

EXHUMING NONDELEGATION . . . INTELLIGIBLY

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ABSTRACT

Whether by avalanche or a thousand cuts, the intelligible principle test may be awaiting its untimely demise at the behest of a reinvigorated nondelegation movement. Perhaps looking to speed up the decomposition, the Fifth Circuit in *Jarkesy v. Securities and Exchange Commission* struck down the SEC's discretion to pursue enforcement actions with its own Administrative Law Judges or in federal court as unconstitutionally delegated legislative power. This Note posits that *Jarkesy* was rightly decided but rife with unconvincing reasoning. Establishing this requires a detour into the meaning of the Necessary and Proper Clause, the significance of the separation of powers, and the interplay between executive and legislative authority. In so doing, this Note proposes a refined nondelegation test that more clearly categorizes the powers that Congress may or may not constitutionally delegate and offers a novel conception of legislative power emphasizing constitutional text. The result is a blueprint that neither defends nor attacks the intelligible principle test but can nonetheless be used as a basis for either. On the one hand, this proposal may provide a spirited framework for asserting that a modified intelligible principle test is constitutionally agreeable and not just practically preferable in a modern society. On the other hand, this proposal endorses a more exacting categorical test that builds on Justice Gorsuch's framework and advocates for more robust enforcement of nondelegation generally.

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INTRODUCTION

With increasing urgency, legal commentators across the nation have warned of the impending “death knell” for the administrative state due to the new makeup of the Supreme Court.¹ So it goes, the Court’s majority apparently may now approve of strictly enforcing the nondelegation principle—the idea that Congress may not delegate its legislative authority—which would shrink the power of federal agencies.² Not the least brunt of this would hit the Securities and Exchange Commission (SEC), which enforces the federal securities laws and regulates the U.S. financial markets for the purpose of protecting investors and ensuring fair transactions.³ The Fifth Circuit, appearing to almost force the Supreme Court’s hand, undercut the SEC’s power to enforce and regulate the securities markets in *Jarkesy v. SEC*.⁴ The split panel held that, inter alia, Congress unconstitutionally delegated legislative power in Dodd–Frank § 929P(a) by granting the SEC the authority to choose whether to bring securities fraud enforcement actions against individuals with administrative law judges (ALJs), who are essentially SEC employees that decide disputes initiated by the agency, or with judges in federal Article III court.⁵ Under the majority’s reasoning, it is the constitutional domain of Congress to decide whether certain public disputes are to be resolved by an agency itself or the federal courts.⁶

A subset of conservative scholars have long asserted that federal administrative agencies operate on shoddy constitutional grounds, as the lovechild of contrived reasoning.⁷ Bureaucratic defenders, on the other hand, have long focused on practical considerations, emphasizing the importance of expert and efficient agencies to modern governance in the

1. See, e.g., Robert Litan, *The Supreme Court Won’t Dismantle the Administrative State Quite Yet*, BARRON’S (Apr. 19, 2022, 4:00 AM), <https://www.barrons.com/articles/the-supreme-court-wont-dismantle-the-administrative-state-regulation-51650298951> [<https://archive.ph/ZADsG>].

2. See Thomas Geoghegan, *When the Court Shrinks the Administrative State, Congress Loses Power*, WASH. POST (July 22, 2022, 1:42 PM), <https://www.washingtonpost.com/outlook/2022/07/22/manchin-administrative-state-epa-schechter> [<https://perma.cc/373V-43XK>].

3. See, *What We Do*, SEC. & EXCH. COMM’N, <https://www.sec.gov/about/what-we-do> [<https://perma.cc/9WEZ-XXYU>] (last visited Jan. 17, 2023).

4. 34 F.4th 446 (5th Cir. 2022).

5. See *id.* at 459; see also 15 U.S.C. § 78u–2.

6. See *Jarkesy*, 34 F.4th at 459.

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

face of a hyper-political and oft-deadlocked Congress.⁸ While the constitutional-by-necessity argument has been alluring to many, it crucially neglects the guard rails actually provided for in the governing document ratified by the people: the Constitution. In the face of increasing opposition, the strongest defense of the administrative state would directly incorporate the text of the Constitution as its starting point and centerpiece, especially given the jurisprudential tilt of the Supreme Court today.

Irrespective of normative considerations, this Note argues the current administrative state could largely be justified based solely on the constitutional text. At the same time, this Note asserts that the Constitution demands a resuscitated nondelegation principle to ensure the balance of power and democratic accountability. To this end, Part I discusses the constitutional principles undergirding federal administrative agencies and introduces the reinvigorated debate over the bounds of regulatory authority. Part II examines the Fifth Circuit's *Jarkesy* opinion and explores the range of powers the Constitution vests in the legislative branch and in the executive branch. Lastly, Part III proposes a refined nondelegation test that more clearly defines those constitutionally permissible statutory delegations of authority, and which calculates that the outcome in *Jarkesy* was correct even if its reasoning was flawed. Ultimately, this proposal elucidates the confines of Congress's delegatory latitude in light of the constitutional text and its careful vesting of powers. The result is a blueprint malleable enough to be used as the basis for breathing new life into the decades of precedent upholding Congress's statutory delegations to federal agencies, or for inaugurating stronger nondelegation scrutiny that sounds the death knell for the modern agency's broad powers.

I. DOCTRINAL FOUNDATIONS

A. SEPARATION OF POWERS AND THE NONDELEGATION DOCTRINE

The very first clause of the United States Constitution vests “[a]ll legislative powers herein granted” in Congress.⁹ Later on, the Constitution vests “[t]he executive power . . . in a President”¹⁰ and “[t]he

8. See *infra* pp. 12-13.

9. See U.S. CONST. art. I, § 1.

10. See U.S. CONST. art. II, § 1, cl. 1.

judicial power . . . in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”¹¹ While “separation of powers” is not a term even mentioned in the Constitution, the principle stems from these Vesting Clauses.¹² As the theory goes, the Constitution’s careful vesting of the federal government’s powers in three separate branches ensures a structurally efficient government and prevents the kind of tyranny detested under the British system.¹³ James Madison once famously declared that “[i]f there is a principle in our Constitution, indeed in any free Constitution more sacred than another, it is that which separates the legislative, executive and judicial powers.”¹⁴ In light of these core tenets, the nondelegation principle stands for the proposition that Congress cannot delegate its legislative powers to anyone else.¹⁵

Nevertheless, the Constitution also provides for some overlap between the three federal branches. Checks and balances ensure, for example, the President’s participation in the lawmaking process through the veto power, the Senate’s participation in the executive function through the power to confirm federal officers, and perhaps even the federal courts’ participation in the executive function through the power to issue writs of mandamus.¹⁶ Additionally, the Necessary and Proper Clause specifies that “Congress shall have power . . . [t]o make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the government of the United States, or in any department or officer thereof,” thereby affording Congress some degree of control over the execution of

11. See U.S. CONST. art. III, § 1.

12. See, e.g., JOHN L. FITZGERALD, CONGRESS AND THE SEPARATION OF POWERS 1-2 (1986).

13. See, e.g., Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 433 (1987).

14. James Madison, 1 ANNALS OF CONGRESS 604; see also THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.”).

15. See, e.g., *Gundy*, 139 S. Ct. at 2121 (2019); see also SOTIROS A. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 37 (1975) (“The best theoretical foundation for the rule of nondelegation is the simple expectation in the constituent act of establishing government that neither the government nor any of its parts should change the constitutional arrangement of offices and powers.”).

16. See Steven G. Calabresi et al., *The Rise and Fall of Separation of Powers*, 106 NW. UNIV. L. REV. 527, 535 (2012); see also FITZGERALD, *supra* note 12, at 35-36.

federal authority.¹⁷ While Congress regularly enacts statutes creating administrative agencies and delegating lawmaking authority to those agencies,¹⁸ Congress's ability to do so is not unlimited.¹⁹ When Congress forms an agency and vests it with Congress's own powers, Congress is purportedly granting executive authority to an executive entity,²⁰ which is a justifiable practice under the Necessary and Proper Clause.²¹

The Supreme Court elucidated its longstanding test for whether Congress has permissibly delegated executive power or impermissibly delegated legislative power in *J.W. Hampton, Jr., & Co. v. United States*.²² The Court explained that a statutory delegation of Congress's legislative power is constitutional if Congress has provided an intelligible principle cabining agency discretion.²³ Such a principle ensures any function authorized by the statutory provision is executive by directing to a sufficient degree how the agency is to perform.²⁴ The underlying rationale is that while Congress cannot delegate purely legislative power, it must have some flexibility to confer discretion to agencies so they may enforce and carry out the law.²⁵ Since *J.W. Hampton*, this "lax"²⁶ test has invalidated a statute on nondelegation grounds only twice, and not since 1935.²⁷ Broad delegations of authority are now embedded in the modern administrative state. For example, the Supreme Court has upheld

17. See U.S. CONST. art. I, § 8, cl. 18.

18. See *infra* notes 28-30 and accompanying text.

19. See, e.g., *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) ("Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend.").

20. See *id.* at 421-22; see also *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (explaining that an executive official performing their duties pursuant to statute "does not exercise 'legislative' power" (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976))).

21. See *Panama Ref. Co.*, 293 U.S. at 406-07, 421; see also Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 346 (2002).

22. 276 U.S. 394 (1928).

23. See *id.* at 409.

24. See *id.*

25. See *id.* at 406-08 ("If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates Congress may provide a Commission . . . to fix those rates . . . all in accord with a general rule that Congress first lays down that rates shall be just and reasonable considering the service given and not discriminatory.").

26. See *United States v. Diggins*, 36 F.4th 302, 319 n.19 (1st Cir. 2022).

27. See Jennifer L. Mascott, *Gundy v. United States: Reflections on the Court and the State of the Nondelegation Doctrine*, 26 GEO. MASON L. REV. 1, 2 (2018).

delegations to determine “excessive profits,”²⁸ “just and reasonable” rates,²⁹ and the regulation of broadcast licenses in the “public interest, convenience, or [as] necessity require[s],”³⁰ to name a few. Indeed, “modern case law tends regularly to disfavor” nondelegation challenges,³¹ which has ushered in the era of the “delegation non-doctrine.”³²

The true extent to which the Necessary and Proper Clause permits delegations, though, has been the subject of much debate. The constitutional convention rejected a plainspoken proposal by James Madison that would have granted the President the authority “to execute such other powers as may from time to time be delegated by the national legislature.”³³ As Congress does not rely upon its explicit substantive powers when it delegates—Congress does not “lay” or “collect” taxes in delegating rulemaking authority to the Internal Revenue Service (IRS)³⁴—the constitutional basis for administrative delegations rests in the Necessary and Proper Clause.³⁵

The original meaning of the Necessary and Proper Clause, even beyond the delegatory context, is not fully apparent. Among the many conclusions are that the Clause merely emphasizes Congress’s fiduciary relationship and incidental powers,³⁶ broadly vests implied or unenumerated powers in Congress to provide for the general interests of the Nation in the face of unforeseen circumstances and new contingencies,³⁷ or authorizes Congress to select the “means” to carry out the aggregate powers the Constitution vests in the federal government as a whole.³⁸ The Supreme Court has, however, articulated the test for

28. See *Lichter v. United States*, 334 U.S. 742, 778 (1948).

29. See *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 585 (1942).

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

31. See *United States v. Parks*, 698 F.3d 1, 8 (1st Cir. 2012); see also *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (“Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation.”).

32. Larry Alexander & Saikrishna Prakash, Essay, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1036 (2007).

33. THE WRITINGS OF JAMES MADISON 61 (Gaillard Hunt ed., 1902).

34. See Alexander & Prakash, *supra* note 32, at 1055.

35. See *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421; see also Lawson, *supra* note 21.

36. See Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 322 (2004).

37. See John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1130-31 (2014).

38. See Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3, 7 (2019).

determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute as “whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”³⁹ The meaning of “necessary” is not intuitive from modern parlance; it does not mean “absolutely necessary,”⁴⁰ but rather “convenient,” “useful,” or “conducive” to the administration of an enumerated authority,⁴¹ and “plainly adapted” to that end.⁴² Moreover, the Clause’s drafting history suggests it is properly analyzed in three distinct parts: Part (I) refers to “the foregoing Powers” of Article I, Section 8; Part (II) refers to “all other Powers vested by this Constitution in the government of the United States;” and Part (III) refers to “any department or officer [thereof].”⁴³ A broad reading of Parts (II) and (III), within the context of congressional delegations, would ostensibly provide Congress the green light to make all delegations conducive to facilitate the full exercise of the powers delegated to the federal government, even those powers Congress does not expressly have.⁴⁴

A movement for a stricter intelligible principle test has recently gained traction, rooted in an emphasis on the separation of powers and reaffirming the democratic accountability of Congress.⁴⁵ A more stringent test would prevent Congress from punting the hard issues for unelected administrative bureaucrats to decide.⁴⁶ Leading the charge, Justice Gorsuch proffered a new test in his *Gundy v. United States* dissent,⁴⁷ which would only uphold a delegation that: (1) authorizes another branch to “fill up the details” of a statutory scheme; (2) makes the application of a rule governing private conduct dependent on executive fact-finding; or (3) assigns certain non-legislative responsibilities.⁴⁸ Thus, Justice Gorsuch’s proposal would require a scalar inquiry into the degree of

39. See *United States v. Comstock*, 560 U.S. 126, 134 (2010); *Sabri v. United States*, 541 U.S. 600, 605 (2004).

40. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 413-15 (1819).

41. See *Comstock*, 560 U.S. at 133-34; *McCulloch*, 17 U.S. at 413, 418.

42. See *McCulloch*, 17 U.S. at 421; *Jinks v. Richland Cnty., S.C.*, 538 U.S. 456, 462 (2003).

43. See Mikhail, *supra* note 37, at 1131.

44. See Alexander & Prakash, *supra* note 32, at 1069-70; see also *infra* Section II.D.

45. See *Gundy*, 139 S. Ct. at 2133-35 (Gorsuch, J., dissenting).

46. See *id.* at 2134-35; see also Mascott, *supra* note 27, at 4-5.

47. *Gundy*, 139 S. Ct. at 2136-37.

48. See *id.*

discretion conferred only after a clear categorical inquiry into the kind of power conferred.⁴⁹

This movement has not been without pushback. First, there is a concern that a stricter test, such as Justice Gorsuch's, would invalidate a countless number of statutes that provide broad discretion to administrative agencies, thereby uprooting modern federal governance.⁵⁰ A complex and ever-changing modern society may often require specialized governance that a generalist Congress simply cannot provide.⁵¹ Second, while Justice Gorsuch's test would undoubtedly invalidate many more statutes, it is not clear the inquiry would be judicially manageable.⁵² For starters, "filling up the details" as a standard is rather malleable and opaque.⁵³ This leaves a judge more room to insert their own predispositions and preferences into the determination of what constitutes a "detail," potentially leading to inconsistent outcomes. Finally, many more delegations would be scrutinized,⁵⁴ yielding more inquiries into the "intractable puzzle" of distinguishing between "legislative," "executive," and "judicial" functions.⁵⁵

49. See Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 177 (2019) ("Justice Gorsuch, however, sought to adopt a more categorical approach that created a set of formal rules to identify those cases that pose a nondelegation problem.").

50. See, e.g., *Gundy*, 139 S. Ct. at 2116, 2130 ("Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs."); Andrew Coan, *Eight Futures of the Nondelegation Doctrine*, 2020 WIS. L. REV. 141, 146 (2020).

51. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *Gundy*, 139 S. Ct. at 2123.

52. See Johnathan Hall, Note, *The Gorsuch Test: Gundy v. United States, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, 180, 211-12 (2020).

53. See *id.* at 211-12.

54. See, e.g., Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 580-81 (1994) (finding states with stricter nondelegation standards "strike down broad grants of authority to agencies more readily than" other states); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1991-2001 (1999) (same).

55. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1238 n.45 (1994) ("The problem of distinguishing the three functions of government has long been, and continues to be, one of the most intractable puzzles in constitutional law.").

II. *JARKESY* AND THE RANGE OF CONSTITUTIONAL POWERS

A. THE SECURITIES AND EXCHANGE COMMISSION'S ENFORCEMENT POWERS IN *JARKESY*

In *Jarkesy v. Securities and Exchange Commission*,⁵⁶ a split three-judge Fifth Circuit panel held that, inter alia, Congress unconstitutionally delegated legislative power in Dodd–Frank § 929P(a) by granting the SEC the authority to choose whether to bring securities fraud enforcement actions in Article III courts or with ALJs.⁵⁷ Petitioner Jarkesy founded and managed two hedge funds with upwards of 100 investors and \$24 million in assets under management.⁵⁸ The SEC began investigating Jarkesy in 2011, alleging that he and his co-conspirators committed fraud under the securities laws through various misrepresentations.⁵⁹ The SEC initiated enforcement proceedings against Jarkesy and the other parties before an SEC ALJ, rather than filing suit in federal court.⁶⁰ Petitioners first sought to enjoin the agency proceedings in the U.S. District Court for the District of Columbia, based on various constitutional claims.⁶¹ The court ruled that it lacked jurisdiction as administrative processes had not been exhausted.⁶² After the proceedings continued, the presiding ALJ concluded that Petitioners were guilty of securities fraud, after which Petitioners sought review by the Commission of the ALJ's findings.⁶³ The Commission rejected Petitioners' constitutional arguments, including those as to due process, the right to civil trial by jury, and the unconstitutional delegation of legislative power, and affirmed the ALJ's conclusion of securities fraud.⁶⁴ The Commission ordered the disgorgement of nearly \$685,000 in ill-gotten gains, a civil penalty of \$300,000, and banned Jarkesy from various activities in the securities

56. 34 F.4th 446 (5th Cir. 2022).

