WHEN DELEGATION BEGETS DOMINATION: DUE PROCESS OF ADMINISTRATIVE LAWMAKING

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I. INTRODUCTION

There was a time when the Supreme Court read the Constitution to require that all legislative powers vested in Congress would have to be exercised through the checks and balances of Articles I or II. Federal legislation would have to gain the support of both houses of Congress and survive presentment to the President.[1] Treaties negotiated by the President would have to gain the approval of two-thirds of the Senate.[2] To preserve the integrity of these checks and balances, neither Congress nor the President unilaterally could make law involving matters within Congress's exclusive legislative domain. Nor could Congress enact legislation authorizing the President, federal agencies, or the federal courts to exercise legislative powers outside the structural constraints of Articles I and II. The Constitution vested all legislative powers in Congress, and those powers could not be delegated.[3]

This "nondelegation doctrine" was not merely the product of arid formalist thinking. The judges who championed the doctrine did so, in large part, because they believed that unilateral federal lawmaking by a single branch would undermine republican values at the core of the Constitution's design. For republicans of the Founding Period, the purpose of government was to safeguard individual liberty from domination: the threat of arbitrary interference. Many of the Framers were steeped in classical republican theory, and they endeavored to establish public institutions and to enshrine public rights within a legal order that would safeguard republican liberty. The checks and balances of Articles I and II were carefully calibrated experiments in republican institutional design; by dispersing lawmaking powers

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[1] U.S. CONST. art. I, § 7.

[2] *Id.* art. II, § 2.

[3] *See, e.g.*, Field v. Clark, 143 U.S. 649, 692 (1892) ("That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."); Wayman v. Southard, 23 U.S. (10 Wheat) 1, 42 (1825) (rejecting the idea "that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative").

across multiple public institutions and relying on each branch to check the others' ambitions, the Framers sought to prevent any single branch from accumulating unchecked power to enact arbitrary laws. Thus, it was primarily respect for the Constitution's republican vision—and not simply formalism for formalism's sake—that inspired federal courts in the nineteenth century to articulate and defend a doctrine of legislative nondelegation.

Whatever the nondelegation doctrine's merits may have been as a matter of constitutional theory, the doctrine lost its luster by the middle of the twentieth century. In case after case, the Court upheld statutes empowering the Executive Branch to make law subject only to the most nebulous of statutory standards. Administrative agencies therefore were permitted to fix "fair and equitable" prices for commodities,[4] set "just and reasonable" rates for natural gas,[5] and regulate broadcasting licenses as "public interest, convenience, or necessity" required.[6] Regulations promulgated pursuant to these broad statutory authorizations had the force of law, and many were backed by both civil and criminal penalties.

In view of these developments, it is now widely accepted that Congress can, in fact, delegate lawmaking powers to the Executive and Judicial Branches. Administrative lawmaking is no longer interstitial (if it ever was), and it does not operate solely at the periphery of federal law. Rather, administrative lawmaking has become a central, defining feature of the modern administrative state in areas as diverse as financial regulation, environmental regulation, and occupational safety regulation. Although the Court has not formally abandoned the nondelegation doctrine, it has, in essence, bowed to the practical imperatives of modern congressional lawmaking, recognizing that "Congress simply cannot do its job absent an ability to delegate power under broad general directives."[7]

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[4] Yakus v. United States, 321 U.S. 414, 420 (1944).
[5] Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 600–01 (1944).
[6] Nat'l Broad. Co. v. United States, 319 U.S. 190, 194 (1943).
[7] Mistretta v. United States, 488 U.S. 361, 372 (1989).

For those who take seriously the republican ideals embodied in the Constitution, Congress's circumvention of legislative checks and balances should be cause for serious reflection. If "congressional delegation" enables unilateral lawmaking by the Executive Branch,[8] this would seem to raise the very threat of domination that the Framers sought to address through the checks and balances of Articles I and II. Is the rise of the modern administrative state fundamentally inconsistent with our republican tradition, as some commentators have suggested?[9]

This Article argues that congressional delegation of lawmaking powers *can* be reconciled with the Constitution's republican design but only if courts set aside the conventional wisdom that Articles I and II *alone* constrain congressional delegation. Instead, federal courts should safeguard the Constitution's republican values by embracing the Due Process Clause of the Fifth Amendment—not Article I and II's checks and balances—as the primary constraint on congressional delegation. Under the "due process model" developed in this Article, Congress may enact legislation entrusting lawmaking authority to administrative agencies as long as it constrains administrative decisionmaking substantively, procedurally, and structurally in such a way that delegation does not engender domination by manifestly increasing the government's capacity for arbitrariness. Substantively, Congress must establish an "intelligible principle" to ensure that agency

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[8] Whether Congress "delegates" its own legislative power when it enacts legislation authorizing executive lawmaking has been the subject of a lively debate. *Compare* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1721 (2002) (rejecting the delegation position), *with* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1298–99 (2003) (defending the nondelegation doctrine). Although this Article uses the term "congressional delegation" to capture congressional authorization of executive lawmaking, it does not intend to take a position on whether such authorizations should be conceptualized as a "delegation" of legislative power in a formalist sense. Rather, this Article's concern is with the practical consequences of delegation from a republican perspective: whether the authorization of executive lawmaking—delegated or not—promotes domination by enhancing the federal government's capacity for arbitrariness.

[9] *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) (arguing that the legal system's validation of the administrative state "amounts to nothing less than a bloodless constitutional revolution").

discretion is not entirely unbounded.[10] But this is not all: due process also dictates that Congress must channel administrative lawmaking through procedural and structural constraints that are sufficiently robust to serve as functional substitutes for the checks and balances of Articles I and II. In short, Congress may authorize the other branches to make law unilaterally only if it establishes procedural and structural constraints that protect liberty. This focus on due process as the key constitutional safeguard limiting congressional delegation offers an attractive alternative to contemporary theories of the nondelegation doctrine because it honors the Constitution's republican ideals while translating the Constitution's republican structure for a world in which administrative regulation is widely accepted as an indispensible feature of American government.[11]

The principle that due process constrains congressional delegation is not widely appreciated today.[12] Even before the nondelegation doctrine reached its zenith in the 1930s, however, the Court had carved out a role for procedural due process in delegation review by recognizing that the Fourteenth Amendment limited state legislative delegations to municipalities.[13] In a series of cases, the Court also invoked due process as a constraint on the

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[10] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

[11] *Cf.* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1166 (1993) (arguing that fidelity to the Constitution's text may require different readings in different interpretive contexts over time).

[12] A few legal scholars have noted in passing that the nondelegation doctrine could be reframed as a due process doctrine, but this idea has remained underdeveloped. *See* Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 208–10 (1989) (discussing the commingling of conceptions of the nondelegation doctrine and the Due Process Clause); Kate R. Bowers, *Saying What the Law Isn't: Legislative Delegations of Waiver Authority in Environmental Laws*, 34 HARV. ENVTL. L. REV. 257, 294 (2010) (discussing case law that supports a procedural due process approach to the nondelegation doctrine); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1553–55 (1991) (discussing due process as it relates to standing and the origins of the nondelegation doctrine as a due process defense); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 730 (1969) (suggesting an eventual coalescence of nondelegation and due process); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 987 n.149 (2007) (discussing due process concerns as an alternative to the nondelegation doctrine).

[13] *See infra* notes 202–09 and accompanying text.

substantive scope of federal legislative delegations,[14] and it intimated in leading nondelegation cases that administrative procedure and the availability of judicial review are relevant due process-centered considerations when evaluating the constitutionality of congressional delegations.[15] In addition, the Court and lower federal courts suggested on a number of occasions that congressional delegations of lawmaking authority must be accompanied by procedural constraints such as requirements for reasoned deliberation and a public statement of the agency's rationale.[16] These aspects of the Court's jurisprudence have little to do with the nondelegation doctrine's formalist reading of "legislative power." But they make sense if we embrace due process as the primary constitutional basis for the contemporary doctrine of constrained legislative delegation.[17] As the nondelegation doctrine's formalist division of "legislative" and "executive" power has eroded with the rise of the modern administrative state, the procedural and structural safeguards of due process have become increasingly salient as the primary constitutional constraints on congressional delegation of lawmaking authority.

One important implication of this emerging due process model is that many of the administrative procedures outlined in the federal Administrative Procedure Act (APA)[18] take on a constitutional dimension. This Article is not the first, of course, to suggest that APA procedures like notice-and-comment rulemaking promote constitutional values such as public accountability, rationality, transparency, and non-arbitrariness.[19] What this

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[14] *See infra* Part IV.A (discussing substantive due process).

[15] *See infra* Part IV.B–C (discussing procedural and structural due process).

[16] *See infra* Part IV.B–C.

[17] Although the due process model helps to explain the contours of the contemporary nondelegation doctrine, it does not require courts to deny that administrative agencies perform legislative functions in practice. This Article therefore prefers to characterize the due process model as a theory of constitutional constraint, not a theory of nondelegation per se.

[18] *See generally* Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559 (2000).

[19] *See, e.g.*, PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 53 (1994) (describing the APA as "a quasi-constitutional statute" and suggesting that "[i]f there were no APA, the courts . . . would certainly have invented something like it in order to implement the constitutional safeguards of the Fifth Amendment's due process clause");

Article does contribute, however, is a richer normative account of precisely *why* and *how* the APA supports our constitutional system of ordered liberty. In particular, this Article argues that where Congress delegates lawmaking authority to the other branches, it must channel that authority through liberty-promoting procedures that are functionally comparable to the checks and balances of Articles I and II. Congress may satisfy this standard by prescribing an intelligible principle to guide agency discretion, coupled with APA-style deliberative administrative procedures that are backed by political accountability and judicial review. Where such substantive, procedural, and structural safeguards are in place, agency lawmaking does not manifestly increase the federal government's capacity for arbitrariness and, therefore, honors the Constitution's republican design.

In the discussion that follows, this Article develops a due process model of congressional delegation in four steps. Part II explains how federal and state courts developed the nondelegation doctrine during the nineteenth century to address concerns that congressional delegation would undermine individual liberty. Part III examines the nondelegation doctrine's decline during the twentieth century and explains why recent efforts to revitalize the nondelegation doctrine through canons of statutory interpretation fail to safeguard the Constitution's republican ideals. Part IV develops the Article's core thesis that due process offers a superior framework for advancing individual liberty. As courts have recognized in a variety of settings, due process addresses the threat of arbitrary agency lawmaking by imposing substantive, procedural, and structural constraints on Congress's delegation of lawmaking functions to federal agencies. To illustrate the due process model's practical applications, Part V briefly considers several areas in which the due process model could prompt a reconsideration of contemporary administrative law. These areas

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Gillian Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 484 (2010) (arguing that the APA's provisions addressing accountability-type concerns constitute "constitutional common law"); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (drawing parallels between the Constitution's republican structure and administrative procedure).

include judicial statutory interpretation, agency self-regulation, congressional delegation to the President, congressional delegation of foreign affairs powers, and delegations of federal lawmaking power to states, tribes, private entities, and international organizations.

II. THE REPUBLICAN ORIGINS OF NONDELEGATION

When courts and legal scholars retrace the nondelegation doctrine's intellectual history, the conventional starting point is John Locke's social-contract theory. According to Locke, all public officials and institutions exercise power delegated from the people and are therefore bound by the common-law maxim that a delegated power cannot be delegated—*delegata potestas non potest delegari*.[20] One implication of this theory is that Congress cannot delegate lawmaking authority to administrative agencies because such delegation would breach the social contract upon which Congress's own authority depends. This Lockean account of nondelegation appears in many judicial decisions[21] and has become a recurring trope in scholarly commentary.[22] Nonetheless, it represents a shallow and, in some respects, misleading account of the doctrine's theoretical origins.

This Part develops Professor Rebecca Brown's insight that the nondelegation doctrine should be viewed primarily as an expression of the Founding Generation's commitment to

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[20] JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 79, ¶ 141 (1986) (1690); *see also* SOTIRIOS A. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 11 (1975) (describing the nondelegation doctrine as "an import into constitutional law from the common law of agency where an ancient maxim prohibits the redelegation of delegated power"); Patrick W. Duff & Horace E. Whiteside, Delegata Potestas Non Potest Delegari*: A Maxim of American Constitutional Law*, 14 CORNELL L.Q. 168, 174 (1928) (describing early nondelegation doctrine cases as based, in part, on the idea that the people delegated legislative power to Congress as a nondelegable "mandate or trust").

[21] *See, e.g.*, J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 405–06 (1928) (noting that the maxim is "well understood").

[22] *See, e.g.*, Alexander & Prakash, *supra* note 8, at 1297 (tracing the nondelegation doctrine to Locke's THE SECOND TREATISE OF GOVERNMENT); Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87, 90–95 (2010) (discussing a Lockean view on nondelegation); Posner & Vermeule, *supra* note 8, at 729 (linking the delegation doctrine metaphor to Lockean theory).

republican liberty.[23] The republican tradition posits that the purpose of public institutions and public law is to safeguard individuals against tyranny, defined as subjection to another's arbitrary will.[24] While other scholars have noted the influence of classical republican political theory in separation of powers jurisprudence,[25] the nondelegation doctrine has received only sporadic consideration as an expression of republican political theory.[26] As this Part demonstrates, however, republicanism offers a compelling explanation for the nondelegation doctrine's genesis in the mid-nineteenth century and its evolution during the early twentieth century.[27]

A. LIBERTY AS NONDOMINATION

Republicanism asserts that all governments bear a basic obligation to advance the good of their people as a whole—*res publica*—rather than their own self-interest or the factional interests of particular groups or individuals.[28] Despite differences

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[23] *See* Brown, *supra* note 12, at 1553–55.

[24] *See infra* Part II.A.

[25] *See generally* THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE (1988) (referencing such influence throughout); M.N.S. SELLERS, AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION (1994) (same); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787 (1969) (same).

[26] *See* BARBER, *supra* note 20, at 11–12, 26–30 (rejecting the republican tradition as both descriptively and normatively inadequate to explain the nondelegation doctrine). A number of scholars have characterized the nondelegation doctrine as a bulwark against arbitrariness. *See, e.g.*, 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 208 (2d ed. 1978) (stating that the purpose of the nondelegation doctrine is to "protect private parties against injustice on account of unnecessary and uncontrolled discretionary power"); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 516–19, 523–25 (2003) (arguing that the Court's application of the nondelegation doctrine is best understood in terms of preventing arbitrariness); Stack, *supra* note 12, at 996–98 ("The nondelegation doctrine aims to protect against arbitrary agency decision-making, and to promote regularity, rationality, and transparency.").

[27] This Article does not claim that republicanism was universally accepted during the Founding Period or that it offers the only plausible account of separation of powers, but only that it represents a historically grounded and normatively attractive theory that best explains the rise of the nondelegation doctrine.

[28] M.N.S. SELLERS, REPUBLICAN LEGAL THEORY: THE HISTORY, CONSTITUTION AND

in emphasis, all republicans share a commitment to individual liberty as freedom from tyranny.[29] Tyranny in this context is synonymous with domination, the condition of being subject to another's arbitrary will.[30]

In the republican tradition, liberty is constituted only in and through institutions because individuals are unable as a practical matter to enjoy independence from the threat of arbitrary interference without collective organization.[31] The purpose of legal and political institutions, from this perspective, is to safeguard individuals from the arbitrary control of others—*dominium*.[32] Republicans also recognize, however, that the state itself may undermine liberty to the extent that it possesses the capacity to

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PURPOSES OF LAW IN A FREE STATE 16 (2003).

[29] *See, e.g.*, ISEULT HONOHAN, CIVIC REPUBLICANISM 180–84 (2002) (discussing three different republican conceptions of freedom, including "[f]reedom as non-domination"); PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 80 (1997) (stating that the republican traditions "cast freedom as non-domination in the role of supreme political value"); SELLERS, *supra* note 28, at 27 ("Republican liberty requires that no person be governed by any other person's simple will or passion."); Samantha Besson & José Luis Martí, *Law and Republicanism: Mapping the Issues*, *in* LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES 3, 13 (Samantha Besson & José Luis Martí eds., 2009) ("According to the majority view, the idea of liberty is the central value in republican political tradition.").

[30] *See* PETTIT, *supra* note 29, at 52 (defining domination as "a power of interference on an arbitrary basis"). Some republicans argue further that public participation in governance is constitutive of individual liberty. *See, e.g.*, MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 5 (Harvard Univ. Press 1996) (arguing that participating in government promotes individual liberty by providing a means for individuals "to pursue their ends"); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988) (contending that the republican tradition enhances freedom by encouraging the revision of normative histories that provide value and self-direction to individuals); Cass B. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1551 (1988) (stating that individual rights are understood "as either the preconditions for or the outcome of" republican deliberation). This Article focuses primarily on the neo-Roman conception of freedom as nondomination, which is associated with Pettit and Skinner, while recognizing that greater public participation in government might be normatively desirable. *Cf.* Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 476 (2010) (arguing that the state must afford citizens opportunities to participate in public governance but suggesting that the public's voluntary disengagement from politics does not *ipso facto* delegitimize public administration).

[31] *See* PETTIT, *supra* note 29, at 100–01.

[32] *See id.*; Yasmin Dawood, The *Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1430 (2008) (arguing that "freedom can only exist under a system of law").

wield public power arbitrarily—*imperium*.[33] Hence, the state's assumption of public powers can be understood to advance the cause of liberty only to the extent that the law requires the state to exercise its coercive powers nonarbitrarily in the interest of its people. Law safeguards liberty by immunizing individuals from the threat of arbitrary interference, whether this threat emanates from the state itself or from other private parties.[34] This institutional and legal constitution of individual liberty is, for republicans, the essence of the rule of law.[35]

The republican conception of liberty has attracted renewed interest in recent years with the publication of Professor Philip Pettit's magisterial *Republicanism: A Theory of Freedom and Government*.[36] Pettit's primary contribution to the republican tradition is his clarification of the distinction between republicanism's conception of liberty as freedom from domination and mainstream liberalism's view of liberty as freedom from interference.[37] As Pettit observes, liberals tend to assume that individuals experience a loss of liberty only when others affirmatively interfere with their interests.[38] In contrast, republicans view another's mere "*capacity* to interfere" as a state of domination—regardless of whether that capacity is exercised.[39] Invoking the classic republican trope of the master–slave relationship, Pettit observes that a benevolent master could grant a slave a measure of independence by voluntarily refraining from interfering with the slave's interests.[40] Nonetheless, for republicans the slave of such a benevolent master would not enjoy liberty in a meaningful sense because the master would continue to possess the legal capacity to dispose of the slave's interests as

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[33] PETTIT, *supra* note 29, at 174; Dawood, *supra* note 32, at 1430.

[34] PETTIT, *supra* note 29, at 36.

[35] *See id.*; ISEULT HONOHAN, CIVIC REPUBLICANISM 184 (Tim Crane & Jonathan Wolff eds., 2002).

[36] PETTIT, *supra* note 29.

[37] *Id.* at 45–50.

[38] *Id.* at 8–9.

[39] *Id.* at 52, 54–55 (emphasis added).

[40] *Id.* at 22–23.

the master sees fit.[41] As long as the slave remains subject to the master's alien control, the slave does not enjoy liberty.[42]

This conception of liberty had particular resonance for American revolutionaries, who viewed British colonial rule as intolerable tyranny precisely because it institutionalized domination. The practice of "taxation without representation" epitomized the tyrannical condition of colonial rule because it demonstrated that the American people "lived at the mercy of an alien and potentially arbitrary will: the will of the British Parliament. Here, as the votaries of the tradition saw it, were a people in the chains of slavery, a people unfree."[43]

Conversely to liberalism, republicanism recognizes that a person may experience governmental interference without suffering domination.[44] A State does not dominate its constituents, for instance, when it imposes proportional civil or criminal sanctions to enforce regulatory laws that are reasonably calculated to advance compelling public interests (e.g., traffic safety, product safety). Such sanctions undoubtedly constitute state interference in the private sphere, but they do not undermine liberty in the republican sense because they do not place any private party in the position of "relating to anyone in the fashion of slave or subject."[45] Indeed, reasonable regulatory laws *advance* the cause of liberty by immunizing all individuals, including those sanctioned, from having their interests subject to the arbitrary control of others—e.g., reckless drivers, unscrupulous manufacturers. Republicanism thus offers a theoretical framework congenial to Blackstone's assertion "that laws, when prudently framed, are by no means subversive, but rather introductive of liberty."[46]

Far from treating individuals as servants or subjects of the State, republicans view the State as the people's fiduciary for the

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[41] *Id.*
[42] *Id.*
[43] *Id.* at 33.
[44] *Id.* at 23.
[45] *Id.*
[46] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 126 (London, Taylor 1830) (1765).

purpose of establishing ordered liberty. "The commonwealth or republican position," observes Pettit, "sees the people as trustor, both individually and collectively, and sees the state as trustee: in particular, it sees the people as trusting the state to ensure a dispensation of non-arbitrary rule."[47] Professor Gordon Wood, the leading historian of early American republicanism, has observed that a State's fiduciary obligation to safeguard its people from domination "summed up constitutionally what republicanism meant to Americans in 1776."[48] American republicans during the Founding Period thus aspired not only to cast off the shackles of colonial rule but also to lay the groundwork for a republican system of government—one capable of institutionalizing ordered liberty through democracy and the rule of law.

B. LIBERTY IN CHECKS AND BALANCES

The effort to construct a republic on American soil presented challenging questions of constitutional design. The Framers scoured classical sources in search of models, with John Adams's *A Defence of the Constitutions of Government of the United States of America*[49] serving as a particularly influential guide.[50] Although republicans envisioned a republican government as the champion of liberty,[51] they also were acutely aware that previous republics ultimately had failed in this pursuit, collapsing into "turbulence, violence, and abuse of power."[52] Writing under the pseudonym Publius, a leading founder of the Roman republic, the authors of

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[47] PETTIT, *supra* note 29, at 8.

