution” in the 1970s and 1980s, resulting in a new conception of competition that focuses on “the economic coin of low prices, high output, and maximum room for innovation.”<sup>286</sup> The

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(2005) (describing “much of the legislative history” as “useless”); Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. (forthcoming 2008) (manuscript at 4, on file with author) (describing legislative history as “notoriously tortured and unhelpful”).

281. 9 ALEXANDER BICKEL & BENNO C. SCHMIDT, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910–21*, at 130 (1984) (describing the method of regulation reflected in the Sherman Act).

282. See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (explaining that Congress “adopted the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself, and not merely the static context that the common law had assigned to the term in 1890”); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (“Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.”); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933) (describing the antitrust laws as having “a generality and adaptability comparable to that found to be desirable in constitutional provisions”); 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 103d2 (2d ed. 2000) (stating that the Sherman Act “invest[ed] the federal courts with a jurisdiction to create and develop an ‘antitrust law’ in the manner of the common law courts”); *supra* notes 118–20 and accompanying text.

283. William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 DUKE L.J. 618, 659 (1987). See also Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1702 (1986) (noting that the Sherman Act “does not contain a program; it is instead a blank check”).

284. HOVENKAMP, *supra* note 280, at 2. Cf. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (acknowledging that “some of the results of large integrated or chain operations are beneficial to consumers” and that “higher costs and prices might result from the maintenance of fragmented industries and markets,” but nevertheless striking down a proposed merger under the Clayton Act).

285. See generally Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979) (explaining the “Chicago” approach to antitrust policy).

286. HOVENKAMP, *supra* note 280, at 2. See *Town of Concord v. Boston Edison Co.*, 915 F.2d 17,

choice between those two models of competition is just the sort of “fundamental policy decision[] underlying important legislation” that the nondelegation doctrine insists be made by Congress.<sup>287</sup>

It seems clear that if the nondelegation doctrine were enforced against delegations to courts, the Sherman Act would be a likely candidate for constitutional invalidation.<sup>288</sup> But should it be? As detailed in Part IV, contemporary debate about delegations of lawmaking authority tends to have less to do with doctrine than with the practical necessity and desirability of the administrative model. There is no good reason to think we can or should abandon such considerations when the delegation in question is to a court instead of an agency. Some delegations to courts may be defensible on functional grounds even if they (like many delegations to agencies) appear to violate the formal nondelegation doctrine.

When held up against the arguments that have been offered in praise of delegations to agencies, however, the Sherman Act’s delegation to courts seems problematic at best. The most glaring difficulty is expertise, or lack thereof. Antitrust is a highly technical field, shot through with difficult and contested questions of economic theory.<sup>289</sup> The Court has

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21–22 (1st Cir. 1990) (explaining that a practice is “anticompetitive” if it “obstructs the achievement of competition’s basic goals—lower prices, better products, and more efficient production methods”).

287. The Benzene Case, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment).

288. The Court brushed aside a nondelegation challenge to the Sherman Act in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), on the ground that the Act “generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent,” *id.* at 69. That statement is hard to square with the Court’s recognition in the same case that the Act’s enumeration of the prohibited acts—all contracts, conspiracies, or combinations in restraint of trade—was “broad enough to embrace every conceivable contract or combination which could be made” and therefore “necessarily called for the exercise of judgment” in separating the wheat from the chaff. *Id.* at 60. The Court found guidance for that task not in the statute’s text or history, but in the common law. *See id.* at 49–62.

289. The recent report of the Antitrust Modernization Commission explained that “[s]ubstantial economic learning now undergirds and informs antitrust analysis. Time and again in recent decades, the Supreme Court has used economic reasoning to develop standards for antitrust analysis. Case-by-case decision-making has provided myriad opportunities for the integration of economics into antitrust analysis, and litigating parties and the courts have used them.” ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 4 (2007), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/introduction.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/introduction.pdf). *See* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 229 (1999) (“[A]ntitrust law has become a branch of applied economics . . . .”); Crane, *supra* note 275 (manuscript at 26–27) (cataloguing the many technical questions that must be asked in most antitrust cases, such as: “[w]hat is the relevant market, as determined by cross-elasticity of demand between products; does the defendant have market power in the relevant market, as determined by whether the defendant has the power to raise price without regard to competitive response; did the defendant’s actions harm the competitive process, as opposed to merely bringing harm to competitors[]; and] were the defendants’ actions justified by efficiency considerations . . . .?”); Farber & McDonnell, *supra* note 277, at 620 (“Discussions of antitrust often focus on economics, leaving many students with the feeling that they have mistakenly wandered into an econ class rather than a law class.”); John E.