57. *See id.* at 459; *see also* 15 U.S.C. §78u–2.

58. *See Jarkesy*, 34 F.4th at 450.

59. *Id.*

60. *Id.*

61. *Jarkesy v. SEC*, 48 F. Supp. 3d 32, 40 (D.D.C. 2014), *aff'd*, 803 F.3d 9, 12 (D.C. Cir. 2015).

62. *Id.*

63. *Jarkesy*, 34 F.4th at 450.

64. *Id.*

industry.⁶⁵ Petitioners again sought remedy in federal court, this time seeking appellate reversal of the Commission’s final order.⁶⁶

The Fifth Circuit ruled in favor of Jarkesy and Petitioners on three separate constitutional grounds, but this Note addresses only the nondelegation holding.⁶⁷ Judge Elrod, writing for the majority, held that the SEC’s statutory authority to select whether to bring enforcement actions in Article III courts before federal judges or within the agency before ALJs violates the constitutional separation of powers by bestowing significant legislative power in the absence of an intelligible principle.⁶⁸ Judge Elrod explained that democratic accountability “evaporates if a person or entity other than Congress exercises legislative power.”⁶⁹ The framers assuredly intended to “sequester[] that power within the halls of Congress.”⁷⁰

The court framed the nondelegation inquiry as “(1) whether Congress has delegated power to the agency that would be legislative power but-for an intelligible principle to guide its use and, if it has, (2) whether it has provided an intelligible principle such that the agency exercises only executive power.”⁷¹ In answering the first, Judge Elrod reasoned “the ability to determine which subjects of its enforcement actions are entitled to Article III proceedings with a jury trial, and which are not” was legislative absent a guiding intelligible principle because it has “the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch.”⁷² As the Supreme Court previously explained, “‘the mode of determining’ which cases are assigned to administrative tribunals ‘is completely within congressional control.’”⁷³ Since “the power to assign disputes to agency adjudication is ‘peculiarly within the authority of the legislative department’” an intelligible principle was required in Dodd–Frank § 929P(a) to prevent the delegation of Congress’s purely legislative powers.⁷⁴

65. *Id.*

66. *Id.* at 451; *see also* 15 U.S.C. § 77i(a).

67. *See Jarkesy*, 34 F.4th at 451.

68. *Id.* at 459.

69. *Id.* at 460.

70. *Id.*

71. *Id.* at 461.

72. *Id.* (quoting *INS v. Chadha*, 462 U.S. 919, 952 (1983)).

73. *Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 50, 52 (1932)).

74. *Id.* (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

While the court acknowledged the Supreme Court's modern jurisprudence has continually upheld even broad delegations, the Supreme Court had not considered a case where the statute provided "no guidance whatsoever" and "said nothing at all indicating how the SEC should make that call."⁷⁵ The majority also rejected the SEC's argument that such power constituted enforcement discretion, an executive power not requiring an intelligible principle, because "Congress did not, for example, merely give the SEC the power to decide whether to bring enforcement actions in the first place, or to choose where to bring a case among those district courts that might have proper jurisdiction."⁷⁶ Instead, it "effectively gave the SEC the power to decide which defendants should receive *certain legal processes* (those accompanying Article III proceedings) and which should not."⁷⁷ Finding persuasive Justice Kagan's explanation in *Gundy* that "'we would face a nondelegation question' if the statutory provision at issue had 'grant[ed] the Attorney General plenary power to determine [the relevant statute's] applicability to pre-Act offenders . . . and to change her policy for any reason and at any time,'" the *Jarkesy* majority calculated that "[i]f the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution."⁷⁸ Thus, since the power to decide fora in this manner is a "legislative power but-for an intelligible principle" and an intelligible principle was lacking, the court concluded that ALJ forum discretion under Dodd-Frank was an impermissible delegation from Congress.⁷⁹

In dissent, Judge Davis would have held that "by authorizing the SEC to bring enforcement actions either in federal court or in agency proceedings, Congress fulfilled its legislative duty."⁸⁰ Judge Davis argued that *Crowell v. Benson* is inapplicable because the determination of forum is not legislative: "[b]y passing Dodd-Frank § 929P(a), Congress established that SEC enforcement actions can be brought in Article III courts or in administrative proceedings" and therefore "fulfilled its duty of controlling the mode of determining public rights cases asserted by the

75. *Id.* at 462.

76. *Id.*

77. *Id.* (emphasis in original).

78. *Id.* at 462-63 (quoting *Gundy v. United States*, 139 S. Ct. at 2123 (Kagan, J.) (plurality opinion)).

79. *Id.* at 460-63.

80. *Id.* at 473 (Davis, J., dissenting).

SEC.”⁸¹ Indeed, “*Crowell* did not state that Congress cannot authorize that a case involving public rights may be determined in either of two ways.”⁸² At the same time, the dissent appeared to contradict this point by arguing the majority was “incorrect” in determining that the SEC’s power to decide fora “falls under Congress’s legislative power.”⁸³ The dissent analogized ALJ forum discretion to enforcement discretion, comparing it to the prosecutor’s ability to choose between two criminal statutes⁸⁴ and agencies’ discretion to institute new policy through rulemaking or adjudication.⁸⁵ As such, no intelligible principle was needed since the determination is executive in nature and Judge Davis would have upheld the statute.⁸⁶

B. CONCURRENT VS. EXCLUSIVE POWERS AND CONVENTIONAL DELEGATIONS

Ascertaining whether the *Jarkesy* majority truly “picked up the wrong tool” in applying the nondelegation doctrine⁸⁷ requires a detour into the variety of powers the Constitution confers. While the Constitution generally vests lawmaking powers in Congress and the power to execute laws in the President, it also signals the branches are not meant to operate in “watertight compartments.”⁸⁸ The Constitution provides for some independence of the branches but qualifies this independence by requiring the cooperation of all branches in order to achieve a fully functioning federal government.⁸⁹ True, the Constitution vests mostly powers that are

81. *Id.*; see also *Crowell v. Benson*, 285 U.S. 22, 50, 52 (1932).

82. *Jarkesy*, 34 F.4th at 473.

83. *Id.* at 474.

84. See generally *United States v. Batchelder*, 442 U.S. 114 (1979).

85. See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *Jarkesy*, 34 F.4th at 474.

86. *Jarkesy*, 34 F.4th at 475.

87. Fourth Branch Podcast, *Deep Dive Episode 232—The Implications of Jarkesy v. SEC for Administrative Tribunals*, REGUL. TRANSPARENCY PROJECT (Aug. 18, 2022), <https://regproject.org/podcast/deep-dive-episode-232-the-implications-of-jarkesy-v-sec-for-administrative-tribunals>.

88. FITZGERALD, *supra* note 12, at 31.

89. See, e.g., *Ex parte Grossman*, 267 U.S. 87, 120 (1925). For example, the judiciary interprets the laws that Congress makes, Congress has the power of federal appropriations and may impeach judges and executive officials, the President may pardon the convicted and veto laws, etc. See also *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

exclusive and unshared by the other branches,⁹⁰ but some powers vested in one branch actually overlap with a power vested in another branch.⁹¹ Evidently, there are some circumstances when the President may participate in the federal government's lawmaking function, even if most of that responsibility lies with Congress.⁹²

Overlap of powers may also occur as a consequence of Congress's latitude to delegate its lawmaking powers and the President's authority to execute Congress's laws under the Take Care Clause.⁹³ Congress may delegate some of its authority because it may sensibly require help in exercising its lawmaking functions.⁹⁴ The constitutional hook permitting this is the Necessary and Proper Clause.⁹⁵ Congress may accordingly authorize executive branch officials to engage in functions which Congress otherwise could have done on its own, and that the executive branch would not have the authority to perform in the absence of the delegation.⁹⁶ These tasks often fall under the "grey area" between

powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

90. See, e.g., U.S. CONST. art. I, § 8, cl. 1 (Congress's taxing power).

91. The Senate's and the President's dual authority to make treaties on behalf of the United States is an obvious example. U.S. CONST. art. II, § 2, cl. 2. Other instances may not be so clear—for example, Congress's power "to make rules for the government and regulation of the land and naval forces," U.S. CONST. art. I, § 8, cl. 14, and the President's powers as Commander in Chief, see U.S. CONST. art. II, § 2, cl. 1.

92. See FITZGERALD, *supra* note 12, at 35 ("There are exceptions to the above generality, which by express provision permit the President to participate in the legislative function. This participation occurs in two principal instances, treaty making and the qualified veto power.").

93. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1725 (2002) ("[T]he authority that the president exercises pursuant to a statutory grant is executive authority in the 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.'").

94. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407 (1928) ("If Congress were to be required to fix every rate, it would be impossible to exercise the power [to regulate interstate commerce] at all."); see also *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) ("[T]he Constitution does not 'deny[] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s].'" (quoting *Yakus v. United States*, 321 U.S. 414, 425 (1944))).

95. See *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 406-07, 421 (1935); see also Lawson, *supra* note 21, at 346.

96. See *Gundy*, 139 S. Ct. at 2123 ("Congress may 'obtain[] the assistance of its coordinate Branches'—and in particular, may confer substantial discretion on executive

legislative and executive authority.⁹⁷ As Justice Marshall elaborated long ago, “Congress may certainly delegate to others powers which the legislature may rightfully exercise itself,” but “[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[,]” which may be left for others “to fill up the details.”⁹⁸ The core distinction is between legislative functions Congress must decide on its own, and those auxiliary concerns Congress may elect to consign to others.⁹⁹

A common manifestation of legislative-executive power overlap involves Congress’s delegation of Article I, Section 8 lawmaking powers to an administrative agency.¹⁰⁰ For example, the IRS may enact any income tax regulations that are “needful,”¹⁰¹ the FTC may promulgate rules to prevent “unfair or deceptive acts” in commerce,¹⁰² and the SEC may espouse exemptions to the general requirement that securities be registered before they are sold.¹⁰³ When the agency decides the issue, such action is reaffirmed as executive, not legislative.¹⁰⁴ The executive’s delegated authority invokes the Article II obligation to execute Congress’s laws under the Take Care Clause.¹⁰⁵ As such, some questions may be concurrently executive and legislative, if Congress decides to leave those questions to the agency. Most of these “conventional delegations” of Article I, Section 8 powers can be ascribed as granting

agencies to implement and enforce the laws.” (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

97. See, e.g., Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 111 (1996) (“The Constitution . . . does not specifically demarcate the boundaries that divide executive and legislative powers For the executive, Congress’ desire to expand its lawmaking function is often characterized as micromanagement, which intrudes upon its power to implement. For the Congress, the executive seeks to expand its implementation authority into the gray area of lawmaking.”).

98. *Wayman v. Southard*, 23 U.S. 1, 20 (1825).

99. See *id.*; see also Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari A Maxim of American Constitutional Law*, 14 CORNELL L. REV. 168, 190-92 (1929).

100. See Alexander & Prakash, *supra* note 32, at 1039-40.

101. See 26 U.S.C. § 7805(a).

102. See 15 U.S.C. § 57a; 15 U.S.C. § 45.

103. See 15 U.S.C. § 77z-3.

104. See, e.g., *United States v. Grimaud*, 220 U.S. 506, 521 (1911) (“[T]he authority to make administrative rules is not a delegation of legislative power.”).

105. See Posner & Vermeule, *supra* note 93, at 1723.

“nonexclusive lawmaking licenses” to agencies, since both Congress and the agency may decide to implement new policies and rules.¹⁰⁶

Both Justice Gorsuch’s test and the intelligible principle test would appear to tacitly accept the principle that there is some degree of overlap between the authority to make law and the authority to execute it. For instance, suppose Congress statutorily grants the agency discretion to promulgate Rule *A* or Rule *B*, depending on some factors to consider, and the agency subsequently chooses to promulgate Rule *A*. Suppose instead Congress requires the agency to promulgate Rule *A*, or even institutes the same substance of Rule *A* in a statute. In the latter scenario, Congress has decided a policy question, but in the former, the agency has. Even under Justice Gorsuch’s formulation, the former may be a permissible delegation provided the choice between Rule *A* and *B* is a detail in the broader policy scheme, even though Congress could have also decided the issue pursuant to Congress’s lawmaking powers. Congress cannot reasonably be expected to conjure up the foresight to prescribe every single component of a grand regulatory scheme, to the point where the agency tasked with carrying out the scheme has no interpretive discretion at all. Consequently, the delegation of these concurrent powers is permissible under nondelegation principles if discretion is cabined to the right degree.¹⁰⁷

Naturally, when the power delegated to an agency is concurrent, Congress could decide the question on its own without the help of an agency. An example of this might be matters of internal agency organization.¹⁰⁸ Within the bounds of its authorizing statute, an agency has the authority to prescribe internal rules and procedures to organize

106. See Alexander & Prakash, *supra* note 32, at 1040:

[A] congressional failure to take up a legislative proposal does not preclude a licensee—typically a government agency—from adopting the proposal, at least if the proposal lies within the scope of the licensee’s delegated authority. Moreover, even if Congress rejects a legislative proposal, the licensee might enact the very same rules embodied in the proposed law. Of course, notwithstanding its delegation, Congress retains the ability to enact statutes itself.

107. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); see also *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Alito, J., concurring).

108. See *Lincoln v. Vigil*, 508 U.S. 182, 196 (1993) (agency discretion as to the distribution of lump sum appropriations unreviewable and akin to agency decisions not to enforce).

itself.¹⁰⁹ Thus, Congress has the power to specify the appropriation of funds to an agency but may instead provide a lump sum appropriation for the agency to distribute itself, since the agency has some degree of organizational autonomy and may be in a better position than Congress to make those allocative decisions.¹¹⁰ Consequently, the distribution of funds within an agency to effect certain ends may fall under both Congress’s lawmaking powers and the agency’s power to executively carry out the statute.

Perhaps less commonly, Congress vests authority to executive officials that may already come within the ambit of power authorized to the executive branch by Article II, consistent with Justice Gorsuch’s third prong.¹¹¹ While Article I vests “all” legislative powers “herein granted” to Congress,¹¹² the Constitution also vests some authority in the President that walks, talks, and squawks like lawmaking in a discretionary policy sense—beyond the President’s power to execute laws—whether exclusive or concurrent with Congress.¹¹³ The Supreme Court has upheld delegations to the President and executive officials lacking an intelligible principle, thus granting what would seem to be raw policy authority, provided the executive branch has some degree of preexisting authority over the delegated power.¹¹⁴ For example, Congress may delegate the authority to define the aggravating factors permitting the imposition of the death penalty in military trials to the President as a result of the overlapping commander in chief power.¹¹⁵ This is because “[t]he delegated duty . . . is interlinked with duties already assigned to the President by express terms of the Constitution.”¹¹⁶ The Take Care Clause, in this case, is not the only source of the executive branch’s power—rather, the executive has at least some independent constitutional

109. *See id.*

110. *See id.*; *see also* Webster v. Doe, 486 U.S. 592, 603 (1988) (holding Director of the CIA’s grounds for firing an employee unreviewable on account of executive branch’s independent national security powers).

111. *See Gundy*, 139 S. Ct. at 2137 (Alito, J., concurring).

112. *See* U.S. CONST. art. I, § 1.

113. *See supra* note 92 and accompanying text.

114. *See, e.g.,* Loving v. United States, 517 U.S. 748, 772-73 (1996); United States v. Mazurie, 419 U.S. 544, 556-57 (1975).

115. *See Loving*, 517 U.S. at 772-73.

116. *Id.* at 772 (quoting *Mazurie*, 419 U.S. at 556-57); *see also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-22 (1936) (refusing to apply “a general rule which will have the effect of condemning legislation like [this] under review as constituting an unlawful delegation of legislative power” due to the President’s independent executive authority over foreign affairs).

authority over the subject matter.¹¹⁷ Moreover, an agency's action pursuant to this type of delegation would presumably constitute the sort of discretion that is unreviewable under the Administrative Procedure Act as "committed to agency discretion."¹¹⁸ Consequently, when Congress delegates discretion to an agency over matters within the scope of some recognized Article II executive power, there is no nondelegation issue.¹¹⁹

Some commentators have attempted to qualify that where the delegation touches on the President's substantive powers, but where the President would not have been able to decide the question on his own, a less stringent nondelegation test should still be required.¹²⁰ Yet, this sliding-scale approach raises several issues and is arguably untenable.¹²¹

117. See David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 20 (2002) ("[T]he Court has also never demanded an intelligible principle when the recipient of delegated authority has adequate independent constitutional authority over the subject matter.").