[48] WOOD, *supra* note 25, at 150. For an argument that U.S. administrative law generally reflects a fiduciary model of delegation and discretion, see generally Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006).

[49] JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1787).

[50] *See* SELLERS, *supra* note 25, at 33 ("John Adams's Defense of the Constitutions of the United States of America [sic] provided Americans with their most comprehensive contemporary commentary and source book for republican institutions and attitudes.").

[51] *See* WOOD, *supra* note 25, at 544 ("The friends of the Constitution are as tenacious of liberty as its enemies. . . . They wish to give the government powers to secure and protect it." (quoting John Marshall) (internal quotation marks omitted)).

[52] Parker v. Commonwealth, 6 Pa. 507, 513 (1847) (quoting James Madison's statement during the Virginia ratification debates) (internal quotation marks omitted).

The Federalist presented American constitutionalism as an effort to take up the fallen banner of classical republicanism, restoring the ideal of liberty as nondomination while correcting the Romans' errors in institutional design and thereby avoiding the "vices" of their predecessors.[53]

For American republicans, constitutionalism demanded a government with maximal capacity to promote the common good but minimal capacity to exercise public powers arbitrarily.[54] The Framers drew inspiration from Montesquieu's proposal in *The Spirit of the Laws* to safeguard liberty by dividing governmental powers structurally into co-equal legislative, executive, and judicial departments.[55] Like Montesquieu, American republicans viewed the union of powers in any single government department as "the very definition of tyranny."[56] By vesting the legislative, executive, and judicial powers respectively in three distinct branches of government, the Framers sought to limit the capacity of any single branch to exercise unilateral, arbitrary power.[57]

Having thus divided power among the three branches, the Framers also built robust checks and balances into the legislative process to curtail Congress's capacity for arbitrary lawmaking. Fearing the potential for a powerful legislature to overwhelm the other branches and defeat liberty, James Madison departed from Montesquieu's vision of neatly separated powers, concluding that liberty did not require the three branches to "have no *partial*

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[53] THE FEDERALIST NO. 9, at 71–73 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* PANGLE, *supra* note 25, at 43 (quoting various Framers who acknowledged the failure of ancient republics and expressed their intention to realize classical ideals).

[54] *See, e.g.*, THE FEDERALIST NO. 10 (James Madison), *supra* note 53, at 80 (arguing that the goal of the republican model of government embodied in the Constitution is "[t]o secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government").

[55] CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151 (Thomas Nugent trans. 1949).

[56] THE FEDERALIST NO. 47 (James Madison), *supra* note 53, at 301.

[57] *See* Reid v. Covert, 354 U.S. 1, 40 (1957) ("Ours is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny."); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1148 (2000) ("[C]ourts and commentators agree on the following objective: The system of separation of powers is intended to prevent a single governmental institution from possessing and exercising too much power.").

agency in, or no *control* over, the acts of each other."[58] To the contrary, Madison recognized that a unitary legislative body vested with unencumbered, unilateral lawmaking power would pose an especially grave threat to liberty because it could facilitate the tyranny of majority rule.[59] That a representative legislature might, in practice, endeavor to serve the common good did not adequately address republican concerns because an unchecked legislative body still would have the *capacity* for arbitrary regulation. Thus, the Constitution ultimately provided not only for the election of federal legislators as popular representatives, but also for legislative bicameralism[60] and presentment of legislation to the President for approval or veto.[61] By placing multiple representative institutions as gatekeepers within the legislative process, the Constitution sought to minimize the federal government's capacity to enact tyrannical laws that would arbitrarily favor one factional interest over another.[62]

Comparable checks and balances appear in the treaty-making provisions of Article II. The Treaty Clause divides treaty-making power between the Executive and Legislative Branches: the President negotiates and signs treaties for the United States with the advice and consent of the Senate; but the Senate, by supermajority vote, serves as the final arbiter of treaty

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[58] THE FEDERALIST NO. 47 (James Madison), *supra* note 53, at 302.

[59] *Id.* at 301; *see also* Rice v. Foster, 4 Del. 479, 487 (1847) (observing that "our republican government was instituted" on a foundation of "separate, co-ordinate branches . . . to operate as balances, checks and restraints, not only upon each other, but upon the people themselves; to guard them against their own rashness, precipitancy, and misguided zeal; and to protect the minority against the injustice of the majority"); Parker v. Commonwealth, 6 Pa. 507, 512 (1847) (describing the Constitution's checks and balances as addressing two concerns: "the attacks of popular delusion and error from without" and "faithlessness and corruption from within"); WOOD, *supra* note 25, at 452 ("An *elective despotism* was not the government we fought for." (quoting Thomas Jefferson) (internal quotation marks omitted)).

[60] U.S. CONST. art. I, § 1.

[61] *Id.* art. I, § 7.

[62] *See* THE FEDERALIST NO. 10 (James Madison), *supra* note 53, at 80–84 (demonstrating how the structure of a republican form of government protects against factual rules); *see also* THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 53, at 72–73 (describing legislative checks and balances as "means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided").

ratification.[63] Thus, although the President takes a leading role in the preparation of treaties, the Constitution ensures that Article II treaties, like federal legislation, become "supreme Law of the Land" only through a process that prevents any single branch from exercising unchecked lawmaking power.[64]

Founding-era republicans viewed these structural features of Articles I and II as devices for promoting collective deliberation about the common good.[65] In theory, legislative checks and balances would promote transparency and force the House, the Senate, and the President to deliberate over the means and ends of public policy, minimizing the potential for any particular institution to hijack the legislative process in pursuit of factional objectives. Where consensus about the common good could not be reached, the same checks and balances would compel legislators to negotiate together toward a mutually acceptable compromise.[66] In theory, the Senate's role in the treaty-ratification process likewise would tend to expose international agreements to enhanced public scrutiny and debate, as well as to stimulate greater inter-branch deliberation and negotiation. Republicans saw these checks and balances as useful devices for decreasing the federal government's capacity for arbitrary lawmaking. While these safeguards might not assure that Congress would never be "arbitrary in the substantive sense of actually going against the interests or judgements of the persons affected," they would offer a meaningful check against arbitrariness in the procedural sense of denying any single governmental institution the "power of interfering on an arbitrary, unchecked basis."[67]

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[63] U.S. CONST. art. II, § 2.

[64] *See id.* art. VI ("This constitution, and the laws of the United States shall be made in pursuance thereof; and all treaties made . . . shall be the Supreme Law of the Land."). This is not to suggest, of course, that the bicameral legislative process and Treaty Clause are interchangeable or that either one fully realizes the republican ideal.

[65] *See* Sunstein, *supra* note 30, at 1561, 1569 (noting that the structure of the checks and balances system in general promotes government discussions).

[66] *See* Jonathan R. Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673, 1674 (1988) (arguing that the Framers' "plan was to hope for republicanism but to gird the republic for an onslaught of pluralism").

[67] PETTIT, *supra* note 29, at 55.

Although the Constitution's Framers aspired to institutionalize liberty, they recognized that Articles I and II were not a perfect prophylaxis against legislative domination. The republican conception of liberty as nondomination is best understood as an ideal to be pursued, as opposed to one that can be fully realized in a Congress constructed from the "crooked timber" of human legislators.[68] Even the most finely engineered constitutional checks and balances and political accountability mechanisms cannot ensure that legislators will always enact laws in the public interest. As such, a legislature's capacity for arbitrariness always will be a matter of degree.[69] Nonetheless, while the Framers recognized that constitutional checks and balances might not be sufficient to fully realize the ideal of republican liberty, they anticipated that these structures would significantly reduce Congress's capacity for arbitrariness by spurring congressional deliberation, contestation, and reason-giving.[70] Having laid a basic structural foundation for republican legislation, the Framers would have to await subsequent contributions—including the Bill of Rights,[71] the Reconstruction Amendments,[72] the APA,[73] the Civil Rights Act,[74] and the Voting Rights Act[75]—to more fully realize the republican ideal of ordered liberty.

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[68] ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 170 (Oxford Univ. Press 1969) (paraphrasing Immanuel Kant).

[69] *See* PETTIT, *supra* note 29, at 58 ("[A] dominating agent may be able to interfere on a more or less arbitrary basis, with greater or lesser ease, and in a more or less severe measure.").

[70] *See* Dawood, *supra* note 32, at 1419 n.31 (noting that relations of power organized to minimize duration); William T. Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I and the Delegation of Legislative Power to Administrative Agencies*, 1986 DUKE L.J. 948, 949 (observing that the Framers designed Article I to promote "circumspection in lawmaking").

[71] U.S. CONST. amends. I, II, III, IV, V, VI, VII, VIII, IX, X.

[72] *Id.* amends. XIII, XIV, XV.

[73] 5 U.S.C. §§ 551–559 (2000).

[74] Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

[75] Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973aa–6 (2006).

C. LIBERTY AND NONDELEGATION

Given the republican ideals embodied in the Constitution's legislative checks and balances, it should perhaps come as no surprise that some federal courts in the nineteenth century took a dim view of the idea that Congress might circumvent those constraints via delegation. The problem was not simply that congressional delegation of legislative power would transgress the common law presumption against subdelegation.[76] Rather, the problem was that the Constitution deliberately channeled federal lawmaking powers through well-defined procedures—e.g., bicameralism, presentment—to safeguard individual liberty. If Congress could authorize the Executive Branch to make law unilaterally, this would circumvent the Constitution's liberty-enhancing checks and balances and increase the federal government's capacity for arbitrary lawmaking. The product of this line of reasoning was the "nondelegation doctrine": Congress could not entrust its constitutionally vested lawmaking functions to the Executive and Judicial Branches.

During the nineteenth century, federal and state courts endorsed the nondelegation doctrine as an essential corollary of the structural Constitution.[77] State supreme courts connected nondelegation principles to constitutional "checks and balances," explaining that nondelegation review was essential to preserve the legislative process against "the attacks of popular delusion and error from without" and "faithlessness and corruption from

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[76] Even in private law, it was widely understood that the presumption against subdelegation could be overcome by evidence "growing out of the particular transaction, or of the usage of trade, [that] a broader power was intended to be conferred on the agent." JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 14, at 15 (8th ed. 1874).

[77] *See, e.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) ("[I]n carrying out that constitutional division into three branches it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial Branch."); Field v. Clark, 143 U.S. 649, 692 (1892) ("That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."); Wayman v. Southard, 23 U.S. (10 Wheat) 1, 42–43 (1825) ("It will not be contended that Congress can delegate to the Courts . . . powers which are strictly and exclusively legislative.").

within."[78] The Court relied on this state court jurisprudence in developing its own nondelegation jurisprudence in the later decades of the nineteenth century. For example, in *Field v. Clark*, the Court characterized the nondelegability of legislative power as "a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the [C]onstitution."[79] Three decades later, the Court in *J.W. Hampton, Jr., & Co. v. United States* stressed that it would be "a breach of the national fundamental law" for Congress to authorize either the President or the federal judiciary to perform its constitutional lawmaking function.[80] Although the Court in these cases did not expressly discuss legislative checks and balances, its effort to distinguish between *legislative* and *executive* powers can be seen as an attempt to preserve the Constitution's republican structure and thereby conserve liberty.

As the nondelegation doctrine took shape over the course of the nineteenth century, the Court introduced two significant clarifications regarding the doctrine's scope. First, the Court reasoned that the Constitution did not preclude Congress from authorizing the Executive Branch to exercise broad discretionary powers as long as Congress conditioned those powers upon discrete findings of fact. For example, the Court upheld a federal statute authorizing the President to suspend the United States' embargo of France and Great Britain if the President determined that those countries had "cease[d] to violate the neutral commerce of the United States."[81] The next year, the Court decided a pair of cases in which it approved similar statutes permitting the President to

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[78] Parker v. Commonwealth, 6 Pa. 507, 515 (1847); *see also* Rice v. Foster, 4 Del. 479, 485 (1847) (connecting nondelegation to republican principles and emphasizing that a legislative "act is void, if it palpably violates the principles and spirit of the constitution, or tends to subvert our republican form of government"); Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm'rs of Clinton Cnty. (*Railroad Co.*), 1 Ohio St. 77, 87 (1852) (reasoning that congressional delegation would "subvert" constitutional checks and balances, which serve "no less for the protection and safety of the minority, than the majority").

[79] 143 U.S. 649, 692 (1892) (citing, *inter alia*, *Railroad Co.*).

[80] 276 U.S. 394, 406 (1928).

[81] The Cargo of the Brig Aurora, Burn Side v. United States (*The Brig Aurora*), 11 U.S. (7 Cranch) 382, 383 (1813).

grant, annul, or revoke the commissions of privateers[82] and to grant passports of safe passage to British ships.[83] The Court relied upon the reasoning of these early decisions decades later when it held that Congress could authorize the President to suspend provisions of an 1890 tariff act upon determining that foreign governments had introduced commodities into U.S. markets on a "reciprocally unequal and unreasonable" basis.[84] The Court reasoned that this allowance did not entrust "the power of legislation" to the President because "Congress itself [had] prescribed, in advance," the discrete circumstances that would merit suspension, as well as "the duties to be levied, collected, and paid . . . while the suspension lasted."[85] Within this regulatory scheme, the President "was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect."[86] Thus, the Court reasoned that Congress could authorize the Executive Branch to wield broad discretionary powers as long as Congress first discharged its constitutional legislative responsibility to specify the circumstances that would trigger executive action.

Second, the Court held that administrative regulations would not unconstitutionally invade legislative powers as long as Congress had established a general statutory standard to guide the agency's actions.[87] Indeed, "[i]f Congress shall lay down by

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[82] The Thomas Gibbons, 12 U.S. (8 Cranch) 421, 421 (1814).

[83] Brown v. United States, 12 U.S. (8 Cranch) 110, 115 (1814).

[84] Field v. Clark, 143 U.S. 649, 680 (1892).

[85] *Id.* at 692–93.

[86] *Id.* at 693. The dissent argued that the law entrusted too much discretionary power to the President and that it unconstitutionally delegated both legislative power under Article I and treaty-making power under Article II. *Id.* at 697 (Lamar, J., dissenting).

[87] *See, e.g.*, Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) ("[I]t . . . becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegatory authority."); Opp Cotton Mills, Inc. v. Adm'r, 312 U.S. 126, 144 (1941) (holding that if Congress has laid out the standards and procedures by which the agency is to act, "there is no failure of performance of the legislative function"); Wichita R.R. & Light Co. v. Pub. Utils. Comm'n, 260 U.S. 48, 59 (1922) ("In creating such an administrative agency the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."); Buttfield v. Stranahan, 192 U.S. 470, 496 (1904) (holding that the delegation was constitutional because "Congress

legislative act an intelligible principle to which the [delegate] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[88] In theory, the requirement that Congress enact an "intelligible principle" to guide executive discretion would ensure "that important choices of social policy are made by Congress" rather than administrative agencies.[89] As long as Congress determined major questions of legislative policy, the theory held, administrative agencies could flesh out the technical details and applications of Congress's framework through administrative regulation.[90]

The nondelegation doctrine reached its high-water mark in 1935 when the Court invoked the doctrine in two high-profile cases as a basis for striking down provisions of the National Industrial Recovery Act (NIRA).[91] The first case, *Panama Refining Co. v. Ryan*,[92] addressed a provision of the NIRA that authorized the President "to prohibit the transportation in interstate and foreign commerce" of so-called "hot oil"—petroleum and petroleum products produced in violation of state law.[93] The Court concluded that the President's discretion was not adequately constrained because Congress did not "require any finding by the President as a condition of his action."[94] Turning to the intelligible principle requirement, the Court lamented that "Congress left the matter to the President without standard or rule, to be dealt with as he pleased."[95] That the President may have acted "for what he believes to be the public good" was no response, the Court observed, because the question was "not one of motives but of

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legislated on the subject as far as was reasonably practicable").

[88] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[89] Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

[90] *See* United States v. Grimaud, 220 U.S. 506, 516–17 (1911) (distinguishing "legislative power" from "administrative authority" and stating that "it [is] impracticable for Congress to provide general regulations for these various and varying details of management").

[91] National Industrial Recovery Act of June 16, 1933 (NIRA), 15 U.S.C. §§ 701–728 (Supp. 1933).

[92] 293 U.S. 388 (1935).

[93] *Id.* at 406.

[94] *Id.* at 415.

[95] *Id.* at 418.

constitutional authority, for which the best of motives is not a substitute."[96] To permit the President to operate without proper congressional direction would render obsolete "the constitutional processes of legislation which are an essential part of our system of government."[97] In other words, absent statutory standards forged in the Article I-prescribed legislative process, even the best-intentioned presidential lawmaking would reflect domination.

Similar concerns about unconstrained executive discretion arose in the second NIRA-based case, *A.L.A. Schechter Poultry Corp. v. United States*.[98] Here, Congress's entrustment of regulatory power to the President was far broader than that considered in *Panama Refining*: the Act vested the President with authority to promulgate "codes of fair competition" for "unfair competitive practices" in *any* industries the President chose to regulate.[99] The President's authority could not be construed as mere fact-finding because Congress did not supply "rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure."[100] Moreover, Congress failed to establish any "standards, aside from the statement of [the NIRA's] general aims of rehabilitation, correction, and expansion."[101] Because in these circumstances "the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country [was] virtually unfettered," the Court invalidated the provision as an unconstitutional delegation of legislative power.[102] Even Justice Cardozo, who cast the lone dissenting vote in *Panama Refining*, concurred that the lawmaking power entrusted to executive control in *Schechter Poultry* was "not canalized within banks that keep it from overflowing" but was "unconfined and vagrant."[103] This, he agreed, was "delegation running riot."[104]

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[96] *Id.* at 420.
[97] *Id.* at 430.
[98] 295 U.S. 495, 537–39 (1935).
[99] *Id.* at 534–35 (quoting the NIRA statute) (internal quotation marks omitted).
[100] *Id.* at 541.
[101] *Id.*
[102] *Id.* at 542.
[103] *Id.* at 551 (Cardozo, J., concurring).

Although some legal scholars have suggested that the nondelegation doctrine aims to ensure lawmaking by *politically accountable* public officials,[105] the better view is that it aims to conserve liberty through checks and balances.[106] As Professor Lisa Bressman has observed, if the nondelegation doctrine's *raison d'etre* was merely to ensure politically accountable lawmaking, the Court's holdings in *Panama Refining* and *Schechter Poultry* would be unsustainable because they invalidate delegations to the politically accountable President.[107]

These features of the nondelegation doctrine make sense, however, if we view the doctrine instead through a republican lens. On the republican account, delegations of uncanalized lawmaking power to the unilateral discretion of a single politically accountable branch are unacceptable because they increase the federal government's capacity for arbitrary lawmaking. While political accountability represents an important constitutional check against the abuse of public powers, it is not a sufficient substitute for legislative checks and balances, which are already predicated upon the political accountability of Congress and the Executive Branch. The nondelegation doctrine thus prohibits transfers of lawmaking power to *all* executive officials (including the popularly elected President and Vice President) outside the Constitution's checks and balances, not just to appointed and career bureaucrats within administrative agencies.[108]

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[104] *Id.* at 553.

[105] *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 9–11 (1993) (arguing that delegation allows legislatures to avoid blame for the burdens that regulatory statutes impose).

[106] *See* 1 DAVIS, *supra* note 26, at 208 ("The purpose [of the nondelegation doctrine] should be to protect private parties against injustice on account of unnecessary and uncontrolled discretionary power."); Bressman, *supra* note 26, at 499–500 (arguing that constitutional lawmaking requirements prevent concentration of power in any one branch to avoid "the tyranny of any one branch").

[107] Bressman, *supra* note 26, at 525.

[108] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 448–49 (1998) (declaring the line item veto an unconstitutional delegation of power from Congress to the President).

D. NONDELEGATION AND INDEPENDENT LAWMAKING POWERS

In contexts where the Constitution vests independent lawmaking power in the Executive and Judicial Branches, the nondelegation doctrine poses no obstacle to congressional delegation. For example, in *Wayman v. Southard*, the Court recognized that Congress could authorize federal courts to develop rules of judicial procedure—a power courts arguably possessed independently under the Constitution.[109] Likewise, the Court has held that Congress may commit broad lawmaking authority to the Executive Branch in fields such as military discipline—where the President possesses independent constitutional authority.[110] Although the Constitution permits Congress to develop statutory standards to constrain the other branches' discretion in these fields, the nondelegation doctrine does not affirmatively *require* Congress to do so; the doctrine simply does not apply if the other branches could perform the same activity without congressional authorization.[111]

This feature of the nondelegation doctrine reflects the limits of the Constitution's republican design. Where the President and the courts enjoy independent lawmaking powers, for example, uncanalized statutory delegations merely preserve the constitutional status quo; they do not introduce new forms of domination. Conversely, in contexts where Congress entrusts lawmaking authority to the other branches that they do not already possess independently, its delegations may undermine liberty by increasing the federal government's capacity for arbitrariness. The nondelegation doctrine's republican foundations

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[109] 23 U.S. (10 Wheat) 1, 44–45 (1825).

[110] *See* Loving v. United States, 517 U.S. 748, 768 (1996) (holding that Congress could authorize the President to prescribe "aggravating factors" for capital punishment in court-martial cases); *see also* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2137–38 (2004) (arguing that the President may exercise independent lawmaking powers over the management of federal lands because Article I does not vest this power exclusively in Congress).

[111] *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5–19, at 981 (3d ed. 2000) ("Where a power is not clearly conferred on Congress alone, courts may construe that power as delegable.").

are thus evident not only in the many fields where the doctrine applies, but also implicitly in the limited contexts where it does not.