acknowledged that “courts are of limited utility in examining difficult economic problems.”<sup>290</sup> Driven in part by that recognition, the Court initially crafted antitrust law in the form of *per se* rules prohibiting or protecting certain conduct.<sup>291</sup> Such rules were easy to administer, but they suffered from the predictable problems of under- and overinclusiveness.<sup>292</sup> Recent years have seen a movement away from *per se* rules and toward more flexible standards that allow judges to consider the challenged conduct in context to determine whether it appears to be an unreasonable restraint of trade.<sup>293</sup> Yet the more nuanced and complex antitrust law becomes, the farther it drifts from the ken of the average federal judge.<sup>294</sup> For example, a frequent problem in antitrust cases is identifying and ruling out alternative explanations for seemingly anticompetitive conduct.<sup>295</sup> That is a difficult task even for economists, but it is worse for generalist judges, who tend to lack the expertise and fact-finding capacities of specialists.<sup>296</sup> Indeed, “there is relatively little disagreement about the basic proposition that often our general judicial system is not competent to apply the economic theory necessary for identifying strategic behavior as anticompetitive.”<sup>297</sup>

Concerns about expertise are exacerbated by the fact that most antitrust actions are—or at least could be—tried to a jury.<sup>298</sup> Antitrust

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Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617, 620 (2005) (“Antitrust law has always implicitly drawn on economic ideas, but over the past three decades, its reliance on them has become overt and sophisticated.”) (internal citation omitted).

290. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 (1972).

291. *See Town of Concord*, 915 F.2d at 22 (emphasizing that “antitrust rules are court-administered rules” and explaining that “the need for clarity and administrability sometimes leads to *per se* rules”). *See generally* Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49 (2007).

292. On the choice between rules and standards, see generally, for example, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Louis Kaplow, *A Model of Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995).

293. *See Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 33–34 (D.C. Cir. 2005) (“The Supreme Court’s approach to evaluating a § 1 claim has gone through a transition over the last twenty-five years, from a dichotomous categorical approach to a more nuanced and case-specific inquiry.”); Crane, *supra* note 291. The Court’s decision in *Leegin*, discussed in Part III, *supra*, exemplifies this trend. *See supra* notes 130–38 and accompanying text.

294. *See HOVENKAMP, supra* note 280, at 2 (“[M]uch of so-called ‘post-Chicago’ antitrust . . . identifi[es] problems and solutions that are beyond the competence of the court system to comprehend and correct.”).

295. *See id.* at 46–47.

296. *See id.*

297. *Id.* at 47.

298. The Court and lower federal courts have assumed that antitrust plaintiffs have a Seventh Amendment right to a jury trial in civil antitrust actions; and, of course, the Sixth Amendment grants

experts contend that juries simply are incapable of resolving complex antitrust matters, which tend to be highly technical and divorced from the sorts of moral judgments that juries typically are called upon to make.<sup>299</sup> The scant empirical evidence available reinforces those concerns, indicating that juries understand neither the legal instructions they are given nor the underlying economic principles, and instead decide cases based upon intuitions about justice unmoored from substantive antitrust law.<sup>300</sup>

To be sure, few antitrust cases actually make it to the jury. Most civil antitrust cases settle or are dismissed before trial, and most criminal cases result in a plea bargain.<sup>301</sup> But the mere *prospect* of jury decisionmaking still may shape antitrust law in potentially important ways. For example, antitrust rules must be crafted in a way that will be accessible to the average juror, which may result in less nuanced rules than might otherwise be possible. Similarly, concern that jurors might tend to err on the side of antitrust plaintiffs and against big businesses might lead courts to adopt deliberately underinclusive liability rules.<sup>302</sup>

The prospect of jury decisionmaking also may affect the ultimate

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defendants a right to a jury trial in criminal actions. *See Crane, supra* note 280 (manuscript at 32–33).

299. *See HOVENKAMP, supra* note 280, at 63 (“[J]uries remain a very weak link in a system where the most relevant evidence is economic and technical. Today the United States is virtually the only jurisdiction where competition policy issues are decided by lay juries in this fashion.”); *Crane, supra* note 275 (manuscript at 25) (“Few institutions could be further from the technocratic model of expert administration than a randomly selected group of lay fact-finders.”). *See also* Douglass W. Ell, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 776 (1978) (arguing that “the jury may be particularly unsuited and unqualified to serve as a factfinder in protracted commercial litigation . . .”). Criminal antitrust cases arguably are more appropriate fora for jury decision-making, as “criminal antitrust remains interested in the intent, truthfulness, knowledge, and moral culpability of the individual.” *Crane, supra* note 275 (manuscript at 31–32).