118. See 5 U.S.C. § 701(a)(2); see also Viktoria Lovei, Note, *Revealing the True Definition of APA § 701(a)(2) by Reconciling "No Law To Apply" with the Nondelegation Doctrine*, 73 U. CHI. L. REV. 1047, 1066 (2006) ("[A] court may properly find that agency action is committed to agency discretion only where the agency has independent authority, because it is only in this case that a delegation lacking a law to apply is constitutional.").

119. See *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1260 (1985).

120. See, e.g., Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1102 (1986).

[A]lthough in *Curtiss-Wright* the president's general foreign affairs power would not have been sufficient to authorize him to act independently of congressional authorization, because he had some power Congress was able to delegate broad authority in a manner that would have been impermissible if he had had no power over the area.

Id.; William D. Araiza, *Toward a Non-Delegation Doctrine That (Even) Progressives Could Like*, AM. CONST. SOC'Y, <https://www.acslaw.org/analysis/acs-supreme-court-review/toward-a-non-delegation-doctrine-that-even-progressives-could-like> [<https://perma.cc/8XYY-NMK2>] (last visited Apr. 15, 2022) ("*Loving v. United States* and *United States v. Mazurie* stand for the proposition that Congress is allowed to provide less of a standard when delegating to an entity (in both of these cases, the president) who possesses some measure of independent constitutional authority to act in that area.").

121. Cf. *Loving*, 517 U.S. at 772–73 ("[T]he same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'" (quoting *Mazurie*, 419 U.S. at 556–57)). This

Perhaps the only category of delegations that would ostensibly fall under the scope of a substantive power of the President that are not, in fact, delegable to the executive branch are those specific questions the Constitution clearly precludes the President from determining.¹²² For example, “[u]nlike general foreign policy determinations, decisions to go to war, to issue letters of marque or reprisal, or to authorize private invasions of another country are not decisions over which the executive has concurrent authority with Congress,” because the Constitution expressly denies the President such abilities.¹²³

Lawmaking contingent on some finding by an executive official, pursuant to Justice Gorsuch’s second prong,¹²⁴ may also be permissible under this reasoning, if both the substance of the pending law and the executive’s factfinding task come within the ambit of a substantive Article II power.¹²⁵ In this case, no criteria, such as procedural rules governing performance of the task or definitions and parameters governing permissible outcomes, are needed to guide the factfinding. Rather, the discretion Congress provides the executive branch as the final hurdle for application of a particular policy again overlaps with some inherent executive authority under Article II.¹²⁶ This is perhaps illustrated

approach fails to specify any guidelines for calculating the supposed inverse relationship between the extent of the President’s “residual” Article II authority over the question to be decided and the breadth of discretion that Congress may accordingly provide him. It is also difficult to imagine a test more lenient than the intelligible principle doctrine, one that does not go so far as to permit all delegations of Congress’s substantive lawmaking powers. Lastly, it is unclear how this approach would grapple with situations where application of a law is contingent on executive factfinding, where Congress leaves the broader implementation of a statutory scheme dependent on some limited determination by an executive official. *See infra* pp. 28-32.

122. *See Lobel, supra* note 120, at 1102.

123. *See id.*

124. *See Gundy v. United States*, 139 S. Ct. 2116, 2136–37 (2019).

125. And likely provided that the factfinding is rationally related in some way to the substance of the lawmaking to be implemented. It would be difficult to defend Congress providing the President with the authority to suspend the writ of habeas corpus if, for example, the President determined that troops were no longer needed in Afghanistan.

126. While the guiding principles cabin executive discretion in a factfinding pursuit would be different from the ordinary sorts of criteria regarding pure policy considerations since a factfinding is necessarily distinct from and generally more limited than a policy determination, the nondelegation principle must still generally apply if the substance of the law and the factfinding are not related to an Article II power in a material way. Otherwise, Congress could easily circumvent the nondelegation doctrine by making law applicable on a ceremonial or even unrelated factfinding. *See infra* note 125. For example, if Congress permitted the EPA to promulgate alternative climate change

by the four times in history where Congress has authorized suspension of the writ of habeas corpus, each time delegating the power to executive branch officials.¹²⁷ While the power to suspend habeas corpus rests with Congress,¹²⁸ Congress may only do so “in Cases of Rebellion or Invasion,”¹²⁹ which may be a specific determination that overlaps with the President’s national security powers¹³⁰ and the President’s commander-in-chief powers.¹³¹

regulatory schemes dependent on a finding that the Hudson River is too high around New York City (without any further definitions, parameters, or other cabining guidance), it is certainly possible this factfinding would amount to near wholesale policy discretion for the EPA, since “too high” is such a subjective and malleable standard, so as to essentially provide no guiding principle at all. The only real limitation on the EPA’s discretion, then, would be Congress’s limitation on the EPA’s range of policy choices, but if that range is sufficiently broad the EPA would still hold raw policy discretion nearly as broad as Congress’s lawmaking authority.

127. See Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 270 (2014).

128. See *Ex parte Bollman*, 8 U.S. 75, 101 (1807).

129. See U.S. CONST. art. I, §9, cl. 2.

130. For a detailed discussion of these powers, see Andrew Kent & Julian Davis Mortenson, *The Search for Authorization: Three Eras of the President’s National Security Power*, THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION (J. Compton and K. Orren eds., 2017).

131. See U.S. CONST. Art. II, § 2, cl. 1; *cf. supra* note 122 and accompanying text. Perhaps there is a distinction to be made where the President decides a specific question he may have substantive Article II authority over, even if the broader question—enacting the relevant law—is expressly vested to Congress, and cases where Congress directly delegates a power to the President that the Constitution has expressly *not* vested in him. Accordingly, the habeas corpus example may be distinguishable from, say, Congress directly delegating the power to declare war against Russia, because in the former instance the President’s task—determining whether there is a rebellion or invasion—may come within the scope of his national security and commander in chief powers. But the Constitution specifically denies the President the war declaration power even if it may otherwise seem to be related to the commander in chief power. Indeed, the President presumably already determines whether there exists a rebellion or invasion in the routine exercise of his national security and commander in chief duties. See *The Prize Cases*, 67 U.S. 635, 667-70 (1862). *But see* Coney Barrett, *supra* note 127, at 325:

[The Suspension Clause] describes not only the circumstances under which Congress can authorize emergency power but also the time at which Congress can enact the authorization. Congress cannot pass any suspension statute [delegating authority to the President to suspend the writ of habeas corpus] until it concludes that an invasion or a

Another illustration might be Justice Gorsuch’s example in *Gundy*.¹³² In *Cargo of the Brig Aurora*,¹³³ the Supreme Court upheld a statute making the suspension of embargos against French and British ships contingent on the President’s finding that either country “cease to violate the neutral commerce of the United States,” which may have been permissible on grounds that while Congress has the power to enact embargoes, the President has independent authority over “many” matters of general foreign affairs, including the precise determination he was tasked with in that case.¹³⁴ Contrast *Brig Aurora* with another example from Justice Gorsuch in *Gundy*:¹³⁵ construction of the Brooklyn Bridge dependent on a finding by the Secretary of War that the bridge would not interfere with navigation of the East River.¹³⁶ This also constitutes lawmaking contingent on executive factfinding pursuant to Justice Gorsuch’s second prong, as Congress could have decided the issue but instead left it for the executive to decide in the future based on some criteria the executive must consider. However, since the question to be resolved—whether the bridge leaves the river navigable—would not clearly fall within an independent Article II power of the executive branch, *Miller v. Mayor of New York* is distinguishable from *Brig Aurora*. The executive’s authority in *Miller* stems solely from the Take Care Clause and as such, the delegation must provide the appropriate degree of discretion to the official so as to not grant pure lawmaking power. In this case, the discretion was limited, as the Secretary of War’s task was merely “to determine whether the bridge, when built, would conform to the prescribed conditions of the act ‘not to obstruct, impair, or injuriously modify the navigation of the river.’”¹³⁷ Thus, Congress’s statutes in *The Brig Aurora* or authorizing the suspension of habeas corpus may not require criteria limiting the discretion of the executive official during the execution of the specific factfinding endeavor. The question to be decided in those instances is limited in scope to a fact-based commitment where any residual discretion falls within the ambit of some executive policy

rebellion exists and that the accompanying threat to public safety may require it.

132. 139 S. Ct. 2116, 2137 (2019).

133. *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 383-84 (1813).

134. *See Gundy*, 139 S. Ct. at 2137.

135. *See id.*

136. *See Miller v. Mayor of New York*, 109 U.S. 385, 393 (1883).

137. *Id.* at 387.

authority. Yet, the Secretary of War's determination of navigability in *Miller* may require cabining criteria, so that the fact-based commitment leaves no discretion in an area the executive branch properly has no constitutional control over.¹³⁸

C. THE PRESIDENT'S (OR THE AGENCY'S) AUTHORITY TO ACT ON THEIR OWN

The related issue of whether the President or an executive official¹³⁹ could resolve a particular question on their own accord—despite the concurrent authority of Congress to resolve the question—yields even muddier answers.¹⁴⁰ Justice Jackson's influential framework from *Youngstown Sheet & Tube Co. v. Sawyer*¹⁴¹ would inform us that presidential power is most limited when acting in opposition to congressional action and most expansive when acting pursuant to congressional authorization.¹⁴² But it provides little insight on the extent of the executive power in the absence of congressional direction.¹⁴³ In applying this framework to the administrative agency arena, a distinction must first be made between situations where the delegated authority

138. See Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 163–64 (2017):

A case like *Brig Aurora* shows the difference between the provisions of the McKinley Tariff at issue in *Field* [which permitted the President to revoke statutory exemptions to tariffs when he found “reciprocally unequal and unreasonable” tariff treatment] and contingent legislation as traditionally understood (and approved). *Brig Aurora* addressed a provision . . . [t]hat is a far more limited, and far more fact-based commitment of authority.

139. For a unitary executive theorist, the executive official's authority to act is dependent on a presidential subdelegation of the President's powers. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–68 (1992).

140. See Lovei, *supra* note 118, at 1062 n.87 (“Note that where the independent authority of the executive is not exclusive but concurrent, the executive's power may not permit it to act independently in the area absent congressional authorization, such as a delegation.”).

141. 343 U.S. 579 (1952).

142. See *id.* at 637–38.

143. See *id.*

relates to some substantive Article II power,¹⁴⁴ such as the commander in chief and foreign affairs powers, and situations where it does not.¹⁴⁵ In the former instance, executive action may not depend on congressional authorization for matters the Constitution entrusts the executive branch to decide,¹⁴⁶ where there would exist no nondelegation issue for the reasons previously mentioned.¹⁴⁷ However, some have contended that there may still exist a nondelegation issue where the delegation expands the President's authority to decide policy matters he would not otherwise have the authority to.¹⁴⁸

Still, a delegated power may often lie within the ambit of some substantive Article II executive power yet regard a matter the executive could not resolve without congressional authorization. For example, the President may not need congressional authorization to temporarily move military troops under the commander in chief powers, but he might need authorization to define the aggravating factors permitting the imposition of the death penalty in military trials.¹⁴⁹ Similarly, the President does not retain the unilateral power to constitute military commissions of his own design without congressional authorization, at least in cases not of "controlling necessity," even if an intelligible guiding principle limiting the President's discretion would not be required in the statutory

144. See *supra* pp. 25-32.

145. See *supra* pp. 22-25.

146. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (President's foreign affairs power "does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."); *The Prize Cases*, 67 U.S. 635, 668-70 (1862) (holding that the President did not need prior congressional approval to start blockades against southern insurrectionists, as his authority to do so derives from the Constitution).

147. See *Loving v. United States*, 517 U.S. 748, 772 (1996):

The President's duties as Commander in Chief, however, require him to take responsible and continuing action to superintend the military, including the courts-martial. The delegated duty, then, is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply. . . .

148. See *Lobel*, *supra* note 120; *Araiza*, *supra* note 120; *Loving*, 517 U.S. at 772-73; *supra* note 121 and accompanying text.

149. See *Loving*, 517 U.S. at 773 ("[W]e need not decide whether the President would have inherent power as Commander in Chief to prescribe aggravating factors in capital cases.").

authorization.¹⁵⁰ For the same reasons previously addressed, Congress may, pursuant to the Necessary and Proper Clause, expand the executive branch's powers to decide matters the executive otherwise would not have the authority to decide. It is simply the nature of lawmaking that the President first needs a law to be passed in order to carry out that law under the Take Care Clause.

In the latter instance—where the delegated authority does not call upon some substantive Article II power—the executive branch likely cannot act in opposition to congressional mandate.¹⁵¹ Though not only is executive action generally permissible pursuant to a valid express grant of power from Congress, it is also permissible for those powers that may be implied from such a grant.¹⁵² Thus, when Congress administers a lump sum appropriation to an agency, thereby neglecting to outline with specificity how those funds are to be used, an agency may properly do so on its own pursuant to the implied goals of the statute.¹⁵³ Congress need not flatly say the agency has authority to allocate the funds.¹⁵⁴ This delegation is “committed to agency discretion,”¹⁵⁵ but not for the same reasons as a policy discretion that would relate to some substantive Article II executive power. Instead, simply creating an administrative agency with specific policy ends both implies the agency has some degree of authority over internal organizational matters not otherwise specified in

150. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 591-92 (2006).

151. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

152. See *United States v. Bailey*, 34 U.S. 238, 255 (1835) (“It is a general principle of law, in the construction of all powers of this sort, that where the end is required, the appropriate means are given.”); *N. States Power Co. v. Fed. Power Comm’n*, 118 F.2d 141, 143 (7th Cir. 1941) (holding that, despite there being no “express statutory mandate,” the “necessary implication” of the statute was that the Federal Power Commission had the power to establish uniform accounting regulations for its licensees).

153. See *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993); Carl W. Tobias, *Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings*, 82 COLUM. L. REV. 906, 924 (1982). In doing so, however, the agency may be subject to presidential mechanisms of control through the Office of Management and Budget’s budgetary requirements. See generally Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016).

154. See *Lincoln*, 508 U.S. at 192 (“After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way.”).

155. See *supra* note 118.

statute and provides the bounds by which this authority is limited.¹⁵⁶ The agency's discretion is, of course, still limited by that which is "reasonable and appropriate" and within the bounds of the agency's broader statutory mandates and constrained purposes.¹⁵⁷ Even though the agency has the "flexibility to shift" funds to account for "unforeseen developments" and "changing requirements," the agency must still function to fulfill its policy mandates and cannot simply "disregard its statutory responsibilities."¹⁵⁸ These criteria naturally render an express intelligible principle unnecessary for the agency's permissible wielding of the implied power. Nonetheless, if Congress were to specify how the funds are to be used, the agency cannot thereafter refuse to follow Congress's direction, as then the executive power would be at its most limited.¹⁵⁹

Determining the scope of agency power becomes trickier where Congress has not clearly, either impliedly or expressly, authorized executive discretion to address the issue.¹⁶⁰ Consider, for example, that in 1890, President Benjamin Harrison signed Executive Order 28, establishing the United States Board on Geographic Names and granting it authority to resolve "all unsettled questions concerning geographic names."¹⁶¹ The Board's determinations were to be accepted as "the standard authority in such matters" for all federal entities.¹⁶² Congress

156. *See Lincoln*, 508 U.S. at 193.

157. *See id.*; *see also* *Gallagher's Steak House, Inc. v. Bowles*, 142 F.2d 530, 534 (2d Cir. 1944) ("[T]he lawful delegation of a power carries with it the authority to do whatever is reasonable and appropriate properly to effectuate the power."); Tobias, *supra* note 153, at 924:

The test of whether the doctrine of implied powers permits a particular agency to spend in a manner not specifically prescribed by statute will depend on the statutory scope of the agency's authority in general, the existence of an explicit residuary powers or spending clause in its enabling or appropriations legislation, and the nature of the expenditure.

158. *See Lincoln*, 508 U.S. at 192-93.

159. *See Lincoln*, 508 U.S. at 193 ("Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes (though not, as we have seen, just in the legislative history)."); *see also* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

160. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.")

161. *See* Exec. Order No. 28.

162. *See id.*

codified essentially the same 57 years later.¹⁶³ In the meantime, though, the Board issued numerous determinations affecting the recognized names of localities nationwide, most notably deciding in favor of “Pittsburg” over “Pittsburgh,” despite equally common public usage of the latter.¹⁶⁴ Accepting that Congress had the constitutional authority to codify as much, it is not fully clear if and why the President had the authority to do the same decades before without congressional authorization. The nature of the question—the federally acknowledged names of localities—does not appear to readily fall under any substantive Article II executive power. Perhaps the authority properly falls between the grey area of Congress’s power to make federal laws and the President’s power to execute federal laws, enabling the President to decide (or subdelegate) the resolution of the matter on his own accord. Or maybe the Executive Order would have been constitutionally impermissible if it had been challenged in court, but only because Congress did not first authorize the President to decide the question; if Congress had, the President indeed could have created the Board and vested it with the authority to determine uniform geographic names.¹⁶⁵ Nevertheless, when a power is delegated by Congress and therefore concurrent, it is clear that Congress’s lawmaking authority trumps any contrary executive decision.¹⁶⁶

There may still be limited circumstances where the agency could be empowered to act in a manner directly opposed to Congress’s wishes.¹⁶⁷ If Congress attempts to limit some exclusively executive power that Congress could not concurrently exercise, it may unconstitutionally infringe upon the executive branch’s Article II powers.¹⁶⁸ In such a case,

163. See 43 U.S.C. § 364(a)-(f).

164. See GEORGE R. STEWART, NAMES ON THE LAND: A HISTORICAL ACCOUNT OF PLACE-NAMING IN THE UNITED STATES 342-44 (1958).

165. Cf. *Youngstown*, 343 U.S. at 634-40 (Jackson, J., concurring).

166. See *id.* at 637 (Jackson, J., concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”); see also *infra* Section III.E.