III. FROM NONDELEGATION TO DELEGATION

By drawing a formal distinction between legislative and executive powers, federal courts for a time enforced a strong nondelegation doctrine and sought to channel all significant federal lawmaking through the checks and balances of Articles I and II. Since the 1930s, however, the Court has not invalidated a single federal statute on nondelegation grounds. Although the Court has not formally abandoned the nondelegation doctrine,[112] it has upheld many sweeping delegations of lawmaking authority to administrative agencies.[113] As a result, the conventional wisdom among administrative law scholars today is that the nondelegation doctrine is, for all practical purposes, "a dead letter."[114] Delegation reigns. The question is whether congressional delegation of broad lawmaking powers can be squared with the Constitution's liberty-promoting checks and balances.

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[112] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (affirming that Article I, Section 1 "permits no delegation of [legislative] powers").

[113] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 371–72 (1989) (upholding complete delegation of power to determine federal sentencing guidelines to the sentencing commission); Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 600–01 (1944) (upholding delegation of power to Commission to determine the just and reasonable rate of natural gas even though Congress "provided no formula" for determining what rates met that standard); Yakus v. United States, 321 U.S. 414, 423 (1944) (upholding delegation of power to fix prices under the Emergency Price Control Act); Nat'l Broad. Co. v. United States, 319 U.S. 190, 194 (1943) (upholding the broad regulatory power of the Federal Communications Commission).

[114] Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 329 (2002); *see also* Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 25 (1982) (explaining that the nondelegation doctrine has evolved into a diluted form); Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 710–11 (1994) (reviewing DAVID SCHOENBRAD, POWER WITHOUT RESPONSIBILITY (1993)) (noting that a judicially enforced nondelegation doctrine is dead).

A. THE DELEGATION DOCTRINE

After striking down significant provisions of the NIRA in *Panama Refining* and *Schechter Poultry*,[115] the Court soon lost its appetite for nondelegation review. In *Yakus v. United States*,[116] the Court upheld a federal statute that directed the President to prevent wartime inflation by setting prices, wages, and salaries at "fair and equitable" levels "so far as practicable."[117] Brushing aside the objection that Congress must prescribe more restrictive standards to guide presidential lawmaking, the Court declared that federal legislation would raise constitutional concerns only in the complete "absence of standards" such that "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed."[118] This laissez-faire approach to the nondelegation doctrine provoked a sharp dissent from Justice Owen Roberts, who lamented that "in fact the Act sets no limits upon the discretion or judgment of the Administrator."[119] In effect, *Yakus* signaled that the Court would no longer second-guess Congress's decision to entrust lawmaking power to federal agencies as long as Congress furnished some standard (however vague) to inform the agency's discretion.[120] For convenience, this Article will refer to this idea that Congress may delegate far-reaching lawmaking powers as the "delegation doctrine."

Yakus's deferential approach toward congressional delegation of lawmaking authority aptly captures the Court's jurisprudence since *Schechter Poultry*. For the past seventy-five years, the Court has averted its eyes while Congress has enacted a host of

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[115] *See supra* notes 92–94 and accompanying text.

[116] 321 U.S. 414 (1944).

[117] *Id.* at 420–21 (quoting the statute) (internal quotation marks omitted).

[118] *Id.* at 426.

[119] *Id*. at 451 (Roberts, J., dissenting).

[120] The Court had sown the seeds for this change years earlier. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935) (reasoning that Congress could delegate lawmaking power provided that it did not "transfer to others the essential legislative functions with which it is . . . vested"); Wichita R.R. & Light Co. v. Pub. Utils. Comm'n, 260 U.S. 48, 59 (1922) (holding that some delegation of lawmaking power was acceptable as long as an agency's rulemaking authority did not constitute a "*pure* delegation of legislative power" (emphasis added)).

expansive delegations with only minimal policy guidance, including authorizing federal agencies to approve business consolidations "in the public interest"[121] and to regulate occupational environments for safety and health "to the extent feasible."[122] Such nebulous congressional standards violate the spirit of checks and balances under Articles I and II[123] and leave essential policy questions unresolved, thereby forcing agencies to decide fundamental matters of national policy downstream at the rulemaking and enforcement stages.[124] Far from opposing such broad congressional delegations, the Court has reconciled itself to the pervasive practice of congressional delegation. On several occasions, the Court has acknowledged openly that Congress does, in fact, delegate legislative powers to agencies,[125] and Justices have questioned whether the Court is "qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to [agencies]."[126] Perhaps the most famous example of the delegation doctrine is *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[127] where the Court cited Congress's delegation of lawmaking power to the Environmental Protection Agency as justification for deferring to the agency's interpretation of the Clean Air Act.[128] By all indications, the Court

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[121] New York Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932).

[122] Am. Textile Mfrs. Inst. v. Donovan (*Cotton Dust Case*), 452 U.S. 490, 508 (1981); Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 612 (1980).

[123] *See Panama Ref. Co.*, 293 U.S. at 421 ("The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested.").

[124] *See Cotton Dust Case*, 452 U.S. at 544, 547–48 (Rehnquist, J., dissenting) (arguing that Congress abdicated its responsibility for making difficult policy choices to agency).

[125] Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 488 (2001) (Stevens, J., concurring) (arguing "that it would be both wiser and more faithful . . . in delegation cases to admit that agency rulemaking authority is 'legislative power' " (citations omitted)); Bowsher v. Synar, 478 U.S. 714, 752 (1986) (Stevens, J., concurring) ("[I]t is far from novel to acknowledge that independent agencies do indeed exercise legislative powers."); INS v. Chadha, 462 U.S. 919, 985 (1983) (White, J., dissenting) ("[L]egislative power can be exercised by independent agencies and Executive departments.").

[126] *Am. Trucking*, 531 U.S. at 474–75 (Scalia, J., dissenting) (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989)) (internal quotation marks omitted).

[127] 467 U.S. 837 (1984).

[128] *Id.* at 843–44; *see also* Patrick M. Garry, *Accommodating the Administrative State: The*

appears to have made peace with broad legislative delegations, giving Congress substantial discretion to entrust lawmaking authority to the Executive Branch outside the checks and balances of Articles I and II.

From a republican perspective, there is much to admire about the delegation doctrine. To the extent that federal regulation is necessary to address domination emanating from the private sphere, administrative lawmaking may facilitate government responsiveness by expanding the federal government's capacity to react. This understanding of the liberty-enhancing potential of congressional delegation resonates with the Court's oft-repeated affirmation that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[129] Further, congressional delegation of lawmaking powers may be "necessary and proper"[130] if the federal government is to safeguard the public from private-sector domination.[131]

On the other hand, the Court's acceptance of congressional delegation is also deeply troubling from a republican perspective to the extent that it magnifies the federal government's capacity for arbitrary lawmaking. If Congress may authorize federal agencies

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Interrelationship Between the Chevron *and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 923 (2006) (arguing that the nondelegation doctrine's erosion and the *Chevron* doctrine are logically intertwined); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 505 (2005) (observing that "*Chevron* relies on constitutional structure" and "Congress's legitimate authority to delegate lawmaking power").

[129] *Mistretta*, 488 U.S. at 372; *see also* Bowles v. Willingham, 321 U.S. 503, 515 (1944) ("Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority. In our complex economy that indeed is frequently the only way in which the legislative process can go forward."). Even ardent supporters of the nondelegation doctrine have recognized that "[a]n absolutist position against delegation would be utter foolishness." Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 295–96 (1987).

[130] U.S. CONST. art. 1, § 8, cl. 18.

[131] *See* Merrill, *supra* note 110, at 2129–31 (noting that the power to transfer congressional authority can be implied from the Necessary and Proper Clause); *cf.* Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) (observing that "[n]ecessity . . . fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules").

to decide significant policy questions unilaterally outside the ordinary checks and balances of Articles I and II, this could undermine liberty by concentrating vast tracks of federal lawmaking power within the Executive Branch. Although Congress could enact new legislation to rescind agency rulemaking powers or to eliminate arbitrary regulations, the threat of a presidential veto together with the time and resources necessary for coordinated legislative action tend to entrench federal regulations against legislative repeal. As a result, congressional delegations potentially transfer federal lawmaking power from a regime with multiple institutional checks and balances—the legislative process—to one in which inter-branch checks and balances could be relatively diluted—the administrative process. These considerations led Professor Kenneth Culp Davis in 1969 to characterize the Court's delegation jurisprudence as "almost a complete failure" because it "failed to provide needed protection against unnecessary and uncontrolled discretionary power."[132]

The challenge for contemporary republicans is to explain how the Court's approval of congressional delegation can be reconciled with the republican ideals embodied in the Constitution's liberty-promoting checks and balances.

B. THE NEW NONDELEGATION DOCTRINE

The Court has not been wholly inattentive to these republican concerns. As it has come to terms with congressional delegation, the Court also has taken steps to safeguard individual liberty by reformulating the nondelegation doctrine as an exercise in statutory interpretation. This so-called "new nondelegation doctrine" has two features.[133] First, the Court polices the limits of statutory delegations to ensure that agencies do not promulgate rules outside the scope of their entrusted authority.[134] Second, the

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[132] Davis, *supra* note 12, at 713.

[133] *See* David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 5 (2002) (describing the use of the new nondelegation doctrine).

[134] *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) (identifying the nondelegation canons used by courts to limit administrative agencies'

Court employs canons of statutory interpretation to narrow statutory delegations and to create meaningful statutory standards in contexts where capacious legislative delegations raise heightened concerns of administrative arbitrariness.[135]

Although superficially appealing, the new nondelegation doctrine does not adequately address the domination concerns that prompted courts to develop the nondelegation doctrine in the first place. From a republican perspective, the new nondelegation doctrine is plainly an unsatisfactory substitute.

1. The Anti-Inherency Principle. The first feature of the new nondelegation doctrine is the principle that the Executive and Judicial Branches lack inherent authority to make federal law absent a discrete constitutional or statutory investiture.[136] Except for those narrow fields such as military discipline and judicial procedure where the Constitution authorizes the Executive and Judiciary to make rules unilaterally, these branches cannot make rules binding on the public unless authorized by federal legislation or treaty.[137] As Professor Thomas Merrill has shown, this anti-inherency principle can be understood to flow from the Vesting Clause of Article I, which dictates "that neither the [E]xecutive [B]ranch nor the [J]udicial [B]ranch has any power derived directly from the Constitution (as opposed to a statute) to make legislative rules on the subjects enumerated in Article I."[138] If the Executive or Judicial Branches assert authority to make rules with the force of law, they must be able to trace that authority to a discrete constitutional, statutory, or treaty-based delegation.

The anti-inherency principle offers a helpful starting point for understanding when courts must defer to agency statutory interpretations. The Court has held that federal courts must defer

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powers).

[135] *Id.*

[136] Merrill, *supra* note 110, at 2101 (conceptualizing this anti-inherency principle as the assertion "that executive and judicial officers have no inherent authority to act with the force of law, but must trace any such authority to some provision of enacted law").

[137] *Id.* at 2136 ("There can be no claim grounded in history and tradition that the executive or the courts enjoy a general, inherent power to promulgate legislative rules absent some delegation by Congress.").

[138] *Id.* at 2101 (emphasis omitted).

to administrative agencies' reasonable interpretations of ambiguous federal statutes.[139] Subsequent cases, such as *United States v. Mead Corp.*,[140] supplement this *Chevron* rule by clarifying that agency statutory interpretations only qualify for *Chevron* deference if the statutory scheme as a whole indicates that Congress intended to delegate authority to the agency to act with the force of law.[141] Considerations relevant to this inquiry include whether Congress authorized the agency to promulgate regulations with the force of law, whether the agency's interpretation can be attributed to a politically accountable official, whether the agency is required to act through a reasonably deliberative process, and whether the agency's interpretation will facilitate a uniform national standard.[142]

These elements of the *Chevron/Mead* test are consistent with the anti-inherency principle to the extent that they seek to connect agency lawmaking authority with congressional intent. Just as federal agencies must be able to trace their exercises of rulemaking authority to particular constitutional, statutory, or treaty delegations, they also must show that their authority to promulgate legally binding statutory interpretations can plausibly be derived from a congressional delegation. Thus, the anti-inherency principle provides a link between the emerging *Chevron*/*Mead* doctrine and judicial review of congressional delegations.

Although the anti-inherency principle advances republican values by preventing agencies from asserting unilateral lawmaking authority without express constitutional investiture or congressional consent, it places no limits upon Congress's power to authorize administrative lawmaking by express delegation. In

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[139] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

[140] 533 U.S. 218 (2001).

[141] *See, e.g.*, *id.* at 229 (holding that *Chevron* deference is warranted when there is "express congressional authorizations to engage in the rulemaking or adjudication process that produces the regulations or rulings for which deference is claimed"). Sunstein coined the term "Step Zero" to capture the idea that *Mead*'s inquiry serves as a gateway into the *Chevron* test. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

[142] *See* Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1283–91 (2008) (describing the interplay between these and other indicators of congressional delegation).

theory, Congress could entrust all of its Article I, Section 8 powers to a single federal agency without providing any limiting principles and still satisfy the anti-inherency principle. This principle therefore does nothing to keep Congress from colluding with the President to authorize sweeping, unilateral executive lawmaking and, thus, to quiet republican concerns about the Court's new nondelegation doctrine.

2. Nondelegation Canons. The second, more controversial feature of the Court's new nondelegation doctrine consists of what Professor Cass Sunstein has dubbed "nondelegation canons."[143] According to Sunstein, the Court has not abandoned its commitment to nondelegation values since the 1930s; it has merely adopted a new strategy to accomplish similar results.[144] Rather than strike down legislative delegations as overbroad, the new nondelegation doctrine employs canons of statutory interpretation to force Congress to make important policy choices related to delegation issues. Sunstein identifies constitutional avoidance as one such nondelegation canon: if a federal statute can bear two interpretations—one that would constitute an "intelligible principle" and another that would not—courts should adopt the interpretation that does not transgress the nondelegation doctrine.[145] Other canons that supposedly address nondelegation concerns include the judicial presumptions against "extraterritorial application of national law, intrusions on state sovereignty, decisions harmful to Native Americans, and absolutist approaches to health and safety."[146] In theory, canons of statutory interpretation channel important policy decisions through the checks and balances of Article I by forcing Congress to provide clear direction if it intends to authorize administrative lawmaking in sensitive areas of public policy. Enforcing nondelegation

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[143] *See* Sunstein, *supra* note 134, at 315–16 (describing the application of these canons).

[144] *Id.*

[145] *Id.* at 316, 318.

[146] *Id.* at 315; *see, e.g.,* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (requiring Congress to provide a clear statement of legislative intent before interpreting a statute to disturb the "usual constitutional balance between the States and the Federal Government" (quoting Astascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (internal quotation marks omitted))).

principles through interpretive canons is "far preferable to the old nondelegation doctrine," Sunstein contends, because these canons "are subject to principled judicial application, and because they do not threaten to unsettle so much of modern government."[147]

On several occasions, the Court has endorsed this idea that the nondelegation doctrine applies "principally" through courts "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."[148] For instance, in *National Cable Television Association, Inc. v. United States*, the Court reviewed the FCC's authority under the Independent Offices Appropriations Act to promulgate regulations setting "fair and equitable" fees for certain cable television licenses.[149] The petitioner, a trade association representing cable antenna television systems, challenged the FCC's assessment of licensing fees.[150] The Court declined to address directly "[w]hether the present Act meets the [nondelegation] requirement of *Schechter* [*Poultry*] and *Hampton*."[151] But the Court emphasized that "the hurdles revealed in those decisions" counseled "read[ing] the Act narrowly to avoid constitutional problems."[152] The Court therefore construed the statute to require fees to be commensurate with their "value to the [license] recipient" and remanded the case back to the FCC for reconsideration under this standard.[153]

Another case that attempts to address nondelegation concerns through statutory interpretation is *Industrial Union Department v. American Petroleum Institute*.[154] There the Court reviewed a provision of the Occupational Safety and Health Act of 1970 that authorized the Secretary of Labor to promulgate standards

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[147] Sunstein, *supra* note 134, at 315.

[148] Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989); *cf.* Int'l Union v. OSHA, 938 F.2d 1310, 1316 (D.C. Cir. 1991) (noting the Court's "current general practice of applying the nondelegation doctrine mainly in the form of 'giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional' " (quoting *Mistretta*, 488 U.S. at 373 n.7)).

[149] 415 U.S. 336, 337–40 (1974).

[150] *Id.* at 340.

[151] *Id.* at 342.

[152] *Id.*

[153] *Id.* at 342–44.

[154] 448 U.S. 607 (1980).

restricting occupational exposure to harmful substances at levels "reasonably necessary or appropriate to provide safe or healthful employment"[155] and adequate to assure, "to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity."[156] The Court rejected the government's argument that this provision did not require the Secretary to establish a statistically significant health risk at a particular exposure level.[157] "If the Government was correct" that the Secretary could prohibit even statistically insignificant risks to public health, "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional . . . . A construction of the statute that avoids this kind of open-ended grant should certainly be favored."[158]

Although the Court has accepted statutory interpretation as a new solution to old nondelegation concerns, there are serious reasons to doubt the adequacy of interpretive canons as functional substitutes for the traditional nondelegation doctrine. As Professor David Driesen has argued, most canons of statutory interpretation, such as the canon against extraterritorial application of federal law and the rule of lenity, have little to do with either nondelegation specifically or republican concerns for arbitrary decisionmaking more generally.[159] So-called nondelegation canons may be better described as anti-inherency canons to the extent that they formalize judicial presumptions about congressional intent. They also may safeguard important secondary values such as comity to other sovereigns,[160] individual freedoms,[161] or due process concerns.[162] But nondelegation canons

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[155] *Id.* at 612 (quoting 29 U.S.C. § 652(8)).

[156] *Id.* (emphasis omitted) (quoting 29 U.S.C. § 655(b)(5)).

[157] *Id.* at 646.

[158] *Id.* (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935)).

[159] Driesen, *supra* note 133, at 24–31; *see also* John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1549 (2008) (noting that applying such canons will be difficult and comes down to "hard-to-define judgments").

[160] *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (noting that the extraterritoriality canon "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord").

[161] *See, e.g.*, Kent v. Dulles, 357 U.S. 116, 129 (1958) (stating that the Court "will construe narrowly all delegated powers that curtail or dilute" personal freedoms); *see also* BARBER,

"are not really aimed at the nondelegation problem at all, rather they limit agency discretion, if at all, incidentally and for other reasons."[163] Nondelegation canons do not force Congress to establish intelligible principles for agencies to follow, nor do they address the potential for uncontrolled and vagrant administrative discretion. They simply incentivize Congress to delegate lawmaking authority more explicitly.

These observations point toward another problem with this aspect of the new nondelegation doctrine: when courts impose narrowing constructions on vaguely worded statutes, they may undermine Congress's policy decisions or substitute their own policy preferences or the preferences of the Executive Branch.[164] Commentators have criticized the constitutional avoidance canon specifically as a device whereby courts may insinuate their own policy preferences into the regulatory process.[165] When courts use interpretive canons to create intelligible principles to guide agency

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supra note 20, at 33 (arguing that the "point of confining discretion" in cases like *Kent* "is to remove the threat to [individual] rights, not to force lawmakers to assume responsibility for their violation," and that such cases "have been interpreted as partial revivals of the delegation doctrine" only "because the Court's desire to limit discretion is a feature of such decisions").

[162] *See* Driesen, *supra* note 133, at 26 (observing that the rule of lenity is concerned primarily with notice).

[163] *Id.* at 31.

[164] *See* Indust. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring) (characterizing the absence of intelligible standards as delegating lawmaking authority to agencies "and, derivatively, to [the] Court"); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 434 (2008) (noting cases in which "the Justices were not giving effect to Congress's intent so much as forging their own path"); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228 (arguing that the canon of avoidance "threatens to unsettle the legislative choice impact in adopting a broadly worded statute").

[165] *See, e.g.*, Manning, *supra* note 164, at 228 (stating that this canon "requires the judiciary, in effect, to rewrite the terms of a duly enacted statute"); Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2231 n.29 (1997) (noting that the "adoption of a narrowing construction . . . confers on politically unaccountable judges the power to make fundamental policy decisions"). The constitutional avoidance canon is not unique in this respect; as Professor Karl Llewellyn observed long ago, the indeterminacy of interpretive canons raises the specter of subterranean judicial lawmaking in a wide variety of contexts. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401 (1950).

administration, this practice not only runs counter to the spirit of *Chevron* deference but also raises liberty concerns to the extent that courts are arguably subject to even weaker checks and balances than administrative agencies when they interpret statutes.

In sum, if the traditional nondelegation doctrine aspired to promote republican liberty by funneling important lawmaking decisions through the checks and balances of Articles I and II, canons of statutory interpretation clearly are not a satisfactory functional substitute. At best, these canons bolster the Constitution's republican ideals only indirectly by suppressing ultra vires administrative lawmaking. At worst, they may simply exchange executive domination for judicial domination.

C. THE PARADOX OF (NON)DELEGATION

If the new nondelegation doctrine does not adequately safeguard republican values implicit in the Constitution's checks and balances, what should be done to safeguard individual liberty in the modern administrative state?

Some scholars have argued that the only way to honor the Constitution's republican values is to reassert a formal distinction between legislative power, on the one hand, and executive or judicial powers, on the other.[166] This approach would require the Court to reformulate the intelligible principle standard as something akin to a more-rigorous "determinate criterion" requirement—a step the Court previously has refused to take.[167] The prospects for this approach in the Court are not promising; over the past half-century, only one Justice—Clarence Thomas—has expressed enthusiasm for reviving the traditional

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[166] *See, e.g.*, SCHOENBROD, *supra* note 105, at 20–21 (arguing that the Court "should take the lead in bringing delegation to an end"); Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 263–64 (2010) (arguing that the Court needs to "develop[ ] a judicially manageable standard for distinguishing excessive or unjustified delegations from those meeting . . . 'the inherent necessities of the governmental co-ordination' " (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928))); Lawson, *supra* note 9, at 1237–39 (explaining the three branches of government and their purposes, as enumerated in the Constitution).