300. *See* Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U. L. REV. 51, 52–59 (1995) (reporting anecdotal evidence that antitrust juries are “overwhelmed, frustrated, and confused by testimony well beyond their comprehension”); *Crane, supra* note 280 (manuscript at 34) (describing shortcomings in jury comprehension).

301. Only about 2 percent of private federal antitrust cases make it to trial. Of the cases that go to trial, roughly half are tried to a jury and half are tried as bench trials. *Crane, supra* note 280 (manuscript at 35 n.140). As for criminal antitrust cases, most (approximately 86 percent) result in plea bargains, but those that go to trial are almost always heard by a jury. *Crane, supra* note 275 (manuscript at 31 n.107).

302. *See Crane, supra* note 280 (manuscript at 35). *Cf. HOVENKAMP, supra* note 280, at 7–8 (explaining that antitrust law produces many false negatives because courts have adopted narrow liability rules in order to counteract the “natural attempt by lawyers to turn every conceivable tort and contract dispute into an antitrust action”). The prospect of jury decisionmaking also may affect antitrust cases in ways that do not generate antitrust law. Most obviously, “[t]he risk, unpredictability, and potentially huge damages awards from trials assure that defendants will settle if the case survives summary judgment.” *Crane, supra* note 291, at 79.

content of antitrust law in a more subtle way, through the mediating influence of procedure. Concern about juries appears to have played a role in recent cases in which the Court adopted procedural rules facilitating the pretrial dismissal of antitrust actions through motions to dismiss<sup>303</sup> or summary judgment.<sup>304</sup> Such jury-avoidance mechanisms arguably distort antitrust decisionmaking, as “[m]any important decisions that would best be made following the give-and-take of cross-examination and expert testimony in a courtroom or administrative proceeding are instead made under the artificial strictures of procedural rules that were not designed with the complexity of industrial policy-making in mind.”<sup>305</sup>

The picture that emerges is not a rosy one. As Herbert Hovenkamp has put it, “Jury trials in front of intelligent but nonspecialist judges is [sic] a truly miserable way to make economic policy, but federal courts do it all the time in the guise of enforcing the antitrust laws.”<sup>306</sup> Courts make such economic policy, moreover, with relatively little democratic input or accountability. The federal judges who create antitrust law are not elected and cannot be removed from office for adopting bad rules.<sup>307</sup> The jurors who apply that law on a case-by-case basis cannot be sanctioned for making bad decisions.<sup>308</sup> And the individuals—or, more commonly, businesses<sup>309</sup>—who initiate private antitrust suits are in no way accountable for their enforcement choices.<sup>310</sup>

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303. See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

304. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

305. Crane, *supra* note 280 (manuscript at 37).

306. HOVENKAMP, *supra* note 280, at 4.

307. See *supra* notes 213–18 and accompanying text.

308. One might counter that the jury itself is a profoundly democratic institution. See *Powers v. Ohio*, 499 U.S. 400, 409 (1991) (describing jury service as a “significant opportunity to participate in civil life”). Congress is made up of the people’s representatives; the jury *is* the people (or at least twelve of them). See Lemos, *supra* note 196, at 1254 n.198. At least in some contexts, decisionmaking by laypeople may be vastly preferable to decisionmaking by insulated technocrats. In particular, the jury is thought to be most valuable when called upon to reflect the *moral* judgment of the community. See, e.g., Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 58–59 (2003). Antitrust, however, is not such an area. See HOVENKAMP, *supra* note 280, at 47–49.

309. See Crane, *supra* note 280 (manuscript at 38) (“About two-thirds of private enforcers of antitrust are aggrieved competitors or other businesses vertically related to the defendant; fewer than twenty percent are consumers.”).

310. See Stephenson, *supra* note 185, at 119. There is reason to fear that many antitrust plaintiffs are pursuing narrow private interests at odds with the public good, for example by seeking liability rules that discourage socially beneficial competitive behavior, or strategically abusing antitrust litigation to achieve similar ends. See Crane, *supra* note 280 (manuscript at 39). *Cf. id.* (manuscript at 40) (“Antitrust defendants do not have the interests of consumers at heart either. Like the competitor-distributor plaintiff class, antitrust defendants seek to promote market conditions conducive to reaping monopoly rents.”).