167. Cf. Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331, 1339 (2003) (“Locke’s point is that executive edicts have no legal force unless they enjoy legislative authorization—a point that the *Youngstown* Court reiterated.”).

168. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) (holding that Congress impermissibly intrudes upon executive authority by placing the execution of statute “in the hands of an officer who is subject to removal only by” Congress.).

Justice Jackson’s framework would indicate that executive power rests at its lowest ebb,¹⁶⁹ but if the authority over the matter stems from some independent core executive power that Congress cannot directly limit, congressional opposition could not directly impede the agency’s authority to act. An example may be the prosecutorial and enforcement charging decisions of agencies tasked with prosecuting a law.¹⁷⁰ Of course, Congress does not have its own enforcement discretion authority, so it is not a concurrent power, but is instead an executive decision committed to agency discretion.¹⁷¹ The Supreme Court has reasoned that enforcement discretion is akin to the prosecutorial decision not to indict, which is historically a quintessential executive power and a natural consequence of the executive branch’s “take care” obligations.¹⁷² Granted, an agency has less political leverage to displease Congress than the President. A terribly aggrieved Congress could, for example, reconstruct and revise the agency’s broader statutory scheme pursuant to Congress’s lawmaking function¹⁷³ and the agency might have strong practical incentives to appease a Congress that wields the power of the purse and funds the agency.¹⁷⁴ Nevertheless, in such cases, Congress would not have the

169. See *Youngstown*, 343 U.S. at 637.

170. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

171. See *id.* at 830 (enforcement discretion is unreviewable under APA §701(a)(1) because the statute can offer no meaningful legal standard through which the court may analyze the agency’s discretion and regards an area of law where judicial review has traditionally been lacking); *Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413-14 (1958) (*per curiam*) (holding the FTC’s decision to proceed against only some members of an alleged conspiracy was committed to agency discretion). *But cf.* *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1906 (2020) (“[T]he DACA Memorandum does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief.”).

172. See *Heckler*, 470 U.S. at 832:

[W]e recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed.”

173. Congress could, for example, strip the SEC’s enforcement discretion by eliminating its enforcement arm entirely. See *infra* pp. 64-66.

174. See, e.g., *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (“[O]f course, we hardly need to note that an agency’s decision to ignore congressional expectations may expose it to grave political consequences.”).

authority to decide the specific question as the agency would, despite the existence of alternative pressure mechanisms.

In sum, when Congress delegates authority to an administrative agency that is already within the scope of the Article II executive powers, there is no nondelegation issue because the executive branch already has some constitutional authority over the subject matter. In contrast, when Congress delegates discretion to an agency over Congress's lawmaking authority—which may be permissible on account of the Necessary and Proper and Take Care Clauses—the Court has analyzed the delegation under the intelligible principle test to determine whether discretion is cabined to the requisite degree. This test is required because separation of powers principles are implicated, as the agency merely has the constitutional responsibility to carry out Congress's policies under the Take Care Clause but not the substantive authority to decide pure policy matters itself.¹⁷⁵ Finally, it is not always clear when the executive branch is empowered to take action resembling policymaking without congressional authorization, but the executive branch may be able to do so when Article II adumbrates a sufficient degree of subject matter authority over the policy issue and when Congress does not challenge the executive's proactivity.

D. WHAT A BROAD READING OF THE NECESSARY AND PROPER CLAUSE WOULD MEAN—UNCONVENTIONAL DELEGATIONS

The ramifications of a broad understanding of the Necessary and Proper Clause with respect to delegations are perhaps overlooked because delegations outside of Article I, Section 8 are historically uncommon.¹⁷⁶ Yet, if the Necessary and Proper Clause is construed to its maximum breadth, it may permit Congress to delegate its own non-legislative powers, or even powers it could not wield itself, so long as the delegation is “necessary and proper” to facilitate the execution of any vested federal power.¹⁷⁷ This is because Parts (II) and (III) of the Necessary and Proper Clause reference “all other Powers” vested in the federal government, lumping federal legislative, executive, and judiciary authority together.¹⁷⁸ When Congress delegates its own powers to administrative agencies with

175. See Driesen, *supra* note 117, at 11-12.

176. See Alexander & Prakash, *supra* note 32, at 1040.

177. See *id.* at 1069-70.

178. *Id.* at 1058.

only broad constraints—such as that specific actions be “in the public interest”—it arguably circumvents the President’s ability to veto proposed laws.¹⁷⁹ If such delegations pass the requirement of being “necessary and proper” solely on account of the vast complexities of modern governance and the hands-on expertise that agencies may offer to enforce the law, then it follows that Congress can also make “unconventional delegations” outside of Article I, Section 8 under the same rationale.¹⁸⁰ After all, those delegations would also free Congress to direct its attention on other important matters, appoint experts with relevant credentials, and enable fluent and more prolific action.¹⁸¹ It also follows that, via delegations, Congress may circumvent other majoritarian requirements, such as the two-thirds approval of the Senate for ratifying treaties.¹⁸² The fact that these non-Article I, Section 8 powers are awesome or vast is not limiting, since, for example, the taxing and commerce powers are regularly delegated. Thus, the potential “unconventional delegations” are endless: Congress could delegate its powers to confirm federal judges, try and impeach, propose constitutional amendments, and so on.¹⁸³

Likewise, a broad reading of the Necessary and Proper Clause might allow Congress to dilute federal powers and circumvent federalism principles by vesting powers Congress does not possess itself under the Constitution.¹⁸⁴ For example, Congress might create an agency with the power to pardon, if it believes an ad hoc approach to criminal law is preferable for the public good.¹⁸⁵ And this reading of the Necessary and Proper Clause might allow Congress to limit the vested powers of the other branches, since it “supplies no reason for distinguishing laws that circumvent presidential powers (as conventional delegations do) and laws that bar the exercise of presidential power.”¹⁸⁶ Congress might, for example, provide that certain offenses are unpardonable because strict deterrence would best carry its laws into execution.¹⁸⁷ Thus, if separation

179. *See id.* at 1069. This may be less of a concern if one endorses a unitary executive theory whereby the President may block quasi-legislative action by even independent agencies. *See supra* note 139 and accompanying text.

180. *See* Alexander & Prakash, *supra* note 32, at 1075.

181. *Id.* at 1075-78.

182. *See id.* at 1066.

183. *See id.* at 1074.

184. *See id.* at 1070.

185. *See id.* at 1064.

186. *Id.* at 1063.

187. *See id.*

of powers and federalism principles do not prevent at least some categories of delegations, Congress might be able to vest its core functions in others or even effectively rewrite the Vesting Clauses *carte blanche*.

III. WHEN CONGRESS CAN DELEGATE: RETOOLING NONDELEGATION WITHOUT (NECESSARILY) UPROOTING THE INTELLIGIBLE PRINCIPLE TEST

It should be difficult to accept that, as a general matter, our constitutional scheme may be construed as permitting Congress to assign powers to others that Congress could not actually exercise itself, as then Congress could aggrandize its own power and uproot the Constitution's careful vesting of powers. Yet, both the majority's and the dissent's nondelegation conceptions in *Jarkesy* fail to consider this. While Congress retains a tremendous amount of authority, it does not retain all federal power, and for good reason. Congress must not supersede the Constitution when it allocates the federal power. Just as our federalist system presumes a national government limited by explicitly vested powers, so too does it presume a national legislature limited by the same foundation. Similarly, there must at least be *some* powers allocated by the Constitution to the federal branches that are nondelegable, even if the would-be delegator properly holds that power. The President may, at times, delegate authority to inferior executive officials and the judiciary may allocate some adjudicative functions to "adjuncts," but these are limited both by the scope of the authority conferred and by who can receive that authority. As a general rule, the branches cannot delegate their own powers to officials in other branches, else the constitutional system would be moot. The Supreme Court cannot delegate its judicial authority to the President, because doing so would be in direct opposition to the Vesting Clauses. The Necessary and Proper Clause may permit Congress to delegate some of its own authority to executive branch officials who would not otherwise have that authority, but that is an exception, not the rule.

Part III of this Note explains that our governmental system presumes federal powers are nondelegable unless there exists some constitutional basis to the contrary. Accordingly, this Part proposes that the nondelegation inquiry first consider the constitutional source of power—i.e. whether the power is constitutionally vested in Congress—rather than whether a delegation fits under some abstract definition of "legislative"

power. After all, the Necessary and Proper Clause references all federal power, not merely lawmaking power. Additionally, this Part contends that the Necessary and Proper Clause is properly limited to only permit statutory delegations of power conducive to unlocking the full scope of powers explicitly vested in the federal branches. It must not permit the two carefully formulated legislative bodies to delegate wholesale when the Constitution contemplates that the elected legislature should decide the matter. In this regard, the Necessary and Proper Clause may serve as an exception to both the general principle that Congress may not delegate powers it does not have the authority to exercise itself, as well as the general principle that delegations of constitutional authority are presumptively impermissible. Finally, in aggregating these concepts, this Part proposes a framework that strengthens the nondelegation doctrine, without necessarily uprooting the intelligible principle test.

A. RATIONALIZING *JARKESY*

Based on the majority’s reasoning in *Jarkesy*, it may appear that the authority in question—the SEC’s power to bring enforcement actions with ALJs or in Article III courts—represents a concurrent power that Congress left for the agency to decide, similar to any other conventional delegation. Indeed, Article III empowers Congress to assign certain “public rights” to administrative adjudication rather than the Article III courts,¹⁸⁸ which the Supreme Court has reaffirmed includes governmental enforcement of a regulatory restriction.¹⁸⁹ Under this reasoning, then, the SEC’s ALJ forum discretion must be struck down because an intelligible principle is required. Consider the explanation of another court distinguishing *Jarkesy*: “in *Jarkesy*, the problem identified was not just the open-endedness of the provision, but the lack of guidance as to how it should be applied.”¹⁹⁰ However, upon closer inspection, the delegated

188. U.S. CONST. art. III, § 1; see *Crowell v. Benson*, 285 U.S. 22, 47-54 (1932).

189. See Fourth Branch Podcast, *supra* note 87:

Granfinanciera v. Nordberg decision, I think, reaffirmed this basic idea that public rights like the government enforcement of a regulatory restriction—in *Atlas Roofing*, it was the unsafe workplace regulation—is the sort of thing that Congress may put in an administrative proceeding before an ALJ without a jury trial right.

190. *United States v. Empire Bulkers Ltd.*, 2022 U.S. Dist. LEXIS 151817, at *7 (E.D. La. 2022); see also *Braidwood Mgmt. Inc. v. Becerra*, 2022 WL 4091215, at *17 (N.D.

authority is not a power that Congress holds at all. Congress cannot go about carving out Article III jurisdiction on a case-by-case basis. Moreover, even if this concern was remedied, it is far from clear the kind of guidance that would realistically constrain an agency's choice of enforcing in federal court or with its own ALJs. Does the Constitution really permit Congress to delegate its jurisdiction-stripping powers so long as there is a broad intelligible principle?¹⁹¹

This Note posits that Dodd–Frank § 929P(a) was correctly struck down by the Fifth Circuit, but for the wrong reasons. The majority is incorrect because their definition of legislative power is untenable and overbroad, since it would include functions not traditionally understood to be legislative, such as the case-by-case ALJ forum discretion delegated in Dodd–Frank. Yet, Congress generally cannot delegate powers it does not have itself. The dissent is incorrect because ALJ forum discretion is a different kind of power than the prosecutorial discretion in charging decisions; namely, it is not traditionally a quintessential executive power because the SEC could not wield this authority in the absence of the specific delegation of that authority.

B. FRAMING THE THRESHOLD QUESTION: THE DEFINITION OF LEGISLATIVE POWER

Merely because a legal question, such as ALJ enforcement discretion, has been “committed to agency discretion” by Congress¹⁹²

Tex. 2022) (“This case, [unlike *Jarkesy*,] is not one in which Congress has offered ‘no guidance.’”).

191. Consider the First Circuit’s reasoning in another case to distinguish *Jarkesy*: “[E]ven if nondelegation concerns were somehow applicable, the direction that prosecutions under [the statute in question] be ‘in the public interest and necessary to secure substantial justice’ indisputably satisfies the lax ‘intelligible principle’ standard under our precedents and those of the Supreme Court.” *United States v. Diggins*, 36 F.4th 302, 319 n.19 (1st Cir. 2022).

192. See David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1211 (2016):

Ordinarily, the agency enjoys unfettered discretion over whether to sue any potential defendant; courts do not review agencies for failing to prosecute anyone in particular. Similarly, choices to proceed in policymaking through rulemaking, adjudication, or any other tool the agency has at its disposal are not reviewed by the courts either. That would seem to make the legal question one that is committed to

does not necessarily mean it evades separation of powers and nondelegation scrutiny.¹⁹³ An agency may have unreviewable discretion to allocate a lump sum appropriation from Congress, but is limited by decipherable statutory directive and overall policy goals as laid out by Congress.¹⁹⁴ Likewise, an agency may choose to make new policy in an adjudication or in a rulemaking,¹⁹⁵ but the agency’s authority to make that policy must be cabined to a sufficient degree in the first place so as to be executive action.¹⁹⁶

In addressing the *Jarkesy* nondelegation challenge, the first issue the court considered was whether Congress delegated a legislative power.¹⁹⁷ In doing so, the court defined legislative power as that which has “the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch.”¹⁹⁸ Justice Gorsuch has similarly formulated legislative power as “the power to adopt generally applicable rules of conduct governing future actions by private persons,” “the power to ‘prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,’ or the power to ‘prescribe general rules for the government of society.’”¹⁹⁹ A major difficulty with these sorts of definitions is not only that they are abstract, enigmatic, and difficult to apply,²⁰⁰ but also that they are overinclusive.²⁰¹ As Judge Davis pointed out, “if *Chadha*’s definition of legislative action is interpreted broadly and out of context, then any SEC decision which affected a person’s legal rights—including charging decisions [which the Supreme Court has characterized as an inherent executive authority]²⁰²—would be legislative

agency discretion, as are choices whether to initiate enforcement actions and which administrative tool to use to make policy.

193. See Lovei, *supra* note 118, at 1066 (“[A] court may properly find that agency action is committed to agency discretion only where the agency has independent authority, because it is only in this case that a delegation lacking a law to apply is constitutional. In such a case, a ‘committed to agency discretion’ claim can succeed for precisely the same reason that a nondelegation attack would fail—because the agency is acting pursuant to an independent source of authority.”).

194. See *supra* note 153 and accompanying text.

195. See *SEC v. Chenery Corp.*, 332 U.S. 194, 201-03 (1947).

196. See *supra* note 153 and accompanying text.

197. See *Jarkesy v. SEC*, 34 F.4th 446, 461 (5th Cir. 2022).

198. See *id.* (quoting *INS v. Chadha*, 462 U.S. 919, 952 (1983)).

199. *Gundy*, 139 S. Ct. at 2133.

200. See *supra* note 55 and accompanying text.

201. See, e.g., *Jarkesy*, 34 F.4th at 475 (Davis, J. dissenting).

202. *Id.* (citing *United States v. Batchelder*, 442 U.S. 114, 124 (1979)).

actions, which is contrary to the Supreme Court's decision in *Batchelder*.²⁰³ Agency substantive regulations, and even some adjudicative orders,²⁰⁴ would also seem to alter legal rights, duties, and relations of regulated entities, yet are consistently reaffirmed as executive actions under modern jurisprudence if exercised pursuant to a delegation of power that cabins discretion to a sufficient degree.²⁰⁵ Additionally, these definitions are underinclusive—a duly enacted law on the books would not be the result of legislative action if that law infringes on an individual's constitutional right. And if nondelegation indeed only applies to legislative powers, the doctrine would not prevent Congress from aggrandizing federal power by assigning new “nonlegislative” powers in the executive or judicial branches in addition to those powers granted under the Constitution if conducive to the exercise to some enumerated federal power. Nor would it prevent Congress from delegating its procedural functions such as the confirmation of judges if Congress determines its plate is full or expert decisionmakers would be helpful.²⁰⁶

Furthermore, the intelligible principle test carves out the definition of legislative powers as the ability to make laws in the absence of a purportedly constraining intelligible principle, yet the Constitution often broadly limits Congress's powers to legislate²⁰⁷ and the Bill of Rights limits all of Congress's actions.²⁰⁸ But that does not also make Congress's lawmaking powers “nonlegislative.”²⁰⁹ If it did, all of Congress's Article I, Section 8 lawmaking powers which are cabined in some broad way that meets the intelligible principle standard would be concurrently legislative and executive.²¹⁰ Consequently, the President might be able to exercise at

203. *Id.*

204. *See* SEC v. Chenery Corp., 332 U.S. 194, 201-03 (1947).