[167] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001).

nondelegation doctrine.[168] Despite some changes in the Court's composition since *American Trucking*, it is hard to imagine a majority of the Court endorsing this approach to congressional delegation in the future. Moreover, it is doubtful that the Court could define the distinction between "lawmaking" and "execution" with sufficient clarity to enable federal courts to apply such a revitalized nondelegation doctrine consistently in a manner that would elude charges of judicial arbitrariness.

A few critics of the nondelegation doctrine have taken the delegation doctrine to the opposite extreme, arguing that the intelligible principle requirement should be cast aside entirely in favor of a delegation doctrine that would permit wholly uncanalized administrative lawmaking.[169] Such critics of the nondelegation doctrine generally argue that federal courts cannot enforce the intelligible principle standard in a coherent way that prevents administrative arbitrariness. Courts are better off jettisoning delegation review entirely in the interest of judicial restraint, they insist.[170] This approach, however, has been just as unpopular in the Court as proposals to revive the traditional nondelegation doctrine. Only one former Justice—Thurgood Marshall—has come close to endorsing this position,[171] and none of the current Justices have done so. Moreover, despite the Court's retreat from intensive nondelegation review in the decades since *Panama Refining* and *Schechter Poultry*,[172] it has not formally

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[168] *Id.* at 487 (Thomas, J., concurring).

[169] *See, e.g.*, Posner & Vermeule, *supra* note 8, at 1721 (arguing that "a statutory grant of authority to the executive branch and other agencies can *never* amount to a delegation of legislative power" and "the constitution just doesn't contain any nondelegation principle of the sort the standard view supposes").

[170] *See, e.g.*, Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, the Rules/Standards Dilemma and the Line Item Veto*, 44 VILL. L. REV. 189, 190–91 (1999) (characterizing the nondelegation doctrine as "ultimately unworkable"); *cf.* Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (observing that "the debate over unconstitutional delegation" has become "a debate not over a point of principle but over a question of degree").

[171] *See* Fed. Power Comm'n v. New England Power Co., 415 U.S. 345, 352–53 (1974) (Marshall, J., concurring) ("The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's [sic], has been virtually abandoned by the Court for all practical purposes . . . .").

[172] *See supra* notes 92–104 and accompanying text.

abandoned the practice of reviewing congressional delegations for an intelligible principle.[173] For these reasons, perhaps, even commentators critical of the nondelegation doctrine generally agree that the Court might revive the doctrine in a future case if presented with a delegation as sweeping and unchecked as that in *Schechter Poultry*.[174]

This Article argues that the case for terminating judicial review of congressional delegations remains unpersuasive because its proponents have not explained how sweeping, unchecked delegations can be reconciled with republican values implicit in the Constitution's checks and balances. In its 1996 decision *Loving v. United States*,[175] the Court explained why delegation review remains indispensible:

> Even before the birth of this country, separation of powers was known to be a defense against tyranny. . . . Though faithful to the precept that freedom is imperiled if the whole of legislative . . . power is in the same hands, the Framers understood that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.
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> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable

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[173] *See, e.g.*, *Am. Trucking*, 531 U.S. at 474–75 (giving examples of cases where the Court reviewed congressional delegations for an intelligible principle); Loving v. United States, 517 U.S. 748, 758 (1996) (reviewing a congressional delegation under the intelligible principle standard).

[174] *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 534–35 (1955) (authorizing the President to promulgate competition codes of conduct in any industry he chose); HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 143 (2006) (noting that the delegation doctrine might be revived "if Congress abdicates its responsibilities again on the scale of *Schechter* [*Poultry*]"); Sunstein, *supra* note 134, at 328 ("In the most extreme cases, judicial invalidation is appropriate; none of the points made here is inconsistent with the view that *Schechter Poultry* was rightly decided.").

[175] 517 U.S. 748.

> government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.
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> Although separation of powers d[oes] not mean that these [three] departments ought to have no partial agency in, or no controul [sic] over the acts of each other, it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another. . . .
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> . . . The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, and may not be conveyed to another branch or entity. This principle does not mean, however, that only Congress can make a rule of prospective force. To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government. . . . This Court established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself.[176]

In this passage, the Court pays homage to the Constitution's republican ideals, but it also unwittingly lays bare the enduring paradox at the heart of judicial review of congressional delegation. On the one hand, the Court affirms that legislative checks and balances are a "basic principle of our constitutional scheme" for securing ordered liberty—a "fundamental precept" that may not be circumvented by transferring Congress's lawmaking function "to another branch or entity." In almost the same breath, however, the Court acknowledges that Congress's delegation of "authority that it could exercise itself" is necessary to realize the constitutional objective of a "workable National Government." The result is an apparent paradox: congress must honor the checks and balances of Article I to safeguard individual liberty from state domination, but it cannot perform its constitutional function to

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[176] *Id.* at 756–58 (citations omitted).

safeguard individual liberty from private domination without delegating around those same constitutional constraints.

Resolving this apparent paradox is no simple matter. In particular, how should federal courts honor the Constitution's republican design if neither the original nondelegation doctrine nor the new nondelegation doctrine is up to the task? In the discussion that follows, this Article takes up *Loving*'s challenge by outlining a constitutional theory for judicial review of congressional delegations that offers a pathway out of the Court's current impasse.

IV. DELEGATION, DOMINATION, AND DUE PROCESS

What is needed is a new doctrine of constitutional delegation review—one capable of reconciling the Constitution's republican ideals with the practical imperatives of twenty-first century administrative lawmaking. This doctrine must accept the practice of administrative lawmaking as lawmaking; adherence to the nondelegation doctrine's formalist conception of legislative power will not do. But it must also preserve a principled role for federal courts in reviewing congressional delegation to address the domination concerns that arise whenever Congress entrusts lawmaking authority to agencies outside the constraints of Articles I and II.

Fortunately, we need not look far for safe passage out of the delegation thicket. Our point of departure is the insight that congressional delegation is not constrained by separation of powers principles alone. Scattered throughout the Court's delegation jurisprudence are references to a second constitutional constraint on congressional delegation, one that complements the checks and balances of Articles I and II. This constraint has received scant consideration in academic commentary,[177] and

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[177] *See, e.g.*, Robert E. Cushman, *The Constitutional Status of the Independent Regulatory Commissions*, 24 CORNELL L.Q. 13, 32–33 (1938) (arguing that "the doctrine of the non-delegability of legislative power could safely be scrapped as long as due process of law remains the effective constitutional guarantee it now is"); Davis, *supra* note 12, at 730 (predicting that the nondelegation doctrine would likely "merge with the concept of due process" in the future); Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV.

although the Court alluded to this constraint in several cases between the 1930s and 1970s, it has not received sustained attention in federal courts for decades. This neglected constitutional constraint is the Fifth Amendment Due Process Clause.

This Part explains how due process principles constrain congressional delegation and argues that this due process model offers an attractive alternative to nondelegation theories based solely upon separation of powers principles. As other legal scholars have observed, the nondelegation doctrine and due process share a common republican concern: to promote liberty by reducing the federal government's capacity for arbitrariness.[178] Unlike the formalist nondelegation doctrine, however, the due process model offers a practical framework for allowing congressional delegation to combat private domination without compromising the republican ideal of ordered liberty. This due process model answers Davis's call for federal courts to develop a delegation doctrine based not only upon the need for substantive standards but also upon procedural and structural safeguards to protect the public against unchecked administrative lawmaking.[179]

In the discussion that follows, this Part identifies three dimensions of constitutional due process that are particularly salient for constraining congressional delegation. First, as a matter of substantive due process, Congress may not entrust lawmaking authority to the other branches without prescribing

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201, 248 (1937) (suggesting that the nondelegation doctrine could be eliminated in favor of "regard[ing] the question simply as one of reasonableness within the due process clause"); Ann Woolhandler, *Delegation and Due Process: The Historical Connection*, 2008 SUP. CT. REV. 223, 225 (discussing links between delegation and due process during the nineteenth century).

[178] *See* Bressman, *supra* note 26, at 525 (noting that the Court's decisions on congressional delegations "can be understood to invalidate delegations that increase the possibility of arbitrary action to unacceptable levels"); Brown, *supra* note 12, at 1553 (stating that "the concerns that the [nondelegation] doctrine is intended to address are, at bottom, procedural due-process concerns"); Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 659 (arguing that due process implements the nondelegation doctrine).

[179] *See* Davis, *supra* note 12, at 725 (arguing that "the purpose of the non-delegation doctrine should no longer be . . . to prevent delegation" but rather "the much deeper one of protecting against unnecessary and uncontrolled discretionary power").

substantive constraints that are sufficient to ensure that agency discretion is not wholly unfettered. Second, procedural due process requires agencies to exercise their lawmaking powers through liberty-enhancing procedures characterized by reasoned deliberation and justification. Third, when Congress delegates lawmaking authority to administrative agencies, structural due process requires that agency lawmakers be subject to meaningful political accountability and that persons adversely affected by agency action have an opportunity to test the constitutional adequacy of Congress's delegation through judicial review. In short, if Congress wishes to delegate lawmaking authority, it must constrain that authority in such a way that the other branches will have no greater capacity for arbitrariness than Congress itself possesses when making law under Articles I and II. A due process-based approach to congressional delegation offers the best model for achieving this republican ideal.

A. SUBSTANTIVE DUE PROCESS

In the Court, substantive due process has long been considered a close cousin of nondelegation. The familial resemblance between these two doctrines has exposed the latter to criticism, as legal scholars have drawn links between nondelegation cases such as *Panama Refining* and *Schechter Poultry*,[180] and the now-infamous substantive due process jurisprudence of the *Lochner* era.[181] While these negative associations may be overstated, the conceptual links between nondelegation, on the one hand, and due process, on the other, cannot be so easily dismissed. During the same period when the nondelegation doctrine was reaching maturity, the Court also was developing a parallel due process doctrine: according to the Court, vaguely worded legislative delegations violated the due process guarantees of the Fifth and Fourteenth Amendments because they raised an unconstitutional risk of administrative

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[180] *See supra* notes 92–104 and accompanying text.

[181] *See* Lochner v. New York, 198 U.S. 45, 52, 64 (1905) (invalidating a state labor law that capped worker hours); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 133 (1980) (characterizing the nondelegation doctrine's demise as "death by association").

arbitrariness.[182] The Court also indicated in a number of cases that the constitutionality of congressional delegations would depend upon whether administrative procedures adequately safeguarded the public against domination.[183] Collectively, these principles underscore the vital, if largely unappreciated, role that due process plays as a safeguard for individual liberty in the administrative state.

The emergence of substantive due process as a constraint on legislative delegations can be traced to federal courts' review of state legislative delegations in the late nineteenth century. An early example is the 1886 case *Yick Wo v. Hopkins*.[184] At issue was a San Francisco county ordinance that required prospective small-business owners to obtain the permission of the county board of supervisors before opening a new laundry.[185] The county board, by its own admission, had used its discretionary licensing authority under the local ordinance to deny business licenses to Chinese immigrants.[186] The Court concluded that the ordinance was unconstitutionally vague because it "seem[ed] intended to confer, and actually to [have] confer[red] . . . a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons."[187] In effect, the ordinance instituted domination by subjecting prospective business owners to the "mere will" of county board members, a "purely arbitrary" discretion that "acknowledge[d] neither guidance nor restraint."[188] As the Court explained, such domination was antithetical to the Constitution's republican values:

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[182] *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1676–81 (1975) (detailing the Court's response to "[v]ague, general or ambiguous statutes . . . [that] threaten the legitimacy of agency action").

[183] *See id.* at 1676 ("Insofar as statutes do not effectively dictate agency actions, individual autonomy is vulnerable to the imposition of sanctions at the unruled will of executive officials . . . who are not formally accountable to the electorate . . . .").

[184] 118 U.S. 356 (1886).

[185] *Id.* at 357.

[186] *Id.* at 374.

[187] *Id.* at 366.

[188] *Id.* at 366–67.

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. . . . [I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power . . . so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth "may be a government of laws and not of men." For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.[189]

These same republican principles had important implications for "the quasi-legislative acts of inferior municipal bodies," the Court observed.[190] Municipal bodies exercising delegated lawmaking powers must employ this entrusted authority "reasonabl[y]" and in conformity "with the general principles of the common law of the land, particularly those having relation to the liberty of the subject."[191] While the Court declined to decide whether the San Francisco county ordinance was invalid on its face,[192] the strong implication of its reasoning was that the legislative delegation itself constituted an unconstitutional entrustment of arbitrary power.[193]

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[189] *Id.* at 369–70.

[190] *Id.* at 371.

[191] *Id.*

[192] Ultimately, the Court determined that it did not have to reach this question because the board's application of the county ordinances clearly violated the Fourteenth Amendment's Equal Protection Clause. *Id.* at 374.

[193] *See* Woolhandler, *supra* note 177, at 240 (noting that "the Court adverted to

State courts picked up on *Yick Wo*'s significance for delegations to the executive branch. For example, in the 1917 decision *Board of Administration of Illinois v. Miles*,[194] the Illinois Supreme Court reviewed a state law that required the estates of patients in state mental asylums to make financial contributions to support the patients' care and authorized hospital boards to make exceptions to "release or modify" this payment requirement "in any case where the circumstances may justify it."[195] The court held that the provision for exceptions violated due process under the Illinois constitution insofar as it gave the hospital unfettered discretionary power.[196] "Any law which vests in the discretion of administrative officers the power to determine whether the law shall or shall not be enforced with reference to individuals in the same situation, without any rules or limitations for the exercise of such discretion, is unconstitutional," the court explained.[197]

Three years later, the Illinois Supreme Court returned to these problems in *People ex rel. Gamber v. Sholem*.[198] A state statute authorized fire marshals to condemn buildings "for want of proper repair, or by reason of age and dilapidated condition, or for any cause" that would render buildings "especially liable to fire" or a danger to other buildings, property, or persons during a fire.[199] The court reasoned that this provision effectively left condemnation decisions "entirely within the discretion of the fire marshal."[200] In the absence of a more uniform rule by which the fire marshal was to act, the court considered the statute an unconstitutional "delegation of legislative and judicial

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nonarbitrariness as a condition of delegation in [*Yick Wo*]"); *cf.* Holmes v. New York City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968) ("It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government . . . would be an intolerable invitation to abuse . . . . For this reason alone due process requires that selections among applicants be made in accordance with 'ascertainable standards.' " (citation omitted)).

194 115 N.E. 841 (Ill. 1917).

195 *Id.*

196 *Id.* at 842.

197 *Id.*

198 128 N.E. 377 (Ill. 1920).

199 *Id.* at 378.

200 *Id.* at 379.

authority."[201] Although the court invoked the structural principle that "the power to make laws . . . cannot be delegated,"[202] it quickly pivoted to cite *Yick Wo* and *Miles* for the proposition—anchored in notions of due process—that "arbitrary discretion" enables "unjust discrimination."[203] To the court, these two constitutional bases for nondelegation—separation of powers and due process—represented mutually reinforcing elements of the Constitution's republican order.

The Court reaffirmed the due process constraints on legislative delegation in its 1928 decision *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*.[204] At issue was a local zoning ordinance that required landowners to acquire the consent of two-thirds of their neighbors before constructing a philanthropic home for children or the elderly.[205] Although the Court acknowledged that this zoning ordinance was likely adopted for a benign purpose, it expressed concern that the ordinance left neighbors "free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice."[206] For the Court, the problem with this delegation was not simply that the approval procedure empowered private delegates, but that it did so without any substantive standard to limit those delegates' discretion.[207] Recognizing that the ordinance introduced domination, the Court cited *Yick Wo* and held that "[t]he delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment."[208]

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[201] *Id.* at 378.

[202] *Id.*

[203] *Id.* at 380.

[204] 278 U.S. 116 (1928).

[205] *Id.* at 117–18.

[206] *Id.* at 122.

[207] *Id.*

[208] *Id.*; *see also* Browning v. Hooper, 269 U.S. 396, 400–01, 405–06 (1926) (striking down a state ordinance authorizing the creation of local road districts to levy taxes and fees without any legislative standard); Eubank v. City of Richmond, 226 U.S. 137, 143–44 (1912) (striking down a similar statute based on the absence of a "standard by which the power thus given is to be exercised"). Although the delegation in *Roberge* was to private parties, lower courts have recognized that the Court's primary concern was the potential for arbitrariness stemming from the absence of substantive constraints. *See, e.g.*, Young v. City of Simi Valley, 216 F.3d 807, 820 (9th Cir. 2000) (finding a local zoning ordinance that

What is especially striking about these due process cases is how closely they resemble the Court's nondelegation jurisprudence of the same period. Although the Court generally invoked substantive due process in state cases and nondelegation norms in federal cases, by the early twentieth century the constitutional standards applied in these two lines of cases had essentially converged. Whether analyzed from a due process perspective or a nondelegation perspective, both traditions asked essentially the same question: whether the legislature had enjoined upon its delegate an intelligible substantive principle to ensure that regulatory powers were not subject to the delegate's wholly unfettered discretion.[209]

A prime example of this convergence in nondelegation and substantive due process analysis is *Panama Refining*, where the Court for the first time set aside a federal statute on nondelegation grounds. Recall that in *Panama Refining* the Court held that Congress transgressed the nondelegation doctrine by failing to establish any factual criteria or legislative principles to guide its delegate's discretion—here, the President's decision whether to prohibit the transportation of hot oil.[210] While the Court emphasized the formal distinction between legislative and executive power,[211] its analysis was otherwise scarcely distinguishable from the inquiry pursued in the *Yick Wo* line of cases. The problem with the statute in question, the Court explained, was that it gave "the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit."[212] As in *Yick Wo*, *Miles*, *Gamber*, and *Roberge*, the Court expressed concern that Congress had

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empowered private citizens "to block adult uses for the purpose of suppressing [speech]" to be facially unconstitutional); Moore v. City of Kirkland, 2006 WL 1993443, at *2 (W.D. Wash. 2006) (clarifying that a delegation of power to private individuals is not unconstitutional of itself, but rather a delegation to private individuals that subjects others to their "will or caprice" may violate due process (quoting *Roberge*, 278 U.S. at 122)).

[209] *See* Abramson, *supra* note 12, at 208–10 (criticizing cases for "commingling" due process and nondelegation).

[210] Panama Ref. Co. v. Ryan, 293 U.S. 388, 418–19, 423 (1935).

[211] *Id.* at 421.

[212] *Id.* at 415.

empowered executive officers to act outside meaningful statutory constraints according to their own arbitrary will. The Court characterized the constitutional difficulty in *Panama Refining* as a transfer of legislative power to the executive, but it could have characterized the challenge just as easily as an investiture of arbitrary executive power in violation of due process, as in the *Yick Wo* line of cases. While the Court did not expressly say as much in *Panama Refining*, the statute's delegation of arbitrary power[213] to the President was as much a Fifth Amendment due process problem as it was a separation of powers problem.

In both his *Panama Refining* dissenting opinion and his *Schechter Poultry* concurrence, Justice Cardozo characterized judicial delegation review as an inquiry into whether the Executive Branch's discretion was entirely "unconfined and vagrant."[214] Judicial intervention would be appropriate only where Congress had granted the Executive Branch a "roving commission to inquire into evils and then, upon discovering them, do anything [it] pleases."[215] This formulation foreshadowed the contemporary delegation doctrine by permitting agencies to make law outside the constraints of Article I as long as their discretion was not wholly unrestrained. Cardozo made no attempt to link his approach to separation of powers formalism, let alone Lockean theories about popular consent. Indeed, he expressly rejected the idea that "separation of powers between the Executive and Congress" was "a doctrinaire concept to be made use of with pedantic rigor."[216] Instead, he framed delegation review in terms that closely mirrored the substantive due process model of legislative delegation from *Yick Wo* and its progeny: as long as Congress had provided some statutory standard to prevent its

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[213] Although the Court disagreed, Justice Cardozo made a strong argument in dissent that the statute does not, in fact, give the President arbitrary power because the President's discretion is limited by the general policies set forth in other parts of the statute. *Id.* at 433–48 (Cardozo, J., dissenting).

[214] *Id.* at 440; A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).

[215] *Panama Ref. Co.*, 293 U.S. at 435 (Cardozo, J., dissenting); *Schecter Poultry*, 295 U.S. at 55 (Cardozo, J., concurring).

[216] *Panama Ref. Co.*, 293 U.S. at 440 (Cardozo, J., dissenting).

delegate from acting as a "roving commission," Congress would have satisfied its essential constitutional obligation.[217]

Viewing the contemporary delegation doctrine through the lens of substantive due process rather than separation of powers formalism helps to explain the current contours of the delegation doctrine, and it resolves some of the logical contradictions in the Court's jurisprudence. In the due process model, Congress must establish substantive standards to prevent the Executive Branch from exercising substantively unfettered lawmaking power, not to draw an arbitrary line in the sand between legislative and executive power. Beyond the minimalist intelligible principle requirement, Congress is free to decide how narrowly it will tailor an agency's lawmaking discretion. This approach to judicial review might not constrain Congress as firmly as the traditional nondelegation doctrine, but it does afford some protection against congressional attempts to delegate around the checks and balances of Articles I and II.[218]

Recognizing the republican linkages between substantive due process and the traditional intelligible principle requirement reinforces the contemporary delegation doctrine, but it does not fully reconcile administrative lawmaking with the Constitution's

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[217] *Id.* at 435. The Court continues to apply due process explicitly as a constraint against unconstitutionally vague delegations of authority to state officers. *See, e.g.*, Chicago v. Morales, 527 U.S. 41, 56 (1999) (striking down a statute criminalizing loitering because it "authorize[d] and even encourage[d] arbitrary and discriminatory enforcement"); *id.* at 71 (Breyer, J., concurring) ("The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case."); Kolender v. Lawson, 461 U.S. 352, 358 (1983) (striking down a loitering statute that was deemed to vest "virtually complete discretion in the hands of the police").