There are steps courts can take, of course, to minimize the problems outlined here. Courts can employ the services of neutral expert witnesses to help them understand the economic issues presented in difficult antitrust cases.<sup>311</sup> Similarly, they can solicit amicus briefs from experts or interested groups<sup>312</sup>—thus bringing the litigation model at least one step closer to notice-and-comment rulemaking. More generally, antitrust law could be adjusted in ways that address some of the pathologies that inhere in the current court-run system. For example, antitrust scholars have called for abandonment of the automatic provision for treble damages on the ground that it “encourages too many marginal or frivolous lawsuits.”<sup>313</sup> Another way to deal with the problems of private enforcement would be to increase the enforcement role of the DOJ and FTC and to cut back on the availability of private actions.<sup>314</sup> Finally, the substantive rules of antitrust law could be changed in ways that make them easier for generalist judges and juries to administer.

All of these fixes work within the existing antitrust system and seek to make it function more effectively. But this is not just an antitrust issue; it is a delegation issue. Viewing antitrust from the perspective of the nondelegation doctrine brings one face to face with the central difficulty that generalist judges, proceeding on a case-by-case basis with the assistance of lay juries, seem particularly ill-suited to developing and applying rules to govern this increasingly technical field. Rather than tweaking the existing institutional arrangement to compensate for its shortcomings, perhaps the better solution would be to address the problem at its root, shifting primary authority over antitrust law out of the federal courts and into the hands of a specialized agency.<sup>315</sup> A full assessment of

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311. See *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 665 (7th Cir. 2002); HOVENKAMP, *supra* note 280, at 90.

312. See *Cascade Health Solutions v. Peacehealth*, 479 F.3d 726 (9th Cir. 2007) (inviting amicus curiae briefs regarding a question of construction under Section 2 of the Sherman Act).

313. HOVENKAMP, *supra* note 280, at 57. See also *id.* at 305–06.

314. See 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 303e (2d ed. 2000) (“Some possibly far-reaching rules of antitrust liability make sense and are administrable in practice only when there is a responsible filtering of the cases presented to the court . . .”).

315. See KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 70–74 (1969) (arguing that the FTC should make more of its rulemaking powers); Crane, *supra* note 275 (manuscript at 51–56) (arguing that the FTC should assume a norm-creating role in antitrust); C. Scott Hemphill, *Paying For Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553, 1618–23 (2006) (discussing the importance of FTC expertise in areas at the intersection of antitrust and other regulatory schema, and arguing that the FTC and other “competition regulator[s]” must play a central role in “decoding the meaning of a legislative enactment as it bears upon industry economics and antitrust law”). A shift to a more regulatory and less litigation-focused model may already be underway. For example, the Hart-Scott-Rodino Antitrust Improvements Act of

the costs and benefits of such a move is beyond the scope of this brief discussion. The point here is not that a court-run antitrust system necessarily is worse than the alternatives, but simply that nondelegation law and theory provide a useful framework for assessing the difficulties associated with the current arrangement.

### B. COURTS AS DELEGATES

Once one recognizes that Congress delegates to courts as well as agencies, it becomes clear that any given delegation—whether to a court or an agency—reflects two important choices.<sup>316</sup> First is the choice *to* delegate, to cede some degree of lawmaking authority to another institution. Second is the choice *of* delegate. Given nondelegation law's overwhelming focus on agencies, the second choice has attracted virtually no notice. But if nondelegation scholars are correct that Congress cannot as a practical matter attend to all the details of modern law itself,<sup>317</sup> it follows that the choice *to* delegate is almost inevitable. It is the choice *of* delegate that matters.

Although the Sherman Act exemplifies some of the practical problems that may result from delegations to courts, it does not follow that delegations to agencies should always be preferred over delegations to courts. I have argued that lawmaking by courts can present distinctive

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1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified in relevant part at 15 U.S.C. § 18a), largely replaced litigation over mergers with pre-merger administrative review. *See, e.g.*, E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U. L.Q. 997, 1024-43 (1986) (describing the regulatory role played by the DOJ Antitrust Division with respect to proposed mergers under the Hart-Scott-Rodino Antitrust Improvements Act).