205. *See, e.g.,* United States v. Grimaud, 220 U.S. 506, 521 (1911) (“(T)he authority to make administrative rules is not a delegation of legislative power.”).

206. *See supra* Section II.D.

207. E.g., bankruptcy rules must be “uniform” and Congress can raise an army, but it cannot fund that army with appropriations lasting longer than 2 years. *See* U.S. CONST. art. I, § 8.

208. *See* Alexander & Prakash, *supra* note 32, at 1044.

209. *See id.*

210. Of course, a law that unconstitutionally restricts the freedom of speech is still on the books of the United States Code, even if a court holds that it cannot be enforced. Whether the Bill of Rights and other non-Article I, Section 8 constitutional constraints actually limit the power to legislate in turn depends on one's definition of “legislative power.” If one accepts the definition of legislative power proffered by this Note,

least some Article I, Section 8 authority even without congressional authorization, since that would be executive action. It seems inconsistent that a power is deemed legislative if it alters legal rights and duties, but thereafter transforms into an executive power simply because of who (the administrative agency, rather than Congress) exercises that power.

Consider Professors Alexander and Prakash's alternative formulation of legislative powers, that:

[A]t the founding, the legislative power was understood as the authority to make rules for the governance of society, whether or not exercised by a legislature. In the Constitution in particular, the legislative powers were those powers to make the laws, rules, and regulations listed in Article I, Section 8.²¹¹

This definition still suffers from abstraction but at least tethers itself to a consideration of the constitutional placement of powers. If—as the Professors assert—the legislative power was truly understood at the founding as the authority to make the laws, rules, and regulations for the governance of society “whether or not exercised by a legislature,” it is not obvious why such a definition should be limited to Congress's Article I, Section 8 powers when similar lawmaking powers appear elsewhere in the Constitution.²¹² Neither passing a Guam infrastructure bill nor stripping a federal court of jurisdiction over a certain kind of dispute would amount to a legislative action under this definition, despite constituting an authority to make rules for the governance of society and resting within the domain of Congress. And if the separation of powers also serves to prevent delegations of Congress's non-lawmaking functions, the nondelegation inquiry should not logically be limited to Article I, Section 8 matters.

Professors Eric Posner and Adrian Vermeule advocate for a “less nuanced” definition of legislative power stressing the authority as constitutionally vested; to them, legislative powers constitute the *de jure* powers held by individual legislators.²¹³ This conception renders a nondelegation doctrine that would only prohibit “if Congress or its

exercising lawmaking authority is not merely the ability to vote on and pass laws, but rather the ability to authorize laws that bind the public. *See infra* pp. 56-59.

211. Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1305 (2003).

212. See, for example, the Territories Clause, U.S. CONST. art. IV, § 3, cl. 2, and the Treaty Power, U.S. CONST. art. II, § 2, cl. 2.

213. See Posner & Vermeule, *supra* note 93, at 1721.

individual members attempted to cede to anyone else the members' *de jure* powers as federal legislative officers, such as the power to vote on proposed statutes."²¹⁴ While this "cruder"²¹⁵ definition is enticing in some regards, no obvious constitutional footing surfaces for its extreme narrowness, so as to exclude collective lawmaking discretion, such as those powers vested to Congress under Article I, Section 8.²¹⁶ Indeed, under such a definition, "to legislate" would essentially mean "to vote," rather than to craft and enact laws over substantive areas, like laws governing the sale of securities.²¹⁷ This would render the Article I Vesting Clause nonsensical, vesting all voting and related powers in two corporate bodies rather than in individual Congresspersons.²¹⁸ The definition also makes it "possible to have constitutions where absolutely no one enjoys any legislative powers," such as the case of an absolute monarch controlling all of the powers found in Article I, Section 8.²¹⁹ Moreover, this definition does not hold when one simultaneously accepts that "[t]he President exercises legislative power when . . . he makes binding rules *without* constitutional or statutory authority,"²²⁰ since the exercise of legislative power here would depend not on any formal *de jure* procedure, but rather on the making of binding rules. In other words, under this definition, it would appear the President does not exercise legislative power, even when he makes binding rules while unauthorized to do so, simply because he does not exercise the *de jure* voting powers of Congress. Nor does he infringe upon or impede those powers, as Congress would remain free to vote to override the President's actions in the future.

214. *Id.* at 1726.

215. *Id.* at 1721.

216. *See* Alexander & Prakash, *supra* note 211, at 1298 ("We cannot discern (and [Professors Posner and Vermeule] do not advance) a plausible rationale for simultaneously permitting Congress to delegate large amounts of lawmaking or rulemaking discretion to third parties while strictly forbidding delegations of the right to vote in Congress.").

217. *See id.* at 1305.

218. *See id.* at 1307 ("A paraphrase of it would read as follows: 'All powers to vote in Congress and all related powers of legislators herein granted shall be vested in a Congress, comprised of two chambers.'").

219. *Id.* at 1308.

220. *See* Posner & Vermeule, *supra* note 167, at 1333 ("The President exercises legislative power when, as the majority opinion in *Youngstown Sheet & Tube Co v Sawyer* said, he makes binding rules without constitutional or statutory authority; on our account, this is the only situation in which executive-branch rulemaking amounts to legislation.").

Lastly, while Professors Posner and Vermeule conclude “[r]ational constitutional framers might sensibly prohibit one [kind of delegation] while leaving the other to policing by future politics,”²²¹ a rational framer might just as well have denied an explicit delegation clause to prevent broad subgrants of carefully vested lawmaking authority.²²² That rational framer may have also explicitly vested limited powers in the federal branches to emphasize the separation of powers, thereby preventing the possibility of the same officials making, enforcing, and adjudicating the law.²²³

All of this is to say that legislative power in the nondelegation context would indeed be properly framed in a less nuanced manner, rather than as some abstract, difficult to apply, and sometimes ungenerously fitting definition. At the same time, it should also not be limited to ritualistic *de jure* procedures. If the executive branch’s authority to fashion law in certain substantive areas, maybe even without prior congressional authorization,²²⁴ is not actually “legislative” at all,²²⁵ perhaps the difference really is semantic. Considering all of this, the most natural definition of legislative power would simply represent the authority the Constitution entrusts in the legislature. After all, the Necessary and Proper Clause permits certain statutes facilitating the exercise of all federal power, not just legislative power. By focusing on the constitutional source to define the power, the nondelegation inquiry becomes much easier to apply and avoids the “intractable” question of whether the power feels more executive or legislative.²²⁶ It would also ensure that Congress’s non-lawmaking functions do not evade proper nondelegation review, merely because they do not fall under some abstract category. After all, the Constitution does, as previously

221. *Id.* at 1337.

222. *See* JAMES MADISON, RECORDS OF THE FEDERAL CONVENTION 67 (Farrand ed., 1911).

223. *Cf.* Sunstein, *supra* note 13, at 433-34 (“Above all, [the distribution of national powers under the Constitution] diffused governmental power, reducing the likelihood that any branch would be able to use its power against all or parts of the citizenry . . . [thereby] operat[ing] as a safeguard against tyranny.”).

224. *See supra* pp. 32-41.

225. *See* *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (“To be sure, some administrative agency action . . . may resemble ‘lawmaking’ . . . however, ‘[i]n the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952))).

226. *See supra* note 55.

discussed, permit the President to participate in the federal government's lawmaking function to create treaties, veto laws, and take care to fill in the interstices of statutory schemes, vests numerous non-lawmaking functions in Congress,²²⁷ and may permit some degree of lawmaking power in the federal judiciary.²²⁸

This definition might initially seem to suggest that the Necessary and Proper Clause would permit delegations of Congress's non-lawmaking powers, especially in light of the fact that the intelligible principle test only applies to legislative power.²²⁹ Yet, to the contrary, it presumes that all *federal* powers—whether serving a lawmaking function or not—are non-delegable unless there exists some constitutional justification to the contrary. The spectrum of permissible delegations of the legislature's, the executive's, and the judiciary's powers reinforces this view. Perhaps delegations of the judiciary's power are the most limited, permissible only when granted to "adjunct" adjudicators who are very limited in function and closely supervised by Article III judges.²³⁰ Delegations of the President's powers may be less limited,²³¹ permissible only when the delegee is an executive official but not constrained by duties as restrictive or supervision as close,²³² since the Take Care Clause implies a fair amount of delegable discretion.²³³ Delegations of Congress's lawmaking

227. See, e.g., U.S. CONST. art. II, § 2, cl. 2 (confirmation power).

228. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); see also William Eskridge, *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1523-29 (1998) (arguing that the judicial power of Article III includes the inherent authority to engage in equitable interpretation of statutory text).

229. See *Gundy v. United States*, 139 S. Ct. 2116, 2133-35 (Gorsuch, J., dissenting) (explaining why the Constitution does not permit Congress to divest itself of its "legislative responsibilities").

230. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 79 (1982) (explaining that adjunct factfinders, such as district court magistrates, are permissible "even in the adjudication of constitutional rights—so long as those adjuncts [are] subject to sufficient control by an Art. III district court.").

231. See *infra* Section III.F.

232. Office of Management and Budget procedures, for example, are not constitutionally required, but rather a mechanism of presidential policy control. See, e.g., Pasachoff, *supra* note 153, at 2185-86.

233. See *Myers v. United States*, 272 U.S. 52, 117 (1926):

But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that

powers may be the least limited—both in scope and by the permissibility of inter-branch recipients—on account of the Necessary and Proper Clause.²³⁴

By emphasizing the distinction and textual placement of the powers vested in the Constitution, a simple definition of legislative power emphasizes that the framers placed Congress’s powers in different sections because they considered those powers distinct. The Necessary and Proper Clause would, in turn, generally operate to permit delegations where Congress may plausibly need help with its Article I, Section 8 or other lawmaking powers.²³⁵ Modern complexities and future unknowns may genuinely demand some degree of rulemaking from expert and efficient administrative agencies. But at the same time, it is equally plausible and likely that some, if not most, of Congress’s powers were never thought delegable at all.

C. CONGRESS GENERALLY CANNOT DELEGATE OR ASSIGN POWERS IT DOES NOT HAVE ITSELF

The corollary of this formalist definition of legislative power is that the nondelegation principle concerns only delegations of Congress’s powers. If, as one commentator posits, Congress retains the awesome “disposing power” to decide who may act on behalf of the federal government with the force of law,²³⁶ the careful vesting of powers in the Constitution would essentially be pointless, and no safety valve would even prevent a delegation of that grand overarching power. But the Supreme Court has consistently held that Congress cannot aggrandize its own powers through delegations.²³⁷ As an anonymous “subscriber” of the Constitution explained in 1789, the Necessary and Proper Clause “is

as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.

The Constitution also contemplates officers of the United States performing executive duties. See U.S. CONST. art. II, § 2, cl. 2.

234. See *infra* Section III.E.

235. *Id.*

236. See Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 452 (2010).

237. See, e.g., *INS v. Chadha*, 462 U.S. 919, 954 (1983) (invalidating the one-house legislative veto); *Clinton v. New York*, 524 U.S. 417, 448-49 (1998) (invalidating the congressional line-item veto); *Bowsher v. Synar*, 478 U.S. 714, 726-27 (1986) (invalidating Congress’s retention of power to remove an officer charged with the execution of the laws outside of impeachment).

confined to the *powers given expressly* by this Constitution to the Congress.”²³⁸ The implication is that, as a general principle, Congress cannot delegate—or perhaps more precisely, assign—powers to agencies that Congress does not have itself, else Congress could add to its own powers.²³⁹

This general principle may or may not be subject to a few exceptions in the Constitution, which are explored here illustratively but not exhaustively. The Necessary and Proper Clause presents an obvious case, since, by its text, it references laws that facilitate not just the “foregoing Powers” of Congress in Article I, Section 8, but also “all other Powers” of the federal government.²⁴⁰ This may, in turn, permit Congress to assign powers to others, if that assignment is conducive to unlocking some other power explicitly vested in the executive or judicial branches, not just those powers vested in Congress.²⁴¹ Another explicit example may be the Article II inferior officers power, which provides that “the Congress may by law vest the appointment of such inferior officers, as they think proper,

238. See, e.g., 32 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 422 (Merrill Jensen et al. eds., 1976).

239. See *Bowsher*, 478 U.S. at 726 (“The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.”); *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 132 (2015) (Thomas, J., concurring) (“Lacking the power itself, [Congress] cannot delegate that power to an agency.”); see also Linda D. Jellum, *Dodging the Taxman: Why the Treasury’s Anti-Abuse Regulation Is Unconstitutional*, 70 U. MIAMI L. REV. 152, 185 (2015) (“Congress does not have the power to direct the judiciary to use a particular approach to statutory interpretation. Because Congress has no such power, Congress has no capacity to explicitly or implicitly delegate this power to the Treasury.”); Alex Tallchief Skibine, *Making Sense Out of Nevada v. Hicks: A Reinterpretation*, 14 ST. THOMAS L. REV. 347, 364 (2001):

Congress may not be able to delegate what it does not have, and since it does not have the power to prosecute such nonmembers without affording them the protection of the Constitution, it is questionable whether it should be able to have the power to authorize the tribes to do that very thing.

The “all other Powers” language of Parts (II) and (III) of the Necessary and Proper Clause, even under the narrow construction endorsed in this Note, may still endow in Congress the power to make laws which facilitate the full use of the executive and judicial branches’ constitutionally vested powers. See *infra* Section III.G.

240. See U.S. CONST. art. I, § 8, cl. 18.

241. See *infra* Section III.G.

in the President alone, in the courts of law, or in the heads of departments.”²⁴² This Clause permits Congress to vest the power to appoint to others—the power to decide who decides—even if Congress may not appoint inferior officers itself.

The Constitution has also been construed to permit Congress to delegate certain quasi-judicial powers,²⁴³ which may entail specific determinations on a case-by-case basis that Congress may not be able to perform on its own.²⁴⁴ Indeed, Article III has been interpreted by the Supreme Court as permitting Congress to assign certain “public rights” to administrative adjudication rather than the Article III courts,²⁴⁵ even though Article III courts exercise the judicial power of the United States.²⁴⁶ Accordingly, Congress properly has the authority to select the “mode of determining” matters of public right²⁴⁷—that is, what body adjudicates those sorts of claims—even if Congress could not adjudicate the claims itself.²⁴⁸ This authority is limited to matters of “public right” because Article III vests the federal judicial power in the judicial branch.²⁴⁹ It does not follow that Congress’s authority to create lower federal courts under Article I and Article III, combined with its Article I, Section 8 lawmaking powers, necessarily also implies the authority to strip the jurisdiction of federal courts to hear any federal statutory claim

242. See U.S. CONST. art. II, § 2, cl. 2.

243. See, e.g., 5 U.S.C. § 554.

244. See U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”).

245. See *Crowell v. Benson*, 285 U.S. 22, 49–54 (1932); see also U.S. CONST. art. III, § 1.

246. Congress may also assign adjudication of disputes outside of Article III courts in other limited situations, such as in military and territorial courts. See, e.g., Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 934-39 (2015).

The Supreme Court has declared that the Article I Inferior Tribunals Clause is coextensive with Congress’s Article III power to create lower federal courts. See, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (plurality opinion) (“Art. I § 8 cl. 9 . . . plainly relates to the ‘inferior Courts’ provided for in Art. II § 1; it has never been relied on for establishment of any other tribunals.”). *But cf.* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 672-73 (2004) (“[T]he Inferior Tribunals Clause can be read to provide a textual predicate for Congress’s acknowledged but controversial power to create Article I tribunals outside of Article III.”).

247. See *infra* notes 73, 81 and accompanying text.

248. See U.S. CONST. art. I, § 9, cl. 3 (Bill of Attainder impermissible).

249. See *Crowell*, 285 U.S. at 49–54.

in favor of agency adjudication.²⁵⁰ Congress may not, for example, utilize its lawmaking authority over bankruptcy affairs to establish a tribunal whose jurisdiction extends beyond public rights into all civil matters.²⁵¹ Perhaps the public-private rights framework can be explained as a principle of executive power, in that public rights may be left to agency adjudication because they are within the scope of Article II powers (like prosecutorial discretion), as not every application of law to fact requires a decision by a court or even *de novo* review by a court.²⁵² This theory would mean that Congress's license to assign certain public rights to administrative adjudication rather than the Article III courts is not an exception at all.²⁵³

One might also assert that since Congress has the authority to create, fund, and endow powers in agencies, it necessarily enjoys the authority to create a body with executive powers that Congress would not otherwise be able to exercise. But, in that case, Congress is only "creating" executive power to the extent that Congress supplies the executive branch

250. The Necessary and Proper Clause cannot serve to extend the substantive lawmaking powers of Congress into the realm of the executive or the judicial. Even Alexander Hamilton did not think the Necessary and Proper Clause grants Congress the ability to control every aspect of the laws it enacts pursuant to its substantive lawmaking powers. See THE FEDERALIST NO. 29 (Alexander Hamilton) ("It would be absurd to . . . believe that a right to enact laws necessary and proper for the imposition and collection of taxes would involve that of . . . abolishing the trial by jury in cases relating to it.")