[218] The Court's delegation cases since *Schechter Poultry* are consistent with the due process approach outlined in this section. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001) (rejecting the argument that Congress must establish a determinate criterion rather than a mere intelligible principle); Yakus v. United States, 321 U.S. 414, 426 (1944) (reasoning that courts should not strike down delegations as overbroad save in "an absence of standards for the guidance" of executive authority); Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943) (upholding a statutory standard that does not establish "a standard so indefinite as to confer an unlimited power"); Mulford v. Smith, 307 U.S. 38, 49 (1939) (inquiring whether Congress had conferred "unrestrained arbitrary power on an executive officer"); Currin v. Wallace, 306 U.S. 1, 17 (1939) (inquiring whether the agency possessed "unfettered discretion").

republican vision of ordered liberty. Whether viewed as a separation of powers doctrine or a due process doctrine, the intelligible principle requirement does not fully protect the public from the enhanced threat of arbitrariness that arises when Congress authorizes agencies to exercise sweeping lawmaking powers outside the checks and balances of Articles I and II. Some further constraint is necessary to ensure that congressional delegation does not beget domination. For the due process model to be successful as such a constraint, courts must look beyond substantive due process to the complementary constraints of procedural and structural due process.

B. PROCEDURAL DUE PROCESS

The idea that procedural due process constrains Congress's authority to entrust lawmaking power to administrative agencies cuts against the grain of conventional wisdom. Leading administrative law treatises declare unequivocally that "due process applies only to individualized decisionmaking" rather than general "policy-based deprivations."[219] This view can be traced to the 1915 decision *Bi-Metallic Investment Co. v. State Board of Equalization*,[220] where the Court held that due process does not require a municipality to give property owners an opportunity for an individualized, adversarial-type hearing before assessing an across-the-board tax on real property.[221] In its opinion the Court took pains to limit the Due Process Clause's application to rulemaking proceedings:

> The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals,

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[219] 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.2, at 737 (5th ed. 2010); *see also* CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 2.20, at 73 (2d ed., 1997) (stating that due process adjudication, and not rulemaking, is required when decisions are made on "individual grounds").

[220] 239 U.S. 441 (1915).

[221] *Id.* at 445.

> sometimes to the point of ruin, without giving them a chance to be heard . . . . There must be a limit to individual argument in such matters if government is to go on.[222]

Over time, the Court has construed this language to stand for the proposition that the Due Process Clause does not obligate agencies to solicit public input during administrative rulemaking proceedings because individuals have no constitutional right to be heard when agencies engage in generalized policymaking.[223]

Although the Court has rejected an individual constitutional right to participate in agency rulemaking, it does not necessarily follow that procedural due process has no application whatsoever to agency rulemaking, as some commentators have suggested.[224] As Professor Hans Linde famously argued, one function of the Due Process Clause is to safeguard the integrity of the legislative process.[225] Ordinarily, when Congress makes law through the process prescribed in Article I, Section 7, its "legislative determination provides all the process that is due."[226] On the

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[222] *Id.*; *see also* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 542 (1978) (holding that due process safeguards may be necessary in rulemaking proceedings when a small number of people are exceptionally affected); United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 246 (1973) (holding that railroads were not prejudiced by the absence of oral hearings regarding an industrywide increase in rates); Bowles v. Willingham, 321 U.S. 503, 519 (1944) (rejecting the notion that the Emergency Price Control Act of 1942 violated landlord's Fifth Amendment right to due process, even though "it makes no provision for a hearing to landlords before the order or regulation fixing rents becomes effective").

[223] *See, e.g.*, Minn. State Bd. of Cmty. Colls. v. Knight, 465 U.S. 271, 285 (1984) (noting that the Constitution does not provide for public participation in policymaking decisions); *see also* Rogin v. Bensalem Twp., 616 F.2d 680, 693–94 (3d Cir. 1980) ("[T]he general theory of republican government is not due process through individual hearings . . . but through elective representation, partisan politics, and the ultimate sovereignty of the people to vote out of office those legislators who are unfaithful to the public will.").

[224] *See, e.g.*, 2 PIERCE, *supra* note 219, at 740–42 (stating that pragmatic concerns—the differences between adjudicative facts and legislative facts—and Constitutional concerns explain why due process should not apply to agency rulemaking). *But see* KOCH, *supra* note 219, at 74 (asserting that "there are no compelling conceptual reasons for exempting rulemaking procedures from the Due Process Clause").

[225] Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 253–54 (1976).

[226] Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982); *see also* Philip Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the*

other hand, federal courts have reasoned that "an individual claiming a *defect* in the legislative process might have a claim for due process."[227] Addressing this potential application of the Due Process Clause, Professor Laurence Tribe has suggested that "the *way* a rule is generated—by what kind of governmental body, on what evidentiary basis, through how accountable and transparent a process—plays a decisive role in its validity."[228]

The Due Process Clause's application to congressional lawmaking has important implications for legislative delegations to administrative agencies. Specifically, due process of lawmaking prohibits Congress from entrusting lawmaking authority to agencies outside the constraints of liberty-conserving administrative procedures. In other words, to satisfy due process, administrative rulemaking procedures must be sufficiently fair and deliberative to ensure, at a minimum, that an agency's institutional capacity for arbitrariness in the administrative process is not manifestly greater than Congress's capacity for arbitrariness in the legislative process.[229] While due process does not require any "particular form of procedure" in rulemaking proceedings,[230] Congress must take care to prescribe procedural

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Privatization of the Public Sphere, 34 WILLAMETTE L. REV. 421, 444 (1998) ("Federal constitutional law conclusively presumes that . . . the legislative process [satisfies due process because, among other things, it] develop[s] the relevant facts and legal standards so that people are not deprived of important rights or interests based on erroneous assumptions.").

[227] Rea v. Matteucci, 121 F.3d 483, 485 (9th Cir. 1997) (emphasis added) (citing Atkins v. Parker, 472 U.S. 115, 130 (1985)). *See generally* Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281 (2002) (examining how "semisubstantive" doctrines have been used in the Rehnquist Court to correct procedural errors or omissions by lawmakers).

[228] 1 TRIBE, *supra* note 111, at 1372 (citing, *inter alia*, Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 17.2, at 1679 n.11 (2d ed. 1988) (noting that "Justice Stevens has also argued that 'the character of [congressional] procedures [should] be considered relevant to the decision whether the legislative process has . . . [violated the equal protection component of] due process' " (alterations in original) (quoting Fullilove v. Klutznick, 448 U.S. 448, 550–51 (1980) (Stevens, J., dissenting))).

[229] *See* Pittston Co. v. United States, 368 F.3d 385, 394 (4th Cir. 2004) (explaining that the nondelegation doctrine ensures "that delegation does not frustrate the constitutional design").

[230] Inland Empire Dist. Council v. Mills, 325 U.S. 697, 710 (1945); *see also* Mathews v.

safeguards that will prevent delegations of lawmaking authority from introducing domination that would subvert the republican ideals implicit in the checks and balances of Articles I and II.[231]

Although rarely acknowledged in administrative law scholarship, the Court's delegation jurisprudence generally supports this principle that due process imposes procedural constraints on congressional delegation. The idea that agencies must employ fair and deliberative procedures when they make law has been a recurring *leitmotif* in the Court's nondelegation jurisprudence, almost from the doctrine's inception.[232] In *Wichita Railroad & Light Co. v. Public Utilities Commission of the State of Kansas*,[233] for example, the Court famously declared that "the Legislature, to prevent [the entrustment of lawmaking authority from] being a pure delegation of legislative power, must enjoin upon [an agency] a certain course of procedure and certain rules of decision in the performance of its function."[234] An agency, in turn, must "show substantial compliance" with the procedures Congress has established "to give validity to its action."[235] One important implication of this constitutional connection between delegation and administrative procedure is that an agency must provide discrete factual findings whenever Congress requires such findings as a predicate for administrative rulemaking.[236]

Eldridge, 424 U.S. 319, 334 (1976) (observing that " '[d]ue process' . . . is not a technical conception with a fixed content" but a "flexible" one that "calls for such procedural protections as the particular situation demands" (citations omitted)).

[231] As one state court has observed, the relevant question is not simply "whether the statute delegating the power expresses *standards*, but whether the procedure established for the exercise of the power furnishes adequate *safeguards* to those who are affected by the administrative action." Warren v. Marion Cnty., 353 P.2d 257, 261 (Or. 1960).

[232] *See, e.g.*, Metzger, *supra* note 19, at 492–94 (discussing the need for "reasoned decisionmaking" in agency rulemaking); Stack, *supra* note 12, at 987–88 (discussing the need for procedural safeguards in exercising delegated authority).

[233] 260 U.S. 48 (1922).

[234] *Id.* at 59; *see also* Panama Ref. Co. v. Ryan, 293 U.S. 388, 433 (1935) (holding that even the President, when "invested with legislative authority as the delegate of Congress . . . necessarily acts under the constitutional restriction applicable to such delegation"); Mahler v. Eby, 264 U.S. 32, 44 (1924) ("It is essential that, where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise . . . .").

[235] *Wichita*, 260 U.S. at 59.

[236] *Id.*

Other leading cases confirm that delegation and administrative procedure are inextricably linked. The Court reaffirmed the importance of deliberative administrative procedure in the same case in which it first formulated the nondelegation doctrine's intelligible principle standard.[237] In describing the President's limited discretion under the Tariff Act of 1922, the Court emphasized that "before the President reaches a conclusion on the subject of investigation, the Tariff Commission must make an investigation, and in doing so must give notice to all parties interested and an opportunity to adduce evidence and to be heard."[238] In the Court's view, "common sense" would permit Congress to delegate "the fixing of such rates" to an administrative agency if the agency acted "after hearing evidence and argument concerning [the rates] from interested parties."[239]

Administrative procedure also featured prominently in *Panama Refining* and *Schechter Poultry*. In both cases, the Court's nondelegation analysis focused primarily on the absence of statutory standards to prevent the President from wielding arbitrary power[240]—a concern that the nondelegation doctrine shares with due process. But the Court also implied that the constitutional difficulties posed in these cases would not be resolved by imposing standards alone. Invoking *Wichita*, the Court in *Panama Refining* emphasized that for a "delegation of legislative power" to be valid, "due process of law requires that it shall appear that the [regulation] is within the authority of the [delegate], and, if that authority depends on determinations of fact, those determinations must be shown."[241] Similarly, in *Schechter Poultry* the Court described the delegating statute as an

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[237] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[238] *Id.* at 405.

[239] *Id.* at 407–08. The Court also noted that the agency's actions must accord with the congressional rule that the rates must be just and reasonable, considering the service given, and not discriminatory. *Id.*

[240] *See supra* notes 92–104 and accompanying text.

[241] Panama Ref. Co. v. Ryan, 293 U.S. 388, 432 (1935) (quoting and discussing *Witchita*); *see also* Stack, *supra* note 12, at 987–88 (stating that the Court's holding was based on the President's failure to articulate the predicate grounds for his actions that would effectively constrain the delegated powers).

unprecedented threat to liberty not only because Congress did "not undertake to prescribe rules of conduct to be applied to particular states of fact," but also because it failed to impose "appropriate administrative procedure[s]" for determining the application of such rules to facts.[242] In short, Congress's failure to prescribe appropriate administrative procedures for carrying out its delegated authority raised constitutional concerns sounding in due process.

The Court returned to this theme in *Carter v. Carter Coal Co.*,[243] when it considered a provision of the Bituminous Coal Conservation Act of 1935 authorizing mine producers and workers to establish legally binding local-wage-and-hour regulations by majority vote.[244] This was "legislative delegation in its most obnoxious form," the Court reasoned, because Congress had conferred upon a majority of mine producers and workers "the power to regulate the affairs of an unwilling minority."[245] According to the Court, Congress's decision to commit public lawmaking power to the majority vote of these private parties was insufficient to safeguard the public against arbitrariness: "The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the [D]ue [P]rocess [C]lause of the Fifth Amendment, that it is unnecessary to do more than refer to

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[242] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541 (1935).

[243] 298 U.S. 238 (1936).

[244] *Id.* at 278, 310–11.

[245] *Id.* at 311. In academic commentary, *Carter Coal* is often pigeon-holed as a case about privatization. *See, e.g.*, David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 476 (2011) (stating that the *Carter Coal* Court invalidated the law "on private delegation grounds"). Yet the Court's primary concern arguably was not the transfer of lawmaking power into private hands per se, but rather the transfer of lawmaking power from the Article I process, with its checks and balances, into a procedure governed by unchecked majoritarianism. In subsequent cases, lower courts have invalidated delegations to private parties in the absence of either intelligible principles or procedural safeguards that would safeguard the public from arbitrariness. *See, e.g.*, Gen. Elec. Co. v. N.Y. State Dep't of Labor, 936 F.2d 1448, 1450, 1458–59 (2d Cir. 1991) (holding it a disputed question of material fact whether a New York labor law was an unconstitutional delegation of legislative authority as applied because the state labor department failed to establish procedures for independently determining whether the labor unions' estimates of prevailing wages were accurate).

decisions of this court which foreclose the question."[246] Justice Hughes, who filed a partial dissent, concurred with this aspect of the majority's judgment: "Such a provision, apart from the mere question of the delegation of legislative power, is not in accord with the requirement of due process of law which under the Fifth Amendment dominates the regulations which Congress may impose."[247]

Three years later, the Court reaffirmed the link between congressional delegation and administrative procedure in *United States v. Rock Royal Co-Op, Inc.*[248] Under the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture had promulgated an order regulating the handling of milk in the New York metropolitan area.[249] After determining that the Act specified a suitable standard to limit the Secretary's discretion in exercising the delegated authority, the Court proceeded further to consider the Secretary's compliance with the Act's procedural hearing requirements.[250] The Court noted that the Secretary had conducted public hearings in five cities, had compiled nearly three thousand pages of testimony, and had collected written submissions from some twenty interested parties.[251] Summarizing its review of the Secretary's decisionmaking process, the Court explained that although "procedural safeguards cannot validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority."[252] *Rock Royal* thus suggested that administrative procedures are germane to judicial review of congressional delegations because substantive and procedural constraints both serve the same purpose: preserving individual liberty from arbitrary administrative regulation.

Similar concerns animated the Court's 1947 decision *SEC v. Chenery Corp.*[253] At bottom, *Chenery* stands for the "simple but

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[246] *Carter Coal*, 208 U.S. at 311.
[247] *Id.* at 318 (Hughes, J., dissenting).
[248] 307 U.S. 533 (1939).
[249] *Id.* at 539–40.
[250] *Id.* at 574–76.
[251] *Id.* at 576.
[252] *Id.*
[253] 332 U.S. 194 (1947).

fundamental rule" that when federal courts review agency action under the APA, they may consider only those official explanations that the agency provides contemporaneously with its decision, not post hoc rationales.[254] Professor Kevin Stack has argued recently that *Chenery* advances nondelegation values by compelling administrative agencies to explain how their actions implement congressional directives.[255] In particular, Stack emphasizes that *Chenery* bolsters the nondelegation doctrine's anti-inherency principle by ensuring that agencies do not make law without grounding their action in a discrete congressional authorization.[256] But as Stack acknowledges, *Chenery* also advances due process concerns insofar as it enjoins upon agencies a "course of procedure" they must follow when making rules with the force of law.[257] The *Chenery* doctrine thus represents yet another manifestation of the relationship between congressional delegation and procedural due process doctrines.

Perhaps the clearest affirmation that due process constrains congressional delegation is the Court's 1976 decision *Hampton v. Mow Sun Wong*.[258] There, five former federal employees challenged their terminations under a regulation adopted by the Civil Service Commission, which excluded most noncitizens from federal employment.[259] In an opinion authored by Justice Stevens, the Court acknowledged that the Equal Protection Clause likely would not prohibit Congress from imposing a citizenship requirement for service in the federal government.[260] Nonetheless, the Court resisted the notion that an "*agent* of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens."[261] Invoking the Fifth Amendment, the Court reasoned that "due process requires that there be a legitimate basis for presuming that the rule was

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[254] *Id.* at 196.
[255] Stack, *supra* note 12, at 992.
[256] *Id.* at 996–97.
[257] *Id.* at 984 (quoting Mahler v. Eby, 264 U.S. 32, 44 (1924)).
[258] 426 U.S. 88 (1976).
[259] *Id.* at 90.
[260] *Id.* at 100–01.
[261] *Id.* at 101 (emphasis added).

actually intended to serve [an overriding national] interest."[262] If Congress was not going to make this determination itself, due process required the delegate to affirmatively justify the rule "by reasons which are properly the concern of that agency."[263] While the Court's rationale was not crystal clear, it apparently concluded that the Fifth Amendment constrained congressional delegation by requiring agencies to employ their delegated lawmaking powers through a decisionmaking process characterized by reasoned deliberation.[264] This implication of the majority's analysis was not lost on Justice Rehnquist, who complained in dissent that the majority's decision would cause the constitutionality of congressional delegations to "depend upon the procedural requirements of the Due Process Clause."[265] *Mow Sun Wong* thus suggests, contrary to conventional wisdom, that procedural due process *does* apply to constrain administrative rulemaking. Although individuals lack a due process right to individualized notice and to a hearing when agencies engage in generalized rulemaking,[266] *Mow Sun Wong* establishes that the Fifth Amendment protects them from agency regulations that are not the product of appropriately fair and deliberative procedures.[267]

Collectively, the Court's delegation cases, culminating with *Mow Sun Wong*, support the principle that the Constitution requires Congress to constrain administrative lawmaking not just substantively but also procedurally. *Wichita*, *Panama Refining*, and *Schechter Poultry* suggest that Congress bears a responsibility to limit agencies' capacity for arbitrary decisionmaking by channeling lawmaking powers through fair and deliberative

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[262] *Id.* at 103.

[263] *Id.* at 116.

[264] *Id.*

[265] *Id.* at 123 (Rehnquist, J., dissenting).

[266] *See supra* notes 220–23 and accompanying text.

[267] *See* Lawrence Gene Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1414 (1978) ("*Mow Sun Wong* posits a right to procedural due process which requires that some legislative actions be undertaken only by a governmental entity which is so structured and so charged as to make possible a reflective determination that the action contemplated is fair, reasonable, and not at odds with specific prohibitions in the Constitution.").

procedures.[268] *Hampton*, *Rock Royal*, *Chenery*, and *Mow Sun Wong* describe in general terms the types of procedural safeguards that would satisfy constitutional review.[269] According to these cases, procedural due process is satisfied when administrative lawmaking involves a deliberative decisionmaking process leading to a publicly accessible, uniform legal rule (*Wichita*, *Rock Royal*, *Chenery*) that is supported by a reasoned justification rationally connected to statutory standards (*Chenery*, *Mow Sun Wong*). *Panama Refining*, *Carter Coal*,[270] and *Mow Sun Wong* explicitly locate these procedural requirements in the Fifth Amendment's Due Process Clause.

Although the Court has yet to clarify precisely *why* the Fifth Amendment requires procedural safeguards in the administrative process, republican theory answers this question: administrative lawmaking procedures are necessary to prevent Congress from undermining the Constitution's republican ideals when it authorizes another body to make law outside of the legislative process's constitutional checks and balances. The Fifth Amendment addresses this problem by requiring Congress to prescribe procedures for administrative lawmaking that are adequate to ensure that such congressional delegations do not enhance the federal government's capacity for domination. Congress satisfies this standard when it channels administrative lawmaking through a "course of procedure"[271] at least as protective of individual liberty as the checks and balances of Articles I and II.

The APA's procedures for formal and informal rulemaking and formal adjudication further these republican ideals.[272] In the rare contexts where Congress has required "formal," trial-type procedures for agency rulemaking or adjudication, the APA mandates that agencies hold closed-record hearings at which all interested parties are authorized to present evidence and, as

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[268] *See supra* notes 234–43 and accompanying text.

[269] *See supra* notes 238–41, 248–67 and accompanying text.

[270] *See supra* notes 243–47 and accompanying text.

[271] Wichita R.R. & Light Co. v. Pub. Util. Comm'n, 260 U.S. 48, 59 (1922).

[272] *See* Pat McCarran, *Foreward* to ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, at iii (1947) (describing the APA as a "comprehensive charter of private liberty and a solemn undertaking of official fairness").

necessary, engage in cross-examination.[273] Similarly, the APA requires that agencies which participate in informal rulemaking must engage the public by publishing notice of proposed rulemaking actions and affording interested persons "an opportunity to participate in the [rulemaking] through submission of written data, views, or arguments."[274] Agencies also must provide a reasoned explanation for their decisions to show that their final rules fall within the scope of their authority and are consistent with statutory standards.[275] When Congress channels delegated lawmaking authority through the APA's requirements or comparable procedural constraints, it curbs administrative domination by forcing agencies to

> operate within a set of legal rules (administrative law) that keep them within their jurisdiction, require them to operate with a modicum of explanation and participation of the affected interests, police them for consistency, and protect them from the importuning of congressmen and others who would like to carry logrolling into the administrative process.[276]

Deliberative administrative procedures like those in the APA thus satisfy due process by honoring the republican values that are implicit in the Constitution's structure.[277] Indeed, in a variety of contexts the APA's procedural requirements are plausibly far *more* effective in protecting the public from arbitrary lawmaking than the checks and balances outlined in Articles I and II.[278] When this

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[273] 5 U.S.C. § 556(d)–(e) (2006).

[274] *Id.* § 553(b)–(c).

[275] *Id.* §§ 553(c), 557(c).

[276] Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 99 (1985).

[277] This is not to say, of course, that the APA's procedural provisions could not be substantially different than they are. Congress is free to revise the APA's procedures within the constraints of due process.