316. By using the language of choice here, I do not mean to suggest that all (or even most) delegations are intentional. *Chevron* established a presumption that ambiguity in an agency-administered statute discloses a congressional intent to delegate to the agency. As others have observed, the presumption is based on a fiction. *See, e.g.*, Merrill & Hickman, *supra* note 73, at 871-72 (noting that the *Chevron* presumption "has been described by even its strongest defender as 'fictional'"). Ambiguity is not necessarily intentional, and even when it *is* intentional, it may not necessarily reflect a conscious intent to delegate. The same may be true regarding the choice *of* delegate. Due in large part to confusion over the scope of *Chevron*, it often will be difficult for Congress to predict with any certainty whether a given question will be resolved by a court or an agency. *See generally* Vermeule, *supra* note 9. It seems less likely, however, that there will be similar uncertainty about the decision whether or not to appoint (or create) an agency to administer a given statute. That is, while there may be difficult questions at the margins, Congress presumably will know whether courts or an agency will take *primary responsibility* for interpreting and administering a statute.

In any event, nothing in the argument here turns on the view that Congress typically will make an intentional choice of delegate. Regardless of whether Congress is delegating to courts on purpose or by mistake, it *is* delegating. The operative question is whether delegations to courts are defensible, not whether they are intentional.

317. *See supra* notes 28-30 and accompanying text.

difficulties because of institutional features such as lack of expertise and democratic accountability. Lawmaking by courts, however, might also have distinctive *advantages* over lawmaking by agencies, or even Congress. For example, courts' insulation from political pressure might be seen as an asset in some circumstances, such as where the purpose of the statutory scheme is to protect members of minority groups from discrimination.<sup>318</sup> There may be a significant advantage to allowing questions of discrimination to be fleshed out, at least in the first instance, at a remove from majoritarian politics. Courts provide a forum where voices that normally get drowned out can be heard clearly.<sup>319</sup> And judges, protected by life tenure and guaranteed salary, can decide antidiscrimination cases without fear that an unpopular decision will result in sanctions. Finally, given their experience enforcing the antidiscrimination provisions of the Constitution, judges may have developed special expertise in the area, particularly concerning the difficulties of proving discriminatory intent.<sup>320</sup>

Thus, the institutional characteristics that differentiate courts from agencies might at times make courts the best choice of delegate. Yet despite the vast literature on courts generally—and the relationship between courts and Congress more specifically—we lack any account of courts as delegates. We know very little, for example, about why Congress sometimes chooses to delegate to the courts instead of to an agency.<sup>321</sup> We

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318. Judges commonly are thought to be more protective of minority interests than legislators and other governmental decisionmakers whose jobs depend to some measure on popular support. For a small sampling of the vast literature on the subject, see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059 (1974); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

319. See *supra* note 226.

320. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (establishing an intricate burden-shifting framework to address the problems of proof in Title VII cases). It bears emphasis that judges' experience with the nondiscrimination commands of the Constitution may have a *limiting* effect on their enforcement of Title VII and other civil rights statutes, in that judges may naturally (but perhaps erroneously) equate the statutory and constitutional prohibitions. That may help explain a seeming anomaly—that judges have tended to interpret antidiscrimination statutes quite narrowly. See, e.g., Ruth Colker, *The Mythic 43 Million Americans With Disabilities*, 49 WM. & MARY L. REV. 1, 14–19 (2007) (explaining that “[t]he Supreme Court has consistently interpreted various civil rights laws so narrowly that they cannot provide meaningful protection under an anti-subordination perspective”); Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 440–42 (describing how the Equal Employment Opportunity Commission has interpreted Title VII more broadly than courts have). See also Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 561–71 (2001) (discussing various biases that may affect judges' resolution in discrimination cases).

321. See Stephenson, *Allocation of Delegated Power*, *supra* note 9, at 1038 (noting that the factors that influence Congress's choice of delegate “are not well understood,” and modeling a “subset” of the

know even less about the consequences of such a choice. Do courts and agencies approach the role of delegate in different ways? Are there systematic differences in their interpretive methodologies and outputs?<sup>322</sup> Answering these questions is critical to any analysis of the proper allocation of power between Congress and its delegates. Put simply, we cannot understand how Congress delegates—or make judgments about how Congress *should* delegate—unless we account for both of its delegates.

Just as attention to courts might enrich our understanding of delegations, attention to delegations might enrich our understanding of courts. That is, focusing on courts in their roles as delegates might change the way we think about judicial doctrines or practices that do not, at first glance, bear any relationship to the nondelegation doctrine. Take, for example, the practice of applying a “super-strong” form of stare decisis to questions of statutory interpretation.<sup>323</sup> On the one hand, stare decisis may be seen as a negative feature of judicial decisionmaking, making courts an unattractive choice of delegate. Unyielding adherence to stare decisis would preclude courts from adapting judge-made law to respond to changed circumstances or evolved understandings.<sup>324</sup> If, as I have argued, there is reason to worry that judge-made law might be based on an incomplete and inexpert understanding of the practical issues involved, we should be loath to endorse a rule that would set that law in stone. We might even want lower courts to enjoy more freedom to depart from Supreme Court decisions when presented with evidence that changes their understanding of the relevant issue.<sup>325</sup>

On the other hand, Congress may well value courts as delegates precisely because they are *different* from agencies—and one particularly salient difference is that, due to stare decisis, courts’ decisions tend to be

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possible considerations—the “relative variability of agency and judicial interpretive decisions, both across time and across discrete issues”).