251. See *Stern v. Marshall*, 564 U.S. 462, 487-95 (2011).

252. See William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1540 (2020).

253. Cf. *Butz v. Economou*, 438 U.S. 478, 513 (1978).

There can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.

Id.; see *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (holding that sovereign immunity bars agency adjudication of complaints filed by a private party against nonconsenting states, given the "strong similarities between [the agency's] proceedings and civil litigation.").

with a new law to carry out.²⁵⁴ Certainly, Congress may frame a statutory scheme to specify the officials entrusted with prosecuting and enforcing certain laws.²⁵⁵ Congress likewise has the authority to set up and dissolve the SEC’s enforcement arm entirely.²⁵⁶ In doing so, however, Congress is not directly vesting prosecutorial discretion. It is merely creating the conditions for the power to exist.²⁵⁷ When Congress enacts a law and provides the Department of Justice with the sole authority to prosecute under that law, Congress does not grant the DOJ the choice of whether to prosecute in a specific case, but rather grants it the corporate ability to prosecute a certain kind of case.²⁵⁸ Congress certainly could not enact a statute which specifies that the Attorney General may not choose whether to bring a specific case—that is, the Attorney General must bring a case under certain circumstances—because doing so would offend separation of powers principles.²⁵⁹ Indeed, courts have construed otherwise mandatory language as not constraining prosecutorial discretion.²⁶⁰ This is because the investigation and prosecution of crimes is a “quintessentially executive function.”²⁶¹ Even though under Justice Jackson’s framework executive action stands at its most limited in opposition to congressional direction, the agency need not follow any attempted limitation of prosecutorial discretion since the agency “can rely only upon [its] own constitutional powers minus any constitutional

254. Cf. Posner & Vermeule, *supra* note 93, at 1730 (“But because the grant of ‘executive power’ and the injunction to the president to ‘take Care that the Laws be faithfully executed’ themselves provide rules about law-execution, their content is determined by the ‘Laws’ that Congress has enacted.”).

255. See, e.g., 33 U.S.C. § 413 (authority of United States Attorneys to prosecute alleged offenders of certain statutory provisions).

256. See 15 U.S.C. § 78u.

257. See *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) (Congress cannot intrude into the executive function, even if “Congress of course initially determined the content of the Balanced Budget and Emergency Deficit Control Act; and undoubtedly the content of the Act determines the nature of the executive duty.”).

258. See, e.g., 33 U.S.C. § 413.

259. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before grand jury, generally rests entirely in his discretion.”); see also *SEC v. Bilzerian*, 750 F. Supp. 14, 17 (D.D.C. 1990) (holding that delegation of civil enforcement authority to the SEC does not violate separation of powers doctrine because Congress has “no power or control over the enforcement activities of the SEC.”).

260. See, e.g., *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973).

261. See *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

powers of Congress over the matter.”²⁶² A statute specifying what official may prosecute alleged offenders of a law does not “imply” prosecutorial discretion like a general appropriations bill implies the authority to allocate those funds pursuant to the agency’s statutory bounds. Congress has the power to determine the allocation of funds but not case-by-case charging decisions.²⁶³ Thus, Congress does not delegate prosecutorial discretion, which is rather a quintessential executive power that cannot be infringed.

Another contention may be that Congress already permits non-Article III federal tribunals to perform functions that Congress could not do, beyond the rote resolution of disputes. This has some merit. Permissive abstention doctrine, for example, allows bankruptcy courts to abstain from hearing a proceeding arising under the Bankruptcy Code, or arising in or related to a case under the Code, if in the interest of justice, comity with state courts, or respect for state law.²⁶⁴ Bankruptcy courts may also, under certain circumstances, abstain from the entire bankruptcy case.²⁶⁵ Nevertheless, this function is rooted in “traditional notions of [judicial] abstention which allow courts to decline to assert otherwise valid subject matter jurisdiction in instances in which they find matters are better resolved in state court or where the interests of justice so demand,”²⁶⁶ thereby heeding federalism principles by avoiding friction with state policies and mimicking the practice of federal courts.²⁶⁷ True, bankruptcy court abstention may bestow broader discretion than non-bankruptcy abstention,²⁶⁸ but this discretion serves to limit the bankruptcy court’s own power—not extend it—perhaps reinforcing Congress’s original view that bankruptcy courts serve as “adjuncts” to Article III

262. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952); *see also supra* Section II.C.

263. *See supra* notes 152-159 and accompanying text.

264. *See* 28 U.S.C. § 1334(c)(1).

265. *See* 11 U.S.C. § 305.

266. *See* *WRT Creditors Liquidation Tr. v. C.I.B.C. Oppenheimer Corp.*, 75 F. Supp. 2d 596, 603 n.1 (S.D. Tex. 1999).

267. *See* *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 33 (1959).

268. *See, e.g.,* *Matter of Wood*, 825 F.2d 90, 93 (5th Cir. 1987) (“The abstention provisions of the [relevant statute] demonstrate the intent of Congress that concerns of comity and judicial convenience should be met, not by rigid limitations on the jurisdiction of federal courts, but by the discretionary exercise of abstention when appropriate in a particular case.”).

judges,²⁶⁹ and thereby reinforcing separation of powers principles. Moreover, not all non-Article III tribunals are created equal, and bankruptcy courts do not bring claims like the SEC does.²⁷⁰ Article I courts, unlike administrative agencies, do not possess policymaking functions, but instead merely engage in resolute factfinding and law interpretation.²⁷¹ This would suggest that bankruptcy court abstention constitutes an inherent judicial power. Alternatively, if the bankruptcy court were considered an executive agency, bankruptcy court abstention might be explained as an executive power,²⁷² merely reinforcing the idea that the executive adjudicatory function should sometimes yield to state and federal court resolution in light of federalism and separation of powers principles.

D. IN DODD-FRANK, CONGRESS IMPERMISSIBLY DELEGATED A POWER IT DOES NOT HAVE ITSELF

With that framework in mind, since Dodd-Frank permits the agency to decide on an individual, case-specific level whether to proceed with enforcement of securities laws in federal court or in an administrative setting,²⁷³ Congress has assigned power it could not exercise itself. Whether Congress does not have the power to do so because such a law would not fall within the scope of Congress's lawmaking powers²⁷⁴ or

269. See Eric G. Behrens, *Stern v. Marshall: The Supreme Court's Continuing Erosion of Bankruptcy Court Jurisdiction and Article I Courts*, 85 Am. Bankr. L.J. 387, 404 (2011).

270. See RICHARD H. FALLON JR. ET AL., *HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 380 (7th ed. 2015).

271. See *id.* ALJs, while not policymakers per se, make initial decisions subject to de novo review by agency heads who establish the standards and procedures governing the ALJs' decisions and who may be involved in the appointment and dismissal of the ALJs. See *id.* Additionally, agency decisions are not self-executing—as in *Crowell*, they generally require an enforcement action in federal court. Yet, legislative court decisions are typically final and enforceable unless appealed. See *id.*

272. Cf. *supra* note 252 and accompanying text.

273. See Fourth Branch Podcast, *supra* note 87 (“Essentially, what the Fifth Circuit held is that an individual case-specific determination about how to proceed against a specific individual regulated entity, against a specific defendant, is an exercise of legislative power.”).

274. Consider Justice Powell's concurrence in *Chadha*, which would have struck down the relevant law not on a failure to present to the President (like the majority), but on grounds that Congress unconstitutionally usurped the judicial power by reserving for itself the authority to determine whether a given individual satisfies statutory criteria. See *I.N.S. v. Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring). Operating from the

because such lawmaking would be limited by other constitutional constraints such as the bill of rights,²⁷⁵ Congress nevertheless does not

starting point that the separation of powers is violated “when one branch assumes a function that more properly is entrusted to another,” Justice Powell reasoned that the House acted in an adjudicatory manner because it made a specific determination on whether individuals “comply with certain statutory criteria,” rather than “enact[ing] a general rule.” *Chadha*, 462 U.S. at 962–63 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)). To Powell:

[The Framers’] concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person was expressed not only in this general allocation of power, but also in more specific provisions, such as the Bill of Attainder Clause, Art. I, § 9, cl. 3. As the Court recognized in *United States v. Brown*, 381 U.S. 437, 442 (1965), “the Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.”

Chadha, 462 U.S. at 962. Yet, *Jarkesy* presents a different scenario than *Chadha*, since the agency, rather than the legislature, would be making the determination. Moreover, there would appear to be no statutory criteria limiting the SEC’s choice between ALJs and federal judges, so the SEC would not be determining whether individuals “comply with statutory criteria” in deciding the forum in which their case will proceed. *Cf. infra* notes 277-280 and accompanying text.

275. While the Supreme Court has affirmed that Congress’s lawmaking is not limited to laws with general effect, any particularized action must be “fairly and rationally understood.” *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 472-73 (1977); *see also* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995). Accordingly, Congress looking to the particular facts of an individual matter and deciding whether it wishes to funnel that defendant to federal court or SEC adjudication could pose several constitutional issues. These may include a “class of one” equal protection violation, such as in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). *See* 86 A.L.R. 6th 173:

Class-of-one claims are as-applied equal protection challenges that are brought when a person or group of persons not part of a traditionally identifiable group, such as race or gender, contend that government actors have intentionally treated them in a manner different from others similarly situated without a rational basis justifying the disparate treatment.

Or they may raise various other issues. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 3 (unconstitutional bills of attainder); *United States v. Klein* 80 U.S. 128, 146 (1871) (impermissible “rule of decision” prescribed by Congress in a pending case); *Hurtado v. People of State of Cal.*, 110 U.S. 516, 535–36 (1884) (deprivation of due process).

have the power to create that law with binding effect and thus cannot effectively delegate the discretion to do so to an agency.²⁷⁶ Nor is selecting between an administrative or judicial forum a quasi-judicial determination that would fall under the potential non-Article III adjudication exception previously discussed because it is not a factfinding and law application pursuit at all, but instead one of pure policy that cannot be declared wrong “in law.”²⁷⁷ Selecting the forum on a case-specific basis—and in turn, determining the procedures afforded to an individual defending themselves²⁷⁸ and the standard that a federal court

[Due process of law] is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, . . . ‘the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,’ so ‘that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society . . .

Id. See generally Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625 (2014) (arguing that various constitutional clauses, including the Equal Protection, Bill of Attainder, Ex Post Facto, Spending, Takings, Contract, and Title of Nobility Clauses, as well as the *Klein* anti-rule of decision doctrine, imply a constitutional principle against special legislation specifically targeted at individuals).

276. See *supra* note 210 and accompanying text. If such a power is inherently executive, then the agency as an executive body may permissibly exercise such authority in the absence of a statutory delegation permitting so. See *infra* notes 284-292 and accompanying text.

277. See H. W. R. Wade, “*Quasi-Judicial*” and *Its Background*, 10 CAMBRIDGE L.J. 216, 224 (1949) (quasi-judicial determinations “conform to a norm, however indefinable, and which are accordingly liable to review on appeal,” whereas administrative determinations consider “the administrator’s own idea of expediency, incapable of being declared wrong *in law* by any higher authority.” Indeed, “judicial ‘law-making’ differs entirely from the kind of legislation which proceeds from sovereign power: the judge in his judicial functions is allowed no political discretion.” (emphasis in original)).

278. The SEC administrative forum by nature provides relatively meager procedural protections to defendants when compared to traditional Article III courts. Never mind that the judge is an employee of the SEC, there is also notably no jury to make factual findings. The SEC Rules of Practice apply instead of the Federal Rules of Civil Procedure and the Federal Rules of Evidence, which provide much more discretion to the ALJ to admit evidence the ALJ determines is “relevant.” See 17 C.F.R. § 201.320. Hearsay is “normally admissible,” unlike in federal court. See Zaring, *supra* note 192, at 1167 (2016). Depositions are unusual and motions to dismiss are impermissible. See *id.* Finally, the so-called “rocket docket” requires that an initial hearing take place within 60 days after notice and the ALJ issue a decision within 300 days of the order instituting proceedings, thereby vastly condensing the process of litigation. See *id.*

may review the factual record of the proceeding²⁷⁹—is not a judicial function stemming from the resolution of disputes between parties and subject to some form of appeal.²⁸⁰ In contrast, those are precisely the sorts of rights afforded to defendants that the Constitution leaves for Congress to decide on a generally applicable level. As a result, the authority to select on a case-by-case basis an administrative or Article III forum for the resolution of securities enforcement actions is either outside the scope of Congress’s lawmaking powers or an unconstitutional assertion of lawmaking power imposed on an individual.

Post-Dodd-Frank, “when [the SEC] concludes that the securities laws have been broken, it now has an essentially unfettered choice between taking its civil complaint to an Article III or agency judge.”²⁸¹ Professor Adler has opined that the majority “picked up the wrong tool” in applying the nondelegation principle because this kind of forum discretion “is the archetypal exercise of executive power.”²⁸² Yet, if, as Judge Davis argued in *Jarkesy*,²⁸³ ALJ forum discretion is akin to enforcement discretion, it would necessarily constitute an exclusive executive power. But as the dissent acknowledges, Congress must first decide the “mode of determining public rights cases.”²⁸⁴ So if Congress truly “fulfill[ed] its duty” by specifying one of two forum avenues from which the SEC may choose,²⁸⁵ the SEC’s authority to choose would be concurrent, not exclusive, and Congress could still decide the matter itself.

While Congress need not statutorily bestow the SEC with enforcement discretion in order for the SEC to exercise such discretion, the same is not true for ALJ forum discretion, which is not within the

279. After agency procedure is exhausted, defendants can appeal to a federal circuit court. However, the circuit court reviews the ALJ’s factual findings under a deferential “substantial evidence” standard, rather than the *de novo* review that would be applicable at the federal district court if proceedings had instead commenced there. *See Zaring, supra* note 192, at 1168.

280. *Cf. Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 532 (2021) (explaining that the exception to state sovereign immunity does not apply to state judges as it does to state executive officials, since state judges generally “do not enforce state laws as executive officials might,” but rather “work to resolve disputes between parties” and the traditional remedy in cases of error is “some form of appeal” to a higher court).

281. David Zaring, *supra* note 192, at 1164.

282. Fourth Branch Podcast, *supra* note 87.

283. *See supra* notes 84-86 and accompanying text.

284. *Jarkesy v. SEC*, 34 F.4th 446, 473 (5th Cir. 2022) (Davis, J., dissenting).

285. *Id.*

scope of executive power unless Congress so provides.²⁸⁶ Legislative functions are not transformed into executive ones simply because the determinations are made at the individual level—ALJ forum discretion is not any more “executive” when determined on a case-by-case basis as is deciding whether to apply a sex offender registration statute to pre-act sex offenders.²⁸⁷ Moreover, judicial authority naturally involves determinations as to a specific case, but executive officials cannot adjudicate matters of private right.²⁸⁸ Finally, ALJ forum discretion differs from prosecutorial discretion because the former is not “interlinked with duties already assigned to the President by express terms of the Constitution.”²⁸⁹ ALJ forum discretion is unlike the choice between prosecuting under two different criminal statutes providing for varying penalties for the same conduct because in the latter, “the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws.”²⁹⁰ But Dodd–Frank § 929P(a) clearly added to the SEC’s enforcement capabilities,²⁹¹ beyond “the range of penalties that prosecutors and judges may seek and impose,”²⁹² and into the evidentiary, reviewability, and other procedural standards and privileges applicable to a given defendant.

286. Dodd-Frank added to the SEC’s enforcement arsenal. Andrew Ceresney, Dir., SEC Div. of Enf’t, Remarks to the American Bar Association’s Business Law Section Fall Meeting (Nov. 21, 2014), <http://www.sec.gov/News/Speech/Detail/Speech/1370543515297> (“Congress provided us [in Dodd-Frank] authority to obtain penalties in administrative proceedings against unregistered parties comparable to those we already could obtain from registered persons.”); *see, e.g.*, Zaring, *supra* note 192, at 1165 (“Dodd-Frank expanded the agency’s administrative jurisdiction to anyone alleged to have violated the securities laws, rather than only those registered with the agency, essentially by permitting the agency to pursue any remedy against unregistered defendants that it could pursue against registered defendants.”).

287. Justice Kagan hinted in *Gundy* that there might have been an intelligibility question if the Attorney General had the authority to specify whether to apply a sex offender registration statute to pre-act offenders, albeit on a general rather than case-specific level. *Cf. Gundy v. United States*, 139 S. Ct. 2116, 2128-31 (2019) (“‘Specify the applicability’ thus does not mean ‘specify whether to apply SORNA’ to pre-Act offenders at all, even though everything else in the Act commands their coverage. The phrase instead means ‘specify how to apply SORNA’ to pre-Act offenders if transitional difficulties require some delay.”).

288. *See generally* *Crowell v. Benson*, 285 U.S. 22 (1932).

289. *See supra* note 116 and accompanying text.

290. *United States v. Batchelder*, 442 U.S. 114, 126 (1979).

291. *See supra* note 286 and accompanying text.

292. *Batchelder*, 442 U.S. at 126.