[278] *See* Davis, *supra* note 12, at 726 ("The courts should recognize that administrative legislation through the superb rule-making procedure marked out by the [APA] often provides better protection to private interests than congressional enactment of detail.").

is so, congressional delegation to administrative agencies may, counterintuitively, *promote* individual liberty.

Because the APA generally satisfies the requirements of due process in administrative rulemaking, it should come as no surprise that the Court rarely has addressed the relationship between congressional delegation and administrative procedure since Congress enacted the APA in 1946. Although the Court has expressed skepticism about constitutionalizing administrative rulemaking procedures on some occasions, it also has affirmed the constitutional status of administrative procedures on others. For example, in its 1986 decision *Bowen v. American Hospital Association*,[279] the Court observed that its acceptance of Congress's "need to vest administrative agencies with ample [lawmaking] power" had been premised on the "correlative responsibility of the agency to explain the rationale and factual basis for its decision."[280] More recently, in *FCC v. Fox Television Stations, Inc.*,[281] Justice Kennedy linked administrative procedure to nondelegation concerns in a concurring opinion in which he observed that the APA's requirements for reasoned decisionmaking "stem from the administrative agency's unique constitutional position."[282] He explained that "[i]f agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances."[283]

In sum, administrative procedures safeguard the nondelegation doctrine's republican values by other means. In the legislative process, the bicameralism and presentment requirements of Articles I and II minimize the government's capacity for arbitrary legislation. In the same spirit, the Due Process Clause safeguards liberty in administrative lawmaking, as with other exercises of delegated authority, by requiring agencies to employ deliberative

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[279] 476 U.S. 610 (1986).

[280] *Id.* at 627; *see also* Metzger, *supra* note 19, at 491–94 (describing the development of the Court's increasingly strict review of administrative decisionmaking).

[281] 129 S. Ct. 1800 (2009).

[282] *Id.* at 1823 (Kennedy, J., concurring in part and concurring in the judgment).

[283] *Id.*

procedures that limit their capacity for arbitrariness.[284] Had Congress never enacted the APA, in other words, due process would have compelled federal courts to require comparable procedural safeguards to honor the Constitution's republican ideals.

C. STRUCTURAL DUE PROCESS

Aside from substantive and procedural constraints, the Due Process Clause imposes additional *structural* constraints on Congress's authority to delegate lawmaking powers. For example, the Court has indicated that certain privatizations of legislative powers are "inconsistent with the constitutional prerogatives and duties of Congress"[285] to the extent that nongovernmental regulators operate outside the chain of political accountability.[286] Although political accountability *alone* is not sufficient to conserve liberty,[287] it is nonetheless a constitutional requirement for all delegations of federal lawmaking powers.[288]

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[284] *See* 1 TRIBE, *supra* note 111, at 988 (observing that federal courts "have . . . relied upon the procedural safeguards internal to agency decisionmaking" to address republican values central to nondelegation review because "such safeguards . . . protect 'against an arbitrary use' of delegated power" (quoting United States v. Rock Royal Co-op, Inc., 307 U.S. 533, 576 (1939))); *cf.* Edward Rubin, *It's Time To Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 111 (2003) (describing the APA's rulemaking procedures as "reiterat[ing], in a diluted and adapted form, the due process requirements . . . for adjudicatory decisions").

[285] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).

[286] *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (observing that delegation to private parties in this context is "legislative delegation in its most obnoxious form" and that "a statute which attempts to confer such power undertakes an unconstitutional inference with personal liberty and private property"). Due process would not necessarily prevent Congress from authorizing private regulatory action or even requiring administrative agencies to consult private organizations when setting regulatory standards, provided that private actions do not enter into force without proper review and approval. *See, e.g.*, Nat'l Ass'n of Regulating Util. Comm'rs v. FCC, 737 F.2d 1095, 1143–44 (D.C. Cir. 1984) (suggesting the FCC could "invite[ ] [private parties] to conduct . . . studies and, if warranted, to propose" standards which the "FCC . . . retained its final authority" to approve).

[287] *See supra* Part IV.B.

[288] *See* Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 511 (2011) (arguing that the constitutional principle of political accountability should be understood to limit delegations of regulatory

Equally important, Congress must afford individuals adversely affected by agency action an opportunity for judicial review to enforce the substantive and procedural requirements of due process.[289] This structural component of the due process model has been embraced by federal judges in a number of decisions spanning the past two decades.[290] For example, in *South Dakota v. U.S. Department of the Interior*, the Eighth Circuit upheld a nondelegation challenge to the Secretary of the Interior's delegated authority to acquire commercial land in trust for the Lower Brule Tribe of Sioux Indians.[291] In the course of its analysis, the court singled out for censure certain "procedural aspects" of the Secretary's statutory program, including the absence of judicial review to challenge procurement decisions.[292] Absent judicial

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authority to private parties).

[289] *See, e.g.*, Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring) ("[T]he [nondelegation] doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards."); Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting) (noting that the requirement that the Legislature limit its grant of authority "prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged"); Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Connally, 337 F. Supp. 737, 759 (D.D.C. 1971) (describing "[t]he safeguarding of meaningful judicial review" as "one of the primary functions" of the nondelegation doctrine).

[290] *See, e.g.*, Touby v. United States, 500 U.S. 160, 170 (1991) (Marshall, J., concurring) (characterizing judicial review as a necessary ingredient to "perfect[ ] a delegated-lawmaking scheme by assuring that the exercise of [delegated] power remains within statutory bounds"); Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 218 (1989) ("[S]o long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed,' no delegation of legislative authority trenching on the principle of separation of powers has occurred." (quoting Mistretta v. United States, 488 U.S. 361, 379 (1989))); South Dakota v. U.S. Dep't of the Interior, 69 F.3d 878, 884–85 (8th Cir. 1995) (holding that Congress may not delegate lawmaking authority without providing an opportunity to reinforce constitutional constraints and to ensure that agencies stay within the limits of their authority), *vacated on other grounds*, 519 U.S. 919 (1996); United States v. Garfinkel, 29 F.3d 451, 459 (8th Cir. 1994) ("[J]udicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge." (quoting United States v. Bozarov, 974 F.2d 1037, 1042 (9th Cir. 1992) (internal quotation marks omitted))); Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly and courts have upheld such delegation because there is court review to assure that the agency exercises the delegated power within statutory limits . . . .").

[291] 69 F.3d at 880, 885.

[292] *Id.* at 884–85.

review, the court argued, such congressional delegation would create "an agency fiefdom" characterized by the "exercise of unrestrained power."[293] Because the Secretary's statutory authority was not subject to any meaningful judicial check, it violated the nondelegation doctrine.[294]

The constitutional link between delegation and judicial review has not gone unchallenged, however. Prior to the Eighth Circuit's decision in *South Dakota*, the Ninth Circuit had reached precisely the opposite conclusion, holding that Congress could withhold judicial review of administrative lawmaking without transgressing the nondelegation doctrine.[295] This circuit split attracted the Court's attention when the Department of the Interior filed a petition for writ of certiorari in *South Dakota*.[296] In an eleventh-hour gambit to avoid Court review, the Department ultimately conceded the reviewability of procurement decisions under the delegation at issue,[297] prompting the Court to grant the petition for certiorari and summarily vacate and remand the case to the Eighth Circuit with instructions to remand the matter to the Secretary of the Interior for reconsideration.[298] This turn of events did not, however, put an end to the underlying controversy regarding the necessity of judicial review to ensure a constitutional delegation. In a dissent from the Court's summary decision, three Justices—Scalia, O'Connor, and Thomas—took the Eighth Circuit to task, protesting that they could not "see how the availability of judicial review has anything to do with" the constitutional validity of a congressional delegation.[299]

Despite the dissent's protestations to the contrary, the availability of judicial review is plainly integral to the

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[293] *Id.* at 885.

[294] *Id.*

[295] *See, e.g.*, United States v. Bozarov, 974 F.2d 1037, 1042 (9th Cir. 1992) (recognizing the "availability of judicial review" of congressional delegations as "a factor weighing in favor of upholding a statute against a nondelegation challenge," but rejecting "the proposition that judicial review is always constitutionally required").

[296] Dep't of the Interior v. South Dakota, 519 U.S. 919, 919 (1996).

[297] *Id.* at 920–21 (Scalia, J., dissenting).

[298] *Id.* at 919.

[299] *Id.* at 921–22 (Scalia, J., dissenting).

constitutionality of congressional delegations. Even under the traditional nondelegation doctrine, judicial review is necessary to prevent wholly standardless delegations and ultra vires administrative action.[300] When considered from a due process perspective, any argument for decoupling congressional delegation from judicial review is even less persuasive. The Due Process Clause's substantive and procedural constraints on congressional delegation would be largely meaningless in practice if administrative agencies could sidestep those constraints without legal review or repercussions. At a minimum, federal courts must be able to review "whether the [delegate]'s action falls within [its] delegated authority, whether the statutory language has been properly construed, and whether the [delegate's] action conforms with the relevant procedural requirements."[301] The due process model thus lends support to the Eighth Circuit's conclusion in *South Dakota* that access to judicial review is an essential component of any constitutionally valid delegation of congressional lawmaking power.[302]

In the past, a number of legal scholars have argued that rigorous rationality review, commonly referred to as "hard look" review, is also necessary to safeguard the public from arbitrary administrative lawmaking.[303] In *Motor Vehicle Manufacturers*

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[300] *See* Thomas W. Merrill, *Delegation and Judicial Review*, 33 HARV. J.L. & PUB. POL'Y 73, 78 (2010) (arguing that ultra vires action by executive agencies without judicial review is unconstitutional); *see also* Peter L. Strauss, *Rulemaking and the American Constitution* 11 (Columbia Law Sch. Pub. Law & Legal Theory, Research Paper Series, Paper No. 1485020, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485020 (examining the role of executive oversight of agency rulemaking in light of the constitutionally required checks and balances).

[301] Florsheim Shoe Co. v. United States, 744 F.2d 787, 795 (Fed. Cir. 1984); *see also* Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (observing that "[c]ourts remain obligated to determine whether statutory restrictions [on delegated authority] have been violated").

[302] *See supra* notes 292–94 and accompanying text.

[303] *See, e.g.*, Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 440–47 (2003) (examining the increasingly important role of judicial review as a check on the excessive use of administrative authority and identifying hard look review as "necessary to enforce [republican] ideals"); *see also* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 768 (advocating "arbitrariness review" as a "surrogate safeguard[ ] for the decline of constitutional checks on agency authority").

Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.,[304] the Court endorsed the hard look standard when it held that agency rules would be deemed arbitrary and capricious under the APA

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[305]

The due process model is consistent with hard look review insofar as it ensures that agencies honor statutory guidelines and furnish reasoned justifications for their actions. The deliberative process contemplated under hard look review, as under the due process model, advances republican values by enmeshing administrative lawmaking within constraints that are roughly equivalent to the checks and balances of Articles I and II. Hard look review, specifically, "acknowledges the unique constitutional position of agencies outside the tripartite system of government envisioned by the Framers, and compensates through heightened scrutiny of agency decisions in the form of the requirement that agencies give adequate reasons."[306] While hard look review might increase the costs of rulemaking[307] and raise concerns about political bias in

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[304] 463 U.S. 29, 43 (1983).

[305] *Id.* at 43.

[306] Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 440.

[307] *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1419, 1444 (1992) (describing hard look review as "extremely resource-intensive"); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 72 (1997) (same). *But see* Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making "Ossified"?*, 19 J. PUB. ADMIN. RES. & THEORY 261, 261 (2010) (offering an empirical study that challenges the ossification thesis).

judicial decisionmaking,[308] these weaknesses are "the price we pay for delegating highly complex important public policy decisions to unelected administrative agencies."[309] The best response to these concerns is for federal judges to exercise prudential self-restraint by using hard look review to ensure "that agencies do their homework, not that agencies arrive at the correct answer."[310] Applied in this manner, hard look review will be less dominating than unchecked administrative discretion. The due process account of hard look review thus resonates with the mainstream republican vision of courts as indispensible checks against executive and legislative domination.[311]

In sum, the due process model envisions a constitutionally grounded role for judicial review of congressional delegations.

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[308] *See* Miles & Sunstein, *supra* note 303, at 765 (stating that some people "fear that judicial biases play a large role in the operation of the hard look doctrine").

[309] William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 444 (2000).

[310] Bressman, *supra* note 26, at 548.

[311] *See* Dawood, *supra* note 32, at 1418 (arguing that judicial review promotes republican values by "prevent[ing] the *most* dominating legislative action with judicial intervention that is the *least* dominating"). Republicans generally accept that judicial review is necessary to ensure that the procedures by which the public interest is protected are not distorted by domination. *See, e.g.*, *id.* at 1416 (arguing that courts should "minimize the illegitimate exercise of power by public officials in democratic design, without [becoming involved themselves] too deeply in determining what that design should be"); Iseult Honohan, *Republicans, Rights, and Constitutions: Is Judicial Review Compatible with Republican Self-Government?*, *in* LEGAL REPUBLICANISM, *supra* note 29, at 100–01 (arguing that strong judicial review can help realize republican non-domination); Horacio Spector, *Judicial Review, Rights, and Democracy*, 22 LAW & PHIL. 285, 295 (2003) (explaining that the implications of moral rights justify judicial review). *But see* RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY 163–64 (2007) (arguing that judicial review is inadequate from a republican perspective because constitutional courts exercise unbridled lawmaking power).

To the extent that federal legislation expressly precludes judicial review of administrative lawmaking, courts should construe such statutes narrowly to permit judicial review for due process issues as well as constitutional issues implicating separation of powers and delegation questions. *See* Webster v. Doe, 486 U.S. 592, 603 (1988) ("We do not think [the statutory provision precluding judicial review] may be read to exclude review of constitutional claims."); Lindahl v. Office of Pers. Mgmt., 470 U.S. 768, 780–81 (1985) (statutory language did not prevent review of whether there had been " 'a substantial departure from important procedural rights' " or "like error 'going to the heart of the administrative determination' " (quoting Scroggins v. United States, 397 F.2d 295, 297 (1968))).

Pursuant to the anti-inherency principle, courts may overturn agency regulations that exceed the scope of congressionally authorized authority. Courts also may intervene if Congress has not prescribed an intelligible principle to guide agency action or if Congress has failed to pair such a substantive standard with fair and deliberative administrative procedures, political accountability, and judicial review. To ensure that judicial review does not undermine liberty, courts ordinarily should afford Congress a healthy margin of deference when evaluating whether congressionally mandated substantive standards, administrative procedures, and structural constraints satisfy due process. They should not manufacture substantive standards where Congress has not done so, nor should they impose procedural requirements on agencies beyond the basic due process requirements of reasoned deliberation and justification. Only where administrative procedures are manifestly inadequate to compensate for Congress's circumvention of constitutional checks and balances through the delegation may courts intervene to prevent administrative lawmaking from "running riot."[312] Under this deferential approach, judicial review of congressional delegations would honor the Constitution's republican ideals.

D. DUE PROCESS AND ORDERED LIBERTY

As developed in the foregoing discussion, the due process model promotes the Constitution's republican design by conserving liberty in the administrative state. While reasonable minds might disagree about which particular safeguards are necessary to safeguard individual liberty when Congress entrusts lawmaking powers to administrative agencies, the three-part due process model outlined in the preceding sections best captures the Court's answer to these republican concerns.

This due process model is superior to both the traditional nondelegation doctrine and the current delegation doctrine because it allows Congress to harvest the benefits of broad delegation while checking the attendant threats to individual

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[312] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935).

liberty. Like the traditional nondelegation doctrine, the due process model takes seriously the republican values embodied in constitutional checks and balances, but it does not require Congress to make every meaningful policy decision within those bounds. Instead, the due process model reconciles administrative lawmaking with the Constitution's republican design by requiring Congress to establish a minimalist substantive standard, combined with administrative procedures and judicial review to further limit potential agency arbitrariness. This approach is more principled than the traditional nondelegation doctrine because it sidesteps the dubious proposition that Congress does not delegate legislative powers to administrative agencies.[313] It also clarifies why congressional delegations need only establish an intelligible principle rather than a fully determinate criterion to pass constitutional muster at a substantial level.[314]

For similar reasons, the due process model is vastly superior to the new nondelegation doctrine.[315] Both the new nondelegation doctrine and the due process model support the principle that federal agencies lack inherent authority to make law absent a delegation from Congress through legislation or from the President through subdelegation. The due process model is less susceptible to judicial domination than the new nondelegation doctrine, however, because it does not deputize courts to narrow broad congressional delegations through canons of statutory interpretation.[316] The due process model leaves the responsibility to establish an intelligible principle where it belongs: with Congress and the President, subject to the checks and balances of Articles I and II. The Judicial Branch's role, in contrast, is limited to evaluating whether Congress has established (1) an intelligible principle, (2) fair and deliberative administrative procedures, and (3) structural constraints such as political accountability and judicial review.

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[313] *See* Posner & Vermeule, *supra* note 8, at 1721.
[314] *See supra* Part III.C.
[315] *See supra* Part III.B.
[316] *See supra* Part III.B.*2*.

The due process model complements the emerging delegation doctrine insofar as both accept that Congress may entrust broad lawmaking discretion to administrative agencies without transgressing separation of powers principles. The problem with the existing delegation doctrine, taken alone, is that it does not adequately address the federal government's increased capacity for arbitrariness when Congress delegates broad lawmaking powers to the Executive Branch. The due process model fills this gap by embedding executive lawmaking within a framework of substantive, procedural, and structural constraints that honor the Constitution's commitment to ordered liberty. To be sure, due process constraints differ in important respects from the checks and balances of Articles I or II, and these differences may produce some functional asymmetries in practice. Nonetheless, the general objective of both legislative checks and balances and the Due Process Clause's substantive, procedural, and structural safeguards are one and the same: to safeguard the public from domination. The due process model's basic requirements thus preserve central features of the emerging delegation doctrine while better honoring the checks and balances of Articles I and II.

Because the due process model operates primarily to reinforce legislative checks and balances—the constitutional architecture of ordered liberty—it offers protection for a broad range of interests in administrative rulemaking. To qualify for relief under the Due Process Clause, plaintiffs must show that they face a deprivation of "life, liberty, or property."[317] Challenges to agency rulemaking based on property interests will be somewhat limited because prospective plaintiffs will have to demonstrate a concrete legal entitlement; the mere unilateral expectation or hope of a future property interest is insufficient.[318] Constitutional liberty interests offer a broader scope for due process challenges to administrative rulemaking. The Court has recognized that "[i]n a Constitution for

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[317] U.S. CONST. amend. V.

[318] *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it.").

a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."[319] Hence, liberty

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.[320]

Whenever agencies categorically exclude individuals from future opportunities as a matter of law, such action could constitute a liberty deprivation triggering due process protection.[321] Thus, administrative agencies cannot adopt regulations depriving individuals of property or barring access to a variety of present or future opportunities without triggering the full substantive, procedural, and structural safeguards of due process.

Critics will no doubt object that the due process model gives courts too much power to tinker with administrative procedure, raising concerns that agency rulemaking will grind to a halt under the weight of new procedural requirements. In theory, due process review could ossify administrative lawmaking if federal courts impose unduly onerous procedural requirements. Alternatively, agencies might overcompensate by employing unduly onerous administrative procedures out of an unjustified fear of judicial vacatur.

While such concerns must be taken seriously, they should not be exaggerated. Due process review would not grant to the federal courts a "roving commission to inquire into evils and then, upon discovering them," authorize the courts to manufacture new

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[319] *Id.* at 572.

[320] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[321] *See Roth*, 408 U.S. at 573–74 (holding that an applicant for state employment lacked a liberty interest, but noting that it "would be a different case" if the state invoked "regulations to bar the [applicant]" from all future employment opportunities in all public state universities).

administrative procedures out of whole cloth.[322] Rather, the due process model authorizes judicial intervention into administrative lawmaking procedure only under very limited circumstances. Plaintiffs challenging administrative lawmaking would have to establish that Congress failed to furnish an intelligible principle, that the agency did not employ minimally fair and deliberative procedures culminating in a reasoned decision, or that the agency was not subject to essential structural safeguards such as political accountability and judicial review. Absent a clear departure from these constitutional requirements, courts have to defer to Congress's assessment regarding how much administrative discretion is necessary to accomplish a particular regulatory purpose. The due process model thus envisions a relatively modest role for judicial review of congressional delegations—one that preserves the constitutional prerogatives of Congress and the Executive Branch, while protecting republican values and avoiding the pitfalls of unconstrained administrative lawmaking.

V. PUTTING THE DUE PROCESS MODEL INTO PRACTICE

If federal administrative law already satisfies the due process model in many essential respects, some might wonder whether the move from nondelegation to due process would accomplish anything more than simply reaffirming the constitutionality of current federal law. In short, does it make a difference in practice whether federal courts apply the traditional nondelegation doctrine, the new nondelegation doctrine, or the due process model? This Part seeks to clarify the due process model's transformative potential by briefly highlighting several areas in which due process principles could significantly impact judicial review of congressional delegations in theory and practice.

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[322] Panama Ref. Co. v. Ryan, 293 U.S. 388, 435 (1935) (Cardozo, J., dissenting). The due process model thus contemplates a far narrower role for judicial review than Davis's theory of administrative common law, which envisioned federal courts exercising sweeping powers to "determine what discretionary power is necessary and what is unnecessary" and to design administrative procedures to curb unnecessary discretionary power. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 50–51 (1969).

A. THE CONSTITUTIONAL STATUS OF ADMINISTRATIVE PROCEDURE

One important implication of the due process model is that ordinary federal administrative procedure assumes a constitutional stature. If the APA did not exist, the Fifth Amendment would require federal agencies to develop comparable procedural requirements to safeguard the public from administrative domination. More importantly for present purposes, to the extent that the APA does not currently satisfy due process, delegations of lawmaking authority thereunder cannot withstand judicial review. The due process model thus clarifies the limits of the Court's holding in *Bi-Metallic*:[323] although individuals do not have a constitutional right to individualized notice and a hearing in generalized rulemaking proceedings,[324] Congress must nonetheless satisfy the basic procedural requirements of due process whenever it entrusts agencies with lawmaking authority.[325] In particular, due process requires that Congress constrain administrative lawmaking with intelligible statutory principles, fair and deliberative procedures, basic political accountability, and judicial review.