322. See Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 502 (2005) (noting the dearth of information on, and attention to, the questions of “[H]ow do agencies interpret statutes? Are there distinctive interpretive methodologies that appeal to administrators? In what contexts? With what effects?”).

323. See *supra* note 234 and accompanying text.

324. See *supra* notes 235–37 and accompanying text.

325. Of course, one might take the view that delegations to courts are bad for other reasons, and therefore applaud super-strong stare decisis as providing some check on the discretion of courts. Although precedent is notoriously manipulable, especially at the Supreme Court level, an absolute prohibition on departing from an earlier interpretation of a statute certainly would impose some limits on the range of judicial options. It also would maximize Congress’s incentives to monitor the Court’s work closely and to override any decisions with which it strongly disagrees.

more stable over time than agencies' decisions.<sup>326</sup> There is good reason to believe that flexibility is particularly important in certain areas of the law, and predictability or consistency in others.<sup>327</sup> If that is correct, then perhaps we should applaud super-strong stare decisis as offering Congress the opportunity to ensure predictability (by delegating to the judiciary rather than an agency) where predictability is most needed. It would follow that the Court's frequent suggestions that super-strong stare decisis does not apply to "common law" statutes like the Sherman Act<sup>328</sup> have it precisely backwards. Far from weakening the case for stare decisis, the fact that Congress has delegated broad discretion to the judiciary might *reinforce* the need for courts to offer a more stable alternative to administrative rulemaking.

Stare decisis provides a ready example of a judicial doctrine that might benefit from the nondelegation perspective, but the list of possible candidates extends well beyond it—including, to name just a few, standing,<sup>329</sup> federal common law,<sup>330</sup> the void-for-vagueness doctrine,<sup>331</sup> and

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326. See Stephenson, *Allocation of Delegated Power*, *supra* note 9.

327. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved . . ."); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 687–703 (1999) (detailing the Court's insistence through the years that consistency is particularly important in areas where there are significant property or reliance interests).

328. See *supra* note 235 and accompanying text.

329. The federal judiciary plays an important role in determining who can access its lawmaking powers. Especially in the last forty years, courts have developed rules of standing that govern, with increasing complexity, the conditions under which individuals and groups can pursue a federal lawsuit. See C. Douglas Floyd, *The Judiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862, 864 (1985) (describing the proliferation of new standing rules created under the Burger Court). From the perspective of the nondelegation doctrine, restrictive standing rules might be seen as a positive development, as they limit the range of cases where courts make law. Cf. Stearns, *Justiciability*, *supra* note 193, at 1319–20. In theory, at least, they also help ensure that the people who have access to the court are representative of those who will be affected by the court's decision, and have adequate incentives to "fight the good fight." Such assurances are especially important given that one of the most significant differences between courts and agencies (and Congress) is that only the parties to a case and their amici can have a voice in the judicial decisionmaking process.

On the other hand, the nondelegation perspective also might suggest some negative features of restrictive standing rules. Courts already are less accessible to public participation than agencies (and Congress). See *supra* text accompanying notes 225–27. Standing rules further restrict the range of voices that can be heard. This is not a new complaint—many commentators have criticized the Court's standing doctrine on similar grounds. See, e.g., Adam A. Milani, *Wheelchair Users Who Lack "Standing": Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 WAKE FOREST L. REV. 69 (2004) (scrutinizing standing doctrine as a procedural hurdle that overly restricts people with disabilities from remedying violations of the Americans with Disabilities Act); Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 635 (1985) (explaining that the standing doctrine has "been employed without consistent rationale to fence

implied rights of action.<sup>332</sup> Indeed, one could conceive of many debates about the appropriate judicial role as debates about the proper scope of judicial lawmaking. Certainly questions of “judicial restraint” or different methods of statutory construction could be (and often are) cast in terms of the distribution of lawmaking power between Congress and courts. Viewing such issues from the perspective of the nondelegation doctrine might contribute to the discussion by focusing attention on the relevant choices being made. As noted above, a statute that delegates broad gap-filling or norm-elaborating powers to the judiciary reflects not only Congress’s decision to cede some lawmaking authority to another institution, but also Congress’s decision to tap the courts—rather than an