Admittedly, *Crowell v. Benson* not only specified that “the mode of determining matters of this class is completely within congressional control” but also that “Congress may reserve to itself the power to decide, *may delegate that power to executive officers*, or may commit it to judicial tribunals.”²⁹³ However, this language is mere dicta, stated within the broader context of justifying Congress’s power to vest the adjudication of certain claims in non-Article III legislative courts.²⁹⁴ Neither *Crowell*, nor the case it cites from 3 years prior²⁹⁵ offer caselaw or any other historical basis as to why the “mode of determining” the appropriate tribunal may be delegated by Congress. The many cases ostensibly offered in support of this proposition in *Ex parte Bakelite Corp.*²⁹⁶ merely confirm a common type of conventional delegation: the authority to resolve certain disputes regarding rights created via Congress’s Article I, Section 8 lawmaking powers in an adjudicatory manner (but not to the extent that it infringes upon the Article III Vesting Clause and the Seventh Amendment right to trial by jury), rather than an unprecedented agency authority to choose between its own ALJs or federal judges to adjudicate certain kinds of disputes.²⁹⁷ Thus, it appears likely that the “mode of determining

293. See *Crowell*, 285 U.S. at 50 (emphasis added).

294. See *id.*

295. See *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929).

296. 279 U.S. 438, 451 n.8 (1929).

297. Den ex dem. *Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 (1855) (“It depends upon the will of congress whether a remedy in the courts shall be allowed at all”); *Grisar v. McDowell*, 73 U.S. 363, 379 (1867) (“[Congress] may . . . provide a special board for their determination, or it may require their submission to the ordinary tribunals. It is the *sole judge of the propriety of the mode.*” (emphasis added)); *Auffmordt v. Hedden*, 137 U.S. 310, 329 (1890) (affirming Congress’s “right to prescribe the conditions attending the importation of goods, upon which it will permit the collector to be sued,” which required a final decision by a third-party appraiser); *Ex parte Fassett*, 142 U.S. 479 (1892) (affirming the district court’s statutory authority to determine whether or not an item seized by a customs collector for failure to pay duty is an “imported article” under the tariff law and thus irrepleviable); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (affirming that “Congress may, if it sees fit, . . . authorize the courts to investigate and ascertain the facts on which [an immigrant’s] right to land depends . . . [or] the final determination of those facts may be in trusted by congress to executive officers.”); *Astiazaran v. Santa Rita Land & Min. Co.*, 148 U.S. 80, 82 (1893) (affirming Congress’s “instructions [to] the secretary of the interior, [to] ascertain the origin, nature, character, and extent of all claims [under property grants from the Mexican government of land in New Mexico and Arizona]” and the ability to issue “notices, summon witnesses, administer oaths, and do all other necessary acts . . . with his decision as to the validity or invalidity of each under the laws, usages, and customs of the country

matters” in *Crowell* and *Ex parte Bakelite* refers not to the authority to assign particular disputes to fora in different branches of the federal government, but rather the authority to resolve the dispute.²⁹⁸

E. WHAT IF CONGRESS DELEGATED THE AUTHORITY TO SELECT THE FORUM ON A GENERAL, RATHER THAN CASE-SPECIFIC, BASIS?

Even if the securities laws permitted the SEC to adopt generally applicable criteria for ALJ forum selection across all cases and cabined discretion to the requisite degree, the Necessary and Proper Clause still would not operate to permit the delegation. Congress could not delegate to the SEC the power to determine which categories of securities fraud cases it wishes to decide itself²⁹⁹—for example, permitting the SEC to promulgate a regulation specifying that cases involving less than a certain dollar amount in securities funnel to ALJs. To start, the Necessary and Proper Clause is, from its inception, closely related to the Supremacy Clause.³⁰⁰ To Alexander Hamilton, both Clauses “resulted by necessary and unavoidable implication from the very act of consisting a federal government, and vesting it with certain specified powers,”³⁰¹ so as to reaffirm Congress’s precise federal lawmaking authority as the “supreme law of the land.”³⁰² As James Madison explained, the Necessary and Proper Clause was a logical step: “[n]o axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are

before its cession to the United States”); *Passavant v. United States*, 148 U.S. 214, 219 (1893) (“It was certainly competent for congress to create this board of general appraisers . . . and not only invest them with authority to examine and decide upon the valuation of imported goods . . . but to declare that their decision ‘shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein.’”).

298. Of course, these cases were decided long before the legislative veto was declared unconstitutional. *See INS v. Chadha*, 462 U.S. 919 (1983). Thus, although it seems odd that Congress might delegate power to an executive official only to retain final judgment to overrule or veto the decision, the line of cases cited in *Ex parte Bakelite* bless such a practice. *See, e.g., Astiazaran v. Santa Rita Land & Min. Co.*, 148 U.S. 80 (1893) (affirming a statute reserving to Congress the final action in land grant claims regarding the Mexican government in New Mexico and Arizona by accepting or rejecting the initial recommendation of the surveyor general).

299. Whether cabined by a weak intelligible principle such as “in the public interest” or one that is much stronger.

300. *See* FITZGERALD, *supra* note 12, at 33; *see generally* THE FEDERALIST NO. 33 (Alexander Hamilton).

301. THE FEDERALIST NO. 33 (Alexander Hamilton).

302. *See* U.S. CONST. art. IV, cl. 2.

authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.”³⁰³ Thus, in this context, the Clause reaffirms Congress’s ultimate ability to fill up the details of its own statutory scheme as it pleases (constrained, of course, by other constitutional limits) if it does not wish to leave the job to others. The result is that Congress may place bounds on some of the President’s own law execution powers—those that are concurrent—as a product of Congress’s substantive lawmaking powers coupled with the incidental powers implied by the Necessary and Proper Clause.³⁰⁴ Congress can reverse the executive decisionmaker’s ultimate determination on matters where the executive and Congress share concurrent authority,³⁰⁵ whether the executive acted on its own accord³⁰⁶ or pursuant to congressional authorization.³⁰⁷

The Necessary and Proper Clause is, in turn, to executive power as the Supremacy Clause is to state power.³⁰⁸ The Clause affirms the

303. THE FEDERALIST NO. 44 (James Madison).

304. *Cf.* *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) (holding that Congress impermissibly intruded upon executive authority by placing the execution of statute “in the hands of an officer who is subject to removal only by” Congress). Consider Posner and Vermeule’s explanation:

Where the [Subdelegation] Act authorizes subdelegation, the only legal restriction on presidential grants of executive authority is that the action of subordinate executive officials must comply with the terms of the grant—precisely the restriction our account imposes on congressional delegations to the executive [rendering pursuant actions executive].

Posner & Vermeule, *supra* note 167, at 1335. Importantly, presidential grants of executive authority are limited not only by the terms of the grant itself, but also by the fact that Congress may or may not choose to authorize (at least some of) them in the first place.

305. *See, e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 312 (standards for illegal arm sales to hostile foreign countries in effect “until otherwise ordered . . . by Congress”). Subject, of course to bicameralism and presentment. *See* *INS v. Chadha*, 462 U.S. 919 (1983) (veto of the executive decisionmaker’s determinations unconstitutional unless the veto passes bicameralism and presentment procedures).

306. *See supra* Section II.C.

307. *See supra* pp. 21-32.

308. *See* AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 110 (2005) (“[T]he real sweep of section 8’s final clause extended not downward over states but sideways against other branches of the federal government.”).

assumption that, for those powers concurrently shared by Congress and the executive, Congress reigns supreme.³⁰⁹ The Subdelegation Act, for example, exhibits this. A subdelegation of executive power from the President to another executive official is not authorized if another statute affirmatively prohibits so or specifically designates an officer to whom the authority may be subdelegated.³¹⁰ This also explains why, for example, the DOJ and the executive branch may be statutorily denied any latitude to prevent a House of Congress's decision to grant witness immunity in exchange for compelled congressional testimony, even if doing so would undermine the criminal prosecution of a seemingly guilty individual.³¹¹ Moreover, this principle explains why Congress could statutorily establish and tinker with the Board on Geographic Names, even decades after the President had already done so on his own.³¹²

Still, there must be some powers of Congress that Congress cannot delegate, especially those that threaten to nullify the constitutional vesting of powers, checks and balances, and federalism principles.³¹³ Indeed, “we must suppose [the branches] were intended to be kept separate in all cases in which they are not expressly blended, and ought, consequently, to expound the constitution so as to blend them as little as possible.”³¹⁴ Those of various ideologies have acknowledged the premise that some of

309. See *Curtiss-Wright*, 299 U.S. at 320 (President’s foreign affairs power is one that “does not require as a basis for its exercise an act of Congress, but which, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (analyzing the independent lawmaking authority vested in the President, which is most limited when acting in opposition to congressional action). *But see* Mark D. Rosen, *Revisiting Youngstown: Against the View That Justice Jackson’s Concurrence Resolves The Relation Between Congress And The Commander-in-Chief*, 54 U.C.L.A. L. REV. 1703, 1706 (2007).

310. See 3 U.S.C. § 302.

311. See 18 USC § 6005; LANCE COLE & STANLEY M. BRAND, *CONGRESSIONAL INVESTIGATIONS AND OVERSIGHT* 232-33 (2011). *But see* Hanah Metchis Volokh, Note, *Congressional Immunity Grants and Separation of Powers: Legislative Vetoes of Federal Prosecutions*, 95 Geo. L.J. 2017, 2019, 2028 (2007) (arguing that 18 USC § 6005 “unconstitutionally allows a committee of Congress to dictate prosecutorial decisions to the executive branch and to make changes to legal rights and duties without using the legislative process laid out in the Constitution.” Therefore, “[i]f a grant of immunity given by Congress is a legislative action, it can only be accomplished through the Article I, § 7 legislative process.”).

312. See *supra* Section II.C.

313. See *supra* Section II.D.

314. 1 ANNALS OF CONGRESS 517 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison); see also *Myers v. United States*, 272 U.S. 52, 116 (1926).

Congress's powers must be nondelegable.³¹⁵ The Necessary and Proper Clause cannot provide Congress with an additional grand power that renders the Framers' careful and explicit delineation of powers redundant, or permits Congress to dismantle principles of federalism by adding to the federal power.³¹⁶ After all, "a federal statute, in addition to being authorized by Art. I, § 8, must also 'not [be] prohibited' by the Constitution."³¹⁷ Rather, separation of powers principles serve as an external constraint on the delegations permissible under the Necessary and Proper Clause.³¹⁸ Congress's Article III power to assign disputes to the executive would not be delegable for the same reason that Congress's voting powers would not be delegable—with powers of this genre, delegations do not serve the kind of "help" the Necessary and Proper Clause permits Congress to enlist.³¹⁹ Indeed, for these powers, it would appear that no meaningful criteria could possibly cabin agency discretion in a way that promotes the exercise of congressional lawmaking. The power to vote is inherently yea-or-nay. A Congressperson does not exercise their voting power unless they wholly instruct the delegee how to vote. Likewise, the SEC's ALJ forum discretion, unlike the allocation of lump sum appropriations, cannot be guided by specific statutory

315. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 425 (1989) (Scalia, J., dissenting) (explaining that certain "legislative powers have never been thought delegable . . . Senators and Members of the House may not send delegates to consider and vote upon bills in their place."); Posner & Vermeule, *supra* note 93, at 1723, 1726 (conceding that even the authors' expansive view of the Necessary and Proper Clause that submits "[a] statutory grant of authority to the executive branch or other agents can never amount to a delegation of legislative power" is limited by a "narrow sense of the nondelegation rule" that would not permit "if Congress or its individual members attempted to cede to anyone else the members' de jure powers as federal legislative officers, such as the power to vote on proposed statutes.").

316. See FITZGERALD, *supra* note 12, at 35 ("[T]here was . . . no thought of granting an authority having no relationship to the other powers provided in the Constitution."). *But cf.* *Jinks v. Richland Cnty., S.C.*, 538 U.S. 456, 461-65 (2003) (holding that a federal statute governing supplemental federal jurisdiction over state law claims, which required tolling of the state statute of limitations on a state law claim while a federal cause of action was pending, was permissible under the Necessary and Proper Clause as conducive to the exercise of Congress's power to create inferior federal courts and ensuring that those tribunals fairly and efficiently exercise the judicial power of the United States).

317. *United States v. Comstock*, 560 U.S. 126, 135 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

318. See Alexander & Prakash, *supra* note 32, at 1055.

319. See *infra* pp. 82-84.

criteria or broader operative statutory directives.³²⁰ Due to the nature of the question, any criteria that do not go so far as to decide the question necessarily confer discretion on the agency to make a raw policy decision that is rather the domain of Congress.³²¹ The SEC’s own guidance has acknowledged the fruitlessness of establishing a “rigid formula dictating the choice of forum.”³²² This is because, at its core, the question simply requires a policy decision, resembling a yea-or-nay from Congress: a policy of either administrative or federal adjudication for a particular class of claims. The SEC’s policy-based approach can never comprehensively and coherently justify a decision one way or another without making a normative, unchecked policy choice.³²³

In contrast, a complex statutory scheme that Congress enacts pursuant to its commerce power represents a very different scenario.³²⁴ Congress’s commerce power would be practically meaningless if Congress had to make every single determination it is authorized by the

320. See *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993):

Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes . . . [b]ut as long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives, [APA] § 701(a)(2) gives the courts no leave to intrude. ‘[T]o [that] extent,’ the decision to allocate funds ‘is committed to agency discretion by law.’ [APA] § 701(a)(2).

321. See *Interstate Comm. Comm’n v. Goodrich Transit Co.*, 224 U.S. 194, 214 (1912).

The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress.

Id.; see also *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 408 (1928).

322. U.S. SEC. & EXCH. COMM’N, DIVISION OF ENFORCEMENT APPROACH TO FORUM SELECTION IN CONTESTED ACTIONS 1 [<https://perma.cc/TUA9-LFZH>].

323. See Eithan Y. Kidron, *Systemic Forum Selection Ambiguity in Financial Regulation Enforcement*, 53 AM. CRIM. L. REV. 693, 695-96, 730 (2016).

324. See U.S. CONST. art. I, § 8, cl. 3.

Constitution to make.³²⁵ Congress may delegate authority to agencies for the same reason it may undertake legislative investigations, despite the Constitution expressly providing for neither. As the Supreme Court has explained, congressional investigations are an “essential and appropriate auxiliary to” Congress’s express lawmaking powers, as “[a] legislative body cannot legislate wisely or effectively . . . where the legislative body does not itself possess the requisite information.”³²⁶ A delegation, then, need not be “necessary” in the sense that it is the only option to facilitate fluid governmental action, but must be “conducive” to the full exercise of Congress’s powers and “plainly adapted” to that end.³²⁷ Delegations of Congress’ non-Article I, Section 8 powers would generally not be conducive to the exercise of full congressional authority, so as to prevent the frustration of an enumerated power.³²⁸ That a delegation might ease a busy Congress’s workload cannot constitute a sufficient reason *ceteris paribus*. A delegation of the ability to vote on laws or confirm judges, for example, is blatantly *not* conducive to the exercise of Congress’s powers.³²⁹ In the context of delegations of authority, the Necessary and Proper Clause serves to reaffirm Congress’s ability to fill up the details of its own statutory scheme pursuant to its substantive lawmaking powers, or delegate when “convenient,” “useful,” or “conducive” to the exercise of that authority,³³⁰ not its ability to abdicate all of its vested duties.

This leads to the conclusion that the Necessary and Proper Clause may generally operate to permit a delegation of Congress’s powers only when that delegation is pursuant to Congress’s Article I, Section 8

325. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407 (1928) (“If Congress were to be required to fix every rate, it would be impossible to exercise the power [to regulate interstate commerce] at all.”).

326. *McGrain v. Daugherty*, 273 U.S. 135, 174-75 (1927).

327. See *supra* note 42.

328. See *Jinks v. Richland Cnty., S.C.*, 538 U.S. 456, 462-63 (2003) (holding that the statute in question is conducive to the exercise of Congress’ power to create inferior federal courts “because it provides an alternative to the unsatisfactory” other outcomes—the absence of the statute “would produce an obvious frustration of statutory policy” exercised pursuant to Congress’s constitutional powers).

329. See also *Alexander & Prakash*, *supra* note 32, at 1054-55 (arguing that if Congress can delegate its legislative powers simply as a result of the Necessary and Proper Clause, it follows that Congress can delegate its other constitutional powers, such as to propose amendments to the Constitution under Article V, as well as powers that Congress does not even wield itself).

330. See *United States v. Comstock*, 560 U.S. 126, 133-34 (2010); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413, 418 (1819).

powers, where it may well often be “convenient” to delegate authority so as to enable Congress to exercise the full scope of an enumerated lawmaking power.³³¹ The framers included the Necessary and Proper Clause because they knew some statutes would be “necessary to provide for the modes of exercising [constitutional] powers,” as it would be “impossible” to make all the laws at one time.³³² A delegation of most, if not nearly all, of Congress’s powers outside of Article I, Section 8, would not enable Congress to unlock the full extent of its powers, but rather would enable the exact opposite: Congress abjuring its constitutional duties.