These implications of the due process model challenge current administrative law orthodoxy. As discussed previously, most legal scholars have construed *Bi-Metallic* to hold that due process has no application whatsoever to administrative rulemaking.[326] Moreover, ever since the Court's landmark 1978 decision *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[327] the prevailing sentiment has been that administrative

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[323] Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915).

[324] *See supra* notes 219–23 and accompanying text.

[325] *See supra* Part IV.B.

[326] *See supra* notes 219–23 and accompanying text.

[327] 435 U.S. 519 (1978). Before *Vermont Yankee*, the D.C. Circuit had taken steps toward creating a federal common law of administrative procedure. *See, e.g.*, O'Donnell v. Shaffer, 491 F.2d 59, 62 (D.C. Cir. 1974) (suggesting that oral proceedings, cross-examination, and notice-and-comment procedures may all be necessary); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 386 (D.C. Cir. 1973) (requiring elaborate statements of technical information in notices of proposed rulemaking), *superseded on other grounds by* 15 U.S.C. § 793(c)(1), *as recognized in* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1042 (D.C. Cir. 1999). *Vermont Yankee* put an end to this movement. *See* 435 U.S. at 525 (faulting the

rulemaking procedure is the exclusive province of Congress.[328] The due process model advanced in this Article, on the other hand, counsels a narrower reading of *Bi-Metallic* and *Vermont Yankee*. While *Bi-Metallic* held that individuals do not have a constitutional right to notice and an opportunity to participate directly in agency rulemaking, it did not suggest that the Constitution would permit Congress to dispense with administrative procedure altogether when entrusting generalized rulemaking powers to federal agencies. Neither did *Vermont Yankee* go so far. To the contrary, the opening paragraph of *Vermont Yankee* acknowledged that there could be some circumstances, however rare, that would "justify a court in overturning agency action because of a failure to employ procedures beyond those required by . . . statute."[329] Because the Court considered it unnecessary to reach that issue in *Vermont Yankee*, it expressly reserved for future consideration whether, or under what circumstances, the Constitution might require agencies to employ more-robust rulemaking procedures than those outlined in the APA and other federal legislation.[330]

The due process model fills the gap left behind in *Bi-Metallic* and *Vermont Yankee* by clarifying the relationship between the Constitution and the APA. Administrative procedure and due process are fundamentally intertwined because the APA addresses domination concerns that would otherwise compromise the Constitution's republican ideals.[331] Ordinarily, courts may not

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D.C. Circuit for "seriously misread[ing] . . . statutory and decisional law" by developing common law administrative procedures to supplement the APA).

[328] *See, e.g.*, BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 4.14, at 204 (3d ed. 1991) ("[T]he Court meant exactly what it said in *Vermont Yankee*: that courts may not impose rulemaking procedural requirements beyond those specified by statute.").

[329] 435 U.S. at 524.

[330] *See id.* at 542–43 (observing simply that agencies need not employ rulemaking procedures more stringent than those prescribed in the APA "[a]bsent constitutional constraints or extremely compelling circumstances"); *cf.* Pearson v. Shalala, 164 F.3d 650, 660 n.12 (D.C. Cir. 1999) (noting that there may be some circumstances in which agency standard-setting could satisfy the APA but not the Fifth Amendment).

[331] *See Pearson*, 164 F.3d at 660–61 (noting the interplay between the APA and the Fifth Amendment); Bressman, *supra* note 26, at 472 (noting that the purpose of the APA is "to guard against overreaching or unfair regulation by providing affected parties increased hearing and participation rights"); Mashaw, *supra* note 128, at 507 ("Agency hearing

impose administrative procedures beyond those identified in the APA because they have no inherent authority to develop administrative common law in the absence of a constitutional requirement[332] and because the APA easily satisfies the demands of procedural due process.[333] For example, when agencies employ traditional "notice-and-comment" rulemaking under the APA,[334] petitioners will rarely, if ever, be able to demonstrate that an agency has not satisfied due process. Consistent with the APA, due process also should be understood to permit interim final rulemaking—postponing notice-and-comment until after a rule has entered into force—in emergencies and other circumstances where "good cause" would support such action.[335] In some contexts, the interest-balancing logic of contemporary due process analysis[336] might even permit an agency to dispense with notice-and-comment procedures altogether, such as where disclosure of an agency's action would pose a grave and imminent threat to national security.[337] On the other hand, due process might occasionally

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processes . . . must satisfy constitutional due process requirements."); Metzger, *supra* note 19, at 489–92 (suggesting that administrative law development and increased judicial scrutiny of these delegations are defined, in part, by constitutional concerns).

[332] *See Vermont Yankee*, 435 U.S. at 524 ("Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.").

[333] *See supra* notes 272–78 and accompanying text.

[334] *See* 5 U.S.C. § 553(e) (2006) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the [rulemaking] through submission of written data, views, or arguments with or without opportunity for oral presentation.").

[335] *See* Administrative Conference of the United States Recommendation 95-4, 60 Fed. Reg. 43,108, 43,112–13 (Aug. 18, 1995) (recommending that interim final rulemaking be employed for rules adopted under the "impracticable" and "public interest" tests); *cf.* Connecticut v. Doehr, 501 U.S. 1, 1–2 (1991) (holding that a state statute authorizing prejudgment attachment of real estate without prior notice or hearing violated due process in the absence of extraordinary circumstances).

[336] *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (explaining that due process has been recognized by the Court on many occasions as "not a technical conception with a fixed content" but a "flexible" process that "calls for such procedural protections as the particular situation demands" (citations omitted) (internal quotation marks omitted)).

[337] *See* Richard J. Pierce, *Presidential Control Is Better than the Alternatives*, 88 TEX. L. REV. SEE ALSO 113, 120 (2010), http://www.texaslrev.com/seealso/vol/88/responses/pierce (asserting that requiring notice-and-comment rulemaking for a Department of Defense directive setting standards for permissible collateral damage to civilians in armed conflict

require more robust procedures than the APA currently mandates. For instance, some of the APA's categorical exemptions for notice-and-comment rulemaking could violate due process to the extent that they allow administrative agencies to make federal law without engaging in an adequately fair and deliberative decision-making process and without any showing of good cause.[338] To the extent that loopholes in the APA increase the federal government's capacity for arbitrariness, they also constitute an unconstitutional threat to individual liberty under the Due Process Clause.

B. JUDICIAL DEFERENCE TO AGENCY STATUTORY INTERPRETATION

The due process model also reinforces key features of the *Chevron* doctrine, which dictates the general circumstances under which courts must defer to federal agencies' interpretations of ambiguous federal statutes.[339] In *Chevron*, the Court held that courts ordinarily should allow administrative agencies to fill gaps and clarify ambiguities in statutes based on Congress's presumed intent to delegate interpretive power, the Executive Branch's superior political responsiveness and accountability, and agencies' superior expertise and capacity for robust deliberation.[340] The primary limitation on *Chevron* deference is that it applies only in contexts where courts can reasonably infer that Congress intended to delegate interpretive discretion to the agency.[341] If it appears

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could have disastrous consequences).

[338] *See generally* Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. 1271 (2010) (arguing that the APA's exemptions for foreign affairs and military functions should be eliminated in favor of the general good cause exemption).

[339] *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (upholding any non-arbitrary and capricious interpretation of an ambiguous statute).

[340] *Id.* at 865–66. Where *Chevron* deference applies, agencies may experiment with different statutory interpretations over time, provided that their interpretations are reasonable. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) (holding that stare decisis does not apply with the same force to agency interpretations under *Chevron*).

[341] *See, e.g.*, Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 737 (2002) (explaining that the Court has stated that "unless Congress delegates formal lawmaking power to an agency, the agency's work product, in whatever form, does not merit *Chevron* deference").

that Congress would not have intended to delegate interpretive authority, courts must evaluate the agency's statutory interpretation under a formally less deferential standard.[342]

The due process model supports *Mead*'s controversial gloss on the *Chevron* doctrine, but it suggests that *Mead* might have more to do with due process than actual congressional intent. According to *Mead*, *Chevron* deference does not apply unless Congress has required "relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[343] Notice-and-comment rulemaking is one example of a procedural form that would satisfy this requirement, but it is not the only one; a formal agency pronouncement reflecting "careful consideration . . . over a long period of time" also may qualify for *Chevron* deference.[344] In addition, whatever process an agency employs, *Chevron* applies only where administrative lawmaking leads to a uniform regulatory standard.[345] While courts have attributed these requirements to congressional intent, the due process model suggests a more nuanced explanation: federal courts will not recognize Congress as having delegated authority to an agency unless the agency has developed its statutory interpretation through a relatively formal, deliberative process that satisfies due

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[342] *See* United States v. Mead Corp., 533 U.S. 218, 228 (2001) ("The weight accorded to an administrative judgment [in a particular case] 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' " (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))).

[343] *Id.* at 230; *see also* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 173 (2007) (applying *Chevron* deference where an agency employed full public notice-and-comment procedures); *Chevron*, 467 U.S. at 865 (reasoning that the EPA Administrator's statutory interpretation was "entitled to deference," in part, because "the agency considered the matter in a detailed and reasoned fashion").

[344] Barnhart v. Walton, 535 U.S. 212, 222 (2002).

[345] *See, e.g.*, *Mead*, 533 U.S. at 232–33; Sutton v. United Air Lines, Inc., 527 U.S. 471, 478–80, 482 (1999) (denying *Chevron* deference where a statute was administered by multiple federal agencies); *cf.* People *ex rel.* Gamber v. Sholem, 128 N.E. 377, 379–80 (Ill. 1920) (invoking the nondelegation doctrine to strike down a state law authorizing condemnation of buildings liable to catch fire because the law would have subjected property owners "to the varying opinions of the different fire marshals in the several localities").

process. This approach reframes *Mead* as a constitutional-avoidance gloss on the *Chevron* doctrine.[346]

Mead, in turn, confirms and clarifies the types of administrative procedure that would satisfy due process. According to *Mead*, federal agencies may exercise delegated lawmaking powers only through "a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[347] This standard is consistent with the Court's instruction in cases from *Wichita* to *Mow Sun Wong*[348] that administrative lawmaking is constitutional only if it is channeled through fair and deliberative procedures.[349] Agencies may not, therefore, exercise delegated lawmaking powers through informal agency reports, memoranda, or letters that do not reflect the level of rigorous institutional review required by procedural due process.[350] To satisfy due process, agencies must identify the

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[346] *See* Bressman, *supra* note 26, at 538 (arguing that *Mead* stands for the proposition that "[a]gencies may possess only so much authority (1) as Congress may grant them, and (2) as they may exercise consistent with the values of fairness, rationality, and predictability").

[347] *Mead*, 533 U.S. at 230; *see also Barnhart*, 535 U.S. at 222 (explaining that "whether a court should give [*Chevron*] deference depends in significant part upon the interpretive method used" and deferring to the agency based, in part, on the "careful consideration the Agency has given the question over a long period of time"); Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1141–42 (9th Cir. 2007) (giving *Chevron* deference because "the formality . . . require[d] for policy statements" under the Endangered Species Act "is indistinguishable from notice-and-comment rulemaking under the APA"); Alaska Dep't of Health & Human Servs. v. Ctrs. for Medicare & Medicaid Servs., 424 F.3d 931, 939 (9th Cir. 2005) (according *Chevron* deference based on a federal agency's "formal administrative process").

[348] *See supra* Part IV.B.

[349] *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976) (stating that Fifth Amendment claim requires inquiry into whether "essential procedures have been followed"); United States v. Rock Royal Co-op, Inc., 307 U.S. 533, 576 (1939) ("Even though procedural safeguards cannot validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority."); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 405 (1928) (stating that before a conclusion is reasoned "the [agency] must make an investigation, and in doing so must give notice to all parties interested and an opportunity to adduce evidence and to be heard"); Wichita R.R. & Light Co. v. Public Utils. Comm'n, 260 U.S. 48, 59 (1922) ("[A]n agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith to give validity to its action.").

[350] *See, e.g.*, Fellner v. Tri-Union Seafoods, L.L.C., 539 F.3d 237, 245 (3d Cir. 2008) (declining to accord preemptive effect to agency letters that were "not the product of some

statutory or treaty delegation and the particular factors that trigger their administrative authority,[351] and they must explain how their actions represent a reasonable exercise of congressionally delegated authority.[352] Ultimately, agency lawmaking must lead to a coherent and consistent legal standard. In each of these respects, cases like *Mead* can be viewed from a due process perspective as demarcating the constitutional limits of *Chevron* deference.

C. AGENCY SELF-REGULATION

A third area where the due process model could inform federal administrative law is agency self-regulation. Prior to *American Trucking*, some legal scholars argued that courts should allow administrative agencies to narrow unconstitutionally broad congressional delegations by establishing substantive standards to limit their own discretion.[353] The Court soundly rejected this position, however, in *American Trucking*.[354] Just as federal courts cannot cure unconstitutional delegations by supplying intelligible principles of their own design,[355] agency self-regulation does not adequately address the problem of unfettered administrative agency authority. The problem, as the Court recognized, is that an administrative agency's "choice of which portion of [Congress's delegated] power to exercise . . . would *itself* be an exercise of

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form of agency proceeding"); Colorado v. Sunoco, Inc., 337 F.3d 1233, 1243 (10th Cir. 2003) (denying *Chevron* deference to actions taken in informal agency reports and memoranda).

[351] *See* SEC v. Chenery Corp., 332 U.S. 194, 196–97 (1947) (noting that a court should not have to "guess" the authority behind an agency's actions); Panama Ref. Co. v. Ryan, 293 U.S. 388, 432 (1935) (stating that due process requires the agency's actions to fall within its statutory authority).

[352] *Compare* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (listing reasonableness factors for APA hard look review), *with Mow Sun Wong*, 426 U.S. at 103 ("[D]ue process requires that there be a legitimate basis for presuming that the [agency] rule was actually intended to serve [a proper] interest.").

[353] DAVIS, *supra* note 322, at 45–49; Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1418 (2000).

[354] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–73 (2001).

[355] *See supra* notes 164–65 and accompanying text.

[unchecked] legislative authority."[356] If Congress does not provide an intelligible principle to guide agency discretion at the outset, principles of procedural and structural due process are ineffectual as safeguards against administrative arbitrariness because agencies, like courts, lack an independent standard against which to evaluate their actions. Although agency self-regulation might be desirable from a republican perspective to limit arbitrariness downstream at the adjudication stage, it does not fully address the domination concerns that arise when Congress delegates unfettered lawmaking authority to an agency at the rulemaking stage. An agency cannot, therefore, "cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute."[357]

On the other hand, agency self-regulation may remedy Congress's failure to prescribe appropriate administrative *procedures*. Procedural due process asks whether an agency has engaged in a fair and deliberative process leading to a rational explanation of the legal and factual basis for the agency's action.[358] When courts conduct this inquiry, it should make little difference whether an agency's procedures derive from the APA, other federal legislation, or administrative self-regulation. Although agencies cannot exercise delegated lawmaking powers without employing minimally fair and deliberative procedures, Congress need not be the one to establish those procedures. As long as an agency's lawmaking procedures satisfy the minimum requirements of due process, congressional delegation does not lead to domination.[359]

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[356] *Am. Trucking*, 531 U.S. at 473.

[357] *Id.* at 472.

[358] *See supra* Part IV.B.

[359] Of course, the mere fact that agency regulations are characterized as "procedural" does not mean that they are foreclosed from having significant effects upon substantive law. *See* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1068 (1980) ("That the *subject* in all these cases is procedure, however, is not to say that the *meaning* and *purpose* of the Constitution's prescriptions on each subject are themselves merely procedural."). To address broader domination concerns, agency procedures should operate evenhandedly in practice, promoting reasoned deliberation and justification, rather than systematically empowering or disempowering particular groups or individuals.

The due process model thus suggests that administrative agencies may cure *procedural* defects in congressional delegations by binding themselves prospectively to employ fair and deliberative lawmaking procedures. As recognized in *American Trucking*, however, no amount of agency self-regulation, no matter how well-intentioned, can compensate for Congress's failure to establish a *substantive* intelligible principle to constrain agency discretion.[360]

D. DELEGATION TO THE PRESIDENT

Yet another area where the due process model could introduce changes to current federal law is congressional delegation to the President. From the nondelegation doctrine's earliest days, federal courts have applied the doctrine to delegations augmenting presidential power.[361] Both *Panama Refining* and *Schechter Poultry* featured congressional delegations to the President, and the Court took pains in both cases to emphasize the dearth of administrative procedure in the President's decisionmaking process.[362] Nonetheless, in recent years federal courts have been reluctant to subject the President's exercise of delegated lawmaking authority to the same procedural and structural requirements that govern ordinary administrative lawmaking. The leading case in this area is *Franklin v. Massachusetts*,[363] where the Court held that the APA does not authorize judicial review of presidential action.[364] Although the Court recognized that "[t]he President is not explicitly excluded from the APA's purview," it stressed that "he is not explicitly included, either," and expressed concern that extending administrative procedure to presidential action could implicate "separation of powers and the

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[360] 531 U.S. at 905.

[361] *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 680–83 (1892) (reviewing a delegation to the President and citing the earlier similar case of *The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813)).

[362] *See supra* notes 240–42 and accompanying text.

[363] 505 U.S. 788 (1992).

[364] *Id.* at 800–01.

unique constitutional position of the President."[365] In the absence of a particularly clear statement from Congress, the Court reasoned that it should not construe the APA to limit presidential lawmaking.[366] The Court thus construed the APA to categorically exempt presidential lawmaking from the ordinary requirements of administrative procedure.[367]

Viewed from a republican perspective, the prospect of procedurally unfettered presidential lawmaking is deeply troubling. Although the Court in *Franklin* argued that separation of powers principles counseled judicial restraint, the Court failed to consider the degree to which its decision would undermine the same republican ideals that constitutional checks and balances were designed to advance. By exempting presidential action from administrative procedure and seemingly allowing the Executive Branch to make law unilaterally outside the checks and balances of Articles I and II, the Court dramatically *expanded* the federal government's capacity for arbitrariness. Indeed, the Court cited precisely these republican concerns six years later in *Clinton v. City of New York* when it held that the presidential line-item veto was unconstitutional.[368] Although the Court did not acknowledge the close symmetry between the two cases, *Clinton* effectively exposed the frailty of *Franklin*'s constitutional logic: Congress could not commit procedurally unfettered, unilateral lawmaking authority to the Executive Branch because such action would "enhance[ ] the President's powers beyond what the Framers would have endorsed."[369]

To reconcile congressional delegation with the Constitution's republican structure, due process requires that Congress "enjoin upon" the President, like all other delegates, "a certain course of procedure"—one that will mitigate the threats to liberty associated with Congress's circumvention of constitutional checks and

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[365] *Id.* at 800.
[366] *Id.* at 801.
[367] *Id.*
[368] 524 U.S. 417, 448–49 (1998).
[369] *Id.* at 451 (Kennedy, J., concurring).

balances.[370] Ideally, Congress could fill this gap by imposing general-framework legislation for presidential administrative procedure[371] or specific procedures tailored to specific congressional delegations. The President also could address domination concerns by committing the White House to follow deliberative procedures such as providing notice and an opportunity for public comment in presidential rulemaking where exceptional circumstances would not require a different approach. Alternatively, the Court could acknowledge *Franklin*'s shaky reasoning and reinterpret the APA to cover presidential lawmaking when the President exercises congressionally delegated authority.[372] Whether such procedures derive from the APA, other federal legislation, or presidential self-regulation, due process requires an opportunity for judicial review to ensure that the President has not exceeded the scope of his congressionally delegated authority and has complied with applicable substantive and procedural constraints. Such measures would fortify congressional delegations against the constitutional difficulties that doomed the line-item veto in *Clinton*.[373]

To be clear, the Constitution does not obligate the White House to use notice-and-comment rulemaking (or its functional equivalent) for *all* exercises of lawmaking authority. In areas such as military discipline, where the Constitution vests the President with independent lawmaking authority, the President may exercise procedurally unfettered power without undermining

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[370] Wichita R.R. & Light Co. v. Pub. Utils. Comm'n, 260 U.S. 48, 59 (1922).

[371] *See* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 154 (1994) (arguing that "we must evaluate twentieth-century congressional framework legislation in light of the great twentieth-century giveaway of legislative power").

[372] This approach would not be difficult to square with the text of the APA; indeed, subjecting presidential action to APA procedure is arguably more consistent with the statute's plain language than *Franklin*'s more attenuated, prudential reading. *See* 5 U.S.C. § 551(1) (2006) (defining "agency" as "each authority of the Government of the United States" except "(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia").

[373] *See* 524 U.S. at 449 ("[T]he procedures authorized by the Line Item Veto Act are not authorized by the Constitution.").

constitutional checks and balances.[374] Due process also would permit the President to dispense with APA-style deliberative procedures where such procedures are "impracticable, unnecessary, or contrary to the public interest."[375] Indeed, it is entirely possible that most presidential lawmaking would qualify for special treatment under one or both of these exceptions. Nonetheless, concluding that the Constitution permits Congress to exempt *all* congressional delegations to the President from deliberative procedure would be a mistake. If this were the case, Congress could make an end-run around the Constitution's liberty-promoting checks and balances by committing all administrative rulemaking authority to the President. This result is unacceptable from a republican perspective because it would do violence to the Constitution's structure. As the Court explained in *Panama Refining*, the requirements of deliberative administrative procedure represent " 'general principles of constitutional government.' We cannot regard the President as immune from the application of these constitutional principles."[376]

E. DELEGATING FOREIGN AFFAIRS POWERS

In one area of federal regulation, Congress has conspicuously circumvented the checks and balances of Articles I and II without recognizing any constraints on its authority to delegate lawmaking power. That area is foreign affairs. Ever since the Court's landmark 1936 decision *United States v. Curtiss-Wright Export Corp.*,[377] federal courts have given Congress a wide birth when it entrusts lawmaking power to the Executive in foreign affairs.[378]

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[374] *See* U.S. CONST. art. II, § 2; *supra* Part II.D.