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out disfavored federal claims”); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1750–58 (1999) (noting that standing is a malleable doctrine that has allowed Supreme Court Justices to assert their own ideological preferences in limiting prisoners’, employees’, and environmentalists’ access to courts). But recognizing that courts are exercising lawmaking power delegated from Congress focuses the critique in meaningful ways. It makes clear that the relevant alternatives include not only litigation under a less restrictive standing regime (the usual proposal), but also a shift of lawmaking authority back to Congress, or to a different delegate. That is, if one believes that a particular aspect of standing doctrine unduly limits the range of voices the courts hear when developing a particular aspect of the law, it is worth asking not only whether standing doctrine should change, but also whether courts are the best institutions for the lawmaking in question.

330. Most scholars agree that any valid exercise of common lawmaking by federal courts must be linked in some way to the Constitution or federal statutory law (or regulations). See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 116–17 (1998) (“A consensus of modern scholars agrees that, to create judge-made law, a federal court ‘must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule.’” (quoting Field, *supra* note 171, at 887)). Common lawmaking, in other words, must have its roots in a delegation of power to the courts. Yet virtually no one has considered the possibility that there might be limits on the scope of permissible delegations. Thomas Merrill is a rare exception. Merrill has suggested that permissible delegations to courts must frame with reasonable specificity the area in which judicial lawmaking is to take place. Merrill, *supra* note 8, at 41 n.182. Merrill describes such a requirement as “more restrictive than the test applied in assessing the constitutionality of delegations to the executive branch, at least as that test has been applied in practice,” but he does not explain why delegations to courts should be more strictly limited than delegations to agencies, nor does he explain why the relevant inquiry should be whether the matters being delegated are clearly defined rather than whether the exercise of discretion is appropriately circumscribed. *Id.*

331. See *supra* note 79.

332. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 731–32 (1979) (Powell, J., dissenting) (arguing that the decision whether to create a private right of action “should have been resolved by the elected representatives in Congress after public hearings, debate, and legislative decision. It is not a question properly to be decided by relatively uninformed federal judges who are isolated from the political process”). Attention to nondelegation principles might suggest that courts should take a different approach to the question of implied rights of action depending on whether the statute in question is administered by an agency. For example, Matthew Stephenson has argued that agencies are better situated than courts to determine whether to recognize a private right of action. Stephenson, *supra* note 185. That argument works, of course, only if an agency already is involved in the administration of the statute. It may be more difficult to defend a restrictive approach to implied rights of action with respect to judicially administered statutes such as 42 U.S.C. § 1983 (2000).

agency—for the job. For those who are dissatisfied with the job courts are doing, it may be instructive to look beyond the usual question of what courts might do differently and consider whether and how matters might be improved by transferring responsibility to a different delegate.

Moreover, recognizing that Congress sometimes chooses to delegate to courts rather than to agencies may shift the way we think about the judicial role in some circumstances. Scholarship on statutory interpretation by courts often views judicial lawmaking with some unease—as something that demands justification.<sup>333</sup> Meanwhile, the administrative state sails along happily, and we with it, buoyed by the belief that Congress *wants* agencies to exercise a creative function. But if that is true for agencies, why is it not also true for courts? If we take ambiguity in agency-administered statutes as a green light for the agency,<sup>334</sup> why is ambiguity in judicially administered statutes so often a cause for embarrassment and anxiety? Focusing on courts in their roles as delegates might help us move beyond the much-rehearsed questions of competition and conflict between courts and Congress to consider how Congress might work in cooperation with both of its delegates.<sup>335</sup>

Finally, attention to the fact that Congress delegates lawmaking authority to both courts and agencies also might contribute to our understanding of the work of agencies as arguments directed toward lawmaking by courts can shed light on similar practices by agencies. John Manning's critique of the absurdity canon illustrates the point. Manning argues for courts to abandon the absurdity canon—which holds that courts should interpret statutes so as to avoid absurd results—because its

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333. See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 10–11 (1994) (defending nonoriginalist approaches to statutory interpretation); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1–4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (defending a “purposive” understanding of statutory interpretation, under which courts must attempt to give effect to the goals of statutes as the law evolves). Of course, many judges and scholars reject the proffered justification. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 9–37 (1997) (defending textualist theory of statutory interpretation); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (same). See also Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994) (arguing that judges “are supposed to be faithful agents, not independent principals”).