F. WHY IS THERE NO NONDELEGATION DOCTRINE FOR EXECUTIVE POWER?

At this point, a last-ditch attack on the nondelegation doctrine might postulate that nondelegation theory is fabricated or arbitrary since no analogous theory exists for the executive branch’s powers. Because the Article I Vesting Clause implies some limitation on the scope of delegations of Congress’s legislative powers, by the same reasoning the Article II Vesting Clause might imply some limitation on the scope of delegations of the President’s executive powers.³³³ Modern jurisprudence does not bat an eye when the President delegates law enforcement power to prosecutors and other executive branch officials with no intelligible principle in sight.³³⁴ There does not seem to have been any nondelegation challenges to Congress’s own authorization of subdelegation from one executive official to another, even when the subdeleegee may act “as he considers appropriate.”³³⁵

The Supreme Court has explained that the President’s ability to subdelegate duties to executive subordinates rests in the Take Care Clause, as a sort of implication by necessity, since “the President alone

331. There may be limited exceptions to this. *See infra* Section III.G.

332. 32 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 238, at 422.

333. As Posner and Vermeule point out, “no one has ever suggested that the Subdelegation Act [which authorizes the President to delegate any of his executive powers to the head of any executive department or agency, *see* 3 U.S.C. § 301] violates the Constitution, even though it authorizes executive delegations that lack any intelligible principle.” Posner & Vermeule, *supra* note 167, at 1335.

334. *See id.*

335. *See* 28 U.S.C. § 510 (authorizing the Attorney General’s subdelegation to inferiors in the Department of Justice).

and unaided could not execute the laws.”³³⁶ This would seem to resemble the Court’s reasoning for permitting delegations of lawmaking powers.³³⁷ Yet, intra-branch delegations from the President to subordinate executive officials generally would not offend separation of powers principles, as inter-branch delegations from Congress to executive officials would.³³⁸ Careful separation of the legislative and executive functions rested at the front of mind at the constitutional convention, since “[t]heir union under the [Articles of] Confederation had not worked well.”³³⁹ The nondelegation principle operates to prevent Congress from delegating its legislative powers to another branch or some other body, and its grounding in separation of powers principles would not readily apply to delegations from the President to another executive agent³⁴⁰ or Congress’s intra-branch delegations.³⁴¹ However, some have commented that

336. *Myers v. United States*, 272 U.S. 52, 117 (1926).

337. *See supra* text accompanying note 94.

338. *See* Posner & Vermeule, *supra* note 167, at 1335.

339. *Myers*, 272 U.S. at 116.

340. That is not to say that *all* of the President’s powers—for example, the ability to pardon—must be presumptively delegable. *See* Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2608 (2011) (“[T]here is no reason to think that the executive may [engage in intrabranched delegation] at its pleasure and without interference, merely because a single individual cannot effectively wield executive power [as the Court in *Myers* explains.]”). Perhaps other constitutional boundaries might limit the President’s ability to delegate.

341. *See* Posner & Vermeule, *supra* note 93, at 1749 (“It should also be noted that the nondelegation doctrine restricts delegation to executive agencies but not to other agencies within the legislative branch.”). While there may exist other limits on delegations to legislative agencies, delegations of investigatory functions, which are “coextensive” with the power of legislation—*see Barsky v. United States*, 167 F.2d 241, 245 (D.C. Cir. 1948)—to congressional committees are generally permissible *not* on grounds that they provide an intelligible guiding principle. *See, e.g., Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938) (“A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress.”). The use of legislative history as a tool of statutory interpretation may also provide support for intra-branch delegations by Congress. *Compare* *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring) (“No one would think that the House of Representatives could operate in such fashion that only the broad outlines of bills would be adopted by vote of the full House, leaving minor details to be written, adopted, and voted upon only by the cognizant committees.”) *with id.* at 276-77 (Stevens, J., concurring) (“[T]he intent of those involved in the drafting process is properly regarded as the intent of the entire Congress.”).

*Chadha*³⁴² and *Bowsher*³⁴³ may propound that legislative intra-branch delegations are impermissible³⁴⁴ or that legislative history is impermissible as a tool of statutory interpretation since it would amount to a “self-delegation” that seeks to control the way in which a statute is applied by the courts through congressional law elaboration, infringing upon the executive and judicial powers.³⁴⁵ Regardless of whether there exist other internal constitutional constraints on intra-branch delegations, it is nonetheless clear that such concerns are markedly distinct from the issues arising from inter-branch delegations.

The reality is also that the President’s own delegations can be, and often are, limited pursuant to other constitutional principles. The Necessary and Proper Clause permits Congress to fill up the details of its own statutory scheme, even when that may impede or alter some of the President’s responsibilities in executing the law.³⁴⁶ As discussed, this affirms congressional superiority over any concurrent powers shared with the executive branch.³⁴⁷ The Constitution also expressly contemplates

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

343. *Bowsher v. Synar*, 478 U.S. 714 (1986).

344. *See, e.g.*, Saiger, *supra* note 340, at 2607-08 (suggesting that “the legislative branch cannot engage in intrabranched delegation,” in light of Justice Stevens’ and the Court’s holding in *Bowsher* that intrabranched delegation of “fundamental” legislative power is unconstitutional, “even as delegation of some of that same power to agencies is unproblematic.”).

345. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 690-97, 725-30 (1997). *But see* John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 542 (2001) (arguing that congressional committees’ authoritative explanations of legislation are not precluded by Article I concerns and instead are justified under the Rulemaking Clause of Article I, Section 5):

Certainly the federal courts have not interpreted *Chadha* and *Bowsher* as justification for telling the Congress that it may not delegate broad power to its committees, as Justice Scalia and Professor Manning would seem to advocate. To the contrary, one would have to conclude from the case law that Congress’s rulemaking power is far-reaching, and that absent the violation of a personal right of a non-legislator or another specific constitutional limitation, courts feel obliged to affirm any congressional rule or practice that involves the enactment process itself.

346. *See supra* text accompanying note 304.

347. *See supra* Section III.E.

government officials leading executive departments,³⁴⁸ and thus, presumably, those officials exercising executive power pursuant to a subdelegation from the President, since intra-branch coordination—as *Myers v. United States* suggests—may be just as important as inter-branch coordination.³⁴⁹ Even further, Article I, Section 7 specifies rules of procedure requisite to the exercise of Congress’s lawmaking functions, thereby ensuring some degree of consideration and aggregation of the various viewpoints of the hundreds of lawmakers from diverse backgrounds and various minds.³⁵⁰ The President, however, has no constraints analogous to presentment and bicameralism to exercise executive action.³⁵¹ Of course, procedure alone does not imply a nondelegation principle,³⁵² but it does ensure a consensus, majority opinion from locally elected lawmakers on matters of national concern, after scrutiny into the different viewpoints.³⁵³

Even outside of the lawmaking context, Congress’s voting procedures ensure that congressional action encapsulates the collective will of local representatives.³⁵⁴ Perhaps one explanation is that the injury suffered by parties adversely affected by legislative delegations is rooted in a quasi-due process right to the “prophylactic procedures that prevent the violation of the nondelegation doctrine.”³⁵⁵ Professor Clark has argued that the Supremacy Clause, coupled with the carefully outlined

348. See U.S. CONST. art. II, § 2, cl. 1. (The President “may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices.”).

349. Compare *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928), with *Myers v. United States*, 272 U.S. 52, 117 (1926).

350. See U.S. CONST. art. I, § 7; see also *Clinton v. City of New York*, 524 U.S. 417, 420-21 (1998) (holding that the Line Item Veto Act, which authorized the President to unilaterally refuse to give effect to certain expenditure and tax benefit provisions in future laws, unconstitutionally violated the “finely wrought” procedures of Article I, Section 7).

351. See Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 666 (1988).

352. An administrative agency required to imitate Article I, Section 7 procedures as a condition for passing rules would hardly remedy the concern.

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

354. For example, the Senate’s power to confirm presidential nominees. See U.S. CONST. art. II, § 2, cl. 2.

355. See Dripps, *supra* note 351, at 676-77.

procedures requisite to federal lawmaking, protects state sovereignty.³⁵⁶ The processes for amending the Constitution,³⁵⁷ enacting a law,³⁵⁸ and making treaties³⁵⁹ condition congressional lawmaking on the supermajority vote of the Senate or the states, thereby functioning to preserve federalism principles and constrain the especially robust congressional lawmaking power by design.³⁶⁰

Moreover, constitutional checks on legislative action simultaneously serve as checks on the executive powers, since Article II powers nearly always require prior congressional authorization and therefore do not pose the same threat of abridging individual freedoms.³⁶¹ The Constitution's vital consensus procedures are abrogated, however, when Congress enables an unelected administrative agency to make virtually all of the same decisions as Congress could have made. The Presidency, however, rests in a single individual, and thus any procedures requisite to the President's exercise of bona fide executive powers would not serve as a means of ensuring the consideration and aggregation of the views of executive branch members.³⁶² Perhaps other procedures may be required by the Constitution for certain executive actions, such as when an agency deprives an individual of property under the Due Process Clause, but these procedures do not serve to ensure a representative decisionmaking

356. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1323–27 (2001).

357. See U.S. CONST. art. V; U.S. CONST. art. VII.

358. See U.S. CONST. art. I, § 7.

359. See U.S. CONST. art. II, § 2, cl. 2.

360. See generally Clark, *supra* note 356. See also Justice Gorsuch's comments in his dissent in *Gundy*:

[T]he framers went to great lengths to make lawmaking difficult. In Article I, by far the longest part of the Constitution, the framers insisted that any proposed law must win the approval of two Houses of Congress—elected at different times, by different constituencies, and for different terms in office—and either secure the President's approval or obtain enough support to override his veto. Some occasionally complain about Article I's detailed and arduous processes for new legislation, but to the framers these were bulwarks of liberty.

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

361. See Dripps, *supra* note 351, at 666.

362. Recall, for example, the President “may require the opinion, in writing, of the principal officer in each of the executive departments,” but need not of course. U.S. CONST. art. II, § 2, cl. 1.

mechanism. Thus, while the right to vote on laws is indeed held by the individual Congressperson,³⁶³ that right is vitiated when the required majority of Congress votes to delegate broad grants of its own powers, because those powers may thereafter be wielded without congressional vote at all. That is simply not the case when the President delegates his Article II powers.³⁶⁴

G. PROPOSED NONDELEGATION TEST

Tying this all together, this Note proposes the nondelegation inquiry begin with two categorical steps before analyzing the degree of discretion conferred. Step one asks whether the power delegated is within the scope of some substantive Article II executive power. If the answer to step one is yes, there is no nondelegation issue. If the answer is no, step two is required. Step two asks whether the power delegated is pursuant to Congress's Article I, Section 8 powers (i.e. is a conventional delegation) or is otherwise constitutionally delegable. If the answer to step two is yes, then step three is required. If the answer is no, the delegation is constitutionally invalid since the agency does not have independent authority to decide, nor does the Necessary and Proper Clause operate to permit a delegation. Finally, step three would proceed as a familiar inquiry into degree: whether discretion is cabined by an intelligible principle or, for Justice Gorsuch, whether the discretion is of mere detail in the statutory scheme.

To clarify, a congressional power outside of conventional Article I, Section 8 lawmaking authority may be constitutionally assignable by Congress if it falls under an exception like those discussed in Section III.C or is otherwise expressly or impliedly permissible under the Constitution, whether or not pursuant to the Necessary and Proper Clause. Apart from those powers that Congress cannot wield itself but may vest in others,³⁶⁵ the Constitution may permit Congress to vest concurrent powers in others outside of the conventional delegations under the Necessary and Proper

363. See Posner & Vermeule, *supra* note 167, at 1337.

364. While the Constitution does not likewise have a provision listing all procedures requisite to the exercise of the judicial power, the Constitution does specify some. See, e.g., U.S. CONST. amend. VI (right to criminal trial by jury); U.S. CONST. amend. VII (right to civil trial by jury). An exhaustive list of procedures was unnecessary since litigation practice was already developed at the time of the founding.

365. See *supra* Section III.C.

Clause. One instance may be the Article IV Territories Clause,³⁶⁶ which provides that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”³⁶⁷ Congress often delegates its Article IV legislative powers over territories to local legislatures within the region.³⁶⁸ Perhaps this is a rare case outside of Article I, Section 8 where the Necessary and Proper Clause would operate to permit a delegation for the same reason it permits delegations of Article I, Section 8 powers: Congress needs some degree of help to fully exercise its lawmaking authority.³⁶⁹ Nonetheless, even if one limited the scope of permissible delegations under the Necessary and Proper Clause strictly to delegations of Article I, Section 8 powers, constitutional text and historical precedent would suggest these territorial delegations must be permissible. Similar delegations date back to before the Constitution, such as in the Northwest Ordinance,³⁷⁰ which provided for a local legislature “to make laws, in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance.”³⁷¹ Evidently, the founders saw no problem with this type of delegation, which amounts to a near wholesale delegation of lawmaking authority. The Clause itself authorizes all “needful” laws, perhaps indicating that a delegatory scheme similar to, or even broader than, that allowed by the Necessary and Proper Clause would be permissible, in light of the fact that the reach of this authority is limited to specific geographic areas and more akin to local, municipal authority.

The Supreme Court Police and the Secret Service may represent examples where the Necessary and Proper Clause serves as an exception to the principle that Congress may not assign powers that the Constitution does not vest in Congress to exercise itself. For example, Congress has assigned the Supreme Court Police the authority to patrol the Supreme Court Building, protect the Justices, make arrests for any violation of law, and enact regulations pursuant to these ends.³⁷² It follows that Congress must have the implicit ability to protect itself so it may carry out its constitutional duties. Accordingly, it should be uncontroversial that

366. See Alexander & Prakash, *supra* note 32, at 1039-40.

367. U.S. CONST. art. IV, § 3, cl. 2.

368. See, e.g., 48 U.S.C. § 1423(a) (Guam); 48 U.S.C. § 1571(a) (Virgin Islands).

369. See *supra* note 94 and accompanying text; see also *infra* Section III.E.

370. See Alexander & Prakash, *supra* note 32, at 1041 (2007).

371. Northwest Ordinance, ch. 8, 1 Stat. 50, 52 n.a (1789).

372. See 40 U.S.C. § 6121; see also 18 U.S.C. § 3056 (powers of the U.S. Secret Service).

Congress may vest the U.S. Capitol Police with authoritative discretion in matters related to the protection of members of Congress.³⁷³ By the same logic, though, the Supreme Court should likewise have the ability to form a body to protect its own members, even if Congress possesses the constitutional authority to set rules to police the Supreme Court Building as a federal property.³⁷⁴ Congress possesses the appropriations power and certainly may provide a lump sum of funds that the Supreme Court may thereafter use towards its own policing.³⁷⁵ But it is not obvious why Congress may create the Supreme Court Police and vest it with the authority to protect Supreme Court Justices, as well as to create regulations which ensure those ends. Perhaps the Necessary and Proper Clause simply permits Congress to protect all three branches of the federal government, because doing so may be proper to facilitate the full authority of the federal government.³⁷⁶ Indeed, Congress cannot vote on laws, nor can the Supreme Court decide cases, if their safety is at risk. This is agreeable with Congress's position in the Constitution "as first among equals, with wide power to structure" the other branches of federal government.³⁷⁷ Even under the narrow reading this Note proposes, Parts (II) and (III) of the Necessary and Proper Clause,³⁷⁸ which references "all other Powers," may permit Congress to enact legislation conducive to a fully functioning federal government (by assigning powers to others), but not to the extent that it would intrude upon the powers vested in another branch or add to the powers of the federal government.³⁷⁹

373. See 2 U.S.C. § 1966.

374. See U.S. CONST. art. IV, § 3, cl. 2.

375. See *Lincoln v. Vigil*, 508 U.S. 182, 196 (1993) (holding agency discretion as to the distribution of lump sum appropriations unreviewable and akin to agency decisions not to enforce); see also *supra* note 108 and text accompanying note 152.

376. Cf. *Jinks v. Richland Cnty., S.C.*, 538 U.S. 456, 462 (2003) (upholding statute as "necessary and proper for carrying into execution Congress's power 'to constitute Tribunals inferior to the supreme Court,' and to assure that those tribunals may fairly and efficiently exercise 'the judicial Power of the United States'" (internal citations omitted)).

377. See AMAR, *supra* note 308, at 110-11.

378. See *supra* text accompanying note 43.

379. See *United States v. Lopez*, 514 U.S. 549, 567-68 (1995); *United States v. Morrison*, 529 U.S. 598, 615 (2000).

CONCLUSION

To summarize, this Note argues that the Fifth Circuit correctly struck down the ALJ forum discretion at issue in *Jarkesy* but framed the concept of legislative power incorrectly. The threshold nondelegation inquiry should simply analyze whether the authority delegated is one that the Constitution vests in Congress or the executive branch, rather than whether the function fits under some abstract description of legislative power. Since ALJ forum discretion on a case-specific basis is not a power that Congress may constitutionally hold itself, is not a quintessential executive power that may not be infringed upon by Congress, and is not otherwise assignable through some constitutional hook, it is a constitutionally impermissible delegation. Finally, even if Dodd–Frank § 929P(a) permitted the SEC to adopt consistent criteria for forum selection across a class of cases and cabined discretion to the required degree, that delegation would still be impermissible because the Necessary and Proper Clause only permits delegations of congressional lawmaking power conducive to Congress unlocking the full scope of that lawmaking power.