[375] 5 U.S.C. § 553(b)(3)(B) (2006).

[376] Panama Ref. Co. v. Ryan, 293 U.S. 388, 433 (1935) (quoting Mahler v. Eby, 264 U.S. 32, 44 (1924)).

[377] 299 U.S. 304 (1936).

[378] *See, e.g.*, Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1438 (9th Cir. 1996) ("Delegation of foreign affairs authority is given even broader deference than in the domestic arena. It is well settled that 'Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than it customarily wields in domestic areas.' " (quoting Zemel v. Rusk, 381 U.S. 1, 17 (1965))); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 124–25 (2d ed. 1996) ("If there

Some courts have gone so far as to assert that the nondelegation doctrine does not apply to this domain, because the President possesses independent constitutional authority to conduct foreign affairs.[379] Further magnifying executive discretion, Congress has exempted foreign affairs functions from the APA's informal rulemaking procedures, allowing the Executive Branch to issue foreign affairs regulations outside the robust deliberative process afforded by public notice-and-comment procedures.[380] As a result, many of the structural safeguards traditionally associated with administrative lawmaking simply do not apply to foreign affairs regulation.[381]

The due process model counsels a different approach. Applying due process, courts should read *Curtiss-Wright* narrowly[382] to stand for the proposition that when administrative agencies exercise lawmaking powers vested in the President by Article II, ordinary structural constraints on congressional delegation do not apply. Congress may dispense with the substantive, procedural, and structural constraints associated with due process only when it directs the Executive Branch to employ lawmaking powers that the Constitution vests concurrently in both Congress and the President. Concurrent lawmaking powers include the regulation of diplomatic immunities[383] and the administration of the armed

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remain some theoretical limitations on Congressional delegation . . . in foreign affairs, no one has persuasively stated what they are and apparently no actual delegation by Congress has approached them.").

[379] *See Curtiss-Wright*, 299 U.S. at 318–19; United States v. Approximately 633.79 Tons of Yellowfin Tuna, 383 F. Supp. 659, 661 (S.D. Cal. 1974) (characterizing *Curtiss-Wright* as holding that "the separation of powers standard of delegation, applied to domestic affairs in *Panama* [*Refining*] and *Schechter* [*Poultry*], does not apply in the foreign affairs sphere"). *But see generally* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999) (critiquing *Curtiss-Wright*).

[380] 5 U.S.C. § 553(a)(1) (2006).

[381] *See* 1 TRIBE, *supra* note 111, at 634 (noting that the Court has allowed "broad delegations of its foreign policy powers to the Executive Branch at times when it might not have permitted similarly expansive delegations with regards to domestic affairs").

[382] *See* Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation*: An Historical Reassessment*, 83 YALE L.J. 1, 3 (1973) (noting that "[n]o agreement on the meaning of [*Curtiss-Wright*] has emerged").

[383] *See In re* Baiz, 135 U.S. 403, 419 (1890) (holding that Article II, Section 2 confers power on the Executive Branch to recognize foreign diplomats).

forces.[384] Within such zones of overlapping constitutional powers, Congress can delegate broad lawmaking powers to the Executive Branch without undermining the checks and balances of Articles I and II.

Curtiss-Wright should not be construed, however, to immunize *all* foreign affairs regulations from constitutional delegation review. The Constitution commits a variety of foreign affairs powers exclusively to Congress. These include the power to regulate foreign commerce,[385] define offenses against the law of nations,[386] and authorize appropriations for foreign assistance.[387] When Congress delegates lawmaking authority for these and other areas of exclusive congressional authority, it must satisfy the basic requirements of due process.[388] A host of cases decided before and after *Curtiss-Wright* confirm this understanding by applying ordinary delegation constraints to executive action in the realm of foreign commerce.[389] Although Congress may find it necessary to

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[384] *See* U.S. CONST. art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . ."); United States v. Eliason, 41 U.S. (Peters) 291, 301 (1842) ("The power of the executive to establish rules and regulations for the government of the army is undoubted.").

[385] U.S. CONST. art. I, § 8, cl. 3; United States v. Guy W. Capps, Inc., 204 F.2d 655, 659 (4th Cir. 1953) ("[T]he power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress."), *aff'd on other grounds*, 348 U.S. 296 (1955).

[386] U.S. CONST. art. I, § 8, cl. 10.

[387] *Id.* art. I, § 8, cl. 11; *see also* HENKIN, *supra* note 378, at 89–90 (arguing that the President also "cannot unilaterally" declare war, regulate patents or copyrights, enact criminal laws to enforce treaty obligations, or enact general immigration laws); *cf.* Medellín v. Texas, 552 U.S. 491, 530–32 (2008) (holding that the President lacks a general constitutional "foreign affairs authority" to direct state courts to comply with a judgment of the International Court of Justice).

[388] *See* Kent v. Dulles, 357 U.S. 116, 129 (1958) (explaining that if " 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress . . . . And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests." (citing, *inter alia*, Panama Ref. Co. v. Ryan, 293 U.S. 388, 420–30 (1936))).

[389] *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 7, 17 (1965) (reviewing an act giving the Executive the power to create travel controls); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 404, 409 (1928) (reviewing the delegation of the authority to fix customs duties); Marshal Field & Co. v. Clark, 143 U.S. 649, 690–91 (1892) (reviewing a delegation to the President to regulate "trade and commerce with other nations"); The Thomas Gibbons, 12 U.S. (8 Cranch) 421, 428–29 (1814) (reviewing a delegation of power to regulate privateers during war); The Cargo of the Brig Aurora, Burn Side v. United States (*The Brig Aurora*), 11 U.S. (7 Cranch) 382, 382–83 (1813) (reviewing the President's proclamation making it

"paint with a brush broader than it customarily wields in domestic areas" in the complex arena of foreign affairs,[390] this does not absolve Congress of its constitutional responsibility to establish an intelligible principle to guide agency discretion.

When Congress delegates its exclusive foreign affairs powers, it also must ensure that executive lawmaking complies with procedural and structural due process.[391] For example, to the extent that the APA currently exempts international trade regulation from ordinary deliberation requirements such as public notice and comment,[392] Congress should address concerns about potential domination by either extending the APA's coverage or instituting comparable requirements of robust deliberation. Alternatively, courts should construe the APA's foreign affairs exceptions narrowly to apply only where APA-style procedures would be impracticable or contrary to the public interest because they would significantly compromise American foreign relations.[393] The notion that agencies may dispense with ordinary rulemaking procedures merely because their actions related to a "foreign affairs function"—even if the impact on foreign relations would be relatively insignificant—is at odds with the due process model.[394] In the dynamic and complex arena of foreign affairs, Congress still

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illegal to carry cargo imported from Britain); United States v. Dhafir, 461 F.3d 211, 215 (2d Cir. 2006) (reviewing delegation of the authority to the President to promulgate criminal offenses regarding foreign affairs); Mast Indus., Inc. v. Regan, 596 F. Supp. 1567, 1574, 1576 (Ct. Int'l Trade 1984) (reviewing a delegation of legislative authority to the President).

[390] *Zemel*, 381 U.S. at 17.

[391] *Cf.* Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 146 (2009) (questioning the constitutionality of federal statutes that authorize the Executive Branch to conclude international agreements without ex post congressional review).

[392] *See generally* William D. Araiza, Note, *Notice-and-Comment Rights for Administrative Decisions Affecting International Trade: Heightened Need, No Response*, 99 YALE L.J. 669 (1989) (analyzing cases where courts held that international trade regulations fell under the APA's foreign affairs exception and therefore were immune from ordinary notice-and-comment procedural requirements).

[393] *Cf.* Rajah v. Mukasey, 544 F.3d 427, 437 (2d Cir. 2008) (holding that the APA's foreign affairs exception applies where notice and comment would result in " 'definitely undesirable international consequences' " (quoting Zhang v. Slattery, 55 F.3d 732 (2d Cir. 1995), *superseded on other grounds by* 8 U.S.C. § 1101(a)(42))).

[394] *Mast Indus.*, 596 F. Supp. at 1583.

must ensure that administrative lawmaking satisfies the minimum requirements of due process.

F. DELEGATING BEYOND THE FEDERAL GOVERNMENT

Although this Article has focused on congressional delegations within the federal government, it should be readily apparent that the due process model would have important implications for delegations to entities outside the federal government as well. For example, the Fifth Amendment arguably limits Congress's authority to entrust federal lawmaking power to state regulators, Native American tribes, private entities, and international organizations. In each of these contexts, Congress must establish safeguards to ensure that congressional delegation does not engender domination. While this Article does not afford the space for a detailed examination of the due process model's application to each of these contexts, a few preliminary observations may be in order.

First, the due process model suggests that Congress must take care to narrow any delegations of its own exclusive lawmaking powers to state and tribal regulators. In a variety of fields, Congress possesses concurrent jurisdiction with states and tribes,[395] meaning that state and tribal authorities may regulate freely to the extent permitted under federal law alongside Congress. Within these fields of concurrent jurisdiction, as in the foreign affairs context, Congress may entrust its lawmaking authority to subnational sovereigns without raising due process concerns because such delegations do not increase the delegate's capacity for domination. On the other hand, Congress may not delegate lawmaking powers in fields of *exclusive* federal jurisdiction, such as immigration or national defense, without prescribing an intelligible principle to constrain its delegate's discretion, requiring the delegate to employ fair and deliberative

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[395] *See* Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 150–52 (2001) (observing that federal and state legislators possess concurrent powers in a variety of areas).

procedures, and ensuring that the delegate is accountable to the general public through federal supervision and judicial review.[396]

Second, due process principles should be understood to govern congressional delegation to private entities. In the past, federal courts have held that the Due Process Clause requires Congress to establish a substantive standard to guide the development of legal standards by private parties.[397] The due process model also suggests that Congress may not authorize private entities to wield public lawmaking powers outside the constraints of fair and deliberative procedures.[398] Private entities entrusted with congressionally delegated lawmaking powers also must be subject to the effective control of public officials, and their actions must be subject to judicial review to ensure that delegation from the public sphere to the private sphere does not engender domination.[399]

Third, the due process model offers a new approach for evaluating the constitutionality of so-called "international

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[396] *See, e.g.*, United States v. Mazurie, 419 U.S. 544, 556–58 (1975) (conducting due process review of a federal statute that expanded a tribe's jurisdiction to regulate activities of non-members outside tribal territory).

[397] *Compare* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583 (1985) (recognizing "that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts" and may empower agency actions that "affect private interests"), *with* Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122–23 (1928) (invalidating an ordinance that imposed no substantive standard to guide the superintendant in issuing building permits, leaving the superintendent to act capriciously and arbitrarily), *and* Gen. Elec. Co. v. N.Y. State Dep't of Labor, 936 F.2d 1448, 1458–59 (2d Cir. 1991) (remanding the case to the trial court to ascertain whether the states procedure in setting wage rates based on private party agreements was guided by a substantive standard or was bargained for collusively). Courts also have criticized delegations to private parties generally, to the extent that they make federal regulation "subservient to selfish or arbitrary motivations or the whims of local taste." Geo-Tech Reclamation Indus., Inc. v. Hamrick, 886 F.2d 662, 666 (4th Cir. 1989).

[398] *Cf. Gen. Elec. Co.*, 936 F.2d at 1458–59 (holding that a state's pro forma adoption of wage rates, drawn from collusively negotiated collective bargaining agreements, would constitute "an unconstitutional delegation of authority" and granting discovery regarding "the actual procedure the state followed").

[399] *See supra* note 288 and accompanying text; Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1470–73 (2003) ("[d]etermining when private delegations are adequately structured to ensure constitutional accountability" and examining the dangers when this structure does not exist); *see also* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 663–73 (2000) (examining the implications of public and private independence).

delegations," including delegations of lawmaking authority to international organizations.[400] During the past decade, a growing body of academic commentary has debated whether—or under what conditions—international delegations violate the nondelegation doctrine.[401] In one recent case, *Natural Resources Defense Council v. EPA*,[402] the D.C. Circuit suggested parenthetically that there was a "serious likelihood" that a treaty entrusting standard-setting authority to member-state representatives would not pass muster under the nondelegation doctrine.[403] The due process model advanced in this Article buttresses this idea that treaty-based delegations are subject to constitutional constraints, but it offers a more-fine-grained constitutional framework for evaluating whether particular treaty-based delegations are constitutional. Whenever the President and Senate jointly commit lawmaking authority to international or regional institutions, they must ensure that those institutions are subject to safeguards—such as an intelligible substantive standard, fair and deliberative procedures, political accountability, and judicial review—to ensure that federal delegation does not beget domination.[404]

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[400] The term "international delegation" has been defined broadly to embrace adjudicatory, executive, and lawmaking functions. *See* Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation,* 71 LAW & CONTEMP. PROBS. 1, 10–17 (2008) (detailing the types of delegated authority, such as legislative delegation, adjudicative delegation, monitoring and enforcement delegation, regulatory delegation, agenda setting, research and advice, policy implementation, and redelegation).

[401] Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Kristina Daugirdas, *International Delegations and Administrative Law*, 66 MD. L. REV. 707 (2007); David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697 (2003); Andrew T. Guzman & Jennifer Landsidle, *The Myth of International Delegation*, 96 CALIF. L. REV. 1693 (2008); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000); John O. McGinnis, Medellín *and the Future of International Delegation*, 118 YALE L.J. 1712 (2009).

[402] 464 F.3d 1 (2006).

[403] *Id.* at 9 (quoting Almandarez-Torres v. United States, 523 U.S. 224, 238 (1998)).

[404] *Cf.* Jensen v. Nat'l Marine Fisheries Serv., 512 F.2d 1189, 1191 (9th Cir. 1975) (holding that federal courts may not review regulations promulgated by the International Pacific Halibut Commission and subsequently approved by the Secretary of State pursuant to a putatively standardless treaty delegation).

Applying due process to international delegations obviously raises a host of complex questions regarding the relationship between the national and international legal orders, which are beyond the scope of this Article. At a minimum, however, the due process model suggests that an exclusive focus on whether international delegations contain an intelligible principle[405] is inadequate because substantive standards alone do not guarantee that international delegations will not beget domination. Future debates about the constitutional validity of international delegations should therefore devote greater attention to procedural and structural safeguards.

G. CASE STUDY: INTERNATIONAL TEXTILE REGULATION

A brief case study from the realm of international textile regulation illustrates the due process model's potential to inform judicial review of congressional delegations. In section 204 of the Agriculture Act of 1956, Congress authorized the President to negotiate agreements with foreign states to limit international trade in textile products "whenever he determines such action appropriate."[406] Upon concluding such agreements, the President was charged with issuing "regulations governing the entry or withdrawal from warehouse of any such commodity, product, textiles, or textile products to carry out any such agreement."[407] President Richard Nixon eventually subdelegated these duties to an inter-agency advisory panel: the Committee for the Implementation of Textile Agreements (CITA).[408]

During the 1980s, a trade association comprised of manufacturers of domestic textile and apparel products brought an action in the U.S. Court of International Trade seeking declaratory

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[405] *See, e.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (evaluating delegation under traditional doctrine).

[406] 7 U.S.C. § 1854 (1982).

[407] *Id.*

[408] Exec. Order No. 11,651, 37 Fed. Reg. 4699 (1972), *reprinted as amended in* 7 U.S.C. § 1854 (1982 & Supp. II 1984). CITA consists of representatives from the Departments of State, Treasury, Commerce, and Labor, with the U.S. Trade Representative or a designee participating as a nonvoting member. *Id.*

and injunctive relief from a CITA regulation that quantitatively restricted the import of certain Chinese textiles pursuant to a multilateral trade agreement.[409] The trade association argued that CITA's import restriction was "arbitrary, capricious, an abuse of administrative discretion, contrary to statute and the Constitution, and therefore void."[410] The Court of International Trade rejected those arguments, however, holding that Congress's delegation did not violate the nondelegation doctrine because it fell within the domain of foreign affairs.[411]

On appeal, the Federal Circuit in *American Ass'n of Exporters and Importers—Textile and Apparel Group v. United States* (*AAEI–TAG*) upheld CITA's import restriction as a valid exercise of delegated lawmaking authority.[412] The court acknowledged that the Foreign Commerce Clause vested authority to regulate international trade exclusively in Congress and that the Executive Branch accordingly lacked such authority absent a valid delegation.[413] The court also conceded that the Act did not place any substantive or procedural restrictions on the Executive Branch's administration of the textile trade program.[414] Nonetheless, the court declined to invalidate the import restriction on constitutional or statutory grounds. First, the court found "no basis, either within [the delegating statute] itself, the overall statutory scheme, or the legislative history, to add more to the statute than meets the eye."[415] Second, it declined to consider whether CITA's finding that a "market disruption" justified

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[409] Am. Ass'n of Exps. & Imps.—Textile & Apparel Grp. v. United States, 583 F. Supp. 591, 591–94 (Ct. Int'l Trade 1984).

[410] *Id.* at 595.

[411] *Id.* at 598. The court also rejected the plaintiff's contention that the executive action exceeded the scope of delegated authority under the Agricultural Act of 1956 and other federal legislation. *Id.* at 594, 598–99.

[412] 751 F.2d 1239, 1239 (Fed. Cir. 1985).

[413] *Id.* at 1247. *But see* United States v. Approximately 633.79 Tons of Yellowfin Tuna, 383 F. Supp. 659, 661–62 (S.D. Cal. 1974) (holding that "when considering a delegation of authority to engage in international negotiations, only the most clear abuse or true congressional abdication or a violation of individual constitutional rights should lead to the invalidation of the legislation by the courts").

[414] *AAEI–TAG*, 751 F.2d at 1247.

[415] *Id.*

restricting Chinese textile imports was "arbitrary and capricious," concluding that this factual finding was unreviewable.[416] Third, it held that CITA's import restriction was exempt from notice and comment under the APA's foreign affairs exception because "prior announcement of CITA's intention to impose stricter quotas" would create "an incentive for foreign interests and American importers to increase artificially the amount of trade in textiles prior to a final administrative determination."[417] Lastly, it rejected the trade association's argument that the delegating statute violated its members' due process rights, reasoning that the Due Process Clause did not apply because the trade association could assert no "legitimate claim of entitlement" to trade in Chinese textiles that would qualify as property for due process protection, only a mere "unilateral expectation" of future commerce.[418]

In contrast, had the Federal Circuit applied the due process model, both its mode of analysis and the outcome of the case could have taken a radically different turn. The due process model affirms that Congress may not delegate its constitutional power over foreign commerce to the Executive Branch without first establishing an intelligible principle to guide executive discretion. No such principle appears in the delegating statute here by the court's own admission.[419] The fact that CITA apparently limited its own discretion by installing an intelligible principle in a subsequent multilateral trade agreement—the market disruption requirement—did not adequately safeguard liberty for the reasons set forth in *American Trucking*: the selection of this standard was itself an exercise in substantively unfettered discretion.[420] Had Congress established a suitable intelligible principle, the deferential arbitrary-and-capricious review standard would have been appropriate under the due process model to ensure that CITA

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[416] *Id.* at 1248.

[417] *Id.* at 1249.

[418] *Id.* at 1250.

[419] *Id.* at 1247. In many contexts where Congress has authorized the Executive Branch to enter into international regulatory agreements, Congress has specified intelligible principles. Hathaway, *supra* note 391, at 159–64.

[420] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001).

acted in reasonable compliance with Congress's chosen standard. Although CITA made a strong showing in *AAEI–TAG* that there was good cause—i.e., the threat of preemptive countermeasures by other states—to set aside the APA's ordinary notice-and-comment procedures,[421] this alone did not relieve CITA of its constitutional due process obligation to craft trade restrictions through fair and deliberative procedures, such as interim final rulemaking. The due process model also challenges the circuit court's conclusion that the trade association in *AAEI–TAG* lacked an interest protected by due process. Under the due process model, CITA's restriction on Chinese textile imports clearly impacted the trade association's constitutionally protected *liberty* interests in freedom of contract, triggering the substantive, procedural, and structural safeguards of due process.[422] In each of these respects, the due process model furnishes a practical framework that could transform how federal courts review congressional delegations like the one at issue in *AAEI–TAG*.

VI. CONCLUSION

This Article has argued that federal courts should abandon the traditional nondelegation doctrine and embrace due process as the primary constitutional constraint on congressional delegation. According to the due process model, Congress may delegate lawmaking authority to administrative agencies if it channels that authority through substantive, procedural, and structural safeguards that prevent delegation from manifestly increasing the federal government's capacity for arbitrary lawmaking, the principal republican concern driving traditional nondelegation principles. Congressional delegations meet this standard when they combine (1) an intelligible principle to guide agency discretion together with (2) deliberative procedural requirements and (3) structural constraints, such as political accountability and judicial review. In most contexts, the APA easily satisfies procedural due process, avoiding the need for further judicial intrusion into

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[421] *AAEI–TAG*, 751 F.2d at 1247.

[422] *See supra* notes 317–21 and accompanying text.

administrative rulemaking procedure. Where an agency's lawmaking procedures do not satisfy the constitutional requirements of due process, however, courts should withhold *Chevron* deference and, where appropriate, set aside regulations to safeguard the public from administrative domination. The due process model thus takes seriously the nondelegation doctrine's republican ideals while reframing the Court's current delegation jurisprudence to better reconcile congressional delegation in the modern administrative state with the Constitution's enduring commitment to individual liberty.