334. See *supra* notes 111–17 and accompanying text (describing *Chevron*).

335. Cf. Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 434, 438 (arguing that we have entered “a period of Supreme Court uncooperativeness with Congress” marked by an apparent assumption on the part of some of the Justices that “where Congress has acted, it has (sole) responsibility for the elucidation of policy, and the only appropriate role of courts is to apply the policies enacted by the acting Congress, whose dimensions properly change only when Congress chooses to act again”).

application depends too heavily on judges' views of public policy and leads courts to upset legislative bargains.<sup>336</sup> Manning's work is a rare and valuable example of an effort to consider how nondelegation principles might apply to the work of courts. But Manning considers *only* courts.<sup>337</sup> He does not seek to apply his critique of the absurdity canon to statutory interpretation by agencies. Other commentators, however, have suggested that agencies *should* rely on something like the absurdity canon.<sup>338</sup> Perhaps there are reasons why agencies are better suited than courts to apply the canon: for example, agencies' expertise might help them identify absurdity when they encounter it.<sup>339</sup> And perhaps the institutional differences between agencies and courts are such that the nondelegation concerns Manning raises do not apply when agencies evade the apparently plain meaning of statutory text in order to avoid an absurd result. Or, perhaps, attention to agencies' use of the absurdity canon would expose problems with Manning's arguments about courts. Whatever the ultimate answer, the analysis will be enhanced by attention to the similarities and differences between courts and agencies.

## VI. CONCLUSION

Though nondelegation law and scholarship have been blind to them, courts are, and always have been, part of the delegation picture. Congress

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336. See Manning, *Absurdity Doctrine*, *supra* note 8.

337. Manning also has offered an interesting argument, grounded in nondelegation principles, about courts' use of legislative history. His claim is that use of legislative history encourages Congress to engage in *self*-delegation, leaving responsibility for important statutory details to the committees or individual members who dominate the legislative record. See Manning, *Textualism*, *supra* note 8. Such self-delegation is likely to be more attractive to Congress than delegation to an agent—whether court or agency—that Congress cannot control as directly. Therefore, the argument goes, when courts rely on legislative history they are both giving effect to Congress's self-delegations and encouraging Congress to resort to that tempting, but unconstitutional, gambit more frequently.

Manning's argument with respect to legislative history concerns a different type of delegation than the kind this Article considers—self-delegation rather than delegation to a coordinate branch. It is worth noting, however, that in this context as well Manning focuses exclusively on courts, even though his argument would seem to apply with equal force to the use of legislative history by agencies. Several prominent administrative law scholars have argued that agencies *should* rely on legislative history, and that such reliance constrains their discretion in ways that might be seen to promote nondelegation norms. See Mashaw, *supra* note 322, at 511–13; Schuck, *supra* note 210, at 785; Peter L. Strauss, *When the Judge Is Not the Primary Official With Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990).

338. See Easterbrook, *supra* note 122, at 14; Sunstein, *supra* note 114, at 2118.

339. Cf. Peter S. Heinecke, *Chevron and the Canon Favoring Indians*, 60 U. CHI. L. REV. 1015, 1023 (1993) (arguing that courts should not set aside agency interpretations on grounds of absurdity because “[o]ne of the motivating factors behind *Chevron* deference is that agencies have greater expertise; they presumably know better than courts what constitutes an ‘absurd’ result”).

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long has delegated power to courts and it continues to do so today. Like agencies, courts exercise a lawmaking function when they fill in the gaps left by broad statutory delegations of power. Yet courts continue to fly under the radar of the nondelegation doctrine.

Nondelegation law and theory ignore courts at their peril, however. Delegations to courts raise the same constitutional concerns as delegations to agencies. The Supreme Court's failure to enforce the nondelegation doctrine directly may be justifiable when it comes to delegations to agencies, but the arguments for why nonenforcement should not be cause for concern do not translate well to judicially administered statutes. And to the extent that the doctrine *is* enforced through subconstitutional rules of statutory construction, the same approach does not make sense as a means of limiting courts' discretion. As we have seen, the narrow-construction approach takes on an oxymoronic quality when considered as a mechanism for limiting judicial discretion. Thus, while the nondelegation doctrine applies in principle to judicially administered statutes, the ways the Court has implemented the doctrine in practice do not work for delegations to courts.

Although the bulk of this Article is devoted to exposing the potential problems with delegations to courts, the goal is not to attack such delegations as much as to call attention to them. There is a rich body of scholarship on the characteristics of agencies that make them good, bad, or indifferent delegates. We need a similar account of courts.